

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35632

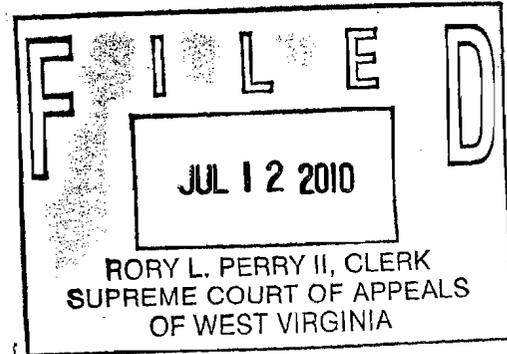
FOUNTAIN PLACE CINEMA 8, LLC.,

Respondent/ Appellant below,

v.

CRAIG A. GRIFFITH, as  
STATE TAX COMMISSIONER OF  
WEST VIRGINIA,

Petitioner/Appellee below.



BRIEF OF WEST VIRGINIA STATE TAX DEPARTMENT

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**BRIEF OF  
WEST VIRGINIA STATE TAX DEPARTMENT**

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**I. INTRODUCTION**

Fountain Place Cinema 8 is a multiplex movie theater located in a strip mall that includes a WalMart, a Lowe's Home Improvement Center, various other retail businesses, and a couple of restaurants. In 2002 the West Virginia Legislature adopted the Economic Opportunity Tax Credit Act to encourage capital investment in the business community and further economic opportunities in this State. Does a movie theater qualify as a business engaged in "destination-oriented recreation and tourism" pursuant to W. Va. Code § 11-13Q-19(a)(5) and, consequently, also qualify for a tax credit of \$393,176.30 ?

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<sup>1</sup>On March 29, 2010, Craig A. Griffith was appointed Acting Tax Commissioner for the State of West Virginia. Tax Commissioner Griffith is substituted as the party to the case in lieu of Christopher G. Morris pursuant to Rule 27(c)(1) of the WV Rules of Appellate Procedure.

The WV Office of Tax Appeals concluded that a movie theater is not a “destination-oriented recreation and tourism” business and affirmed the decision of the Tax Department denying the tax credit. The Circuit Court of Logan County reversed and concluded :

**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 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.**

Circuit Court Decision at PP. 11 & 12, Paragraph 41 (emphasis added).

According to the Circuit Court decision, “attention getting” attractions such as laser tag arenas, go-kart tracks, miniature golf courses and movie theaters, are good enough to warrant a tax credit in Logan, West Virginia.

The legal question presented is rather simple– Is a movie theater a business engaged in “destination-oriented recreation and tourism” under West Virginia law ?

## II. STATEMENT OF FACTS

Primarily, this case presents a legal question and the facts are not generally in dispute. Fountain Place Cinema 8 is a multiplex movie theater which was constructed in 2006 and is located in Logan, WV. Approximately, 200,000 customers attend movies at Fountain Place Cinema on a yearly basis. *See* Circuit Court Decision at P. 1, Finding of Fact 1. Based upon a marketing survey conducted by Fountain Place Cinema, approximately 30 percent of their customers are residents of Eastern Kentucky. *See* OTA Decision at Finding of Fact 5. Furthermore, Fountain Place Cinema believes that an additional 10 percent of its customers were visiting the Hatfield McCoy Trail System and decided to attend a movie while in the area. *See* OTA Decision at Finding of Fact 6; *see* also Circuit Court Decision at P. 11, Paragraph 38. The estimate of Hatfield McCoy Trail System riders who also attend a movie was based upon conversations by Ms. Dianne Barnette, the managing member of Fountain Place Cinema, with movie customers who appeared to be from out of town. *See* Circuit Court Decision at P. 11, Paragraph 39; *see* also OTA Transcript at P. 31, Lines 1-6.

Ms. Barnette admitted at the administrative hearing that she has no verifiable evidence of the number of movie customers who came to Logan for the primary purpose of watching a movie at Fountain Place Cinema. *See* OTA transcript at P. 30, Lines 19-22. In addition, Ms. Barnette admitted that Fountain Place Cinema shows the same movies which are showing at virtually every movie house in the country. *See* OTA transcript at P. 30, Lines 19-22.

## III. STANDARD OF REVIEW

The West Virginia Supreme Court of Appeals has frequently addressed the standard of review on appeal. Factual findings made by the Tax Department or any other administrative agency receive deference. *See* Syl. Pt. 2, *CB&T Operations, Co., Inc. v. Tax Commissioner*, 211 W. Va.

198, 564 S.E.2d 408 (2002). On the other hand, questions of law are subject to *de novo* review. *CB&T*, at Syl. Pt.1; *See also* Syl. Pt. 1, *Muscattell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996); and *Helton v. REM Community Options, Inc.*, 218 W. Va. 165, 167-168, 624 S.E.2d 512, 514-515 (2005).

#### IV. ARGUMENT

##### A. The Circuit Court Decision is Contrary to Both the Letter and the Spirit of the Economic Opportunity Tax Credit Act

Fountain Place Cinema seeks a tax credit of \$393,176.30 under the West Virginia Economic Opportunity Tax Credit. *See* Circuit Court Decision at P. 2, Paragraphs 2-5; *see also* OTA Record at Document 1, P. 14. Eligible taxpayers may claim the credit in equal installments over a ten year period. Specifically, Fountain Place Cinema claims the tax credit as a “destination-oriented recreation and tourism” business.

##### Business eligible for credit entitlements

(a) Notwithstanding any other provision of this article to the contrary, except as provided in section five of this article, no entitlement to the economic opportunity tax credit may result from, and no credit is available to any taxpayer for, investment placed in service or use except for taxpayers engaged in the following industries or business activities:

....

(5) Destination-oriented recreation and tourism;

....

W. Va. Code § 11-13Q-19(a)(5).

In enacting the Economic Opportunity Tax Credit, the Legislature did not define the term “destination-oriented recreation and tourism.”

At the proceedings below, the Tax Department, Fountain Place Cinema, and Chief Administrative Law Judge Michelle Bishop of the WV Office of Tax Appeals, concluded that the term is not clear and unambiguous. The Circuit Court reached the same conclusion. *See* Circuit Court Decision at P. 6, Paragraph 12 and P. 7, Paragraph 20. When a statute is clear and unambiguous, the courts must apply the statute as written. *See* Syl. Pt. 3, *Concept Mining, Inc. v. Helton*, 217 W. Va. 298, 617 S.E.2d 845 (2005). If a statute includes a term that is not defined, then courts must construe the statute. Under West Virginia law, the goal is to implement the intention of the Legislature. *Concept Mining* at Syl. Pt. 2. It is a cardinal rule of statutory construction that undefined terms will be given their ordinary, everyday meaning. *See* Syl. Pt. 2, *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000). The man on the street provides the simplest test for the ordinary meaning of the key phrase at issue with the tax credit. Ask the man on the street one question : If you traveled 30 miles to watch a movie, would you consider yourself a tourist ? The answer will be no.

Furthermore, individual words or phrases should not be analyzed in isolation; rather words and phrases should be analyzed in light of the whole statute. *American Bituminous* at Syl. Pt. 2. The West Virginia Supreme Court has stated that statutory construction requires an holistic approach to construing a statute, that every word employed in the statute is presumed to have meaning, and that the Legislature does not employ language carelessly or idly. *See Bullman v. D & R Lumber Company*, 195 W. Va. 129, 133, 464 S.E.2d 771, 775 (1995). *See also Houyoux v. Paige*, 206 W. Va. 357, 361, 524 S.E.2d 712, 716 (1999) citing *Bullman*.

Since the Economic Opportunity Tax Credit does not define the term “destination-oriented recreation and tourism,” both the Tax Department and Fountain Place Cinema constructed

definitions based upon the ordinary meanings of the individual words. Fountain Place reiterated its definition in the *Petition For Appeal* to Circuit Court at Paragraphs 57-61. The Circuit Court generally adopted the definition as advocated by Fountain Place Cinema and concluded: “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.” Circuit Court Decision at P. 9, Paragraph 31.

ALJ Bishop noted in the OTA Decision that Fountain Place Cinema tended to minimize the word “oriented” in its proffered definition. See OTA Decision at P. 7, Paragraph 1. As the Tax Department argued below and as the Office of Tax Appeals concluded, the Taxpayer’s definition, subsequently adopted by the Circuit Court, emphasized the recreational aspect and minimized the significance of the destination contrary to the clear language of the statute. The Office of Tax Appeals concluded that “[a]n 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.” See OTA Decision at P. 7, Paragraph 3. In short, the business activity in and of itself must be a business engaged in “destination-oriented recreation and tourism” and not merely be ancillary.

At the administrative hearing, Ms. Barnette testified that, in her opinion, a movie theater is *per se* a destination-oriented recreation because, “you plan on going to the movies, you know, make arrangements, get a babysitter, whatever, so it is a destination.” See OTA Transcript at P. 18, Lines 13-20. While Ms. Barnette’s observation regarding the logistics of going to the movies may be correct, her observation does not address whether a movie patron would be classified as a tourist.

A business cannot be engaged in “destination-oriented recreation and tourism” unless the customer is a tourist.

ALJ Bishop further observed that the W. Va. Code § 11-13Q-19(a)(5) employed the conjunction “and.” OTA Decision at P. 6, Paragraphs 3. Therefore, in order to qualify for the tax credit, the activity must be both destination - oriented recreation and destination-oriented tourism. OTA Decision at P. 7, Paragraphs 2. The activity cannot be merely ancillary to the destination-oriented recreation and tourism provided by the Hatfield McCoy Trail System. In order to qualify for the tax credit, the destination is of central importance. OTA Decision at P. 7, Paragraphs 2. Watching a good movie is entertaining and recreational; but is watching a movie “destination-oriented recreation and tourism”? If you drive 30 miles to watch a movie, are you a tourist ?

The West Virginia Legislature did not define the term “destination-oriented recreation and tourism” in the Economic Opportunity Tax Credit Act passed in 2002. Therefore, the courts are required to determine the Legislature’s intent. The best source of legislative intent would be whether the West Virginia Legislature has addressed this or a similar term in other State laws. Thus, this Court has held that “[s]tatutes which relate . . . to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *Pari materia* to assure recognition and implementation of the legislative intent.” *See* Syl. Pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975). This Court has adhered to the “basic rule of statutory construction that ‘[s]tatutes in *pari materia* must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect.’” *State ex rel. McKenzie v. Smith*, 212 W. Va. 288, 301, 569 S.E.2d 809, 822 (2002) (quoting Syl. Pt. 3, *State ex rel. Graney v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958)). In fact, this Court

has read statutes together which relate to the same subject matter regardless of whether the statutes were enacted at the same or different times. See Syl. Pt. 1, *Owens-Illinois Glass Co. v. Battle*, 151 W. Va. 655, 154 S.E.2d 854(1967) (“ Statutes relating to the same subject matter, whether enacted at the same time or at different times, and regardless of whether the later statute refers to the former statute, are to be read and applied together as a single statute the parts of which had been enacted at the same time.”); see also Syl. Pt. 1, *State v. Reel*, 152 W. Va. 646, 165 S.E.2d 813 (1969).

As noted *supra*, the Economic Opportunity Tax Credit Act does not define the term “destination-oriented recreation and tourism.” Subsequent to enacting the Economic Opportunity Tax Credit Act set forth in W. Va. Code § 11-13Q-1 *et seq.*, in 2002, the West Virginia Legislature enacted the West Virginia Tourism Development Act in 2004. The legislative findings for the 2004 act clearly identify the close connection between the tax credit for “destination-oriented recreation and tourism” before this Court and the Tourism Development Act.

### **Legislative findings**

The Legislature finds and declares that **the general welfare and material well-being of the citizens of the state depend, in large measure, upon the development of tourism development projects in the state** and that it is in the best interest of the state to induce the creation of new, or the expansion of existing, tourism development projects within the state in order to advance the public purposes of relieving unemployment by preserving and creating jobs and by preserving and creating new and greater sources of revenues for the support of public services provided by the state; **and that the inducement for the creation or expansion of tourism development projects should be in the form of a tax credit to be applied to consumers sales and service taxes collected on the gross receipts generated directly from the operations of the new or expanded tourism development projects, in lieu of tax credits on income that are largely deferred for a number of years after start up of a major tourism development project**; and all of which new or expanded tourism developments are of paramount importance to the

state and its economy and for the state's contribution to the national economy.

W. Va. Code § 5B-2E-2 (emphasis added).

In addition, both statutes share a second common purpose of promoting economic growth in the State. *See* W. Va. Code §§ 11-13Q-2 and 5B-2E-2.

The Tax Department is not arguing that the West Virginia Tourism Development Act has repealed the Economic Opportunity Tax Credit Act as it relates to “destination-oriented recreation and tourism;” but that the two statutes which address the common purposes of promoting tourism and economic growth in this State should be read *in pari materia*. Therefore, the intent of the West Virginia Legislature in enacting the West Virginia Tourism Development Act in 2004 would be far more insightful than the wishes of the South Carolina Legislature or the Connecticut Legislature in adopting the statutes on which the Circuit Court based its decision. *See, infra*.

Admittedly, there are significant differences between the EOTC Act and the West Virginia Tourism Development Act. The EOTC Act is a tax credit which may be applied against the taxpayer’s business and occupation tax liability, business franchise tax liability, corporate net income tax liability, and personal income tax liability for the owners of a small business. *See* W. Va. Code §§ 11-13Q-7(c),(d),(e), and (f). The West Virginia Tourism Development Act offers a credit against the consumers sales tax collected from customers by the tourism business. *See* W. Va. Code §§ 5B-2E-7 and 7a. Nevertheless, the West Virginia Tourism Development Act is informative of our Legislature’s intent regarding the development of “destination-oriented recreation and tourism.”

The West Virginia Legislature specifically defined “tourism attraction,” for the purposes of the Tourism Development Act as :

(14) **“Tourism attraction” means a cultural or historical site, a recreation or entertainment facility, an area of natural phenomenon or scenic beauty, a West Virginia crafts and products center or an entertainment destination center.** A project or tourism attraction does not include any of the following:

(A) Lodging facility . . .

(B) A facility that is primarily devoted to the retail sale of goods, **other than an entertainment destination center**, a West Virginia crafts and products center or a project where the sale of goods is a secondary and subordinate component of the project; and

(C) **A recreational facility that does not serve as a likely destination where individuals who are not residents of the state would remain overnight in commercial lodging at or near the project or existing attraction.**

W. Va. Code § 5B-2E-3(14) (emphasis added).

A multiplex theater would not be classified as a cultural or historic site, an area of natural phenomenon or scenic beauty, a crafts or product center, or an entertainment destination center as specifically defined by statute. *See, infra*. It is also highly unlikely that the Kentucky residents who patronize Fountain Place Cinema would remain overnight in commercial lodging in any significant numbers. When the two statutes are read *in pari materia*, it is clear that Fountain Place Cinema would not qualify as a “tourism attraction.” Driving 30 miles one way to watch a movie does not make you a tourist. If the customer is not a tourist, then the business is not engaged in “destination-oriented recreation and tourism.”

In addition, the West Virginia Division of Tourism has promulgated legislative rules related to the issue of tourism which clarify the term "destination oriented."

2.8. "Destination Camping" means a full-service camping facility that is located within the state **whose recognized reputation for service and activities are the primary motivating factor for visitors to travel to the area where it is located.** Destination Campgrounds must have cabin/lodge room facilities in addition to a minimum of 65 campsites, including RV sites with full hook-ups. Camp sites must be numbered and the destination must include water, shower house, restrooms and firewood. Visitor registration is required along with a campground host and night security. Destination Campgrounds must have an on-site restaurant or grocery/gift shop facilities and offer at least three recreational camping activities.

2.9. "Destination Inn or Bed and Breakfast" means a lodging facility located within the state **whose recognized reputation for service and amenities are the primary motivating factor for visitors to travel to the area where it is located.**

144 CSR 1 §§ 144-1-2.8 and 2.9<sup>2</sup> (emphasis added).

Therefore, by analogy, in order to qualify as "destination-oriented recreation and tourism," the activity must be the primary motivating factor for the visitors to travel to West Virginia.

Similarly, in order to qualify for the tax credit at issue, the Taxpayer must prove that the primary motivating factor for its Kentucky customers to travel to Logan, was to see a movie at Fountain Place Cinema. Yet, Ms. Barnette, the managing member for Fountain Place Cinema, admitted on cross-examination that she doesn't know the primary reason people attended her movie

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<sup>2</sup> The legislative regulations promulgated by the Division of Tourism were amended in 2010 and became effective May 27, 2010. The previous version of the legislative rule which was effective April 4, 2006 included the definition "destination inn or bed and breakfast." References in the Tax Department's *Petition For Appeal* were based on the 2006 version of the legislative rules. The definition for "destination camping" quoted above was added to the 2010 version of the rule which became effective after the *Petition For Appeal* was filed. All references in this *Brief* are to the current version of the legislative rule.

theater.

Mr. Mudrinich:

You said you did the marketing survey about and you determined approximately thirty percent (30%) of your customers came from Kentucky? Do you have any idea how many of these people were staying the night, weekend, or longer at a hotel or campground nearby?

Ms. Barnette: No.

Mr. Mudrinich:

So, we don't know if they just came in for dinner and a movie, or if they were here on vacation?

Ms. Barnette: Right.

OTA Transcript at P. 27, Line 20-P. 28, Line 6.

Ms. Barnette admitted that no one takes their vacation to travel to Logan, WV, to watch a movie.

Mr. Mudrinich:

You've had these various surveys taken, do you have any verifiable evidence of the number of your customers who came to Logan on their vacation for the primary purpose of watching movies at your theatre?

Ms. Barnette: No.

Transcript at P. 30, Lines 19-22.

Similarly, the Administrative Law Judge questioned the reliability of percentages as an indicator of "destination-oriented recreation and tourism" since Logan is in a border area and the movie theater is located in a strip mall in a rural area which necessarily attracts customers. *See* OTA Decision at P. 7, Paragraph 3.

The fair reading of Ms. Barnett's testimony is that she does not know whether the customers are on vacation in Logan primarily to watch a movie at Fountain Place Cinema 8, taking a break after

riding the Hatfield McCoy Trail System, high school students on a date on Saturday night, county residents in Logan for dinner and a movie, or simply people watching a movie after shopping at Lowes or WalMart which are located in the same strip mall as the movie theater.

Yet, the legislative regulations are clear. Destination means that the underlying activity must be the primary motivating factor for traveling to West Virginia. Unless a movie patron came to Logan on vacation for the primary purpose of watching a *Drillbit Taylor*, *Prom Night* or *Horton Hears A Who* at Fountain Place Cinema, the tax credit cannot be claimed.<sup>3</sup>

Furthermore, the legislative regulations enacted by the Division of Tourism define the term "destination."

2.7. "Destination" means one of the following:

2.7.1. A region or area located within the state containing three or more attractions;

2.7.2. An independent activity located within the state;

2.7.3. A cultural or historic site or event which includes, but is not limited to, fairs or festivals, heritage and historic sites and museums;

2.7.4. Entertainment establishments which include, but are not limited to, pari-mutuel gaming establishments, live performing art centers, sporting organizations or arenas, vineyards or wineries;

2.7.5. Scenic or natural sites such as show caves or caverns;

2.7.6. Theme or Amusement Parks; or

2.7.7. Zoos, Aquariums or Wild Animal Parks;

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<sup>3</sup> The complete list of movies which were playing at Fountain Place Cinema during the administrative hearing is set forth in the Transcript at P. 28, Lines 7-21. The list includes *Prom Night*, *Street Gangs*, *Nim's Island*, *Leatherheads*, *The Ruins*, *Twenty-One*, *Superhero Movie*, *Drillbit Taylor* and *Horton Hears a Who*.

144 CSR 1 §§ 144-1-2.7- 2.7.7 (emphasis added).

Obviously, the WV Division of Tourism did not believe that the term “destination” would include a multiplex movie theater for tourism purposes.

Although the term “destination” includes an area with three or more attractions as stated in Section 2.7.1, a movie theater would not be classified as an attraction for tourism purposes.

2.4. "Attraction" means an entity which is at least one of the following:

2.4.1. A cultural or historic site or event which includes, but is not limited to, fairs or festivals, heritage and historic sites and museums;

2.4.2. Entertainment establishments which include, but are not limited to, pari-mutuel gaming establishments, live performing art centers, sporting organizations or arenas, vineyards or wineries;

2.4.3. Scenic or natural areas such as show caves or caverns;

2.4.4. Theme or Amusement Parks;

2.4.5. Zoos, Aquariums or Wild Animal Parks;

2.4.6. Recreational Activities, including but not limited to whitewater rafting, skiing and snow activities, mountain biking, hunting and fishing.

144 CSR 1 §§ 144-1-2.4- 2.4.6.

The underlying theme is that an “attraction” and a destination refers to an activity which is unique, an activity which is not commonplace. Ms. Barnette testified at the administrative hearing that Fountain Place Cinema shows the same first run movies that are showing at virtually every movie theater in the country. See Transcript at P. 29 Lines 7-16. There is no cultural significance attached to watching *Horton Hears A Who* at Fountain Place Cinema in Logan as opposed to watching *Prom Night* in New York City, San Francisco or Pikeville, Kentucky. Common sense would tell you that a multiplex movie theater showing the same movies you could see in virtually every town in the

nation, would not be an attraction for tourism purposes. The definition of the term “attraction” in the legislative regulations promulgated by the Division of Tourism follows common sense. When read *in pari materia* with the Economic Opportunity Tax Credit Act before the Court, a multiplex movie theater is not a business engaged in tourism and would not qualify as “destination-oriented recreation and tourism” for purposes of obtaining a tax credit.

The purpose of enacting the tax credit for “destination-oriented recreation and tourism” under the Economic Opportunity Tax Credit Act was to promote *Wild and Wonderful West Virginia* and not to subsidize merely “attention getting” multiplex movie theaters or go-kart tracks. The underlying purpose was to promote recreation and tourism activities which are offered by West Virginia that tourists can’t do at home. A business is not engaged in “destination-oriented recreation and tourism” unless it can be demonstrated that the business activity is the primary reason people traveled to the place. Simple logic demands as much.

In addition, the Circuit Court also based its decision in large part on a statute from South Carolina defining the phrase “tourism, sports, and recreation facilities” :

(8) **“Tourism, sports, and recreational facilities” shall mean** 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.

South Carolina Code § 4-29-10(E)(8) (emphasis added).

*See* Circuit Court Decision at PP. 15-16, Paragraph 55 & 56. The Circuit Court also followed a Connecticut statute as urged by Fountain Place Cinema in construing the tax credit set forth in W. Va. Code § 11-13Q-19(b)(5).

(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.

C.G.S.A. § 32-23d(y) (emphasis added).

*See* Circuit Court Decision at P. 15 - Footnote 28 quoting C.G.S.A. § 32-23d(y) (emphasis added).

The Circuit Court ignored the obvious. The Legislature of South Carolina specifically included theaters within the definition of “tourism, sports, and recreational facilities.” Similarly, the Connecticut Legislature specifically classified theaters as “recreation projects” for the purposes of the Connecticut Development Authority. If the West Virginia Legislature had enacted the South Carolina definition of “tourism, sports and recreation facilities” or the Connecticut definition of “recreation projects,” then the Tax Department would adopt Taxpayer’s interpretation of “destination-oriented recreation and tourism.” However, the WV Legislature did not enact the South Carolina or the Connecticut statutory definitions. Furthermore, neither the South Carolina statute nor the Connecticut statute includes a requirement that the “tourism, sports and recreation facilities” or the “recreation projects” be destination oriented.

As the Tax Department argued in the proceedings below, the West Virginia Legislature subsequently enacted tax credits which specifically include multiplex movie theaters in “entertainment destination centers” in the West Virginia Tourism Development Act in 2004.

"Entertainment destination center" means a facility **containing a minimum of two hundred thousand square feet of building space adjacent or complementary to an existing tourism attraction**, an approved project, or a major convention facility and which provides a variety of entertainment and leisure options that contain at least one

major theme restaurant and at least three additional entertainment venues, **including, but not limited to**, live entertainment, **multiplex theaters, large-format theaters, motion simulators**, family entertainment centers, concert halls, virtual reality or other interactive games, museums, exhibitions or other cultural and leisure time activities. Entertainment and food and drink options shall occupy a minimum of sixty percent of total gross area, as defined in the application, available for lease and other retail stores shall occupy no more than forty percent of the total gross area available for lease.

W. Va. Code § 5B-2E-3(9) (emphasis added ).

Clearly, the West Virginia Legislature knows how to include multiplex movie theaters in legislation designed to promote tourism. It is especially telling that the West Virginia Legislature enacted the West Virginia Tourism Development Act in 2004 and specified rigid guidelines for “entertainment destination centers.” Not all entertainment businesses qualify for the tax credit. Obviously, Fountain Place Cinema cannot meet the rigid definition of “entertainment destination center” enacted by the Legislature in 2004 and, instead, seeks to claim the Economic Opportunity Tax Credit set forth in W. Va. Code § 11-13Q-19(a)(5).

Even though the two statutes authorize tax credits against different tax bases, it is doubtful that the Legislature would enact open-ended tax credits for movie theaters as “destination - oriented recreation and tourism” in W. Va. Code Section 11-13Q-19(a)(5) in 2002 and two years later enact additional tax credits for movie theaters as "entertainment destination center" under rigid guidelines. The conclusion is obvious. The West Virginia Legislature did not intend to enact tax credits for movie theaters located in a strip mall anchored by a Lowe’s Home Improvements Center and a WalMart store under the Economic Opportunity Tax Credit Act in 2002.

**B. The Circuit Court Applied the Wrong Statutory Construction to the Economic Opportunity Tax Credit Act**

The Circuit Court correctly stated that the Economic Opportunity Tax Credit Act is

socioeconomic legislation based upon the expressed legislative purpose. See Conclusions of Law at Paragraphs 48, 49 & 60. Furthermore, the Circuit Court stated: “With respect to socioeconomic legislation, our Court has always attempted to liberally construe socioeconomic legislation to effectuate recited legislative intent.” See Conclusion of Law 59. The Circuit Court squarely premised its liberal construction of the EOTC Act on *Andy Bros. Tire Co., Inc. v. West Virginia State Tax Commissioner*, 160 W. Va. 144, 147, 233 S.E.2d 134, 136 (1977). See Footnote 30 in Circuit Court decision.

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.”

Conclusion of Law 53 (Footnote omitted; emphasis added).

The Circuit Court liberally construed the EOTC Act and broadly construed the phrase “destination oriented recreation and tourism.”

However, *Andy Brothers* is not applicable due to significant differences in the underlying tax credits involved and the evolution of tax credits in West Virginia since 1977. First, the West Virginia Legislature has expressly stated in the Economic Opportunity Tax Credit Act : “The provisions of this article shall be **reasonably construed** in order to effectuate the legislative intent recited in section two of this article.” W. Va. Code § 11-13Q-16(b) (emphasis added). Furthermore, the Legislature clearly imposed the burden on the taxpayer to prove by clear and convincing evidence that he is entitled to claim the tax credit. See W. Va. Code § 11-13Q- 18(a). Rather than following the clear direction of the Legislature, the Circuit Court chose to broadly construe the

Legislative intent and purpose. *See* Conclusions of Law 59 & 60.

Second, the Circuit Court failed to examine the underlying statute on which *Andy Brothers* was based and automatically applied a catch phrase to the case currently on appeal. In *Andy Brothers* the Supreme Court examined the application of a tax credit under the *Business and Occupation Tax Credit For Industrial Expansion*. The Supreme Court was forced to determine legislative intent since the B&O Tax Credit under consideration did not contain any direction from the Legislature beyond a brief recitation of legislative findings. *See* W. Va. Code § 11-13C-1 (1974 Replacement Volume). However, the Economic Opportunity Tax Credit Act before this Court has expressly stated that the tax credit is to be construed “reasonably.” *See* W. Va. Code § 11-13Q-16(b). Obviously, the West Virginia Legislature is free to grant tax credits to any taxpayer under practically any conditions that the Legislature deems proper. In the case before this Court, the Legislature has explicitly stated that the EOTC Act is to be construed reasonably. The Legislature could have followed the direction set in *Andy Brothers*; however, the Legislature chose not to do so for the 2002 tax credit.

If the Circuit Court had examined the history of the B&O Tax credit analyzed in *Andy Brothers*, the Circuit Court would have reached a different conclusion regarding how to construe the EOTC Act. The B&O Tax Credit from 1977 was effectively reincarnated as the West Virginia Business Investment and Jobs Expansion Credit Act in 1985. *See* W. Va. Code § 11-13C-1 *et seq.* The West Virginia Legislature essentially adopted the Supreme Court rationale set forth in *Andy Brothers* and stated that the Business Investment and Jobs Expansion Credit Act of 1985 should be “liberally construed.” *See* W. Va. Code § 11-13C-12(b). However, the West Virginia Legislature had second thoughts about a liberal construction and significantly amended the Business Investment

and Jobs Expansion Credit Act in 1990. The Legislature concluded :

(b) *Construction.* - The rule of statutory construction codified in subsection (b), section twelve of this article, is hereby replaced with a rule of reasonable construction in which 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 this article.

W. Va. Code § 11-13C-14(b).

The change under Section 11-13C-14(b) is particularly relevant to this case since the Business Investment and Jobs Expansion Credit Act was amended once again in 1993 to include tax credits for “destination-oriented recreation and tourism.” See W. Va. Code § 11-13C-15(b)(5). The reasonable construction for “destination-oriented recreation and tourism” dates back almost 20 years.

Furthermore, the Circuit Court’s decision to “broadly construe” the tax credit at issue was not merely a question of semantics. The Circuit Court compounded the error by ignoring the burden of proof specified by the Legislature in the Economic Opportunity Tax Credit Act currently before this Court: “ 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 this article.” W. Va. Code § 11-13Q-18(a). If the taxpayer states that she has no demonstrable evidence that her customers came to Logan on vacation for the primary purpose of watching a movie at Fountain Place Cinema, then the Taxpayer has not carried its burden of proof requiring clear and convincing evidence.

The Circuit Court correctly noted “the general proposition that tax laws are to be strictly construed in favor of taxpayers.” See Conclusion of Law 53. However, the prevailing rule in the vast majority of the states and in the field of federal taxation for claiming tax credits is exactly the opposite of the result in *Andy Brothers*. It is well settled that tax credits and tax deductions are

matters of legislative grace and the taxpayer bears the burden of proving that he is entitled to claim the tax credit at issue. The Court of Appeals for the Fourth Circuit has succinctly summarized the standard treatment regarding tax credits. *See Norfolk Southern Corporation v. Commissioner of Internal Revenue*, 140 F. 3d 240, 244 (4th Cir. 1998) (“Moreover, because tax credits and deductions are a matter of legislative grace, taxpayers bear the burden of proving entitlement to the credits they claim on their returns. *See INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84, 112 S. Ct. 1039, 1042-43, 117 L.Ed. 2d 226 (1992)”). Similarly, the First Circuit has also addressed the long standing rule regarding tax credits. *See MedChem (P.R.), Inc. v. Commissioner of Internal Revenue*, 295 F.3d 118, 123 n.6 (1st Cir. 2002) (We are not persuaded by M-PR's contention that, if [Internal Revenue Code] § 936 is ambiguous, then this court should strictly construe it against the government. Here, we are interpreting a provision permitting a tax credit, not a provision levying a tax. . . . M-PR's argument would be more appropriate were this a case involving a statute imposing a tax, rather than a statute permitting a tax credit.). The general rule that tax credits are strictly construed against the person claiming the credit not only reflects long standing general principles of tax law in this country, it reflects the express intention of the West Virginia Legislature as codified in W. Va. Code §§ 11-13Q-16(b) and 18(a).

Nevertheless, the West Virginia Supreme Court has established the default position in this State regarding how tax credits should be construed. *Andy Brothers, supra*, stated that tax credits are to be construed liberally. *Brockway Glass Company, Inc. v. Caryl*, 183 W. Va. 122, 394 S.E.2d 524 (1990) expressly followed *Andy Brothers*<sup>4</sup>. As argued, *supra*, the West Virginia Legislature first

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<sup>4</sup> The Business and Industrial Jobs Expansion Credit was amended in 1990 to require the taxpayer to prove that he is entitled to the credit by clear and convincing evidence. *See* W. Va. Code § 11-13C-14(b). Although the decision in *Brockway Glass* was issued on May 18, 1990, *Brockway*

codified the result in *Andy Brothers* under the Business and Industrial Job Expansion Tax Credit Act in 1985, then amended the tax credit statute in 1990 to establish a reasonable construction of the tax credit and impose a clear and convincing standard on taxpayers claiming the tax credit. See W. Va. Code § 11-13C-14(b). When the Legislature is silent regarding how a tax credit should be construed, the result in *Andy Brothers* should control. However, when the Legislature specifies how a tax credit should be construed— as in W. Va. Code §§ 11-13Q-16(b) and 18(a) which are currently before the Court— the wishes of the Legislature must control.

Tax policy is a particularly legislative function in our State. See *Lingamfelter v. Brown*, 132 W. Va. 566, 573, 52 S.E.2d 687, 691 (1949); *Winter v. Brown*, 143 W. Va. 617, 622, 103 S.E.2d 892, 894 (1958); *State ex rel. City of Charleston v. Sims*, 132 W. Va. 826, 833, 54 S.E.2d 729, 734 (1949); and *General Motors Corporation v. Rose*, 179 W. Va. 461, 464, 370 S.E.2d 117, 120 (1987) (in dissent). Whether it is best to construe the tax credits authorized by the Economic Opportunity Tax Credit Act in 2002 broadly, reasonably, or narrowly, presents a question which can only be answered by the Legislature. The wisdom supporting any tax policy is a legislative question which the courts should not address. See *Neal v. The City of Huntington*, 151 W. Va. 1051, 1056, 158 S.E.2d 223, 226 (1967). The decision by the West Virginia Legislature to reasonably construe the EOTC Act and to require the taxpayer to prove by clear and convincing evidence that he is entitled to claim the tax credit are legislative questions which have been answered in this situation. Despite the extremely clear directive from the Legislature, the Circuit Court erred when it disregarded the statutory language and liberally construed the Economic Opportunity Tax Credit Act in order to

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*Glass* concerned a tax credit for the 1979 tax year. Therefore, *Brockway Glass* followed the liberal construction as specified in *Andy Brothers*.

award a tax credit to Fountain Place Cinema. In effect, the Circuit Court rewrote W. Va. Code §§ 11-13Q-16(b) and 18(a) and shifted the burden of proof to the Tax Department contrary to the express directions from the Legislature.

**C. The Circuit Court Adopted a 40-30 Rule for Tax Credits Which is not Found in the Statutory Language**

The Circuit Court has set the bar so low that virtually every recreational facility in West Virginia can qualify for a tax credit as “destination oriented recreation and tourism.” The Circuit Court concluded that “about thirty percent” of the customers visit Fountain Place Cinema from the Commonwealth of Kentucky. *See* Circuit Court Decision at P. 11, Paragraphs 36, 37 & 38. According to Ms. Barnette’s testimony at the administrative hearing, Logan is approximately twenty miles from the Kentucky border. *See* OTA Transcript at P. 27, Lines 9-17. According to *YAHOO! Maps*, Fountain Place Cinema is 30.19 miles from Kentucky Route 292 at South Williamson, Kentucky. Geography is a proper subject for judicial notice. *See Boyce Motor Lines v. United States*, 342 U.S. 337, 344 (1952). The Tax Department asks the Supreme Court to take judicial notice that Fountain Place Cinema is approximately 30 miles from the Kentucky border. Furthermore, Ms. Barnette testified that, based upon talks with people she did not recognize as regular customers, approximately 10 percent of movie patrons are Hatfield McCoy Trail Riders.<sup>5</sup>

The Circuit Court has adopted an objective rule which has no basis under the Economic Opportunity Tax Credit. The Court concluded that virtually any recreational business in an

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<sup>5</sup> For the purposes of this appeal, the Tax Department accepts the anecdotal evidence that approximately 10 % of movie patrons are Hatfield McCoy Trail Riders who decided to also watch a movie after riding the Trail. The Tax Department further accepts that Fountain Place Cinema draws approximately 30% of its customers from Eastern Kentucky. In the *Petition For Appeal* the Tax Department erroneously referred to this argument as the 30-30 Rule.

“economically stagnate area” can receive a tax credit as a “destination-oriented recreation and tourism” business if forty percent of the taxpayer’s customers travel thirty miles or farther. Applying the Circuit Court’s logic, the business can claim to be in an “economically stagnate area” which, as argued *infra*, is an undefined term, conduct a marketing study to determine that forty percent of its customers travel thirty miles or more, and claim a tax credit. The Circuit Court’s 40-30 Rule effectively repeals the clear statutory requirement set forth in W. Va. Code § 11-13Q-19(a)(5) that the business must be destination-oriented tourism. As Ms. Barnette testified, there is no reliable evidence that any customers vacationed in Logan for the primary purpose of watching movies at Fountain Place Cinema.

The Circuit Court has adopted a standard that Marquee Cinema located at the South Ridge Shopping Center in South Charleston may meet. The Elkins Cinema 7 may also qualify for a tax credit. The South Ridge Grand Prix and Family Fun Center (go-kart track) located in South Charleston may meet the 40-30 Rule as well. Many people would consider enjoying a good meal to be recreational. Café Cimino located in Sutton may qualify for a tax credit under the 40-30 Rule. The one Chuck E. Cheese restaurant located in West Virginia may also qualify for a tax credit under the Circuit Court 40-30 Rule. Restaurants in the Ruby Tuesday chain and the Cracker Barrel chain are normally located along major highways; in all probability, these restaurants could qualify under the Circuit Court’s 40-30 Rule.

Furthermore, the Circuit Court’s 40-30 Rule is contrary to the legislative regulations promulgated by the Division of Tourism. Essentially, the Circuit Court decreed that an “attention getting attraction” in an economically stagnate area qualifies as “destination-oriented recreation and tourism” if 40 percent of the customers travel 30 miles or more. However, the legislative regulations

for the West Virginia Tourism Development Act clearly enact a far more stringent requirement.

An independent activity may qualify as a destination for tourism purposes. See 144 CSR 1 § 144-1-

2.7.2. *supra*.

2.13. "Independent Activity" means **an entity or organization which attracts a minimum of eighty-five percent (85%) of its visitors from outside the local market and is at least one of the following:**

2.13.1. An entity or organization which provides recreational activities including, but not limited to, whitewater rafting, skiing and snow activities, mountain biking, hunting and fishing, bus tours, dinner cruises and sightseeing tours;

2.13.2. A Resort;

2.13.3. A Destination Inn or Bed and Breakfast;

2.13.4. An entity or organization offering vacation rentals;

2.13.5. Destination shopping; or

2.13.6. Destination Camping.

144 CSR 1 § 144-1-2.13- 2.13.6 (emphasis added).

For tourism purposes, the term "local market" is defined as "the geographic area within fifty (50) miles of a destination." 144 CSR 1 § 144-1-2.15. Therefore, the Circuit Court should have deferred to the intention of the West Virginia Legislature as expressed in the tourism rules and adopted an 85-50 Rule instead of creating its 40-30 Rule from thin air.<sup>6</sup> Accordingly, Fountain Place Cinema would need to demonstrate by clear and convincing evidence that 85 percent of its customers traveled 50 miles or more to watch *Prom Night* in order to qualify for the tax credit.

It is ludicrous to argue that the WV Legislature intended to adopt a tax credit for chain

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<sup>6</sup> The 85-50 Rule dates back to the 2006 version of the legislative rules.

restaurants or movie theaters as “destination oriented recreation and tourism” business hoping to increase economic opportunity in this State. Nevertheless, if the Chuck E. Cheese restaurant located in Charleston or the Ruby Tuesday restaurant located in Beckley would conduct a marketing survey showing that 40 percent of its customers traveled 30 miles or more– an easy feat to accomplish along major highways– then Chuck E. Cheese could obtain a tax credit under the Circuit Court’s 40-30 Rule. Awarding a tax credit to a chain restaurant is no less ludicrous than awarding a tax credit to a movie theater showing the same movies as a theater in every other town in America in hopes of increasing economic opportunity in this State. Neither idea makes sense. The Circuit Court decision simply ignores the statutory requirement that the business engaged in “destination-oriented recreation and tourism” must be the draw.

**D. The Circuit Court Created a Five Part Test Which is not Found in the Economic Opportunity Tax Credit Act**

The Circuit Court created a five-part test which is not found in the Economic Opportunity Tax Credit Act.

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.

Circuit Court Decision at P. 10, Paragraph 32.

After creating a test from thin air, the Circuit Court failed to evaluate Fountain Place Cinema under

the test. As noted above, the Circuit Court based its decision on the assumed fact that Logan is an “economically stagnate area” and the 40-30 Rule.

Factors one, two and four, of the Circuit Court’s test are irrelevant concerning whether a business is engaged in “destination-oriented tourism and recreation.” The Circuit Court stated that Logan County is an “economically stagnate area.” Certainly, Logan County has seen hard economic times for too many years. However, the economic situation of a surrounding county is not a stated concern under the Economic Opportunity Tax Credit Act.

The Circuit Court has thrown the doors wide open for taxpayer subsidies with no objective standards. The Court concluded that in an “economically stagnate area,” a miniature golf course could qualify as a destination-oriented tourism business. What constitutes an “economically stagnate area”? If the county unemployment rate is above the statewide unemployment rate, is the county an “economically stagnate area”? If the West Virginia per capita income is below the national per capita income, is the entire State an “economically stagnate area”? If a county has recently experienced the closure of a local business, such as the Ravenswood aluminum plant, is the county an “economically stagnate area”? In short, any Circuit Court judge is free to select a negative economic indicator in his county, declare an “attention getting” attraction to be a business engaged in “destination-oriented recreation and tourism,” and award a tax credit to a theme restaurant, a laser tag arcade, a go-kart track, or a miniature golf course.

The Economic Opportunity Tax Credit set forth in W. Va. Code § 11-13Q-1 *et seq.*, was not enacted to promote “economically stagnate area[s]” as assumed by the Circuit Court. In fact, a review of the entire Economic Opportunity Tax Credit Act clearly indicates that the WV Legislature did not even include the phrase “economically stagnate area,” “economically stagnant area” or even

“economically depressed area,” in the statute.

The West Virginia Legislature has enacted other tax credits to promote economically depressed areas of the State and to assist individuals who live in poverty. For example, the WV Legislature has adopted one tax credit which is specifically targeted at economically depressed areas. In 1996 the WV Legislature enacted the Neighborhood Investment Program Act which gave tax credits for promoting economic development in “economically disadvantaged” areas as defined by statute. *See* W. Va. Code §§ 11-13J-1, *et seq.*, and 11-13J-3(b)(10). Furthermore, the Neighborhood Investment Program Act specifically included a provision that all recipient projects must be approved by the West Virginia Development Office in order to ensure that objective standards were met.

In addition, the WV Legislature has adopted several tax credits focused on assisting individual taxpayers who suffer from economic adversity. Prime examples include the business and occupation tax credit for reducing electric and natural gas utility rates to low-income residential customers, the tax credit for hiring economically disadvantaged Korean or Vietnam era war veterans, and the low-income family tax credit. *See* W. Va. Code §§ 11-13F-1, *et seq.*, 21A-2C-1, *et seq.*, and 11-21-22, respectively. All three tax credits include specific guidelines regarding who is eligible to qualify for the tax credits and do not authorize tax credits in general terms for “economically stagnate area[s]” as the Circuit Court has done.

No one can dispute the fact that Logan, West Virginia, has experienced hard economic times for too many years. Nevertheless, the Economic Opportunity Tax Credit was not created by the Legislature to subsidize movie theaters, miniature golf courses, or laser tag arenas, as the Circuit Court advocates. The purpose of the Economic Opportunity Tax Credit was to promote

manufacturing plants, information processing companies, warehousing and regional distribution centers, goods distribution centers, research and development centers, and destination-oriented recreation and tourism development. See W. Va. Code § 11-13Q-19. In addition, the Economic Opportunity Tax Credit also aimed to attract corporate headquarters in other states to relocate to West Virginia. See W. Va. Code § 11-13Q-5.

The argument that the West Virginia Legislature equated the construction and operation of a movie theater on a par with the construction of a manufacturing plant or a new corporate headquarters in terms of fostering economic opportunity is ludicrous. The argument is even worse once the Economic Opportunity Tax Credit Act is reviewed in light of the legislative regulations promulgated by the Division of Tourism pursuant to W. Va. Code § 5B-2E-1 *et seq.* Fountain Place Cinema is not a business engaged in “destination-oriented recreation and tourism.” The first factor in the Circuit Court’s five factor test conflates the objective of the Economic Opportunity Tax Credit Act and other tax credits targeted to assist depressed areas of the State and individuals who live in poverty.

The second factor— the availability of other recreational opportunities— is not a good measure of whether the business in question qualifies as a business engaged in “destination-oriented recreation and tourism.” Tourists travel from all over the Eastern United States to raft up the New River regardless of whether there are other recreational choices around Fayetteville. Tourists travel to Charles Town Races and Slots to enjoy gaming activities and watch horses race regardless of the availability of movies in downtown Charles Town. Tourists will enjoy white water rafting on a great river such as the New River or the Gauley River regardless of whether you can watch *Prom Night* or *Horton Hears a Who* while in town. A business engaged in “destination-oriented recreation and

tourism” stands on its own and is not dependent on the presence or absence of other things to do in town.

Fountain Place Cinema failed the third factor in the Circuit Court’s test– the cultural significance of the business. The testimony of Mrs. Barnette, the theater owner is clear; Fountain Place Cinema shows the same movies as virtually every other movie theater in the country. *See* OTA Transcript at P. 29, Lines 7-12. There is no cultural significance attached to viewing *Drill Bit Taylor*, *Prom Night*, or *Horton Hears A Who*, at a strip mall in Logan as opposed to watching the same movies in New York City or San Francisco.

The fourth factor in the Circuit Court’s test is also irrelevant. The proximity of a business engaged in “destination-oriented recreation and tourism” to other similar businesses does not determine whether the business constitutes a business engaged in “destination-oriented recreation and tourism.” Such a business is the draw regardless of similar attractions which are close by. Tourists travel to West Virginia for some of the finest downhill skiing in the Mid-Atlantic states. Clearly, Canaan Valley, Timberline Ski Resorts, and White Grass Cross Country Ski Center, are the types of businesses that might qualify as “destination oriented recreation and tourism” businesses despite the fact that all three businesses are located in Tucker County. By the same token, being the only movie theater in town does not transform a local movie theater into a “destination-oriented tourism and recreation” business.

Fountain Place Cinema failed the fifth factor in the five factor test created by the Circuit Court– the number of local customers versus the number of customers from far away. Ms. Barnette testified that 30 percent of customers lived in Kentucky and 10 percent of customers were Hatfield McCoy Trail riders. *See* Circuit Court Decision at P. 11, Paragraph 38. Therefore, 60 percent of

Fountain Place's customers are local residents. How can Fountain Place Cinema be a business engaged in "destination-oriented recreation and tourism", when sixty percent of customers are local residents? Can an business be a "destination-oriented recreation and tourism" business if more than half of the customers are local citizens? Ten percent of the movie patrons came to Logan first to ride the Hatfield McCoy Trail System, then decided to watch a movie while in town and not the other way around. Fountain Place Cinema failed the fifth factor in the Circuit Court test. The Division of Tourism regulations include a clear and objective test— an independent activity must draw 85 percent of its customers from outside of a 50 mile radius. The West Virginia Legislature clearly agreed with the Division of Tourism when it approved the legislative regulations in 2010.

The five factor test created by the Circuit Court is not based on the Economic Opportunity Tax Credit Act and is a *non sequitur*. The five factor test created by the Circuit Court is not a very good measure of whether a business constitutes a business engaged in "destination-oriented recreation and tourism." The five factor test should be rejected since it is not based on the Economic Opportunity Tax Credit Act. If this Court is inclined to adopt an objective test for "destination-oriented recreation and tourism" businesses, then the Court should adopt the "independent attraction" test set forth in the legislative rules promulgated by the Division of Tourism— the 85-50 Rule.

## V. CONCLUSION

Administrative Law Judge Bishop noted the Pandora's Box which would be opened by adopting Fountain Place's reading of the phrase "destination-oriented recreation and tourism."

If the presiding administrative law judge were to adopt the definition proposed by Petitioner, it is difficult to imagine new or expanded businesses that would not be eligible for the EOTC. But given the Legislature's having limited the availability to a finite list of

situations, the term “destination-oriented recreation and tourism” must be more restrictive. While there is little to guide the deciphering of the purpose behind the limitation, **it is evident that the Legislature did not intend the credit to be available to every taxpayer building or expanding a business; otherwise there would be no limitation at all.**

OTA Decision at P. 8, Paragraphs 2 (emphasis added).

The decision of the Circuit Court of Logan County is contrary to the letter and the spirit of the Economic Opportunity Tax Credit Act, is contrary to similar West Virginia state laws related to tourism, ignores the clear language of WV Code §§ 11-13Q-16(b) and 18(a), and was based on a judicially created test which is not found in the statute at before this Court. The Court should reverse the decision of the Logan County Circuit Court.

**Respectfully submitted,**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 35632

FOUNTAIN PLACE CINEMA 8, LLC.,

Respondent/ Appellant below,

v.

CRAIG A. GRIFFITH, as  
STATE TAX COMMISSIONER OF  
WEST VIRGINIA,

Petitioner/Appellee below.

CERTIFICATE OF SERVICE

I, L. Wayne Williams, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing *Brief of West Virginia State Tax Department* was served via United States Mail, postage prepaid, this 12th day of July, 2010, addressed as follows:

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