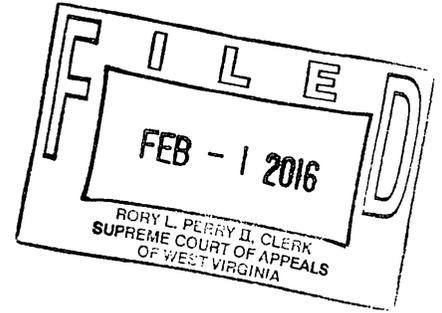


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0888



IN RE: TAX ASSESSMENT OF CABELA'S RETAIL, INC.

**BRIEF OF RESPONDENT
OHIO COUNTY ASSESSOR**

Patrick S. Casey (WV Bar No. 668)
Taylor D. Potts (WV Bar No. 12799)
CASEY & CHAPMAN, PLLC
1140 Chapline Ave.
Wheeling, WV 26003
304-231-2405
866-296-2591 (fax)

COUNSEL FOR RESPONDENT OHIO COUNTY ASSESSOR

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I. Statement of the Case

This appeal concerns Petitioner, Cabela's Retail, Inc.'s (Cabela's), challenge to both the 2009 and 2010 tax assessments of its store at The Highlands retail commercial development in Triadelphia, Ohio County, West Virginia. Cabela's is a national chain of retail stores that focuses on the sale of outdoor recreational activity equipment and apparel. In 2004, the massive, 175,000 plus square foot, store was opened at The Highlands development as one of Cabela's flagship retail locations. In keeping with its retail model, Cabela's built the store with higher end finishing, exhibits such as a large aquarium, and other attractions that make it not only a retail store but a destination experience for those looking for the very best in outdoor accessories and apparel.

Cabela's initially challenged the Ohio County Assessor's ("Assessor") appraisal and tax assessment of its retail store at the Highlands in 2009 by filing for a Review of Property Valuation with the Ohio County Commission ("Commission"). *See JT. APP. 15.* It filed a similar protest to the 2010 appraisal and tax assessment. *See JT. APP. 361.* In those challenges Cabela's claimed that the Assessor's valuation of \$52,332,200.00 in 2009 and \$50,085,900.00 in 2010 were excessive and did not reflect the actual market value of the Cabela's property. *See JT. APP. 5-13, 348-356.* The Commission held hearings for both challenges, and after hearing all evidence and testimony submitted by both Cabela's and the Commission upheld the tax assessments for both 2009 and 2010. *See JT. APP. 54 & 402.*

Both the 2009 and 2010 challenges were made for the same reasons and consisted largely of the same testimony, facts, and evidence. In support of its challenges Cabela's hired licensed appraiser Douglas Herold ("Mr. Herold") to perform an appraisal and introduce testimony. *See JT. APP. 16-53, 135-157, & 222-310.* Mr. Herold testified that the Assessor's valuation of the Cabela's store was inaccurate because it was based on the cost appraisal approach. *See JT. APP. 141-142.*

According to Mr. Harold, since the Cabela's store was built with unique features, which may only be valued by Cabela's, the more appropriate approach for determining the store's true value was the sales comparison/market data appraisal approach. *Id.* In fact, Mr. Herold did not even perform a cost approach appraisal because he opined that it was not the best approach. *See JT. APP. 143.* Using the sales comparison/market data appraisal approach Mr. Herold used the sale of other "big box" stores such as Lowe's, Walmarts, Targets, etc., to find the value of Cabela's Highlands store to be \$22,600,000.00 for both the 2009 and 2010 tax years. *See JT. APP. 19 & 366.* This number did not include the value of the land which was undisputed at approximately \$14,000,000.

Jeff Prettyman ("Mr. Prettyman")¹ conducted the valuations of the Cabela's store for the Assessor in both 2009 and 2010, and testified in support of the Assessor at the hearings. *See JT. APP. 152-157 & 230-269.* In choosing to use the cost appraisal approach Mr. Prettyman testified that he considered both the sales comparison/market data approach and the income approach. *See JT. APP. 250.* In deciding against their use Mr. Prettyman stated that due to the Cabela's store uniqueness there were no sales of similar enough properties to properly perform the sales comparison/market data approach, and that he did not have the necessary data, i.e. sales and income figures for Cabela's retail business, to perform an income approach appraisal. *See JT. APP. 152 & 259-260.* Cabela's only argument in the initial hearing was that the sales comparison/market data appraisal approach was more appropriate and gave a more accurate value than the cost appraisal approach used by the Assessor. *See JT. APP. 135-157.*

The Commission ultimately upheld the tax assessments for both 2009 and 2010. *See JT. APP. 54 & 402.* Cabela's appealed both cases to the circuit court challenging the Commission's

¹ Mr. Jeff Prettyman is identified as Mr. Freeman in the 2009 Board of Equalization and Review hearing transcript. *See JT. APP. 152-157.* Mr. Prettyman is an employee of the Ohio County Assessor's office. He testified that he has performed thousands of commercial appraisals for the Assessor's office and that he has all the required training and certifications under state law. *See JT. APP. 231, 242-243.*

decision to uphold the appraisals and assessments. *See* JT. APP. 3-13 & 346-356. The 2009 and 2010 appeals were consolidated for the purposes of the appeal. *See* JT. APP. 452-458. In an order dated July 20, 2011, the circuit court remanded the case to the Board of Equalization and Review for further factual development stating:

Based upon the limited record, it is unclear who to blame for the fact that there was insufficient data for [Mr.] Prettyman to conduct [the] sales and income approaches to valuation. Without that data the Assessor's determination that the cost approach was the most appropriate method for valuing the subject property was correct and was neither arbitrary, capricious, nor unreasonable. However, the West Virginia Supreme Court has given clear directive in W. Va. C.S.R. § 110-1P-2.1.4 that 'each of these factors should be considered in the appraisal of a specific parcel' of commercial real property. The record does not disclose whether each of these enumerated factors has been thoroughly considered. . . . The Court FINDS that the Assessor failed to place any evidence on the record to show whether he considered the required appraisal factors set forth in W. Va. C.S.R. §110-1P-2.1.1 to 2.1.4 (1991). Therefore, the matter must be REMANDED to the Board of Equalization and Review for further determination of the factors and method utilized by the Assessor in his cost based approach for valuation of the Cabela's property.

See JT. APP. 196-197. Thus, the circuit court remanded the cases to the Board of Equalization and Review for the sole purpose of developing more testimony and evidence regarding the factors used in determining the assessment generated by the cost appraisal approach. *See* JT. APP. 196. In recognizing the broad discretion of the Assessor and the challenging taxpayer's burden, the circuit court decided that the Assessor had the authority and discretion to choose the cost appraisal approach in this situation. *Id.* The remand was strictly limited to whether Mr. Prettyman considered the requisite factors set forth in W. Va. C.S.R. §110-1P-2.1.1 to 2.1.4 (1991).

The remand hearing was held on February 28, 2013, and Mr. Prettyman elaborated on his testimony regarding his use of the cost appraisal approach. *See* JT. APP. 230-269. Mr. Prettyman testified that he considered all the factors listed in W. Va. C.S.R. 110-1P-2.1.1-2.1.4 as requested by the circuit court. *See* JT. APP. 234-242. Mr. Prettyman explained how the individual factors were considered and what weight they were afforded. *See* JT. APP. 230-269. Importantly, on cross

examination Cabela's did not attempt to obtain any further information about Mr. Prettyman's consideration of the factors. *See JT. APP. 243-263.* Instead Cabela's ignored the purpose and scope of the remand order and focused its questions predominantly on why the cost appraisal approach was chosen even though the circuit court had already found the Assessor's use of the cost appraisal approach to be appropriate. *See JT. APP. 250-262.* Cabela's hired yet another appraiser, Jay Goldman ("Mr. Goldman"), who simply regurgitated Mr. Herold's original appraisal. *See JT. APP. 271-308.*

The Commission once again upheld the tax assessments and Cabela's appealed to the circuit court once again. *See JT. APP. 312.* The circuit court affirmed the judgment of the Commission. *See JT. APP. 459-467.* In upholding the valuations for both 2009 and 2010 the circuit court held:

[This] Court is bound by the law and cannot substitute its own judgment when such a heavy burden is born by the taxpayer. 'Arbitrary or unjust action by an assessor in fixing the value of land must be shown by clear and cogent proof in order that the complaining taxpayer may be given relief . . . There is no bright line rule as to how to apply depreciation, only that it is required to be considered. It is clear from the testimony that the Assessor did, in fact, consider depreciation as required, but then rejected it. Therefore, it is the finding of the Court that Cabela's has failed to show by clear and convincing evidence that the Assessor's valuation of the Cabela's property for the years 2009 and 2010 was arbitrary or unjust and therefore the valuations are hereby AFFIRMED.

See JT. APP. 466-467. It is from this order that Cabela's appeals.

II. Summary of the Argument

The circuit court did not err in upholding the Assessor's 2009 and 2010 tax assessments of Cabela's flagship store at The Highlands development in Ohio County. The Assessor's appraisals were made considering all the required factors under West Virginia law and represent the fair value of Cabela's property. Cabela's did not meet the taxpayer's burden of proving by clear and

convincing evidence that the appraisals were arbitrary or unjust, or that the circuit court otherwise abused its discretion in upholding the assessments.

Cabela's argues that Mr. Prettyman did not choose the most accurate appraisal approach. However, the question is whether he considered using the three approaches, not whether he used them, and the fact is he did. Mr. Prettyman testified that, "[b]ecause of Cabela's uniqueness, I felt that a[n] income approach, nor a sales approach . . . a sales approach can apply. There's nothing that sells like it. An income approach – I was not furnished [Cabela's income information], so that left me the cost approach." *See* JT. APP. 152. The circuit court did not err in upholding the assessments because Mr. Prettyman appropriately applied the cost appraisal approach as required by West Virginia law. West Virginia law requires that all the depreciation and factors listed in W. Va. C.S.R. § 110-1P-2 be considered when performing the cost appraisal approach. Mr. Prettyman stated that he considered the depreciation and factors on several different occasions. Finally, the circuit court did not err in upholding the assessments because Cabela's did not prove by clear and convincing evidence that the Assessor's valuation was plainly wrong, unjust, or arbitrary. The fact that the circuit court, given Cabela's high burden of proving the Assessor's valuation was wrong, determined to accept the Assessor's valuation as in compliance with West Virginia law and reasonable under the circumstances is not an abuse of discretion.

III. Statement Regarding Oral Argument and Decision

The Assessor states that oral argument is proper pursuant to the requirements of W. Va. R. of App. Pro. 18(a). This case is further appropriate for Rule 19 argument because it involves both claimed error in the application of settled law and claims of results against the weight of the evidence. W. Va. R. of App. Pro. 19(a). The Assessor also contends that this case is otherwise not

appropriate for decision on the memorandum because of its complexity, length, and importance to the application of tax assessments throughout the state in general.

IV. Standards of Review.

Cabela's has a significant burden to overturn the appraisal and the circuit court's judgment. A county assessor's valuation of a property is presumed to be correct. Western Pocahontas Properties, LTD. v. County Commission of Wetzel County, 189 W. Va. 322, 431 S.E.2d 661, 664 (1993). To prevail, a challenging taxpayer must show by clear and convincing evidence that the tax assessment is wrong in order to have it altered. In re Tax Assessment of Foster Foundations Woodlands Retirement Community, 223 W. Va. 14, 672 S.E.2d 150, 160-163 (2008). To meet this heightened burden, the taxpayer must do more than simply introduce evidence that is counter to the Assessor's valuation but must meet the highest standard of civil proof and provide evidence enough to allow the fact finder to make a decision without hesitation. O'Dell v. Stegall, 226 W. Va. 590, 703 S.E.2d 561, 580 n.11 (2010). This requires more than the simple testimony of an opposing appraiser's findings. Killen v. Logan County Commission. 170 W. Va. 602, 295 S.E.2d 689 *Syl. pt. 8* (1982).

Further, when reviewing tax assessments, courts apply a trifurcated standard of review. If the tax assessment is challenged based on the law the courts review it under a *de novo* standard. In re Tax Assessment of Foster Foundations Woodlands Retirement Community, 223 W. Va. 14, 672 S.E.2d 150, 154-155 (2008). However, if the tax assessment is challenged for factual determinations it is reviewed under the clearly erroneous standard. Mountain America, LLC v. Huffman, 224 W. Va. 669, 687 S.E.2d 768, 678 (2009); In re Tax Assessment of Foster Foundations Woodlands Retirement Community, 223 W. Va. 14, 672 S.E.2d 150, 154-155 (2008). Finally, the trial court's ultimate order upholding or overturning a tax assessment is reviewed under

an abuse of discretion standard. Lee Trace, LLC v. Hess 2015 WL 7628718 at 2 (W. Va. Nov. 20, 2015).

V. Argument

The Assessor contends that the circuit court’s affirmation of its tax assessments was appropriate and that the circuit court committed no error with regard to upholding either the tax assessment values or the methods used to achieve them. In support of this position the Assessor presents three arguments: (1) the circuit court appropriately found that the Assessor’s use of the cost appraisal approach was proper under the circumstances, (2) the circuit court appropriately upheld the tax assessments based on the Assessor’s use of the cost appraisal method, and (3) the circuit court’s decision upholding the Assessor’s valuations was not against the weight of the evidence.

A. The circuit court appropriately found that the Assessor’s use of the cost appraisal approach was proper under the circumstances.

For tax assessment purposes, West Virginia law requires that, “all property . . . be assessed annually . . . at sixty percent of its true and actual value; that is to say, at the price for which the property would sell if voluntarily offered for sale . . . not the price which might be realized if the property were sold at a forced sale.” W. Va. Code § 11-3-1(a). In finding this price, county assessors are instructed to, “consider and use where applicable three (3) generally accepted approaches to value: (A) cost, (B) income, and (C) market data[/sales comparison]. W. Va. C.S.R. § 110-1P-2.2.1 (1991). The choice of method to be used depends on the circumstances as, “the most accurate form of appraisal should be used, [when possible], but because of difficulty in obtaining necessary data from the taxpayer, or due to the lack of comparable commercial and/or industrial properties, choice between the alternative appraisal methods may be limited.” W. Va. C.S.R. § 110-1P-2.2.2. This Court has continually held that “[t]itle 110, Series 1P of the West

Virginia Code of State Rules confers upon the State Tax Commissioner 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.” In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W. Va. 250, 552 S.E.2d 757, 759, *Sly. Pt. 5* (2000); Century Aluminum of West Virginia, Inc. v. Jackson County Com’n, 229 W. Va. 215, 782 S.E.2d 99, 108 (2012); and Pope Properties/Charleston Limited Liability Co. v. Kanawha County Assessor, 230 W. Va. 382, 738 S.E.2d 546, 552 (2013).

In attempting to frame its initial challenge as an issue of law Cabela’s mischaracterizes the holding of the circuit court. The circuit court, in fact, found that all three approaches must be considered under West Virginia law. *See* JT. APP. 193-196. In so finding, the circuit court stated, “[t]he specific direction is that ‘[i]n determining an estimate of fair market value, the Tax Commissioner will *consider* and use where applicable, three (3) generally accepted approaches to value: (A) cost, (B) income, and (C) market data.’ 110 W. Va. C.S.R. § 1P-2.2.1,” *See* JT. APP. 193(emphasis added), however, “[i]n the case of In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W. Va. 250, 539 S.E.2d 757, 764 (2000), the Court made it clear that the Tax Commissioner has discretion in choosing the most reliable technique for appraising property . . . ,” *See* JT. APP. 194. This clearly shows that the circuit court understood that the three approaches need to be, and were, considered and that it ultimately found no abuse of discretion in the Assessor’s choice of the cost approach under the circumstances.

1. The Assessor in fact considered all three appraisal approaches required by law, and rejected the income and sales comparison/market data approaches.

In further challenge to the Assessor's use of the cost appraisal approach Cabela's argues that the Assessor did not consider the income or sales comparison/market data approaches as required by West Virginia law. Cabela's main support for this argument is that Mr. Prettyman testified that he did not have the resources necessary to research comparable properties for either approach, and that he did not provide in depth testimony regarding his consideration of them. However, once again Cabela's either misstates or misunderstands the testimony.

It is apparent that the income approach is inappropriate to value Cabela's property because a Cabela's property has never been rented. West Virginia law expects that income will be judged based on the income from the preceding three years. W. Va. 110-1P-2.1.1.9. Even Cabela's appraiser, Mr. Herold, stated he would not rely on the income approach because of the fact no rental income information existed for a Cabela's property. *See JT. APP. 151*. Due to the lack of accurate information, Mr. Prettyman's choice not to use the income approach was appropriate.

In regards to the sales comparison/market data approach, Mr. Prettyman stated that he considered the sales comparison approach but ultimately rejected it because he believed the Cabela's property was unique and had no comparable sales to judge it against. *See JT. APP. 152, 260, & 268-269*. While Mr. Prettyman admitted that he was more limited in his information and resources than Cabela's hired appraisers, he did not testify that he did not have access to comparables information. *See JT. APP. 260-261*. The fact that Mr. Prettyman has different resources than a large commercial appraiser does not mean he cannot properly obtain the data and appropriately consider the sales and income information. Mr. Prettyman's finding that no comparables existed does not show he did not consider the sales comparison/market data approach.

To the contrary, it is evidence that he considered it and then rejected it because he did not find it reliable. The statute requires the three appraisal approaches to be “consider[ed] and use[ed] where applicable,” Mr. Prettyman’s actions were appropriate under the circumstances.

2. West Virginia law provides assessors with leeway and discretion to choose which appraisal approach is most appropriate under the circumstances.

Thus far the Assessor’s arguments have been premised on the fact that even under Cabela’s extraordinary and narrow view of the facts and law, the tax assessments were still conducted appropriately. However, Cabela’s view is an inaccurate statement of the law. Under Cabela’s view by “consider all three approaches” what is actually required is that an assessor performs all three appraisal approaches and only then discount one or more of them based on the results. *See JT. APP. 254*. When a circuit court found that West Virginia law required the use of more than one appraisal approach, as Cabela’s does here, this Court found it to be an erroneous interpretation and application of the law. *In re Tax Assessment Against American Bituminous Power Partners LP*, 208 W. Va. 250, 539 S.E.2d 757, 763 (2000). In finding this to be an incorrect interpretation of the law this Court found that there is a decided difference between the words “consider” and “use,” and the fact that the regulations require an assessor to “consider” means that actual use is not required. Ultimately holding that “[w]hen the regulation in question is read as a whole, it becomes clear that the [assessor] has considerable discretion in choosing the applicable method of valuing a particular property,” and that, “[t]he exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.” *Id.* at 764.

Mr. Prettyman was within his authority to choose the cost appraisal approach. The final question is whether Mr. Prettyman’s choice to do so was an abuse of discretion. The answer to this question is no. Mr. Prettyman testified that when valuing a building that is built by its owner, for the owner’s use, and actually owner occupied the proper approach to employ is the cost. *See JT.*

APP. 269. He further found that there were no appropriate comparables to judge Cabela's property against. *See* JT. APP. 152, 260, & 268-269. The mere fact that Cabela's appraisers disagree or have found otherwise is not enough to show Mr. Prettyman's decision was unreasonable or an abuse of discretion give the facts.

B. The Assessor properly applied the cost appraisal approach under West Virginia law.

West Virginia law defines the cost appraisal approach as "replacement cost of the improvements reduced by the amount of accrued depreciation and added to an estimated land value." W. Va. C.S.R. § 110-1P-2.2.1.1. It further goes on to state that "[i]n applying the cost approach the [assessor] will consider three types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence." *Id.* Making the cost approach formula "replacement cost of improvements, less all types of depreciation, added to a land value" W. Va. C.S.R. § 110-1P-2.3.4. Going on to define "functional obsolescence" 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 like factors [or] the inability to perform adequately the function for which an item was designed," W. Va. C.S.R. § 110-1P-2.3.8, and "physical deterioration" as "[a] loss in value due to natural wear and tear of property resulting from age, use, abuse, etc," W. Va. C.S.R. § 110-1P-2.3.20.

It must be noted that the parties concede that there is no economic obsolescence in relation to the Cabela's property. *See* JT. APP. 286. That leaves two depreciation considerations: physical deterioration and functional obsolescence. Cabela's argues that depreciation was improperly handled by the Assessor in its valuation of the Cabela's property.

1. Physical deterioration was appropriately handled in the Assessor's tax assessment.

Absent some exceptional damage, wear and tear for commercial, retail properties should occur at the same rate. The West Virginia State Tax Commissioner has given counties a state mandated mass appraisal system which automatically accounts for physical deterioration of buildings at a fixed rate. *See* JT. APP. 235-238, 246-248, & 256-258. Cabela's challenge in relation to this is that Mr. Prettyman did not take into consideration items which may depreciate at a faster rate than the physical structure of the building itself, such as HVAC, paint, roofing, etc. *See* JT. APP. 286. However, in Lee Trace LLC v. Hess, this Court cited to the testimony of the Berkeley County Deputy Assessor who testified that the state mandated appraisal system had fields that account for all required depreciation. 2015 WL 7628718 at 3 (W. Va. Nov. 20, 2015). Further, Mr. Prettyman testified that the state mandated system took into consideration the depreciation of items such as HVAC, roofing, etc. by factoring it in with the physical deterioration of the building. *See* JT. APP. 256-257. Cabela's can point to no testimony or evidence that shows the mass appraisal system does not take these items into consideration and, therefore, cannot show that the Assessor was clearly wrong in his use of the mass appraisal system for physical deterioration purposes.

2. Mr. Prettyman complied with the law by consideration functional obsolescence.

Cabela's argues that Mr. Prettyman did not appropriately use "functional obsolescence," specifically "super adequacy," in performing the cost based appraisal. However, in two recent cases, this Court held that what is required when performing the cost appraisal approach is that the three suggested types of depreciation be considered not that they be employed. Century Aluminum of West Virginia, Inc. v. Jackson County Com'n, 229 W. Va. 215, 782 S.E.2d 99, 108-109 (2012) and Lee Trace, LLC v. Hess, 2015 WL 7628718 at 3 (W. Va. Nov. 20, 2015). Absent from the

requirement of consideration is direction or a requirement regarding how to consider them. Century Aluminum, 782 S.E.2d 99, 108. There is no requirement under West Virginia law that an assessor make adjustments to an assessment because of physical deterioration, functional obsolescence, or economic obsolescence. Id. at 108-109.

Mr. Prettyman considered the issue of “super adequacy” in regards to his assessment of Cabela’s property. *See* JT. APP. 238-239. In doing so he performed his duty under West Virginia law. Cabela’s has not submitted any evidence that the Assessor failed to consider “functional obsolescence.” In fact, their argument is that he considered it and then improperly failed to use it. Thus, Cabela’s claim fails to show Mr. Prettyman did not comply with West Virginia law and is not enough to show the assessments were wrong or that the circuit court abused its discretion in finding he complied with the law.

3. The Assessor’s tax assessments took into consideration all the required factors listed under W. Va. C.S.R. § 110-1P-2.

In relation to appraisals of any kind, West Virginia law lays out numerous factors which must be considered. *See generally* W. Va. C.S.R. § 110-1P-2. These include the location of the property, its characteristics, ease of alienation of the property, size of property and the impact its sale would have on surrounding properties, purchases within the last eight years, transactions involving comparable properties, value of the property to its owner, condition of the property, income produced by property in preceding three years, and other assessments using commonly accepted methods of determining value, W. Va. C.S.R. § 110-1P-2.1.1.1-10. Other considerations which are important to valuing a property are 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-2.1.3.1-12. Recognizing that “[e]ach of these factors should be considered in the appraisal . . . [s]ome,

however, may be given more weight than others.” W. Va. C.S.R. § 110-1P-2.1.4 (1991). There is no requirement that each factor be used only considered. In re Tax Assessment Against American Bituminous Power Partner LP, 208 W. Va. 250, 529 S.E.2d 757, 764 (2000).

The only issue on remand was whether Mr. Prettyman took into consideration all the factors required by W. Va. C.S.R. § 110-1P-2.1.1.1-10 and W. Va. C.S.R. § 110-1P-2.1.3.1-12. Mr. Prettyman testified that he considered all of the factors before the Board of Equalization and Review. *See* JT. APP. 232-242. In his testimony, Mr. Prettyman, with counsel, went through each factor stating that he considered each in his assessments. *See* JT. APP. 241-242. By considering all required factors, both generally and individually, he has met his obligation under West Virginia law. Despite holding a high burden, Cabela’s chose to ignore the scope and purpose of the remand order and ask questions almost exclusively regarding Mr. Prettyman’s choice to use the cost appraisal approach. *Id.* The circuit court in its discretion was convinced that Mr. Prettyman had performed his obligations under West Virginia law.

It is clear that the Assessor complied with West Virginia law and appropriately applied the cost appraisal approach. Mr. Prettyman considered all forms of depreciation and all required factors as mandated by the law.

C. The circuit court’s decision to uphold the tax assessments of Cabela’s property was within its discretion and was not against the weight of the evidence.

As noted above, in challenging the tax assessments, Cabela’s had a significant burden because county tax assessments are presumed to be accurate and correct with the burden falling on the taxpayer to show, by clear and convincing evidence, that the tax assessment was erroneous. Western Pocahontas Properties, Ltd. v. County Comm’n of Wetzel County, 189 W. Va. 322, 431 S.E.2d 661, 663-664 (1993). Even if a taxpayer is capable of presenting clear and convincing evidence they will not necessarily win a challenge. When it comes to the factual determinations,

i.e. the Assessor's reasoning behind the use or non-use of any items required to be considered, this Court is limited to overturning these findings only upon proof that they are clearly erroneous. Mountain America, LLC v. Huffman, 687 S.E.2d 768, 678 (2009) and In re Tax Assessment of Foster Foundations Woodlands Retirement Community, 223 W. Va. 14, 672 S.E.2d 150, 154-155 (2008). Finally, the trial court's ultimate order upholding or overturning a tax assessment is reviewed under an abuse of discretion standard. Lee Trace, LLC v. Hess 2015 WL 7628718 at 2 (W. Va. Nov. 20, 2015).

Taking these standards into consideration it is apparent that Cabela's claims regarding the weight of the evidence must fail. Cabela's has submitted evidence in the form of an appraisal and testimony by Mr. Herold, supported by Mr. Goldman. However, evidence that merely contradicts that of the Assessor's is not enough for Cabela's to overcome its burden. In order to overturn the decision of the circuit court this Court must find that Mr. Prettyman violated West Virginia law in performing his assessment or that there was some defect in his reasoning that made the assessment obviously wrong or unreasonable. Neither of these can be found here.

As shown above, Mr. Prettyman took into account all three appraisal methods, the three types of depreciation required under the cost approach, and all the factors in W. Va. C.S.R. 110-1P-2 before coming to his final conclusions and assessment values. Mr. Prettyman clearly complied with West Virginia law and his appraisal is not clearly erroneous.

Differences in the opinions of appraisers regarding different considerations and overall value is not uncommon. In fact, even Cabela's appraisers admitted to as much in their testimony. *See JT. APP. 288*. In choosing to rely on the sales comparison/market data appraisal approach Cabela's appraisers gave significant weight to how the "super adequacies" effected Cabela's

property value. On the other hand, Mr. Prettyman did not find that it effected the value of Cabela's property because it did not affect Cabela's use of it, Cabela's ultimately choose to build to suit the needs that were most important to it, and he could not find an instance of Cabela's selling a property that would show reduction in market value for this reason. *See* JT. APP. 152, 240-241, 267-269. Based on these considerations, Mr. Prettyman found that Cabela's property did not suffer from any "functional obsolescence" including "super adequacies." These differences of opinion regarding "super adequacy" and its effect are not enough to show by clear and convincing evidence that Mr. Prettyman was wrong nor are they enough to show that the circuit court abused its discretion in accepting the testimony of Mr. Prettyman and upholding the assessments.

Beyond this lack of evidence, the appraisal submitted by Cabela's suffers from its own inadequacies and as such fails to be clear and convincing evidence that the Assessor's tax assessments were plainly wrong. This Court has found that "[t]he appraisal criteria [should] take into account '[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 its owner." In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, 223 W. Va. 14, 672 S.E.2d 150, 172 (2008). In In re Tax Assessment of Foster Foundation's Woodlands Retirement Community this Court upheld a tax assessment over a challenge of, "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 costs of such improvements allegedly were greater than their market value" Id. at 170. In upholding the assessment and the lower court's judgment, this Court noted that West Virginia law takes into consideration and allows considerations outside of pure market value. Id. at 172.

Cabela's argues that because of its retail model it has spent money on its property that the market may not necessarily value. This is a consideration allowed to be taken into account by West Virginia law. The extra amenities Cabela's put into its Highlands property bring it more income from the property. It also allows Cabela's to reap the benefits of extra visitors, further sales, better marketing, and various other benefits. 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 the taxes. Which is exactly what these other considerations were included to avoid. *See, e.g., In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*.

By ignoring West Virginia law that allows and requires for considerations outside of pure market or resale value Cabela's appraisal fails to comply with West Virginia law. If Cabela's appraisal fails to comply with the law then it cannot be proper evidence to support a finding that the Assessor's was clearly wrong. For the forgoing reasons, Cabela's has failed to carry its burden of proof and prove not only that the Assessor was plainly wrong, but that the circuit court abused its discretion in holding as it did.

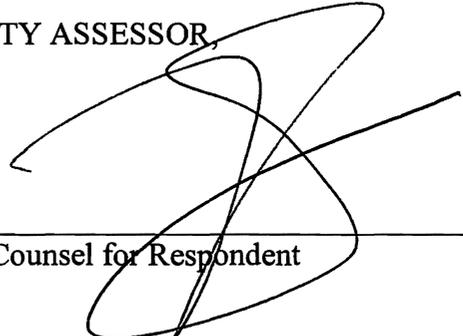
VI. Conclusion

West Virginia law gives significant latitude and discretion to county tax assessors in choosing the methodology of appraising a property so long as they take into consideration the factors noted in W. Va. C.S.R. 110-1P-2. The circuit court was correct in determining that the appraisal of the Cabela's property was performed in compliance with West Virginia law and that Cabela's failed to carry its burden, by clear and convincing evidence, that the appraisals were arbitrary, illegal, or otherwise unjust or inappropriate. For these reasons, Respondent Assessor

prays that this Court affirm the circuit court's final judgment upholding the Assessor's tax assessment for both 2009 and 2010.

OHIO COUNTY ASSESSOR,
Respondent,

By: _____
Counsel for Respondent

A large, stylized handwritten signature in black ink is written over the signature line and extends upwards into the respondent's name area.

Patrick S. Casey (WV Bar No. 668)
Taylor D. Potts (WV Bar No. 12799)
CASEY & CHAPMAN, PLLC
1140 Chapline St.
Wheeling, WV 26003
304-231-2405
866-296-2591 (fax)

COUNSEL FOR RESPONDENT OHIO COUNTY ASSESSOR