

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

PRESTON GOODEN,
ASSESSOR OF BERKELEY COUNTY,

Appellant

IN RE:

TAX ASSESSMENT AGAINST THE PURPLE
TURTLE, LLC, JOSEPH ATKINS AND DANA
GRABINER, MARY A. MELNYK, LINDA A.
LLOYD, RYAN MCCARTHY AND ERICA B.
PATTHOFF, DAVID SPRINGER AND JUDITH
LEITNER SPRINGER, JOSEPH L. McNAMARA
AND DONNA B. McNAMARA, GWENDA A.
GLESMAN AND PAUL R. SCHRIBNER,
WILLIAM W. DONAHOE AND WENDY JONES
DONAHOE, KENNETH R. REITZIG
AND ELIZABETH D. REITZIG, TIMOTHY
D. REITZIG, TIMOTHY ROBERT YATES AND
GENEVIEVE YATES

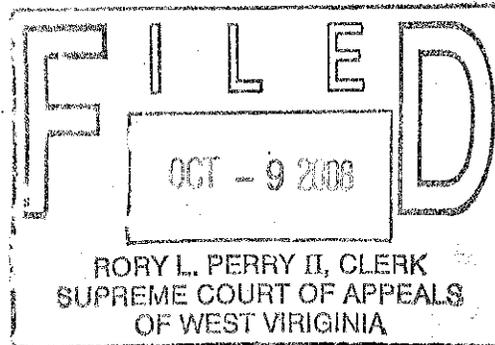
Appellees

Docket No. 34276

From The Circuit Court of
Berkeley County, West Virginia

Civil Action No. 06-C-198 and
07-C-247

The Honorable David Sanders, Judge



APPELLANT'S BRIEF

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I. RULINGS FROM WHICH APPEAL IS TAKEN

This appeal is taken by Appellant Preston Gooden, Assessor of Berkeley County, West Virginia (hereinafter referred to as "Assessor") from the Order of the Circuit Court of Berkeley County, entered November 28, 2007, and entitled "Order Granting Summary Judgment To Appellants." The Appellees were the Property Owners down below and hereinafter referred to as "Property Owners"), The Final Order was made in response to the Motion for Summary Judgment made by the Property Owners and Motions to Dismiss filed by the Assessor.

STATEMENT OF THE NATURE OF THE CASE

The Property Owners are owners of certain lots or parcels located in a subdivision know as Broomgrass located in Gerrardstown Tax District, Berkeley County, West Virginia. The Property Owners filed a protest to the 2006 proposed assessments with the County Commission of Berkeley County West Virginia acting as a Board of Equalization and Review. After consideration of the evidence presented by the Property Owners and the Assessor, The Commission affirmed the proposed assessment and found that the Property Owners failed to establish by clear and convincing evidence that the proposed assessments were erroneous and that the subject property was not assessed at its true and actual value. The Property Owners filed an appeal of the 2006 Assessment to the Circuit Court of Berkeley County but failed to attach the record of the proceeding before the Board of Equalization and Review.

The Property Owners filed a protest to the 2007 proposed assessments with the County Commission of Berkeley County West Virginia acting as a Board of Equalization and Review. After Consideration of the evidence presented by the Property Owners and the Assessor, The Commission affirmed the proposed assessment and found that the Property Owners failed to establish by clear and convincing evidence that the proposed assessments were erroneous and that the subject property was not assessed of its true and actual value. The

Property Owners filed an appeal of the 2007 Assessment to the Circuit Court of Berkeley County but attach only a portion of the record of the proceeding before the Board of Equalization.

II. STATEMENT OF FACTS

1) Prior to January 15, 2006 Preston Gooden Assessor of Berkeley County performed an appraisal of the property of the Property Owners and provided the required notification of the proposed assessments as required by the applicable West Virginia Code.

2) On or about February 16, 2006, the Property Owners filed a protest to the 2006 Proposed Assessment with the County Commission of Berkeley County acting as a Board of Equalization and Review.

3) Subsequent to the filing of the protest, the County Commission of Berkeley County sitting as a Board of Equalization and Review held a hearing on the protest.

4) At the said hearing the Assessor presented the following evidence to the Board of Equalization and Review.

A. Purple Turtle LLC acquired 320 acres located in Gerrardstown Tax District, Berkeley County West Virginia in October 2004.

B. Purple Turtle LLC subdivided 16 one acre tracts and created the Broomgrass Subdivision.

C. Purple Turtle LLC marketed the 16 one acre tracts for a sales price ranging from \$175,000.00 and \$225,000.00.

D. Based upon the Property Record Cards maintained by the Berkeley County assessor's Office the following lots were sold by Purple Turtle LLC:

1. Lot 1 \$205,000.00
2. Lot 2 \$195,000.00
3. Lot 3 \$195,000.00
4. Lot 4 \$195,000.00
5. Lot 5 \$205,000.00
6. Lot 8 \$195,000.00
7. Lot 9 \$205,000.00
8. Lot 13 \$205,000.00
9. Lot 15 \$185,000.00

5. The Berkeley County Assessor collected the comparable sales data in the Broomgrass Subdivision and entered the data into the Computer Assisted Mass Appraisal System Software as required by the State of West Virginia pursuant to Administrative Notice 2006-16.

6. Based upon the data it was determined by the Berkeley County Assessor that the appraised value for the subject lots was \$192,000.00 per lot.

7. The Property Owners presented to the Board of Equalization in support of their protest to the 2006 assessment an Appraisal Report and Valuation Analysis of 320.5849 Acres (Broomgrass) prepared by John P. McClurg and Calvert L. Estill of the Hawthorne Group for the Berkeley County Farmland Preservation Board.

8. After considering the evidence presented by the Property Owners and by the Assessor of Berkeley County. The Commission found that the Property Owners had failed to prove by clear and convincing evidence that the proposed assessments were erroneous and that the subject property was not assessed at its true and actual value.

9. On or about March 24, 2006, the Property Owners filed an appeal of the 2006 Tax Assessment but failed to perfect their appeal. The Property Owners failed to attach any record of the proceeding before the Board of Equalization.

10. On or about February 20, 2007, the Appellants filed a protest to the 2007 Proposed Assessment with the County Commission of Berkeley County acting as a Board of Equalization and Review.

11. Subsequent to the filing of the protest, the County Commission of Berkeley County sitting as a Board of Equalization and Review held a hearing on the protest.

12. The Assessor presented evidence of the appraised value of the subject property including but not limited to the evidence present at the 2006 hearing and testimony of the Assessor's appraiser.

13. The Berkeley County Assessor collected the comparable sales data in the Broomgrass Subdivision and entered the data into the Computer Assisted Mass Appraisal System Software as required by the State of West Virginia pursuant to Administrative Notice 2007-16.

14. Based upon the data it was determined by the Berkeley County Assessor that the appraised value for the subject lots was \$192,000.00 per lot.

15. The Property Owners presented to the Board of Equalization in support of their protest to the 2007 assessment an Appraisal Report and Valuation Analysis of 320.5849 Acres (Broomgrass) prepared by John P. McClurg and Calvert L. Estill of the Hawthorne Group for the Berkeley County Farmland Preservation Board.

16. There was attached to the Protest to the 2007 Assessment an undated affidavit of John P. McClurg executed on March 3, 2007.

17. Counsel for the Assessor objected to the appraisal being evidence of true

and actual value of the property based upon the reports failure to meet the standards established by the Uniform Standards of Professional Appraised Property. (USPAP)

18. After considering the evidence presented by the Property Owners and the Assessor of Berkeley County. The Commission found that the Property Owners had failed to prove by clear and convincing evidence that the proposed assessments were erroneous and that the subject property was not assessed at its true and actual value.

19. On or about March 22, 2007, the Property Owners filed an appeal of the 2007 Tax Assessment but failed to perfect their appeal by neglecting to attach the record of the proceeding before the Board of Equalization.

III. PROCEEDINGS BELOW

- 1) Property Owners on or about March 24, 2006, filed an appeal of the 2006 Tax Assessment.
- 2) On or about April 7, 2007, The Assessor filed a Motion to Dismiss Appeal
- 3) After responsive memoranda had been filed by the parties, the Circuit entered an Order on March 15, 2007 denying the Assessor's Motion to Dismiss Appeal.
- 4) On or about March 7, 2007 the Property Owners filed a Motion for Leave to Amend Appeal to Consider the 2007 Tax Assessment.
- 5) On or about March 22, 2007, the Property Owners filed an appeal of the 2007 Tax Assessment.
- 6) On or about April 11, 2007, the Assessor filed a Writ of Prohibition.
- 7) On or about April 17, 2007 the Circuit Court granted the Property Owners Motion to Amend Appeal.
- 8) On or about April 26, 2007 the Assessor filed a Motion to Dismiss Appeal.

9) On May 10, 2007, the Supreme Court of Appeals of West Virginia refused the Writ of Prohibition.

10) On or about July 11, 2007 the Property Owners filed a Motion for Summary Judgment.

11) After responsive memoranda had been filed by the parties, the Circuit entered an Order on November 28, 2007 granting the Property Owners Motion for Summary Judgment.

IV. STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo*. Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755, syl. pt. 1, (1994). Further, "questions of law and statutory interpretations are subject to a *de novo* review." Burnside v. Burnside, 194 W. Va. 263, 460 S.E.2d 264, syl. pt. 1 (1995). *See, Belt v. Rutledge*, 175 W. Va. 28, 330 S.E.2d 837 (1985) ("[i]f the question on review is one purely of law, no deference is given and the standard of judicial review by the courts is *de novo*." "Although factual findings are reviewed under the clearly erroneous standard, mixed questions of law and fact that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles are reviewed *de novo*." *Burnside*, 460 S.E.2d at 265.

V. ASSIGNMENTS OF ERROR

- A. THE LOWER COURT ERRED IN DENYING THE ASSESSOR'S MOTION TO DISMISS THE APPEAL OF THE 2006 AND 2007 TAX ASSESSMENTS BASED UPON THE FAILURE OF THE PROPERTY OWNERS' TO PERFECT THEIR APPEAL.
- B. THE LOWER COURT ERRED IN ITS APPLICATION OF THE STANDARD OF REVIEW OF THE DECISION OF THE BERKELEY COUNTY COMMISSION'S DECISION AFFIRMING THE PROPOSED ASSESSMENT.

POINTS AND LEGAL AUTHORITIES

Cases

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VI. DISCUSSION OF LAW

A. THE LOWER COURT ERRED IN DENYING THE ASSESSOR'S MOTION TO DISMISS THE APPEAL OF THE 2006 AND 2007 TAX ASSESSMENT BASED UPON THE FAILURE OF THE PROPERTY OWNERS' TO PERFECT THEIR APPEAL

A party who is aggrieved by a proposed assessment and has appeared before the County Commission sitting as a Board of Equalization and Review may have the decision of the Board of Equalization reviewed by the Circuit Court pursuant to West Virginia Code § 11-3-25.

To determine if the aggrieved party has perfected the appeal, the Court must look at West Virginia Code §58-3-4 and read it inparamutual with West Virginia Code §11-3-25. It is required that the Petition be accompanied by the original record of the proceeding in the County Commission in lieu of a transcript of said proceeding. These provisions are mandatory and will be considered together.

When it appears upon review of the Court that the Petition, though presented within the thirty-day period, was not accompanied by the original record of the proceeding in the County Commission and that no record of such proceeding was filed in the Circuit Court within the limitation of thirty days prescribed by West Virginia Code §11-3-25, the appeal applied for must be refused by the Circuit Court. In Re: Stonestreet, 147 W. Va. 719, 131 S.E.2d 52; and Rawl Sales and Processing Company v. County Commission, 191 W. Va. 127, 443 S.E.2d 595.

The Property Owners in the proceedings below conceded that West Virginia courts have interpreted WV. Code § 58-3-4 as applying, and therefore requiring that a "transcript or record of the proceeding below be presented with an appeal under certain circumstances." Even after the Property Owners conceded the statutory requirement, the Circuit Court failed to dismiss the appeal. This ruling by the Court was clearly in error.

When an appeal deals only with the amount of an assessment made on a piece of property, the law deems it unnecessary for the Circuit Court to hear additional evidence because it is simply charged with making a determination "from the evidence so certified." The need for the Court to be given a copy of the original record of the underlying proceeding with the appeal is obviously a necessity when its decision is based on the underlying record. See West Virginia Code § 11-3-25 and In Re: Stonestreet, 147 W. Va. 725 131 S.E. 2d 52.

The Property Owners have asserted that the Assessor has failed to present a valid reason to disturb the rule, that the failure to attach the record was not a failed flaw. The Assessor continually asserts that the West Virginia Supreme Court of Appeals and the West Virginia Legislature have required that the record to be filed with the appeal. The legislature has the duty to determine the procedural process of protesting tax assessments and have required that the record be filed with the Circuit Court. West Virginia Code § 11-3-25.

The Property Owners failed to file the record of the proceeding before the County Commissioners until the filing of its Opposition to Motion to Dismiss Appeal of 2006 Tax Assessment on March 7, 2007, more than a year after the denial of the Appeal. Further they elected to file only the portion of the record the Property Owners presented, and excluded evidence presented by the Assessor. A court that is charged with a review of record to determine if a decision is supported by the record must have the full record to make its review.

The Property Owners again conceded that the Court needed the record that was presented to the County Commission of Berkeley County sitting as a Board of Equalization and Review to determine if the decision of the Commission is supported by the record. However, they felt inclined to only include the portions of the record that supported their position.

In the Appeal of the 2007 Assessment, the Property Owners again failed to attach the record and/or transcript for the Court to consider in its review. Further, in subsequent filing by the Property Owners included facts that were not presented at the hearing before the Board of Equalization and Review. This was filed on May 9th, 2007 which was 78 days from the decision of the Board of Equalization and 48 days after the Property Owners where required to perfect their appeal. The filing of the complete record would prevent the Property Owners from making assertions that were not part of the original proceeding.

The Property Owners asserted that the failure to file the transcript or record does not prejudice the Assessor because he prepared and submitted evidence supporting its claim and had the opportunity to review the material presented by the Property Owners. The prejudice is not that the Assessor is unaware of the evidence presented to the Board of Equalization and Review but that the Court does not have the transcript or record to review in making its determination concerning the appeal. The matter pending before the Circuit Court was to determine if the County Commission's decision was supported by the evidence of record.

The statutory framework, for the appeal and review of a decisions of the Board of Equalization when an appeal deals with the valuation on a piece of property, deems that the Courts review is simply charged with making a determination from the evidence so certified. The Circuit Court does not hear additional evidence therefore it is fundamental that the court be given a copy of the original record of the underlying proceeding with the appeal. See West Virginia Code § 11-3-25 and In Re: Stonestreet, 147 W. Va. 725.

The filing requirements established by statute, like the ones involved in the instant case are not readily susceptible to equitable modification or tempering. Concept Mining, Inc. v. Helton, 217 W.Va. 298, 617 S. E. 2d 845 (2005)

B. THE LOWER COURT ERRED IN ITS APPLICATION OF THE STANDARD OF REVIEW OF THE DECISION OF THE BERKELEY COUNTY COMMISSION'S DECISION AFFIRMING THE PROPOSED ASSESSMENT.

There exists a presumption of the validity of the assessment and that clear evidence is required to overcome the presumption.” Western Maryland Rg. Com. v. Board of Public Works 141 WV 413, 90 SE 2d 433. This Court has consistently recognized that ‘there is no doubt either in this jurisdiction, or in the country at large, that a reviewing court will not interfere with the conclusions reached by an assessing body, unless the assessment made is clearly illegal or grossly and palpably wrong on the facts.’” Western Pocahontas Prop. LTD v. County Comm.’s, 189 WV 322, 431 S.E. 2d 661. Therefore, [i]t is obvious that where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous.

The proper standard of review before the Circuit Court was whether the decision of the Board of Equalization and Review was supported by substantial evidence. The Supreme Court of Appeals of West Virginia has clearly enunciated this standard of review. In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W.Va. 250, 539 S.E.2d 757 at Syllabus Point 5 Property Owners, must prove that the decision of the Board of Equalization and Review was not supported by the evidence contained in the record.

The Court has recognized that a judicial review of a decision of the Board of Equalization and Review to a challenged tax assessment valuation is limited to the same scope permitted under West Virginia Code 29A. Frymier-Halloran v. Paige 193 WVA 687, 485 S.E. 2d 780.

West Virginia Code § 29A-5-4(a)(5)&(6) provide guidance upon which a court shall reverse, vacate or modify the order of the agency (County Commission) if the substantial

rights of the Petitioner or Petitioners have been prejudiced because of the administrative findings, inferences, conclusions, decision or order are:

- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The evidence provided by the Property Owners concerning the valuation of the real property for the year 2006 consisted of filing of the Appraisal Report and Valuation Analysis of 320.5849 Acres (Broomgrass) prepared by John P. McClurg and Calvert L. Estill of the Hawthorne Group for the Berkeley County Farmland Preservation Board. The only addition to the protest of the 2007 assessment was the addition of the avadavat of John P. McClurg. Neither Mr. McClurg or Mr. Estill were presented for testimony. The appraisal failed to meet the USPAP requirement for an appraisal of the one acre tracts.

11 USC 1101 et seq. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 recognize USPAP as the generally accepted appraisal standards and require USPAP compliance for appraisers in federally related transactions. State Appraiser Certification and Licensing Boards; federal, state, and local agencies, appraisal services; and appraisal trade associations require compliance with USPAP.

Pursuant to the USPAP standards an appraisal can only be used for the purpose for which the appraisal was prepared. The appraisal filed by the Property Owners at both hearings were prepared for the Berkeley County Farmland Protection Board to determine the value of a conservation easement.

In The Statement of Limiting Conditions and Assumptions the report states:

“2. This appraisal is to be used in whole and not in part. No part of it shall be used in conjunction with **any other appraisal.**”(Emphasis added)

By the terms of the appraisal the purpose of the appraisal was “...to estimate the market value of the conservation easement to be purchased over approximately 304.5434 acres of the 320.5849 acres (Broomgrass) located near Gerrardstown, West Virginia...” This report was not prepared to determine the value of the one acre lots that are the subject of this protest.

The appraisal prepared does not contain a certification giving the opinion of the estimated market value of the one acre lots but does state “It is our considered opinion that as of the effective date of this report, April 20, 2005, the estimated market value of the easement interest of the subject property is \$508,000.” Therefore the Property Owners failed to place credible evidence on record to show the true and actual value of the one acre lots or a certificate of compliance with USPAP for the determination of the value of the one acre lots.

The Assessor argued before the Board of Equalization the point that the appraisal presented to the Board of Equalization in support of their protest of the assessments failed to meet the USPAP standards. The Assessor argued an appraisal can only be used for the purpose for which the appraisal was prepared. The appraisal filed by the Property Owners at both hearings was prepared for the Berkeley County Farmland Protection Board to determine the value of a conservation easement and that by the expressed statement of the report that the appraisal was not to be used in whole and not in part.

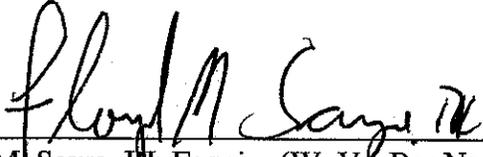
Based upon the foregoing the Property Owners did not provide to the Board of Equalization any credible evidence to the value of the property. The only credible evidence to the value is the evidence provided by the Assessor concerning the sales price of the individual

lots. The Assessor testified to the method used to appraise the subject property and that he complied with the state requirements in preparing his appraisal. Therefore the decision of the County Commission of Berkeley County was supported by the evidence of record.

VII. PRAYER FOR RELIEF

WHEREFORE, based upon the evidence in the record and the authorities cited herein, the Appellant respectfully submit that the Final Order is in error, and as such, the Final Order should be reversed, and that an order entered granting the Appellant's Motion to Dismiss the Appeal.

Purple Turtle LLC
By Counsel



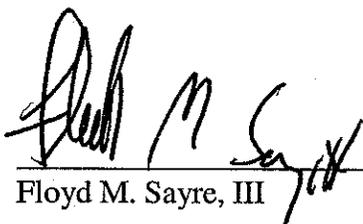
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CERTIFICATE OF SERVICE

I, Floyd M. Sayre, III, Esquire, do hereby certify that a true and exact copy of the foregoing *APPELLANT'S BRIEF* has been served, by United States mail, postage prepaid, upon the following:

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Counsel for Appellee, Purple Turtle, LLC et al.

Date: October 8, 2008



Floyd M. Sayre, III