

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. ~~100163~~
35627

FOSTER FOUNDATION,

Petitioner,

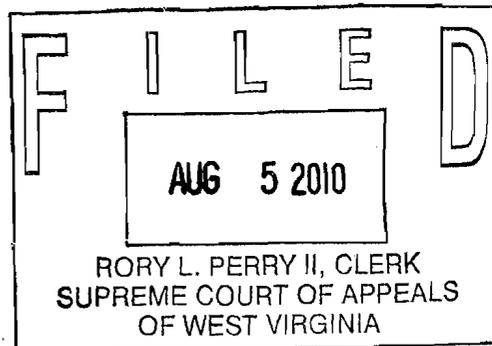
v.

GLEN B. GAINER III, in his capacity as
West Virginia State Auditor,

And

THE COURT OF CLAIMS OF THE STATE
OF WEST VIRGINIA,

Respondents.



**BRIEF OF RESPONDENT
GLEN B. GAINER III
WEST VIRGINIA STATE AUDITOR**

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NOW COMES the Respondent, Auditor Glen B. Gainer III ("Auditor"), by counsel and files its Response to Petitioner's Brief as required by this Court's Order dated June 2, 2010.

PRELIMINARY STATEMENT

The Petitioner seeks to overturn an Order issued August 14, 2009, by the Court of Claims of the State of West Virginia denying Petitioner's claim for reimbursement of

certification fees and interest accrued during the eight-year time frame in which Petitioner did not pay taxes on its property.

The Legislature has stated as a matter of law and policy that delinquent land not only constitutes a public liability, but also represents a failure on the part of delinquent private owners to bear a fair share of the costs of government. See, W. Va. Code § 11A-3-1. There is a "paramount necessity" of providing regular tax income for the state, county and municipal governments, and for school purposes. *Id.*

As described below, Petitioner has not, and cannot, prove that the Court of Claims erred in ruling that the imposition of certification fees and interest was proper. To hold otherwise would have allowed Foster Foundation to have the benefit of its property tax free for eight years without consequence in contradiction of law and public policy.

Petitioner asserts that the fee was improper only by ignoring the delinquent land statutory framework containing numerous examples of certification and by misdirecting the Court's attention from Petitioner's own responsibility for the improper suspension of the property from the land sale. The fee flows directly from Petitioner's refusal to pay its fair share of taxes.

STATEMENT OF FACTS

The Petitioner, Foster Foundation, is a non-profit organization seeking to recover \$457,386.79 as reimbursement for certification fees as well as interest accrued during the eight-year time period during which it did not pay taxes on its property. Petitioner claims that it followed the procedures for contesting the taxability of property by merely

filing a Complaint against Assessor Adkins in the Circuit Court of Cabell County on March 26, 1998. However, this Court in *Ayers v. Cline*, 176 W. Va. 123 (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. Petitioner did not pay and then file a complaint against the Assessor. Had it done so, no fees or interest would have accrued. Instead, counsel for Foster Foundation entered into an agreement with the Sheriff of Cabell County and the Tax Commissioner without notice to the State Auditor, in which they agreed that the property would not be sold.

Foster Foundation did not follow the court’s clear legal mandate to pay under protest. Filing a complaint against the county assessor in the circuit court in which the property is located, without also paying the taxes then assessed, is not the proper procedure for contesting taxability of property. Even Petitioner admits in its Petition that it did not pay its taxes until May 25, 2006; a full eight years after the decision from Assessor Adkins that Foster Foundation was no longer exempt from paying property taxes and well after the dispute arose with Assessor Atkins concerning its taxability.

When Petitioner finally decided to pay its overdue taxes and contacted the Delinquent Land Division in the State Auditor’s office to determine the amount necessary to redeem the property, significant statutory fees and interest had accrued. Petitioner now complains and asserts that certification of the land books and the imposition of statutory fees and interest by the Auditor was improper; even though such accrual is clearly required by the statutory framework.

PROCEDURAL HISTORY

In September 2006, Petitioner instituted a civil action in Cabell County Circuit Court seeking a refund of the \$2,252,477.32 in interest and certification fees it had paid in order to redeem its property. On November 27, 2006, Respondent 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 proper 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 venue for the claimant to seek relief. Petitioner sought relief in the Court of Claims on December 6, 2007. A hearing was held by the Court of Claims on February 25, 2009, and an Evidentiary Hearing was held on March 27, 2009. Following closing briefs by both parties, on August 14, 2009, the Court of Claims entered an Order denying Petitioner's claim. See, *Official Record* provided by the Court of Claims of the State of West Virginia (hereinafter "OR") at pp. 341-351. On September 11, 2009, Foster Foundation filed a Petition for Rehearing which was denied by the Court of Claims on October 15, 2009. Petitioner then filed a Petition for Writ of Certiorari which was granted by this Court on June 2, 2010.

STANDARD OF REVIEW

Pursuant to West Virginia Code § 53-2-2 certiorari lies to review the judgments or orders of inferior tribunals. This Court has never stated whether certiorari applies to the Court of Claims as an administrative body of the Legislative branch of government. This Court has, however, 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 (1966). This Court has, however found that mandamus is a proper remedy against the Court. In *State ex rel. McLaughlin v. Court of Claims*, 209 W. Va. 412 (2001), this Court reviewed the nature of 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.

Because of the Court of Claims' exercise of a legislative power, this Respondent questions the applicability of certiorari to this matter. The exercise of the legislature's delegated power to investigate claims against the State that are subject to sovereign immunity, arguably does not constitute the decision of an "inferior tribunal," but the action of a separate branch of government.¹

¹ This Respondent respectfully suggests that the Petition be denied for this reason as well as the substantive reasons set forth herein.

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 Atty. v. Bayer Corp.*, 223 W. Va. 146 (2008). A *de novo* or independent review of both the law and facts in this matter confirms that the Court of Claims ruling was correct.

DELINQUENT LAND PROCESS OVERVIEW

Article Three of Chapter 11A provides that the State Auditor shall ex officio be State Commissioner of Delinquent and Non-entered Lands and it is his duty to administer and carry into execution the laws with reference to such lands. W. Va. Code § 11A-3-33.² These duties only come into play when a property owner fails to timely pay taxes.

Initially, when property becomes delinquent, it is placed on a list of delinquent land prepared by the Sheriff. See, W. Va. Code § 11A-2-11 and Exhibit A. The Sheriff then subscribes an oath, which is certified by a person authorized to administer it, that the delinquent list is accurate to his knowledge. *Id.* W. Va. Code § 11A-2-14 explains that delinquent lists are then sent to the County Commission and the Commission certifies a copy of each list to the Auditor. See Demonstrative Exhibit B Chart attached hereto and incorporated herein as Exhibit A.

² Prior to 1994, the State actually “purchased” property not sold at the tax sale, and title to the land passed to the State. Due process problems occurred because the former owner had his or her interest in the land taken away at that point in the process. Petitioner states that the land statutes have been fraught with due process problems, but cites two law review articles that were written prior to the corrections made by the Legislature in the Code in 1994.

A copy of the delinquent list is then posted at the front door of the courthouse of the county at least two weeks before the session of the County Commission at which it is to be presented for examination. W. Va. Code § 11A-2-13. If taxes are still not paid, a second delinquent notice is published, notice to the taxpayer is sent via certified mail, and a lien is recorded with the Sheriff as mandated by W. Va. Code § 11A-3-2. See Exhibit A. After the Sheriff conducts a sale, the list of the disposition of delinquent property is then prepared by the Sheriff and certified by the Clerk, which is then forwarded to the State Auditor. See W. Va. Code § 11A-3-9 and § 11A-3-11. Sections 11A-3-9 and 11A-3-11 require that all types of property be placed on the list, certified and forwarded to the State Auditor.

This certified list contains the disposition of all delinquent land from the county so that complete and accurate records may be maintained by the State. It contains land offered for sale, as well as, land suspended from sale.

Thereafter, the only mechanism in the code for redemption of delinquent land is pursuant to section thirty-eight, (§11A-3-38) which sets forth the steps necessary to redeem property. There is no other mechanism in the code for the redemption of land placed on the certified list. The fees associated with that redemption are statutorily mandated as set forth in section thirty-nine.

ARGUMENT

Petitioner assigns only one error to the Court of Claims ruling. It asserts 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. Plaintiff asserts that land suspended from the Sheriff's sale may not be included on the certified list of the disposition of delinquent land. Despite clear statutory language to the contrary, Petitioner suggests that land should somehow remain in limbo, unclaimed in the Sheriff's office, unaccounted for by any land books, until such time that Petitioner would decide to pay its taxes. In addition to misreading the Code, Petitioner ignores its own conduct which is the cause of the problem about which it complains. Had Petitioner refrained from entering into an agreement with the Sheriff and Tax Commissioner, its property would have been offered for sale. Petitioner complains now about a problem it created and benefited from for eight years.

I. FEES APPLY TO ALL LAND ON THE CERTIFIED LIST

Despite Petitioner's manipulation of the Code, fee imposition is proper and required for all land included on the certified list. Petitioner ignores the several types of certification provided for by the Code and cites one or two isolated sections of the delinquent land statutes to suggest that the delinquent property must first be offered for sale by the Sheriff *before* the land can be included on the land books certified to the Auditor.³ However, upon reading all sections of the Code *in pari materia*, it is clear from the statutory language that the delinquent property list contains the disposition of

³ In *Mingo Redevelopment Authority v. Green*, 207 W.Va. 486, 534 S.E.2d 40, (2000), the Court correctly quoted the trigger for certification:... if the Sheriff is unable to sell for taxes. The focus being the state's ability to obtain the taxes owed. *Green* 204 W.Va. 486 at footnote 9.

all delinquent land and that this list is certified to the Auditor once it is placed on the delinquent list by the Sheriff.⁴

West Virginia Code Section 11A-3-9 states:

As soon as the sale provided for in section five of this article has been completed, the Sheriff shall prepare a list of all tax liens on delinquent real estate purchased at the sale, or **suspended** from sale, or redeemed before sale, or certified to the auditor...

The Sheriff shall, at the foot of such list, subscribe an oath, which shall be subscribed before and **certified...**(*emphasis added*).

Thus, the Sheriff prepares the list of the disposition of all delinquent land after the sale, including land suspended from the sale. The list is then certified and transmitted through the Clerk to the Auditor.

West Virginia Code Section 11A-3-11 states:

(a) Within one month after completion of the sale, the Sheriff shall deliver the original list of sales, suspensions and redemptions described in section nine of this article, with a copy thereof, to the clerk of the County Commission. **The clerk shall bind the original of such list** in a permanent book to be kept for the purpose in his office, and shall note each sale and suspension, each redemption not previously noted, and each certification on his record of delinquent lands. The clerk, within ten days after delivery of the list to him, **shall transmit the copy to the auditor**, who shall note each sale, suspension, redemption and certification on the record of delinquent lands kept in his office. (*emphasis added*).

These sections clearly require that the list of the disposition of all properties be certified by the Sheriff and sent to the Auditor.

Petitioner suggests that certification to the Auditor was improper, however, sections nine and eleven clearly require that property suspended from sale be included on the land books sent to the Auditor. There is no discretion in this process.

⁴ Statutes relating to the same subject should be read and applied together to fully ascertain the Legislature's intent, See, e.g. Syllabus Point 5, *Ewing v. Board of Education of Summers County*, 202 W. Va. 228 (1998).

During the Evidentiary Hearing held on March 27, 2009, Mr. Rollyson, the Deputy Land Commission for the State Auditor, also confirmed that the inclusion of property suspended from sale on the certified list was proper and, in fact, mandatory:

“... The Sheriff is required to certify to the county clerk a list of properties which includes everything that was on that delinquent list which includes those properties that receive no bid, those properties were suspended, redeemed, sold to individuals, certified to the state, or erroneous assessment.

That list is then in turn sent to the county clerk. The county clerk in turn certifies to the auditor the entire list of properties....” (See OR at pp. 236-237).

Petitioner syllogistically cites inapplicable sections of the land sale statutes while ignoring the sections that require inclusion of suspended land on the certified list sent to the auditor to implausibly conclude that the statutorily required fees do not apply. A careful review of the statutes, however, proves the contrary. The payment of taxes on delinquent land is called the redemption of such land and is provided for by W. Va. Code §11A-3-38. Upon receipt of the certified list, the Auditor assesses the interest and penalties for the delinquent properties on the list and receives a statutory certification fee at the time of redemption. Section thirty-eight allows any individual entitled to pay the taxes on land to redeem it from the Auditor upon payment of the necessary taxes and fees.

Section thirty-eight provides:

...**any other person** who was **entitled to pay the taxes** thereon, may redeem such real estate from the auditor...

(b) In order to redeem **the person** seeking redemption **must pay** to the auditor such of the following amounts as may be due: (1) The taxes, interest and charges due on the real estate on the date of certification to the auditor or the discovery of the nonentry, with interest at the rate of twelve percent per annum from the date of such certification...*(emphasis added)*.

Pursuant to West Virginia Code § 11A-3-38(a)(b)-39(a), once property becomes delinquent and is placed on the delinquent list certified to the Auditor, the Auditor must collect the taxes, interest and fees. When the taxes are paid to the Auditor, the certification fee is also collected. West Virginia Code Section thirty-nine (a) states:

a) Upon payment of the sum necessary to redeem, the auditor **shall** execute a certificate of redemption in triplicate...

The fee for issuing the certificate of redemption **shall** be ten dollars or seven and one-half percent of the total taxes, interest and charges due, whichever is greater. (*emphasis added*).

The Court will note that the language and therefore, the certification fees, are mandatory.

As the code unambiguously provides, the property must either be redeemed from the Auditor or placed on the certified list of lands to be sold by the Deputy Land Commissioner pursuant to section forty-two. There is no mechanism by law for the disposition of delinquent lands after completion of the certified list other than the state level redemption or sale. If Petitioner was not subject to the redemption requirements, there would be no statutory mechanism available for Petitioner to redeem.

Mr. Rollyson also confirmed in his testimony that the imposition of fees and interest applies to suspended properties such as Petitioner's property:

By Ms. Hopkins:

"Q. Mr. Rollyson, those code sections that you just mentioned regarding the interest and certification fees, do they apply only to property offered for sale?

A. No.

Q. Do they apply to land that was suspended as well?

A. Yes.

Q. If the redemption provision only applied to offers for sale of property, would suspended property owners be able to ever redeem their land?

A. No.

Q. In your 27 years involved in administering this statute, have you ever had those statutes interpreted to only apply to land offered for sale?

A. Absolutely not."

(See OR at pp. 248-249).

Petitioner claims that in the absence of a Sheriff's tax sale, the Auditor should have returned the property to the Cabell County Sheriff for a tax sale. Petitioner claims that the property owner could then redeem the property from the Sheriff prior to the next sale, and therefore no certification fee should be imposed upon redemption from the Sheriff. There is no code provision that remotely suggests this possibility. Petitioner cites W.Va. Code § 11A-3-7 for this argument, however, section seven has no applicability to this matter. It states that:

"...whenever it shall appear to the Sheriff that any real estate included in the list has been previously **conveyed by deed** and no tax thereon is currently delinquent, or **that the tax lien thereon has been sold previously** and not redeemed, or that the tax lien thereon **ought not to be sold for the amount stated therein**, he shall suspend the sale thereof and report his reasons therefore to the County Commission and to the auditor..." (*emphasis added*).

Section seven applies to liens that have been deeded, sold or sold for an incorrect amount. It does not apply to properties that have been suspended from a sale which is the issue herein. Additionally, nowhere in the statute does it say that once property has been placed on the certified list the Auditor should, or could, *return* property to the county Sheriff for a tax sale.

To summarize, if property becomes delinquent it is placed on the delinquent list. If not redeemed in the requisite time period, the delinquent list is then certified to the Auditor, and the Auditor collects the required certification fee for these properties at

redemption. See, W. Va. Code §§ 11A-3-38(a)(b)-39(a). The fact that Petitioner's property was not sold and was instead suspended does not change the fact that it was properly placed on the delinquent list and therefore certified to the Auditor. As the process overview indicates, Petitioner could only redeem its property before it ended up on the certified list. After the Auditor receives the certified list, redemption can only be issued upon the payment of the taxes, interest, and fees due.

Petitioner seeks the windfall of redemption without payment of the interest and certification fees. The statute does not permit property placed on the certified list sent to the Auditor to be redeemed without interest and certification fees, nor does it say that the certification fees, interest, and costs assessed by the Auditor are discretionary. By assessing the interest and certification fees, the Auditor was simply performing his nondiscretionary statutory duties as described in Chapter 11A of the West Virginia Code.

II. PETITIONER CAUSED ITS OWN HARM

Petitioner's argument focuses on the failure to "offer the land for sale" at the Sheriff's sale. Ironically, Petitioner seeks to profit from its own wrongful act. Absent the improper agreement to suspend the sale which was made without the State Auditor's knowledge, the property would have been offered for sale.

This agreement violated this Court's clearly expressed precedent concerning the process to challenge an assessment. The Court stated in *In re Elk Sewell Coal*, 189 W. Va. 3 (1993), that "[t]here is no statutory mechanism in the West Virginia Code which authorizes parties to enter into a settlement agreement under which a taxpayer may

withhold full payment of property taxes due pending appeal of an assessment.” 189 W. Va. 3 at 8 (1993).

Therefore, Petitioner’s argument that the property had to be offered for sale is merely an attempt to profit from its own lack of compliance and failure to bear a fair share of the costs of government, which robbed the state and the school fund of the money they were due for more than eight years. If sustained, this precedent would open the door for countless property owners to avoid tax payment indefinitely, thereby crippling our tax revenues and school systems.

Despite the existence of the agreement, Petitioner had actual notice that these fees and interest were accruing and increasing during the eight year suspension because its counsel requested copies of the charges due from the State Auditor on several occasions over the years.⁵ Petitioner knew that the land had been sent to the Auditor because it requested statements several times. Petitioner knew the amounts were increasing since the numbers were greater with each successive request. Yet, Petitioner took no steps to ascertain from the State Auditor what it would need to do to stop the amount from increasing.

During the Evidentiary Hearing, Mr. Rollyson testified that Petitioner knew the fees were accruing because counsel contacted his office several times over the years regarding the Foster Foundation property.⁶

By Ms. Hopkins:

⁵ At the Evidentiary Hearing before the Court of Claims, summary documents were introduced into evidence proving that Foster Foundation had received notice on at least four or five different dates of the interest and certification fees accruing and increasing throughout the years beginning in 2001. For a list of those requests, see OR at p. 329.

⁶ Mr. Rollyson stated, “It’s, the standard operating procedure of our office is that when an individual or a corporation calls that we will mail out statements to them based upon the request of the individual or the request of a county official.” When asked by counsel if the only way the auditor’s office would send out a statement is if in fact it had been contacted by someone, Mr. Rollyson replied, “Yes.” See OR at p. 243.

“Q. So in the Foster Foundation matter, it appears that they received notice of the interest and certification fees accruing at least on it looks like four or five different dates throughout the year. Is that right?...”

Q. Is that correct?

A. Yes.”

(See OR at pp. 246-247).

Petitioner knew that the interest and certification fees on its delinquent property were imposed and increasing as time passed, irrespective of the fact that the property was not offered for sale at a Sheriff's tax sale.

The agreement to suspend Petitioner's land did not and could not have addressed the statutory imposition of fees and interest on the property during the eight year time frame that Foster Foundation elected not to pay its taxes, nor did the agreement include or even notify the State Auditor who is charged with the collection of those amounts and administration of the delinquent land statutes.

Petitioner suggests that the Auditor was unjustly enriched by collecting the statutory fees.⁷ However, Petitioner fails to note the unjust enrichment that would result if it was allowed to maintain the benefit of land ownership tax free for eight years without interest, fee or penalty.

CONCLUSION

In this case, (although the appropriate procedure under law was to pay under protest) when Petitioner's property became delinquent, rather than selling the property to obtain the taxes due, Petitioner, the Assessor of Cabell County, and the Tax Commissioner entered into an agreement to suspend the land from the Sheriff's sale.

⁷ As Mr. Rollyson testified, pursuant to W. Va. Code §11A-3-36, a significant portion of the certification fee was transferred to the General School Fund. See OR at pp. 257-258.

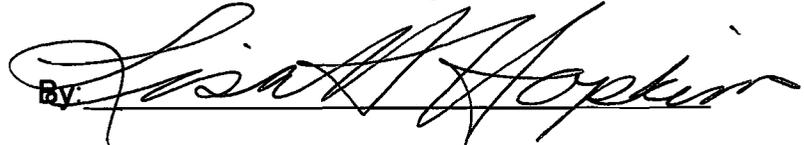
The Sheriff of Cabell County suspended the sale of the property and then placed it on the delinquent list while Petitioner maintained and controlled its property without paying taxes over the ensuing eight year period. When Petitioner eventually sought redemption, the Auditor assessed "the taxes, interest and charges due on the real estate on the date of certification to the auditor...with interest at the rate of twelve percent per annum from the date of certification." W. Va. Code § 11A-3-38(b). The Auditor then assessed "the fee for issuing the certificate of redemption" which is "ten dollars or seven and one-half percent of the total taxes, interest and charges due, whichever is greater." W.Va. Code § 11A-3-39(a). Therefore, the Auditor properly assessed and collected the taxes, interest, and fees for Petitioner's delinquent property.

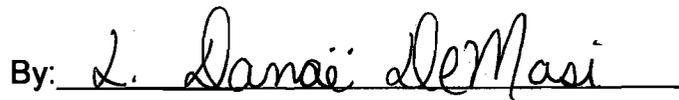
Petitioner was never relieved of the duty to pay taxes, a duty that is clearly defined in the statutory language supporting the public policy reasons set out by the Legislature for the creation of the land sale statutes. See, W.Va. Code § 11A-3-1. No *ex parte* agreement could negate the fact that taxes, interest, and fees were accruing on Petitioner's delinquent land; nor would the parties to the agreement have maintained the authority to waive those amounts. Petitioner should not be allowed to profit from its failure to follow proper process. It is contrary to law and public policy for Petitioner to be relieved of paying interest and certification fees for delinquent property as there is no local, state, or federal taxing scheme which allows owners of property to benefit from maintaining their property without paying the appropriate property taxes assessed thereon.

WHEREFORE, for reasons set forth herein, the imposition of fees and interest upon Foster Foundation was appropriate and an independent review of the Court of

Claims ruling based upon the facts, evidence and law before it confirms that it was proper and should be affirmed. For reasons set forth herein, Glen B. Gainer III, West Virginia State Auditor, respectfully requests that this Court affirm that the Court of Claims ruling was proper.

Glen B. Gainer III, West Virginia State Auditor

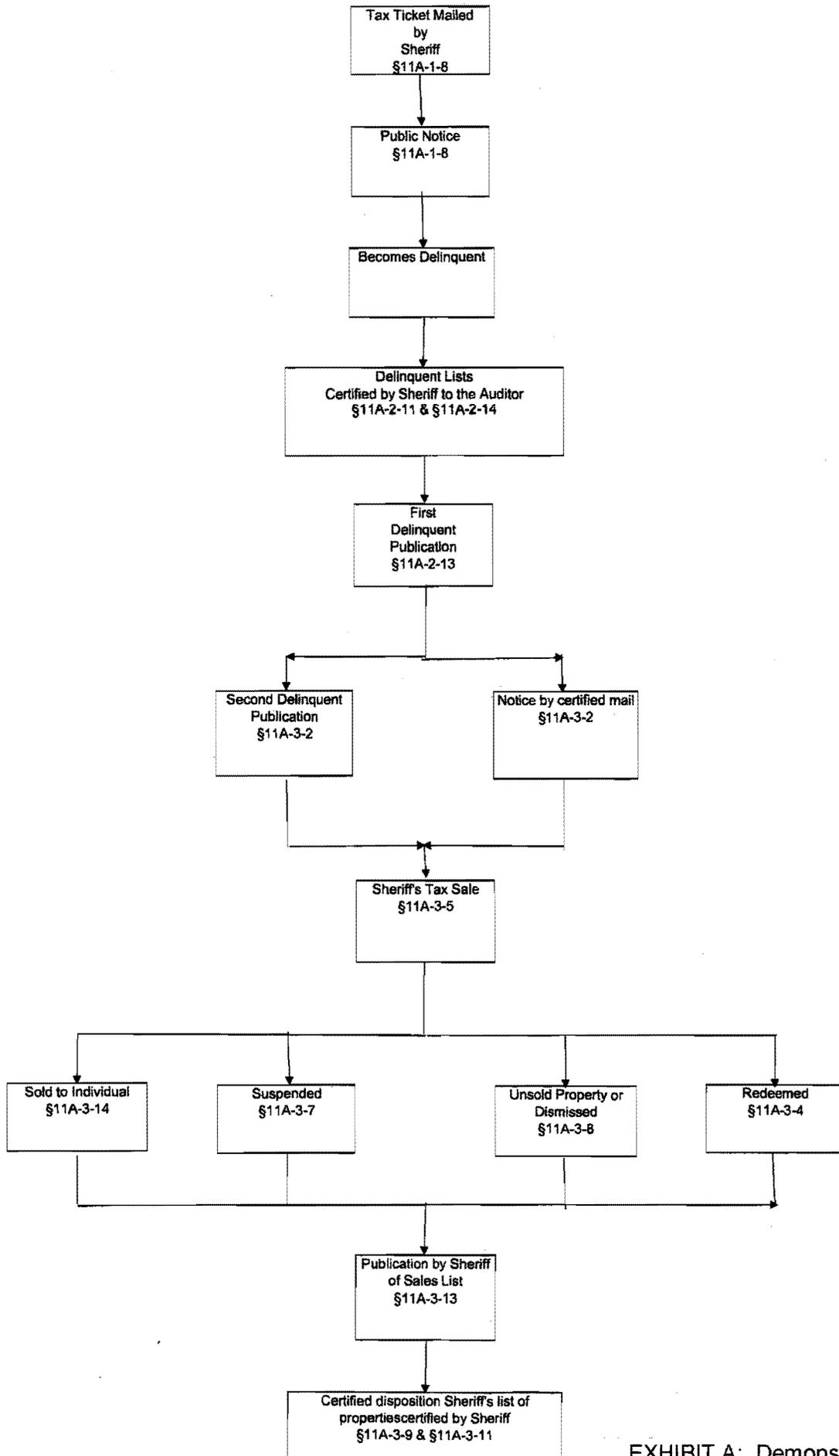
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Delinquent Land Process



CERTIFICATE OF SERVICE

I, Lisa A. Hopkins, Senior Deputy Commissioner of Securities and General Counsel of the West Virginia State Auditor's Office, do hereby certify that a true copy of the foregoing "**BRIEF OF RESPONDENT GLEN B. GAINER III, WEST VIRGINIA STATE AUDITOR**" was served upon the following, by United States mail, a true copy thereof on the 5th day of August 2010, addressed as follows:

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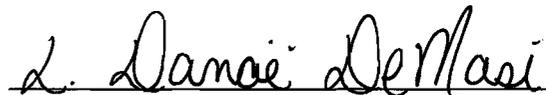
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