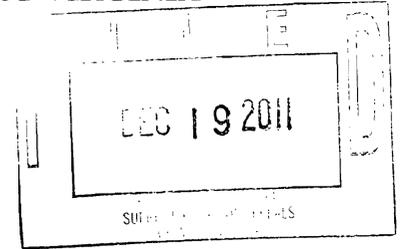


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Target Corporation, Petitioner Below, Petitioner

vs.

Docket No. 11-1355

**Kathie Hoffman, Assessor and the County Commission
of Ohio County, Respondents Below, Respondents**

Petitioner's Brief

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Target Corporation, Petitioner Below, Petitioner

vs.

Docket No. 11-1355

**Kathie Hoffman, Assessor and the County Commission
of Ohio County, Respondents Below, Respondents**

Petitioner's Brief

Target Corporation, the Petitioner herein, appeals the decision of the Circuit Court of Ohio County dated September 6, 2011 in Civil Action No. 11-CAP-3, in which the Circuit Court affirmed the decision of the Ohio County Commission sitting as a Board of Equalization and Review rejecting Target's appeal of the Ohio County Assessor's appraisal of its real and personal property for tax year 2011 and, in fact, increasing, rather than decreasing, the value of Target's property.

I. Assignments of Error

- 1. If a Board of Equalization and Review increases the appraised value of property for *ad valorem* tax purposes, it must first give the taxpayer five days' notice. When, as here, no notice is given, the increase is void.**
- 2. After a taxpayer meets its burden to show the assessor's value is excessive, the Assessor must demonstrate that his or her appraisal is supported by substantial evidence. Here, the Assessor failed to do so.**
- 3. Due Process requires that an independent tribunal hear Target's appeal, yet the Board of Equalization and Review had already instructed the Assessor to increase the value of Target's property (with no notice to Target) at the time that Target appeared before them to argue for a decrease in value. At least with respect to Target for this appeal, the tribunal was not independent and Target's Due Process rights were infringed.**

II. Statement of the Case

This is a straightforward property tax appeal; there are no technical appraisal issues presented in this case. Target Corporation constructed its store in Ohio County in 2006 and spent \$6.2 million on the building. See Board Tr. at 10, 26-27; Apx. Rec. Vol. 2 at 10, 26-27. As recently as February 25, 2011, the Assessor of Ohio County valued the building at \$6.6 million. See Apx. Rec. Vol. 1 at 22. Yet in three days between the day that document was printed and the date of Target's hearing before the Ohio County Commission sitting as a Board of Equalization and Review ("Board")¹, the Assessor increased her value of the building to \$9.7 million. See Apx. Rec. Vol. 1 at 19. This increase cannot be explained by any renovations or additions to the building, and Target demonstrated at the hearing before the Board that the new value was far higher than the values for the five other Target buildings in West Virginia, as determined by the Assessors in the counties in which the other stores are located². Not only was there no rational basis for this sudden enormous increase in value, but, as Target discovered at the hearing before the Board, the increase was, in fact, dictated by the Board in a meeting with the Assessor - a meeting of which Target had no notice and which Target wasn't permitted to attend. Yet the Board served as the tribunal at the first level adjudicatory hearing for Target's appeal. Due Process requires an independent tribunal; here, the Board had prejudged the outcome of the case.

Target has appealed the value of its real and personal property in Ohio County every year since at least 2009. See Board Tr. at 39-47, Apx. Rec. Vol. 2 at 39-47 (discussion of appeals

¹ Target's hearing was on February 28, 2011. See Circuit Court Tr. at 9-10. The transcript of the Board's hearing incorrectly states the hearing was conducted on February 22, 2011.

² The new value of \$9.7 million for a 126,842 square foot building is a value of \$76.80/square foot. By comparison, the other five buildings, all of similar size, are valued by their Assessors at \$29.49 to \$56.01/square foot. See Apx. Rec. Vol. 1 at 79.

for tax year 2009 and 2010 for the same property). For tax year 2010, the Assessor of Ohio County (“Assessor”) initially appraised the value of Target’s property at \$16,757,000. *See* Apdx. Rec. Vol. 1 at 19 and 21. Target appealed this value to the Board. On May 26, 2010, the Ohio County Commission entered an exoneration reducing the value from \$16,757,000 to \$12,975,300. *See* Final Order at 3, Apdx. Rec. Vol. 1 at 3; *see also* Board Tr. at 39-47, Apdx. Rec. Vol. 2 at 39-47

The Assessor increased the value of Target’s real and personal property from \$12,975,300 to \$13,881,600 and delivered the property books to the Ohio County Commission by February 1, 2011 with this \$13,881,600 value. *See* Apdx. Rec. Vol. 1 at 22 Computer printout dated Feb 25, 2011. On February 21, 2011, Target filed an Application for Review of Property Valuation with the Assessor. *See* Apdx. Rec. Vol. 1 at 17. On February 28, 2011, Target appealed before the Board to appeal the Assessor’s \$13,881,600 value for tax year 2011. *See* Board Tr. at 14, Apdx. Rec. Vol. 2 at 14 (Target’s attorney stating that he believed the appraised value for 2011 was \$13,881,600).

At that hearing, Target discovered that the Assessor had met with the Board sometime prior to February 28, 2011 for the purpose of discussing the appraised value of Target’s property. *See* Board Tr. at 43-44, Apdx. Rec. Vol. 2 at 43-44 (Assessor testifying that she tried to use the \$13 million value but the Board disapproved it). Target was not notified of this meeting and was not present at the meeting. According to the Assessor, the Board refused to accept the Assessor’s value of \$13,881,600; at some point in time subsequent to that meeting, the value was increased from \$13,881,600 to \$17,043,600. *See* Board Tr. at 14, Apdx. Rec. Vol. 2 at 14 (Mr. Prettyman stating that the Assessor’s value was \$17,043,600). Target was never notified of this

increase; at the February 28, 2011 hearing, Target still believed that the appraised value of its property for tax year 2011 was \$13,881,600. *Id.*

At the hearing before the Board, Target introduced an appraisal performed by Mr. Anthony C. Barna, who is licensed as a Certified General Appraiser in Pennsylvania (Apdx. Rec. Vol. 1 at 77) and was temporarily licensed in West Virginia for this specific assignment as required by W. Va. Code § 30-38-5(c) (Apdx. Rec. Vol. 1 at 78). Mr. Barna also testified and was cross examined at the hearing before the Board. The Assessor did not object to the qualifications of the appraiser.

The Assessor, by contrast, introduced very little evidence at the hearing. While she did introduce two computer printouts from the Integrated Assessment System (“IAS”) provided for her use by the State Tax Commissioner and used to appraise property in Ohio County, neither of those printouts supported her appraised value for the property in question. Rather, one reflected her initial value for the property for the previous tax year (prior to the exoneration described above) of \$16,757,000 (Apdx. Rec. Vol. 1 at 21); the other, dated February 25, 2011, indicated that she valued the property at \$13,881,600 for tax year 2011. Apdx. Rec. Vol. 1 at 22. The Assessor did not introduce a computer printout that supported her final value of \$17,043,600; in fact, she and her representative struggled to even be able to tell the Board what her final value was. *See* Board Tr. at 14, Apdx. Rec. Vol. 2 at 14 (Assessor struggling to come up with the correct value and Mr. Prettyman finally stating that it was \$17,043,600).

Yet the Board denied Target’s appeal and set the value of Target’s property at \$17,043,600. *See* Apdx. Rec. Vol. 1 at 9. Target then appealed to the Circuit Court of Ohio County, where it was assigned to Judge Martin J. Gaughan and was assigned Civil Action No. 11-CAP-3. A hearing was conducted on August 18, 2011. The Court below entered its Order

affirming the Board on Sept. 6, 2011. *See* Apdx. Rec. Vol. 1 at 1. Target then filed its Notice of Appeal with this Court on September 28, 2011 and today files this brief and the agreed Appendix Record in accordance with the Scheduling Order entered October 5, 2011.

II. Summary of Argument

In *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009), this Court ordered that

to ensure that this Court has a complete record from which to review future appeals of ad valorem tax assessments of commercial real property, we hold that when a circuit court reviews an appraisal of commercial real property made for *ad valorem* taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer's consideration of the required appraisal factors set forth in W. Va.C.S.R. §§ 110-1P-2.1.1 to 2.1.4 (1991).

Stone Brooke, 224 W.Va. at 705, 688 S.E.2d 314. In fact, the Court below made a finding that “the Assessor properly considered the required appraisal factors set forth in W. Va. C.S.R. §§ 110-1P-2”. Order at 4, Apdx. Rec. Vol. 1 at 4. However, the Circuit Court’s finding was predicated solely on the fact that “Deputy Assessor Prettyman testified that he considered all of the items in W. Va. C.S.R. §§ 110-1P-2”. *Id.*

In fact, a review of the record made before the Ohio County Commission sitting as a Board of Equalization and Review reveals that that’s just about the sum total of the evidence presented by the Assessor to the Board to support her appraisal. She failed to introduce even the usual printout form the computer system provided to her by the Tax Department that often is used as the basis for an Assessor’s value, much less discuss even one of the more than twenty factors required by the Tax Commissioner’s legislative rule.

In *Stone Brooke*, this Court observed that

it is quite apparent to this Court that, despite the fact that all of the factors set forth in W. Va.C.S.R. §§ 110-1P-2.1.1 to 2.1.4 are required to be considered when appraising commercial real property, such an analysis is rarely completed.

Stone Brooke, 224 W.Va. at 706, 688 S.E.2d 315. This case is yet another example of that failure and exemplifies the Court's additional observation that:

Despite the clear directive in W. Va.C.S.R. § 110-1P-2.1.4 that "each of these factors should be considered in the appraisal of a specific parcel" of commercial real property, this Court rarely is presented with a record from which we can determine whether each of the enumerated factors has been thoroughly considered.

Stone Brooke, 224 W.Va. at 705, 688 S.E.2d 314.

Moreover, when the taxpayer appeared before the Board to protest what it thought was the Assessor's appraised value, it discovered that the Assessor had already consulted with the Board and had been instructed by the Board to increase the appraised value. The Taxpayer wasn't notified that the Assessor was going to meet with the Board and didn't have the opportunity to be present at that meeting. Nor was the taxpayer notified that the Board was considering this increase, and that lack of notification hindered the taxpayer's ability to prepare its case and to present its objections to the increased value. Because the Board had prejudged the outcome of Target's appeal, Target was denied due process of law.

In short, if it is proper for a circuit court to completely ignore the evidence presented by the taxpayer and to affirm the Assessor's increased value with no notice to the taxpayer based on a single conclusory statement by the taxing authority that he or she considered all of the required factors is sufficient to satisfy the requirement announced in *Stone Brooke* that a circuit court must make findings of fact and conclusions of law addressing the assessing officer's consideration of the required appraisal factors, this Court might just as well have saved its breath.

IV. Statement Regarding Oral Argument and Decision

In this case, oral argument under Rule 19 of the W. Va. Revised Rules of Appellate Procedure would insure that the Court has the opportunity to fully understand what transpired in the hearings before the Board of Equalization and Review and the Circuit Court and would thus significantly aid the decisional process. This case is appropriate for memorandum decision to enforce the points of law announced in the *Stone Brooke* decision.

V. Argument

1. Standard of Review

In *Stone Brooke, supra*, this Court stated that

“ “[a]n assessment made by a board of review and equalization and approved by the circuit court will not be reversed when supported by substantial evidence unless plainly wrong.” Syl. pt. 1, *West Penn Power Co. v. Board of Review and Equalization [of Brooke County]*, 112 W.Va. 442, 164 S.E. 862 (1932).’ Syl. pt. 3, *Western Pocahontas Properties, Ltd. v. County Comm'n of Wetzel County*, 189 W.Va. 322, 431 S.E.2d 661 (1993).” Syl. pt. 4, *In re Petition of Maple Meadow Mining Co. for Relief from Real Property Assessment For the Tax Year 1992*, 191 W.Va. 519, 446 S.E.2d 912 (1994).

Syl. pt. 3, *In re Tax Assessment of Foster Found.'s Woodlands Ret. Cmty.*, 223 W.Va. 14, 672 S.E.2d 150 (2008). Stated otherwise,

[i]n a case involving the assessment of property for taxation purposes, which does not involve the violation of a statute governing the assessment of property, or a violation of a constitutional provision, or in which a question of the constitutionality of a statute is not involved, this Court will not set aside or disturb an assessment made by an assessor or the county court, acting as a board of equalization and review, where the assessment is supported by substantial evidence.

Syl. pt. 2, *In re Tax Assessments Against the S. Land Co.*, 143 W.Va. 152, 100 S.E.2d 555 (1957), *overruled on other grounds by In re the Assessment of Shares of Stock of the Kanawha Valley Bank*, 144 W.Va. 346, 109 S.E.2d 649 (1959). *But see In re Tax Assessment Against Amn. Bituminous Power Partners, L.P.*, 208 W.Va. 250, 255, 539 S.E.2d 757, 762 (2000) (“[J]udicial review of a decision of a board of equalization and review regarding a challenged tax assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A. In such circumstances, a

circuit court is primarily discharging an appellate function little different from that undertaken by this Court; consequently, our review of a circuit court's ruling in proceedings under [W. Va.Code] § 11-3-25 is *de novo*.” (footnote and citation omitted)).

Stone Brooke, 224 W.Va. at 696-697, 688 S.E.2d 305-306.

2. If a Board of Equalization and Review increases the appraised value of property for *ad valorem* tax purposes, it must first give the taxpayer five days' notice. When, as here, no notice is given, the increase is void.

a. The Exoneration for Tax Year 2010 Established the True and Actual Value for the Property for Tax Year 2010.

As noted above, the Assessor introduced a Commercial/Industrial Review Document for tax year 2010 that showed an appraised value of \$16,757,000. *See* Apdx. Rec. Vol. 1 at 21.

However, as the Circuit Court below observed, the County Commission approved an exoneration that finally set the value of the property for tax year 2010 at \$12,975,300. *See* Final Order at 3, Apdx. Rec. Vol. 1 at 3; *see also* Board Tr. at 39-47, Apdx. Rec. Vol. 2 at 39-47 (discussion of appeals for tax year 2009 and 2010 for the same property).

Article X § 1 of the Constitution of West Virginia provides, in part, that “[s]ubject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law”. W. Va. Code § 11-3-1 directs that “[a]ll property shall be assessed annually as of the first day of July at its true and actual value”. The exoneration statute permits either the taxpayer or the taxing authority to apply to a county commission for relief from an error in the property books, but that authority is significantly limited. Not just any error can be corrected; rather, only errors that result “from a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment” can be corrected. *See* W. Va. Code § 11-3-27(a); *see also* Syl. Pt. 4, *State ex rel.*

Prosecuting Attorney of Kanawha County v. Bayer Corp., 223 W.Va. 146, 672 S.E.2d 282

(2008):

Under W. Va.Code § 11-3-27(a) (2000) (Repl.Vol.2008), a mistake occasioned by an unintentional or inadvertent act is established by evidence showing that, although the duty of care was not breached, an error occurred in the entry in the property books of the county, including entries with respect to classification and taxability of property. Relief under the statute may not be granted if it is shown that a taxpayer breached its duty of care.

There are also limits on when the request for exoneration can be made. *See* W. Va. Code § 11-3-27(a) (limiting the errors that can be corrected to those for which application is made “within one year from the time the property books are delivered to the sheriff or within one year from the time such clerical error or mistake is discovered or reasonably could have been discovered”).

The organic law of this State therefore prohibits property from being taxed at anything other than its true and actual value. A county commission can only grant an exoneration and reduce the value of property below the Assessor’s original appraised value if it finds that the original appraisal was the result of “a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment”, and if the mistake was brought to its attention in a timely manner. There is no provision in the law to permit the county commission to grant an exoneration to settle a lawsuit unless it finds that the original appraisal was, in fact, wrong. A taxpayer is entitled to infer from the fact that the county commission sets the value of property through the exoneration process that the county commission set the property at its true and actual value. If a subsequent appraisal by the Assessor results in a substantially higher value, the taxpayer is entitled to inquire as to why the increase was justified, if for no other reason than to insure that the same mistake or error hadn’t again occurred.

The fact that an exoneration had been approved by the County Commission for the 2010 tax year was explained to the Circuit Court (see Circuit Court Tr. at 6, 10; Apdx. Rec. Vol. 3 at 6,10. However, the Court below erroneously concluded that as a matter of law that, because the Assessor testified that there was “no agreement or understanding that the exoneration would apply to future years”, the legal effect of the exoneration was limited to providing Target “with a reduction in the amount of property tax to be paid for that year (i.e., 2010)”. Order at 5, Apdx. Rec. Vol. 1 at 5.

b. The Assessor Initially Valued the Property at \$13,881,600.

W. Va. Code § 11-3-19 provides, in part, that “[t]he assessor shall complete the assessment and make up the assessor's official copy of the land and personal property books in time to submit the same to the board of equalization and review not later than February 1 of the tax year”. It is clear from the record that the Assessor valued the taxpayer’s property for tax year 2011 at \$13.8 million when the property books were delivered to the County Commission, and was still valued at that amount as late as February 25, 2011 *See* Apdx. Rec. Vol. 1 at 22 (computer printout titled Commercial/Industrial Review Document dated Feb 25, 2011, 25 days after the property books must be delivered to the County Commission). An increase of \$906,300 in value from \$12,975,300 to \$13,881,600 represents about a 7% increase in value and thus is below the 10% threshold requiring the Assessor to provide notice under W. Va. Code § 11-3-2a. This fact was also explained to the Circuit Court (see Circuit Court Tr. at 10; Apdx. Rec. Vol. 3 at 10. Nevertheless, Target objected to the increase in value from \$12,975,300 to \$13,881,600 and made preparations to appeal the new value to the Board.

c. After the Property Books were Delivered to the County Commission, the County Commission Increased the Value to \$17,043,600.

The taxpayer was clearly surprised at the hearing before the Board to find that the appraised value had increased from \$13,881,600 to \$17,043,600. The appraisal report by Mr. Barna dated Feb. 15, 2011 indicates that he believed the appraised value for the property for tax year 2011 was \$13,881,600. *See* Barna Appraisal at 9, Apdx. Rec. Vol. 1 at 35. Mr. Rose, who represented Target before the Board, also indicated that he believed the Assessor's value was \$13,881,600 and that the exhibit that Target prepared comparing the appraised values of its stores in West Virginia (*see* Apdx. Rec. Vol. 1 at 79) had been prepared in the belief that the Assessor's value was \$13,881,600. *See* Board Tr. at 14, Apdx. Rec. Vol. 2 at 14; *see also* Circuit Court Tr. at 10; Apdx. Rec. Vol. 3 at 10.

W. Va. Code § 11-3-24 (1979)³ provides, in part:

The commission ... shall correct all errors in the names of persons, in the description and valuation of property, and they shall cause to be done whatever else may be necessary to make the valuation comply with the provisions of this chapter...If the commission determine that any property or interest is assessed at more or less than its true and actual value, it shall fix it at the true and actual value. *But no assessment shall be increased without giving the property owner at least five days' notice, in writing, and signed by the president of the commission, of the intention to make the increase.*

This section requires the Board to give all taxpayers five days' notice in writing by personal service or by registered mail of *any* increase in any assessment. Since the Circuit Court fixed the true and actual value of the Petitioner's property at \$12,975,300 for tax year 2010, *any* appraised value greater than that amount would require notice to the Petitioner.

³ Ch. 11 Art. 3 of the W. Va. Code was significantly changed by the Legislature in the 2010 Regular Session. However, W. Va. Code § 11-3-32 provides that "[u]nless specified otherwise in this article, all amendments to this article adopted in the year 2010 shall apply to the assessment years beginning on or after July 1, 2011. Since this case concerns the assessment year beginning July 1, 2010, the current provisions of W. Va. Code § 11-3-24 are not applicable, and the previous version (effective before the 2010 amendments) is used.

Here, the new value of \$17,043,600 was \$4,068,600 more than the value the County Commission approved as being the true and actual value for the previous year (\$12,975,000). Yet the Assessor essentially refused to answer the specific question “[i]s it fair that neither Mr. Prettyman nor you believe that from July 1st, 2009, to July 1st, 2010, that property increased in almost \$4 million in value?” See Board Tr. at 46-48, Apdx. Rec. Vol. 2 at 46-48. Not only could she not justify an increase in value for 2011, but she ultimately denied that the exonerated value was correct:

[Ms. Hoffman] Is it a true assessment? Basically, I don't think that it was true in the fact that I put it on for that value at that time, but in order to settle litigation, I did agree to that.

Board Tr. at 42, Apdx. Rec. Vol. 2 at 42. Regardless of the Assessor's motive in agreeing to the \$12,975,000 value for 2010, it was up to the County Commission to decide what the true and actual value of the property was for that year, and the County Commission decided to grant the Assessor's requested exoneration. Neither the County Commission nor the Assessor can now pretend that the true and actual value of the property for tax year 2010 was anything other than \$12,975,000 or that the value of \$17,043,600 for tax year 2011 isn't a huge increase.

d. The Taxpayer Had No Opportunity to Prepare to Challenge a Value of \$17,043,600.

The record reflects that the Assessor discussed her initial value of \$13,881,600 with the County Commission at some point in time, and it is clear that the taxpayer was unaware of that meeting and was not present to represent its own interests at that meeting. See Board Tr. at 43-44, Apdx. Rec. Vol. 2 at 43-44 (Assessor Hoffman testifying that “[w]e tried to do that with the \$13 million that I had told you [Mr. Rose] that we were considering as the Board's approval... I applied to the Board to see if we couldn't carry it. They disapproved it”. The record simply

does not reflect when the value was increased from \$13.8 million to \$17 million, whether it was the Assessor or the Board that came up with the \$17 million value, or what the basis for the new value was.

Once the property books are delivered to the County Commission, there is no statutory authority for the Assessor to change her appraised values. Rather, W. Va. Code § 11-3-24 grants that authority only to the Board, and then only after “giving the property owner at least five days' notice, in writing, and signed by the president of the commission, of the intention to make the increase”. The record doesn't show that proper notice was given, because it simply was not. This failure was not without practical effect; since the basis of the increase was not disclosed to the taxpayer before the hearing, the taxpayer had no opportunity to effectively prepare to rebut the reasons for the change. Moreover, since the Assessor failed to introduce the updated printouts from the IAS into evidence, the taxpayer was deprived of the opportunity to cross examine on the basis for the increase.

This Court has emphasized that

a critical aspect of the entire procedure is the requirement of notice to the affected owner of the property. *See, e. g., Pulaski County v. Commercial National Bank*, 210 Ark. 124, 194 S.W.2d 883.... Under this provision, the Board of Equalization and Review may not increase any assessment until the proper notification has been given. This insures due process of law for the affected owner. This Court has commented on this notice provision in *Consolidation Coal Co. v. Krupica, W.Va.*, 254 S.E.2d 813 (1979) in which it observed that: ‘where the county commission increases the assessment, the property owner must be given at least five days' notice in writing of the intention to make the increase.’”.

Tug Valley Recovery Center, Inc. v. Mingo County Commission, 164 W.Va. 90, 109 n. 6, 261 S.E.2d 165, 174 n. 6 (1979).

There are a few cases in West Virginia that indicate that an appearance by the taxpayer at a hearing to contest a tax assessment may under some circumstances constitute a waiver of

formal notice requirements (*see, e.g. Rawl Sales & Processing Co. v. County Com'n of Mingo County*, 191 W.Va. 127, 443 S.E.2d 595 (1994) and *In re Tax Assessments Against Pocahontas Land Co.*, 172 W.Va. 53, 303 S.E.2d 691 (1983)). In all of these cases, however, the taxpayers had actual notice of the final assessment reported by the assessor, usually in writing, which, though it may have been technically deficient in some fashion, was received early enough to permit it to effectively prepare for the hearing. That certainly was not the case here, and as a result, the taxpayer was deprived of an opportunity to effectively attack the final appraised value.

The notice issue was presented to the Circuit Court below. In oral argument, Mr. Rose argued that “when they produced the property record card of \$16,757,000, that wasn’t the value that they evidentially proposed, and that was affirmed by the Board of Equalization and Review. That was a \$17.1 million value”. Circuit Court Tr. at 8, Apdx. Rec. Vol. 3 at 8. He also argued that “we’ve raised a notice issue. And that is that we are entitled, I think, to notice that there was an increase of our values that were going up ten percent or more. We never received that. There should have been a written notice five days before we were heard. That never occurred”. *Id.* at 9. In *Petitioner's Memorandum of Law*, Target cited W. Va. Code § 11-3-24 as the source of this requirement. *See Memorandum* at 12 and 15-16. Mr. Rose also explained to the Court that the fact that Target didn’t know what the final value was affected the exhibits it prepared for the hearing. *Id.* at 9-10. The Court asked whether Target received notice of the \$13.9 million value, and Mr. Rose correctly explained that notice wasn’t required because that value was relatively close to the \$12.975 million value for tax year 2010. *Id.* at 10.

The Court below made two errors with respect to the notice issue. Since the Court erroneously concluded that the effect of the exoneration on the value of the property was limited to tax year 2010 (see discussion above), it therefore concluded that Target was on notice of “both

the appraised values for tax year 2010 as well as the 2011 appraised value prior to the hearing before the Board of Equalization and Review. Target had prior notice of all appraised values for the tax year 2011". Order at 6, Apdx. Rec. Vol. 1 at 6. This conclusion is at odds with the evidence in this case that Target didn't find out about the \$17,043,600 value - the final value now on the land books - until it showed up at the hearing.

Secondly, the Court cited only W. Va. Code § 11-3-2a, which requires notice by the Assessor if she increased the value by more than 10% over the prior year and which was not implicated here, and failed to cite W. Va. Code § 11-3-24, which is the section with which the County Commission failed to comply. The Court seemed to recognize that there was a problem, because it stated that "[a]ssuming *arguendo* that a technical error of the statute did occur", Order at 6, Apdx. Rec. Vol. 1 at 6, but it then erroneously concluded that "it would be considered harmless error since Target's substantial rights were not affected by the error. Therefore, Target's [sic] was provided adequate notice to prepare an appeal as was not prejudiced". *Id.* This conclusion ignores the fact that Target's ability to prepare its appeal was, in fact, compromised in that its ability to prepare exhibits that accurately represented how excessive the appraised value was and to effectively cross examine the Assessor on the basis of her value was compromised by the lack of notice. It also ignores that the County Commission simply lacks jurisdiction under W. Va. Code § 11-3-24 to increase assessments unless it complies with the mandatory notice provisions, which did not occur in this case. Since no such notice was given, the action of the Board setting the value at \$17,043,600 is void.

- 3. After a taxpayer meets its admittedly high standard of proof to show the assessor's value is excessive, the Assessor must demonstrate that his or her appraisal is supported by substantial evidence. Here, the Assessor failed to do so.**
- a. The Taxpayer Clearly Met Its Burden to Prove with Clear and Convincing Evidence that the Assessor's Value Was Excessive**

The burden imposed on the taxpayer in a challenge to the value of his property as appraised the Tax Commissioner is undeniably very high. "It is obvious that where a taxpayer protests his assessment before a board, he bears the burden of demonstrating *by clear and convincing evidence* that his assessment is erroneous. *In re Tax Assessments Against Pocahontas Land Co.*, 172 W.Va. 53, 303 S.E.2d 691 (1983) (emphasis added); see also Syl. pt. 5, *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, *supra*, overruling both *Killen v. Logan County Commission*, 170 W.Va. 602, 295 S.E.2d 689 (1982) and *Eastern American Energy Corp. v. Thorn*, 189 W.Va. 75, 428 S.E.2d 56 (1993) (per curiam) ("A taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous"). While the burden is high, there is simply no issue here as to whether the taxpayer met its burden.

As noted by this Court in *Foster*, *supra*, the governing statutes do not specify the type of evidence that the taxpayer must submit at the hearing before the Board of Equalization and Review to meet its burden:

The requirement of an appraisal and/or expert testimony is not contained in the statute governing taxpayers' appeals of property assessments but is alluded to in Syllabus point 8 of *Killen*. See W. Va.Code § 11-3-24. See also Syl. pt. 8, *Killen v. Logan County Comm'n*, 170 W.Va. 602, 295 S.E.2d 689 ("An objection to any assessment may be sustained only upon the presentation of competent evidence, *such as that equivalent to testimony of qualified appraisers*, that the property has been under- or over-valued by the tax commissioner and wrongly assessed by the assessor.

Foster, supra, 223 W.Va. at 28 n. 21, 672 S.E.2d at 168 n.21 (emphasis in original). This Court later confirmed that the testimony of a qualified appraiser that the property has been wrongly assessed by the Assessor satisfies the taxpayer's burden:

We pointed out in *Killen* [, *supra*] that county assessors were not limited to the commissioner's appraisals and that they could "consult other credible and reliable sources of information, *e.g.*, the property owner's *sworn* valuation and appraisal by bona fide appraisers, in determining the assessed value." (emphasis in original). Regarding taxpayer objections to the valuation of property, we said that "[a]n objection to any assessment value may be sustained only upon the presentation of competent evidence, such as that equivalent to testimony of qualified appraisers, that the property has been under- or over-appraised by the tax commissioner and wrongly assessed by the assessor." We believe that the price paid for a parcel of land in a recent arm's length transaction is an indicator of market value on a par with the testimony of a qualified appraiser.

Kline v. McCloud, 174 W.Va. 369, 373, 326 S.E.2d 715, 719 (1984) (citations omitted).

Here, Target fully and completely met its burden with the introduction of a detailed appraisal prepared by an independent professional appraiser. As this Court recognized in *Stone Brooke, supra*, the applicable legislative rule promulgated by the Tax Commissioner to govern the valuation of industrial and commercial property permits the use of one or more of three approaches to determining value:

Pursuant to W. Va.C.S.R. § 110-1P-2.2.1 (1991), three types of appraisal methods may be used when valuing commercial real property for ad valorem taxation purposes: the cost approach, the income approach, and the market data approach.

Stone Brooke., 224 W.Va. at 695 n. 1, 688 S.E.2d at 304 n. 1. In fact, Mr. Barna used all three approaches to determining the value. Given that the objective of all three methods is the same (*i.e.*, the determination of the true and actual value of the property), one would hope that all three approaches would yield similar values, and that's exactly the result here: the market data (or "sales comparison" approach yielded a value of \$9,100,000 (Apdx. Rec. Vol. 1 at 48-55); the cost approach yielded a value of \$9,200,000 (Apdx. Rec. Vol. 1 at 56-61); and the income

approach yielded a value of \$9,100,000 (Apdx. Rec. Vol. 1 at 62-64). To arrive at a final value, W. Va. C.S.R. § 110-1P-2.2.2 states that “[o]nce generated, the various estimates of value may be considered in determining a final value estimate” but also provides that “[w]hen possible, the most accurate form of appraisal should be used, but because of the difficulty in obtaining necessary data from the taxpayer, or due to the lack of comparable commercial and/or industrial properties, choice between the alternative appraisal methods may be limited”. Here, however, Mr. Barna indicated that “[t]he approaches applied in this appraisal produce reliable indications of the subject’s value, because a good supply of independent data was available for each method”. (Apdx. Rec. Vol. 1 at 66). The appraisal also concluded that the sales comparison approach should be given “significant weight, because of the strength and similarity of the comparable sales data”; concluded that the cost approach “provides a convincing indication of the subject’s value, because the land value is well supported and depreciation is extracted from numerous comparables in the market”, and concluded that the income approach was the “least reliable method, due to the difficulty in accurately determining the market rent, vacancy, and capitalization rate for such a large single tenant property”. *Id.* Based on these considerations, the appraisal concluded that “the fee simple market value of this property is \$9,100,000 as on July 1, 2010”. *Id.*

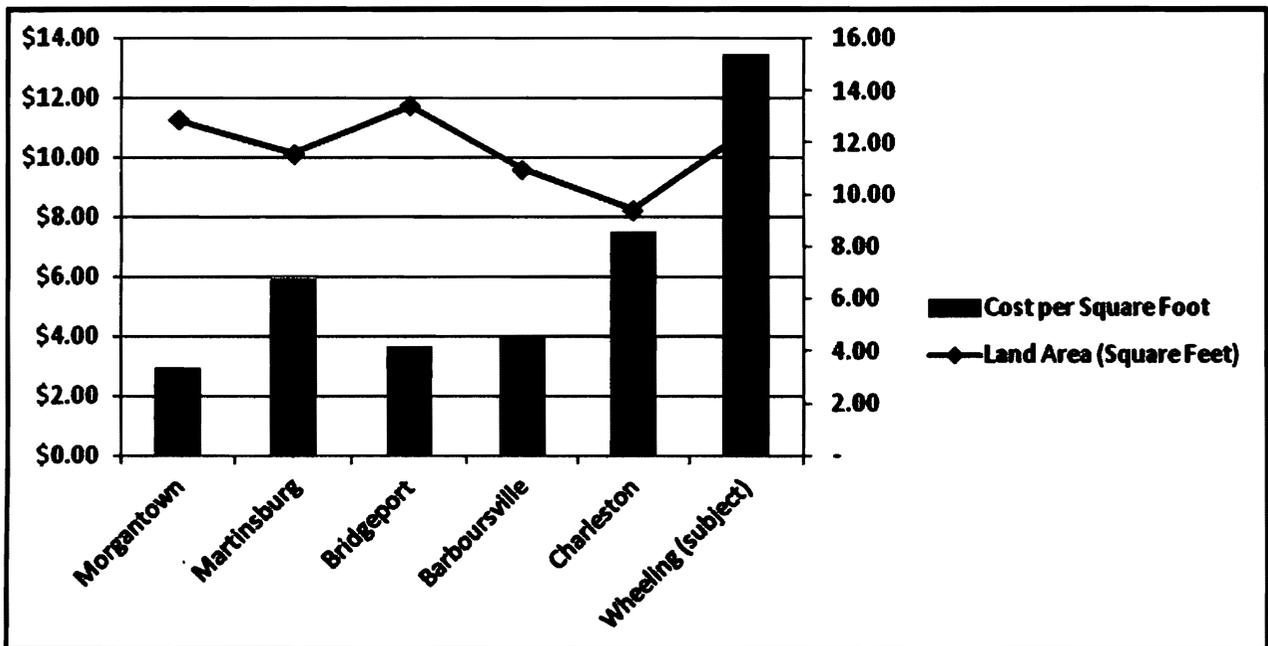
The Assessor, by contrast, appraised the subject property at \$17,043,600. *See* Board Hearing Transcript at 14 (Apdx. Rec. Vol. 2 at 14), or almost twice as much as Target’s appraised value. This huge discrepancy between the Assessor’s value and Mr. Barna’s value demonstrates conclusively that the Assessor’s appraisal is grossly excessive.

b. Independent Evidence that the Assessor's Value Was Excessive

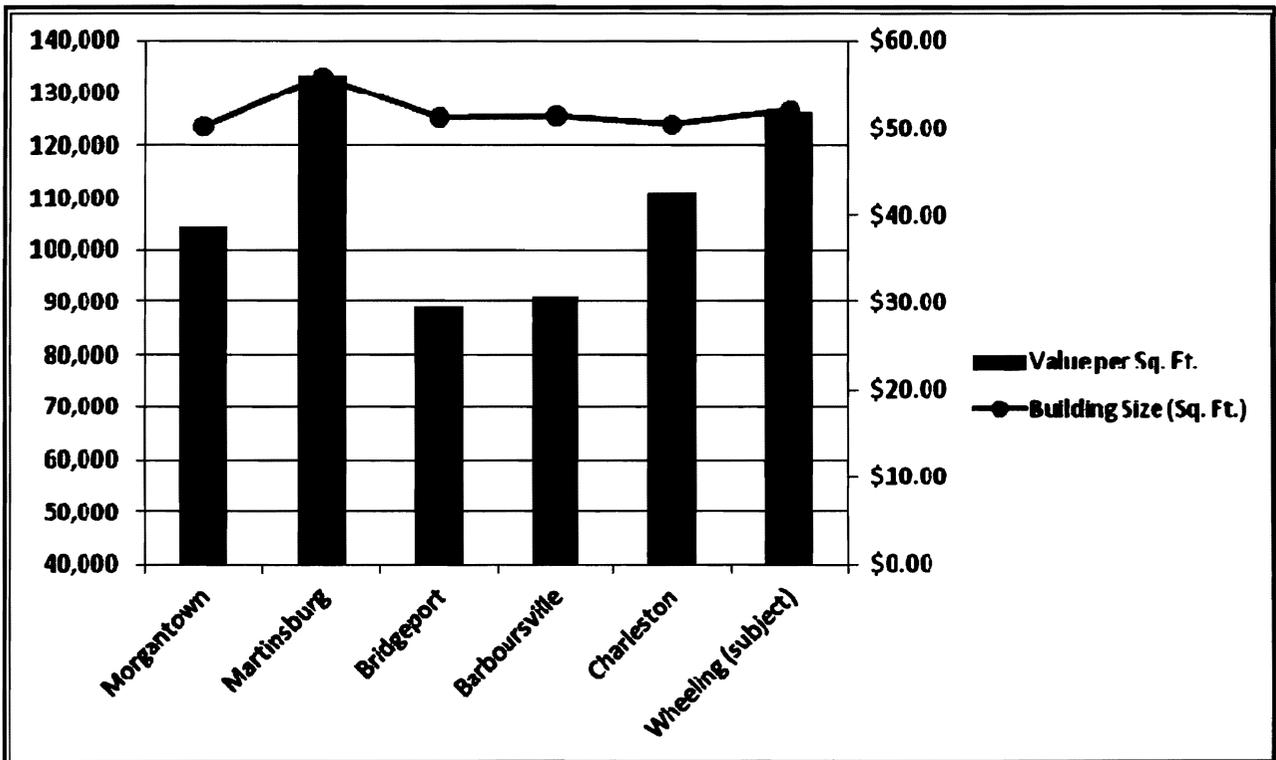
There is also independent evidence in the record that the Assessor's value is excessive.

Target owns a total of six stores in West Virginia. All were constructed between 1999 and 2008; the subject property was constructed in 2006. A spreadsheet summarizing the value per square foot of the land, the building per square foot, and the value of the property as a whole per building square foot was prepared by Target and was introduced at the hearing before the Board. See Apdx. Rec. Vol. 1 at 79; see also Board Tr. at 12.

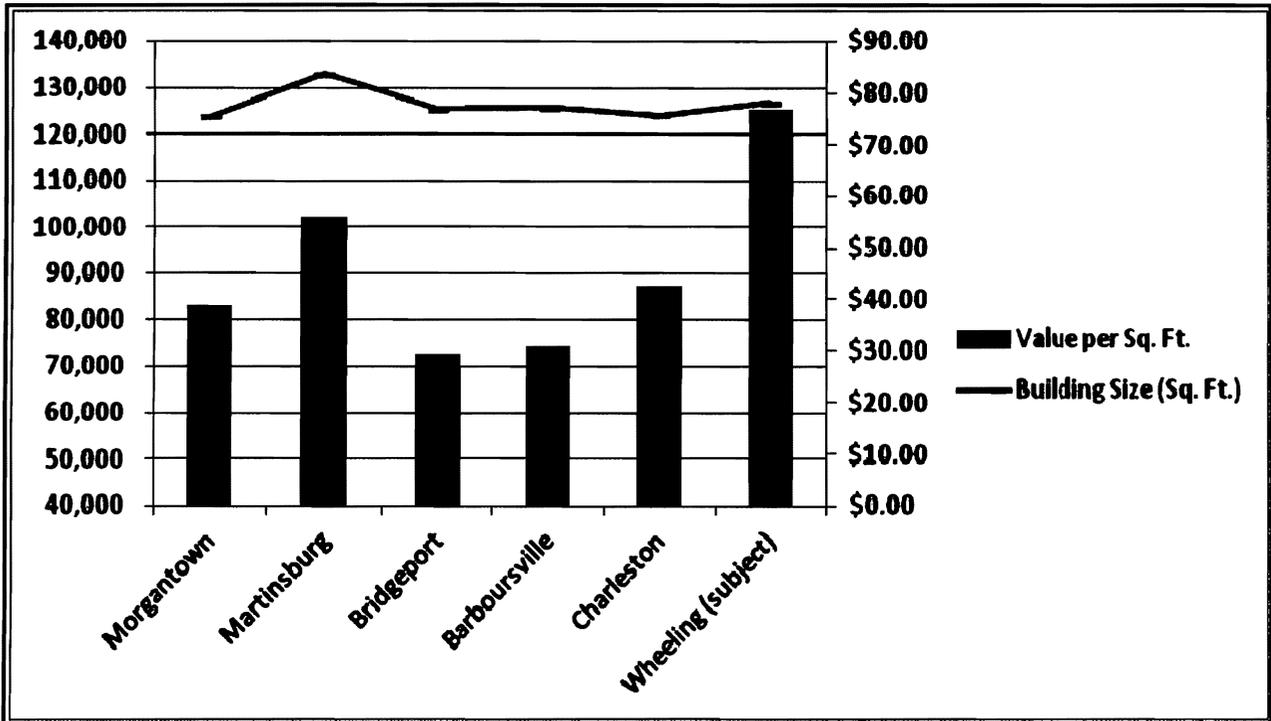
The data on this spreadsheet clearly confirms that the subject property is overvalued compared to other very similar Target stores in West Virginia. As to the value of the land, all six stores are constructed on lots of similar sizes, varying from 9.41 acres to 13.44 acres. Except for the subject property, the local Assessors have valued the land at between \$2.91 and \$7.51 per square foot. The subject property, however, is valued at \$14.47 per square foot, almost twice as high as the next most expensive property. Presented graphically, the similarity in sizes and disparity in land values is obvious:



When the spreadsheet was prepared, the taxpayer understood that the total appraised value was \$13,881,600, including \$7,302,400 for the land and \$6,579,200 for the building. *See Board Tr. at 14, Apdx. Rec. Vol. 2 at 14.* Again, all of the buildings are of similar size, ranging from a low of 123,763 square feet to 133,041 square feet. Excluding the subject property, the value per square foot ranges from a low of \$29.49 to \$56.01. Presented graphically, what the taxpayer understood to be the appraised value of the building on a square foot basis appeared to be toward the high end but at least within the range as appraised in other counties:



However, the actual appraised value of the building for tax year 2011 was \$9,741,200, not \$6,579,200. As the chart below indicates, the actual square foot value of \$78.80 is more than \$20.00 per square foot larger and by far and away the largest of any of the Target stores in West Virginia:



These data independently confirm Mr. Barna’s conclusion that the Assessor overvalued the subject property. Moreover, his value of \$9,100,000, or \$4,700,000 for the land (\$8.65 per square foot) and \$4,400,000 for the building (\$34.69 per square foot) are well within (and toward the high side) of the ranges for the other counties in West Virginia.

Without a single reference to Target’s detailed appraisal or to the detailed testimony of its expert witness, and without reference to this independent evidence that the Assessor’s value was excessive, the Court below concluded that “Target failed to prove by clear and convincing evidence that such tax assessment is erroneous”. Conclusion of Law No. 3, Order at 6, Apdx. Rec. Vol. 1 at 6.

c. The Assessor Failed to Demonstrate that Her Appraisal Was Supported by Substantial Evidence.

Once the taxpayer meets its burden to show that the value as appraised by the Tax Commissioner was excessive, it is incumbent upon the taxing authority to place some evidence in the record to show why its assessment is correct”. *In re Tax Assessments Against Pocahontas*

Land Co., 172 W.Va. 53, 61, 303 S.E.2d 691, 699 (1983); *see also Stone Brooke, supra*, 224 W.Va. at 701, 688 S.E.2d at 310 (“Having concluded, then, that the Tax Commissioner has afforded discretion to the assessing officer to select the most accurate appraisal method for the commercial property under consideration, we must consider whether the Assessors properly valued the LIHTC properties at issue herein”). The Assessor utterly failed to meet her burden in this case.

1. The Assessor failed to introduce detailed documentary evidence or testimony to support his or her appraisal.

It is common in appeal hearings before a Board of Equalization and Review for the Assessor or the Tax Commissioner to introduce a computer printout from the Integrated Assessment System (“IAS”) to support the taxing authority’s appraisal of the property in question. The IAS is provided to the various county assessors by the Tax Commissioner. The assessors enter data about each property, which then produces a value for each commercial property. This value can be adjusted by modifying the value of various factors also entered by the Assessors. It is also common for an assessor to testify that these computer printouts, titled “Commercial/Industrial Review Document”, reflect the values of each and every item of data and each factor used to produce the value for the property.

One would expect the Assessor to argue that, if he or she introduced this document and testified that it reflects the values of each and every item of data and each factor used to produce the value for the property, this document would be sufficient to support a finding that the Assessor properly considered the required appraisal factors set forth on W. Va. C.S.R. §§ 110-1P-2. On the flip side, it could also be argued that absent a demonstration that each and every one of the more than twenty factors enumerated in W. Va. C.S.R. §§ 110-1P-2 appears on the

Commercial/Industrial Review Document, the introduction of this document alone would not support such a finding.

It is impossible to decipher the information shown on the Commercial/Industrial Review Document without a reference manual that explains the hundreds of abbreviations and computer codes shown on these sheets. Nor is it possible to decipher from the sheets any hint as to how the data were used to generate the appraised values. Thus, simply introducing a Commercial/Industrial Review Document sheds no real light on the data the Assessor relied on and how the Assessor reached her final values. This Court in *Stone Brooke* clearly contemplated a more detailed presentation by the Assessor that describes in detail how each of the factors found at W. Va. C.S.R. §§ 110-1P-2.1.1 to 2.1.4 (1991) contributed to the Assessor's appraised values. Absent such a detailed presentation, there would be no basis for a circuit court to conclude from the introduction of a Commercial/Industrial Review Document that the Assessor proved with substantial evidence that each of the enumerated factors was properly considered.

In this case, however, we don't even get to the threshold question as to whether the introduction of the Commercial/Industrial Review Document alone can satisfy the Assessor's burden. Here, while the Assessor did, in fact, introduce two Commercial/Industrial Review Documents, neither of those supported her final value of \$17,043,600 for this property. Rather, the Assessor introduced a Commercial/Industrial Review Document for the previous tax year (2010) that showed an appraised value of \$16,757,000. *See* Apdx. Rec. Vol. 1 at 21. The Assessor also introduced a Commercial/Industrial Review Document for tax year 2011 that showed an appraised value of \$13,881,600. *See* Apdx. Rec. Vol. 1 at 22. The Assessor did NOT introduce a Commercial/Industrial Review Document for tax year 2011 that showed an appraised value of \$17,043,600.

While the Assessor did introduce a spreadsheet that showed a value of \$7,302,400 for the land and \$9,741,200 for the building (which totals \$17,043,600) for tax year 2011 (*see* Apdx. Rec. Vol. 1 at 19), this spreadsheet reflects none of the item of data or factors used to produce the value for the property that would be shown on a Commercial/Industrial Review Document had one been prepared and introduced for tax year 2011.

Thus, even if the introduction of a Commercial/Industrial Review Document for tax year 2011 that showed an appraised value of \$17,043,600 would be sufficient to carry the Assessor's burden after *Stone Brooke* (which the Petitioners deny, at least in the absence of detailed testimony supporting each and every one of the required factors), here, the Assessor failed to introduce any testimony or documentary evidence to support the final appraised value of \$17,043,600. None of the evidence introduced by the Assessor was sufficient to permit the Circuit Court to "conduct an analysis of whether the Assessors properly considered the requisite factors to determine whether the actual amount of the Assessors' cost approach appraisals of the Taxpayers' LIHTC property is correct" as required by *Stone Brooke*, 224 W.Va. at 706, 688 S.E.2d at 315.

- 2. The Assessor failed to demonstrate that she properly considered each and every one of the factors enumerated in the Tax Commissioner's legislative rule found at W. Va. C.S.R. § 110-1P-2.2.2 through -2.1.4.**

In *Stone Brooke*, this Court announced a new syllabus point that more clearly articulates just what the taxing authority's burden entails:

When a circuit court reviews an appraisal of commercial real property made for *ad valorem* taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer's consideration of the required appraisal factors set forth in W. Va.C.S.R. §§ 110-1P-2.1.1 to 2.1.4 (1991).

Syllabus Point 7, *Stone Brooke, supra*. In order for the Circuit Court to be able to comply with this Court's directive that it make findings of fact and conclusions of law addressing the assessing officer's consideration of the required twenty-four appraisal factors set forth in the Tax Commissioner's Legislative Rule, the taxing authority must introduce evidence at the hearing as to exactly how it considered these factors. In *Stone Brooke*, this Court observed that:

Despite the clear directive in W. Va.C.S.R. § 110-1P-2.1.4 that "each of these factors should be considered in the appraisal of a specific parcel" of commercial real property, this Court rarely is presented with a record from which we can determine whether each of the enumerated factors has been thoroughly considered.

Stone Brooke, 224 W.Va. at 705, 688 S.E.2d at 314. This case presents no exception to that general rule. Before the Board, Mr. Prettyman, speaking on behalf of the Assessor, stated only that:

Q. (by Mr. Tennant) Sir, with respect to your appraisal, have you, in fact, considered all of the times in West Virginia Code of State Rules Section 110-1P-2 promulgated in 2010?

A. (Mr. Prettyman) Yes.

Board Hearing Transcript at 32; Apdx. Rec. Vol. 2 at 32.

This naked conclusion was not supported with any explanation or detail. Mr. Prettyman did not indicate which, if any, of the items listed in W. Va. C.S.R. § 110-1P-2 affected his appraisal, detail how the value of any of those items were evaluated or calculated, or explain why items that were not used weren't considered significant. The direct examination of Mr. Prettyman ended abruptly after Mr. Prettyman's response above. *Id.* His statement does not constitute evidence of probative force. See *State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.*, 223 W.Va. 146 at 158-159, 672 S.E.2d 282 at 294-295 (2008):

Bayer attributed the errors for the taxing periods in question “to difficulties that arose when reconciling the accounting system of Bayer with that of Lyondell Chemical Company, which Bayer had purchased in 2000.” Although the three witnesses called by Bayer testified that Bayer used reasonable care when reporting the tax data for the periods in question, the statements were conclusory allegations that were not supported by any details regarding the measures used to prevent or discover errors before reporting the tax data in question. *See Brown v. Meyer*, 580 S.W.2d 533, 535 (Mo.Ct.App.1979) (“The rule is that a submissible case is dependent upon proof of facts. Mere conclusions do not satisfy that standard.”); *Dallas Ry. & Terminal Co. v. Gossett*, 156 Tex. 252, 294 S.W.2d 377, 380 (1956) (“It is well settled that the naked and unsupported opinion or conclusion of a witness does not constitute evidence of probative force[.]”).

Therefore, there is no evidence in the record that the Assessor properly considered any of the required factors for this property.

In fact, the transcript clearly indicates that, at least as to one of the required factors, the Assessor did not even understand the factor, much less properly consider it. W. Va. C.S.R. § 110-1P- 2.1.1.3 requires consideration of “[t]he ease of alienation thereof, considering the state of its title, the number of owners thereof, and the extent to which the same may be the subject of either dominant or servient easements”. Mr. Prettyman was cross examined on this specific factor:

MR. ROSE: ...In valuing the Target building, what considerations did you give for the ease of alienation of that building?

MR. PRETTYMAN: I’m not following you.

MR. ROSE: Well, that’s one of the characteristics you said you considered when you testified that you had addressed every element in the Commissioner’s --

MR. PRETTYMAN: Oh, rules.

MR. ROSE: That’s okay. Can you describe what considerations you gave to the ease of alienation of this property in terms of whether it increased or decreased the value previously arrived

at?

MR. PRETTYMAN: You're talking about the complete fit and finish and quality of the --

MR. ROSE: No. No. I'm talking about the ease of alienation. Considering the state of it's title, the number of owners, and the extent to which the same may be subject, you have dominant or subservient easements. You've testified that you considerer that factor in valuing this property, and I'm just asking you how you came to do that.

MR. PRETTYMAN: Oh, there was no easement factor -- there was no easement alienation factor.

Board Hearing Transcript at 38 (Apx. Rec. Vol. 2 at 38). Obviously, Mr. Prettyman was completely unfamiliar with the term "ease of alienation", and it would be impossible to conclude from his responses that he properly considered by how much the value of the property in question should be increased or decreased by that factor.

Despite the fact that all parties recognized that the *Stone Brooke* case imposes a significant new burden on the taxing authority (see discussion before the Circuit Court of Ohio County, Apx. Rec. Vol. 3 at 24-25 (discussion by Mr. Musser) and at 27-29 (Mr. Tennant recognizing the requirement to put testimony in the record as to all of the twenty-plus factors and asserting that there was insufficient time allotted by the Board to meet this requirement), then the Assessor's failure to introduce evidence on any of the more than twenty enumerated factors in the Tax Commissioner's legislative rule means that there was no basis for the Court below to find "that the Assessor properly considered the required appraisal factors set forth on W. Va. C.S.R. §§ 110-1P-2". See Final Order at 4, Apx. Rec. Vol. 1 at 4. There was no basis for the Court's conclusion that "[t]he methods utilized by the Assessor in valuing the Target property is

[sic] consistent with the required appraisal factors set forth in W. Va. C.S.R. §§ 110-1P-2, *et seq.*” Conclusion of Law No. 2, Order at 6, Apdx. Rec. Vol. 1 at 6.

3. The Assessor failed to address Target’s fully supported assertion that its property suffers from functional and economic obsolescence.

The Tax Commissioner’s rules for valuing commercial and industrial real estate, in fact, require, if the cost approach is used, that both functional and economic obsolescence must be considered:

Cost Approach - To determine fair market value under this approach, replacement cost of the improvements is reduced by the amount of accrued depreciation and added to an estimated land value. In applying the cost approach, the Tax Commissioner will consider three (3) types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence.

W. Va. C.S.R. § 110-1P-2.2.1.1. In *Stone Brooke*, the Supreme Court specifically directed that the circuit courts on remand “should consider whether the Assessors correctly applied the cost approach when appraising the Taxpayers’ properties, including considering depreciation through physical deterioration, *functional obsolescence, and economic obsolescence* as required by W. Va. C.S.R. § 110-1P-2.2.1.1”. *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. at 706 n. 15, 688 S.E.2d at 315 n. 15 (emphasis added).

Target introduced extensive evidence to show that the property suffers from extensive functional and economic obsolescence. Mr. Barna testified that “for a single-tenant building of 125,000 square feet, there’s tremendous external depreciation, meaning that the market does not recognize the costs that were paid to build that building in the potential re-sale of that property”, Board Tr. at 11; Apdx. Rec. Vol. 2 at 11, and that “there are very few users out there of 125,000 square foot retail buildings”. *Id.* He testified that the design of the building is based on the Target business model, with “characteristics [that] are very specific to Target”. Board Tr. at 12; Apdx. Rec. Vol. 2 at 12. As a result, if Target abandoned the property, it probably could not be

sold to another large retailer such as Walmart, Lowe's, or Best Buy; rather, it would have to be subdivided into smaller spaces. *Id.* He quantified the depreciation at 40% for the property as a whole, which includes all three types of depreciation. Physical depreciation made up six of the 40%; Mr. Barna did not attempt to divide the remaining 34% between functional and economic obsolescence. Board Tr. at 27-29; Apdx. Rec. Vol. 2 at 27-29.

Mr. Barna's appraisal document describes in detail how he used the market extraction technique to quantify the total depreciation for this property. In short, he compared the actual sales price with the replacement cost of the improvements for eleven comparable properties in the same area as the subject property. From this data, he was able to graph the remaining value for the improvements vs. age in years for the improvements and extrapolate an overall depreciation of 40% for the subject property. *See* Apdx. Rec. Vol. 1 at 32-35.

It is important to note that, as the Tax Commissioner's legislative rule indicates, depreciation is applied only in the cost approach. W. Va. C.S.R. § 110-1P-2.2.1.1. Applying 40% obsolescence to the replacement cost yielded a value by the cost approach of \$9,200,00, which compares well with Mr. Barna's results by the income and market data (sales comparison) approaches, both of which arrived at a value of \$9,100,00. Clearly, without a significant deduction for all forms of depreciation, the result of the cost approach would far exceed that of the other two approaches and would greatly overstate the value of the property.

This is exactly what the Assessor did. The Assessor did not dispute Mr. Barna's assertion that large retail spaces designed for a specific occupant's use inherently suffer from obsolescence. She did not dispute Mr. Barna's assertion that no other large retailers would be willing to purchase the property as is on the open market. She did not dispute that the market

extraction technique could be used to quantify the total depreciation for this property, nor did she dispute that any of the properties that Mr. Barna used in that technique weren't comparable.

Rather, Mr. Prettyman again offered only conclusory statements:

Q. With respect to depreciation itself, have you, for the assessment in the value, taken a depreciated amount for physical deterioration?

A. Yes.

Q. And have you considered in your appraisal the functional obsolescence?

A. The function -- building function; yes.

Q. And have you considered the economic obsolescence as an item?

A. I've considered it.

Q. And is it accurate that you did not assign any amount for functional obsolescence?

A. That's correct.

Q. And why is that?

A. well, like I said in previous hearings, it's a growing and expanding marketplace, and I felt that there was no obsolescence needed.

Q. With respect to the functioning of the building?

A. Yes, that's correct.

Board Tr. at 31-32; Apdx. Rec. Vol. 2 at 31-32. These conclusory statements cannot serve to support a finding that the Tax Commissioner "correctly applied the cost approach when appraising the Taxpayers' property, including considering depreciation through physical deterioration, functional obsolescence, and economic obsolescence as required by W. Va. C.S.R. § 110-1P-2.2.1.1". *Id.*, 224 W.Va. at 706 n. 15, 688 S.E.2d at 315 n. 15. Yet the Court below observed only that "[Mr. Prettyman] testified that he considered the economic obsolescence and functional obsolescence in determining the appraised value" and completely ignored Mr. Barna's testimony and appraisal. *See* Order at 4, Apdx. Rec. Vol. 1 at 4. This type of perfunctory review by the Court below makes a mockery of this Court's order that

When a circuit court reviews an appraisal of commercial real property made for *ad valorem* taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer's consideration of the required appraisal factors set forth in W. Va.C.S.R. §§ 110-1P-2.1.1 to 2.1.4 (1991).

Syllabus Point 7, *Stone Brooke, supra*.

4. The Assessor failed to address Target's fully supported assertion that the Assessor incorrectly used properties that were not comparable to the taxpayer's in the valuation of the taxpayer's property

Mr. Barna testified that he reviewed the "comparable" land values that were used by the Assessor in coming up with her value of the value of the taxpayer's land, and stated that in his opinion, none of the parcels used by the Assessor were appropriate because of the difference in size between the parcels used by the Assessor (all less than four acres) and the taxpayer's parcel (more than 12 acres). Board Tr. at 7-8; Apx. Rec. Vol. 2 at 7-8. He also testified that there were two external considerations that affected the sale price of the Sheetz property: the installation of a traffic light and an agreement "that no other gas station, besides the pumps that are at the Walmart, be permitted in the Highlands development if Sheetz were to go in". Board Tr. at 8-9; Apx. Rec. Vol. 2 at 8-9.

As to the value of the land, the Assessor testified only that "I came up with a \$585,600 per-acre value, which is \$13.44 a square foot". Board Tr. at 30; Apx. Rec. Vol. 2 at 30. He introduced exhibits (found at Apx. Rec. Vol. 1 at 18-19) that demonstrate how he came up with this value. He used the undated sale price for four parcels (for Sheetz, Quaker Steak and Lube ("QS&L"), Best Buy, and Robinson), determined the sale price per square foot for each, and determined that the price per square foot that he used in 2010 of \$11.55 per square foot should be increased by 16.6% (that is, to \$13.44 per square foot) for 2011. *See* Apx. Rec. Vol. 1 at 18. His values for the taxpayer's land indicate that he used a value of \$11.55 a square foot (or \$503,248 per acre) to value the property for tax years 2009 and 2010 and a value of \$13.44 a square foot (or \$585,597 per acre) for tax year 2011. *See* Apx. Rec. Vol. 1 at 19; *see also* Apx. Rec. Vol. 1 at 21 (indicating a value of \$11.55 a square foot (or \$503,248 per acre) for tax year

2010) and at 22 (indicating a value of \$13.44 a square foot (or \$585,597 per acre) for tax year 2011).

By contrast, Mr. Barna testified that he used recent sales of comparably sized commercial parcels, a Sheetz property that is close to the subject property and two located nearby in Pennsylvania. Board Tr. at 6-7; Apdx. Rec. Vol. 2 at 6-7. His appraisal includes a full description of each of the three properties that he used. It also indicates that he reduced the price per acre for the Sheetz property by 30% to account for the fact that it was significantly smaller than the subject property. Accordingly, he came up with a value of \$430,000 per acre (\$9.87 per square foot) for the subject property, which he applied to the 11 usable acres to yielded a land value of \$4,700,000. *See* Apdx. Rec. Vol. 1 at 56-57.

The Assessor therefore failed completely to address several valid concerns raised by Mr. Barna as to the method by which the Assessor determined the value of the land. First, the Assessor failed to recognize that smaller parcels sell for a higher price per unit of size than do large parcels. Comparing the price per acre of a 2-acre parcel and of a 12 acre parcel is comparing apples to oranges. Secondly, the sale price for the Sheetz parcel used by the Assessor was artificially increased by the agreement not to compete. Thirdly, the Assessor valued 1.47 acres of the taxpayer's unusable land at the same value as the eleven acres of usable land. Yet the Circuit Court below addressed none of these concerns.

The Circuit Court below recognized that the County Commission approved an exoneration for tax year 2010, Conclusion of Law No. 1, Order at 7, Apdx. Rec. Vol. 1 at 7, and that the Assessor valued the property at \$17,043,600 for tax year without any remodeling or additions having been made to the property. *Id.* Nevertheless, the Court concluded that “[t]he assessment made by the Ohio County Board of Equalization and Review for tax year 2011 is

supported by substantial evidence”. Conclusion of Law No. 1, Order at 6, Apdx. Rec. Vol. 1 at

6. In Order to do so, it ignore the fact that not only did the Assessor fail to explain how she considered even one of the more than twenty required factors, she didn't even manage to introduce a computer printout with her actual value on it. It had to ignore that the Assessor didn't effectively rebut the taxpayer's assertion that the property suffers from significant economic and functional obsolescence, and it had to ignore the taxpayer's assertion that the parcels of land the Assessor used weren't comparable.

4. Due Process requires that an independent tribunal hear Target's appeal.

In *Foster, supra*, this Court determined that W. Va. Code § 11-3-24, which requires a County Commission to sit as a Board of Equalization and Review was not facially unconstitutional due to the fact that the County Commission is the entity responsible for administering the fiscal affairs of the county and the tax revenue at issue provides the funding for such fiscal affairs. *Foster*, 223 W.Va. 24, 672 S.E.2d 160. Nevertheless, there, the Court reiterated that an otherwise constitutional statute may be unconstitutional when applied in a particular case, and repeated the standard for establishing this fact:

Insofar as the challenged statute establishes the procedure that taxpayers must follow to contest their assessed taxes, W. Va.Code § 11-3-24 must be construed in favor of the government, represented here by the Commission. Nevertheless, the Foundation may overcome this presumption and establish that W. Va.Code § 11-3-24 is unconstitutional if it satisfies the burden of proof reiterated in Syllabus point 1 of *Schmehl v. Helton*, 222 W.Va. 98, 662 S.E.2d 697 (2008):

“To establish that a taxing statute, valid on its face, is so unreasonable or arbitrary as to amount to a denial of due process of law when applied in a particular case, the taxpayer must prove by clear and cogent evidence facts establishing unreasonableness or arbitrariness.’ Point 4, Syllabus, *Norfolk and Western Railway Company v. Field*, 143 W.Va. 219 [100 S.E.2d 796 (1957)].” Syllabus Point 2, *State ex rel. Haden v. Calco Awning [& Window Corp.]*, 153 W.Va. 524, 170 S.E.2d 362 (1969).

Foster, 223 W.Va. 22-23, 672 S.E.2d 158-159 (footnote omitted).

Here, as discussed above, the evidence clearly established that Target appeared before the Board prepared to dispute the increase in value from the \$12,975,000 value as exonerated for tax year 2010 to \$13,881,600. At the hearing, Target discovered that the Assessor's value had increased from \$13,881,600 to \$17,043,600 and that that increase was the result of a meeting between the Assessor and the Board in which the Board refused to accept the value of \$13,881,600. *See* Board Tr. at 43-44; Apdx. Rec. Vol. 2 at 43-44. The outcome of Target's appeal was a foregone conclusion. The Board denied Target's appeal of the \$13,881,600 value because it had already decided that it should be increased to \$17,043,600, and it did so in a secret meeting at which Target was not present. The Board's action was unreasonable, arbitrary, and utterly unfair. As a result, Target was denied due process of law.

VI. Conclusion

As Justice Neely observed in his dissent in *Rawl Sales & Processing Co. v. County Commission Of Mingo County*, *supra*, "[a]lthough someone should review the assessor's property evaluation, assigning this important review to the county commission is perhaps not a scheme whose design would prompt nomination for the Nobel Prize in jurisprudence". *Id.* at 133, 443 S.E.2d at 601. This marginally fair (at best) appeals process is even more unfair when the County Commission meets in secret with the Assessor with no notice to the taxpayer and tells the Assessor to increase her assessment, and when the taxpayer doesn't discover the higher value until it shows up at its appeal hearing. Perhaps one should view this Court's directive in *Stone Brooke* that the Circuit Court must make findings of fact and conclusions of law as to whether the Assessor properly considered each and every one of the more than twenty factors specified in the Tax Commissioner's legislative rule as an attempt to level the playing field, at least slightly -

but the Circuit Court's decision in this case complies with the letter but in no way with the spirit of that decision.

WHEREFORE, the Petitioner PRAYS this Honorable Court to:

REVERSE the decision of the Circuit Court of Ohio County that affirmed the decision of the Ohio County Commission sitting as a Board of Equalization and Review, and

REMAND this case to the Circuit Court with instructions to

FIND, upon the record made before the Board, that the taxpayer proved with clear and convincing evidence that the value of its real property in Ohio County for tax year 2011 was \$9,100,00;

FIND that Assessor failed to prove with substantial evidence that she properly considered each and every one of the factors specified in W. Va. C.S.R. § 110-1P-2.1.1 through -2.1.4;

FIND that Assessor failed to prove with substantial evidence that her value of \$17,043,600 was correct;

FIND that the Board's decision to uphold the Assessor's value of \$17,043,600 was capricious and an abuse of discretion;

FIND that the Board's failure to notify the taxpayer that it intended to increase the value of the taxpayer's real property from \$13,881,600 to \$17,043,600 violated the requirements of W. Va. Code § 11-3-24;

FIND that, with respect to this taxpayer, the fact that the Target was required to appear before the same Board that had already decided to increase the value of Target's property with no notice to Target denied to Target due process of law, and to

SET the value of the Petitioner's real property for tax year 2011 at \$9,100,000,

and

for such other relief as this Court deems appropriate.

Respectfully Submitted,

TARGET CORPORATION

By Counsel



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Submitted: December 19, 2011

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Target Corporation, Petitioner Below, Petitioner

vs.

Docket No. 11-1355

**Kathie Hoffman, Assessor and the County Commission
of Ohio County, Respondents Below, Respondents**

CERTIFICATE OF SERVICE

I, Steven R. Broadwater, hereby certify that on December 19, 2011, I caused to be served a copy of "*Petitioner's Brief*" by mailing a true and exact copy thereof to:

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in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail.



Steven R. Broadwater
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