

15-0934

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

UNIVERSITY PARK AT
EVANSDALE, LLC,
Petitioner,

v.

//Civil Action No. 15-CAP-8
Honorable Lawrance S. Miller, Jr.,
by special assignment,

MARK A. MUSICK, in his
capacity as the Monongalia
County, West Virginia, Assessor,
Respondent.

OPINION ORDER DENYING PETITION FOR APPEAL

On August 18, 2015, came the Petitioner, University Park at Evansdale, LLC, ("UPE") by its counsel, James A. Walls and Joseph V. Schaeffer; and came the Respondent, Assessor Mark A. Musick ("Assessor") by his counsel Assistant Prosecuting Attorney Phillip Magro; and came *amicus curiae*, the North Central West Virginia Property Owners Association, Inc., by counsel Edmund J. Rollo, on what the parties had previously called cross-motions for summary judgment. At the conclusion of the hearing, the Court took the matter under advisement. After considering the briefs, the arguments of counsel, the record, and the pertinent legal authorities, this Court finds first, that UPE presented an issue of taxability to the Monongalia County Commission sitting as the Board of Equalization and Review; and second, that UPE failed to follow the proper procedures for contesting the taxability of its leasehold interests. Therefore, because UPE did not seek a property tax ruling from the State Tax Commissioner pursuant to the mandatory provisions of West Virginia Code § 11-3-24a, this Court finds that the Petition for Appeal should be denied.

FACTS AND PROCEDURAL HISTORY

This case is an appeal by UPE from a ruling by the Monongalia County Commission sitting as the Board of Equalization and Review ("BER"). The BER de facto affirmed the Assessor's assessment of UPE's leasehold interest in property located near the Evansdale campus of West Virginia University in Morgantown, West Virginia. The Assessor assessed UPE's leasehold interest of property in the amount of \$9,035,617 for the tax year 2014.

UPE contended before the BER that its leasehold interest was neither freely assignable nor a bargain lease, so therefore, pursuant to the legal framework in *Maplewood Community, Inc. v. Craig*, 216 W. Va. 273, 607 S.E.2d 379 (2004) (per curiam), UPE contended its leasehold interest has an assessable value of \$0.00. After a hearing before the BER, the BER ruled that UPE presented an issue regarding taxability of the leasehold interest as opposed to one of valuation, and that therefore the BER lacked jurisdiction to consider the matter. (*See* Hr'g Tr. 41-42, Feb. 17, 2015.¹) *See also* W. Va. Code § 11-3-24(c) ("But in no case shall any question of classification or taxability be considered or reviewed by the board [of equalization and review].").

On March 20, 2015, UPE timely appealed the BER's ruling to the Circuit Court of Monongalia County pursuant to West Virginia Code § 11-3-25. After a motion for disqualification of the assigned Monongalia County Circuit Judge, the Supreme Court of

¹ The typed hearing transcript in this case is a subject of dispute because it was admittedly not certified by the County Clerk of Monongalia County pursuant to West Virginia Code § 11-3-25. *See* W. Va. Code § 11-3-25(b) ("The party desiring to take an appeal from the decision of either board [the BER or the Board of Assessment Appeals] shall have the evidence taken at the hearing of the application before either board, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the board, certified by the county clerk and transmitted to the circuit court as provided in [West Virginia Code § 58-3-4]") Because the audio transcript, which included cassette tape recordings of the hearing, was certified by the County Clerk, this Court considers the audio transcript certified by the County Clerk and the written transcript prepared by certified court reporter Susan E. Alldridge (which no party has alleged is not a correct replication) as citable. While no party has pointed this out, the transcript does contain an error. On the cover page, the transcript alleges to be a reproduction of a "Tuesday, 17 January 2015" hearing. The hearing was actually conducted on February 17, 2015. Thus, this Order cites the transcript as "Feb. 17, 2015" to prevent confusion.

Appeals, by Administrative Order entered June 5, 2015, assigned Judge Lawrence S. Miller, Jr., of the Eighteenth Judicial Circuit to preside over this action.

On June 18, 2015, this Court held a scheduling conference in this matter, during which a briefing schedule was adopted. The schedule required the parties, on their initiative and use of the term "summary judgment," to file cross-motions for summary judgment by July 17, 2015, and responses by July 31, 2015.² During that hearing, counsel for the Assessor indicated that he would file a motion to dismiss based on his contention that the Assessor was not the proper party in the appeal. A hearing was conducted on the Assessor's Motion to Dismiss on July 6, 2015. By order entered July 17, 2015, this Court denied the Assessor's motion to dismiss and found that the Assessor was a proper party. Concurrent with the motion to dismiss, the North Central West Virginia Property Owners Association, Inc. ("Association") filed a motion to intervene, in which it sought to intervene for the purpose of filing an *amicus curiae* brief. By order entered July 14, 2015, this Court denied the Association's motion to intervene but did grant permission for the Association to participate as *amicus* solely on the substantive, non-procedural issues presented by this appeal.

On July 17, 2015, both parties filed their respective motions for summary judgment. On July 31, 2015, Petitioner UPE filed a Response in Opposition to Respondent's Motion for Summary Judgment. Also on July 31, 2015, counsel for *amicus curiae* provided the Court with a brief.³ This Court conducted the hearing on the cross-motions for summary judgment on August 18, 2015. Based on the record, the Court makes the following findings of fact.

² The original scheduling order entered in this matter by the Circuit Court of Monongalia County also ordered "[t]hat the parties shall file their cross-motions for summary judgment by July 17, 2015, and responses by July 31, 2015."

³ In a previous order, this Court ordered that the North Central Property Owners Association, Inc. could participate in this case as *amicus curiae*, but solely on the substantive legal issue regarding assessments of leasehold interests situated similarly to the leasehold interest at issue in this case. Because *amicus* disregarded the Court's order and briefed technical issues of pleading, the Court will not consider *amicus*'s argument on those points. Further, to the

A. UPE's leasehold interest with WVU

The central issue presented by this appeal is whether the Assessor's assessment of UPE's leasehold interest in the property owned in fee by WVU is proper. The leasehold interest is governed by a lease and a sublease, both dated December 23, 2013.

The first lease ("Lease") between the West Virginia University Board of Governors ("WVU") and UPE states that WVU and UPE, through a "Pre-Development Agreement," undertook actions resulting in WVU's acquisition of the land in question for the "purpose of furthering the University's strategic interest to provide its students with safe and affordable housing, along with amenities, in close proximity to its Evansdale campus[.]" (Lease at 1.) Pursuant to the Lease, WVU desired to lease the land to UPE, and that UPE desired to lease the land from WVU and construct improvements thereon, and that UPE would transfer the improvements to WVU. (*Id.*) Thereafter, WVU desired to lease the land back from UPE. (*Id.*)

The lease term is for forty (40) years, (*Id.* at 11, ¶ 3.1), with a guaranteed option to renew after the first term and an option to renew thereafter. (*Id.* at ¶ 3.2.1, 3.2.3.) In consideration for the lease, UPE agreed to pay \$10.00 per month during the construction period. (*Id.* at 12, ¶ 4.1.1.) UPE agreed to pay an amount equal to fifty (50) percent of the "Net Cash of University Park per Lease Year" at the conclusion of the construction period. (*Id.* at ¶ 4.1.2.1.) In addition to the base rent, UPE agreed to pay "additional rent if the Debt Service Coverage Ratio is at least 1.25:1.00 for such Lease Year as described" in that section. (*Id.* at ¶ 4.1.2.2.) UPE's obligation to pay "Lease Year Incentive Rent expires upon |WVU| receiving Lease Year Incentive Rent over the Lease Term in an amount equal to Fifteen Million Dollars

extent that the record, including the *amicus* brief, refers to the North Central West Virginia Property Owners Association, Inc. as an "intervenor," it is erroneous. This Court denied the North Central West Virginia Property Owners Association, Inc.'s motion to intervene because they sought to intervene for the purpose of filing an *amicus* brief.

(\$15,000,000) plus Carrying Costs from the Commencement Date of [the] Lease.” (*Id.* at ¶ 4.1.2.2(2).)

The Lease also has a restriction on alienability. Article 28.1 of the Lease states:

Limitation: Consent Required. [UPE] may not, at any time, sell, assign, convey, or transfer (each, as applicable, a “Transfer”) this Lease to another Person without the prior written consent of Lessor, which consent shall not be unreasonably withheld, conditioned, or delayed. As used herein, “Transfer” shall not include any subletting of the Leased Premises. Notwithstanding the foregoing, but subject to the provisions of Section 26.6.6, such restriction on Transfer shall not apply to a Leaschold Mortgagee or its nominee following the acquisition of the leasehold estate in a foreclosure sale or by deed in lieu of foreclosure.

(Lease at 53, ¶ 28.1.)

On the same date of the Lease, December 23, 2013, pursuant to a Sublease Agreement (“Sublease”), UPE sublet the leased property back to WVU. In consideration for the sublease, which “relates only to the housing facilities that constitute the Residential Premises of University Park and does not relate to the Commercial Premises[.]” (Sublease, ¶ 1.3), WVU agreed to pay UPE “Rent . . . in an amount equal to one hundred percent (100%) of the Gross Revenues of the Residential Premises for each Sublease Year during the Sublease Term.” (*Id.* at ¶ 3.2.) The amount of rent during the first sublease year was “anticipated to be not less than \$600,000 per month of each Sublease month” (*Id.* at ¶ 3.2.) The Sublease’s term “is coterminous with the Lease meaning that it shall expire on the latter of the last day of the fortieth (40th) Sublease Year or the last day of any Renewal Term under the Lease.” (*Id.* at ¶ 3.5.)

In sum, the Lease and Sublease operate the following way:

- WVU leases land it owns to UPE;
- UPE finances the development of improvements and constructs the improvements, which immediately become the property of WVU;

- UPE subleases the residential premises (which counsel alleges consists of 97% of the property) back to WVU;
- WVU collects rents from tenants and pays 100% of those revenues to UPE in consideration for the sublease;
- UPE pays 50% of the net cash back to WVU (or more if revenues exceed the amount stated in the Lease) in consideration for the lease. UPE "is a for-profit entity." (Hr'g Tr. 15, Feb. 17, 2015 (testimony of Mark J. Nesselroad).)

B. Assessor Musick's assessment of UPE's leasehold interest

Assessor Musick assessed UPE's leasehold interest at a value of \$9,035,617 for the tax year 2014. The record indicates that Assessor Musick's office was in communication with the UPE developers at least as early as October 2014 regarding the lease agreements and other details of the partnership between UPE and WVU. It also appears from the record that during that same time frame, Assessor Musick's office sought the advice of a law firm in Charleston, West Virginia, to make a determination of the taxability of UPE's leasehold interest. (*See also* Hr'g Tr., Jan. 28, 2015, from a meeting between the Monongalia County Commission and rental property owners during which Commissioner Callen stated that "we entered in an agreement with a highly reputable state tax attorney in this state that had nothing to do with Morgantown . . . to do an analysis of . . . all of those cases He got an opinion and he followed that opinion."; Hr'g Tr. 26, Feb. 17, 2015 (testimony of Assessor Musick) ("Lewis and Glasser . . . felt that it was taxable based on a leasehold interest").⁴)

By Notice dated January 12, 2015, the Assessor notified UPE that he had assessed the personal property at \$9,035,617, which he believed represents sixty percent of the appraised market value. The description of the property contained on the Assessor's appraisal invoice is "INCOMPLETE CONSTRUCTION[.]" The Assessor testified before the BER and stated that

⁴ Assessor Musick did not testify as to any of the reasons he was given that the leasehold interest was in fact taxable. (*See generally* Hr'g Tr., Feb. 17, 2015.)

his office calculated that the development was 20.6 percent complete on July 1, 2014 “[a]nd they took that of the total value that was submitted of what the project would be to get it appraised at 60 percent of that to get the assessed value.” (Hr’g Tr. 23-24, Feb. 17, 2015.)

On January 26, 2015, the Assessor sent an e-mail to Mark J. Nesselroad, Chief Operating Officer and General Counsel for Glenmark Holding Limited Liability Company. The e-mail from the Assessor stated the following, in pertinent part:

After the meeting on Friday I was going over the content of what was briefly discussed and it looks like your side is contesting the value from a standpoint of it should be a \$0.00 value. The Board of Equalization reviews appeals that our *[sic]* based on disputed values but not taxability or classification issues.

The Notice of Increase letter that was received is based on our office seeing this project as being taxable through a leasehold interest. At this time if a taxpayer objects to that ruling, they can submit in writing their objection and why to the Assessor. The Assessor th[e]n can certify both opinions to the State Tax Commissioner for their review and ruling of the appeal being submitted.

If you have any other information that you think makes the assessed value we have lower, please provide to our office for review. I know the discussion was on the assessment being in error from Brian and he stated about going to the commission as the Board of Equalization for their ruling. That is why I mentioned above their role.

I know this is not the answer you wanted to hear, but you have the right to appeal our status of making it taxable.

On January 27, 2015, counsel for UPE sent Assistant Prosecuting Attorney Phillip Magro a letter in which he demanded that the Assessor withdraw the Notices of Assessment⁵ by January 30, 2015, or UPE would initiate legal actions. Counsel for UPE stated that “representatives of Paradigm, WVCH, and UPE have met and corresponded with the Assessor and others in his office many times since 2013 to ensure that the Assessor had all of the information he needed to properly analyze the assessability and taxability of the Sunnyside and Evansdale projects.” He further stated that, “[a]s you also know, in West Virginia, a leasehold

⁵ The second Notice of Assessment involved University Place and is not at issue in this appeal.

interest is taxable only if it is freely assignable and if it has a separate and independent value from the freehold.” In footnote 2 in the letter, counsel for UPE wrote:

Yesterday, in an e-mail to Mark J. Nesselroad of UPE, the Assessor suggested that UPE could object in writing to the assessment and provide the Assessor with information as to why the assessment is incorrect so that the Assessor could seek a ruling from the State Tax Commissioner. With all due respect, that suggestion is untimely, self-serving, and disingenuous. The Assessor has known exactly what my clients’ position is on this issue for more than a year, and he had all of the information he needed to seek a ruling from the Tax Commissioner long ago.

UPE did not ask the Assessor to certify the question to the State Tax Commissioner.

Instead, UPE sought review in the BER and contended the issue was one of valuation and not taxability.

At the August 18, 2015 hearing, the Court asked counsel for UPE why UPE did not ask for a property tax ruling on the issue of taxability from the State Tax Commissioner. Counsel responded that it had, but that it was unable to get one for political reasons that he was not prepared to comment on at that time. The certified record, however, indicates that UPE affirmatively chose to not seek a property tax ruling from the State Tax Commissioner pursuant to the provisions of West Virginia Code § 11-3-24a. This Court is left to speculate as to why a property tax ruling was not obtained, and speculation is no match for the certified record on appeal.⁶

C. The BER Hearing and the BER’s Ruling

On February 17, 2015, the BER conducted a hearing on the Assessor’s assessment of UPE’s leasehold interest. Testimony was taken from Mark J. Nesselroad, Chief Operating

⁶ The Court notes that on August 24, 2015, it received a letter, dated August 20, 2015, in which counsel for the Assessor requested counsel for UPE clarify the statements he made regarding whether UPE sought a property tax ruling from the State Tax Commissioner. On August 25, 2015, counsel for the Assessor called and left a telephone message to disregard his letter. The Court will not consider the letter because the time for briefing and arguing this case has passed.

Officer and General Counsel for UPE, and from Assessor Mark Musick. James Walls, Esq., appeared on behalf of UPE. Assessor Musick was not represented by counsel.

Mr. Nesselroad testified that the lease was not assignable without restrictions or limitations. (Hr'g Tr. 10, Feb. 17, 2015.) To assign the lease or to sublet the lease,⁷ UPE must first obtain WVU's consent. (*Id.* at 10-11.) Mr. Nesselroad did not testify about whether the Lease is economically advantageous to UPE; he did however state that UPE was a for-profit entity but he did not know how much money UPE made in 2014. (*Id.* at 15.) After questioning by attorney Walls, Commissioner Bloom sought to question Mr. Nesselroad about how much money UPE made on the project. Attorney Walls objected and stated that it was not relevant to the legal framework, which he contended was only a determination of whether the Lease was freely assignable and whether it was a bargain lease. (*See id.* at 15-20.)

Assessor Musick testified and was questioned by counsel for UPE. The Assessor testified that he assessed the property at 60 percent of the cost of 20.6 percent of the full project. (*Id.* at 23-24.) Counsel for UPE asked the Assessor: "Did you are anybody else in your office use the formula that the state tax commissioner directed assessors to use when assessing leasehold interests in West Virginia when you assessed the leasehold value of the lease at University Park?" (*Id.* at 25.) Assessor Musick responded: "No." (*Id.* at 26.)

Assessor Musick also agreed with counsel for UPE that if "WVU doesn't say that it's freely assignable[.]" then he was "not entitled to tax or assess U Park's leasehold interest[.]" (*Id.* at 28.) After reviewing the lease with counsel for UPE, Assessor Musick agreed that Article 28.1, governing the alienability of the leasehold interest, operated to prevent the free assignability of the leasehold interest. (*Id.* at 30-31.)

⁷ Although Mr. Nesselroad's testimony indicated the property could not be sublet without the written consent of WVU, Article 28 of the Lease states: "As used herein, "Transfer" shall not include any subletting of the Leased Premises."

At the conclusion of the hearing, Commissioner Callen began the deliberations by reading West Virginia Code § 11-3-24(c). Commissioner Callen read:

The board shall proceed to examine and review the property books, and shall add on the books the names of persons, the value of personal property, and the description of value of real estate liable to assessment which was admitted by the assessor. The board shall correct all errors in the names of persons, in the description and valuation of property, and shall cause to be done whatever else is necessary to make the assessed valuation comply with the provisions of this chapter. But in no case shall any question of classification or taxability be considered or reviewed by the board.

(Hr'g Tr. 40, Feb. 17, 2015.) Commissioner Callen further stated that after reviewing the *Maplewood* case⁸ and Judge Clawges's opinion in the *Mon Elder* case,⁹ he believed that the answer is "not that it's zero; it's that it is not taxable. We [the County Commission sitting as a board of equalization and review] cannot decide whether it's taxable or not taxable . . ." (*Id.* at 41.)

After the 3-0 vote by the BER in favor of affirming the assessment based on the BER's lack of jurisdiction to consider issues of taxability, counsel for UPE and Commissioner Callen had the following colloquy:

MR. CALLEN: I don't disagree with you. I'm telling you we don't have the jurisdiction to decide it. So let's pass it on to the court that does have the jurisdiction to decide it. That's my finding.

MR. WALLS: You read the right language, and it says that it has an assessed value of zero because all the value should be on the freehold. The leasehold doesn't have any –

MR. CALLEN: Right. Right. But that says: "Therefore, the leasehold interest is not taxable."

MR. WALLS: Right. But before that – before that –

MR. CALLEN: You cannot dispute –

MR. WALLS: Before that –

MR. CALLEN: -- that that is a question of taxability.

MR. WALLS: Before you – before that, though. They said it has not -- the leasehold interest has no assessable value.

⁸ *Maplewood Community, Inc. v. Craig*, 216 W. Va. 273, 607 S.E.2d 379 (2004) (per curiam).

⁹ *Mon Elder Services, Inc. v. Monongalia County Commission, et al.*, Monongalia County Circuit Court Case Nos. 02-C-AP-18, 03-C-AP-10, 04-C-AP-13, and 05-C-AP-10.

MR. CALLEN: But I got to include it all. I can't drop off something I don't like.

MR. WALLS: I understand. With all due I understand. I disagree, but I understand your point.

MR. CALLEN: That's you know, that's fine. I mean, it says very clearly that I'm not to – I'm not – we're not allowed to decide taxability.

MR. WALLS: And I'm not asking you to. But I understand.

MR. CALLEN: But you are. You said that – you said, on three different occasions – because I wrote it down – “this assessment is improper.” Improper means it is not taxable. So I took that you are arguing taxability.

MR. WALLS: If you go back to the very beginning, I made it clear. The first words out of my mouth was this is about valuation.

MR. CALLEN: Right. But I don't pick and choose. I listen to everything, and then make my decision.

MR. WALLS: Okay. Well, we'd ask you to set it to zero, then.

MR. CALLEN: What's that?

MR. WALLS: The assessed value.

MR. CALLEN: No, no. You did not prove by clear and convincing evidence that – as to what the true value is and that the value was wrong.

MR. WALLS: Okay. Could I have that part -- could the commission make that its decision?

MR. BLOOM: Okay. Clarification. We voted on it.

MR. CALLEN: Right.

MR. BLOOM: It's – the decision is done.

* * *

MR. CALLEN: Now, take it to circuit court, get it solved, and we won't have to worry about it again.

(Hr'g Tr. 42-45, Feb. 17, 2015.)

STANDARD OF REVIEW

An initial issue – which is not raised by either party – is the standard of review in this appeal. The parties have labeled their motions as motions for summary judgment, and presumably seek to use the Rule 56 standard. *See* W. Va. R. Civ. P. 56(c) (“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”).

However, appeals in the circuit court from a county commission sitting as a board of equalization and review are on the record, and thus this Court does not sit in a posture to resolve whether there are disputed issues of fact. West Virginia Code § 11-3-25(c) states, in pertinent part:

If there was an appearance by or on behalf of the taxpayer before either board, or if actual notice, certified by the board, was given to the taxpayer, the appeal, when allowed by the court or judge, in vacation, shall be determined by the court from the record as so certified

W. Va. Code Ann. § 11-3-25(c) (West 2015). The Supreme Court of Appeals of West Virginia has held that “[a] taxpayer challenging an assessor’s tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous.” Syl. pt. 5, in part, *In re Tax Assessment of Foster Foundation’s Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2008). The clear and convincing evidence standard is justified because, “[a]s a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct.” 223 W. Va. at 25, 672 S.E.2d at 161 (quoting Syllabus Point 2, in part, *Western Pocahontas Props., Ltd. v. County Comm’n of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993)).

Thus, in an appeal from a board of equalization and review to a circuit court regarding a tax assessment (and when the taxpayer appeared before the board or had actual notice), the circuit court must determine whether the taxpayer proved by clear and convincing evidence presented to the board of equalization and review that the tax assessment is erroneous. To make that determination, the Supreme Court of Appeals of West Virginia has held that “judicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code. ch. 29A. . . .” *In re Tax Assessment Against Am*

Bituminous Power Partners, L.P., 208 W. Va. 250, 255, 539 S.E.2d 757, 762 (2000); *see also Pope Properties/Charleston Ltd. Liability Co. v. Robinson*, 230 W. Va. 382, 385 n.2, 738 S.E.2d 546, 549 n.2 (2013) (noting that *In re Tax Assessment Against Am. Bituminous Power Partners* “observes that judicial review by a circuit court of the decision of a board of equalization and review regarding a challenged tax assessment is limited to roughly the same scope permitted under the contested cases section of the State Administrative Procedures Act . . .”).¹⁰

There is an exception, however, to the “on the record” limitation of an appeal from a board of equalization and review. “If, however, there was no actual notice to the taxpayer, and no appearance by or on behalf of the taxpayer before the board, or if a question of classification or taxability is presented, the matter shall be heard de novo by the circuit court.” W. Va. Code Ann. § 11-3-25(c) (West 2015). Thus, questions involving taxability are heard de novo by the circuit court. West Virginia Code § 11-3-25(c) governs both appeals from a board of equalization and review and a board of assessment appeals. *See* W. Va. Code § 11-3-25(c) (“If there was an appearance by or on behalf of the taxpayer before *either board* . . .”).

¹⁰ West Virginia Code § 29A-5-4 governs judicial review of contested cases in administrative cases. Subsection (g) states that a circuit court

shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code Ann. § 29A-5-4(g) (West 2015).

An issue is presented by the exception to the general rule that appeals from a board of equalization and review is on the record, and is pertinent to this appeal. Specifically, the question is if, as in the case at bar, the BER finds that the issue is one of taxability and not of valuation, and thus, in effect, does not consider the value of the property, does the circuit court consider the question of taxability de novo under West Virginia Code § 11-3-25(c)?

This Court finds that the answer to that issue is no for two reasons. First, West Virginia Code § 11-3-24a provides that in cases concerning classification or taxability of property, after the Tax Commissioner has issued a ruling that is binding on the assessor,

either the assessor or the taxpayer may apply to the circuit court of the county within thirty days after receiving written notice of the Tax Commissioner's ruling, for review of the question of classification or taxability in the same fashion as is provided for appeals from the county commission sitting as a board of equalization and review in section twenty-five of this article [W. Va. Code § 11-3-25].

W. Va. Code Ann. § 11-3-24a(c) (West 2015).

Second, West Virginia Code § 11-3-23a, which governs informal review and resolution of classification, taxability, and valuation issues, specifically states that “[a] taxpayer who wants to contest the classification or taxability of property must follow the procedures set forth in section twenty-four-a of this article [W. Va. Code § 11-3-24a].” W. Va. Code Ann. § 11-3-23a(b) (West 2015) (emphasis added). For the circuit court to review de novo the taxability of the property would allow a taxpayer to skip the mandatory requirements of presenting the issue to the State Tax Commissioner as provided by West Virginia Code § 11-3-24a. Thus, the provision in West Virginia Code § 11-3-25(c) that provides that “if a question of classification or taxability is presented, the matter shall be heard de novo by the circuit court” is read by this Court to apply only when an appeal is taken from the State Tax Commissioner's ruling regarding the same under West Virginia Code § 11-3-24a.

Therefore, because this Court finds that a Rule 56 motion for summary judgment is not applicable to an on-the-record appeal from a board of equalization and review, this Court would, absent the specific factual circumstances presented by this case, utilize the standard of review applicable in administrative appeals under West Virginia Code § 29A-5-4 to consider whether the taxpayer proved by clear and convincing evidence to the BER that the assessor's assessment was erroneous. However, because the BER in this case did not consider the value of the property at all, and instead made a determination that the issue was one of taxability and thus it lacked jurisdiction, this Court will consider de novo whether the issue before the BER was one of taxability. Because this Court finds that the resolution of that issue resolves the appeal, the Court does not need to consider whether the assessed value was erroneous.

OPINION

Before considering the substance of the appeal, the Court considers various arguments made by the Assessor in his July 17, 2015 "Motion for Summary Judgment" and "Memorandum in Support of Motion for Summary Judgment" and UPE's July 31, 2015, "Response in Opposition to Respondent's Motion for Summary Judgment." The Assessor made the following 14 arguments:

1. Assessor Musick is not the proper party Respondent.
2. UPE failed to join the necessary and proper parties to the appeal.
3. When the BER hears tax protests, it does so pursuant to West Virginia Code § 11-3-24.
4. An aggrieved taxpayer who elects to appeal the BER's decision must do so pursuant to West Virginia Code § 11-3-25. Because § 11-3-25(b) requires the county clerk to certify the record, and the transcript was not certified by the county clerk but was

instead transcribed by certified court reporter Sue Alldridge, the Court should grant summary judgment in favor of the Assessor.

5. UPE failed to file a bill of exceptions for appeal pursuant to West Virginia Code § 58-3-3, and failed to make any objections or exceptions on the record.
6. The provisions of West Virginia Code § 53-8-1, et seq., are controlling.
7. UPE did not show by clear and convincing evidence that its assessments were erroneous.
8. UPE did not sustain its burden to show that the valuation was incorrect.
9. Assessor Musick followed the prescribed methodology imposed by the West Virginia State Tax Department.
10. This Court can only reverse the decision of the BER when its decision is supported by substantial evidence, unless plainly wrong.
11. The allegations in the Petition do not show a clear and cogent right in UPE for the action prayed for.
12. The action taken by the BER was proper and correct.
13. The BER followed the laws and statutes of West Virginia.
14. The BER has jurisdiction to enter the valuation of UPE's property in this matter.

(Resp.'s Mot. Summ. J.)

The Memorandum in Support of Summary Judgment largely rehashes the arguments the Assessor made during his motion to dismiss. (*Compare* Mem. in Supp. Mot. Summ. J. at 1-8 with June 25, 2015 Motion to Dismiss.) This Court, by Order entered July 17, 2015, made findings of fact and conclusions of law, which are hereby incorporated by reference, denying the motion to dismiss. To the extent the same grounds are raised by the Assessor's motion for

summary judgment, this Court adopts the findings of fact and conclusions of law in its July 17, 2015 Order Denying Respondent Assessor's Motion to Dismiss in their entirety. However, the Assessor raises several new grounds, which this Court now considers.

A. A tape recording of the hearing was certified by the County Clerk, and the Assessor does not allege that the transcript is inaccurate.

The Assessor contends that West Virginia Code § 11-3-25(b) requires the County Clerk to certify the record, and the County Clerk did not certify the transcript prepared by certified court reporter Sue Alldridge. Accordingly, the Assessor asks this Court to grant summary judgment in his favor.

West Virginia Code § 11-3-25(b) states:

The party desiring to take an appeal from the decision of either board shall have the evidence taken at the hearing of the application before either board, including a transcript of all testimony and all papers, motions, documents, evidence and records as were before the board, certified by the county clerk and transmitted to the circuit court as provided in section four, article three, chapter fifty-eight of this code, except that, any other provision of this code notwithstanding, the evidence shall be certified and transmitted within thirty days after the petition for appeal is filed with the court or judge, in vacation.

W. Va. Code Ann. § 11-3-25(b) (West 2015).

UPE admits that it did not have the transcript prepared by Sue Alldridge certified by the County Clerk, (UPE's Resp. at 12), but argues that the audio transcript prepared by the County Clerk was certified and provided with the petition for appeal. (*Id.*)

West Virginia Code § 11-3-25(b) does not specify what type of transcript is to be certified and provided to the circuit court on appeal. Because the audio transcript was certified by the County Clerk, and because no argument is made that the stenographic transcript is an inaccurate representation of that hearing, this Court denies the Assessor's motion for summary judgment on this ground. The Court considers the typed transcript as an aid to understand the

certified audio transcript. The record has been fairly presented to this Court, and this Court can easily discern what transpired before the BER.

B. Although UPE did not file a bill of exceptions, it did plainly and unambiguously object to the BER's ruling during the February 17, 2015 hearing.

The Assessor contends that this Court should grant summary judgment in his favor because UPE did not file a bill of exceptions as required by West Virginia Code § 58-3-3, which states:

At the trial or hearing of any matter by the county court as to which an appeal will lie under section one of this article, a party may except to any opinion of the court and tender a bill of exceptions to such opinion, which, if the truth of the case be fairly stated therein, shall be signed by the commissioners holding the court, or a majority of them, and the same shall be a part of the record of the case. Or, in lieu of such bill of exceptions, such exception may with like effect be shown by certificate in the manner provided in sections thirty-six and thirty-seven, article six, chapter fifty-six of this Code, signed by such commissioners, or a majority of them. If any commissioner refuse to sign such bill of exceptions or such certificate in a case in which he participated in the decision complained of, he may be compelled to do so by the circuit court of the county by mandamus. A party to any such proceeding, as to which an appeal will lie as aforesaid may avail himself of any error appearing on the record by which he is prejudiced without obtaining a formal bill of exceptions, provided he objects or excepts on the record to the action of the court complained of, and provided it is such a matter as can be considered without a formal bill of exceptions.

W. Va. Code Ann. § 58-3-3 (West 2015). The provisions of West Virginia Code § 58-3-3 are mandatory in tax appeals brought pursuant to West Virginia Code § 11-3-25, so long as they are not inconsistent with the applicable provisions of § 11-3-25. See *In re Stonestreet*, 147 W. Va. 719, 131 S.E.2d 52 (1963) (holding that provisions of W. Va. Code § 58-3-4 requiring a certified record are mandatory in appeals under W. Va. Code § 11-3-25).

However, a pertinent exception to the general rule that bills of exceptions are required is contained in West Virginia Code § 58-3-3.

A party to any such proceeding, as to which an appeal will lie as aforesaid may avail himself of any error appearing on the record by which he is prejudiced

without obtaining a formal bill of exceptions, provided he objects or excepts on the record to the action of the court [now commission] complained of, and provided it is such a matter as can be considered without a formal bill of exceptions.

W. Va. Code Ann. § 58-3-3 (West 2015).

Bills of exceptions and certificates in lieu thereof were unknown to the common law and are wholly creatures of statute. . . . The purpose of a bill of exceptions is to exhibit on the record the supposed mistakes of the trial court, which do not appear on the record and could not otherwise be brought before an appellate court for review and correction, if erroneous.

Rollins v. Daraban, 145 W. Va. 178, 182-83, 113 S.E.2d 369, 372 (1960) (internal citations and quotations omitted).

In this case, UPE plainly and unambiguously objected to the BER's ruling by disagreeing and attempting to persuade the BER to change its ruling. This Court can clearly see what the alleged error is on appeal. Accordingly, the Court finds and concludes that the exception to the general rule requiring bills of exception contained in West Virginia Code § 58-3-3 is applicable, and denies the Assessor's motion for summary judgment on this ground.

C. This Court does not consider UPE's argument that the Assessor did not follow the appraisal methodology because UPE did not follow the mandatory statutory procedures to appeal an issue of taxability.

UPE asks in its motion that this Court grant its appeal because UPE contends the Assessor abused his discretion by failing to follow the standards prescribed by the State Tax Commissioner, contained in West Virginia Code of State Rules § 110-1P-3.3, for valuation of leasehold interests. According to UPE, this constitutes clear and convincing evidence that the assessment was incorrect. Therefore, UPE asks this Court to set the assessment at \$0.00.

The Assessor contends that this Court should grant it summary judgment because UPE did not show by clear and convincing evidence that the assessment was incorrect.

Because this Court finds that the issue before the BER involved one of taxability, and thus the mandatory statutory procedures contained in West Virginia Code § 11-3-24a were not followed, this Court finds that it is unnecessary to consider this ground for appeal.

D. The remaining grounds asserted by the Assessor are summary conclusions that were not supported by evidence or argument.

The remaining grounds cited by the Assessor in support of his motion are summary conclusions that were not supported by evidence in the record or by the argument of counsel. For example, the fourteenth ground, that the BER had jurisdiction to enter the valuation of UPE's property, is at odds with what actually happened in the case. Accordingly, the Court denies the Assessor's motions for the remaining grounds/summary conclusions.

E. The assessment was not void *ab initio* even though it was not requested by the freeholder.

UPE contends in its motion that because WVU did not request that the leasehold interest be assessed, this Court should find in its favor. (Pet'r's Mot. Summ. J. at 18.) UPE cites Syl. pt. 3, *Maplewood, supra*, for the proposition that "the burden of showing that a leasehold has an independent value is upon the freehold taxpayer and the taxpayer must request in a timely manner the separate listing of freehold and leasehold interests." Syl. pt. 3, *Maplewood Community, Inc. v. Craig*, 216 W. Va. 273, 607 S.E.2d 379 (2004) (per curiam); Syl. pt. 2, *Great A & P Tea Co. v. Davis*, 167 W. Va. 53, 278 S.E.2d 352 (1981). In footnote 8 of UPE's Motion for Summary Judgment, it states that placing the burden on the freeholder reflects a common-sense approach "[b]ecause a separately-marketable leasehold estate reduces the value

of the freehold, the freeholder has an incentive to seek a separate listing when its freehold estate is so burdened." (Pet'r's Mot. Summ. J. at 18 n.8.)¹¹

Although *Great A & P Tea Co. v. Davis, supra*, does require the freehold taxpayer to request that the leasehold interest be assessed, this framework is a poor way to consider the issue as it is presented in this case. WVU is the freeholder, and it is not a *taxpayer* and has no incentive to request that UPE pay property taxes on the leasehold interest because WVU never gets a tax bill. Second, post-*Great A & P*, in 1989 the State Tax Commissioner promulgated the Valuation of Leasehold Interests training manual. In that manual, Step Two requires the assessor to determine the taxability of the partial interests. "In the case of publicly owned property, the lessor's interest . . . would be tax-exempt, while the lessee's interest, if marketable, would be taxable." (Valuation of Leasehold Interests at 5.)

Under this framework, this Court finds and concludes that the Assessor has the discretion to examine different leasehold interests and determine the taxability of such leasehold interest, and if taxable, the value. In this particular case, because WVU is tax-exempt and thus the freeholder is not a *taxpayer*, this Court denies UPE's Motion for Summary Judgment on this ground.

F. The question UPE presented to the BER was an issue of taxability, and thus the BER did not have jurisdiction to answer it. Because UPE did not follow the mandatory procedures outlined in West Virginia Code § 11-3-24a, this Court finds and concludes that the Petition for Appeal should be denied.

The BER ruled after the February 17, 2015 hearing that it did not, pursuant to West Virginia Code § 11-3-24(c), have jurisdiction to decide questions of taxability, and that in the opinion of the BER, the issue UPE presented was one of taxability.¹²

¹¹ UPE does not explain how a separately-marketable leasehold interest reduces the value of the freehold more than a non-assignable leasehold interest of 40 years. Either way, the property is subject to a lease for a significant length of time and would still operate to encumber the property.

UPE argued in front of the BER that its leasehold interest is not freely assignable and is not a bargain lease, therefore the value of the leasehold interest is \$0.00. UPE has maintained that argument on appeal to this Court. UPE contends that this Court has a mandatory statutory duty to correct the alleged erroneous assessment and set the valuation of its leasehold interest at zero dollars because the lease is not freely assignable and is not a bargain lease. UPE further contends that the BER erred by ruling that the issue was one of taxability and not of valuation.

First, West Virginia Code § 11-3-25(d) provides that

[i]f, upon the hearing of appeal, it is determined that any property has been assessed at more than sixty percent of its true and actual value determined as provided in [Chapter 11], the circuit court shall, by an order entered of record, correct the assessment, and fix the assessed value of the property at sixty percent of its true and actual value.

W. Va. Code Ann. § 11-3-25(d) (West 2015). Accordingly, if the Court finds that the leasehold interest is assessed at more than sixty percent of its true and actual value, then this Court must correct the assessment. Implicit in that finding, however, is that the property is taxable in the first instance.

UPE contends that the BER erred by finding that this is an issue of taxability. UPE argues that the BER's ruling is erroneous because the leasehold interest does not have a value independent of the freehold estate.¹³ UPE cites *Maplewood Community, Inc. v. Craig*, 216 W. Va. 273, 607 S.E.2d 379 (2004) (per curiam), for the proposition that "a leasehold interest has assessed value only if it has value independent of the freehold." (Pet'r's Mot. Summ. J. at 11.)

¹² The Court notes that UPE argued at the August 18, 2015 hearing in this Court that the BER made valuations in two similar cases, and that after being presented with similar issues later made different rulings after experiencing what UPE called a "learning curve." This Court is confined to the record, and the record before this Court does not show what the BER ruled in the other cases or why it may have ruled that way. Accordingly, this Court does not assign any weight to what the BER ruled in the other cases.

¹³ In other words, the leasehold interest has value, but it is not a value separate and apart from WVU's freehold estate. UPE contends the assessable value is zero, presumably because the interest is already included in the freehold estate's worth.

UPE further contends that whether the leasehold interest has independent value depends on whether the leasehold interest is freely assignable and whether it is a bargain lease. (*Id.*)

A leasehold interest can be taxable under certain circumstances. In *Great A & P Tea Co., Inc. v. Davis*, 167 W. Va. 53, 278 S.E.2d 352 (1981), the Supreme Court of Appeals of West Virginia held that

[t]he county assessor may presume that leaseholds have no value independent of the freehold estate and proceed to tax all real property to the freeholder at its true and actual value; the burden of showing that a leasehold has an independent value is upon the freehold taxpayer and the taxpayer must request in a timely manner the separate listing of freehold and leasehold interests.

Syl. pt. 2, *Great A & P Tea Co., Inc. v. Davis*, 167 W. Va. 53, 278 S.E.2d 352 (1981).

In *Davis*, the Mar-Mar Corporation leased a building to A & P. The county assessor assessed the Mar-Mar property and included the property that was leased to A & P. Mar-Mar appealed this assessment to the BER, and the BER reduced the assessment. After that, the assessor subtracted the difference and assessed the amount of the leasehold interest to A & P. A & P then appealed to the BER and the State Tax Commissioner. The BER ruled adverse to A & P and the State Tax Commissioner ruled that the leasehold interest was taxable.¹⁴

The Court held that West Virginia Code § 11-5-4 (1972) provided statutory authority "that a separate leasehold is taxable if it has a separate and independent value from the freehold." 167 W. Va. at 55, 278 S.E.2d at 355. The Court reasoned that

[w]here leaseholds are of short duration the rent paid will usually reflect income to the owner of the freehold commensurate with the fair market value of the real property. Under ordinary conditions the freehold estate will not be reduced in value by virtue of the leasehold, nor will the leasehold itself have any ascertainable market value. Since this latter condition is the normal circumstance in West Virginia, when assessors assess freeholds subject to leaseholds the property is usually fully taxed.

¹⁴ A & P appears to have launched a two-prong attack. It appealed to the BER regarding the valuation of the leasehold interest, and then it sought an abatement from the State Tax Commissioner.

However, there are circumstances involving long-term leaseholds where changed business conditions combined with persistent inflation have made the leaseholds themselves marketable assets of value. Under such circumstances, since the freehold estate is charged with the leasehold for a term of years, the freehold's fair market value is reduced in exact proportion to the value of the leasehold and, therefore, if the real property subject to the leasehold is to be taxed at its "true and actual value," assessors must take into consideration the reduced value of the freehold attendant upon the making of a very bad contract.

167 W. Va. at 56, 278 S.E.2d at 355.

Thirteen years later, the Supreme Court of Appeals considered a case involving the taxation of a leasehold estate where the owner of the freehold estate was tax exempt based on its status as a political subdivision. In *Maplewood Community, Inc. v. Craig*, 216 W. Va. 273, 607 S.E.2d 379 (2004) (per curiam), the Court consolidated two cases involving similar facts. Both petitioners, Maplewood and Mon Elder, were not-for-profit West Virginia corporations exempt from federal income taxes. Both petitioners provided senior residential communities on a not-for-profit basis and challenged the assessments on the basis that they operated the communities primarily for charitable purposes.

Especially pertinent to the analysis in the case at bar, in Mon Elder's case the Monongalia County Assessor assessed Mon Elder's leasehold interest. Monongalia Health Systems, Inc., incorporated Mon Elder and donated 11.35 acres, which was then conveyed to the Monongalia County Building Commission. Mon Elder and the Building Commission entered into a lease arrangement under which Mon Elder paid rent to the Building Commission in an amount sufficient to amortize the principal and interest on the tax exempt development bonds. Mon Elder was prohibited from transferring, leasing, sub-leasing, or otherwise conveying its interest in the lease without the consent of the Building Commission. At the end of the lease term, the Building Commission retained ownership of the senior residential community.

In 2001, the Monongalia County Assessor assessed the Building Commission's interest in the property. Mon Elder requested that the Assessor exempt the property on the grounds that it was property used for charitable purposes. After the Assessor rejected the request, Mon Elder and the Assessor jointly requested a property tax ruling from the State Tax Commissioner. See W. Va. Code § 11-3-24a (requiring protests regarding classification or taxability of property to be sent to the State Tax Commissioner before appeal to the circuit court). The State Tax Commissioner concluded that the Building Commission was exempt from the property tax based on its status as a political subdivision.

In 2002, the Monongalia County Assessor, instead of attempting to assess the property against the Building Commission, assessed the property against Mon Elder for its leasehold interest in the property. Mon Elder then requested the Assessor to exempt it from property taxes on the grounds that it operated for charitable purposes.¹⁵ Mon Elder and the Assessor again jointly requested a property tax ruling from the State Tax Commissioner, and the State Tax Commissioner ruled that she did not have sufficient information to demonstrate that the property was used exclusively for charitable purposes. At the same time it was seeking a ruling from the Tax Commissioner, Mon Elder also sought review before the BER. On the same day the Tax Commissioner issued its ruling, the BER affirmed the Assessor's appraisals against Mon Elder.¹⁶

Mon Elder then appealed both the Assessor's (and the Tax Commissioner's) determination that the property was not used for charitable purposes and the BER's decision to the circuit court. The circuit court affirmed the property tax assessments and based its ruling on

¹⁵ The State Tax Commissioner did not reach this issue in the 2001 case because she found that the Building Commission was exempt from property taxes because it was a political subdivision.

¹⁶ Although the *Staplewood* opinion does not explicitly so state, it appears that Mon Elder attempted to have the property considered exempt by the Tax Commissioner while simultaneously attacking the valuation before the BER. The opinion does not state the BER's reasoning for affirming the assessment.

a finding that Mon Elder had failed to meet its burden of proof before the BFR. The circuit court did not rule on “whether Mon Elder’s leasehold interest ha[d] any assessable value independent of the underlying value of the property[.]” *Maplewood Community, Inc.*, 216 W. Va. at 279, 607 S.E.2d at 385.

After concluding that the property was not subject to exemption because it was not operated exclusively for charitable purposes, the Supreme Court of Appeals considered the “Taxability of Mon Elder’s Leasehold Interest[.]” *Maplewood Community, Inc.*, 216 W. Va. at 286, 607 S.E.2d at 392 (emphasis in original because it was a subheading in the opinion). The Supreme Court framed the argument the following way: “According to Mon Elder, only when the record affirmatively establishes that the lease has acquired marketable value separate from the underlying property can such a leasehold be *subject to taxation*.” *Id.* (emphasis added).

The Court found first that a county assessor could tax a leasehold interest if it has an independent value. 216 W. Va. at 286, 607 S.E.2d at 392 (citing Syl. pt. 2, *Great A & P Tea Co. v. Davis, supra*). The Court stated that

[s]ubsequent to the *Davis* case, the state tax department developed an eight-step process for valuing leasehold interests in real estate that is referred to as the ‘Leaschold Appraisal Policy.’ Pursuant to that process, steps one and two require an initial determination of whether a leasehold estate was created and secondly whether the lessee has a marketable right to assign or transfer the lease. The remaining six steps in the process are directed at arriving at a value for the leasehold estate. Critical to applying this policy, however, is appreciation of the fact that ‘the separate value of a leasehold, if any, is based on whether the leasehold is economically advantageous to the lessee, that is a so-called bargain lease, and is freely assignable so that the lessee may realize the benefit of such bargain in the market place.’

Maplewood Community, Inc., 216 W. Va. at 286, 607 S.E.2d at 392 (quoting "Valuation of Leasehold Interests," State Tax Commissioner's Annual In-Service Training Seminar, June 14, 1989).¹⁷

The *Maplewood* opinion also shows that the State Tax Commissioner argued, in response to Mon Elder's contention that it was not a bargain lease, that the annual rent payment during the final fourteen years of the forty-five-year lease was only ten dollars. See 216 W. Va. at 287, 607 S.E.2d at 393. In response to Mon Elder's argument that the lease was not freely assignable, the State Tax Commissioner argued that the lease agreement did not prohibit assignment – it merely prohibited the sale of the lease without the approval of the lessor.¹⁸ See *id.* The Supreme Court of Appeals did not decide either issue, and instead remanded the case back to the circuit court to make findings of fact and conclusions of law regarding the *taxability* of the leasehold interest. The Court stated that "we remand this issue of whether the lease agreement between Mon Elder and the Building Commission has value independent of the property at issue to the circuit court for further proceedings." *Id.*

UPE contends that under the framework established in *Maplewood Community, Inc.*, this Court should find that its leasehold interest should be assessed at zero because it is neither freely assignable nor a bargain lease. UPE relies heavily on the Circuit Court of Monongalia County's June 23, 2005 opinion on remand in *Mon Elder Services, Inc. v. Monongalia County Commission, et al.*, Monongalia County Consolidated Case No. 02-C-AP-18.

¹⁷ The "Valuation of Leasehold Interests" was included in the certified record. *Amicus* correctly points out that the "Valuation of Leasehold Interests" cited by the *Maplewood* Court does not contain the terms "freely assignable" and "bargain lease." (*Amicus* Brief at 12.) Instead, the Valuation of Leasehold Interests states at page five that "[f]irst, the lease contract should be examined to see whether an estate for years was created and are the marketable rights transferable. Second, the assessor . . . should make the determination as to taxability (for ad valorem tax purposes) of the partial interests to the various parties involved." The Leasehold Appraisal Policy referenced by the *Maplewood* Court and the Circuit of Monongalia County is not the "Valuation of Leasehold Interests" as cited by both courts. That citation is erroneous, and this Court was not provided the "Leasehold Appraisal Policy."

¹⁸ This Court finds these points pertinent. The State Tax Commissioner was provided with the opportunity to argue whether the property was taxable in the *Mon Elder* case, unlike in the situation at bar.

In that order, the Monongalia County Circuit Court found "that Mon Elder's leasehold interest does not have any assessable value independent of the underlying value of the property[,] and therefore[] the leasehold interest is not taxable." Order at 2, June 23, 2005, *Mon Elder Services, Inc. v. Monongalia County Commission, et al.*, Monongalia County Consolidated Case No. 02-C-AP-18. The Circuit Court cited *Maplewood, supra*, for the proposition that "the separate value of a leasehold, if any, is based on whether the leasehold is economically advantageous to the lessee, that is a so-called bargain lease, and is freely assignable so that the lessee may realize the benefit of such bargain in the market place." *Id.* at 6 (quoting *Maplewood*, 216 W. Va. at 286, 607 S.E.2d at 392 (which in turn erroneously cited the Valuation of Leasehold Interests training manual)¹⁹).

The Circuit Court reasoned that because the total of the rents paid over the life of the lease exceeded the entire cost of acquisition or construction of the project, that therefore it was not a bargain lease. *Id.* Second, the Circuit Court reasoned that because the lease agreement stated that it could not be transferred without the prior written consent of the issuer, the lease was therefore not freely assignable. *Id.* at 7.

The Mon Elder case is distinguishable from this case two separate ways.²⁰ First, in that case, Mon Elder properly presented the question of exemption from taxes to the State Tax Commissioner. In the case at bar, UPE purposefully forewent certifying this question to the State Tax Commissioner, and even recognized in the demand letter that "[t]he Assessor has

¹⁸ See footnote 17, *supra*. It should be noted that the Valuation of Leasehold Interests training manual from the June 1989 in-service training manual was promulgated by the State Tax Commissioner. The State Tax Commissioner in *Maplewood* argued that Mon Elder's lease did not prohibit assignment and instead only prohibited the sale of the lease without the approval of the Building Commission. See *Maplewood*, 216 W. Va. at 287, 607 S.E.2d at 393.

²⁰ Although not a distinguishing characteristic, this Court notes that on remand, the *Mon Elder* case was decided by a court of equal jurisdiction. To the best of this Court's knowledge, the order on remand in *Mon Elder* was not appealed to the Supreme Court of Appeals. Accordingly, a definitive ruling by the Supreme Court of Appeals of West Virginia has not been issued, and it may have or may not have agreed with Mon Elder Services, Inc., or the State Tax Commissioner, on the taxability of Mon Elder Services, Inc.'s leasehold interest.

known exactly what my clients' position is on this issue for more than a year, and he had all of the information he needed to seek a ruling from the Tax Commissioner long ago." (Letter from James Walls to Phillip Magro at n.2, Jan. 27, 2015.) Thus, UPE recognized that the Tax Commissioner could issue a ruling; however, UPE did not follow the mandatory procedures set forth in West Virginia Code § 11-3-24a.²¹ The Assessor, although allowed by statute to seek a property tax ruling on his own, is under no duty to do so. *See* W. Va. Code § 11-3-24a(b) ("The assessor may, and if the taxpayer requests, the assessor shall, certify the question to the State Tax Commissioner . . ."). *See also* W. Va. Code § 11-3-23a(b) ("A taxpayer who wants to contest the classification or taxability of property **must** follow the procedures set forth in section twenty-four-a of this article.") (emphasis added).

Second, to the extent that the analysis involves only a determination of whether the leasehold interest is a "bargain lease" and whether it is "freely assignable," the facts in the case at bar are different. Unlike in the case at bar, Mon Elder did not sublease the property.

This Court recognizes *Mon Elder* and *Maplewood* both cite the Valuation of Leasehold Interests for a proposition that it does not state. The Valuation of Leasehold Interests seminar training manual does not refer to "bargain leases" or "freely assignable" leases. Instead, it refers to "marketability." It states:

Before one proceeds with the valuation of leasehold interests, there are several preliminary steps which should be covered.

First, the lease contract should be examined to see whether an estate for years was created and are the marketable rights transferable.

Second, the assessor . . . should make the determination as to taxability (for ad valorem tax purposes) of the partial interests to the various parties involved. In the case of publicly owned property, the lessor's interest (the leased

²¹ UPE stated at the August 18, 2015 hearing that it had tried to get an opinion from the State Tax Commissioner but was precluded for political reasons that counsel would not expound upon. However, the record is quite clear that post-assessment, UPE did not ask the Assessor to certify the question to the State Tax Commissioner as contemplated in West Virginia Code § 11-3-24a. Counsel did state that perhaps it would do that in the future.

fee) would be tax-exempt, while the lessor's interest (leasehold interest), if marketable, would be taxable. . . .

Valuation of Leasehold Interests at 5, State Tax Commissioner's Annual In-Service Training Seminar, June 1989. The remaining steps then involve the valuation of the leasehold interest. As a preliminary matter, the first two steps are to determine whether a leasehold interest was created that is taxable.

This Court, however, does not need to reach the merits of this issue, and will not reach the merits of whether it is actually taxable, because UPE failed to follow the proper procedure, which it was mandated to do by statute, to determine whether the leasehold interest was taxable. This Court analyzes this case under the *Muplewood* framework to demonstrate that the first step of the inquiry involves a question of law regarding taxability of leasehold interests and that the BER is not the proper forum. *This Court is NOT making a ruling that the property is taxable or is not taxable because the statutory procedures, which would have required the input of the State Tax Commissioner were not followed.*

UPE's argument, although not wholly unpersuasive,²² is based on the contention that because its leasehold does not have a value independent of the freehold, the value should be assigned as zero. However, the determination is one of taxability for the following reason: In order to be taxable, the leasehold interest must have a value separate and apart from the freehold estate. The *Great A & P Tea Co. v. Davis* case held that "[i]t would appear from the statutory scheme that a separate leasehold is taxable if it has a separate and independent value from the freehold." 167 W. Va. at 55, 278 S.E.2d at 355. Thus, the question presented to the BER was

²² The Court makes this comment because it finds that the framework is not crystal clear. In one sense, whether a leasehold interest has value separate and independent from the freehold estate requires, to some extent, a determination about value. The Court disagrees with UPE's argument because that question does not require a determination of what that value is. That is the second step, which is to be completed after taxability is established. Hence, a "value" of zero dollars is really just another way of saying it is not taxable, or that it is worthless. See *Merriam-Webster's Collegiate Dictionary* 1445 (11th ed. 2003) (defining "worthless" as "lacking worth: VALUELESS").

whether the leasehold interest had a value separate from the freehold estate. A resolution of that question answers whether the leasehold interest is taxable. That is a matter of law that the BER does not have jurisdiction to consider. See W. Va. Code § 11-3-24(c) ("But in no case shall any question of classification or taxability be considered or reviewed by the board."). The valuation of property is a ministerial task, and a county commission is equipped to make such determination. Whether a leasehold interest has value separate and independent from the freehold estate, and is thus taxable, is a question of law that a county commission has no authority to decide. See *Muckin v. Taylor County Court*, 38 W. Va. 338, 18 S.F. 632 (1893).

The Court further finds and concludes that because UPE did not follow the correct statutory procedure to contest the taxability of its leasehold interest, the Petition for Appeal must be denied. W. Va. Code § 11-3-24(c) states, unequivocally, that "[i]n no case shall any question of classification or taxability be considered or reviewed by the board [of equalization and review]." W. Va. Code Ann. § 11-3-24(c) (West 2015). West Virginia Code § 11-3-23a also states unequivocally that "[a] taxpayer who wants to contest the classification or taxability of property must follow the procedures set forth in section twenty-four-a of this article." W. Va. Code Ann. § 11-3-23a(b) (West 2015).

Those procedures require a taxpayer who wishes to challenge the taxability of his or her property to take the following actions. First, the taxpayer, up to and including the time the property books are before the BER, must apply to the assessor for information regarding the taxability of his or her property. W. Va. Code § 11-3-24a(a). If the taxpayer believes that the property is "exempt or otherwise not subject to taxation, the taxpayer shall file objections in writing with the assessor. The assessor shall decide the question . . ." *Id.*

If the assessor wishes, he may certify the question to the State Tax Commissioner. W. Va. Code § 11-3-24a(b). If the taxpayer requests the question be certified to the State Tax Commissioner, then the assessor must certify the question. *Id.* The State Tax Commissioner then, at least by February 28 of the assessment year, must instruct the assessor as to how the property shall be treated. W. Va. Code § 11-3-24a(c). That property tax ruling from the State Tax Commissioner is binding on the assessor,

but either the assessor or the taxpayer may apply to the circuit court of the county within thirty days after receiving written notice of the Tax Commissioner's ruling, for review of the question of classification or taxability in the same fashion as is provided for appeals from the county commission sitting as a board of equalization and review in section twenty-five of this article.

W. Va. Code Ann. § 11-3-24a(c) (West 2015). “[I]f a question of classification or taxability is presented, the matter shall be heard de novo by the circuit court.” W. Va. Code Ann. § 11-3-25(c) (West 2015).

Because this was a question of taxability, UPE took its appeal from the Assessor's decision to the wrong forum. UPE should have asked the Assessor to certify the question to the State Tax Commissioner, and then it could have appealed to the Circuit Court, where it would have been heard de novo, should it have received an adverse ruling from the State Tax Commissioner. (In turn, should UPE have received a favorable property tax ruling, the Assessor could have appealed the issue to the circuit court where it would have been considered de novo.) The Legislature has enunciated a clear policy that the State Tax Commissioner be given the first opportunity to rule on the issue of questions of taxability, and the State Tax Commissioner has not been able to do so in this instance. The statutory language is clear that any taxpayer seeking to contest the taxability of his or her property “*must* follow the procedures

set forth in twenty-four-a of this article." W. Va. Code Ann. § 11-3-23a(b) (West 2015) (emphasis added).

This Court finds and concludes that UPE presented an issue of taxability to the BER, therefore, the Court further finds and concludes that Petitioner UPE sought review before the wrong forum. Because the statutory procedures for appeal of a question of taxability were not followed and the State Tax Commissioner was not provided with its statutory right and obligation to decide this issue first, this Court finds and concludes that the Petition for Appeal should be denied.

CONCLUSION

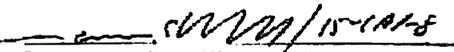
For the reasons discussed in this Opinion Order, the Court does hereby

ORDER that the Petition for Appeal is denied.

All parties are saved their exceptions and objections to the rulings of the Court. It is further

ORDERED that the Clerk of the Court personally deliver or send via first-class mail a certified copy of this Order to James A. Walls, counsel for UPE; to Phillip Magro, counsel for the Assessor; and to Edmund J. Rollo, counsel for *amicus curiae*.

ENTER this 26 day of August, 2015.


Lawrance S. Miller, Jr, SPECIAL JUDGE

ENTERED Aug 26, 2015

DOCKET LINE #: 63

JEAN FRIEND, CIRCUIT CLERK

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

**UNIVERSITY PARK AT
EVANSDALE, LLC,
Petitioner,**

v.

**//Civil Action No. 15-CAP-8
Honorable Lawrance S. Miller, Jr.,
by special assignment,**

**MARK A. MUSICK, in his
capacity as the Monongalia
County, West Virginia, Assessor,
Respondent.**

**ORDER DENYING PETITIONER'S MOTION TO ALTER OR AMEND
"OPINION ORDER DENYING PETITION FOR APPEAL"**

On September 10, 2015, Petitioner University Park at Evansdale, LLC ("UPE"), through counsel James A. Walls and Joseph V. Schaeffer, filed a "Motion to Alter or Amend 'Opinion Order Denying Petition for Appeal.'" Petitioner UPE cites Rule 59(e) as authority for it to bring this motion. After considering the Motion to Alter or Amend, the Court's August 26, 2015 Opinion Order, and the pertinent legal authorities, the Court finds and concludes that a hearing is not necessary, and that the motion should be denied for two reasons: first, the Court finds no procedural rule provides for a motion to alter or amend a judgment denying a petition for appeal under West Virginia Code § 11-3-25; and second, the Court finds and concludes that it should not, on the merits, alter or amend its August 26, 2015 Opinion Order Denying Petition for Appeal.

On August 26, 2015, this Court entered an Opinion Order Denying Petition for Appeal after conducting a hearing on the Petition for Appeal, which the parties erroneously referred to as Rule 56 cross-motions for summary judgment.¹ The Court denied the Petition for Appeal

¹ Compare W. Va. R. Civ. P. 56(c) ("The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine

because, in summary, UPE presented a question of taxability to the BER, and the BER did not have authority to consider that question under West Virginia Code § 11-3-24(c). This Court further ruled that it could not consider the issue of taxability *de novo* on appeal from the BER, because UPE did not follow the mandatory statutory procedure of seeking certification of the issue of taxability to the State Tax Commissioner. See W. Va. Code § 11-3-24a and § 11-3-24.

First, no procedural rule exists for this Court to alter or amend its final August 26, 2015 Opinion Order Denying Petition for Appeal.² Rule 59(e) is not applicable to an appeal regarding taxation under West Virginia Code § 11-3-25. The statute provides for a hearing in circuit court, and this Court entered a final judgment following such hearing. The appeal process prescribed by West Virginia Code § 11-3-25 does not provide for motions to alter or amend the judgment. “Rule 59(e) may be used by a party who seeks to change or revise a judgment entered as a result of a motion to dismiss or a motion for summary judgment.”

Franklin D. Cleckley, Robin Jean Davis, Louis J. Palmer, Jr., *Litigation Handbook on West*

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”), with W. Va. Code § 11-3-25(c) (“If there was an appearance by or on behalf of the taxpayer before either board . . . the appeal . . . shall be determined by the court from the record as so certified”) and Syl. pt. 5, *In re Tax Assessment of Foster’s Foundation’s Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2008) (“[a] taxpayer challenging an assessor’s tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous.”).

Thus, contrary to UPE’s contention, even Rule 56’s general framework is inapplicable and any reference to Rule 56 merely adds confusion. The appeal was on the record, and this Court would have been limited to a review of the record to “roughly the same scope permitted under the West Virginia Administrative Procedures Act[.]” *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 255, 539 S.E.2d 757, 7672 (2000). However, given the procedural posture of the case, the Court had to determine whether the issue presented a question of taxability versus a question of valuation. The Court considered that legal question *de novo*.

² The Court recognizes that in its July 17, 2015 Order Denying Respondent Assessor’s Motion to Dismiss, the Court deemed the Rules of Civil Procedure applicable under Rule 81(a)(1). Order at 4 n.4, July 17, 2015. However, that ruling was specifically to deem Rule 6(d) applicable in an effort to impose order on the parties’ briefing. Technically, Rule 81(a)(1) applies only to review of decisions of magistrates and administrative agencies, neither of which are applicable here. The Court found that Rule 6(d) imposed a reasonable and orderly briefing schedule, and therefore the Court adopted it for this case, which this Court concludes it has the authority (and responsibility) to do. Cf. Syl. pt. 2, *State v. Fields*, 225 W. Va. 753, 696 S.E.2d 269 (2010) (“To safeguard the integrity of its proceedings and to insure the proper administration of justice, a circuit court has inherent authority to conduct and control matters before it in a fair and orderly fashion.”). This Court further notes that West Virginia Code § 11-3-25(d) only provides for a “hearing of appeal[;]” it does not prescribe the procedural rules for providing briefs to the Circuit Court.

Virginia Rules of Civil Procedure 1283-84 (4th ed. 2012). It applies to civil cases tried in the circuit courts of West Virginia. The previous hearing, although styled by the parties as a hearing on cross-motions for summary judgment (erroneously in this Court's opinion), was not a Rule 56 hearing at all, and the judgment rendered was not a summary judgment. Thus, this Court finds and concludes that Rule 59(e) is not applicable to this proceeding.

Second, the Court finds and concludes that even if Rule 59(e) applies, UPE presents the same arguments, although phrased slightly different, in its Motion to Alter or Amend that it presented in its erroneously-styled Motion for Summary Judgment. This Court issued a detailed Opinion Order in which this Court explained its reasoning for its findings and conclusions, and nothing presented in the Motion to Alter or Amend persuades the Court to change its ruling. This Court continues to adhere to its August 26, 2015 Opinion Order Denying Petition for Appeal, which is hereby incorporated by reference and adopted *in toto*.

CONCLUSION

For the reasons explained in this Order, the Court does hereby

ORDER that the September 10, 2015 "Motion to Alter or Amend 'Opinion Order Denying Petition for Appeal'" is denied.

All parties are saved their exceptions and objections to the rulings of the Court. It is further

ORDERED that the Clerk of the Court personally deliver or send via first-class mail a certified copy of this Order to James A. Walls, counsel for Petitioner; to Phillip Magro, counsel for Respondent Assessor; and to Edmund J. Rollo, counsel for *amicus curiae*.

ENTER this 18 day of September, 2015.



Lawrance S. Miller, Jr., SPECIAL JUDGE