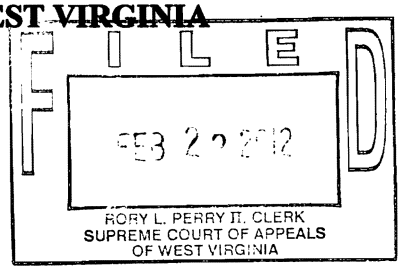
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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 Reply Brief

Herschel H. Rose III
herschelrose@roselawwv.com
(WV State Bar No. 3179)
Steven R. Broadwater
(WV State Bar No. 462)
sbroadwater@roselawwv.com
ROSE LAW OFFICE
300 Summers St., Suite 1440
PO Box 3502
Charleston, WV 25335
(304) 342-5050
(304) 342-0455 (FAX)

Table of Contents

I. Argument 1

A. Respondent's Claim that the Issues Surrounding the Exoneration for Tax Year 2010 Were Waived by Petitioner 1

B. The Ohio County Commission Prejudged the Outcome of Target's Appeal 4

C. The Appearance at the BOR Hearing Did Not Waive the Lack of Notice 5

D. The Respondents' Objections to Petitioner's Evidence Are Misplaced 7

1. Target Had Little Choice in What Witnesses to Present 7

2. Objections to Target's Evidence 10

E. The Petitioner Met Its Burden of Proof 14

F. The Assessor Failed to Meet Her Burden of Proof 15

G. Due Process 18

Table of Authorities

Cases

Borough of Wanaque v. North Jersey District Water Supply Commission, 20 N.J. Misc. 232, 26 A.2d 569 (N.J.Bd.Tax App. 1942) 6
Bradford County Citizens in Action v. Board of Com'rs of Bradford County, 64 Pa.Cmwlth. 349, 439 A.2d 1346 (Pa.Cmwlth., 1982) 6
Fayette County Nat'l Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997) 16
Gilmore v. Lawrence County, 246 Ark. 614, 439 S.W.2d 643 (Ark., 1969) 6
In Interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996) 16
In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W.Va. 250, 539 S.E.2d 757 (2000) 19
In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, 223 W.Va. 14, 672 S.E.2d 150 (2008) 9
In re Tax Assessments Against Pocahontas Land Co., 172 W.Va. 53, 303 S.E.2d 691 (1983) 6, 11
Killen v. Logan County Com'n, 170 W.Va. 602, 295 S.E.2d 689 (1982) 9, 11
Kline v. McCloud, 174 W.Va. 369, 373, 326 S.E.2d 715, 719 (1984) 11, 12
People ex rel. Lunn v. Chicago Title & Trust Co., 409 Ill. 505, 100 N.E.2d 578 (Ill., 1951) 6
Rawl Sales & Processing Co. v. County Com'n of Mingo County, 191 W.Va. 127, 443 S.E.2d 595 (1994) 5, 6
State v. Duell, 175 W.Va. 233, 332 S.E.2d 246 (1985) 12
Stone Brooke Ltd. Partnership v. Sisinni, 224 W.Va. 691, 688 S.E.2d 300 (2009) 16, 17, 19
Teter v. Old Colony Co., 190 W.Va. 711, 441 S.E.2d 728 (1994) 12
West Virginia Dept. of Highways v. Thompson, 180 W.Va. 114, 375 S.E.2d 585 (1988) 12
West Virginia Div. of Highways v. Butler, 205 W.Va. 146, 516 S.E.2d 769 (1999) 12

Statutes

SB 401 10
W. Va. Code § 11-3-24 ..... 3, 5
W. Va. Code § 11-3-25 13
W. Va. Code § 11-3-2a 2, 3
W. Va. Code § 30-38-5(c) 11

Rules

W. Va. R. Evid. 702 11
W. Va. R. Evid. 703 12
W. Va. R. Evid. 704 11

Regulations

W. Va. C.S.R. § 110-1P-2 17
W. Va. C.S.R. § 110-1P-2.1.4 16
W. Va. C.S.R. § 110-1P-2.2.1 14
W. Va. C.S.R. § 110-1P-2.2.1.1 17
W. Va. C.S.R. §§ 110-1P-2.1.1 to 2.1.4 ..... 16, 17

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 Reply Brief

I. Argument

A. Respondent's Claim that the Issues Surrounding the Exoneration for Tax Year 2010 Were Waived by Petitioner

With respect to the fact that the County Commission granted an exoneration request for the subject property for the previous (2010) tax year, the Respondents assert that the Petitioner failed to raise any issues related to that exoneration below:

> For whatever reason, this specific issue was not raised in the original Petition nor was it even mentioned in the subsequent Petitioner's Memorandum of Law filed with the Circuit Court. In fact, the only time that Petitioner's counsel mentioned the 2010 exoneration was during oral argument at the hearing on August 18, 2011, and no contention was made at that time that the exoneration was determinative of the "true and actual" value of the Property as opposed to a one time settlement as evidenced by the Assessor's testimony. (App Vol 3 at 6). Therefore, this portion of Petitioner's argument as presently framed should be deemed waived and not preserved for appeal to this Court.

Respondents' Joint Brief at 6-7.

These statements are factually incorrect. A significant portion of the hearing before the Board was devoted to the Petitioner's attorney's assertion that the exoneration for tax year 2010 set the true and actual value for that year, and trying to determine from the Assessor or her staff the basis for the enormous increase over that amount for tax year 2011. See Board Tr. 39-48.

In addition, this issue was, in fact, raised in several paragraphs of the Petition filed in the Circuit Court:

> 4. For tax year 2010, the assessor appraised the Petitioner's property at $12,975,300.
>
> 5. For tax year 2011, the assessor increased the value of the Petitioner's property by $4,068,300 over her value for that property for tax year 2010, an increase in excess of 31% over the assessor's value for tax year 2010.
>
> 6. Despite increasing the appraised value of Petitioner's property by over 31% for tax year 2011, the assessor failed to give the Petitioner any formal, written notice of this increase. See West Virginia Code §11-3-2a. In fact, the Petitioner was unaware of the magnitude of the 2011 increase in assessed value until the day of the hearing before the Ohio County Commission sitting as a Board of Equalization and Review, which took place on February 28, 2011.

See Petition at 1-2. In addition, this issue was also raised in the Memorandum of Law filed in the Court below:

> Either the Assessor or the Ohio County Commission, or both, increased the appraised value of the Tridelphia Target store from July 1, 2009 to July 1, 2010 by over $4 million, or over 31%, without identifying what changes in the property or the marketplace justified such an increase.

See *Petitioner's Memorandum of Law* at 6. That Memorandum also asserts:

> As recently as May 26, 2010, in an exoneration before the Ohio County commission, the Assessor valued Target's Tridelphia building and land, as of July 1, 2009, at $12.975 million. When she delivered the assessment books to the County commission on January 1, 2011, she had increased the valuation of the property to $13,881,600. Apparently, following an appearance before the Ohio County Commission sitting as a board of equalization and review, of which Target received neither notice nor invitation, the Ohio County Assessor increased the appraised value of the property to $16,757,000. Transcript, 43-44. By the time Target appeared before the Ohio County Commission sitting as a board of equalization and review on February 28, 2011, the total value of the property had increased $17,043,600. This volatility suggests that in the one year from July 1, 2009, the assessment date for 2010 taxes, until July 1, 2010, the assessment date for 2011 taxes, the fair market value of the Target store in Tridelphia increased by slightly more than $4 million, in the opinion of the Ohio County Assessor.

Id. at 10. It also asserts that:

> Apparently, sometime around February 25, 2011, the Assessor presented a proposed $13.8 million appraisal on the Tridelphia Target property to the County Commission. This was done without formal notice to Target. At that time, the County Commission directed that the appraised value of the Tridelphia Target store be increased from the $13,881,600 value reflected on the Assessor's books as they were submitted to the County Commission on February 1, to a value of $16,757,000. For reasons that are unclear, that value subsequently increased to $17,043,600, which is the current appraised value of the Target property at Tridelphia according to the Assessor. All this occurred without notice to Target, in violation of West Virginia Code §11-3-24.
>
> If the initial assessment of the Target property contained in the assessments books delivered to the Ohio County board of equalization and review was for either $16,757,000 or $17,043,600, the Assessor failed to provide notice, pursuant to West Virginia Code §11-3-2a of an increase in the valuation of real property of more than 10% over the 2010 assessment, modified by exoneration, of $12,975,000.

Id. at 11-12. The Petitioner clearly raised this issue on appeal to the Circuit Court, and that fact no doubt explains why that Court *directly addressed it* in its final order that is the subject to this appeal:

> Target claims that it cost $6,200,000 to construct the building in 2006. The Assessor's appraised value of the property for the tax year 2010 was set at $16,757,000. However, this appraised value was reduced for the 2010 tax year to $12,975,300 through exoneration by the Commission. Thereafter, the Assessor valued the property at $17,043,600 for the tax year 2011 without any remodeling or additions being made to the property. Target maintains that the Assessor's values for the property in question are incorrect and that an increase of approximately $4 million in value from 2009 to 2011 is unexplained.

Final Order at 3, Apdx. Rec. Vol. 1 at 3. The Respondents' assertion, then, that the issue of whether the exoneration set the true and actual value of the property, and of whether notice of the astronomical 31% increase by the Board required notice to the taxpayer "should be deemed waived and not preserved for appeal to this Court" is ludicrous.

B. The Ohio County Commission Prejudged the Outcome of Target's Appeal

The Respondents assert that there is only "unsubstantiated conjecture on the part of the Petitioner that the Commission in any way attempted to alter the Assessor's valuation of the Property at issue". *See* Respondents' Joint Brief at 7. This, too, is factually incorrect. The facts are clear. 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. As late as Feb 25, 2011, this $13,881,600 value was still reflected in the Assessor's computed system. *See* Apdx. Rec. Vol. 1 at 22 (computer printout). When Target appeared at the hearing before the Board on February 28, 2011, its attorney still believed the value was $13,881,600. *See* Board Tr. at 14, Apdx. Rec. Vol. 2 at 14.

But the value wasn't still $13,881,600. It had been increased to $17,043,600. *See* Board Tr. at 14, Apdx. Rec. Vol. 2 at 14 (Mr. Prettyman stating, after some confusion, that the Assessor's value was $17,043,600). The Assessor explained how this change occurred:

> We tried to do that with the $13 million that I had told you 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, and the State of West Virginia told me that a Board of Review is only for one year and I had to remove it from all my papers.

Board Tr. at 43-44, Apdx. Rec. Vol. 2 at 43-44.

It is abundantly clear from her testimony that the Assessor met with the Board prior to February 28, 2011 and asked them to "approve" her value of $13,881,600. As the Assessor clearly testified, the Board disapproved that value. There is no "unsubstantiated conjecture" here; the Assessor's own testimony refutes that assertion. The Petitioner knew nothing of this meeting and was not permitted to attend to protect its interests. It is hardly a "baseless accusation" (*see id.*) to describe this as a secret meeting; Merriam Webster includes several definitions of the word "secret", including "kept from knowledge or view", "working with hidden aims or methods", and "revealed only to the initiated". All of those definitions are applicable to this meeting between the Assessor and the Board.

Sometime after that secret meeting, the value suddenly increased to $17,043,600. Since the property books had already been delivered to the Board, action by Board was required to accept this new value in lieu of the Assessor's original value of $13,881,600, and W. Va. Code § 11-3-24 requires that the Board provide notice to the taxpayer of *any* increase over the Assessor's value. Such notice was never afforded to Target.

C. The Appearance at the BOR Hearing Did Not Waive the Lack of Notice

The Respondents assert that the appearance by the Petitioner at the hearing before the Board waived any lack of notice, citing *Rawl Sales & Processing Co. v. County Com'n of Mingo County*, 191 W.Va. 127, 443 S.E.2d 595 (1994). *See* Respondents' Joint Brief at 7-8. The Petitioners read this case too broadly.

While it is certainly true that this Court has held that the appearance by the taxpayer *in some situations* constitutes a waiver of formal notice requirements, in each of those cases, the taxpayers had actual notice, 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. In *Rawl Sales*, the taxpayer "admitted that they were informed of the actual assessments that were applicable to their properties prior to their appearance before the Board". *Id.*, 191 W.Va. at 130, 443 S.E.2d at 598. Accordingly, the Court there found that "the taxpayers had ample opportunity to argue against the final assessments before the Board of Equalization and Review". *Id.* Likewise, in *In re Tax Assessments Against Pocahontas Land Co.*, 172 W.Va. 53, 303 S.E.2d 691 (1983), a taxpayer's actual receipt of written notice dated February 19 of an increase from a board of equalization and review and appearance before the board on February 28 was held to cure defective newspaper publication of a general increase.[1]

By contrast, in this case, while the Petitioner did appear before the Board to contest its value as appraised by the Assessor, as described above, it did so prepared only to contest the Assessor's original value of $13,881,600. 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

---

[1] In cases cited in *Pocahontas Land*, the Court examined cases from other jurisdictions and found them to be consistent with this general rule: appearance by the taxpayer who had actual notice and was fully prepared could cure a technically deficient notice. The Arkansas Supreme Court in *Gilmore v. Lawrence County*, 246 Ark. 614, 439 S.W.2d 643 (Ark., 1969) concluded that a statutory notice by publication that was defective as to content but that showed the valuation fixed by the board could be cured by the taxpayer's appearance "in ample time before the board". *Id.*, 246 Ark. at 619, 439 S.W.2d at 646. In *People ex rel. Lunn v. Chicago Title & Trust Co.*, 409 Ill. 505, 100 N.E.2d 578 (Ill., 1951), the Court held that similar technically defective notices mailed eight days in advance of the hearings, in the absence of any showing that the objectors were harmed thereby, did not amount to unreasonably short notice. *Id.*, 409 Ill. at 512-513; 100 N.E.2d at 583. In *Bradford County Citizens in Action v. Board of Com'rs of Bradford County*, 64 Pa.Cmwlth. 349, 439 A.2d 1346 (Pa.Cmwlth., 1982), taxpayers argued that notice requirements were not satisfied because the notice sent by the Board did not set forth the date on which the *de novo* hearing would be held. However, the notice did state that all appeals would be heard after a certain date and that those individuals who wished to appear at the hearings could contact the Board to schedule a mutually convenient time to appear. The Court concluded that this notice was adequate since it was sent on or about September 19, 1978 and that the relevant hearings did not begin until October 22, 1978, more than twenty days later. Finally, while it is not clear in *Borough of Wanaque v. North Jersey District Water Supply Commission*, 20 N.J. Misc. 232, 26 A.2d 569 (N.J.Bd.Tax App. 1942) what form the notice took and how far in advance of the hearing it was received, the Court did state that "[i]t is enough, we believe, that respondent had sufficient notice of the hearing before the county board to enable it to appear and be heard. This it did, resulting in as favorable a determination as could have occurred under any circumstances of service, *i. e.*, a dismissal of the appeals." *Borough of Wanaque v. North Jersey District Water Supply Commission*, 20 N.J. Misc. at 233-234, 26 A.2d at 570-571.

$13,881,600. *See* Appraisal at 9, Apdx. Rec. Vol. 1 at 35. When Target's representatives walked into the hearing, they had no idea that the Board had already rejected that value, and they had no idea that it had been secretly raised to $17,043,600. They were afforded no opportunity to inquire as to how the new value had been determined, had no opportunity to give their appraiser an opportunity to examine the basis for that increase, and thus had no opportunity to prepare to effectively cross examine the Assessor. If the taxpayer is required to meet a high standard of proof in the hearing before the Board, it is only fair that the taxpayer be afforded ample opportunity to both prepare to present its case and to effectively challenge the Assessor's value. The complete lack of any notice in this case precluded the Petitioner from effectively preparing to effectively challenge the Assessor's value.

D. The Respondents' Objections to Petitioner's Evidence Are Misplaced

1. Target Had Little Choice in What Witnesses to Present

The Respondents present a litany of alleged facts surrounding the "context" in which multiple "big box retailers" in the Highlands Development in Ohio County have challenged the Assessor's appraisals of their property. Of course, only Target's appraisal is at issue here, so the assertion that the Assessor has been "confronted by a group of 'hired guns' composed of tax consulting firms who solicit big box retailers and then retain appraisers and legal counsel to appear at the BOR hearings", *id.*, isn't in the record. Neither is there any support for the idle speculation that "there is no direct cost or expense to the taxpayer unless a reduction in the tax assessment is obtained so that there is no risk or downside in protesting the appraisement", *id.* at 3-4; in fact, that assertion flies in the fact of common sense, since taxpayers have to bear at least the costs of appraisals, court costs, etc. Perhaps it also would be logical to speculate that if the

Assessor weren't overvaluing multiple properties in the Highlands Development, she wouldn't be confronted with so many protests.

Speculation aside, the Respondents also complain that there is a "lack of taxpayer involvement" at Board of Equalization and Review Hearings, *see* Respondents' Joint Brief at 3-4, and that the Assessor and Board are deprived of the opportunity to question those having "direct and actual knowledge of the facts". *Id.* at 4. Yet later in the brief, the Respondents admit that "the Petitioner had made arrangement well before the BOR hearing to obtain a commercial appraisal, *had various communications with the Assessor*, and had legal counsel present at the hearing". *Id.* at 8 (emphasis added). They also admit that both the Assessor and BOR undertook unspecified "informal actions . . . on behalf of this taxpayer with regard to the 2011 assessment prior to the BOR hearing on February 28, 2011". *Id.* at 7. Thus, by the Respondents' own admissions, Target had various communications with the Assessor before resorting to filing a formal protest to the Board, and these communications were meaningful enough that the Assessor took some action "on behalf of the taxpayer" with the Board before the protest was filed. *See also* Board Hearing Tr. at 33-34, 43-44 (Apdx. Rec. Vol. 2 at 33-34, 43-44). Thus, the assertion that there was a lack of taxpayer involvement in this case is simply nonsense[2]. In fact, as the transcript reflects, it appears that the taxpayer and the Assessor had just about come to a meeting of the minds, but that the Board, without notice to the taxpayers, decided to rejected the Assessor's proposed value. Board Hearing Tr. at 43-44 (Apdx. Rec. Vol. 2 at 43-44).

It is also more than a little ironic that the Respondents are complaining that taxpayers resort to the use of professional property management and appraisal experts and attorneys to represent them in protests to the Board of Equalization and Review, because in large part, it is

[2] As was the assertion that the secret meeting described above was conducted "on behalf of the taxpayer", since the taxpayer wasn't allowed to participate.

this Court's interpretation of the applicable statutes that has made such representation virtually a requirement. In *Killen v. Logan County Com'n,* 170 W.Va. 602, 295 S.E.2d 689 (1982), this Court stated, in syllabus point 8, that "[o]n 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. The objecting party, whether it be the taxpayer, the tax commissioner or another third party, must show by a preponderance of the evidence that the assessment is incorrect". *Killen* was overruled in part by *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (2008), in which this Court held that the taxpayer must prove that the taxing authority's appraisal is excessive by clear and convincing evidence, rather than by a simple preponderance of the evidence as is sufficient in most civil cases. However, in *Foster*, this Court mentioned, and did not repudiate, the requirement for the testimony of a qualified appraiser. *See Foster*, 223 W.Va. at 28 n. 21, 672 S.E.2d at 164 n. 21.

The irony here is that the Respondents are complaining about the standard of proof imposed on taxpayers *that favors the Respondents*. Given that a taxpayer must prove that the taxing authority's appraisal is excessive by clear and convincing evidence, and given that the testimony of a qualified appraiser is the only evidence that has been sanctioned by this court as being sufficient to meet that stringent standard, it is hardly surprising that only taxpayers owning large commercial properties can afford to retain both expert appraisers to perform their own independent appraisals of the properties in question and the attorneys required to prosecute their almost inevitable appeals.

Having made the commitment to spend the amount of money required to retain these experts, it is hardly surprising that the property owners themselves often do not believe it necessary to testify on their own behalf - a decision that seems all the more practical given the fact many Boards of Equalization and Review artificially limit the time allotted for each hearing due to the limited time during which they can be heard and the multiple responsibilities of county commissions[3].

2. Objections to Target's Evidence

The Respondents' object to the fact that Mr. Barna, rather than a Target employee, was allowed to introduce documentary evidence showing the original cost of the building on the subject property. *See e.g.* Respondents' Joint Brief at 4-5 ("documents were offered that purportedly came from the Petitioner to show the actual construction costs of the improvements as well as a spreadsheet of alleged assessments of Target stores in other West Virginia counties"). First, the Assessor was represented at the hearing before the Board by Mr. Tennant, who represents the Ohio County Commission before this Court. Mr. Tennant participated fully in the hearing - but at no time did he object to the introduction of any of the documents tendered by the taxpayer in this case.

Secondly, the Board had a policy to accept all documents tendered without any need for a formal motion. *See* Board Hearing Tr. at 3 (Apdx. Rec. Vol. 2 at 3) (Board member asking at the outset of the hearing asking if the taxpayer had any documents that it wanted included in the record, accepting tendered documents, and stating that "[w]e'll go ahead and enter those into the record"); Board Hearing Tr. at 5 (Apdx. Rec. Vol. 2 at 5) (taxpayers' attorney attempting to move Mr. Barna's appraisal into the record, and Board member stating "[y]ou don't have to do

[3] It remains to be seen if SB 401 will significantly improve this situation by permitting a county commission to also sit as a Board of Assessment Appeals in the fall of the year.

that; it's in the record"). Tr. 5. Third, by law, hearings before a Board of Equalization and Review are supposed to be informal. As this Court has stated, "courts do not demand that a hearing before a board be surrounded by extensive due process procedures. *The formal rules of evidence are not applicable*". *In re Tax Assessments Against Pocahontas Land Co.*, *supra*, 172 W.Va. at 61, 303 S.E.2d at 700 (emphasis added).

Finally, even had the West Virginia Rules of Evidence been applicable, the documents to which Respondents object would still have been admissible through the taxpayer's expert witness, who was a professional appraiser who presented an independent appraisal of the property in question. That appraiser (Mr. Barna) 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). There were no objections raised to Mr. Barna's qualifications to testify as an expert before the Board.

Even under the West Virginia Rules of Evidence, it is clear that Mr. Barna should have been allowed to testify as an expert witness and that it was proper for him to offer his opinion as to the value of the property in question. See W. Va. R. Evid. 702, 704. On multiple occasions, this Court has recognized that a professional appraiser's testimony is appropriate to establish value in condemnation proceedings. For example, in *Kline v. McCloud*, 174 W.Va. 369, 373, 326 S.E.2d 715, 719 (1984), this Court observed that:

> 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 (citations omitted). The same is true in condemnation and eminent domain cases. *See e.g. West Virginia Div. of Highways v. Butler*, 205 W.Va. 146, 516 S.E.2d 769 (1999); *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994); *West Virginia Dept. of Highways v. Thompson*, 180 W.Va. 114, 375 S.E.2d 585 (1988).

Under W. Va. R. Evid. 703, an expert witness is permitted to rely on facts or data he gathers before testifying, even if those facts or data would not themselves be admissible, if they are the type of facts reasonable relied upon by experts in the field in forming opinions or inferences on the subject. For example, in presenting testimony in criminal trial, expert medical witness should be permitted to state facts or data upon which he bases his opinion, and this includes information available to him in form of records or documents whose reliability has been reasonably established and which have been kept in regular course of professional care or treatment and are of a type reasonably relied upon by experts in witness' particular field of expertise. *State v. Duell*, 175 W.Va. 233, 332 S.E.2d 246 (1985). Actual construction costs clearly fall within the ambit of that rule. There were no objections raised at the hearing to Mr. Barna testifying as to the original cost of the building. *See* Board Hearing Tr. at 10 (Apdx. Rec. Vol. 2 at 10), and Mr. Tennant was able to cross examine Mr. Barna on where he obtained the information and, in the process, determined that Mr. Barna verified its accuracy. *See* Board Hearing Tr. at 26-27 (Apdx. Rec. Vol. 2 at 26-27).[4]

---

[4] Mr. Prettyman did testify that he rejected a document submitted by Target for tax year 2010 purporting to show actual construction costs because it was incomplete. *See* Board Hearing Tr. at 33-34 (Apdx. Rec. Vol. 2 at 33-34).

Mr. Barna also testified that Target provided to him information concerning how other Assessors appraised other Target stores in West Virginia, Board Hearing Tr. at 12-13 (Apdx. Rec. Vol. 2 at 12-13), and a document summarizing this information was introduced at the Board hearing. *See* Apdx. Rec. Vol. 1 at 79. Mr. Barna testified that he used and considered that information in the process of evaluating and appraising the subject property. Board Hearing Tr. at 13 (Apdx. Rec. Vol. 2 at 13). Given that, it was entirely appropriate for him to testify as to the inferences and conclusions he drew from those documents, as he did. Board Hearing Tr. at 12-16 (Apdx. Rec. Vol. 2 at 12-16). Again, there were no objections raised at the hearing to Mr. Barna testifying as to the values as determined by other Assessors for other Target stores in West Virginia, *see* Board Hearing Tr. at 13 (Apdx. Rec. Vol. 2 at 13), although the Assessor clearly disputed how similar the other properties were to the one in Ohio County, *see* Board Hearing Tr. at 34-45 (Apdx. Rec. Vol. 2 at 34-35), which would go to the weight of the taxpayer's evidence, not its admissibility.

In summary, the Board's policy of accepting all documents tendered into the record is consistent with the informal nature of the hearings. By statute, upon appeal of a Board's decision to a circuit court, the taxpayer cannot introduce new evidence but is limited only to the record made before the Board. W. Va. Code § 11-3-25. Given that restriction, the Board's policy of accepting all documents tendered into the record best preserves the taxpayer's ability to appeal. But even had the formal Rules of Evidence been in effect, the documentary evidence to the Respondents now object most likely would have been admissible through Mr. Barna, and in any event, the Assessor's failure to object to the introduction of those documents at the time they were offered would preclude them from raising the issue of their admissibility here.

E. The Petitioner Met Its Burden of Proof

The Respondents mischaracterize the appraisal performed by the Petitioner's expert appraiser:

> ...the main methodology relied upon by him utilized the sales comparison approach which was in fact based on a number of properties that were unmistakably not comparable to the Property at issue in terms of either time or location. (See App Vol 1 at 55).

Respondents' Joint Brief at 8. In fact, as explained in Petitioner's opening brief, Mr. Barna used all three of the approaches to value contemplated by W. Va. C.S.R. § 110-1P-2.2.1, and that all three approaches were properly performed can be inferred from the fact the results of all three approaches were quite similar.

Moreover, Respondents assertion that Mr. Barna's market data approach was "based on a number of properties that were unmistakably not comparable to the Property at issue in terms of either time or location" isn't supported even by their own citation to App Vol 1 at 55. In fact, Mr. Barna's appraisal states:

> While a diverse array of sales was initially considered, three recent sales of large, single tenant commercial properties discussed in this section for direct comparison to the subject are those transactions which I consider to be <u>most</u> similar to the subject. Supplemental sales data of large retail properties is included at the end of this section.

Appraisal at 22, Apdx. Rec. Vol. 1 at 48. It is the "supplemental sales data of large retail properties at the end of this section" cited by the Respondents; the three properties used by Mr. Barna in his market data approach are found in his appraisal at 23-28, Apdx. Rec. Vol. 1 at 49-54. And even though Mr. Barna used only the three properties he considered to be the most similar, it is impossible to find properties that are exactly like the subject in every respect. Accordingly,"[f]or dissimilar features between the comparables and the subject, adjustments are made to derive an adjusted indication of the price at which the subject property could be

expected to sell". Appraisal at 22, Apdx. Rec. Vol. 1 at 48. These adjustments are shown clearly in the appraisal at 23-24, Apdx. Rec. Vol. 1 at 49-50. There is simply no substance to Respondents' attack on Mr. Barna's market data approach, the results of which were fully supported by the results of both his cost and income approaches.

F. The Assessor Failed to Meet Her Burden of Proof

The Respondents assert that the Assessor was fully justified in her decision to use only the cost approach in appraising Target's property. The Petitioner agrees that the Assessor has the discretion to select the most applicable approach and have no objection here to her selection of the cost approach. It asks only that the Assessor correctly apply the cost approach and that she demonstrate that she has done so.

That the Assessor did not correctly apply the cost approach is apparent from her failure to properly consider the significant amount of functional obsolescence present with this property. *See* Petitioner's Brief at 28-31. It is also apparent from the wide disparity between the Assessor's value and Mr. Barna's. Finally, it is apparent from the wide disparity between the Assessor's value and the values as determined for similar stores by other Assessors in other counties in West Virginia.

The Respondents don't dispute the fact that the Assessor failed to offer specific testimony that each and every one of the individual factors in the Tax Commissioner's regulations were considered in arriving at the final valuation, much less describe how each factor contributed to that valuation. Rather, they assert only that "[i]t is obvious that counsel for Petitioner cannot point to any regulation or legal precedent that would require each of the specific factors to be individually enumerated by the Assessor". Respondents' Joint Brief at 12. Of course, this Court has provided exactly this legal precedent:

> 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... Therefore, 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. Considering only the orders at issue in the cases sub judice, rarely are the requisite criteria mentioned in the circuit court's order and, even if these factors are mentioned, there is no indication that the assessing officer has thoroughly considered these criteria as required by W. Va.C.S.R. § 110-1P-2.1.4. Accordingly, 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).FN14
>
> > FN14. Requiring a circuit court to conduct a particular analysis and to memorialize its findings of fact and conclusions of law with regard thereto is consistent with other decisions of this Court imposing similar requirements in other contexts. *See, e.g.,* Syl. pt. 3, *Fayette County Nat'l Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997) ("Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." (emphasis added)); Syl. pt. 1, in part, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996) ("Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected...." (emphasis added)).

Stone Brooke Ltd. Partnership v. Sisinni, 224 W.Va. 691 at 705-706, 688 S.E.2d 300 at 314-315 (2009). There, the Court further remanded the cases there under consideration:

> back to their respective circuit courts for further proceedings 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 properties is correct.FN15
>
> > FN15. On remand, the circuit courts additionally 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.

Id., 224 W.Va. 691 at 706, 688 S.E.2d 300 at 315. If the Assessor properly considered each of the factors enumerated in W. Va. C.S.R. §§ 110-1P-2.1.1 thru 2.1.4, she had only to introduce evidence thereof to the Board. If she properly considered all of the components of depreciation, including functional obsolescence as required by W. Va. C.S.R. § 110-1P-2.2.1.1 in her cost approach, she had only to introduce evidence thereof to the Board. But, in fact, she did neither; rather, she struggled even to come up with the value that she and/or the Board agreed upon before the hearing - the value that she didn't share with the taxpayer beforehand. *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). Clearly, the Circuit Court finding that "the Assessor properly considered the required appraisal factors set forth in W. Va. C.S.R. § 110-1P-2", Final Order at 4, Apdx. Rec. Vol. 1 at 4, is unsupported by the record of the hearing made before the Board, is plainly wrong, and should be reversed.

G. Due Process

The Respondents complain of "a major deficiency at the BOR hearing level; i.e., the lack of authentication of the testimony and documentation presented to the BOR by these outside, retained representatives as well as the inability of the Assessor and BOR to question the taxpayer employees or personnel having direct and actual knowledge of the facts as to which the third party consultants have offered at the hearings". Respondents' Joint Brief at 4. In other words, it's not enough to satisfy the Respondents that taxpayers are required to appeal an Assessor's appraisal of its property to a tribunal that is anything but impartial. Having a County Commission put on its "Board of Equalization and Review" hat doesn't magically change the fact that the County Commission, as the body responsible for the County's budget and administration, has a direct interest in preserving the County's tax base and therefore has a direct interest in the matter over which it presides.

And it's apparently not enough that the taxpayer bears an unusually heavy burden before a Board of Equalization and Review: not only must a taxpayer prove that the Assessor's value is too high, but it must do so by clear and convincing evidence. The only judicially sanctioned evidence that meets this standard is the testimony of a professionally appraiser; it simply would not be prudent for any taxpayer to attempt to contest an Assessor's value without having gone to the expense of having a professional appraisal of its property. Finally, it's not enough that the taxpayer also must overcome a high standard of review should it decide, as here, to appeal the inevitable adverse decision from the Board of Equalization and Review to a circuit court.[5] In

---

[5] " 'An 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' ... '[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

order to overturn a Board's decision, a circuit court must find, *inter alia*, that the Board's decision is "clearly wrong in view of the reliable, probative and substantial evidence on the whole record" or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion". *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250 at 255 n. 8, 539 S.E.2d 757 at 762 n. 8 (2000).

No, none of that is sufficient for the Respondents. They also now insist that taxpayers be required to meet formal document authentication standards such as those found in the West Virginia Rules of Evidence at hearings before the Board and that employees of corporate taxpayers knowledgeable about all of the facts upon which the taxpayer's expert relies appear and be subject to cross examination. Well, the Respondents can't have their cake and eat it too. County commissions can't hear appeals if the Rules of Evidence are required, because county commissioners aren't lawyers, much less trained judges. The use of formal rules of evidence and authentication would make hearings last longer than a part time county commission has to devote to such matters, and requiring their use could well make an appeal cost more than even a large commercial taxpayer could bear.

It is incorrect to suggest that the taxpayer here has abandoned any claim that either the tribunal or the standard of proof violates due process; rather, the taxpayer didn't see any point to rehashing legal arguments that these requirements make the appeals process facially unconstitutional already that have been rejected by this court. However, it's hard to imagine a case in which the taxpayer could present any more persuasive evidence or in which the Assessor could do any less to support her Assessment. Moreover, it's hard to imagine a situation that could be more unfair to the taxpayer than one where, as here, the tribunal has already decided the

---

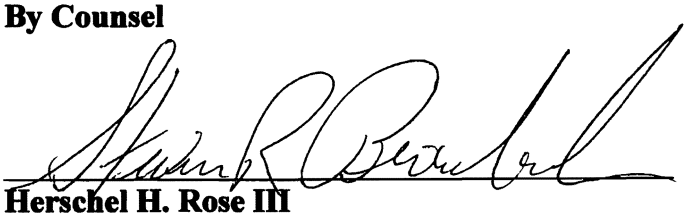
little different from that undertaken by this Court..." *Stone Brooke*, 224 W.Va. at 696-697, 688 S.E.2d 305-306.

outcome before the hearing ever begins. Even if the appeals process is facially constitutional, the fact that the tribunal prejudged the outcome of this case makes that process unconstitutional as applied in this instance.

Respectfully Submitted,

TARGET CORPORATION

By Counsel



Herschel H. Rose III
herschelrose@roselawwv.com
(WV State Bar No. 3179)
Steven R. Broadwater
(WV State Bar No. 462)
sbroadwater@roselawwv.com
ROSE LAW OFFICE
300 Summers St., Suite 1440
PO Box 3502
Charleston, WV 25335
(304) 342-5050
(304) 342-0455 (FAX)

Submitted: February 22, 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

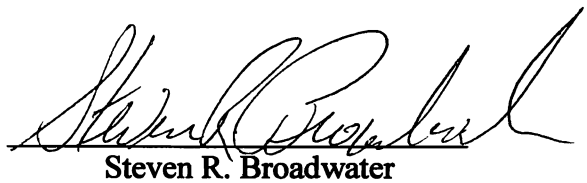
CERTIFICATE OF SERVICE

I, Steven R. Broadwater, hereby certify that on February 22, 2012, I caused to be served a copy of "*Petitioner's Brief* and the *Appendix Record* (in three volumes)" by mailing true and exact copies thereof to:

Donald J Tennant, Jr. Esquire
Tennant Law Offices
38 15th St., Suite 100
Wheeling WV 26003

Ronald M Musser, Esquire
Dinsmore & Shohl LLP
Bennett Square
2100 Market St.
Wheeling WV 26003

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



Steven R. Broadwater
(WVSB No. 462)