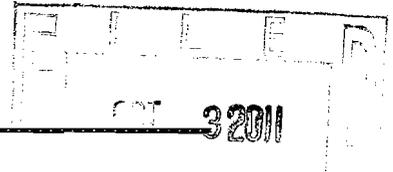


11-1358

No. 11-069



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS, a public corporation, Petitioner below,

Petitioners

v.

HONORABLE JEFFREY B. REED,
Judge of the Circuit Court of Wood County, West Virginia,
Randall Rapp, Lloyd Pannell and Robin Pannell, husband and wife,
Walter R. Butcher, Jr. Trustee, Williamstown Bank, Inc., a West Virginia
corporation, d/b/a Williamstown National Bank and Jeff Sandy,
Sheriff of Wood County, West Virginia, Defendants below

Respondents

From the Circuit Court of
Wood County, West Virginia
Civil Action No. 10-C-109

PETITION FOR WRIT OF PROHIBITION

Leah R. Chappell, Esq., WWSB 5530
Adams, Fisher & Chappell, PLLC
P.O. Box 326
Ripley, WV 25271
(304) 372-6191
Counsel for Petitioner

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	3
I. ISSUES PRESENTED	4
II. PROCEEDINGS AND RULINGS BELOW	5
III. ASSIGNMENTS OF ERROR	7
IV. ARGUMENT	8
A. Prohibition is the Only Remedy to Correct a Clear Legal Error	8
B. Respondent Clearly Exceeded His Jurisdiction by Ordering the Production of Appraisals and Evaluations Pertaining to Other Condemnation Matters in Direct Contravention of Federal Laws	9
C. Respondent Clearly Abused His Discretion by Requiring the Production of Expert Witness Reports Prepared for Cases or Proceedings Other Than the Instant Case	15
D. Respondent Clearly Abused His Discretion by Requiring the Production of All Appraisal Reports and Evaluations Pertaining to the South Mineral Wells Project Without Regard to the Unique Aspects of Each Parcel	17
V. CONCLUSION	19
VERIFICATION	21
MEMORANDUM OF PERSONS TO BE SERVED	22
CERTIFICATE OF SERVICE	23
APPENDIX A	24

TABLE OF AUTHORITIES

	Page
Federal Cases	
<u>Wise v. United States</u> , 369 F.Supp. 30 (W.D.Ky., 1973)	11
<u>Hofer v. Mack Trucks, Inc.</u> , 981 F.2d 377 (8 th Cir. 1992)	17
<u>U.S. v. Miller</u> , 317 U.S. 369, 63 S.Ct. 276 (U.S. 1943)	18
State Cases	
<u>State ex. el. Abraham Linc. Corp. v. Bedell</u> , 216 W.Va. 99, 602 S.E.2d 542 (2004)	8
<u>State ex. rel. Westbrook Health Services Inc. v. Hill</u> , 209 W.Va. 668, 550 S.E.2d 646 (2001)	8
<u>State ex rel. West Virginia State Police v. Taylor</u> , 201 W.Va. 554, 499 S.E.2d 283 (1997)	8
<u>Hinkle v. Black</u> , 164 W.Va. 112, 262 S.E.2d 744 (1979)	9
<u>Huntington Urban Renewal Authority v. Commercial Adjunct Co.</u> , 161 W.Va. 360, 242 S.E.2d 562 (1978)	10, 13
<u>In City of Reno v. Reno Gazette-Journal</u> , 63 P.3d 1147 (Nev. 2003)	13, 14
<u>West Virginia Dept. of Transp., Div. of Highways vs. Dodson Mobile Home Sales and Services, Inc.</u> , 218 W.Va. 121, 624 S.E.2d 468 (2005)	13
<u>DOT vs. Cookman</u> , 219 W.Va. 601, 639 S.E.2d 693 (2006)	16
Federal Statutes and Regulations	
Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C.A. 4601, <u>et. seq.</u>	9
42 U.S.C. 4655(a)	9
42 U.S.C. 4655(a)(1)	10
42 U.S.C. 4651(1), (2) and (3)	10, 11
49 C.F.R. 24.9(b)	12, 13, 14, 15
49 C.F.R. 24.9(e)	12
State Statutes	
W. Va. Code 53-1-1	8
W. Va. Code 17-2A-20	9
W. Va. Code 54-3-2	5, 15
W. Va. Code 54-3-3	9, 10
W. Va. Code 53-1-9	20
State Rules	
W.Va. R.Civ. Pro. 26(b)(4)(A)(i) and (ii)	15, 16
W.Va. R.Civ.Pro. 26(b)(1)	17
Other Authorities	
Wright, Miller & Marcus, <u>Federal Practice and Procedure: Civil 2d</u> , §2009	17
<u>The Appraisal of Real Estate</u> (American Institute of Real Estate Appraisal, 12 th ed., 2002)	18

I. ISSUES PRESENTED

The present Petition arises from an Order issued by Respondent Judge Jeffrey B. Reed (hereafter "Respondent") as a result of a hearing held in the Circuit Court of Wood County on August 15, 2011, concerning a Motion to Compel Discovery, filed by the Respondents Pannell (hereafter "Pannells") below in this condemnation litigation matter. After reviewing the legal memoranda submitted by the parties and following oral argument, the Court Ordered that *"Highways be required to produce to the Defendants [Pannell] any and all appraisals in Highway's possession prepared by any appraiser or expert named by Highways in the instant civil action for all properties which are a part of Project No. U354-14-7.47, subject to the notification procedures set forth in Paragraph No. 6 below."* Paragraph 6 of the Circuit Court's Order further required the Petitioner Division of Highways (hereafter "Highways") to provide 30 days' written notice of the anticipated release of said appraisals to the owners or former owners of the affected properties.¹

In reaching its determination concerning the discovery of appraisals for other affected properties, the Respondent ignored the fact that federal law precludes the production of such materials and that appraisals are wholly irrelevant and beyond the scope of discovery.

If left undisturbed, Respondent's rulings and their resulting precedent will have a chilling effect upon Highways' statutory right to take private property for public use. Highways' ability to effectively negotiate and convert lands necessary

¹ Although not specifically made part of the record, Highways acknowledges that all appraisals prepared incident to the South Mineral Wells interchange project were done by the same appraiser, Roscoe Shiplett.

for critical public projects, such as the South Mineral Wells highway interchange project at issue in this case, will be severely impaired if they are required to publicize unrelated appraisals and evaluations. Failing to recognize that each parcel of real estate is unique, and that each possesses different elements and characteristics which define its value, property owners unschooled in the intricacies of valuation of real estate will believe that their property should be valued the same as their neighbor's property. Further, the confidentiality promised by Highways appraisers when appraising properties affected by a Highways project will cease to exist, leaving many affected landowners with little incentive to provide confidential financial information to Highways appraisers and diminishing the accuracy of these appraisals. The West Virginia Legislature endeavored to prevent such results when it implemented the Uniform Relocation Assistance and Real Property Acquisition Policies Act (W.Va. Code §54-3-2) and adopted related federal administrative regulations. Thus, Petitioners have no choice but to now seek relief from this Court.

II. PROCEEDINGS AND RULINGS BELOW

The West Virginia Department of Transportation, Division of Highways condemned an Exxon station with operating gas pumps and underground storage tanks and a convenience store, all owned by Respondent Randall Rapp. The property also contained a Subway sandwich shop operated by the Pannells, whose tenancy was ended incident to the condemnation. Highways condemned 24,898 square feet for noncontrolled access right of way, 158 square feet for a temporary construction easement and 2,808 square feet, more or less, for a

temporary structure removal easement. The condemnation left an uneconomic remnant which the Respondent Rapp declined to sell to Highways. The taking occurred incident to an upgrade of the South Mineral Wells interchange with State Route 14 along I-77 in Wood County, West Virginia. No commissioner's hearing has been held, but the parties engaged in substantial written discovery before the current dispute arose. The parties each identified expert witnesses, and expert reports and appraisals associated with the subject property were exchanged. Highways also made thousands of pages of engineering and similar records requested by the Respondents available for inspection and copying incident to the Respondent Pannells' Request for Production of Documents. Trial was originally set for October 18, 2011.

Apparently dissatisfied with the reports and appraisals that were initially exchanged, the Pannells served their Second Set of Interrogatories and Requests for Production of Documents on Highways' counsel on May 18, 2011. See Exhibit B. By correspondence attached to Exhibit B, Highways delineated reasons why it refused to produce appraisals on properties other than the subject property. On June 24, 2011, the Pannells filed their Motion of Defendants, Lloyd Pannell and Robin Pannell, to Compel. (Exhibit B)

The Pannells' second set of discovery requests specifically requested as follows:

"Interrogatory No. 4: Please identify each and every appraisal conducted internally by the Petitioner and every and every (sic) appraisal conducted externally on behalf (sic) the Petitioner regarding the Mineral Wells Project at any time during the Project, including the date of each appraisal, the parcel or parcels

appraised in each appraisal, and the name, address and phone number of the appraiser who performed each appraisal.

Request No. 1: Please produce a copy of each appraisal identified in response to Interrogatory No. 4 above.

Request No. 22: Please produce copies of any internal appraisals or valuations of property prepared for the Mineral Wells project.”

Highways objected to these requests in reliance upon 49 C.F.R. § 24.9 and W.Va.R.Civ.P. 26(b)(4). Although the requested information is specifically designated “confidential” by federal law, the Respondent ordered Highways to notify each affected landowner in writing of the prospective release of the appraisal(s) by August 25, 2011 and to produce each appraisal for a property affected by the South Mineral Wells interchange project to the Pannells no later than September 25, 2011. Said Order effectively requires the release of approximately 25 appraisals, comprised of a mixture of residential, commercial and industrial properties.

III. ASSIGNMENTS OF ERROR

- A. Respondent Clearly Exceeded His Jurisdiction by Ordering the Production of Appraisals and Evaluations Pertaining to Other Condemnation Matters in Direct Contravention of Federal Laws.**
- B. Respondent Clearly Abused His Discretion by Requiring the Production of Expert Witness Reports Prepared for Cases or Proceedings Other Than the Instant Case.**
- C. Respondent Clearly Abused His Discretion by Requiring the Production of All Appraisal Reports and Evaluations Pertaining to the South Mineral Wells Project Without Regard to the Unique Aspects of Each Parcel.**

IV. ARGUMENT

A. Prohibition is the Only Remedy to Correct a Clear Legal Error.

Pursuant to West Virginia Code §53-1-1, a “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, which the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” In that regard, a writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court, although having jurisdiction, exceeds its legitimate powers. See State ex el. Abraham Linc. Corp. v. Bedell, 216 W.Va. 99, 602 S.E.2d 542 (2004).

While it has been clearly established in West Virginia that a writ of prohibition will not issue to prevent a “simple misuse” of discretion by a trial court, it is clearly available when a trial court substantially abuses its discretion with respect to discovery orders. See State ex rel. Westbrook Health Services Inc. v. Hill, 209 W.Va. 668, 550 S.E.2d 646 (2001). Moreover, as noted by the Court in State ex rel. West Virginia State Police v. Taylor, 201 W.Va. 554, 499 S.E.2d 283 (1997), when a writ of prohibition raises the invasion of confidential materials which are exempted from discovery, discretionary exercise of this Court’s original jurisdiction is appropriate.

In the instant matter, Respondent exceeded any legitimate power by ordering the production of appraisal reports prepared for all other properties involved in the South Mineral Wells interchange project, which are immaterial and confidential appraisals for properties which are not a part of the

condemnation in the underlying matter. Moreover, Respondent ignored federal law and prevailing case law in reaching his conclusions.

In determining whether to grant a rule to show cause in prohibition based on abuse of discretion, this Court “must consider the adequacy of other available remedies such as appeal and the over-all economy of effort and money among litigants, lawyers and courts.” See Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979). In the matter *sub judice*, there is no other remedy available. In that regard, immediate relief from this Court is necessary to prevent the dissemination of irrelevant, immaterial and confidential non-party materials.

B. Respondent Clearly Exceeded His Jurisdiction by Ordering the Production of Appraisals and Evaluations Pertaining to Other Condemnation Matters in Direct Contravention of Federal Laws.

The South Mineral Wells interchange project receives federal assistance from the U.S. Highway Administration, rendering the entire project subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act, (42 U.S.C.A. 4601, et. seq., hereinafter referred to as the “Federal Act”). Pursuant to 42 U.S.C. 4655(a), the Federal Act requires that a state agency comply with the Federal Act’s policies whenever the agency seeks federal financial assistance for “any program or project which will result in the acquisition of real property.” W. Va. Code 17-2A-20 specifies that Highways “shall provide a relocation assistance program that must comply with and implement the federal laws and regulations relating to relocation assistance to displaced persons as set forth in the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970.” In addition, W. Va. Code 54-3-3 applies the federal real property acquisition policies

to all state agencies with powers of eminent domain. See also, Huntington Urban Renewal Authority v. Commercial Adjunct Co., 161 W.Va. 360, 242 S.E.2d 562 (1978).

Pursuant to the Federal Act, federal funding and approval of state programs is available only where the state agency provides assurances that, "in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title" 42 U.S.C. 4655(a)(1). Unless an impediment to compliance exists in state law, Highways must fully comply with 42 U.S.C. 4651 when acquiring real property for a project for which it receives federal funding.

No such impediment exists in state law. On the contrary, W. Va. Code 54-3-3 requires acquiring agencies to adopt rules and regulations to implement its provisions, and grants such agencies the power and authority to do the same.

Under this federal law, an agency seeking to take land through condemnation proceedings must, prior to the initiation of condemnation proceedings, seek to purchase the property through negotiations and conduct a pre-negotiation appraisal. 42 U.S.C. 4651(1) and (2). Pursuant to 42 U.S.C. 4651(3), an agency seeking to take land through condemnation proceedings must, before the initiation of negotiations "establish an amount which [it] believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property . .

. [the agency must also] provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount [it] established as just compensation." (emphasis supplied)

Under the Federal Act, as it is required to be followed by Highways in the South Mineral Wells interchange project, even a landowner is not entitled to a complete copy of the appraisal performed upon his own property. According to 42 U.S.C.A. 4651(3), the condemning agency is only required to furnish the landowner with the written statement and summary of the basis for the amount established as just compensation referenced above (commonly referred to as the "statement of just compensation"). Addressing this issue, the Court for the Western District Court of Kentucky, in Wise v. United States, 369 F.Supp. 30 (W.D.Ky., 1973), found the plain wording of the statute persuasive, and held that the Federal Act does not require that a full appraisal report be furnished to the landowner for projects under the purview of the Federal Act. Although not required, it is Highway's policy to exchange appraisals and comparable sales data for the property at issue in discovery, as was done in the underlying matter. However, the mere fact that the Federal Act does not mandate that a landowner be provided appraisals for his own property speaks strongly to whether the regulation requires the disclosure of appraisals of other properties in the same project.

The Federal Act speaks directly to the confidentiality of appraisals conducted incident to federally funded projects:

“(b) Confidentiality of records. Records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise.” 49 C.F.R. §24.9(b).

Neither the Respondent nor the Pannells cited any state or federal statute or regulation which they contended constitutes “applicable law provid[ing] otherwise.” The record is completely silent on any finding of fact or conclusion of law rendered by the Respondent on any “applicable law” under which the subject appraisals could be rendered discoverable. 49 C.F.R. 24.9(e) expressly maintains the confidentiality of such records in the context of an administrative appeal. It would be irrational to conclude that documents retaining their confidentiality in the context of an administrative appeal lose that confidentiality in civil litigation *between Highways and an unrelated property owner*.

The purpose of the confidentiality regulation becomes even more apparent when one considers the type of information collected by appraisers in conducting pre-condemnation appraisals. The most obvious examples of such information includes rental, taxation and expense data collected from owners of commercial properties for the income approach. When the real estate interest to be valued includes minerals, the stakes become even higher. Mineral lessors frequently provide Highways appraisers with their private leases including royalty rates, contractual commitments for quantity and quality of product, drilling data, coal reserve studies and the ultimate price collected by the lessor. When one considers that mineral lessors frequently spend **hundreds of thousands to millions of dollars** on mineral reserve studies to determine the quantity and quality of the minerals they own, the need for privacy becomes absolutely

critical.² The negotiation of leases between coal lessors and lessees is also highly competitive and the final product of these negotiations is rarely made public. However, this information is critical to an accurate appraisal of the real estate interests affected by Highways projects. **In mineral cases, property owners or lessors almost always require Highways and/or its contract appraisers to sign confidentiality agreements restricting the disclosure of the information provided so that competitors cannot obtain this data.** In short, the cooperation necessary for Highways to make accurate determinations of just compensation and to make fair offers to property owners only occurs when the appraiser can, under the blanket of federal regulation, promise the landowner confidentiality in the use of the owner's information.

While this Court has interpreted portions of the Federal Act³, it has never ruled on the release of records protected by 49 C.F.R. 24.9(b). In fact the only Court that has reviewed this portion of the Federal Act is the Nevada Supreme Court in the case of In City of Reno v. Reno Gazette-Journal, 63 P.3d 1147 (Nev. 2003). In this matter, a newspaper, pursuant to Nevada's Public Records Act, sought the disclosure of documents relating to the acquisition and relocation of a railroad, a federally assisted project. The newspaper requested the appraisal values for each of the thirty-two parcels of property to be acquired by the City and all appraisal documentation. The City denied the request on the basis of

² It is worth noting that, if this Court approves the wholesale disclosure of pre-condemnation appraisals conducted by the State, property owners will have an incentive to force condemnation of their property so that, incident to litigation, the owner can obtain the appraisals conducted on a neighboring owner's property, including extraordinarily valuable mineral reserve studies and competing lease information.

³ See Huntington Urban Renewal Authority v. Commercial Adjunct Co., *supra* and West Virginia Dept. of Transp., Div. of Highways vs. Dodson Mobile Home Sales and Services, Inc., 218 W.Va. 121, 624 S.E.2d 468 (2005).

confidentiality. Subsequently, the newspaper filed a Petition for Writ of Mandamus demanding the disclosure of these documents, which the trial court granted. On appeal, the Nevada Supreme Court determined the requested documents to be declared confidential by law and that the documents were thereby exempt from disclosure under the Nevada Public Records Act. Interpreting 49 C.F.R. §24.9(b), the Nevada Supreme Court stated:

“This regulation plainly makes records involved in the acquisition of real property for federally funded programs confidential, and not public information, unless there is a law providing that they are not confidential . . . Here, the federal regulation specifically provides that these records are ‘confidential regarding their use as public information, unless applicable law provides otherwise,’ . . . acquisition records have been declared confidential under 49 C.F.R. §24.9(b), which was adopted by statute into Nevada law.” City of Reno v. Reno Gazette-Journal, 63 P.3d at 1150 (Nev. 2003).

While City of Reno may be distinguished from the facts at hand, the distinction only serves to support Highways’ position. Freedom of Information Act requests are typically enforceable with tight response deadlines imposed on government entities from which information is requested, and failure to respond in a complete and timely manner is frequently penalized by an award of attorney fees. Given that the current issue is framed simply as an abuse of discovery issue, rather than an issue relating to the West Virginia Freedom of Information Act, the Pannells’ protections can under no circumstances be greater than a newspaper seeking public information under FOIA.

The South Mineral Wells interchange project’s status as a federally assisted highway requires Highways to follow the regulations set forth in the Federal Act *or risk the loss of federal reimbursement for highway construction projects*. Thus, any records, including appraisals, remain confidential unless the

State of West Virginia makes an independent determination that public records covered under the Federal Act should not remain confidential. The West Virginia Legislature affirmatively adopted the Federal Act *in totum* and enacted no statute or legislative rule limiting the “confidential” label placed by the Federal Act upon appraisals and/or other evaluations which are prepared for federally assisted projects. If the Legislature intended to limit the protections afforded landowners affected by a project (that being all landowners, not just the Pannells), the Legislature could have easily included such language when it implemented the Uniform Relocation Assistance and Real Property Acquisition Policies Act (W.Va. Code §54-3-2) and adopted related federal administrative regulations.

49 C.F.R. §24.9(b) preempts disclosure of the appraisals on the properties appraised incident to the South Mineral Wells project. In that regard, Respondent abused his discretion by ordering Highways to produce appraisals and evaluations that have been declared confidential by the Federal Act.

C. Respondent Clearly Abused His Discretion by Requiring the Production of Expert Witness Reports Prepared for Cases or Proceedings Other Than the Instant Case.

Rule 26(b)(4)(A) of the West Virginia Rules of Civil Procedure establishes the parameters for discovering information from testifying experts. Pursuant to Rule 26(b)(4)(A)(i), a party may use interrogatories to obtain information regarding the expected opinions of testifying expert witnesses, and under Rule 26(b)(4)(A)(ii), a party may depose a testifying expert witness. With respect to discovering information from testifying experts through interrogatories, Rule 26(b)(4)(A)(i) provides as follows:

“A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.”

No provision of this Rule obligates a party to turn over documents its trial expert prepared *in another proceeding*, nor does the rule even expressly require a party to turn over the actual report that its expert prepared in the case at hand. Under Rule 26(b)(4)(A)(i), the reports sought by the Pannells are simply not discoverable. If Highways chooses to simply turn over an expert's report rather than answer a complicated series of interrogatories concerning the specifics of the expert's opinion, the bases therefore and the facts underlying said opinions, this action does not grant the Pannells greater latitude in discovery than that set forth in the Rules of Civil Procedure.

Under the opinion in DOT vs. Cookman, 219 W.Va. 601, 639 S.E.2d 693 (2006), once "appropriate circumstances" have been shown to permit disclosure under Rule 26, there must be a further determination of "exceptional circumstances" before reports are actually turned over. Any report disclosed pursuant to the Respondent's Order will, in accordance with the usual practices of appraisers, be based upon a combination of information available to all appraisers, such as public records of real estate sales, or confidential information provided by the landowner, which is protected by federal law.

Neither the Pannells nor the Respondent have made any effort to explain what "exceptional circumstances" exist in this case which would warrant the

wholesale disclosure of every report prepared by Roscoe Shiplett on the properties affected by the South Mineral Wells Interchange project.

D. Respondent Clearly Abused His Discretion by Requiring the Production of All Appraisal Reports and Evaluations Pertaining to the South Mineral Wells Project Without Regard to the Unique Aspects of Each Parcel.

Appraisals and evaluations prepared on behalf of Highways for other properties affected by the South Mineral Wells project are irrelevant, immaterial and will not lead to the discovery of admissible evidence. Rather than assist the trier of fact, this superfluous information will only further complicate and convolute the underlying matter since the only issue to be determined at trial is that of just compensation *for the subject property*.

While Highways recognizes that under W.Va.R.Civ.P. 26(b)(1), the information sought by the Pannells need not be admissible at trial, at a minimum, it must appear “reasonably calculated to lead to the discovery of admissible evidence.” as the Eighth Circuit noted in Hofer v. Mack Trucks, Inc., 981 F.2d 377 (8th Cir. 1992):

“While the standard of relevance in the context of discovery is broader than in the context of admissibility, this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery. Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.”

The question of whether the information sought is discoverable ultimately depends on the facts and circumstances of the particular case. Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d, §2009. On this basis, the discovery sought by the Pannells is clearly beyond the scope of discovery.

In a real estate context, an appraisal is defined as the act or process of estimating value. Part of the appraisal process is the gathering, analysis and interpretation of information related to a specific property's use, quality, value and/or utility. The appraiser then formulates his estimation of market value based upon this information. The Appraisal of Real Estate (American Institute of Real Estate Appraisal, 12th ed., 2002). In that regard, an appraisal has been described by the United States Supreme Court as "at best, a guess by informed persons." U.S. v. Miller, 317 U.S. 369, 63 S.Ct. 276 (U.S. 1943).

By their very nature, appraisals of real estate are parcel-specific, with the size, utility, highest and best use, methodology and other factors to be considered varying with each property. Accordingly, the only similarity between the property at issue and other affected properties is that each was the subject of Highways condemnation or purchase for the South Mineral Wells project.

Notwithstanding Highways' objection, Respondent determined that "*any appraisal or valuations performed by identified expert witnesses or consultants of the Petitioner on other parcels that are a part of the subject project, are discoverable for the reasons that the [Pannells] are entitled to discover whether or not such appraisers or consultants have acted consistently in their approach to valuation and to discover any inconsistencies for purposes of cross-examination and possible impeachment.*" September 19, 2011 Order, para. 2. This argument, and the Respondent's acceptance thereof, completely overlooks the absurdity of this argument and the likelihood that using this information at trial will simply result in the dreaded "trial within a trial", where, for instance, the question

of whether the appraiser's choice of comparable sales for a neighboring property is relevant to his choice of comparable sales for the subject property.

While Respondent has not determined that he will allow evidence related to appraisals of other property to be introduced as evidence at trial, the Respondent's finding that "*any appraisal or valuations performed by identified expert witnesses or consultants of the Petitioner on other parcels that are a part of the subject project, are discoverable for the reasons that the [Pannells] are entitled to discover whether or not such appraisers or consultants have acted consistently in their approach to valuation and to discover any inconsistencies for purposes of cross-examination and possible impeachment*" (Order of September 19, 2011, para. 2) clearly evidences his intent that the confidential information contained in these reports will be openly disseminated at trial. Further, the discovery should be denied because the appraisals Ordered released clearly exceed the scope of the subject matter and will only serve to prejudice and prolong the litigation. In this regard, the Respondent abused his discretion when he determined that the appraisals and valuations prepared for all properties affected by this project were discoverable.

V. CONCLUSION

Thus, it is clearly apparent that Respondent has exceeded his judicial authority and discretion by ordering Highways to disclose all appraisals and evaluations prepared for Highways and relating to parcels of land affected by the federally funded South Mineral Wells Interchange project.

WHEREFORE, for the foregoing reasons, Highways respectfully requests that this Honorable Court issue a rule to show cause, suspend any and all proceedings in the underlying action pending the Court's ruling herein pursuant to W. Va. Code 53-1-9; and grant a Writ of Prohibition in this matter to prohibit the Respondent from enforcing the Order from the hearing on August 15, 2011, entered on September 19, 2011.

Respectfully submitted,
**WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, a state agency,**
By counsel



Leah R. Chappell, Esq. WVSB 5530
ADAMS, FISHER & CHAPPELL, PLLC
Attorneys at Law
P. O. Box 326
Ripley, WV 25271
Telephone: (304) 372-6191
Facsimile: (304) 372-2175
Counsel for the Petitioners

VERIFICATION

**STATE OF WEST VIRGINIA,
COUNTY OF WOOD, to-wit:**

Lyn M. Westbrook, Realty Manager, West Virginia Department of Transportation, Division of Highways, District 3, 624 Depot Street, Parkersburg, WV, named in the foregoing Petition for Writ of Prohibition, being duly sworn, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information and belief, and that so far as they are stated to be upon information, she believes them to be true.

**WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, a state agency,**

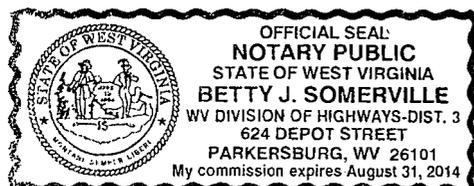
By: *Lyn M. Westbrook*
Lyn M. Westbrook

Its: Realty Manager

**STATE OF WEST VIRGINIA,
COUNTY OF WOOD, to-wit:**

I, *Betty J. Somerville*, a notary public in and for said state, do hereby certify that Lyn M. Westbrook, who signed the writing above, bearing date the 3rd day of October, 2011 for the West Virginia Department of Transportation, Division of Highways, has this day acknowledged before me the said writing to be the act and deed of said state agency.

Given under my hand this 3rd day of October, 2011.



Betty J. Somerville
Notary Public

My commissioner expires: *August 31 2014*

MEMORANDUM OF PERSONS TO BE SERVED

Persons to be served the Rule to Show Cause should this Court grant the relief requested in this Petition for Writ of Prohibition are as follows:

Andrew C. Woofter, III, Esq.
P. O. Box 265
Parkersburg, WV 26102-0265
Counsel for Defendant Rapp

Robert L. Bays, Esq.
Bowles, Rice, McDavid, Graff & Love, PLLC
P. O. Box 49
Parkersburg, WV 26102
Counsel for Defendants Pannell

William Crichton, VI, Esq.
Crichton & Crichton
325 9th Street
Parkersburg, WV 26101
Counsel for Defendant Rapp

Honorable Judge Jeffrey B. Reed
Wood County Judicial Building
2 Government Square
Room 221
Parkersburg, WV 26101-5353

Jason Wharton, Esq.
Wood County Prosecuting Atty.
317 Market Street
Parkersburg, WV 26101
Counsel for Respondent Judge Reed

Carole A. Jones, Clerk
Circuit Court of Wood County, West Virginia
Wood County Courthouse
2 Government Square, Rm. 113
Parkersburg, WV 26101



Leah R. Chappell, WVSB 5530
Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioner hereby certifies that she did serve a true copy of the attached Petition for Writ of Prohibition on this the 3rd day of October, 2011 by U.S. Mail, to all parties at the following addresses:

Andrew C. Woofter, III, Esq.
P. O. Box 265
Parkersburg, WV 26102-0265
Counsel for Defendant Rapp

Robert L. Bays, Esq.
Bowles, Rice, McDavid, Graff & Love, PLLC
P. O. Box 49
Parkersburg, WV 26102
Counsel for Defendants Pannell

William Crichton, VI, Esq.
Crichton & Crichton
325 9th Street
Parkersburg, WV 26101
Counsel for Defendant Rapp

Honorable Judge Jeffrey B. Reed
Wood County Judicial Building
2 Government Square
Room 221
Parkersburg, WV 26101-5353

Jason Wharton, Esq.
Wood County Prosecuting Atty.
317 Market Street
Parkersburg, WV 26101
Counsel for Respondent Judge Reed

Carole A. Jones, Clerk
Circuit Court of Wood County, West Virginia
Wood County Courthouse
2 Government Square, Rm. 113
Parkersburg, WV 26101



Leah R. Chappell, Esq.

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE