

**BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Foster Foundation,

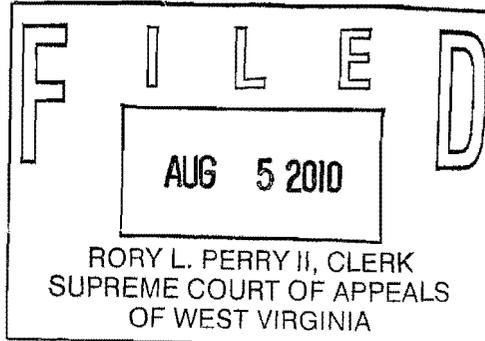
Petitioner,

V.

**Glen B. Gainer III, in his capacity as
West Virginia State Auditor,**

and

**The Court of Claims of the State of
West Virginia,
Respondents.**



NO. 35627

BRIEF OF THE COURT OF CLAIMS OF THE STATE OF WEST VIRGINIA

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BRIEF OF THE COURT OF CLAIMS OF THE STATE OF WEST VIRGINIA

NOW COMES the President of the West Virginia Senate and the Speaker of the West Virginia House of Delegates on behalf of the Respondent, the Legislature's Court of Claims of the State of West Virginia ("Court of Claims"), by counsel, and file this brief pursuant to the order of this Court dated June 2, 2010, issuing a writ of certiorari .¹

PRELIMINARY STATEMENT

The underlying Petition for Writ of Certiorari seeks to review an Order of the Court of Claims entered on October 15, 2009, which denied the Petitioner Foster Foundation's claim to

¹This Court has stated "...in the future, litigants should be careful to bring all cases involving the legislature against the presiding officers of the House and Senate." *Common Cause of West Virginia v. Tomblin*, 186 W. Va. 537, 539, 413 S.E.2d 358, 360, n.2 (1991). See also, Rule 31, Joint Rules of the Senate and House of Delegates, which provides:

Governing Powers.

31. The President of the Senate and Speaker of the House of Delegates shall have the power to and are hereby authorized to act on behalf of the Legislature as required by the business and legal affairs of the Legislature unless otherwise directed by a majority vote of both houses while the Legislature is in session or by the majority vote of the Joint Committee on Government and Finance while the Legislature is not in session.

recover certification fees collected by the West Virginia State Auditor. The Court of Claims represents that it has followed the procedures set forth in the West Virginia Code, and further, the Petitioner has not assigned any error based on the procedures followed in the Court of Claims.

STATEMENT OF FACTS

The Petitioner, Foster Foundation, is a non-profit organization engaged in the operation of a home for the aged, seeking to recover \$457,386.79 as reimbursement for certification fees. These fees accrued, as well as interest, during an eight-year period in which Petitioner did not pay taxes on its property. The Petitioner had been exempt from ad valorem property taxes from 1923 until 1998, when the exemption was deemed to no longer apply. Petitioner then contested the taxability of its property by filing a Complaint against Assessor Ottie Adkins in the Circuit Court of Cabell County on March 26, 1998. The Petitioner withheld payment of taxes pending the date of the sheriff's sale of the delinquent property pursuant to an Agreed Order that held any sheriff's sale in abeyance until the resolution of the tax matter. Petitioner claims that it followed the procedures for contesting the taxability of property by filing the Complaint. However, this Court in *State ex rel. Ayers v. Cline*, 176 W. Va. 123, 342 S.E.2d 89 (1985), stated that property owners are required to "pay then protest" to ensure that the government has a recourse to enable it to operate while taxes are being contested. The Petitioner did not pay the taxes and then protest the amount due. Instead, Petitioner entered into the Agreed Order in which they agreed that the property would not be sold. On May 25, 2006, the Petitioner paid \$6,555,877.29 to the State Auditor's office to satisfy the ad valorem real property taxes, interest, publication fees and certification fees that had accrued during the eight year period in which the Petitioner was contesting the taxability of the property. \$457,386.79 of that amount

were for the certification fees. In the Petitioner's Brief, the Petitioner would have this Court compel the Respondent Court of Claims to recommend that the Legislature appropriate public monies to pay that amount to back to Petitioner. This represents a change of position by Petitioner, insofar as the relief requested in the Petition was limited to a request that the Auditor return this amount to Petitioner. The Respondent Court of Claims objects to such an untimely change of position.

PROCEDURAL HISTORY

On September 11, 2006, the Petitioner instituted a civil action in Cabell County Circuit Court seeking a refund of the \$2,252,477.32 in interest, certification fees, and publication fees which it had paid in order to redeem its property. On November 27, 2006, the State Auditor filed a Motion to Dismiss based on failure to state a claim upon which relief may be granted, immunity, and improper venue. On April 17, 2007, the Circuit Court of Cabell County ordered that the Circuit Court of Kanawha County was the venue for the cause of action. On September 11, 2007, the Kanawha County Circuit Court entered an Order granting the State Auditor's Motion to Dismiss, stating that the Court of Claims was the proper avenue for the Petitioner to "seek funds paid to the State." On December 6, 2007, Petitioner filed the underlying action in the Court of Claims. Hearings were held in the Court of Claims on February 25, 2009, and March 27, 2009. The Court of Claims entered an order denying Petitioner's claim on August 14, 2009. On September 11, 2009, Petitioner filed a Petition for Rehearing which was denied by the Court of Claims on October 15, 2009. In the instant action, the Petitioners have asked this Court to review the action of the Legislature's Court of Claims.

STANDARD OF REVIEW

Pursuant to W. Va. Code §53-3-2 (2008), certiorari lies to review the judgments or orders of inferior tribunals. This Court has not previously specifically ruled whether certiorari applies to the Court of Claims as an administrative body of the Legislature. This Court has found in *State ex rel. McLaughlin v. Court of Claims*, 209 W. Va. 412, 549 S.E.2d 286 (2001), that mandamus is a proper remedy against the Court of Claims. The Court stated:

The Court of Claims is an administrative arm of the West Virginia Legislature, not a court created within the judicial branch of government. The Legislature has established the Court of Claims by law and delegated to it the Legislature's power to investigate certain claims against the State that may not be prosecuted in the courts because of the State's sovereign immunity...

Because the Court of Claims is a public body created by law, a writ of mandamus may issue against this body, in the same fashion as it issues against any other public officer or body to which the Legislature has delegated its powers. *McLaughlin*, 209 W.Va. at 415, 549 S.E.2d at 489.

This Court has also noted in *G.M. McCrossin, Inc. v. The West Virginia Board of Regents*, 177 W. Va. 539, 355 S.E.2d 32 (1987), in a footnote, that:

While not at issue in this case, this Court obviously may review decisions of the court of claims under the original jurisdiction granted by article VIII, section 2 of our Constitution, through proceedings in mandamus, prohibition, or certiorari. ... Review in this fashion is necessary because the court of claims is not a judicial body, but an entity created by and otherwise accountable only to the Legislature, and judicial recourse must be available to protect basic principles of separation of powers. *G.M. McCrossin, Inc*, 177 W. Va. at 541, 355 S.E.2d at 33.

Assuming *arguendo* that a Writ of Certiorari is an appropriate mechanism to challenge the advisory opinion of the Court of Claims, then the standard of review is *de novo*. *State ex rel. Prosecuting Attorney of Kanawha County, West Virginia. v. Bayer Corp.*, 223 W. Va. 146, 672 S.E.2d 282 (2008).

ARGUMENT

This Court has not previously specifically ruled whether certiorari applies to the Court of Claims. Certiorari lies to review the judgments or orders of inferior tribunals. This Court has maintained that certiorari did not lie against a city council relating to enactment of an ordinance as such enactment was legislative in nature and not reviewable by certiorari. *Garrison v. City of Fairmont*, 150 W. Va. 498, 147 S.E.2d 397 (1966).

This Court later held in *Lower Donnally Association v. Charleston Municipal Planning Commission and the City of Charleston, West Virginia*, 212 W. Va. 623, 575 S.E.2d 233 (2002), that:

3. The final actions of a planning commission adopting a comprehensive plan or amendments to it, approving or rejecting plats or plans of subdivisions, and adopting a final report with respect to a zoning ordinance, regardless of whether that report is an initial report or a revised and resubmitted report, are subject to review by writ of certiorari regardless of whether the final action of the planning commission is dispositive of the matter or is followed by legislative action of the governing body. Insofar as *Garrison v. City of Fairmont*, 150 W. Va. 498, 147 S.E.2d 397 (1966) conflicts, that holding is hereby modified.

4. **Judicial review of planning commission final actions that require further action by a governing body is limited to consideration of whether the record discloses that procedures required by law have been followed.** *Syl. Pt. 3 and 4, Lower Donnally Association* 212 W. Va. at 623 575 S.E.2d at 233. (*emphasis added*).

This Court stated in *State ex rel McLaughlin v West Virginia Court of Claims*, that:

The Court of Claims is an administrative arm of the West Virginia Legislature, not a court created within the judicial branch of government. The Legislature has established the Court of Claims by law and delegated to it the Legislature's power to investigate certain claims against the State that may not be prosecuted in the courts because of the State's sovereign immunity. *See* W. Va. Code §14-2-1. The Court of Claims is also charged by law with the duty of recommending payment of such of those claims as it finds worthy, in specified amounts to be paid by specific appropriations designated by the Legislature for payment of claims against the State, which it recognizes as moral obligations of the State

notwithstanding the immunity of the State from suit in its various courts. *McLaughlin*, 209 W. Va. at 415, 549 S.E.2d at 289.

The Court of Claims exercises the Legislature's delegated power to investigate claims against the State that are subject to sovereign immunity, which arguably does not constitute the decision of an inferior tribunal but the action of a separate branch of government.

Should this Court decide that certiorari does apply to the Court of Claims as an administrative body of the Legislature, then its role as a body that recommends payment of claims against the State, which it recognizes as moral obligations of the State, is similar to that of the actions of a planning commission in *Lower Donnally Association*. Whereas in *Lower Donnally Association*, the final actions of the planning commission could have been dispositive of the matter or could have been followed by legislative action of the governing body, so too could recommendations of the Court of Claims be paid by the Legislature through specific appropriations or they could remain unfunded. In such an instance where there is to be further action by a governing body, this Court in *Lower Donnally* held:

Instead, the purpose for judicial review in such situations is to address any alleged procedural irregularities in a planning commission's performance of its responsibilities and thereby provide the opportunity for timely correction if necessary. Consequently, we further hold that judicial review of planning commission final actions that require further action by a governing body is limited to consideration of whether the record discloses that procedures required by law have been followed. *Lower Donnally Association*, 212 W. Va. at 631, 575 S.E.2d at 241.

In this instance, had the Court of Claims recommended that payment should be made to Petitioner, it would have been presented to the Legislature for payment, and the Legislature could have specifically appropriated money to pay the claim, or could have chosen not to follow the recommendation of the Court of Claims and made no appropriation. However, the Court of Claims denied the Petitioner's claim to recover certification fees. As in *Lower Donnally*, therefore, any

review of this matter should be limited to consideration of whether the record discloses that procedures required by law have been followed.

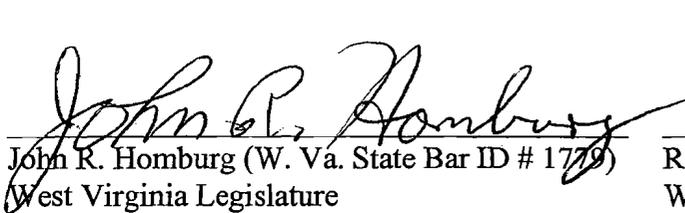
Petitioner has not assigned any error based on the procedures surrounding the decision of the Court of Claims.

CONCLUSION

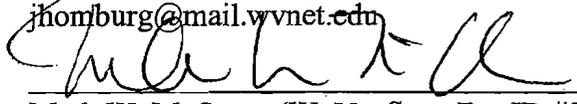
In this case, the Petitioner's only assignment of error is that the Court of Claims improperly ruled that certification fees apply to land suspended from the sheriff's sale and included thereafter on the certified list sent to the Auditor. Judicial review of the actions of the Court of Claims, if applicable in any event to an arm of the legislative branch of government, is limited to whether procedures required by law have been followed. Petitioner has not assigned any error based on the procedures of the Court of Claims in arriving at its decision denying Petitioner's claim, or in the procedures involved with the Rehearing which was also denied by the Court of Claims.

The Court of Claims followed the proper procedures in the handling of Petitioner's claim. Petitioner has made no assignment of error regarding those procedures. WHEREFORE, for the reasons set forth herein, the President of the West Virginia Senate and the Speaker of the West Virginia House of Delegates on behalf of Respondent, The Court of Claims of the State of West Virginia, respectfully request that this Court dismiss the instant action for lack of jurisdiction under Separation of Powers Doctrine and the system of checks and balances embodied in the United States Constitution, and the Division of Powers set forth in the West Virginia Constitution, Article V, Section 1.

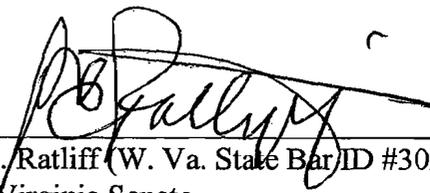
Respectfully submitted,



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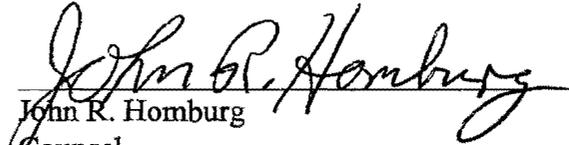
**The Court of Claims of the State of
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Respondents.**

CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on August 5, 2010, a true copy of the foregoing Brief of the Court of Claims of the State of West Virginia was served upon the following via hand delivery and by depositing the same, postage prepaid, in the United States Mail:

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