

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Target Corporation, Petitioner Below,**

**Petitioner**

**v.**

**Docket No. 11-1355**

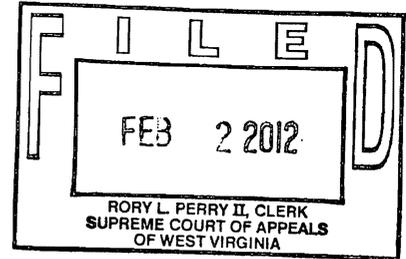
**Kathie Hoffman, Assessor, and the County  
Commission of Ohio County, Respondents Below,**

**Respondents**

**RESPONDENTS' JOINT BRIEF**

**Ronald M. Musser, Esq.  
WV State Bar #2697  
Dinsmore & Shohl LLP  
Bennett Square  
2100 Market Street  
Wheeling, WV 26003  
ronald.musser@dinsmore.com  
(304) 230-1700  
Counsel for Kathie Hoffman,  
Ohio County Assessor**

**Donald J. Tennant, Jr., Esq.  
Tennant Law Offices  
38 fifteenth Street, Suite 100  
Wheeling, WV 26003  
don@tennantlaw.com  
(304) 230-3200  
Counsel for County Commission of Ohio County**



## Table of Authorities

### Cases

<u>Bayer MaterialScience, LLC and Bayer Cropscience, USA, LP v. State Tax Commissioner et al.</u> , 223 W.Va. 38, 672 S.E.2d 174 (2008) .....	13
<u>In Re: Tax Assessment Against American Bituminous Power Partners, L.P.</u> , 208 W.Va. 250, 539 S.E.2d 757 (2000) .....	11
<u>In Re: Tax Assessments of Foster Foundation’s Woodlands Retirement Community</u> , 223 W.Va. 14, 672 S.E.2d 150 (2008) .....	13
<u>Mountain America, LLC, et al. v. Donna Huffman</u> , 224 W.Va. 669, 687 S.E.2d 768 (W.Va. 2009) .....	6
<u>Rawl Sales &amp; Processing Co. v. County Commission of Mingo County</u> , 191 W.Va. 127, 443 S.E.2d 595 (1994) .....	7
<u>Stone Brooke Ltd. Partnership v. Sisinni</u> , 224 W.Va. 691, 688 S.E.2d 300 (2009) ....	3, 6, 13

### Statutes

W.Va. Code §11-3-27(a) .....	6
------------------------------	---

### Regulations

W.Va. C.S.R. 110-1-P-2 <i>et seq.</i> .....	10
---	----

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Target Corporation, Petitioner Below,**

**Petitioner**

**v.**

**Docket No. 11-1355**

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

**Respondents**

---

**RESPONDENTS' JOINT BRIEF**

---

Kathie Hoffman, as Assessor of Ohio County, and the County Commission of Ohio County, the Respondents herein, file this Joint Brief in response to the Petitioner's Brief which appeals the decision of the Circuit Court of Ohio County, West Virginia, in Civil Action No. 11-CAP-3 that upheld the Assessor's appraisal of the Petitioner's real property and improvements as confirmed by the County Commission of Ohio County sitting as the Board of Equalization and Review.

**I. Assignments of Error**

The Respondents maintain that the three (3) Assignments of Error raised in the Petitioner's Brief are not supported by a review of the overall record and will be addressed in the order presented by counsel for the Petitioner.

## **II. Statement of the Case**

For tax year 2011, the Assessor's office reviewed various valuation data in accordance with the applicable statutes and regulations and prescribed methodology in arriving at an overall appraised value of \$17,043,600 for the Petitioner's property located at the Highlands development in Ohio County, West Virginia (hereafter "Property"). This appraisal included a land value of \$7,302,400 for 12.47 acres and improvements valued at \$9,741,200 which primarily consists of a building of approximately 126,411 square feet.

A hearing was held before the County Commission sitting as the Board of Equalization and Review (hereafter "BOR") in February 2011 during which counsel for the Petitioner offered the written appraisal and oral testimony of Mr. Anthony C. Barna along with other exhibits as evidence regarding the value of the Property. No employee or other personnel of the Petitioner having direct knowledge of the construction costs of the building and improvements was brought forward by the Petitioner. Written materials and the oral testimony of the Assessor and her Deputy Assessor, Jeffrey Prettyman, were also presented in support of the Assessor's valuation of the Property.

Following the written decision of the BOR which upheld the Assessor's valuation, counsel for the Petitioner timely filed an appeal with the Circuit Court of Ohio County, West Virginia to challenge such assessment. Following the submission of briefs by counsel for the parties, Judge Martin J. Gaughan conducted a hearing on August 18, 2011, at which time oral presentations were made based upon the certified record of the BOR hearing and the pleadings of counsel. By Order entered on September 6, 2011 ("Circuit Court Order"), Judge Gaughan made detailed findings of fact and conclusions of law based upon the certified record as well as the pleadings and oral presentation of counsel in denying the Petitioner's challenge to the assessed

values as affirmed by the BOR. Subsequently, counsel for the Petitioner filed the present notice of appeal to this Court.

## **II. Summary of Argument**

The Petitioner's counsel has cited the proper requirements to be set forth in the Circuit Court's order when reviewing an appeal of the appraisal of commercial real property under the decision in Stone Brooke Ltd. Partnership v. Sisinni, 224 W.Va. 691, 688 S.E.2d 300 (2009). Despite the fact that Judge Gaughan made specific findings of fact and conclusions of law based upon the complete record before him, including the testimony of the Deputy Assessor that all required appraisal factors were considered in arriving at the 2011 appraisal, counsel for Petitioner goes to great lengths to assail the Circuit Court Order. The basis for disputing the Circuit Court Order relies heavily on numerous allegations of Petitioner's counsel as to factual matters which are not contained in the record of proceedings before the BOR. As such, the Petitioner's Brief is rife with factual misstatements and unsubstantiated inferences as well as misapplication of the law.

The present appeal highlights a growing and serious problem with regard to the statutory process governing the rights of taxpayers to challenge the assessments of their real property. The current legislative enactments and underlying regulations contemplate direct involvement by the taxpayer, including commercial entities, having personal knowledge of the circumstances surrounding property valuations. However, in virtually every instance of challenges to commercial property assessments at the Highlands development in Ohio County, the Assessor and BOR are now 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 at which the actual taxpayer representatives are conspicuously absent. Presumably, this

is because 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 appraisal.

This lack of taxpayer involvement underscores 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.

Having presented the above context in which the Petitioner's hearing was conducted, the Respondents maintain that despite some minor issues which in no way affected the overall process and valuation of the Petitioner's property, this taxpayer has not demonstrated by clear and convincing evidence either that the Assessor did not provide substantial evidence to support the 2011 tax year assessment or that the BOR violated the Petitioner's right of due process with regard to the formal hearing conducted at the request of the Petitioner.

Of significance is the Assessor's testimony denying the assertion by Petitioner's counsel that the settlement of the 2009 and 2010 tax appeals of this Petitioner established the true and actual value for the 2011 tax year. To the contrary, she testified that there was nothing to substantiate such a claim and that she had been advised by the West Virginia Department of Tax and Revenue that each tax year required a separate assessment based upon the original assessment prior to any exoneration or other one-time adjustment.

At the BOR hearing, the Petitioner was represented by its present legal counsel and a commercial appraisal who introduced his appraisal and testified as to its contents. Petitioner's counsel also proffered several statements as to the Petitioner's purported communications with the Assessor and the lack of knowledge by the Petitioner of the actual assessment. In addition,

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. However, no employee of the Petitioner was present to offer direct testimony or to be available for cross examination as to many of the representations made by either the appraiser or Petitioner's counsel regarding such offered documents.

In stark contrast to the unauthenticated documentation provided by the Petitioner's hired professionals, the testimony and exhibits presented by both the Assessor and the Deputy Assessor were clearly based upon their personal knowledge as to the various communications along with the data that were presented to the BOR.

Again, the main contention of the Petitioner's counsel in seeking the reversal of the Circuit Court Order is that Judge Gaughan "completely ignore[d] the evidence by the taxpayer" and likewise improperly concluded that the Assessor had considered all of the relevant appraisal factors as established by the legislature and legal precedent. However, counsel for the Respondents strongly maintain that the Circuit Court Judge had more than ample evidence before him in terms of the record of the BOR hearing, legal briefs and oral presentation by counsel to support the findings of fact and conclusions of law in his order affirming the assessment.

#### **IV. Statement Regarding Oral Argument and Decision**

Counsel for the Respondents do not believe that oral argument would assist the Court in the adjudication of this matter. The factual issues on appeal may be fully addressed by reviewing the Findings of Fact and Conclusions of Law contained in the Circuit Court Order in conjunction with the record on appeal. There are no legal principles of law to be established or modified that would require oral presentation to the Court.

## V. Argument

### 1. Standard of Review

An assessment made by a board of review and equalization will not be reversed when supported by substantial evidence unless plainly wrong. Mountain America, LLC, et al. v. Donna Huffman, 224 W.Va. 669, 687 S.E.2d 768 (W.Va. 2009) at Syl. Pt. 2; Stone Brooke Ltd. Partnership, supra.

### 2. Failure to Provide Notice to Taxpayer

#### a. **Exoneration of 2010 Tax Year Established True and Actual Value**

The Respondents strongly object to the statements and inferences that the settlement of the prior 2009 and 2010 tax appeals by the Petitioner somehow resulted in fixing the appraised value for the 2011 tax year. Not only did Petitioner's counsel not introduce any evidence at the BOR hearing to support this contention, but the only relevant and credible testimony was expressly to the contrary as provided by the Assessor. Moreover, she testified that representatives of the West Virginia State Tax Department confirmed that the prior settlement, whether effected through an exoneration or otherwise, was not precedent to future valuations. (App. Vol 2 at 39-46) Counsel for the Petitioner cites W.Va. Code §11-3-27(a) as placing limitations on the use of an exoneration solely to correct a clerical error or mistake or other unintentional act and within a timely manner. (Petitioner's Brief at page 9). 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.

**b. Assessor's Initial Valuation**

Counsel for Petitioner has attempted to cast suspicion on both the Assessor and BOR for informal actions taken on behalf of this taxpayer with regard to the 2011 assessment prior to the BOR hearing on February 28, 2011. Despite the Petitioner's allegations that this was tantamount to a secret meeting during which the County Commission improperly increased the assessment to \$17,043,000 without notice to the Petitioner, there is absolutely nothing in the BOR hearing record to support such baseless accusations by counsel for the Petitioner.

**c. Commission Did Not Increase the Value of the Property**

As set forth above, there was no action taken by the Commission at any meeting to increase the appraised value of the Property in contravention of the statutory process for appraisal of properties. As Petitioner's counsel is well aware, having formerly served as the Tax Commissioner, it is the duty of the Assessor to appraise the value of property, and the Commission convenes solely as the BOR to conduct a fact finding hearing in order to either affirm or deny such valuation. Again, 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.

**d. The Appearance at the BOR Hearing Waived any Lack of Notice**

Counsel for the Petitioner takes great pains in attempting to circumvent the well-recognized legal precedent that appearance at the BOR hearing constitutes a valid waiver of any formal notice requirement. See, Rawl Sales & Processing Co. v. County Commission of Mingo

County, 191 W.Va. 127, 443 S.E.2d 595 (1994). This is especially applicable to the present case since 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. While Petitioner's counsel continues to assert that the taxpayer had not been informed of the specific amount of the increase, there was no credible witness presented on behalf of the Petitioner at the hearing to substantiate these proffered comments.

Counsel for Petitioner also takes exception with the finding in the Circuit Court Order that the prior settlement of the 2010 tax appeal was limited to that specific tax year as a back-handed attempt to invoke a requirement for formal notice of the 2011 appraisal. However, the documented record in this proceeding clearly demonstrates that the Petitioner was not prevented in any manner from presenting its challenge to the 2011 appraisal and any objection to the contrary is without merit.

**3. The Petitioner Failed to Meet its Standard of Proof While the Assessor Presented Substantial Evidence in Support of the 2011 Appraisal**

a. As indicated previously, the only witness presented by Petitioner's counsel at the BOR hearing was an appraiser who discussed the contents of his report.<sup>1</sup> The testimony of Mr. Barna has been portrayed as a thorough valuation of the Property after taking into consideration all recognized factors for accurate appraisal. However, 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). Other than the report and testimony of the Petitioner's appraiser

---

<sup>1</sup> While Mr. Barna indicated he considered all appraisal methods in his valuation, his report reflects a very limited "Intended Use" of such appraisal; namely, "Assist with a tax assessment proceeding". (Real Estate Appraisal, Executive Summary, App. Vol 1 at 33).

as to the value, the only other evidence offered by counsel for the Petitioner consisted of an application for payment and a spreadsheet that purportedly listed the appraisement of other Target stores in West Virginia. This listing for 2011 appraised values in various counties in West Virginia (App Vol 1 at 79) was also apparently relied upon by the Petitioner's appraiser. Other than Mr. Barna's statement that he believed such data to have been given to him by someone at Target (App Vol 2 at 13), there is absolutely nothing in the record to verify or corroborate these appraisements as being accurate representations of the values of other Target stores that were calculated by other West Virginia County assessors. As a result, none of these values or the corresponding testimony were properly given any weight by the Circuit Court.

In direct contrast to the presentation of the Petitioner's appraiser are the Assessor's comparable land sales and buildings costs at the Highlands development (App Vol 1 at 18-19) together with the testimony presented by the Deputy Assessor based upon his first hand knowledge of the building costs and land sales at that specific location. (App Vol 2 at 30) The fact that the Assessor's appraisement was much higher than the value offered by the Petitioner's appraiser does not "demonstrate[s] conclusively that the Assessor's appraisal is grossly excessive." (Petitioner's Brief at 18)

**b. Valuations by Other Assessors in Their Counties is Not Relevant**

Petitioner's counsel devotes several pages to depicting graphs and drawing inferences from them in an effort to establish that the appraisements of Target stores in other counties should somehow be considered "independent evidence" that the valuation in the present case is excessive. This approach is misplaced for a number of reasons, one of the main ones being that assessors are charged with the duty to evaluate the properties in their respective counties based upon the characteristics unique to their area. There is no "one size fit all" comparison that can be

made to these individual locations rather than a separate valuation based on the specific factors such as location, surrounding development, economic conditions, etc. The other significant shortcoming is the continuing lack of any authentication of this information that is merely presented by Petitioner's counsel with no corroborating testimony of anyone with actual knowledge of these alleged appraisements which are also not relevant for Ohio County.

**c. The Assessor Presented Substantial Evidence to Support the Valuation**

One of the grounds for challenging the appraisal by Petitioner's counsel was that the comparables used by the Assessor were too small in comparison and that no adjustment was made by the Deputy Assessor, Jeffrey Prettyman, to correct for this disparity. However, Mr. Prettyman testified that he did adjust for the smaller parcel sizes in reaching a per acre value of those recent sales of properties located at the Highlands. (App Vol 2 at 30) Moreover, the comparables utilized by Mr. Prettyman were arrived at by using the land sales of more recent land sales at the actual Highlands development which are much more comparable in time and location than those listings relied upon by the Petitioner's appraiser.

Petitioner's counsel asserts that the Assessor did not adequately demonstrate that the appraisal by her office considered all of the criteria under W.Va. CSR §110-1P-2 *et seq.* in arriving as the appraised value of the Property. To the contrary, Mr. Prettyman expressly testified that he considered the cost, income and market approach in the appraisal of the Property and applied the cost approach based on the relatively new construction and the lack of any other relevant data that would involve either the income or market approach. (App Vol 2 at 30-31)

The appraisal methodology set forth by Mr. Prettyman is entirely consistent with the practical limitations on assessments recognized in W.Va. C.S.R. §110-1P-2 *et seq.* and which has

been cited in the case of In Re: Tax Assessment Against American Bituminous Power Partners, L.P., 208 W.Va. 250, 539 S.E.2d 757 (2000):

“When the regulation in question is read as a whole, it becomes clear that the Tax Commissioner [here, Assessor] has considerable discretion in choosing the applicable method of valuing a particular property.” 208 W.Va. at 257, 539 S.E.2d at 764.

Therefore, the record is abundantly clear that the analysis required under the applicable regulations and case law was satisfied by the Assessor’s office in reaching the decision to utilize the cost basis to appraise the property and consideration of the factors under the Regulations.

In a further effort to discredit Mr. Prettyman’s testimony, Petitioner’s counsel asserts that he failed to offer specific testimony that each and every one of the individual factors in the above cited regulations was considered in arriving at the final valuation. Accordingly, it is contended that the Circuit Court committed error by finding that the testimony of the Deputy Assessor that he considered all of these factors was adequate to meet this requirement.<sup>2</sup> Counsel for the Petitioner cites a portion of the Deputy Assessor’s statements in a misguided effort to somehow impeach his testimony on this point. (Petitioner’s Brief at 26-27) To the contrary, in response to the question regarding consideration of “ease of alienation”, the Deputy Assessor replied that “there was no easement factor” – there was no easment alienation factor.” (App Vol 2 at 38-39) Given that “ease of alienation” includes consideration of dominant and subservient easements, the fact that this witness stated that such factor had been considered and apparently found not to be applicable to the cost approach does not impair the credibility of his testimony that he did consider all of the required factors.

The argument by counsel for the Petitioner that the Assessor failed to consider any economic or functional obsolescent is likewise wholly unsupported by the record. Again, Mr.

---

<sup>2</sup> During the BOR hearing, the Deputy Assessor expressly stated that he did consider all of the items in WV CSR §110-1P-2 (App Vol 2 at 30-32).

Prettyman testified that he considered such obsolescence but did not apply such factor since the Property was in a growing market area (the Highlands). His testimony, however, did confirm that physical obsolescence, or depreciation, was considered and applied to the building as part of the cost approach valuation.<sup>3</sup> (App Vol 2 at 32)

It 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. Furthermore, based upon the record before him, Judge Gaughan was certainly entitled to find that the testimony of the Deputy Assessor was adequate to comply with the holding of this Court in Stone Brooke Limited Partnership, supra.

**4. The Petitioner's Due Process Rights Were Not Violated**

In the original Petition filed in the Circuit Court, counsel for Petitioner contended that the decision of the BOR should be reversed and that the Assessor's appraised value should be reduced to the figure proposed by the Petitioner's appraiser based in part upon an allegation of due process violations regarding both the propriety of the Commission to sit as the Board of Equalization and Review as well as the application of the clear and convincing standard of proof. Following the entry of the Circuit Court Order, Petitioner's counsel has now backed away from these original constitutional arguments in lieu of trying to persuade this Court that the Commission held a secret meeting to raise the Petitioner's appraisal such that its action as the BOR failed to provide an impartial tribunal to consider the challenge of the Assessor's valuation. Again, this approach is based entirely unsubstantiated statements and inferences by

---

<sup>3</sup> In fact, based on the reduction in building value, the Assessor applied approximately 7% depreciation from the prior year as opposed to only the 6% physical depreciation calculated by Mr. Barna. (App Vol 2 at 29-30)

selective reference to items in the record and corresponding purported errors in Judge Gaughan's written decision.<sup>4</sup>

The well-recognized precedent established by this Court in tax appeal cases holds that once the Assessor has chosen a method of valuation and applied it to appraise commercial property, such valuation is presumed correct and should be afforded great deference. Only by the taxpayer proving, by clear and convincing evidence, that such assessment is erroneous should a Court set aside the Assessor's appraised value. Stone Brooke Limited Partnership, supra at Syl. Pt. 5; In Re: Tax Assessments of Foster Foundation's Woodlands Retirement Community, 223 W.Va. 14, 672 S.E.2d 150 (2008). Moreover, discretion is conferred upon the taxing authorities in choosing the most accurate method of appraising commercial properties and such discretion will not be disturbed absent a showing of an abuse of discretion. Bayer MaterialScience, LLC and Bayer Cropscience, USA, LP v. State Tax Commissioner et al., 223 W.Va. 38, 672 S.E.2d 174 (2008) at Syl. Pt. 7 (citations omitted).

## V. Conclusion

The Respondents contend that the actual evidence in the record presented on behalf of the Petitioner, excluding those items not properly authenticated and which should not be given any weight, does not demonstrate an abuse of discretion by the Assessor in appraising the Property based solely upon cost approach rather than either the income or sales comparison approaches. Mr. Prettyman presented substantial testimony in support of the method chosen while the

---

<sup>4</sup> In the Petitioner's Memorandum of Law submitted to the circuit court prior to the hearing on August 18, 2011, counsel for Petitioner admitted that "The record . . . does not disclose any demonstrated bias on the part of the commissioners." Furthermore, the purported due process violation based upon the taxpayer's clear and convincing standard of proof is not raised on appeal is therefore deemed to have been waived.

Petitioner's counsel failed to disprove the underlying data relied upon by Mr. Prettyman in arriving at the appraised value utilizing this method.

Furthermore, the evidence presented on behalf of the Petitioner through the oral testimony and the report prepared by Mr. Barna which relied upon wholly irrelevant and dissimilar properties and valuations at distant times as opposed to focusing on true comparables to the present Target location at issue. Accordingly, the Petitioner has clearly failed to sustain its burden of proof by clear and convincing evidence in order to set aside the Assessor's valuation.

In view of the obvious failure of the Petitioner to meet its standard of proof by clear and convincing evidence to demonstrate that the valuation of the Assessor was plainly wrong or an abuse of discretion as a result of utilizing the replacement cost approach, the decision of the BOR, as upheld by Judge Gaughan, should be affirmed and the Petitioner's appeal be denied.

Respectfully submitted,

By   
Of Counsel for Ohio County Assessor

By   
Of Counsel for County Commission of  
Ohio County

Ronald M. Musser, Esq.  
WV State Bar #2697  
Dinsmore & Shohl LLP  
Bennett Square  
2100 Market Street  
Wheeling, WV 26003  
Counsel for Ohio County Assessor

Donald J. Tennant, Jr., Esq.  
WV State Bar #3718  
Tennant Law Offices  
38 fifteenth Street, Suite 100  
Wheeling, WV 26003  
Counsel for County Commission of Ohio County

**CERTIFICATE OF SERVICE**

Service of the foregoing Respondents' Joint Brief was had upon the Petitioner by mailing a true copy thereof by United States mail, postage prepaid, this 15<sup>th</sup> day of February, 2012, to counsel of record as follows:

Herschel H. Rose III, Esq.  
Rose Law Office  
300 Summers Street, Suite 1440  
P.O. Box 3502  
Charleston, WV 25335  
Counsel for Petitioner

  
Of Counsel for Respondents

Ronald M. Musser, Esq.  
WV State Bar #2697  
Dinsmore & Shohl LLP  
Bennett Square  
2100 Market Street  
Wheeling, WV 26003  
Counsel for Ohio County Assessor

Donald J. Tennant, Jr., Esq.  
Tennant Law Offices  
38 fifteenth Street, Suite 100  
Wheeling, WV 26003  
Counsel for County Commission of Ohio County