

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

UNIVERSITY PARK AT EVANSDALE, LLC,
Petitioner Below,

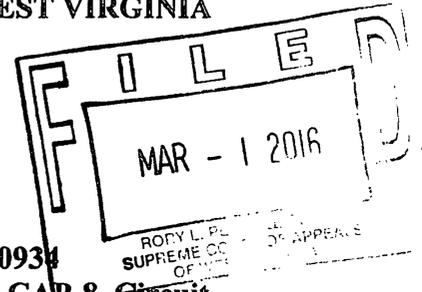
Petitioner,

v.

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

Respondent.

No. 15-0934
(No. 15-CAP-8, Circuit
Court of Monongalia County)



PETITIONER'S REPLY BRIEF

UNIVERSITY PARK AT EVANSDALE, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION..... 1

II. RESTATEMENT OF THE FACTS AND PETITIONER’S REQUESTED RELIEF 1

III. ARGUMENT 3

 A. Petitioner had no obligation to involve the State Tax Commissioner in this matter..... 3

 B. Petitioner has advanced the only logical interpretation of West Virginia law..... 4

 C. Respondent misconstrues *Maplewood* to avoid its controlling effect on this appeal..... 6

 D. Respondent has responded to arguments Petitioner did not raise on appeal..... 7

IV. CONCLUSION 8

TABLE OF AUTHORITIES

West Virginia Cases

<i>Hereford v. Meek</i> , 132 W. Va. 373, 52 S.E.2d 740 (1949).....	6
<i>James M.B. v. Carolyn M.</i> , 193 W. Va. 389, 456 S.E.2d 16 (1995).....	7
<i>Lee Trace, LLC v. Raynes</i> , 232 W. Va. 183, 751 S.E.2d 703 (2013) (per curiam)	5
<i>Maplewood Cmty., Inc. v. Craig</i> , 216 W. Va. 273, 607 S.E.2d 379 (2004) (per curiam)	6, 7

West Virginia Statutes

W. Va. Code § 11-3-1	4
W. Va. Code § 11-3-19	4
W. Va. Code § 11-3-24	5
W. Va. Code § 11-3-24a	6
W. Va. Code § 11-3-25a	3
W. Va. Code § 11-3-9	4, 6
W. Va. Code § 11-5-1	4
W. Va. Code § 11-8-1	4

West Virginia Regulations

W. Va. C.S.R. § 110-1P-3.3.....	5
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I. INTRODUCTION

The only conclusion that can rationally be drawn from the statutory scheme and this Court's decisions is that Petitioner's argument – that its leasehold interest in University Park has an assessed value of zero – presents a challenge to *valuation* rather than *taxability*. Hence, Petitioner properly protested its assessment to the Monongalia County Commission sitting as a Board of Equalization and Review (the "BER"). Based both upon settled law and Respondent's concessions, the BER and then the Circuit Court of Monongalia County should have corrected the assessed value of Petitioner's leasehold interest in University Park for 2015 *ad valorem* property taxes and fixed it at zero.

II. RESTATEMENT OF THE FACTS AND PETITIONER'S REQUESTED RELIEF

University Park is a mixed-use facility owned by West Virginia University Board of Governors ("WVU BOG") in the Evansdale neighborhood of Morgantown, West Virginia. [J.A. 3, 5, 61-62]. WVU BOG leases University Park to Petitioner in exchange for Petitioner (a) having financed its construction in the amount of approximately \$89.6 million; (b) having paid construction period rent in the amount of \$10 per month; and (c) agreeing to pay what is estimated to be more than \$90 million over the initial forty year lease term. [J.A. 56, 61-62, 288, 303-05, 307-08, 331-32]. Petitioner then subleases the majority of University Park – approximately 97% - back to WVU BOG for use as West Virginia University owned, operated, managed, and leased on-campus residential student housing. [J.A. 56, 313-23, 720, 722, 725, 727-729]. Petitioner has a conditional right to operate or lease the remaining 3% of University Park as commercial space providing amenities to the student tenants and surrounding community. [J.A. 60-61, 319-21, 363].

In sum, WVU BOG has fee ownership of the real property and improvements comprising University Park, and Petitioner has a leasehold interest for which it will pay in excess of \$180 million in construction costs and direct rental payments. Petitioner has no reversionary interest, no option to purchase at the end of the lease, and is significantly limited in its ability to sell, assign, convey, transfer, operate, and sublease its leasehold interest. [J.A. 59-60, 345, 731].

At issue in this appeal is Respondent's assessment of Petitioner's leasehold interest in University Park for *ad valorem* property taxes and Petitioner's protest of that assessment to the BER. For tax year 2015, Respondent assessed Petitioner's leasehold interest in University Park at \$9,035,617. [J.A. 531]. Petitioner protested that assessment to the BER on February 17, 2015, on the basis that its leasehold interest was neither freely assignable nor a bargain lease and, under the controlling regulations and this Court's holding in *Maplewood*, should have been assessed at a value of zero. [J.A. 87-88, 91-92, 102, 117-118]. Respondent conceded the controlling legal framework and that Petitioner's leasehold interest is neither freely assignable nor a bargain lease. [J.A. 74-76, 79-80]. Nevertheless, the BER concluded that Petitioner's protest presented a question of taxability within the State Tax Commissioner's exclusive jurisdiction and *de facto* affirmed the assessment. [J.A. 89, 103, 117-118]. In an August 26, 2015, Order (the "August 26 Order") denying Petitioner's appeal, the Circuit Court of Monongalia County agreed. [J.A. 1182-1214].

Petitioner submits to this Court that the BER and Circuit Court got it wrong. Petitioner challenged the valuation of its leasehold interest in University Park, and the BER and, then, the Circuit Court were obligated to correct and fix Petitioner's assessment at zero based on the uncontroverted evidence presented. Petitioner now asks the Court to do what the BER and Circuit Court did not: affirm that Petitioner's protest of its assessment presented a question of

valuation within the BER's jurisdiction and remand this matter to the Circuit Court with instructions to correct and fix Petitioner's assessment at zero.

III. ARGUMENT

A. **Petitioner had no obligation to involve the State Tax Commissioner in this matter.**

The Circuit Court's August 26, 2015, Order (the "August 26 Order") makes much of Petitioner's reference to the State Tax Commissioner in communications with Respondent and the State Tax Commissioner's failure to appear before the Court. Respondent's *Summary Response*, which is a near-verbatim recitation of parts of the August 26 Order, does the same. Those arguments, however, are either misleading or unfair.

In the first instance, Respondent's assertion that Petitioner "recognized that the [State] Tax Commissioner could issue a ruling" is misleading. [Resp.'s Summ. Resp. 10]. It is true that Petitioner was aware then, as it is now, that the State Tax Commissioner could issue a ruling on questions of classification or taxability. What is not true is Respondent's suggestion that Petitioner agreed that its protest concerned a question of classification or taxability. Although Petitioner concededly has not always been precise in its terminology – referring on occasion to "taxability" when "assessability" would be the more appropriate description – it has spoken clearly through its actions. Petitioner submitted its valuation protest to the body having jurisdiction over precisely those questions: the BER.

In the second instance, the Monongalia County Prosecuting Attorney was responsible by statute for providing the State Tax Commissioner with notice of any hearing before the Circuit Court. W. Va. Code § 11-3-25(a). Petitioner had no obligation to notify the State Tax Commissioner and, in fact, fulfilled its sole notice obligation when it provided the Monongalia County Prosecuting Attorney of its intention to appeal. [J.A. 1036 (Pet'r's Notice)]. It is thus

unfortunate that the Circuit Court found the State Tax Commissioner's absence to be a pertinent fact that it considered to Petitioner's detriment. [J.A. 1208 (Aug. 26 Order n. 18)]. It is indefensible, however, for Respondent – whose counsel was responsible for providing the State Tax Commissioner with notice – to repeat the Circuit Courts' finding in his *Summary Response* as an implied failure by Petitioner. Whether attributable to lack of notice or a conscious decision, Petitioner had no responsibility for the State Tax Commissioner's failure to appear and participate before the Circuit Court. Just as it was unfair for the Circuit Court to consider that fact to Petitioner's detriment, it would be unfair for this Court to do so here.

B. Petitioner has advanced the only logical interpretation of West Virginia law.

There are three basic components to *ad valorem* property taxation under West Virginia law: assessment, levy, and collection. With few exceptions, the assessor begins the process by entering the value of the real and personal property in his jurisdiction in the property books at sixty percent of its true and actual value. W. Va. Code §§ 11-3-1 & 11-5-1. The board of equalization and review then corrects and fixes the assessments and, after it completes its work, returns the property books to the assessor who extends the levy rates set by the various levying bodies against all non-exempt property. W. Va. Code §§ 11-3-9, 11-3-19, & 11-8-1 *et seq.* Once that process is completed, the assessor turns his property books over to the county sheriff for the collection of taxes, which are set by the application of levy rates to the assessed value. W. Va. Code § 11-3-19.

Under this system, there are two possibilities for why *ad valorem* property taxes would not be collected by the sheriff. The first possibility is based in the assessment, such as in Petitioner's case where extension of the levy to a leasehold interest with zero assessed value would result in a no tax bill being sent. The second possibility is based in the levy, where an

exemption from property taxes would prohibit the levy rates from being extended to the assessed value of the property, and no tax bill is sent.

Petitioner's position is that the jurisdictional line between the BER and the State Tax Commissioner is determined by whether the challenge is to the assessment component (in which case the BER has jurisdiction) or to the levy component (in which case the State Tax Commissioner has jurisdiction to determine which classification applies to the property and if an exemption applies). Respondent's position, on the other hand, is that the jurisdictional line is determined by collection component; that is, if taxes will not be collected, the question falls within the State Tax Commissioner's exclusive jurisdiction.

The problem with Respondent's position is that it erroneously focuses on the effect (non-payment of taxes) instead of the cause (assessment or levy). The result is an inefficient and inconsistent system: inefficient because it encourages a property owner at the margins to bring a protest before both the BER and the State Tax Commissioner and inconsistent because of the potential for competing values. For example, a leaseholder might argue before the State Tax Commissioner that its leasehold interest has zero assessable value because it is neither freely assignable nor a bargain lease. At the same time, that leaseholder might also reasonably argue before the BER that, even if its leasehold interest is both freely assignable and a bargain lease, the county assessor derived its value through the improper formula.¹ Because the State Tax Commissioner and BER's determinations are equally binding, W. Va. Code §§ 11-3-24 & 11-3-

¹ This example is based in the facts of this appeal. Petitioner has argued here that, under the controlling regulations and this Court's holding in *Maplewood*, its leasehold interest has zero assessable value because it is neither freely assignable nor a bargain lease. Petitioner has also argued, however, that Respondent disregarded the binding regulations for valuation of leasehold interests in W. Va. C.S.R. § 110-1P-3.3. There can be little question that a challenge to the method valuation is itself a valuation challenge properly brought before a county commission sitting as a board of equalization and review. *See, e.g., Lee Trace, LLC v. Raynes*, 232 W. Va. 183, 193-94, 751 S.E.2d 703, 713-14 (2013) (per curiam) (considering appeal originating in a county commission sitting as a board of equalization and review in which the county assessor's use of a cost approach as opposed to income approach was assigned as error).

24a, a county assessor like Respondent could be caught between two inconsistent determinations. Such a result is, of course, absurd.

Under Petitioner's interpretation, there is no potential for an absurd result because there is no potential for inconsistent determinations. The BER and State Tax Commissioner would each be responsible for its own portion of the *ad valorem* property taxation process, and so neither would consider a question simultaneously before the other. Moreover, in the rare case a party would challenge both the assessment (i.e., the assessed value of the property) and the levy (i.e., the exemption of the property), any decision by the State Tax Commissioner would clearly control. W. Va. Code § 11-3-9(c) (prohibiting extension of levy against exempt property regardless of underlying value).

This Court has long adhered to the rule of statutory construction that a statute should be interpreted to avoid an absurd result. *See, e.g., Hereford v. Meek*, 132 W. Va. 373, 393, 52 S.E.2d 740, 750 (1949). Petitioner's interpretation of the jurisdictional line between the BER and the State Tax Commissioner is the only rational interpretation to accomplish this goal and, as a consequence, is the interpretation that should be adopted by this Court.

C. Respondent misconstrues *Maplewood* to avoid its controlling effect on this appeal.

Like the Circuit Court, Respondent's analysis of *Maplewood* misses the forest for the trees. [Resp.'s Summ. Resp. 6-9 (analyzing *Maplewood Cmty., Inc. v. Craig*, 216 W. Va. 273, 607 S.E.2d 379 (2004) (per curiam))]. As Petitioner has elsewhere explained, this Court should reject Respondent's myopic focus on *Maplewood*'s reference to the "taxability" of Mon Elder's leasehold interest. [See Pet'r's Br. 24-26]. Instead, this Court should focus its attention on *Maplewood* to the procedural posture and the relief granted.

Procedurally, Mon Elder’s valuation-based appeal in *Maplewood* came before this Court in the same manner as Petitioner’s appeal here. Mon Elder argued to the BER that its leasehold interest lacked independent value from the freehold (i.e., had an assessed value of zero) and then appealed the adverse determination to, first, the Circuit Court, and, then, this Court. 216 W. Va. at 287, 607 S.E.2d at 393. If, as Respondent contends, a protest alleging an assessed value of zero must be brought before the State Tax Commissioner rather than the BER, then this Court should have declined jurisdiction. *See, e.g., James M.B. v. Carolyn M.*, 193 W. Va. 389, 456 S.E.2d 16 (1995) (“This Court’s jurisdictional authority is either endowed by the West Virginia Constitution or conferred by the West Virginia Legislature. Therefore, this Court has a responsibility *sua sponte* to examine the basis of its own jurisdiction.”). Critically, however, this Court exercised its jurisdiction to consider Mon Elder’s appeal from its protest before the BER and to remand the matter back to the circuit court. *Maplewood*, 216 W. Va. at 287, 607 S.E.2d at 393. In doing so, this Court tacitly held to that valuation protests alleging an assessed value of zero may be brought before the BER – a holding upon which Petitioner and others have relied.

D. Respondent has responded to arguments Petitioner did not raise on appeal.

In his *Summary Response*, Respondent contends that paragraph E of the August 26 Order “go[es] to the heart of this appeal.” [Resp.’s Summ. Resp. 2]. Paragraph E of the August 26 Order relates to whether a county assessor may separately list a leasehold interest if not requested to do so by the freeholder. Contrary to Respondent’s belief, Petitioner did not raise this issue on appeal and does not intend to argue it to the Court. Petitioner requests that the Court disregard this portion of Respondent’s *Summary Response*.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons and those apparent to the Court, Petitioner respectfully requests that the Court enter an Order reversing the Circuit Court's August 26 Order, remanding this matter to the Circuit Court with instructions to correct and fix the assessment of Petitioner's leasehold interest in University Park for tax year 2015 at its true and actual value of zero, and granting such other relief as the Court deems just and proper.

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By SPILMAN THOMAS & BATTLE, PLLC



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As the Monongalia County, West Virginia,
Assessor, Respondent Below,

Respondent.

CERTIFICATE OF SERVICE

I, James A. Walls, hereby certify that service of the foregoing *Petitioner's Reply Brief* has been made by first-class U.S. mail, postage-prepaid, on this 1st day of March, 2016, upon the following:

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