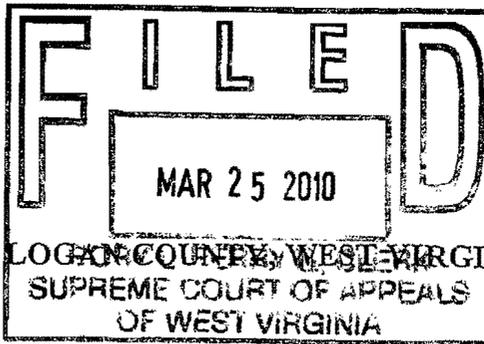


35632



IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA
FOUNTAIN PLACE CINEMA 8, LLC,
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Petitioner,

v.

Civil Action No. 09-AA-1
Honorable Roger L. Perry

CHRISTOPHER G. MORRIS, as
STATE TAX COMMISSIONER OF
WEST VIRGINIA,

Respondent.

ORDER

On a former day, October 22, 2009, came the parties, by their attorneys, for purposes of a hearing in an appeal from a decision of the West Virginia Office of Tax Appeals (hereinafter "OTA") dated March 2, 2009, by the Petitioner, Fountain Place Cinema 8, LLC, (hereinafter "Fountain Place"), rejecting Fountain Place's application for a tax credit under the Economic Opportunity Tax Credit Act (hereinafter "EOTCA"), W. Va. Code §§ 11-13Q-1, *et seq.*

After considering the record, the briefs, and the arguments of counsel, the Court hereby makes the following findings of fact and conclusions of law.

Findings of Fact

1. Fountain Place owns and operates a 26,000 square-foot, eight-screen movie theater in Logan that was constructed in 2006. The theater has stadium seating, curved screens, and Dolby Surround sound, seats approximately 1,250 people, and includes an arcade area with approximately 15 games. Approximately 200,000 patrons visit Fountain Place Cinema each year. According to marketing studies conducted by Fountain Place, about thirty percent of those patrons are residents of eastern Kentucky. These findings of fact were first made by West

Virginia Office of Tax Appeals Administrative Law Judge Michele Duncan Bishop in her March 2, 2009 final decision identified as Document # 20 of the Record submitted in this case.

2. By letter dated October 15, 2007, Fountain Place applied to the Tax Commissioner for a tax credit under the EOTCA, W. Va. Code §§ 11-13Q-1, *et seq.* (State's Ex. 1 to Official Transcript of April 16, 2008 Evidentiary Hearing (hereinafter "Hearing Tr.").)

3. Specifically, Fountain Place noted that it was a new business "engaged in the activity of destination-oriented recreation and tourism." *Id.*

4. Fountain Place's application noted that for the tax year 2006 it had a Qualified Investment of \$3,931,763 and a New Jobs Percentage of 10%. *Id.*

5. Pursuant to the provisions of the EOTCA, the maximum credit allowed to Fountain Place is \$39,317.63 per year, for the tax years 2006 through 2015.¹

6. By letter dated November 16, 2007, the Tax Commissioner denied the EOTCA credit sought by Fountain Place. State's Ex. 2 to Hearing Tr.

7. As justification for denying Fountain Place's request, the Tax Commissioner simply stated that "Fountain Place Cinema 8, LLC is not . . . eligible" for the EOTCA credit "[b]ased upon information available to" it. *Id.*

8. On January 17, 2008, Fountain Place filed an appeal to the OTA of the Tax Commissioner's denial of the EOTCA credit. Pet'r Ex. 1 to Hearing Tr.

¹ The amount of credit allowed under the EOTCA "is determined by multiplying the amount of the taxpayer's 'qualified investment' . . . by the taxpayer's new jobs percentage . . ." W. Va. Code § 11-13Q-4(b). After determining the amount of the credit allowed, the credit must then "be taken over a ten-year period, at the rate of one tenth of the amount thereof per taxable year." W. Va. Code § 11-13Q-4(c). Application of the foregoing formula to Fountain Place results in the following: \$3,931,763 (Qualified Investment) * .10 (New Jobs Percentage) = \$393,176.30 / 10 (Credit Applicable Period) = \$39,317.63 per year, for the tax years 2006 - 2015.

9. After an administrative hearing held on April 16, 2008, and briefing by the parties, the OTA affirmed the Tax Commissioner's denial of the EOTCA credit by Final Decision dated March 2, 2009.

10. Both the Tax Commissioner and the OTA agreed with Fountain Place that the phrase "destination-oriented recreation and tourism" is ambiguous because it is not defined in the Act and no legislative rule explaining the credit exists. OTA Final Decision at 5.

11. The OTA concluded, however, that "a 'destination-oriented' location should be the draw itself, not merely ancillary to its surroundings. An entity engaged in the business of 'destination-oriented recreation and tourism,' then, must, at least, in and of itself draw travelers to its location while offering refreshment through an activity that amuses or stimulates." OTA Final Decision at 7.

12. The OTA then held that Fountain Place was not entitled to the EOTCA credit because "[n]o reliable evidence has been presented which would show that patrons travel to Logan, West Virginia for the primary purpose of viewing movies at Fountain Place Cinema. . . . Indeed, the evidence tends to show instead that Petitioner's business benefits from its proximity to the Hatfield-McCoy Trail System and the cluster of businesses surrounding it." OTA Final Decision at 8.

Conclusions of Law

1. This case is not about any evidentiary dispute as the material facts are undisputed, but rather is about the proper application of state law. Consequently, determining what is meant

by the phrase “destination-oriented recreation and tourism,” as that phrase is used in W. Va. Code § 11-13Q-19(a)(5), presents a pure question of law subject to *de novo* review.²

2. The Court must reverse, vacate, or modify the OTA’s decision if the substantial rights of the Petitioner has been prejudiced because the administrative findings, inferences, conclusions, decision or order are: (a) in violation of constitutional or statutory provisions; (b) In excess of the statutory authority or jurisdiction of the agency; (c) made upon unlawful procedures; (d) affected by other error of law; (e) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Id.*³

3. Finally, deference to agency interpretation is due only so long as “the agency interpretation is not in conflict with the plain language of the statute,”⁴ but “[a] statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.”⁵

The Phrase “Destination-Oriented Recreation and Tourism” is Not Clear and Unambiguous and, Thus, Must Be Construed to Give Effect to the Intent of the Legislature and the General Purpose of the EOTCA.

4. When enacting the EOTCA, the Legislature found “that the encouragement of economic opportunity in this State is in the public interest and promotes the general welfare of

² *Consolidated Natural Gas Co. v. Palmer*, 213 W. Va. 388, 391, 582 S.E.2d 835, 838 (2003), quoting Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995) see also *Keesee v. Gen. Refuse Serv., Inc.*, 216 W. Va. 199, 204, 604 S.E.2d 449, 454 (2004).

³ See also *Smith v. West Virginia Human Rights Com'n*, 216 W. Va. 2, 602 S.E.2d 445 (2004).

⁴ *Appalachian Power*, 195 W. Va. at 586, 466 S.E.2d at 437 (quoting *National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 517 (1992)).

⁵ Syl. pt. 1, *Consumer Advocate Div. v. PSC*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

the people of this State[;]" therefore, the purpose of the EOTCA is "to encourage greater capital investment in businesses in this State and thereby increase economic opportunity in this State[.]" W. Va. Code § 11-13Q-2.

5. A credit under the EOTCA is not permitted "until the person asserting a claim for the allowance of credit under this article makes written application to the commissioner for allowance of credit[.]" W. Va. Code § 11-13Q-18(b)(1).

6. In addition to submitting an application to the Tax Commissioner, the EOTCA credit is available only to certain "industries or business activities[.]" one of which is "[d]estination-oriented recreation and tourism" W. Va. Code § 11-13Q-19(a)(5).

7. Noticeably absent from the definitions section of the EOTCA is an explanation of what constitutes a destination-oriented recreation and tourism industry or business activity. *See* W. Va. Code § 11-13Q-3.⁶

8. Regulatory guidance as to the meaning of "destination-oriented recreation and tourism" is also of no help because the State has not promulgated EOTCA regulations.

9. When a statute is ambiguous, it is incumbent upon the reviewing court "to ascertain and give effect to the intent of the Legislature[.]" which means that "effect must be given to each part of the statute and to the statute as a whole as to accomplish the general purpose of the legislation."⁷

⁶ Although West Virginia is not the only state to provide tax credits to promote recreation and tourism, *see, e.g.*, Arkansas Tourism Development Act, A.C.A. §§ 15-11-501, *et seq.*, West Virginia is the only state to have enacted a statute using the term "destination-oriented recreation and tourism."

⁷ Syl. pts. 3 and 4, *State ex rel. Hechler v. Christian Action Network*, 201 W.Va. 71, 73, 491 S.E.2d 618, 620 (1997) (internal and quoting citations omitted).

10. Based on the opposing positions taken by Petitioner, the Tax Commissioner, and the OTA, the phrase “destination-oriented recreation and tourism” is very broad.

11. While the words themselves are easily understood, the phrase is not the type of phrase that denotes a definite and unquestionable meaning.

12. This inherent vagueness and broadness can only lead to the conclusion that, without a statutory definition, “destination-oriented recreation and tourism” is not clear and unambiguous.

13. The Legislature’s failure to provide a definition for “destination-oriented recreation and tourism” is notable for two reasons.

14. First, of the six industries or business activities eligible for the EOTCA credit, three of the six contain “including, but not limited to” language, and provide examples of taxpayers eligible for the credit. W. Va. Code §§ 11-13Q-19(a)(1)-(3).

15. The Legislature also took great pains to thoroughly define “[r]esearch and development” and to provide examples of what the phrase includes and does not include. W. Va. Code § 11-13Q-3(b)(25).

16. Thus, of the six types of taxpayers eligible for the EOTCA credit, the Legislature provided examples of eligible industries or business activities for three of the six and thoroughly defined the eligible industry or business activity for another.

17. The failure to provide a definition, or at a minimum an example(s), of “destination-oriented recreation and tourism” leads to the inevitable result that the phrase cannot be read as having one true meaning.

18. Second, the lack of a “destination-oriented recreation and tourism” definition is notable when considering a previous opinion issued by the Supreme Court when reviewing a

decision involving an exemption under the Consumer Sales and Service Tax provisions, W. Va. Code §§ 11-15-1, *et seq.*

19. In *Wooddell v. Dailey*,⁸ the Tax Commissioner sought review of a circuit court decision which dealt with the “definition of ‘professional services’[,] as used in W. Va. Code . . . [§] 11-15-8”⁹ The *Wooddell* court noted that the absence of a definition for the phrase “professional services” made “it impossible” for them to say that the statute at issue was “clear and unambiguous” and, therefore, there was “no room for the application of the well-recognized principle that a statute which is clear and unambiguous should be applied and not construed.”¹⁰

20. According to the reasoning in *Wooddell*, the proper conclusion to be drawn from the Legislature’s failure to define “destination-oriented recreation and tourism” is that the phrase is ambiguous.¹¹

The OTA Erred by Affirming the Tax Commissioner’s Denial of the EOTCA Credit Based Upon an Erroneous Interpretation and Application of the Phrase “Destination-Oriented Recreation and Tourism” Under W. Va. Code § 11-13Q-19(a)(5) Which Does Not Give Effect to the Intent of the Legislature and the General Purpose of the EOTCA.

21. As noted in Syllabus Point 4 of *State ex rel. Tucker County Solid Waste Authority v. W. Va. Div. of Labor*,¹² when statutory language is not plain and unambiguous, the statutory “language must be construed before it can be applied”¹³

⁸ 160 W.Va. 65, 68, 230 S.E.2d 466, 469 (1976).

⁹ *Id.* at 67, 230 S.E.2d at 468-69.

¹⁰ 160 W. Va. at 68, 230 S.E.2d at 469 (citations omitted).

¹¹ Indeed, both the Tax Commissioner and the OTA agreed with Fountain Place that the phrase is ambiguous. OTA Final Decision at 5.

¹² 222 W.Va. 588, 668 S.E.2d 217 (2008).

¹³ 222 W.Va. at ____, 668 S.E.2d at 224.

22. To determine the meaning of ambiguous statutory language, one must “start with the text of the statute in question and then move ‘to the structure and purpose of the Act in which it occurs.’”¹⁴

23. When a statute fails to provide “specific statutory definitions,” the words in the statute are “presumed to have their ordinary and common meaning.”¹⁵

24. When ascertaining the ordinary and common meaning, one of the fundamental principles “of statutory construction [is] that the meaning of a word cannot be determined in isolation, but it must be drawn from the context in which it is used.”¹⁶

25. Without doubt, the Legislature intended to create a tax credit that provides an incentive to taxpayers who make capital investments in West Virginia. See W. Va. Code § 11-13Q-2.

26. What is unclear is exactly which taxpayers qualify as “destination-oriented recreation and tourism” industries or business activities.

27. In order to ascertain the ordinary and common meaning of the phrase “destination-oriented recreation and tourism” an examination of the common meaning of such words is required.¹⁷

¹⁴ *W. Va. Health Care Cost Review Authority v. Boone Memorial Hosp.*, 196 W.Va. 326, 338, 472 S.E.2d 411, 423 (1996) (quoting *N. Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 1677, 131 L.Ed.2d 695, 705 (1995)).

¹⁵ *W. Va. Health Care Cost Review Authority*, 196 W.Va. at 337, 472 S.E.2d at 422 (citing Syl. Pt. 3, *Byrd v. Board of Educ. of Mercer County*, 196 W.Va. 1, 467 S.E.2d 142 (1995); *Metropolitan Prop. and Liab. Ins. Co. v. Acord*, 195 W.Va. 444, 450, 465 S.E.2d 901, 907 (1995)).

¹⁶ *W. Va. Health Care Cost Review Authority*, 196 W.Va. at 338, 472 S.E.2d at 423 (quoting *Randolph County Bd. of Educ. v. Adams*, 196 W.Va. 9, 16, 467 S.E.2d 150, 157 (1995); *Kittle v. Icard*, 185 W.Va. 126, 133, 405 S.E.2d 456, 463 (1991)).

28. "Destination" is defined as "the place to which a person or thing is going or sent .

...¹⁸

29. "Recreation" is defined as "refreshment in body or mind, as after work, by some form of play, amusement, or relaxation."¹⁹

30. "Tourism" is defined as "tourist travel, especially when regarded as a source of income for a country, business, etc."²⁰ "Tourist" includes "one who makes a tour; one who makes a journey for pleasure."²¹ "Travel" is defined as "the act or process of traveling[.]" with "traveling" relating to "a passing from place to place; the act of performing a journey."²²

31. Thus, "destination-oriented recreation and tourism" consists of traveling from one location to another for the purpose of amusement and/or relaxation, when such travel provides a source of income to a business entity. This "overly-technical" definition of the phrase at issue should not be read so broadly as to include an activity requiring travel from any location to any other location without regard to the distance between to two places. Similarly, it should not be read so broadly as to include any activity of amusement and/or relaxation without regard to

¹⁷ An examination of the term "oriented" has been purposefully excluded for the following reasons: (a) the April 16, 2008 evidentiary hearing focused primarily on the other three terms; and (b) an examination of the term "oriented" is unlikely to assist this Court in its ultimate decision of whether the Petitioner is engaged in the industry or business activity of destination-oriented recreation and tourism. Using the American Heritage Dictionary (Second College Edition 1985), the OTA defined "Oriented" in its decision as "To become adjusted or aligned." (OTA Final Decision at fn. 4).

¹⁸ *Webster's New Universal Unabridged Dictionary* 495 (2nd ed. 1983).

¹⁹ *Id.* at 1509.

²⁰ *Id.* at 1929.

²¹ *Id.*

²² *Id.* at 1942-43.

traditional and conventional ideas of what activities constitute tourism or recreation. Without more specific legislative guidance as to the applicability of the phrase "destination-oriented recreation and tourism," courts are left to ascertain the meaning of this phrase – however, application of this phrase should not be made without consideration of "common-sense" and should not yield an absurd result.

32. Construction of the phrase at issue cannot occur by looking at the words in a vacuum. A court must look at the structure and purpose of the Act, as well as the factual circumstances of each case. A determination of whether a business participates in "destination-oriented recreation and tourism" must be made by an application of the facts to the circumstances surrounding the business or activity. These circumstances include, but are not limited to, (1) the economy of the region, (2) the availability of other recreational choices in the area, (3) the cultural significance of the business or activity, (4) the business's distance from other similar businesses, (5) the amount of patronage from local or nearby customers versus customers from farther away.

33. Counsel for both parties generally assert and agree that there is no real evidentiary dispute as to the material facts in this case. Both parties moved very quickly to matters of statutory interpretation and legislative intent, particularly as to the phrase "destination-oriented recreation and tourism." Both parties agree the term is ambiguous. Both parties seem to decline to apply the law to this factual scenario as found by Judge Bishop, the Chief Administrative Law Judge, below.

34. The evidence in the record, based on those findings of fact made below, indicates that a certain percentage of Fountain Place's customers are traveling from areas outside the Logan area for the purpose of watching a movie.

35. According to Diana Barnette, the managing member of Fountain Place, the theater draws about 200,000 customers per year. Hearing Tr. 15:14.

36. Of the 200,000, Ms. Barnette testified that “about thirty percent (30%)[,]” or 60,000, of the customers visit from the Commonwealth of Kentucky. *Id.* 15: 17-18.

37. Fountain Place was able to ascertain the number of customers that visit from Kentucky by conducting a marketing study in which it offered free movie passes to customers who were willing to provide their zip codes. *Id.* 16:1-6.

38. In addition to drawing 30% of its customers from Kentucky, Ms. Barnette testified that another 10% of Fountain Place’s customers are individuals visiting the Hatfield-McCoy Trail System (hereinafter “the Trail”). *Id.* 17:7-12.

39. Ms. Barnette and Fountain Place arrived at the 10% number based on conversations and interactions with customers visiting the theater. *Id.* 31:3-6.²³

40. The 80,000 number demonstrates that Fountain Place has succeeded in drawing customers from areas outside the Logan area for the purpose of watching a movie.²⁴

41. This Court finds that applying these facts, as found by Judge Bishop below, to the law, namely this Court’s interpretation of the phrase “destination-oriented recreation and tourism” within the statute in question, are sufficient to support a finding that Fountain Place is “destination-oriented recreation and tourism” and thereby eligible for the Economic Opportunity

²³ Although the Tax Commissioner notes that this is anecdotal evidence, it offered no evidence to the contrary.

²⁴ Although the Tax Commissioner notes that Fountain Place shows the same films as do theatres in cities such as Cleveland, New York, Columbus, Pittsburgh, and other cities, Fountain Place’s evidence centered upon customers traveling from Kentucky, not those remote locations. Moreover, the fact that someone does not “vacation” in Logan for purposes of “watching a movie,” as noted by the Tax Commissioner, is dispositive of whether Fountain Place is a “destination-oriented recreation and tourism” business.

Tax Credit. Fountain Place's is one of the few "attention getting" attractions in the region, and its classification as "destination-oriented recreation and tourism" must be determined by evaluating its status in the context of a rather economically stagnate area. In the context of this area, this facility has a status more akin to a "Dixie Stampede" or "Medieval Times" attraction rather than a conventional theatre. A particular business that is "destination-oriented recreation and tourism" in one location or set of circumstances may not be in another. A movie theatre, laser tag arena, miniature golf course, go-kart track, themed restaurant/attraction, outdoor adventure business, or other service/entertainment business may be "destination-oriented recreation and tourism" in Logan, West Virginia but not in Charleston, West Virginia; Huntington, West Virginia; the New River Gorge area of West Virginia; West Virginia highland areas or major tourist locations across America such as Las Vegas, Nevada; New York, New York; or Gatlinburg, Tennessee depending on the facts. A business in any other area must be considered according to its own factual circumstances on a case-by-case basis.

42. The Tax Commissioner and the OTA classified Fountain Place as an "ancillary business" that "is not, in itself, a destination-oriented tourism facility." (Hearing Tr. 34:11-12; OTA Final Decision at 7.) Such a classification is inappropriate for two reasons.

43. First, exactly why the Tax Commissioner and the OTA believe that an "ancillary business" cannot qualify as a "destination-oriented recreation and tourism" industry or business activity is unclear. Nowhere in the EOTCA is there language indicating that the Legislature meant to exclude an "ancillary business" from the credit. *See* W. Va. Code § 11-13Q-1, *et seq.*

44. Second, what the Tax Commissioner and the OTA failed to acknowledge, is that Fountain Place is a standalone tourist destination that enhances the Logan area's ability to market itself as a tourist destination.

45. Fountain Place's value as a standalone tourist destination is evident from the letters written by the managing director of the Hatfield-McCoy Convention & Visitors Bureau (hereinafter "the Bureau") and the president of the Logan County Chamber of Commerce (hereinafter "the Chamber"), both of which confirm the theater's role in developing the Logan area into a tourist destination. See Pet'r Exs. 3 and 4 to Hearing Tr.

46. There is nothing in the statute that indicates that the Legislature intended to exclude "ancillary businesses" from the benefits of the statute. Indeed, as long as a business is engaged in "destination-oriented recreation and tourism," it is qualified for the tax credit and given the evidence that Fountain Place is playing a vital role in developing the Logan area into a tourist destination leads supports the conclusion that the theater is engaged in a destination-oriented recreation and tourism industry or business activity.²⁵

47. To ensure complete construction of the ambiguous phrase "destination-oriented recreation and tourism" an examination of the "structure and purpose" of the EOTCA is necessary.²⁶

48. With respect to purpose, the Legislature clearly noted that the EOTCA was enacted "to encourage greater capital investment in business . . . and thereby increase economic opportunity in" West Virginia. W. Va. Code §§ 11-13Q-2 (emphasis added).

²⁵ The Tax Commissioner's argument that shopping at a local store or drinking at a local sports bar are comparable to traveling from Kentucky, for example, to watch a film at Fountain Place is unpersuasive as neither a local shop nor a local bar are comparable to, for example, a regional outlet mall or a regional bar like Gilley's in Texas, featured in the film *Urban Cowboy*, which draw customers from a wide geographical area.

²⁶ *W. Va. Health Care Cost Review Authority*, 196 W.Va. at 338, 472 S.E.2d at 423 (1996) (quoting *N. Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 1677, 131 L.Ed.2d 695, 705 (1995)).

49. Such economic opportunity is exactly what Fountain Place's investment in Southern West Virginia has created.

50. As noted above, Fountain Place has succeeded in bringing 80,000 individuals to its facilities from areas located outside the Logan area. Additionally, Fountain Place has partnered with the Bureau to provide tourists with a recreational activity other than trail riding. Hearing Tr. 25:12-15. The relationship between Fountain Place and the Bureau allows the area to be marketed as a full service tourist destination. Such marketing permits the Logan area to draw an increased number of tourists to the area, which in turn encourages capital investment and increases economic opportunity.

51. As for the structure of the EOTCA, the act contains no definitions or examples of what the Legislature meant by "destination-oriented recreation and tourism". See W. Va. Code § 11-13Q-1, *et seq.*

52. As noted above, four of six taxpayers eligible for the EOTCA were either defined or examples were provided. The definitions and examples provided are telling in that each one evidences the Legislature's ability to limit the applicability of the EOTCA. If the Legislature meant to limit "destination-oriented recreation and tourism" to certain taxpayers it is clear, based on the other definitions and examples provided as to eligible taxpayers, that Legislature was entirely capable of providing such limitations.

53. Because of the lack of guidance provided by the EOTCA regarding taxpayers qualifying as "destination-oriented recreation and tourism" industries or business activities, the phrase should be construed broadly to include the Fountain Place's cinema complex. Such a conclusion is warranted when considering the general proposition that "tax laws are strictly

construed, and when there is doubt regarding the meaning of such laws they should be construed in favor of the taxpayer.”²⁷

54. Other states with similar statutes have included theatres in the definition of recreation and tourism facilities.

55. In South Carolina, for example, the term “Tourism, sports, and recreational facilities” is defined as in a revenue bond statute as “property used for or useful in connection with theme parks, amusement parks, historical, educational or trade museums, cultural centers, or spectator or participatory sports facilities, generally available to the public, including without limitation thereto marinas, beaches, bathing facilities, golf courses, theaters, arenas, and auditoriums.”²⁸

56. Moreover, South Carolina’s statute has been broadly interpreted as including public lodging and restaurant facilities which are not appurtenant to a qualifying facility as long as its primary purpose is to provide services in connection with a qualifying facility.²⁹

57. Likewise, in the present case, construction of the phrase at issue in favor of Fountain Place is justified when considering the inclusion of theatres in other state statutes

²⁷ *Wooddell*, 160 W. Va. at 68, 230 S.E.2d at 469 (citing *State ex rel. Battle v. Baltimore and Ohio Railway Co.*, 149 W. Va. 810, 143 S.E.2d 331 (1965), *cert. denied*, 384 U.S. 970, 86 S.Ct. 1859, 16 L.Ed.2d 681 (1966); *State v. Carman*, 145 W. Va. 635, 116 S.E.2d 265 (1960)).

²⁸ S.C. Code § 4-29-10(e)(8); *see also* Conn. Gen. St. Ann. § 33-23(d)(y) (“‘Recreation project’ means any project which is to be primarily available for the use of the general public including without limitation stadiums, sports complexes, amusement parks, museums, theaters, civic, concert, cultural and exhibition centers, centers for the visual and performing arts, hotels, motels, resorts, inns and other public lodging accommodations and which the authority determines will tend to (1) promote tourism, (2) provide a special enhancement of recreation facilities in the state or (3) contribute to the business or industrial development of the state.”). The Tax Commissioner’s argument that the South Carolina and Connecticut statutes are different misses the point, which is that two states with similar statutes have specifically included theatres in the definition of recreation and tourism facilities.

²⁹ *Hucks v. Riley*, 292 S.C. 82, 354 S.E.2d 913 (1987).

within the definition of recreation and tourism facilities, the ambiguous nature of the phrase “destination-oriented recreation and tourism,” the EOTCA’s failure to provide guidance as to what the Legislature meant by such, and the general proposition that the tax laws are strictly construed in favor of taxpayers.

58. Construction in favor of Fountain Place is further justified when considering the socioeconomic nature of the EOTCA.

59. With respect to socioeconomic legislation, our Court “has always attempted to liberally construe socioeconomic legislation to effectuate recited legislative intent.”³⁰

60. The socioeconomic purpose of the EOTCA was clearly stated by the Legislature:

The Legislature finds that the encouragement of **economic opportunity** in this state is in the public interest and promotes the general welfare of the people of this state. In order to **encourage greater capital investment** in businesses in this state and thereby increase **economic opportunity** in this state, there is hereby enacted the economic opportunity tax credit.

W. Va. Code, § 11-13Q-2 (emphasis added).

61. Such stated purpose demonstrates that the Legislature’s underlying reasoning for enacting the EOTCA was to promote economic growth and opportunity through capital investment in businesses in West Virginia.

62. When considering the 80,000 individuals that visit Logan to view the most recent movie releases, it is evident that Fountain Place has succeeded in creating economic opportunity, and thereby satisfies the socioeconomic intent and purpose of the EOTCA.³¹

³⁰ *Andy Bros. Tire Co., Inc. v. West Virginia State Tax Com’r*, 160 W.Va. 144, 147, 233 S.E.2d 134, 136 (1977) (string cite omitted). The Court in *Andy Bros. Tire Co., Inc.*, construing the West Virginia Business Investment and Jobs Expansion Tax Credit Act (previously known as the “Business and Occupation Tax Credit Act”), found evidence of the Legislature’s socioeconomic purpose “with[in] a paragraph pronouncing need for encouragement of new industry and expansion of existing industry” within West Virginia. *Andy Bros. Tire Co., Inc.*, 160 W.Va. at 147, 233 S.E.2d at 136.

63. According the West Virginia Code §11-13Q-18(a), the burden of proof is on the taxpayer to establish by clear and convincing evidence that the taxpayer is entitled to the benefits allowed by the Economic Opportunity Tax Credit (by being engaged in this business of “destination-oriented recreation and tourism”) within the meaning of the statute. This decision should not be read to mean that any movie theatre in West Virginia is eligible for the credit. Application of the phrase “destination-oriented recreation and tourism” is fact-specific and must be made on a case-by-case basis with consideration of the factors discussed above. There was much argument at the October 22, 2009 hearing in this case on whether or not a finding for Fountain Place would open a “Pandora’s Box” of eligibility for virtually any business expansion or new business in West Virginia. It is not the intent of this Court to create this effect, and this effect should not result from this decision because it remains the taxpayer’s burden to show that it is “destination-oriented recreation and tourism” within the meaning of the statute and the factors of consideration above.

64. The undersigned is of the opinion that sufficient facts have been found to support this decision and that application of the statute and phrase at issue to these facts supports the ultimate finding and classification of Fountain Place as “destination-oriented recreation and tourism.” The undersigned acknowledges, and attempted to allow for, his personal knowledge of the area and has not “generated his own facts.”

³¹ The Tax Commissioner makes reference to the West Virginia Tourism Development Act of 2004, which was enacted after the EOTCA and provides tax credits for some “entertainment destination centers,” W. Va. Code § 5B-2E-3(9), but that statute is not before this Court. Moreover, the fact that the Legislature chose in 2004 to include certain movie theatres in a tax credit statute sheds no light on the EOTCA which was enacted two years earlier.

WHEREFORE, the Court hereby REVERSES the decision of the Office of Tax Appeals in this matter; REMANDS the case for an award of the tax credits sought by the taxpayer; and DISMISSES the appeal, WITH PREJUDICE, from the docket of this Court.

The objections and exceptions of the Tax Commissioner are duly noted and the Clerk is directed to provide a copy of this Order to all counsel of record upon its entry.

Entered this 17th day of November, 2009.

Roy L Perry
Hon. Roger L Perry, Judge

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