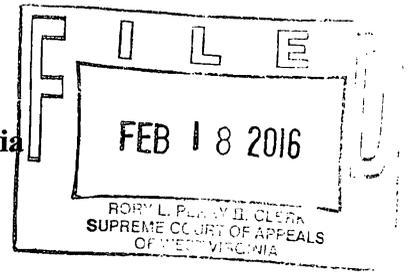


In the Supreme Court of Appeals of West Virginia

DOCKET NO: 15-0888



**In Re: Tax Assessment of Cabela's Retail, Inc.**

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**PETITIONER'S REPLY BRIEF**

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### **Assignments of Error**

1. The Circuit Court erred in holding that the Ohio County Assessor's failure to consider the income and comparable sales approach is not required by West Virginia law.
2. The Circuit Court erred in affirming the decision of the Board of Equalization and Review to uphold the Ohio County Assessor's 2009 and 2010 tax assessments of Cabela's retail store, despite the Assessor's failure to properly apply the cost appraisal approach.
3. The Circuit Court erred in affirming the valuation of the Cabela's retail store set by the Board of Equalization and Review, despite overwhelming evidence offered that the value set by the Assessor was excessive.

**Statement Regarding Oral Argument and Decision**

Cabela's states that oral argument is necessary pursuant to the criteria in Rule 18(a). Further, Cabela's contends that this case is appropriate for Rule 19 argument because it concerns the Circuit Court's application of settled law and a judgment based on insufficient evidence or a result against the weight of the evidence. Finally, Cabela's states that this case is appropriate for a memorandum decision.

## Argument

### **1. The Assessor's failure to engage in legitimate, thoughtful, and contemplative consideration, as required by West Virginia law, necessitates the reversal of the Circuit Court's Order affirming the 2009 and 2010 tax assessments.**

This Court has consistently defined the term "consider", as it is used within the rules and regulations applicable to the Ohio County Assessor's ("Assessor") obligation to annually assess the value of Cabela's retail store, to require active, thoughtful engagement on the part of the Assessor.<sup>1</sup> See *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 256, 539 S.E.2d 757, 763 (2000) ("*ABPP*"). See also *Century Aluminum of West Virginia, Inc. v. Jackson County Com'n*, 229 W.Va. 215, 225, 728 S.E.2d 99, 109 (2012) ("*Century Aluminum*"). In *Century Aluminum*, this Court affirmed its previous interpretation of the term "consider", as originally set forth in *ABPP*, stating:

The Court in *ABPP* focused upon the term "consider" as it is used within the rules and found that "consider" is defined as "to think carefully about, esp[ecially] in order to make a decision; contemplate; reflect on" (internal citation omitted) (quoting *Random House Webster's Unabridged Dictionary* 434 (2d ed.1998)). The court ultimately determined based upon the foregoing definition that "[t]he Tax Commissioner is required to 'consider' the various approaches to valuation by contemplating the feasibility of utilizing each of the ascribed methods. On the other hand, these methods are to be 'used' or actually employed only where applicable." (internal citation omitted).

...

This Court must examine the plain wording of the rule that requires the Tax Commissioner to "consider" three types of depreciation: physical deterioration, functional obsolescence and economic obsolescence in utilizing the cost approach. See W. Va. C.S.R. § 110-1P-2.2.1.1. As in *ABPP*, the term consider is defined as "to think carefully about, about esp[ecially] in order to make a decision; contemplate; reflect on." 208 W.Va. at 257, 539 S.E.2d at

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<sup>1</sup> Petitioner herein replies to the Brief of Respondent Ohio County Assessor ("Assessor"), and Brief of Respondent Ohio County Commission, which adopted, in its entirety, the complete brief, arguments, and positions set forth in the Response Brief filed by the Assessor.

764 (quoting *Random House Webster's Unabridged Dictionary* 434 (2d ed.1998)).

*Century Aluminum of West Virginia, Inc. v. Jackson County Com'n*, 229 W.Va. at 224, 728 S.E.2d at 105. As this Court has made clear on multiple occasions, consideration requires more than the passive acknowledgment and disregard offered by Ohio County Assessor's office employee Jeff Prettyman in conducting the tax assessments at issue. Legitimate, active consideration requires understanding and contemplation prior to arriving at a conclusion.

Ultimately, the flaw fatal to the Assessor's position is that, contrary to the arguments advanced in the response brief, at multiple junctures the required consideration simply did not occur. By example, as set forth more fully in Petitioner's Brief, Mr. Prettyman's passive disregard of the income and sales approaches, based upon misunderstanding and his inability or failure to seek out all information was insufficient under West Virginia law. (*See* Appendix pp. AR259-260). *See also Kline v. McCloud*, 174 W.Va. 369, 326 S.E. 715 (1985){ TA \s "Kline v. McCloud, 174 W.Va. 369, 372, 326 S.E. 2d 715, 718 (1985)" }. Even under the most deferential basis, his conduct cannot be viewed as legitimate "consideration" of the three appraisal methods as required by West Virginia law.

By way of further example, the record clearly indicates that Mr. Prettyman failed to comprehend the concept of functional obsolescence, including super-adequacy. Without an understanding of the concept to be considered, it is unreasonable to assert that Mr. Prettyman thought about, contemplated and reflected upon the depreciation factor prior to arriving at his final conclusions.

Functional obsolescence is defined as "[t]he loss of value due to factors such as excess capacity, changes in technology, flow of material, seasonal use, part-time use or other like factors [...]. *See* W. Va. C.S.R. §110-1P-2.3.8. This was not the definition provided by Mr.

Prettyman during his testimony at the Remand Hearing on February 28, 2013. (See Appendix pp. AR238-239). In fact, as set forth below, Mr. Prettyman's own testimony at the Remand Hearing demonstrates a lack of true understanding of functional obsolescence. Without a true understanding, there cannot be consideration.

The Circuit Court acknowledged Mr. Prettyman's lack of understanding and lack of consideration in its Order of August 17, 2015, stating:

Mr. Prettyman testified, although without much elaboration, that he considered the factors in W. Va. C.S.R. § 110-1P-2 (1991). Specifically, he testified that he considered, but rejected any functional obsolescence. However, it appears that his only consideration on functional obsolescence was that the store was not "too big" for what it was originally built but, functional obsolescence clearly entails far more than just size.

...

Mr. Prettyman also rejected the concept of "super-adequacy" (a building larger than needed) in evaluating the depreciation of the building. Mr. Prettyman's reasoning was that because the building was only five years old that they wouldn't have built it way to large and therefore, he did not make any adjustments.

(See Appendix pp. AR 459-467). During his testimony at the February 28, 2013 Remand Hearing, Mr. Prettyman further solidified the notion that he failed to fully comprehend the concept of functional obsolescence, including super-adequacy, stating:

- Q. And the functional obsolescence was not –was not factored?  
A. It was considered but not utilized too much extent.  
Q. Why?  
A. It's at its highest and best use in good condition.

(See Appendix p. AR267).

...

- Q. Are you familiar with the phrase "super-adequacy"?  
A. Yes, sir.  
Q. What does that mean?  
A. That means you've built a building that way larger than you need.

Q. And did you consider the issues of super-adequacy in appraising the building in this matter?

A. No, sir.

Q. Why not?

A. It didn't apply. They -- it's a -- at this time was a five-year-old building. I don't think that they would have built it way to large. And it would be considered way to large after you built it.

(*Id.*)

In *Lee Trace, LLC v. Hess* ("*Lee Trace*"), this Court held that:

In utilizing the cost approach to assessments, as the assessor did here, one must "consider" three types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence. *See* W. Va. C.S.R. §§110-1P-2.2.1.1. Interpreting this rule, we have clarified that it "does not require ...any adjustment to the valuations made regarding property because of physical deterioration, functional obsolescence, and economic obsolescence...Rather, all that is required ... in applying the cost approach valuation is that [one] will think about, contemplate [the] three types of depreciation.

*See Lee Trace, LLC v. Hess*, 2015 WL 7628718, at \*3 (W. Va. Nov. 20, 2015). *See also Century Aluminum*, 229 W.Va. at 225, 728 S.E.2d at 109. In the current matter, it is clear that Mr. Prettyman failed to fully comprehend the concept of functional obsolescence, including super-adequacy, and as a result the Assessor failed to consider the depreciation type as required by West Virginia law.

As established above, to "Consider", as defined by this Court, requires both thoughtful contemplation and understanding. *See APBB*, 208 W. Va. at 256, 539 S.E.2d at 763. *See also Century Aluminum*, 229 W.Va. at 225, 728 S.E.2d at 109. Because of Mr. Prettyman's passive disregard of required factors and/or lack of understanding of the concepts at issue, true consideration was not afforded as is required by West Virginia law. For this reason the Circuit Court's Order affirming the assessments must be reversed.

**2. *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community* confirms that when the Assessor utilizes the cost approach method, the Assessor is required, not simply allowed, to consider the three types of depreciation and is required to determine the true and actual, fair market value.**

In an apparent effort to discredit the appraisal submitted by Cabela's, the Assessor argues that *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2008) ("*Foster Foundation*") stands for the proposition that West Virginia law does not require the Assessor to appraise the subject property at its true and actual, fair market value or consider, and when applicable, utilize, functional obsolescence, including super-adequacy. Significantly, the Assessor indicates that "this (functional obsolescence, including super-adequacy) is a consideration *allowed* to be taken into account by West Virginia law". (*See* Br. of the Resp't Ohio County Assessor at p. 17) (emphasis added). Further, the Assessor argues, "allowing Cabela's to build this type of property and then *automatically discount it because of 'market value'* is to allow Cabela's to reap the rewards of its property without paying its fair share of taxes." (*Id.*) (emphasis added). The position advanced by the Assessor in this regard is clearly contrary to the mandates of West Virginia law. In *Foster Foundation*, this Court held:

Lastly, the Foundation contends that because it is a not-for-profit corporation, it may have incurred construction costs that cannot be recouped if the property is sold because the cost of such improvements allegedly was greater than their market value and that this factor should have been considered in reaching its assessed value. The appraisal criteria take into account, however, "[t]he value of such property to its owner," W. Va. C.S.R. § 110-1P-2.1.1:7, suggesting that a particular parcel of property may be valued at one amount by its owner while it may be valued differently by persons other than the owner. Moreover, to the extent that the value of the Foundation's improvements to the Woodlands property have been diminished by depreciation, this factor also is required to be considered in appraising commercial property. W. Va. C.S.R. § 110-1P-2.2.1.1 ("to determine fair market value under th[e cost] approach, replacement cost of the

improvements is reduced by the amount of accrued depreciation and added to an estimated land value. In applying the cost approach, the Tax commissioner will consider three (3) types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence." Thus, these factors, too were all within the ambit of criteria *required* to be *considered* in appraising commercial property for the purpose of taxation.

*Foster Foundation*, 223 W. Va. at 36, 672 S.E.2d at 72. The opinion in *Foster Foundation* does not obviate the Assessor's obligation to appraise the subject property at its true and actual value.

To the contrary, in *Foster Foundation* this Court reaffirmed its decision in *Killen v. Logan County Comm'n*, 170 W. Va. 602, 295 S.E.2d 689 (1982), stating:

W. Va. Code § 11-3-1 (1977) (Repl.Vol.2008) further instructs that "[a]ll property shall be assessed annually...at its true and actual value." We have interpreted the term "value" with respect to tax assessments as meaning " 'worth in money' of a piece of property – its market value.

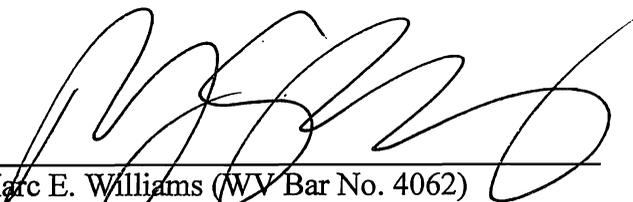
*Foster Foundation*, 223 W. Va. at 33, 672 S.E.2d at 69. Therefore, there can be no reasonable disagreement that in assessing commercial property for purposes of taxation the Assessor is required to determine the fair market value. Conversely, the fair market value is not a discount to be applied, but a conclusion to be arrived at in properly appraising a property consistent with West Virginia law.

Moreover, the Court in *Foster Foundation* did not obviate the Assessor's required obligation to consider functional obsolescence, including super-adequacy. As set forth above, the Court clearly articulated that the three types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence, are all factors within the ambit of criteria *required* to be considered in appraising commercial property for the purpose of taxation. As set forth above, true consideration was not given to the three types of depreciation due to an abject misunderstanding of the concepts at issue. For this reason, the Circuit Court's Order affirming the assessments must be reversed.

**Conclusion**

In conclusion, for the reasons stated herein, and those previously set forth in Petitioner's Brief, Cabela's respectfully requests that this Court reverse the Circuit Court's final judgment and require that the assessed value of Cabela's retail store is set in conformity with the appraisal prepared by Mr. Herold and submitted by Cabela's in this matter.

**CABELA'S RETAIL, INC.**



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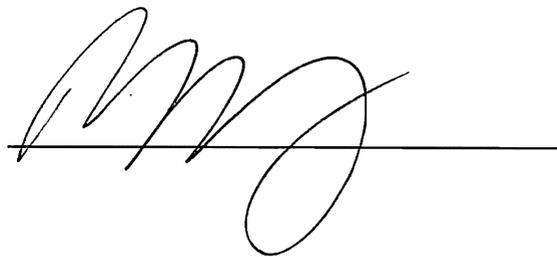
**(Appeal of Civil Action Nos. 09-CAP-6 and 10-CAP-8 in the Circuit Court of Ohio County,  
West Virginia)**

**CERTIFICATE OF SERVICE**

The undersigned attorney does hereby certify that on the 18<sup>th</sup> day February, 2016, a true copy of the foregoing "*Petitioner's Reply Brief*" was served upon the following counsel by depositing the same, postage prepaid, in the United States Mail:

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A handwritten signature in black ink, appearing to be "DJT", is written over a horizontal line.