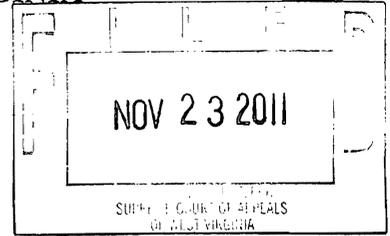


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1398



**POPE PROPERTIES/CHARLESTON
LIMITED LIABILITY COMPANY,**

Petitioner,

v.

THE HONORABLE PHYLLIS GATSON
in her capacity as Kanawha County Assessor,

Respondent.

BRIEF OF APPELLANT

Lower Court: Kanawha County Circuit Court
(Civil Action No. 11-AA-42)

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I. ASSIGNMENTS OF ERROR

- A. The Circuit Court of Kanawha County erred in affirming Respondent's incorrect legal conclusion that Pope Properties' 79 income-producing commercial parcels of real property are non-commercial parcels solely because they exist in the condominium form of ownership under W. Va. Code § 36A-7-1.
- B. The Circuit Court of Kanawha County erred in affirming Respondent's refusal to consider Pope Properties' income data under the Income Approach in Respondent's 2011 assessments of Pope Properties' 79 income-producing commercial parcels of real property solely because the parcels exist under W. Va. Code § 36A-7-1 in the condominium form of ownership.
- C. The Circuit Court of Kanawha County erred in affirming Respondent's exclusive reliance on sales data of three sales of two owner-occupied parcels in Respondent's 2011 assessments of Pope Properties' 79 income-producing commercial parcels of real property because the data is incomparable and, thus, incompetent.

II. STATEMENT OF THE CASE

A. Procedural History

On February 22, 2011, Pope Properties/Charleston Limited Liability Company ("Pope Properties" or "Petitioner") came before the Kanawha County Commission, sitting as the Board of Review and Equalization ("Board"), to challenge the Kanawha County Assessor's ("Assessor" or "Respondent") assessments of the 79 Parcels using the Market Approach after refusing to consider and much less use the Income Approach. *See generally*, Hearing Transcript at *Appendix* 000023-000221. The Board, though wrongly, determined that the Assessor did not abuse her discretion in selecting the Market Approach. *See Order of Board*, ¶7 at *Appendix* 000296.

Pope Properties appealed the Board's decision to the Circuit Court of Kanawha County, West Virginia. On August 18, 2011, after a hearing lasting only a few moments, the Circuit Court denied Pope Properties' Petition for Appeal and affirmed the Board's Order. *See Final*

Order Denying Petition for Appeal entered on September 19, 2011 at Appendix 000001-000007. Pope Properties appeals from the Order.

B. Statement of Facts

Pope Properties is the owner of 79 income-producing condominium apartments in the Country Club Village Apartments complex in South Charleston, West Virginia (hereinafter “Parcels”). *Appendix* at 000042. The Assessor is the assessing officer of Kanawha County. Country Club Village Apartments comprise apartment buildings built in 1979. *Id.* In the late 1970s, Country Club Village Apartments were converted from the fee form of ownership to the condominium form of ownership under the Unit Property Act (*W. Va. Code* §§ 36A-1-1 *et seq.*). Of the 102 units, Pope Properties purchased 79 of them, and since 1991 has operated them solely as income-producing rental properties. *Appendix* at 000076. Sixteen of the 79 parcels are one-bedroom apartments; 63 are two bedroom units. *Id.* The Parcels have never been owner-occupied since Pope Properties acquired them. *Id.* Pope Properties has never held out the Parcels for sale. *Id.* at 21. Since 1991, the Parcels have been assessed as Class III parcels. They are, for all purposes, commercial parcels of real property. *Appendix* at 000163. Yet, the Assessor refuses to treat the Parcels as commercial parcels. *Appendix* at 000138.

Of the three methods or approaches¹ to ascertain the value of real property for assessment purposes, the Assessor appraised the Parcels using only the Market Approach while refusing even to consider the Cost Approach and, more important, the Income Approach despite that West Virginia law requires the use of the Income Approach as the primary method to appraise commercial parcels. The Assessor incorrectly believes that West Virginia law

¹ They are the Cost Approach, the Market Approach (also the Market Data or Sales Comparison Approach) and the Income Approach.

mandates that she use only the Market Approach to appraise commercial parcels as owner-occupied residential parcels when they are owned in the condominium form of ownership. *See* discussion, *infra*.

For the 2011 tax year, and using only the Market Approach, the Assessor appraised each of Pope Properties' 16 one-bedroom apartments to be \$63,700 and each of its 63 two-bedroom apartments to be \$70,000. *Appendix* at 000076. The Assessor fixed the 2011 assessments of the Parcels by taking 60 percent of their alleged fair market values. *Id.*

<i>Type of unit</i>	<i>2011 Market Value</i>	<i>2011 Assessment</i>
16 one-bedroom units	\$63,700.00	\$38,220.00
63 two-bedroom units	\$70,000.00	\$42,000.00

Accordingly, in a single year, the 2011 assessments of the Parcels nearly doubled those for the 2010 *ad valorem* tax year.

On February 22, 2011, Pope Properties filed an Application for Review of the 2011 assessments of the 79 Parcels. The same day, Pope Properties appeared before the Board and contested the Assessor's conclusions about the fair market values and assessments of the Parcels. *See generally, Hearing Transcript* at *Appendix* 000023-000221.

During the hearing, Pope Properties called an expert appraiser, Stephen A. Holmes, a certified general real property appraiser licensed in the state of West Virginia. *Appendix* at 000056. Mr. Holmes has owned the Upshur Agency in Buckhannon, West Virginia, since 1971 and each year his practice completes between 400 and 700 appraisals. *Appendix* at 000056-57. Mr. Holmes has testified hundreds of times, including appearances before the boards of equalization and review for Braxton, Upshur and Randolph Counties. *Appendix* at 000056. He has never been disqualified by a tribunal. *Id.* At the hearing, the Board agreed through counsel

that Mr. Holmes is qualified as an appraiser. *Appendix* at 000057. Commissioner Kent Carper stated that the witness was “more than qualified.”² *Appendix* at 000062.

Mr. Holmes testified that the 79 Parcels are all Class III parcels.³ *Appendix* at 000062. Mr. Holmes appraised the 79 Parcels at \$42,000 for each of the 16 one-bedroom apartments and \$49,000 for each of the 63 two-bedroom apartments. *Appendix* at 000064. In reaching these fair market values, Mr. Holmes considered all three of the statutory approaches to appraising real property in West Virginia: (1) the Income Approach; (2) the Market Approach; and (3) the Cost Approach. *Appendix* at 000065.

The Cost Approach attempts to calculate the replacement cost of a structure less its depreciation plus land value. *See Standard on Mass Appraisal of Real Property* attached as Exhibit 5 to the Hearing Transcript at *Appendix 000260-000281*. Mr. Holmes rejected the Cost Approach because the apartment buildings were too old for this approach to be relevant or meaningful. *Appendix* at 000098.

² The Board of Equalization and Review and its counsel acknowledged Mr. Holmes as a highly qualified expert in the field of commercial real property appraisal in West Virginia.

³ *West Virginia Code* § 11-8-5, *Classification of property for levy purposes*, provides:

For the purpose of levies, property shall be classified as follows:

Class I. All tangible personal property employed exclusively in agriculture, including horticulture and grazing; all products of agriculture (including livestock) while owned by the producer; all notes, bonds, bills and accounts receivable, stocks and any other intangible personal property.

Class II. All property owned, used and occupied by the owner exclusively for residential purposes; all farms, including land used for horticulture and grazing, occupied and cultivated by their owners or bona fide tenants.

Class III. All real and personal property situated outside of municipalities, exclusive of Classes I and II.

Class IV. All real and personal property situated inside of municipalities, exclusive of Classes I and II.

The Market Approach estimates market value based on comparisons of sales of comparable parcels. *Appendix* at 000278. The Market Approach is the only approach that the Assessor claims to use to appraise the Parcels and, allegedly, the only approach that the Assessor employs to appraise condominium parcels in Kanawha County. *Appendix* at 000134.

Joseph M. Pope, a principal of Pope Properties, testified that Pope Properties' commercial lender finances the Parcels only in the aggregate and solely on their consolidated profit-and-loss statement, that is, by using the Income Approach. *Appendix* at 000099; *also see Mr. Holmes's testimony in the Hearing Transcript in Appendix* at 000077. Similarly, Mr. Holmes testified that he individually appraised each of the 79 Parcels based on its gross rents and the ratable operating costs allocated to it. *Appendix* at 000068, 000074-75, 000082-83.

Mr. Holmes testified that, although he considered the Market Approach, he could not place significant reliance on its use because there exist only three published sales of only two parcels during the prior three years, all of them of owner-occupied Class II parcels that Pope Properties neither owned nor controlled.⁴ *Appendix* at 000098. Mr. Holmes testified that it was incorrect as a matter of appraising standards for the Assessor to have used the sales of Class II parcels as comparable sales in appraising Class III commercial parcels because Class II parcels by definition under state law are owner-occupied properties. *Appendix* at 000105. Mr. Holmes testified that not only were the Class II parcels incomparable to the Parcels for the Market Approach to be employed, but, further, that the universe of three sales of two parcels was too small even if they had been comparable. *Id.*

⁴ The Assessor admitted that all three sales of these allegedly comparable sales were of Class II parcels. *See* Hearing Transcript at 114. Class III has a tax rate that is double the tax rate for Class II properties. *Id.*

Systematically (as opposed to automatically) eliminating both the Cost and Market Approaches, Mr. Holmes testified that of the three approaches, by far the most accurate method for appraising the 79 Parcels is the Income Approach. *Appendix* at 000065. The Income Approach, he said, establishes the fair market value based on the present worth of future benefits to be derived through income production (such as rent from a parcel) over the remainder of its economic life. *See Standard on Mass Appraisal of Real Property* in Exhibit 5 to the Hearing Transcript in *Appendix* at 000275. Mr. Holmes testified it was reasonable to consider the 79 apartments as solely income-producing because Pope Properties had operated them exclusively as such for almost 21 years. *Appendix* at 000098.

Mr. Holmes arrived at the appraised values using the Income Approach by preparing “an individual income statement based on the income produced by those 79 units” using information from Pope Properties. *Appendix* at 000085. The figures he relied on are set forth in a *General Property Income Analysis* attached to *Appendix* at 000230-000245. Mr. Holmes’s analysis included the creation of a first-year expense report and operating statements for both the one- and two-bedroom apartments, including a calculation of the gross income and the application of a reasonable vacancy rate, resulting in a calculation of the “gross effective income”. *Id.* at 92. Mr. Holmes then subtracted the ratable share of expenses from that to ascertain the “net operating income.” *Id.* He then applied a “capitalization rate” of nine percent that was developed using various factors. *Id.* Based on these data, Mr. Holmes fixed the fair market value of each of the one-bedroom apartments at \$42,000 and each of the two-bedroom apartments at \$49,000. *Appendix* at 000065.

Notably, the Assessor neither questioned nor cross-examined in any way Mr. Holmes’s methods, assumptions or data that he used in the Income Approach. After receiving the exhibits

and hearing how Mr. Holmes prepared the values of the Parcels, Mr. Carper stated: “I think your math is right. I understand your opinion.” *Appendix* at 000087.

At the hearing, Pope Properties also offered Mr. Pope’s testimony and Chief Deputy Assessor Steve Duffield’s, which proved that the Parcels are neither assessed nor taxed equally with other similar income-producing, commercial Class III apartments in Kanawha County. For instance, it was undisputed at the February 22, 2011, hearing that there are apartments *in the same apartment complex* as the Parcels that the Assessor appraises using the Income Approach rather than the Market Approach because they are not condominiums. *Appendix* at 000045. Even though these very similar apartments are newer than the 79 apartments on the Parcels, the Assessor appraised them at significantly less value than those for the 79 apartments in issue. *Id.*

Further, a Pope Properties’ affiliate owns an apartment complex called the Presidio in Cross Lanes, which the Assessor assesses using exclusively the Income Approach. *Appendix* at 000044. The Assessor admitted at the hearing that a competing complex, Roxalana Hills Apartments in Dunbar, is also assessed using the Income Approach rather than the Market Approach. *Appendix* at 000153.

The Assessor’s only explanation for the discrimination was that Roxalana Hills is “an apartment not a condominium.” *Id.* Similarly, during the hearing the Assessor’s counsel, Stephen Sluss, argued: “I think he’s comparing condos with apartments. And those are different.” *Appendix* at 000047. Likewise, Mr. Carper concluded during the hearing that apartments are a “completely different legal creature” to which the Assessor’s counsel responded: “Absolutely.” *Appendix* at 000154.

The Assessor values the Parcels different than other similar Class III apartment properties in Kanawha County simply and solely because they are condominiums based on the flawed premise that condominiums cannot also be apartments as a matter of law. *Appendix* at 000153.

Mr. Duffield testified that in Kanawha County all condominiums units are appraised, without exception, using the Market Approach and without consideration to the Income Approach or Cost Approach. *Appendix* at 000079.⁵

In the case of income-producing condominiums, this practice also is directly contrary to the Mass Appraisal standards upon which the Assessor claims she relies. Standard 4.4 states that “[i]n general, for income-producing properties, the income approach is the preferred valuation approach.” *See Standard on Mass Appraisal of Real Property* attached as Exhibit 5 to the Hearing Transcript in *Appendix* at 000268. The same standards also dictate that the Income Approach is the most appropriate method for valuing commercial property. *Appendix* at 000269.

In addition, the Assessor used only the Market Approach in this case even though the Assessor all but acknowledged at the hearing that there was insufficient evidence of comparable sales in relation to the Parcels. Board member David Hardy asked:

Q: Mr. Duffield, do you think the three comparables is a fair universe to reach a conclusion that you reached?

A: It’s all I had available at the time.

Appendix at 000095. Further, the Assessor used three comparable sales pertaining to only two parcels (which Pope Properties never owned) that are both owner-occupied Class II properties.

⁵ This is unlawful insofar as the condominiums are commercial parcels because West Virginia law requires the Assessor to also consider the Income Approach. *See* discussion, *infra*.

None of the comparables were for non-owner-occupied Class III properties. *Appendix* at 000095, 000098.

Pope Properties' counsel, James C. Stebbins, asked Mr. Duffield whether the Parcels are commercial. "No," Mr. Duffield said, and, when asked why, he replied: "Because, again, they're individually owned units." Then, Mr. Stebbins: "Are these not apartment buildings?" Mr. Duffield: "No, sir. They're condominiums." *Appendix* at 000137-38.

Mr. Duffield testified that the Parcels are not commercial properties even though he acknowledged that Pope Properties owned and operated them for its business; the 79 apartments have never been owner-occupied since Pope Properties bought them; and the apartments have always been held out to the public as income-producing rental apartments. *Appendix* at 000043.

At the February 22, 2011, hearing, the Board denied the Pope Properties' challenge to revise values of the Parcels. *Appendix* at 000217-18. The Circuit Court of Kanawha County affirmed the decision of the Board. From that decision Petitioner now appeals.

III. SUMMARY OF ARGUMENT

Pope Properties hereby appeals the decision of the Honorable Duke Bloom, Judge of the Circuit Court of Kanawha County, West Virginia, affirming the decision of the Board affirming the Assessor's assessments of the 79 Parcels for the 2011 tax year. The outcome of this case of first impression will affect the assessment and *ad valorem* taxation of thousands of condominium parcels in West Virginia.

The Circuit Court erred in affirming Respondent's incorrect legal conclusion that Pope Properties' 79 income-producing commercial parcels of real property are non-commercial parcels solely because they exist in the condominium form of ownership under *W. Va. Code* § 36A-7-1.

The 79 Parcels are commercial properties. Under *W. Va. Code* §§ 36A-7-1 and 36B-1-105 a condominium unit must be treated like any other parcel of real property for assessment purposes. Accordingly, treating the 79 Parcels as commercial is fundamental to the fair and equal assessment and taxation of them. *West Virginia C.S.R.* § 110-1P-2 specifically provides that each and every one of the above factors “should be considered in the appraisal of a specific parcel.” Neither the West Virginia Code nor the Code of State Regulations draws any distinction whatsoever between a condominium parcel and a fee parcel for assessment and taxation purposes. Yet, the Assessor has created a distinction for this purpose and unfairly discriminated against Petitioner based on it: the Assessor refused to employ the Income Approach in ascertaining the fair market values of the 79 Parcels only because they are held in the condominium form of ownership.

The Circuit Court also erred in affirming Respondent’s refusal to consider Pope Properties’ income data under the Income Approach in Respondent’s 2011 assessments of Pope Properties’ 79 income-producing commercial parcels of real property solely because the parcels exist under *W. Va. Code* § 36A-7-1 in the condominium form of ownership.

The Circuit Court found that the Assessor considered the other approaches and factors before ultimately determining that the Market Approach was the appropriate method to value the 79 condominiums. This is not true. The transcript of the hearing before the Board provides absolutely no evidence that the Assessor considered any of the factors required by the *W. Va. C.S.R.* The Assessor’s admitted practice of blindly applying a blanket rule to all condominium units in Kanawha County regardless of the information available to her was grossly improper and a dereliction of duty. Applying such a blanket rule was directly contrary to *W. Va. C.S.R.* § 110-1P-2.

Lastly, the Circuit Court erred in affirming Respondent's exclusive reliance on sales data of three sales of two owner-occupied parcels in Respondent's 2011 assessments of Pope Properties' 79 income-producing commercial parcels of real property because the data is incomparable and, thus, incompetent.

Using three sales of two Class II owner-occupied parcels as "comparables" was not the most accurate form of appraisal. The data used were incomparable and, therefore, incompetent to be employed as comparables for the appraisals of the Parcels as a matter of law. The Assessor simply disregarded competent income evidence that should have been used to appraise income-producing properties in favor of incompetent evidence and blind application of a rule that all condominiums must be appraised using the Market Approach regardless of the value of the "comparable" information that may be available.

In the case below, Pope Properties presented facts and data about the 79 Parcels, particularly under the Income Approach, that the Assessor did not contest; yet the Circuit Court ignored them. Pope Properties demonstrated that the Assessor's 2011 assessments of the 79 Parcels are not supported by substantial evidence; yet the Circuit Court endorsed them without explanation. Pope Properties showed that the Assessor applied egregiously incorrect interpretations of the law to this case; yet the Circuit Court did not explain its affirmation of them. For both factual and legal reasons, the assessments of the 79 Parcels are plainly wrong. Pope Properties has amply met its legal burden to entitle it to the relief it now requests.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pope Properties requests oral argument under Rules 19 and 20 of the *Revised Rules of Appellate Procedure* because this case involves a matter of first impression and because Appellant believes that the decisional process would be significantly aided by oral argument.

V. ARGUMENT

Standard of Review

Although an assessor is afforded some discretion, it is nonetheless mandatory with respect to every assessment that the assessor “choose and apply the most accurate method of appraising commercial properties.” *Stone Brooke Limited Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009) (citing *American Bituminous Power Partners*, 208 W.Va. 250, 539 S.E.2d 757 (2000)). “Title 110, Series 1P of the *West Virginia Code of State Rules* confers upon the State Tax Commissioner⁶ discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.” Syllabus Point 5, *In re Tax Assessment against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000).

Further, “the burden of proof is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous.” Syl. Pt. 2, *Western Pocahontas Props., Ltd. v. County Comm’n of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993). However, an assessment must be reversed when it is “plainly wrong” or when it is not supported by “substantial evidence.” Syl. Pt. 1 *West Penn Power Co. v. Board of Review and Equalization of Brook County*, 112 W. Va. 442, 164 S.E.862 (1932).

“When a circuit court reviews an appraisal of commercial real property made for *ad valorem* taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer’s consideration of the required appraisal

⁶ In the instant case, the Assessor may be substituted for the Tax Commissioner.

factors set forth in *W. Va. C.S.R. § 110-1P-2.1.1 to 2.1.4.*” Syllabus Point 7, *Stone Brooke Limited Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009).

A. The Circuit Court of Kanawha County erred in affirming Respondent’s incorrect legal conclusion that Pope Properties’ 79 income-producing commercial parcels of real property are non-commercial parcels solely because they exist in the condominium form of ownership under W. Va. Code § 36A-7-1.

All error in this case is traced to the Assessor’s mistaken legal conclusion that Pope Properties’ 79 condominium units are not and cannot be “commercial” properties solely because they existing in the condominium form of ownership.⁷ The Assessor has stated her belief that all condominium parcels created under the Unit Property Act (*W.Va. Code § 36A-1-1 et seq.*) are non-commercial as a matter of law. In its Order, the Circuit Court wrongly affirmed the Assessor’s incorrect legal conclusions when it found that “the condominiums are residential and not commercial.” *Appendix* at 000006.

Treating the 79 Parcels as commercial (as opposed to owner-occupied residential) is fundamental to the fair and equal assessment and taxation of them. Being commercial, the 79 Parcels are entitled to be appraised using the Income Approach. To the contrary — and this is where the Assessor errs again — the Assessor refuses to employ the Income Approach in ascertaining the fair market values of the 79 Parcels only because they are held in the condominium form of ownership.

The Code of State Regulations, in fact, requires the Assessor to specifically consider when assessing a commercial property its “location, size, shape, topography, accessibility, present use, highest and best use, easements, zoning, availability of utility, **income imputed to the land** and supply and demand for land of a particular type.” *W. Va. C.S.R. § 110-1P-2.1.1* to

⁷ The more common form of real property ownership is the fee form.

2.1.4. (*emphasis supplied*). These factors notably concern the use of a parcel, and not the form of ownership in which it is held. And, nowhere does the Code of State Regulations distinguish between the fee and condominium form of ownership for assessment and taxation purposes. Moreover, *W. Va. C.S.R. § 110-1P-2* specifically provides that each and every one of the above factors “should be considered in the appraisal of **a specific parcel.**” *Id. (emphasis supplied)*. This Court holds that “[w]hen a circuit court reviews an appraisal of commercial real property made for *ad valorem* taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer’s consideration of the required appraisal factors set forth in *W. Va. C.S.R. § 110-1P-2.1.1 to 2.1.4.*” Syllabus point 7, *Stone Brooke Limited Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009).

Yet, both the Assessor and the Circuit Court failed to make the requisite findings of law and conclusions of law, and, despite this Court’s directives, they have dodged their obligation by re-defining reality: They, simply enough, have concluded that the Parcels are not commercial and declared, thus, that “it was not mandatory for the Kanawha County Assessor to consider the above factors in this case because the condominiums are residential and not commercial or industrial.” *Appendix* at 000006. Offered by the Assessor, this is a fallacy so obvious and extreme that it is an embarrassment to Respondent’s credibility as an assessing authority.

The 79 Parcels are clearly commercial properties. If plain sense somehow leaves the issue open, then state law completely closes it. The Code of State Rules defines “commercial property” as “income producing real property used primarily but not exclusively for the sale of goods or services, including, but not limited to offices, warehouses, retail stores, **apartment buildings**, restaurants and motels.” *W. Va. C.S.R. § 110-1P-2.3.3 (emphasis supplied)*.

Helpfully, *Black's Law Dictionary* defines “commercial property” as “[i]ncome producing property (e.g., office buildings, apartments, etc.) as opposed to residential property.” *Black's Law Dictionary* (6th ed.) at 271.

It was undisputed below that all 79 Parcels have always been income-producing properties since Pope Properties purchased them in 1991. *Appendix* at 000076. The Parcels have never been anything to Pope Properties other than rental units in an apartment complex. It is obvious that the units located in the apartment buildings in the Country Club Village Apartments complex are “apartments” and thus meet the definition of commercial property because they are income-producing units in an apartment building. *Id.*

Yet, the Assessor is forced throughout these proceedings to take the false position ad absurdum that the 79 apartments at issue, in fact, are not apartments⁸. This is sleight of hand. During the hearing before the Board, the Assessor’s counsel, Stephen Sluss, argued: “I think he’s comparing condos with apartments. And those are different.” *Appendix* at 000047. Likewise, Commissioner Carper opined during the hearing that apartments are a “completely different legal creature” than condominiums, to which the Assessor’s counsel responded: “Absolutely.” *Appendix* at 000154. During the February 22, 2011, hearing before the Board hearing, Mr. Carper engaged in the following stupefying colloquy with Pope Properties’ counsel, Mr. Stebbins:

Commissioner Carper: “Why are you calling them apartments now all of a sudden? Why are you calling them apartments?”

Mr. Stebbins: “Because they are apartments.”

Commissioner Carper: “Okay.”

⁸ If the Parcels are not commercial, as Appellee insists, then Petitioner should be relieved of liability for other kinds of tax that state and local governments levy against it as a commercial enterprise.

Mr. Stebbins: “They’re not owner-occupied. If you really want to equalize this, make it like Roxalana Hills, which is what it is exactly like.”

Commissioner Carper: “Do you lose if they are not apartments under the law?”

Mr. Stebbins: “Do we lose if they are not apartments under the law?”

Commissioner Carper: “Yes.”

Mr. Stebbins: “No.”

Commissioner Carper: “They why are you calling them apartments for?”

Mr. Stebbins: “That’s what they are. What should I call them? Dolphins or something? I mean, you call them what they are.”

Appendix at 000179.

The Circuit Court echoed this profound illogic in its Order when it concluded as a “matter of law” that “[t]here is a legal distinction between a ‘condominium’ and an ‘apartment’”. *Appendix at 000056.* That is false. There is no legal distinction between a condominium and an apartment in the law of West Virginia or, so far as Petitioner’s has discovered, the law of any jurisdiction in the United States. By holding that “Pope Properties’ 79 units are condominiums and not apartments,” the Circuit Court creates a legal distinction (with a substantial negative consequence to Petitioner) that does not exist and, indeed, is contrary to law. *Id.*

Pope Properties’ buildings look like apartment buildings and they are apartment buildings under any definition of the building type. Pope Properties’ public signage calls the complex “Country Club Village Apartments”. As a matter of fact they are apartment buildings. There is no law in West Virginia declaring that a condominium cannot be an apartment. It

makes sense that there would be no such law because “condominium” is simply a form of ownership while “apartment” is merely a descriptive of the building’s physical structure and layout. The term “apartment” is integral to the definition of “condominium” in *Black’s Law Dictionary*:

[c]ondominium ownership is a merger of two estates in land into
1) the fee simple ownership of **an apartment** or unit in the
condominium project, and tenancy in common with other co-
owners in the common elements.

See Black’s Law Dictionary (6th ed.) at 295 (*emphasis supplied*). Further, *Black’s* defines “apartment house” as “a building containing multiple residential rental units.” *Id.* at 94. The 79 Parcels are in buildings with “multiple residential rental units.”

The Circuit Court concludes in its Order that “there is a legal distinction in West Virginia between the term ‘condominium’ and ‘apartment’” *Appendix* at 000005; however, the Circuit Court does not cite a single case, statute or regulation making this false distinction. Neither does Respondent. Perhaps they do not because just the opposite is true. In West Virginia law, the Unit Property Act itself specifically recognizes that condominium parcels can be commercial property. Chapter 36A of the *West Virginia Code, Condominiums and Unit Property*, defines “building” as:

[a]ny multi-unit building or buildings or complex thereof,
whether in vertical or horizontal arrangement, as well as other
improvements comprising a part of the property and used or
intended to be used for residential, **commercial** or industrial
purposes or for any other lawful purpose or for any combination
of such uses.

Id. (*emphasis supplied*). In *Gant v. Gant*, 329 S.E.2d 106 (W.Va. 1985), this Court specifically acknowledged, albeit in *obiter dicta*, that a “condominium” can be an “apartment” when it noted that one of two spouses in a divorce proceeding “has been the owner of a valuable

condominium apartment in Reno.” *Id.* at 110 (*emphasis supplied*). To see the error of the Assessor’s ways, and the Circuit Court’s conclusions, one need only contrast the authoritative language of this statute and the case law with the Assessor’s specious argument that condominiums are not “commercial property.” *Appendix* at 000138. What more is required to defeat the Assessor’s troublesome claim?

Yet, by refusing to concede, and despite all evidence, law or sense to the contrary, that the 79 Parcels are commercial or that condominiums can be apartments, the Assessor, in effect, has cut out of whole cloth a new class of real property for assessment and taxation purposes. The Assessor wrongly believes that the 79 Parcels, even though they are income-producing, commercial Class III properties, should be assessed as if they are owner-occupied Class II properties simply and solely because the Parcels exist in the condominium form of ownership. Her position is not based on West Virginia law; it is based, despite West Virginia law, on the categorically false belief that condominiums cannot be income-producing, commercial parcels. Moreover, Mr. Duffield testified that the Assessor assesses all condominiums in Kanawha County essentially as owner-occupied Class II parcels. Thus, the Assessor has chosen to assess the Parcels as if they were owner-occupied Class II parcels even though they are Class III parcels.

Neither *W. Va. Code* § 36A-7-1 nor the subsequent superseding provisions of *W. Va. Code* § 36B-1-105 support the Assessor’s position in this case. In fact, both sections support Pope Properties’. These two sections demonstrate that there is nothing about condominiums⁹ under West Virginia law that requires the Assessor to treat them differently than other kinds of

⁹ According to *Black’s Law Dictionary*, condominium ownership is a “merger of two estates in land, the fee simple ownership of an apartment or unit in a condominium project and tenancy in common with other co-owners and the common elements.” *Black’s Law Dictionary* (6th ed.) at 295.

real property for assessment purposes. To the contrary, under these provisions, a condominium unit must be treated just like any other parcel of real property for assessment and taxation purposes.

That the condominium form of ownership ought not be treated differently from the fee form of ownership is articulated in *W. Va. Code* § 36B-1-106:

Applicability of local ordinances, regulations, and building codes . . . In condominiums . . . no zoning, subdivision, or other real estate use law, ordinance or regulation, may prohibit the condominium...form of ownership or impose any requirement upon a condominium . . . which it would not impose upon a physically identical development under a different form of ownership.

Id. (emphasis supplied). In the instant case, the Assessor is doing exactly the opposite and has created a separate class of property for taxation purposes by imposing higher taxes on the 79 Parcels than she would “upon a physically identical development under a different form of ownership.” *Id.* *West Virginia Code* § 36A-7-1 mandates that a condominium unit and its undivided interest in the common elements be assessed and taxed “for all purposes as a separate parcel of real estate.” The Assessor and the Circuit Court have drawn a legal distinction between a fee parcel and a condominium parcel where it does exist. Closer to the point, West Virginia licensed appraisers themselves are obligation to treat a “parcel of real estate” and like terms without any expressed legal distinction between the condominium form of ownership and the fee form of ownership. *W. Va. Code* § 30-38-3(m).

The Assessor and the Circuit Court radically depart from decisions from other jurisdictions that align with Pope Properties’ case on closely similar facts. In *Supervisor of Assessments of Baltimore City v. Chase Associates*, 306 Md. 568, 510 A.2d 568 (1986), the taxpayer acquired a multi-story income-producing apartment building and then “filed a

condominium declaration establishing a condominium regime of 246 units on the property” with the plan of selling the units. 306 Md. 568, 571. The Baltimore assessing authority also argued that a “condominium conversion constituted a substantive change in the use of the property” for purposes of re-assessment under the Maryland statutes. 306 Md. 568, 573. The Maryland court of appeals reversed, stating:

A condominium regime is nothing more than a form of ownership of real property. 1 P. Rohan & M. Reskin, *Condominium Law and Practice* § 1.01[1] (1985); Payne, *Condominiums and the Ancient Estates in land: New Context for Old Learning*, 14 Real Est. L.J. 291 (1986) [citations omitted]. Thus, although the establishment of a condominium regime on property previously owned as a cooperative does constitute a change in **form of ownership, it does not, of itself, constitute a change in the use of the property.** Cf. *Bridge Park Co. v. Borough of Highland Park*, 113 N.J. Super. 219, 273 A.2d 397, 398-99 (App.Div.1971) (condominium held not to constitute a change in use for zoning purposes); *Graham Court Assoc. v. Town Council, etc.*, 53 N.C.App. 543, 281 S.E.2d 418, 420-23 (1981) (same); *Baker v. Town of Sullivan’s Island*, 279 S.C. 581, 310 S.E.2d 433, 435-36 (Ct.App. 1983) (same).

306 Md. 568, 578; also see *Thames Point Associates v. Sup’r of Assessments of Baltimore City*, 1987 Md. Tax LEXIS 2 (1987)(*emphasis supplied*).

Similarly, in *Fairway Development Co. v. Bannock County*, 113 Idaho 933, 750 P.2d 954 (1988), Fairway Development Co., owned and operated a 56-unit apartment complex, and then filed a declaration of condominium with the plan of selling the units while continuing to lease the unsold units. 113 Idaho 933, 935. At the time of assessment in issue, the taxpayer had sold only nine out of 56 units, or 16 percent of the total. Since the declaration was made, the Bannock County assessing authority appraised each condominium unit using the Market Approach and increased the appraised value of each of the rented condominium units an average of 337 percent. *Id.*

The Idaho supreme court¹⁰ chastised the assessing authority's failure to conform to that state's statutory mandate to employ a valuation analysis that gives "major consideration" to the parcels' "actual and functional use". *Id.* at 935. "[T]his case must be remanded for a determination as to whether the sole appraisal method employed [that is, the Market Approach] . . . resulted in an appropriate and fair assessment given the actual and functional use . . ." as leased, income-producing properties. *Id.* at 936. The Idaho court affirmed that it is the *use of the parcels*, not its form of ownership that is the principal trait for the selection of the proper valuation approach. In *Fairway Development*, the Idaho court, in admonishing the lower tribunal on remand, stated: "The [Market Approach], which was the only method used by the Bannock County Assessor in the instant case, simply may or may not return a proper valuation of the properties in this unique situation. Fairway has been unsuccessful in its attempts to market forty-seven of the fifty-six units as condominiums. Rather, those forty-seven units have been actually and functionally used for the past ten years as apartments. Certainly it cannot be said on this record that exclusive use of the market data approach based on sales of condominiums (when none have been sold for ten years) gives *major consideration* to the 'actual and functional' use." 113 Idaho at 958 (emphasis original).

In *In re Application of County Collector*, 136 Ill.App.3d 496, 483 N.E.2d 414 (Ill.App.1985), "the property owner sought to have all units in a complex subject to the Declaration of Condominium for assessment purposes, whether sold or not, because in Illinois" the assessments for condominiums were treated most favorably to the taxpayer. The Illinois court of appeals rejected the taxpayer's assertion that the filing of a declaration of condominium

¹⁰ The Idaho constitution, as West Virginia's, guarantees uniform and proportional taxation of real property. Sections 2 and 5, article VII, *Idaho Constitution*.

transformed the property from rental property to residential property for tax purposes, holding that the “underlying basis for taxation is not the form of ownership, but the use to which the owner puts his property. Here the use of the 12 unit condominium buildings is exactly the same as a 12 unit apartment building.”¹¹ 483 N.E.2d at 417; see also *Palatial Properties, Inc. v. County of Hennepin*, 265 N.W.2d 207 (1978).

That the Parcels are condominiums truly has nothing to do with that they are income-producing, commercial parcels. It is their use as income-producing parcels and not their form of ownership that makes the 79 Parcels commercial. That the Parcels are apartments has little bearing on the outcome; although to the extent it does, it only enhances Pope Properties’ case because *W. Va. C.S.R. § 110-1P-2.3.3* and *W. Va. Code § 36A-1-2(a)* say so. It is plain error of fact and law for the lower court to rule that the Parcels are not commercial in nature.

B. The Circuit Court of Kanawha County erred in affirming Respondent’s refusal to consider Pope Properties’ income data under the Income Approach in Respondent’s 2011 assessments of Pope Properties’ 79 income-producing commercial parcels of real property solely because the parcels exist under W. Va. Code § 36A-7-1 in the condominium form of ownership.

It is undisputed that it is mandatory with respect to every assessment that the Assessor “choose and apply the most accurate method of appraising commercial properties.” *Stone Brooke Limited Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009) (citing *American Bituminous Power Partners*, 208 W.Va. 250, 539 S.E.2d 757 (2000)). *W. Va. C.S.R. § 110-1P-2* provides:

[i]n determining an estimate of fair market value, the tax commissioner will consider **and use where applicable**, three generally accepted approaches to value: a) cost, b) income, and c) market data.

¹¹ Notably, the Illinois court’s decision was adverse to the taxpayer.

Id. at § 2.2.1 (*emphasis supplied*).

“When a circuit court reviews an appraisal of commercial real property made for *ad valorem* taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer’s consideration of the required appraisal factors set forth in *W. Va. C.S.R. § 110-1P-2.1.1 to 2.1.4.*” Syllabus Point 7, *Stone Brooke Limited Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009). These sections of the *Code of State Regulations* require the Assessor to specifically consider when assessing commercial properties the property’s “location, size, shape, topography, accessibility, present use, highest and best use, easements, zoning, availability of utility, **income imputed to the land** and supply and demand for land of a particular type.” *Id.* (*emphasis supplied*). *W. Va. C.S.R. § 110-1P-2* specifically provides that each and every one of the above factors “should be considered in the appraisal of **a specific parcel.**” *Id.* (*emphasis supplied*). Yet, the Circuit Court in its final order failed to make findings of fact and conclusions of law addressing the Assessor’s consideration of the required appraisal factors set forth in *W. Va. C.S.R. § 110-1P-2.1.1-2.1.4*. Thus, the Circuit Court has denied Pope Properties its right to an order explaining its decision.

To the contrary, in its Order, the Circuit Court makes the following patently false finding of fact: “Also, based upon the testimony below, the Kanawha County Assessor did consider the other approaches as well as the other factors contained in *W. Va. C.S.R. § 110-1P-2.1.1* before ultimately determining that the market data approach was the appropriate method to use to value the 79 condominiums.” *Appendix* at 000006. The transcript of the hearing before the Board provides absolutely no evidence that the Assessor considered any of the

factors. These are false and conclusory statements inserted in an order by Appellee's counsel who has no evidence to back them up.

That they are false is proved by the Assessor's own statements. The Assessor claims that she carefully considered the factors and the three statutory approaches for appraising real property. In contradiction, the Assessor states that she automatically uses only the Market Approach when the parcels are condominiums and categorically rejects the Cost and Income Approaches because, she believes, West Virginia law requires her to do so. She affirmed this in testimony about her appraisals of the 79 Parcels because, as she declared, the 79 Parcels are held in the condominium form of ownership. The Assessor, thus, could not have considered either the Cost Approach or Income Approach because she excluded them from her consideration at the outset. Indeed, she baldly refused to use Pope Properties' ample income data pertaining to the 79 Parcels because she was not, she claimed, allowed to.

The Assessor's admitted practice of blindly applying a blanket rule to all condominium units in Kanawha County regardless of the information available to her is grossly improper and a dereliction of duty. It is plainly wrong and an abuse of her discretion. Applying such a blanket rule is directly contrary to *W. Va. C.S.R. § 110-1P-2*, which requires her in all cases to give "important considerations affecting the value of land," including the parcel's "location, size, shape, topography, accessibility, present use, highest and best use, easements, zoning, availability of utility, **income imputed to the land** and supply and demand for land of a particular type." *Id. (emphasis supplied)*. Each and every one of the above factors "should be considered in the appraisal of **a specific parcel.**" *Id. (emphasis supplied)*. In the instant case, it is undisputed that Pope Properties repeatedly attempted to give to the Assessor information

regarding the income of its 79 Parcels but the Assessor refused to accept or consider them. *Appendix* at 000191.

Blind application of the Assessor's rule also violates case law enforcing *W. Va. C.S.R. § 110-1P-2*. This Court specifically holds that the Assessor is **not** permitted to have a "preference for any one particular method but only for the most accurate form of appraisal." *Stone Brooke Limited Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009). Yet, the Assessor clearly gives preference to the Market Approach when she values all condominium parcels using that approach regardless of the use of the parcels or available income data. West Virginia law requires the Assessor to consider all of the property characteristics described in *W. Va. C.S.R. § 110-1P-2* and all three appraisal approaches with respect to each assessment and does not allow her to create a blanket rule applicable to all condominium parcels. The only person who actually considered all required property characteristics and all three approaches for the 79 Parcels was Mr. Holmes who properly determined that by far the most accurate approach for valuing the 79 Parcels is the Income Approach.

The Assessor proudly states that hers is a blanket rule that she applies to **all** condominiums in Kanawha County **irrespective of their use**. Chief Deputy Assessor Duffield testified at the hearing that all condominium units in the County are assessed using the Market Approach no matter that their actual use is as commercial parcels.¹² *Appendix* at 000134. The Assessor claims in her Response Brief in the Circuit Court that all condominiums in Kanawha County are assessed using the Market Approach based on comparable sales in the area because

¹² That would mean that the Assessor disregards all income and cost data even for condominium office buildings in Kanawha County, a claim that no credible person could seriously believe.

of their “unique protections under law.”¹³ *Appendix* at 000348. To parry against Pope Properties’ own constitutional claims, the Assessor goes so far as to argue that it might raise her own constitutional concerns if she was to consider any other approach given that all other condominium units in Kanawha County are appraised using the Market Approach. *Appendix* at 000352.

Thus, for the Assessor to represent that she carefully considered all three approaches or any factors other than market data is false and insulting to the record in this case. By her own admission she did not and by her own admission she has completely denied Pope Properties due process and equal protection of law. *See Stone Brooke Limited Partnership v. Sisinni, supra.*

C. The Circuit Court of Kanawha County erred in affirming Respondent’s exclusive reliance on sales data of three sales of two owner-occupied parcels in Respondent’s 2011 assessments of Pope Properties’ 79 income-producing commercial parcels of real property because the data is incomparable and, thus, incompetent.

At the hearing before the Board, Pope Properties’ expert, Mr. Holmes testified that, although he considered the Market Approach, he could not place significant reliance on its use because there were only three published sales of two units¹⁴ during the prior three years and all three of those sales were owner-occupied Class II parcels.¹⁵ *Appendix* at 000098. Mr. Holmes testified that it is simply wrong to use the sales of Class II parcels as comparable sales in appraising Class III commercial parcels because Class II parcels by definition are “owner-occupied” properties. *Appendix* at 000105. *See, also, W.Va. Code* § 11-8-5. Mr. Holmes

¹³ Petitioner has no idea what “unique protections under law” condominiums have. In fact, Petitioner has been uniquely penalized for owning its 79 apartments as condominiums.

¹⁴ One Class II parcel was sold twice.

¹⁵ The Assessor admitted that all three sales of these allegedly comparable sales were of Class II parcels. *See* Hearing Transcript at 114. Class III has a tax rate that is double the tax rate for Class II properties. *Id.*

testified that not only were the properties in the wrong class, but, further, that the “universe” of comparable sales was too small even if they had been in the right class. *Id.* Mr. Holmes was correct.

The Assessor is required to use the “most accurate form of appraisal” in fixing the fair market value of a particular parcel. *W. Va. C.S.R § 110-1P-2.2.2; Stone Brooke Limited Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009). In the instant case, using three sales of two class II owner-occupied parcels as “comparables” was simply not the most accurate form of appraisal. The data used were, in fact, incomparable and, thus, incompetent to be employed as comparables for the appraisals of the Parcels as a matter of law. As Mr. Holmes further testified, the data were also insufficient in quantity to be meaningful, an opinion that the Assessor never opposed.

When questioned during the hearing before the Board, the Assessor all but acknowledged that there was insufficient evidence of comparable sales in relation to the Parcels. Board member David Hardy asked:

Q: Mr. Duffield, do you think the three comparables is a fair universe to reach a conclusion that you reached?

A: It’s all I had available at the time.

Appendix at 000095. The Assessor falls far short of her burden when she simply disregards competent income evidence that should be used to appraise income-producing properties in favor of incompetent evidence and blind application of a rule that all condominiums must be appraised using the market approach regardless of the value of the “comparable” information that may be available.

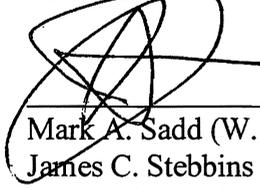
VI. CONCLUSION

Pope Properties therefore appeals the decision by the Circuit Court of Kanawha County, West Virginia, affirming the decision of the Board affirming the Assessor's assessments of the 79 Parcels for the 2011 tax year. The Assessor greatly over-valued each of the Parcels based on her mistaken belief that condominium units, such as these, cannot be commercial real property as a matter of West Virginia law. Because the Assessor believes that the 79 Parcels cannot be commercial, the Assessor wrongly reasoned that West Virginia law forbids her from considering the income from them to ascertain their fair market values for assessment purposes.

WHEREFORE, Petitioner, Pope Properties/Charleston Limited Liability Company, prays that this Honorable Court reverse and set aside the Respondent's 2011 assessments and because Pope Properties, by clear and convincing evidence, has established that the fair market values of the Parcels are \$42,000 for each of 16 one-bedroom apartments and \$49,000 for each of the 63 two-bedroom apartments, and, by applying the assessment rate of 60 percent of fair market value, calculate the lawful assessment for each of the 16 one-bedroom apartments to be \$25,200 and for each of the 63 two-bedroom apartments to be \$29,400. In the alternative, Pope Properties respectfully requests that the decision of the Circuit Court of Kanawha County, West Virginia, be reversed and that the case be remanded with instructions to the Circuit Court to require the Assessor to reappraise the Parcels by giving consideration to all three appraisal methods with primary consideration to the Income Approach based on the Parcels' property characteristics required by West Virginia law.

**POPE PROPERTIES/CHARLESTON
LIMITED LIABILITY COMPANY,**

By its counsel

A handwritten signature in black ink, appearing to be "Mark A. Sadd", written over a horizontal line. The signature is somewhat stylized and overlaps the line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1398

**POPE PROPERTIES/CHARLESTON
LIMITED LIABILITY COMPANY,**

Petitioner,

v.

THE HONORABLE PHYLLIS GATSON
in her capacity as Kanawha County Assessor,

Respondent.

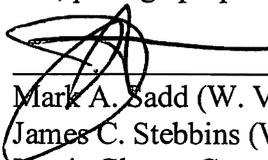
CERTIFICATE OF SERVICE

I, Mark A. Sadd/James C. Stebbins, counsel for Petitioner, Pope Properties/Charleston Limited Liability Company, do hereby certify that on this 23rd day of November, 2011, I served a copy of the foregoing **BRIEF OF APPELLANT** upon:

Karen Tracy McElhinny, Esq.
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and

Stephen C. Sluss, Esq.
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by depositing the same to them in the U. S. Mail, postage prepaid and sealed in an envelope.



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