



Virginia Local Government Law

Can You Sue a Board of Equalization in Virginia?

By: Andrew McRoberts. *This was posted Monday, April 26th, 2010*

J&D Partnership v. Board of Equalization
Loudoun County Circuit Court, Civil Action No. 58503

In 2008, as the real estate market stagnated, the Loudoun County Board of Equalization (BOE) received a huge spike in assessment appeals, far more than in the past. This was especially true with appeals of assessments for commercial properties, which are typically much more complex than residential ones. On many occasions, some thinly-supported appeals had been withdrawn after a large amount of staff and BOE time had been spent in analysis.

Fearing even more appeals in 2009, the BOE adopted new rules and procedures for applicants for commercial properties which among other things, required the applicants to disclose what they thought fair market value to be, address the three recognized appraisal methods and provide any comparable sales relied upon.

A number of commercial landowners reportedly failed to comply with these requirements by the deadline for applications to be filed in June. In September, these landowners each received a letter from the BOE, which told them that their BOE appeal would proceed no further, and their next step would be to file a lawsuit in the circuit court. Some of these landowners and their counsel objected to the BOE's action, for many reasons. Most significantly, they objected to the authority of the BOE to adopt such rules and refuse them a hearing if not followed.

After unsuccessfully objecting directly to the BOE, nine of these commercial property owners, represented by John H. Foote, Esquire of Walsh Colucci Lubeley Emrich & Walsh and Ilene Baxt Boorman, Esquire of Wilkes Artis, filed a declaratory judgment action in Loudoun County Circuit Court. There were four counts in the complaint, alleging the action of the BOE in adopting these rules and denying a hearing to the plaintiffs was ultra vires (given the Dillon Rule), arbitrary and capricious, and violated the plaintiffs' constitutional due process and equal protection rights.

The prayer for relief requested a declaration that (i) the BOE acted beyond its authority in dismissing the cases without a hearing and therefore deprived the plaintiffs of their due process and equal protection rights, (ii) the

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BOE must provide the plaintiffs a hearing, and (iii) the BOE cannot establish the form of evidence the taxpayers must present.

Sands Anderson and myself were hired to defend the case. In response to the complaint, I filed three demurrers on behalf of the BOE.

The first demurrer turned the plaintiffs' Dillon Rule argument around on them and asserted that the BOE is not sui juris and therefore cannot sue and be sued. This demurrer cited the BZA of Fairfax County v. Board of Supervisors of Fairfax County, 276 Va. 550, 666 S.E.2d 315 (2008) arguing that just as the BZA in that case had no authority to sue the Board of Supervisors "or anyone else," a BOE was just as limited in its ability to be sued by anyone. It also asserted that there simply is no statutorily-prescribed mode of proceeding to sue the BZA, a quasi-judicial arm of the state.

The second demurrer asserted that a declaratory judgment would be inappropriate because an adequate remedy at law existed, i.e. an appeal of the BOE's action to the circuit court as suggested in the Chairman's letter. The Declaratory Judgment Act supplements normal legal processes and where such processes are adequate, they should be followed.

The third demurrer asserted that a declaratory judgment would be inappropriate because it sought to correct past behavior as opposed to guide future conduct. The Declaratory Judgment Act is not appropriate to litigate over past events, but is intended to prevent litigation by allowing clarification of rights and procedures before damage is done. In this case, the BOE had taken final action for tax year 2009.

On January 13, 2010, visiting Judge Herman A. Whisenant, Jr. heard oral argument and agreed with all three demurrers. In addition, Judge Whisenant ruled sua sponte that by receiving the applications for relief from the plaintiffs and issuing the letter in response, the BOE had provided the plaintiffs any hearing required by the statute and issued the equivalent of an order. The Court dismissed the case with prejudice. The final order was entered on March 1, 2010, and was not appealed.

I would be pleased to share the final order (with a transcript of the court's ruling attached), and discuss the case with any interested local government attorney. Please contact me directly.

What do you think about this result? Should a Board of Equalization or a Board of Zoning Appeals be treated like a court? Courts, after all, do not get sued, but their decisions get appealed. Or, should a BOE or BZA be treated like other local government bodies can sue and be sued?

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