TWENTY-FIFTH JUDICIAL CIRCUIT
OF VIRGINIA

VICTOR V. LUDWIG
JUDGE
AUGUSTA COUNTY COURTHOUSE
P.O. BOX 689
STAUNTON, VIRGINIA 24402-0689
(540) 245-5323

TELEPHONE: (540) 245-5323
FAX NUMBER: (540) 245-5296

COUNTIES
ALLEGHANY, AUGUSTA, BATH,
BOTETOURT, CRAIG, HIGHLAND, ROCKBRIDGE

CITIES
BUENA VISTA, CLIFTON FORGE, COVINGTON,
LEXINGTON, STAUNTON AND WAYNESBORO

September 2, 2010

SEP 03 2010

Stephen K. Strosnider, Esquire
Franklin, Denney, Ward & Lawson
P. O. Drawer 1140
Waynesboro, Virginia 22980

Patrick J. Morgan, Esquire
County Attorney
County Government Center
P. O. Box 590
Verona, Virginia 24482-0590

Re: *Thomas S. Cline, et al. v. County of Augusta and Board of Equalization for the County of Augusta*
Case No.: CL1000514-00

Gentlemen:

This matter comes to the Court as an independent claim pursuant to the provisions of Title 2.2, Title 37 of the Code of Virginia (the Act) and on an appeal from the Augusta County Board of Equalization (the Board) pursuant to Code §58.1-3382. As you know, the parties presented evidence on May 12, 2010, only on the first issue raised by the Clines, specifically whether the order of the Board was void because it had failed to comply with the Act. The final brief on the issue was filed on July 9, 2010.

In this case, it was not the Clines who sought initial relief from the Board; rather, it was neighboring landowners who appealed, arguing that their properties were assessed at a value equal to the Clines' property and that the fair market value of their properties was less than that of the Clines. The Board agreed that the properties of the appellants and the Clines should not have been the same, and it directed staff further to investigate the issue. With that additional data, the Board concluded that the appellants' properties were properly valued, and, pursuant to Code §58.1-3379.A. and §58.1-3381, it increased the assessment of the Clines' property. Accordingly, by letter of November 9, 2009, the Board notified the Clines who sought a hearing on the matter before the Board.[1] The hearing was held on November 18, 2009.

[1] PEx B.

Preliminary matters:

It does not appear that there is much dispute (nor could there be) that the Board is a public body covered by the Act. Its members are appointed by the Circuit Court pursuant to Code §58.1-3370, its duties and method of operation are prescribed by Code §§58.1-3378, 58.1-3379, 58.1-3381, 58.1-3384, and 58.1-3386. In the definitional section of the Act (Code §2.2-3701) a public body is defined as "any . . . board . . . of the Commonwealth or of any political subdivision of the Commonwealth, including . . . counties . . . ." Although not specifically designated as a public body, in doing its work, the Board is to give notice of its meetings "at least 10 days beforehand by publication having general circulation the county . . . and . . . by posting a notice at the courthouse and each public library, voting precinct or both." (Code §58.1-3378) I note that the notice is not limited to the taxpayers who seek relief from the Board but is to be given to the public in general.[2]

With respect to the Board's obligation to conduct open meetings, Code §2.2-3700 provides, in part:

> Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked

With respect to the maintenance of minutes of the meetings of public bodies, Code §2.2-3707.I. provides, in part:

> Minutes shall be recorded at all open meetings. * * *
>
> Minutes, including draft minutes, and all other records of open meetings, including audio or audio/visual records shall be deemed public records and subject to the provisions of this chapter.
>
> Minutes shall be in writing and shall include (i) the date, time, and location of the meeting; (ii) the members of the public body recorded as present and absent; and (iii) a summary of the discussion on matters proposed, deliberated or decided, and a record of any votes taken. * * *

More specific to the Board (but not inconsistent with the more general provision applicable to public bodies) is Code §58.1-3384, which provides:

> The board shall keep minutes of its meetings and enter therein all orders made and transmit promptly copies of such orders as relate to the increase or decrease of assessments to the taxpayer and commissioner of the revenue. The orders shall be recorded on forms prepared by the Tax Commissioner and provided to localities by the Department of Taxation or

[2] While not binding on the Court, the Attorney General has opined that the Board is a public body. See 1983-1984 Op. Att'y Gen. Va. 442.

> on forms prepared by the board that contain, at a minimum, all the information required on the forms prepared by the Tax Commissioner.[3]

With respect to the method and form of any official action taken by the Board, Code §2.2-3710 provides, in part:

> Unless otherwise specifically provided by law, no vote of any kind of the membership . . . of any public body shall be taken to authorize the transaction of any public business, other than a vote taken at a meeting conducted in accordance with the provisions of this chapter. No public body shall vote by secret or written ballot . . . .

With respect to any failure by the Board to conduct an open meeting, Code §2.2-3711 provides:

> No . . . motion adopted, passed or agreed to in a closed meeting shall become effective unless the public body, following the meeting, reconvenes in open meeting and takes a vote of the membership on such . . . motion that shall have its substance reasonably identified in the open meeting.

Finally, with respect to a claim pursuant to the Act, Code §2.2-3713.E. provides:

> In any action to enforce the provisions of [the Act], the public body shall bear the burden of proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by this chapter shall be presumed to be a violation of this chapter."[4]

Pursuant to this section, it is the Board's burden to prove that its action was statutorily exempt if it has not complied with its obligations under the Act.

---

[3] Not necessary to this decision and with all due respect to Judge Smith (a very fine judge, indeed, and one whom I hold in high regard), I do not agree with his conclusion in *Saul Holdings, L.P. v. Fairfax County Board of Supervisors* regarding a shifting of the burden to the taxpayer to ensure that the Board complies with its statutory obligation. With regard to the County's suggestion that the General Assembly has acquiesced in that opinion by not changing the statute, I doubt it. If the General Assembly is perusing opinions of Circuit Court judges, it has too much time on its hands.

[4] On appeal by a taxpayer to the Circuit Court of an assessment of his real estate, the burden of proof is on the taxpayer to show that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application. *See* Code §58.1-3984. Although that is a statute of general application, the Supreme Court of Virginia has applied it in cases on appeal to the Circuit Court from an order of the Board of Equalization. See *Keswick Club, L.P. v. County of Albemarle*, 273 Va. 128 (2007). At this stage of the proceeding, however, the Court is not addressing the assessment itself; rather, it is addressing the issues arising under the Act. Curiously, the relevant statute cited here applies when the meeting does not comply with the requirements of the Act (specifically, that the meeting was not a public one). It does not address the allocation of the burden of proof as to whether or not the meeting was a public one, but, given that the burden is on the Board to prove compliance, it is reasonable to allocate the burden of each component of compliance (including the character of the meeting) to the Board.

Summary of the evidence:

Martin Lightsey testified that he served as Secretary of the Board. He was present at the time of the Clines' hearing at the Government Center in the "supervisor's caucus room" (Caucus Room) on November 18, 2009. He described the meeting place as "a small conference room," furnished with a table with dimensions of five feet by ten feet, seating eight people, and some chairs around the periphery of the room.

Mr. Lightsey testified that the citizens who had cases pending before the Board entered the caucus room through a hallway in which there were chairs for their use while waiting for their cases to be heard. He noted that, at the beginning of his tenure on the Board (which was the beginning of the Board's hearing appeals of the current assessment), those who were waiting to be heard would sometimes enter the conference room while the Board was conducting the hearing for another person, and, because of the limited size of the room, that could be disruptive. By the time of the Clines' hearing, the Board had addressed that problem by posting a sign on the door to the caucus room, reading "Please wait here until your case is called." Generally, when the Board was ready to hear a specific matter, a member of staff or one of the board members would call the taxpayer into the room. Mr. Lightsey candidly acknowledged that those whose cases were not the topic of the Board's immediate attention "were not encouraged to enter the room until their cases were called." However, he specifically declined to state that the waiting taxpayers were not allowed to enter prior to the calling of their cases. He added that, after the sign was installed, "[I]t just did not happen."

With respect to the Clines, Mr. Lightsey testified that the case was substantively out of the ordinary because it was the result of the Board's having increased the Clines' assessment in order to fulfill its obligation to equalize the assessments in the area in which the Clines' property was located. Mr. Lightsey said that, at the close of the hearing, the Board informed the Clines that it would make its decision and excused them. Mr. Lightsey believed (but was not certain) that the Board made the decision and took the vote on the issue that day, but he was not certain if the Board acted immediately after the Clines' departure; he was certain that the vote was not taken in the Clines' presence.[5]

In response to the question whether there were minutes of the meeting at which the Board addressed the Clines' appeal, Mr. Lightsey said that he did not believe that there were minutes indicating the date, time, and location of the meeting or who was present. He did think that there was a document indicating what was discussed with reference to the appeal and what was decided. Without specific reference to the Clines' appeal, Mr. Lightsey testified that, if a decision was made on anything other than a unanimous vote, he made a note of what the vote was, but he did not compile that information into minutes.

Eric Shipplett testified that he, too, was a member of the Board, serving as its chairman. He said that, prior to the Board's commencing its work, the members participated in an orientation meeting conducted by a person from the Commonwealth's tax office.[6] Mr. Shipplett

[5] The only evidence of official action that the Board took on the matter was the entry of orders dated November 24, 2009, and December 1, 2009. See PEx C and PEx D, respectively. (It appears that PEx D corrects PEx C.)

[6] Mr. Lightsey identified the individual as Brian Bergen.

said that he knew that the meetings were to be open ones, but he said that the information at the orientation meeting did not address the specific format of the meetings or the nature of the required minutes in any detail (except that the Board was discouraged from recording the proceedings).

Mr. Shipplett agreed that, once the sign was posted, no member of the public who was not involved in the case under consideration ever came to the Caucus Room to state that he or she wanted to observe the proceedings.

With respect to the Clines' hearing, Mr. Shipplett testified that Mr. Cline arrived and asked questions, that Mr. Shipplett told him why the Board believed that the Clines' initial assessment was incorrect, that Mr. Cline did not offer evidence as to why the increase in the assessment would be incorrect, and that he did not request to listen to the Board's deliberations. Mr. Shipplett testified that the Board did not take its vote on the matter until after Mr. Cline had left the caucus room.

Thomas Cline testified that on November 11, 2009, he received the letter (dated November 9) by which the Board notified him that it was "necessary to increase [his] assessment" and informed him that he "had an opportunity to show cause against this increase." Mr. Cline confirmed that the hearing on his appeal of the Board's action occurred on November 18, and he agreed with Mr. Lightsey's general description of the Caucus Room and the entrance to it. As directed by the sign, Mr. Cline waited until those citizens whose cases were scheduled before his had left, and then someone came to usher him into the Caucus Room. After he had presented his case (although his real purpose in going to the meeting was to determine why the Board had increased his assessment), Mr. Shipplett told him that the Board would make a decision and notify him "within a couple of weeks." Although Mr. Cline received "unofficial notice" of the decision the following day, he did not receive the official notice until November 24.

Subsequent to the hearing on November 18, Mr. Cline made at least two efforts to obtain the record of his hearing. He said that he was allowed to examine all of the records which the Board (or the Commissioner of the Revenue) had, and he did find a "work sheet" for November 18, but he did not find any document that appeared to be minutes of that meeting.

Neither party introduced documentary evidence that would satisfy the requirements of either Code §2.2-3707.I or Code 58.1-3384. Neither PExC or PExD reflects (i) the date, time, and location of the meeting; (ii) the members of the Board recorded as present and absent; or (iii) a summary of the discussion of matters proposed, deliberated or decided, or a record of any votes taken. Nor does either exhibit reflect that it is a form prepared by the Tax Commissioner and provided to the County by the Department of Taxation or, if it is a form prepared by the Board, that it contains all the information required on the forms prepared by the Tax Commissioner.

Analysis:

The initial inquiry is whether the meeting at which the Board acted on the Clines' appeal was an open meeting, conducted in conformity with the requirements of the Act, and the Court concludes that it was not.

Code §2.2-3701 defines an open meeting as "a meeting at which the public may be present." Conversely, a closed meeting is "a meeting from which the public is excluded." Unfortunately, strictly read, the definitions leave a gap between a meeting at which the public "may" (a precatory or permissive verb) be present and a meeting at which the public is "excluded." One may argue that, so long as the public is not excluded, the meeting is not a closed one, but that does not answer the question of what constitutes an open one. Is it one which the public can come and go at will, or is it one that is in a controlled environment from which the public may not be barred but are permitted to enter on request? While the defined terms are not dispositive of whether the Board's conduct of the hearing on the Clines' appeal was at an open meeting, any definitional ambiguity must be considered in light of the stated purpose of the Act as articulated in Code §2.2-3700 (with emphasis added):

> By enacting this chapter, the General Assembly ensures the people of the Commonwealth *ready access* to public records in the custody of a public body or its officers and employees, and *free entry* to meetings of public bodies wherein the business of the people is being conducted.
>
> * * *
>
> The provisions of this chapter shall be *liberally construed to promote an increased awareness* by all persons of governmental activities and *afford every opportunity* to citizens to witness the operations of government.

Considering the definition of an open meeting with those policies in mind, it is clear that the intent of the statute is to ensure that the public is to have ready access for free entry to the meetings without any discouragement by the public body of any kind. Even if the waiting participants were not deterred by a sign which said "Please wait here until your case is called," that language would certainly have the chilling effect on those citizens who were fully entitled to observe the hearings but had no case to be called.

The size of the Caucus Room, its location, the method of entry, and the method in which the Board conducted the business of hearing the Clines' appeal are all factors that the Court must consider in assessing whether the meeting was an open one. Taking all of that into consideration, it is clear that the Board's hearing involving the Clines was not an open meeting as contemplated by the Act (or that the Board went into closed session when it made its decision regarding the Clines' appeal), and the Board has not borne its burden of proving that it is exempt pursuant to Code §2.2-3713.E. Even if the conduct of the meeting could be construed as being an open one, the Board did not take its vote at that meeting but waited until after the Clines had left, without reconvening and without reasonably identifying the substance of the vote in the open meeting. As I have noted above, Code §2.2-3711 unequivocally provides that "[n]o . . . motion adopted, passed or agreed to in a closed meeting shall become effective unless the public body, following the meeting, reconvenes in open meeting and takes a vote of the membership on such . . . motion that shall have its substance reasonably identified in the open meeting." Accordingly, the action taken by the Board regarding the Clines on November 18 was not an effective act by that public body.

To anticipate a question as to the result of the Court's finding that the Board's action of November 18 was ineffective, I note that the action to which I refer was the increase in the assessment of the Clines' property. To be sure, there was some suggestion at the hearing that the Board actually increased the Clines' assessment earlier than the hearing, and that assertion is

corroborated by language contained in its letter to the Clines of November 9. (See PEx B.) In that letter, the Board stated that it found "it necessary to increase [the Clines'] assessment," and it informed the Clines that they could "appeal [the] new assessment." However, whatever the language, the fact of the matter is that the Board did not have the authority to amend the Clines' assessment except within the limits of Code §58.1-3381 which provides, in part:

> No assessment shall be increased until after the owner of the property has been notified and given an opportunity to show cause against such increase, unless such owner has already been heard.

Accordingly, any attempt by the Board to increase the Clines' assessment prior to November 18 would have been void as an *ultra vires* act. In fact, there is no evidence (other than the use of loose language in the letter of November 9) that that was the Board's intention. On the contrary, it was not until after the hearing that the Board attempted to enter the order effecting the increase. It is the Board's formal actions, specifically its decision to increase the assessment after the hearing and the subsequent entry of the orders of November 24, 2009, and December 1, 2009 (the Orders) that the Court finds to be ineffective.

The Clines have asked that the Court "issue a writ of mandamus pursuant to §2.2-3713 which (a) directs the County of Augusta" to adjust the Clines' assessment to the amount fixed prior to the Board's void orders, (b) to order that the County refund to the Clines "the excess taxes paid to the County," and (c) to order that the County pay the Clines' attorney's fees.

With regard to the writ of mandamus, the Clines ask that the Court direct the Commissioner to certify an error and that the County direct the Treasurer to make a refund. Regarding the former, it appears that the writ would be ineffective if directed generally to the County literally to make the changes in the land book. Code §58.1-3385 provides, in part, as follows:

> The commissioner of the revenue shall make on his land book the changes so ordered by the board and, if such changes affect the land book for the then current year and such land book has been then completed, the commissioner of the revenue may for that year make a supplemental assessment in case of an increase in valuation.

Given that the Commissioner was statutorily obliged to make the change ordered by the Board, it would be the Commissioner's responsibility to make the correction to adjust the land book to reflect the assessment as it was prior to the change made pursuant to the Board's Orders. However, the Commissioner, a Constitutional officer, is not a party to this action. To be sure, the Court has determined that the Board's action in issuing its Orders was ineffective, and it may be that an independent action against the Commissioner would be appropriate (though I hope unnecessary) because it would appear to be a ministerial act to correct a change made pursuant to Code §55.1-3385 if (as here) the initial change was based on a void order from the Board. Moreover, the Commissioner has clear authority, pursuant to Code §58.1-3981.A., to correct an erroneous assessment.

Having noticed the mechanical ambiguity (*i.e.*, how actually to make the change on the land books), I further note that it is clear that the Court, pursuant to Code §58.1-3897,[7] has the power to order a correction of an erroneous assessment and a refund of any payment made pursuant to an erroneous assessment.[8] That section provides, in part:

> If the court is satisfied from the evidence that the assessment is erroneous . . . the court may order that the assessment be corrected and that the applicant be exonerated from the payment of so much as is erroneously charged, if not already paid. If the tax has been paid, the court shall order that it be refunded to the taxpayer, with interest at the rate provided by 58.1-3918 or in the ordinance authorized by 58.1-3916, or as otherwise authorized in that section.
>
> If, in the opinion of the court, any property is valued for taxation at more than fair market value, the court may reduce the assessment to what in its opinion based on the evidence is the fair market value of the property involved. If, in the opinion of the court, the assessment be less than fair market value, the court shall order it increased to what in its opinion is the fair market value of the property involved and shall order that the applicant pay the proper taxes.
>
> For the purpose of reducing or increasing the assessment and adjusting the taxes the court shall have all the powers and duties of the authority which made the assessment complained of, as of the time when such assessment was made, and all powers and duties conferred by law upon such authority between the time such assessment was made and the time such application is heard.

For the reasons described in this letter, the Court will enter an order directing that the County effect the adjustment of the assessment of the Clines' property (in whatever fashion the County elects to do so, so long as it is in accord with the relevant statutes), to $942,100.00, the level prior to the Commissioner's change pursuant to the Orders. I note that this mandate is not pursuant to the second paragraph of Code §58.1-3897 because the Court has not found, "based on the evidence [that that amount] is the fair market value of the property involved;" rather, the conclusion is based on the fact that the unadjusted assessment is the only valid assessment. There has been no evidence to indicate that the unadjusted assessment is incorrect, and the case law makes it clear that it is presumptively correct. *See, e.g., Bd. of Supervisors v. Donatelli & Klein, Inc.,* 228 Va. 620, 627 (1985)

---

[7] I understand that this statute is in Title 58.1, but the language is not limited to correcting an erroneous assessment determined only through the proceedings in that Title. In this case, the error is not one found by the Court pursuant to an appeal through the mechanisms of Title 58.1 but under the provisions of the Act. Nevertheless, the assessment (as amended by the Orders) is no less erroneous.

[8] *See Arlington County Board, et al. v. Albert Ginsberg,* 228 Va. 663 (1985).

With respect to the refund, Court will enter an order requiring that the County, pursuant to Code §58.1-3987.A, direct the Treasurer to refund to the Clines any overpayment of taxes, with interest.

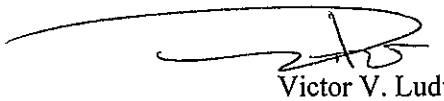
With regard to the Clines' attorney's fees, Code 2.2-2713.D. provides, in part:

> If the court finds the denial to be in violation of the provisions of this chapter, the petitioner shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorneys' fees from the public body if the petitioner substantially prevails on the merits of the case, unless special circumstances would make an award unjust.

That is an issue which the Court reserves.

Based on the conclusions of this letter, I do not believe that it is necessary to address the other matters raised at the hearing or on brief, and I ask that Mr. Strosnider prepare an order consistent with this letter opinion.

Very truly yours,



Victor V. Ludwig
Judge

VVL/me