IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-372

ICA EFiled: Jan 31 2024
02:10PM EST
Transaction ID 71918326

The Silver Creek Association, Inc.,
a West Virginia non-profit corporation,
Russell D. Jessee and Cinnamon M. Jessee,
Jeffrey S. Banks and Drenna Banks,
Malcolm J. Cooper and Colleen K. Cooper,
Duval Lee Fuqua and Dorthea A. Fuqua,
Raymond Bruce James and Harriet Hawks,
Louis J. Constanzo, David Christopher and
Linda Christopher, William C. White, II,
William R. Terrini and Mary L. Terrini,
Michael D. Cajohn and Jennifer L. Cajohn,
Kevin R. Banning, all individuals,

Petitioners below, Petitioners,

v.

Matthew R. Irby,
in his official capacity as State Tax Commissioner
of the State of West Virginia; and
Johnny A. Pritt,
In his official capacity as Assessor
of Pocahontas County, West Virginia,

Respondents below, Respondents.

Appeal from the
Circuit Court of Pocahontas County
(Civil action no. 2020-P-31)

UNIFIED REPLY OF PETITIONERS

Mark A. Sadd (WVSB 6005)
Lewis Gianola PLLC
300 Summers Street, Suite 700
Charleston, West Virginia 25301
(304) 345-2000 phone
(304) 343-7999 fax
msadd@lewisgianola.com
Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Respondents, the State Tax Commissioner ("STC") and the Pocahontas County Assessor ("PCA"), each filed a response to Petitioners' brief. The points of fact, legal authorities and arguments in their responses are largely the same. For efficiency, Petitioners submit this unified reply to them.

The legal issues boils down to whether UCIOA prohibits owners of real estate in the condominium form of ownership (and by extension all forms of common interest ownership) from taking advantage of the "split assessment" for *ad valorem* tax purposes that is available to fee owners under W. Va. Code § 11-4-2, W. Va. Code § 11-4-3 and W. Va. Code § 11-4-18. Petitioners show that UCIOA does not act as a bar. Rather, Respondents are improperly reading and enforcing W. Va. Code § 36B-1-15(b) as bar in violation of Petitioners' right to be taxed equally under Article X §§ 1, 1a and 1b of the WEST VIRGINIA CONSTITUTION

II. POINTS IN REPLY

1. Petitioners have the fundamental right under the Article X §§ 1, 1a and 1b of the WEST VIRGINIA CONSTITUTION to have their parcels of real estate in the condominium form of ownership assessed, classified and taxed in the same manner as those in the fee form. Both our Constitution and the West Virginia Legislature require Respondents to treat parcels of real property in both forms as the same species of property for assessment, classification and taxation. The big question for this Court is whether, as Respondents claim, UCIOA bars Respondents from a "split assessment" to a "unit"[1] under W. Va. Code §§ 11-4-2 and W. Va. Code § 11-4-8.

[1] A "unit" means "a physical portion of the common interest community designated for separate ownership or occupancy . . ." W. Va. Code § 36B-1-103(33).

The answer is "no". Respondents are incorrect that W. Va. Code § 36B-1-105(b)(2)[2] prohibits splitting a "unit" for assessment and taxation despite as Respondents emphasize, UCIOA requires that "no separate tax or assessment may be rendered against any common elements"[3]. STC Response p. 6. First, it is obvious that W. Va. Code § 36B-1-105(b)(2) itself does not prohibit an assessor from "classifying" a unit according to more than one of its uses under W. Va. Code §§ 11-4-2 and 18. The text of the statutory provision does not include the word "classify" nor any derivation. Indeed, the opposite is true. UCIOA, as Petitioners discussed at length in their brief, explicitly prohibits any "real estate use law, ordinance, or regulation" from imposing "any requirement upon a condominium . . . . which it would not impose upon a physically identical development under a different form of ownership." W. Va. Code § 36B-1-106(b). Further, UCIOA declares that "the provisions of [UCIOA] do not invalidate or modify any provision of any . . . real estate use law, ordinance, rule, or regulation governing the use of real estate." W. Va. Code § 36B-1-106(c).

Second, UCIOA is drafted to ensure that the common elements of a common interest community are not subject to *separate* assessment or tax from those of the units themselves. To be sure, assessment and taxation of the common elements are fully captured through the assessment and taxation of the units. That is why under UCIOA, "[i]f there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements,

[2] UCIOA provides that "[i]n a condominium or a planned community: (1) if there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate. (2) if there is any unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no development rights." W. Va. Code § 36B-1-105(b).

[3] "Common elements" in a "condominium" means "all portions of the common interest community other than the units." W. Va. Code § 36B-1-103(4).

constitutes for all purposes a separate parcel of real estate." W. Va. Code § 36B-1-105(b)(1). UCIOA's drafters elaborated on this point:

> When separate tax assessments become mandatory under this Section, the assessment for each unit must be based on the value of that individual unit, under whatever uniform assessment mechanism prevails in the state or locality. Importantly, no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively, even though, in the context of planned communities, the common elements owned by the association might be subject to taxation as a separately owned parcel of real estate, in the absence of this provision.

Comment 1 to Section 1-105 of UCIOA (1982) (*National Conference of Commissioners on Uniform Laws*) JA-153.

2. Respondent is overstating the meaning and legal effect of W. Va Code § 36B-1-105(b)(2) that "no separate tax or assessment may be rendered against any common elements". STC Response p. 6. Respondent also refers to both Respondents' failed efforts a decade ago to render a separate assessment and tax against Silver Creek's common elements. The Pocahontas County Circuit Court (Judge Jennifer P. Dent, presiding) reversed the Respondents' decision to issue a separate assessment on a large portion of the common elements. JA-474-475.

In response to the reversal, the Assessor unilaterally classified Petitioners' owner-occupied units as Class 3 because a fraction of the common elements were devoted to commercial use. Upon submission of the question, the State Tax Commissioner issued the Property Tax Ruling adverse to Petitioners. The lower court endorsed Respondents' theory. STC Response at pp. 1-4, 11-12. Virtually all of Respondent's history of that case is irrelevant to the import of this one.

3. Respondent rejects that the courts must strictly review the executive branch's deprivation of Petitioners' right to split assessments of their units under W. Va. Code §§ 11-4-2 and 18. CTS Response at pp. 13-15. Petitioners assert they have the fundamental right to equal

protection of Article X §§ 1, 1a and 1b of the WEST VIRGINIA CONSTITUTION and, accordingly, their implementing W. Va. Code §§ 11-4-2 and 18. Respondent rather calls for a "rational basis" as the "appropriate standard" on the incorrect belief that UCIOA itself creates the distinction between the condominium and fee forms of ownership of real estate for the purpose of availing taxpayers the advantages of W. Va. Code § 11-4-2 and 18. STC Response at pp. 13-14.

Just as the lower court did, Respondent goes on and on that the West Virginia Legislature created the distinction with the enactment of W. Va. Code § 36B-1-105(b). As noted, Petitioners assert that Respondents are misapplying UCIOA and, thus, through their enforcement of West Virginia law are unlawfully and disparately denying Petitioners their right to fair and equal taxation based on assessment and classification of their parcels of real property. Thus, Petitioners have met their burden that it is not UCIOA but rather Respondents' conduct that is "is essentially arbitrary and unreasonable". Syl. 7, *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 466 S.E.2d 424 (1995). Respondents so far have not explained how they have come to interpret W. Va. Code § 36B-1-105(b) as a prohibition against giving Petitioners split assessments under W. Va. Code §§ 11-4-2 and 18. STC Response at pp 15-16.

The Supreme Court's holding in *In Re U.S. Steel Corp.* 165 W. Va. 373, 268 S.E.2d 128 (1980) certainly stands for the proposition that Respondents are unlawfully and disparately depriving Petitioners by "deviating" from the actual meaning of W. Va. Code § 36B-1-105 and "ignoring" W. Va. Code § 36B-1-106. Respondents cannot show that the West Virginia Legislature intended that the condominium form of ownership of real estate be treated less favorably for purposes of assessment, classification and taxation than the fee form. Respondents. In fact, Petitioners are not asking the Assessor to render a separate assessment and tax against the common elements of their units; Petitioners are asking the Assessor to divide their units according to

classifications, as W. Va. Code § 11-4-18 provides, "solely to the segregation of real property according to the classification contemplated by the 'Tax Limitation Amendment.'"

4. In this case, each of the individual Petitioners owns and exclusively occupies his Silver Creek unit for residential use, that is Class 2. At the same time less than five percent of the Lodge's common elements are devoted to commercial use.[4] Splitting a "unit" under W. Va. Code §§ 11-4-2 and 8 does not require rendering a separate tax or assessment against the common elements. In no instance do W. Va. Code §§ 11-4-2 and 8 require Respondents to enter more than a single assessment for a parcel of real estate whether it be in the condominium or fee form of ownership. Respondents' assertions or implications to the contrary are false. For evidence on this point, Petitioners ask this Court to review the itemized "split" assessments for parcels of real estate in Pocahontas County for years 2019 and 2020. They are attached to the Petition for Appeal of Property Tax Ruling 21-1. JA-11-47. Petitioners obtained these through a West Virginia Freedom of Information Act request of the Pocahontas County Assessor in anticipation of its appeal of the Property Tax Ruling to the lower court.[5] JA-22. As shown below, the first three split assessments for the 2019 year disclose that the Assessor treated each taxpayer as having a single parcel of real estate. JA-41. In the first example, Thomas H. Kinder of Durbin in 2019 was the assessed owner of Parcel 32 on Durbin Corp. Tax Map 4. For classification purposes, Mr. Kinder's single parcel of

[4] On pages 8-13 of STC Response, the State Tax Commissioner's lays out a lengthy discussion that implies that the parties dispute that a part of the common elements in the Lodge is devoted to commercial use. The parties do not dispute the existence of the different uses. The parties dispute that UCIOA bars Petitioners from the benefits of splitting the classification of their "units" as Class 2 from the classification of their "units" "together with their interests in the common elements" as Class 3.

[5] In their 2020 written FOIA request Petitioners asked for "[e]ach and every entry in each of the 2019 and 2020 Land Books for Pocahontas County, West Virginia, including name, account number, address, legal description, and all other data entered thereon by custom or by law, that was entered with 'segregation of real property according the classification' with respect to the tax parcel or parcel described in the entry pursuant to W. Va. Code § 11-4-18"

real estate was "split" between his "Residence" classified as "2" and "Kinders Market" classified as "3".

11/23/2020 02:25 PM — Pocahontas County, WV — REAL PROPERTY ASSESSMENT SYSTEM — SPLIT PARCEL REPORT — FOR TAX YEAR 2019 OWNTYPE 6 — PAGE: 1 — AA108PTD

PARCEL	LEGAL DESCRIPTION	LAND VALUE	IMPR VALUE	NRA VALUE	TOT ASMT	TOT TAX
02- 4-0032-0000-0000 KINDER THOMAS H &	RESIDENCE	1,836 68.0000000	12,984 40.0000000	0	14820	0
PO BOX 100 DURBIN WV 26264 0100	TAX CLASS: 2					
02- 4-0032-0000-0000 KINDER THOMAS H &	KINDERS MARKET	864 32.0000000	19,476 60.0000000	0	20340	187.98
PO BOX 100 DURBIN WV 26264 0100 AA12 LEGALS: LT 6 BLK 7 40X120	TAX CLASS: 4	100.0000000	100.0000000			
02- 4-0034-0000-0000 PHELPS EDWARD R III &	LT 9 BLK 7 40X120 FEE RESIDENCE ON 2ND FLOOR	1,380 50.0000000	3,780 25.0000000	0	5160	23.85
PO BOX 38 DURBIN WV 26264 0038	TAX CLASS: 2					
02- 4-0034-0000-0000 PHELPS EDWARD R III &	LT 9 BLK 7 1ST FLOOR WHISTLE STOP	1,380 50.0000000	11,340 75.0000000	0	12720	117.56
PO BOX 38 DURBIN WV 26264 0038 AA12 LEGALS: LT 9 BLK 7 40X120 FEE	TAX CLASS: 4	100.0000000	100.0000000			
02- 6-0003-0001-0000 VARNER KENNETH H &	BLK 9 DURBIN 4.08 AC (FARM)	571 5.2900000	0 0.0000000	0	570	2.64
PO BOX 243 DURBIN WV 26264 0243	TAX CLASS: 2					
02- 6-0003-0001-0000 VARNER KENNETH H &	BLK 9 DURBIN RENTAL MH	10,229 94.7100000	5,640 100.0000000	0	15870	146.67
PO BOX 243 DURBIN WV 26264 0243 AA12 LEGALS: BLK 9 DURBIN 4.08 AC	TAX CLASS: 4	100.0000000	100.0000000			

Based on his blended residential and commercial uses and, thus, classifications, Mr. Kinder's single assessment comprises a "Land Value" and "Impr Value" for each classification and an *ad valorem* tax for each classification.

In the second example, Edward R. Phelps III, of Durbin, is assessed with a single parcel of real estate, identified as Parcel 34 on Durbin Corp. Tax Map 4. Mr. Phelps has a single building on his parcel. The Assessor, as W. Va. Code § 11-4-2 requires, shows that Mr. Phelps' residence is located within "40X120 FEE" on the "2nd Floor", classified as "2" while the "Whistle Stop" is located on the "1st Floor", classified as "4".

The third example, Kenneth H. Varner, of Durbin, is assessed with a single parcel of real estate, identified as Parcel 3.1 on Durbin Corp. Tax Map 6. Mr. Varner has a "4.08 AC (FARM") classified as "2" and a "RENTAL MH" classified as 4.

If the final order is affirmed, then all 144 parcels with split assessments in 2019 and all 143 parcels with split assessments in 2020 should be prohibited from taking advantage of W. Va. Code § 11-4-18. JA-40-137. If the Assessor somehow is treating a single parcel of real estate for "split assessment" as two distinct parcels of real estate, then the Assessor would be acting contrary to W. Va. Code §§ 11-4-2 and 18. These provisions authorize and, in truth, require the Assessor to segregate a single parcel of real estate between its owner-occupied residential use (Class 2) and its other uses, whether Class 3 or Class 4. To effect this, W. Va. Code § 11-4-2, *Form of landbooks*, mandates that the Tax Commissioner:

> shall prescribe a form of landbook and the information and itemization to be entered therein, **which shall include separate entries of**: (1) All real property or **whatever portion thereof in square feet that is owned, used, and occupied by the owner exclusively for residential purposes**, including mobile homes, permanently affixed to the land and owned by the owner of the land; (2) all real property or whatever portion thereof in square feet that is owned by an organization that is exempt from federal income taxes under 26 U.S.C. §501(c)(3) or 501(c)(4) and used primarily and immediately for a purpose that is exempt from tax under §11-3-9 of this code; (3) all real property or whatever portion thereof in square feet that is owned by an organization that is exempt from federal income taxes under 26 U.S.C. §501(c)(3) or 501 (c)(4) and that is not used primarily and immediately for a purpose that is exempt from tax under §11-3-9 of this code; (4) all farms including land used for agriculture, horticulture, and grazing occupied by the owner or bona fide tenant; (5) and all other real property. For each entry there shall be shown: (A) The value of land, the value of buildings, and the aggregate value; (B) the character and estate of the owners, the number of acres or lots, and the local description of the tracts or lots; and (C) the amount of taxes assessed against each tract or lot for all purposes.

(emphasis supplied).

West Virginia Code § 11-4-18, *Division or consolidation of tracts for segregation*, provides:

> In the manner prescribed in section seventeen of this article, **the county court may, upon the application of the owner, divide**, consolidate, or both, as the case may be, **any tracts or lots for the**

> **purpose of entry upon the land books of the county**. **This shall apply solely to the segregation of real property according to the classification contemplated by the "Tax Limitation Amendment."** No such division shall be made unless there is in actual fact a distinction in use, and unless the division requested is one which the owner would make for the separate conveyance of portions of the tract or lot, but in no case shall any single structure be divided and only contiguous tracts or lots shall be consolidated.

(emphasis supplied).

These provisions do not require the applicant for a "split assessment" to make, in fact, a division of his parcel in order to obtain the benefits of a "split assessment". Indeed, to require the applicant to make a division of his parcel would defeat the very purpose of W. Va. Code §§ 11-4-2, 3 and 18 to tax different uses a single parcel of real estate without an actual division of the parcel.

5. The lower court minimizes the effect, applicability and scope that its final order on other property held, assessed, classified and taxed in the common interest form of ownership. JA-705-717. Respondents naively claim to believe that their enforcement posture of W. Va. Code § 36B-1-105(b) affects only the assessment, classification and taxation of condominium units. STC Response at p. 15. This Court's failure to reverse the final order on an incorrect understanding of W. Va. Code § 36B-1-105(b) and W. Va. Code § 36B-1-106 likely will lead to turmoil in the market, and for no good reason other than the perpetuation of a bad and improper court decision.

To be sure, Petitioners do not seek reversal of the final order for policy reasons; but it is necessary for our courts to understand the effects of a bad and improper court decision on the lives and property interests of West Virginians.

III. CONCLUSIONS AND PRAYER FOR RELIEF

For all the foregoing reasons, Petitioners, The Silver Creek Association, Inc., Russell D. Jessee and Cinnamon M. Jessee, Jeffrey S. Banks and Drenna Banks, Malcolm J. Cooper and Colleen K. Cooper, Duval Lee Fuqua and Dorthea A. Fuqua, Raymond Bruce James and Harriet Hawks, Louis J. Constanzo, David Christopher and Linda Christopher, William C. White, II, William R. Terrini and Mary L. Terrini, Michael D. Cajohn and Jennifer L. Cajohn and Kevin R. Banning, pray that this Honorable Court reverse, vacate and remand the final order of the Pocahontas County Circuit Court in this case and to enter judgment in favor of Petitioners.

Further, Petitioners ask this Court to direct Respondents or the lower court, as the case may be, to mould relief in favor of Petitioners in accordance with its holdings, including without limitation to classify the individual Petitioners' parcels of real estate as Class II and Class III in accordance with W. Va. Code §§ 11-4-2, 3 and 8 for the applicable *ad valorem* tax year and all subsequent years for which the factual conditions of Petitioners parcels of real estate are the same. Further, Petitioners ask this Court to grant Petitioners all of their reasonable lawyers' fees and costs. Further, Petitioners ask this Court to grant Petitioners such other relief that this Court believes is reasonable and prudent to give Petitioners the relief they requested.

The Silver Creek Association, Inc.,
a West Virginia non-profit corporation,
Russell D. Jessee and Cinnamon M. Jessee,
Jeffrey S. Banks and Drenna Banks,
Malcolm J. Cooper and Colleen K. Cooper,
Duval Lee Fuqua and Dorthea A. Fuqua,
Raymond Bruce James and Harriet Hawks,
Louis J. Constanzo, David Christopher and
Linda Christopher, William C. White, II,
William R. Terrini and Mary L. Terrini,
Michael D. Cajohn and Jennifer L. Cajohn,
Kevin R. Banning, all individuals,

By their counsel

/s/ Mark A. Sadd
Mark A. Sadd (WVSB 6005)
Lewis Gianola PLLC
300 Summers Street, Suite 700
Charleston, West Virginia 25301
(304) 345-2000 phone
(304) 343-7999 fax
msadd@lewisgianola.com
Counsel for Petitioners

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-372

The Silver Creek Association, Inc.,
a West Virginia non-profit corporation,
Russell D. Jessee and Cinnamon M. Jessee,
Jeffrey S. Banks and Drenna Banks,
Malcolm J. Cooper and Colleen K. Cooper,
Duval Lee Fuqua and Dorthea A. Fuqua,
Raymond Bruce James and Harriet Hawks,
Louis J. Constanzo, David Christopher and
Linda Christopher, William C. White, II,
William R. Terrini and Mary L. Terrini,
Michael D. Cajohn and Jennifer L. Cajohn,
Kevin R. Banning, all individuals,

Petitioners below, Petitioners,

v.

Matthew R. Irby,
in his official capacity as State Tax Commissioner
of the State of West Virginia; and
Johnny A. Pritt,
In his official capacity as Assessor
of Pocahontas County, West Virginia,

Respondents below, Respondents.

Appeal from the
Circuit Court of Pocahontas County
(Civil action no. 2020-P-31)

CERTIFICATE OF SERVICE

I, Mark A. Sadd, counsel for Petitioners' Below, Petitioner, The Silver Creek Association, Inc., do hereby affirm that on January 31, 2024, counsel for Respondents was served with a copy of *Unified Reply of Petitioners,* via electronic mail and through File and Serve Xpress to the following record of counsel:

Cassandra L. Means-Moore, Esquire
Seth E. Harper, Esquire
ASSISTANT ATTORNEYS GENERAL
1900 Kanawha Boulevard, East
Building 1, Room W-435
Charleston, West Virginia 25305

Teresa W. Helmick, Esquire
PROSECUTING ATTORNEY
900 Tenth Avenue
Marlinton, WV 24954

/s/ Mark A. Sadd
Mark A. Sadd (W. Va. Bar 6005)