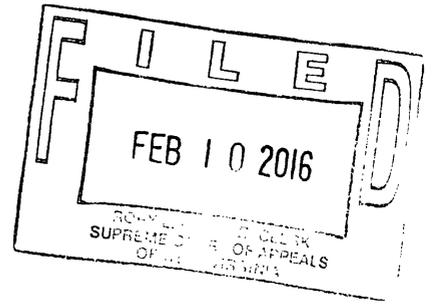


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
UNIVERSITY PARK AT EVANSDALE, LLC,
Petitioner Below,



Petitioner,

v.

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

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

COPY

Respondent.

RESPONDENT'S SUMMARY RESPONSE

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

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RELIEF SOUGHT

Respondent asks that this court affirm the decision below.

STATEMENT OF THE CASE

On August 18, 2015 came University Park at Evansdale, LLC, (“UPE”) by its counsel, James A. Walls and Joseph V. Schaeffer; and the 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 that matter under advisement. After considering the briefs, the arguments of counsel, the record, and the pertinent legal authorities. The lower Court found 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, the lower Court found that the Petition for Appeal should be denied.

**OPINION OF THE LOWER COURT IN MAKING
Its DECISION DATED AUGUST 26, 2016**

Lawrence S. Miller Jr., Special Judge entered an order as the same pertains to the action that was filed in the Circuit Court of Monongalia County, West Virginia. This ruling and decision was based upon various rulings as delineated in paragraphs A-D which do not go to the heart of this appeal. Paragraphs E and F of the lower Courts decision do in fact go to the heart of this appeal and these paragraphs in this opinion are as follows:

- 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, the lower Court should find in its favor. (Pet'r's Mot. Summ. J. at 18.) UPE cites Syl. pt. 3, *Maplewood, supra*, for the position 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 a 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*, 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." (Per'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 Interest 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, the lower Court found and concluded that the Assessor has the discretion to examine different leasehold interests and determine the taxability of such leasehold

¹¹UPE 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.

interest, and if taxable, the value. In this particular case, because WVU is tax-exempt and thus a freeholder is not a *taxpayer*, the lower Court denied 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, the lower Court found and concluded 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

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 the lower Court. UPE contends that the lower 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 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.

West Virginia Code Ann. § 11-3-25(d) (West 2015). Accordingly, if the lower court found that the leasehold interest is assessed at more than sixty percent of its true and actual value, then the

¹²The lower Court notes that UPE argued at the August 18, 2015 hearing in the lower 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." The lower Court was confined to the record, and the record before the lower Court does not show what the BER ruled in the other cases or why it may have ruled that way. Accordingly, the lower Court did not assign any weight to what the BER ruled in other cases.

lower 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 a value independent of the freehold." (Pet'r's Mot. Summ. J. at 11.) 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.*) 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

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

¹⁴A&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.

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

[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 fully taxed. 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 55, 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 the 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, 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 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

¹⁵The 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.

¹⁶Although the *Maplewood* 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.

court affirmed the property tax assessments and based its ruling on 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 was: “According to Mon Elder, only when the record affirmatively established 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 valuation leasehold interests in real estate that is referred to as the ‘Leasehold 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 lease hold 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 a bargain in the market place.’

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

¹⁷The ‘Valuation of Leasehold Interests’ was included in the certified record. *Amicus* correctly points out 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 *Maplewood* Court and Circuit Court 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.”

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 circuit court to make finding of fact and conclusions of law regarding the *taxability* of the leasehold interest. The Court stated that “we remand the 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.

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

¹⁸This 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.

lessee may realize the benefit of such a 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 prior written consent of the issuer, the lease 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, and even recognized in the demand letter that “[t]he 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.” (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

¹⁹See footnote 7, *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 approval of the Building Commission. See *Maplewood*, 216 W.Va. at 287, 607 S.E.2d at 393.

²⁰Although 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 have not agreed with *Mon Elder Services, Inc.*, or the State Tax Commissioner, on the taxability of *Mon Elder Services, Inc.*, leasehold interest.

²¹UPE 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.

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.

The lower Court recognized *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 transferrable. Second, the assessor...should make the determination as to taxability (for ad valorem tax purposes) of the partial interests in the various parties involved. In the case of publicly owned property, the lessor’s interest (the leased fee) would be tax-exempt, while the lessee’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.

The lower Court, however, did 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. The lower Court analyzed this case under the *Maplewood* framework to demonstrate that the first step of inquiry involves a question of law regarding taxability of

leasehold interest and that the BER is not the proper forum. **The lower Court did NOT make 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 the "[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 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 not authority to decide. See *Mackin v. Taylor County Court*, 38, W.Va. 338, 18 S.E. 632 (1893).

The lower Court further found and concluded that because UPE did not follow the correct statutory procedure to contest the taxability of its leasehold interest, the Petition for Appeal must

²²The lower Court made 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 lower Court disagreed 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").

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 consent 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 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

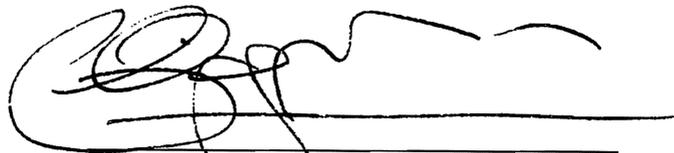
novo, should it have received an adverse ruling from the State Tax Commissioner. (In turn, should UPE have received a favorable property tax ruling, the Assessor could have appealed the issue to the circuit court where it would have been considered de novo.) The Legislature has enunciated a clear policy that the State Tax Commissioner be given 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 for the in twenty-four-a of this article.” W.Va. Code Ann § 11-3-23a(b) (West 2015) (emphasis added).

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

CONCLUSION

For the above stated reasons respondent asks that this Court affirm the decision below because the petitioner sought relief before the wrong forum. The statutory procedures for appeal of a question of taxability were not followed and the State Tax Commissioner was not provided with his statutory right and obligation to decide this issue first.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

UNIVERSITY PARK AT EVANSDALE, LLC,
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Assessor, Respondent Below

Respondent.

CERTIFICATE OF SERVICE

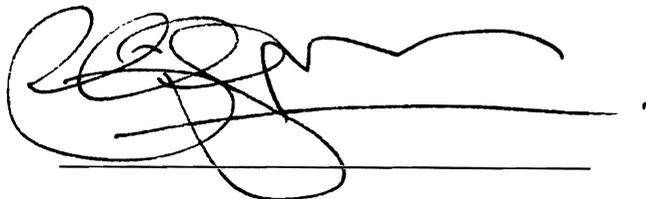
I, Phillip M. Magro, do hereby certify that service of the foregoing *Respondent's Brief* was made upon counsel of record this 9th day of February 2016 by mailing a true and exact copy thereof via first class United States Mail, postage prepaid, in an envelope addressed as follows:

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All on this 9th day of February 2016



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