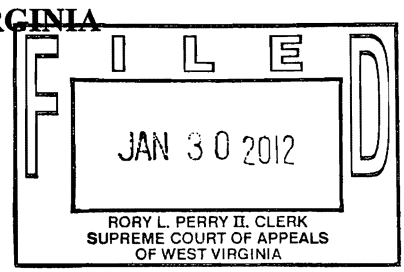
**SUPREME COURT OF APPEALS OF WEST VIRGINIA**




**No. 11-1398**

**Pope Properties/Charleston Limited Liability Company,**

**Petitioner,**

**v.**

**The Honorable Phyllis Gatson**
**in her capacity as Kanawha County Assessor,**

**Respondent.**

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# REPLY OF PETITIONER

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## I. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's Statement of the Case contains materially false and misleading assertions of facts that reflect poorly on the Assessor's candor to this Court.

First, the Assessor claims that she "properly considered the three methods[[1]] for valuing property and considered the other factors listed in *W. Va. C.S.R.* § 110-1P-2.1.1." *See* Brief of Respondent at pp. 2, 3, 5. Her claim is patently false and her refusal to consider the Income Approach is largely the reason for this appeal. Petitioner has offered ample and current data for the Income Approach, but the Assessor flat out has refused to look at the information. The uncontested evidence proves that the Assessor at the outset explicitly refused even to consider using any approach but the Market Approach. The Assessor has repeatedly stated that her refusal to consider using either the Income or Cost Approaches for the 79 Parcels[2] is based on her belief that *W. Va. Code* § 36A-7-1 of the Unit Property Act requires her to use only the Market Approach to appraise parcels of real property that are held in the condominium form of ownership. *Id.* at p. 15. That is why Petitioner has appealed to this Court.

The Assessor testified through her chief deputy, Steve Duffield, that her office has expressly adopted only the Market Approach for its appraisals of ***all*** condominium parcels in Kanawha County irrespective of their use or character, including whether they are income-producing commercial parcels and regardless of the quantity or quality of data for using the Income Approach. *See* discussion, *infra.* As to the 79 Parcels, the Assessor wrongly concluded that the Unit Property Act (*W. Va. Code* § 36A-1-1 *et seq.*) requires that only the Market Approach can be used to value each of them to the automatic exclusion of the Income and Cost

[1] The three methods of appraising real property for assessment purposes are the Cost Approach, the Income Approach and the Market Approach.

[2] This appeal concerns the incorrect 2011 assessments for 79 parcels that Petitioner owns and manages together as Country Club Village Apartments in Kanawha County.

Approaches. The Assessor took this incorrect legal position even ***before*** she began the process of appraising and assessing the 79 Parcels. Mr. Duffield affirmed the Assessor's position during his testimony before the Board of Equalization and Review.

Affirming this error, the Kanawha County Circuit Court stated in its final Order, which the Assessor prepared for the court at the judge's request:

> 6. "[*W. Va. C.S.R.* § 110-1P-2.1.1 also states that, for real property used for commercial or industrial purposes, the appraisal shall consider the following factors:
>
> a) The location of such property;
> b) Its site characteristics;
> c) The ease of alienation thereof . . .;
> d) The quality of size of the property and the impact which its sale may have upon surrounding properties;
> e) If purchased within the previous eight years, the purchase price thereof and the date of each such purpose;
> f) Recent sale of, or other transactions involving, comparable property;
> g) The value of such property to its owner;
> h) The condition of such property;
> i) The income, if any, which the property actually produces and has produced within the next preceding three (3) years;
> j) And any commonly accepted method of ascertaining the market value of any such property . . .
>
> *W. Va. C.S.R.* § 110-1P-2.1.1 (1991). However, unlike asserted by Pope Properties, *it was not mandatory for the Kanawha County Assessor to consider the above factors in this case because the condominiums are residential and not commercial or industrial, and "consider" is not synonymous with "use".*

(Emphasis supplied).

The Assessor's entire theory of her case is that the 79 Parcels are not commercial (despite that they are income-producing) because they are held in the condominium form of ownership. Thus, the Assessor's statements to the contrary in her pleadings are pure misrepresentations and, Petitioner avers, she knows them to be false.

Second, the Assessor falsely states that, despite not having to, she nonetheless considered the nine factors listed in *W. Va. C.S.R.* § 110-1P-2.1.1. *Stone Brooke Limited Partnership v. Sisinni*, 224 W. Va. 691, 688 S.E.2d 300 (2009). Nothing in the record supports this fantasy. The contrary is true. Moreover, the Circuit Court ruled that that "it was not mandatory" for the Assessor to consider them. Order at p. 6. Petitioner's expert appraiser, Mr. Holmes, is the only appraiser who considered all of the factors and stated his findings and conclusions in a written report that Pope Properties submitted into evidence below. Committing its own errors, the Circuit Court itself, despite *Stone Brooke's* directive, failed to address each of the factors in the Order from which this appeal is taken.

Third, the Assessor Respondent falsely misstates one of Petitioner's legal positions: "Pope Properties argues that the Kanawha County Assessor, in valuing those 79 condominium units, should have ignored market data from arm's length sales of other condominium units in this same complex." *Id.* Pope Properties has never argued or suggested that the Assessor should ignore any approach. To the contrary, its expert appraiser, Steve Holmes of Buckhannon, testified at the hearing before the Board of Equalization and Review that he considered all three approaches to appraising real property in West Virginia and systematically eliminated the Market and Cost Approaches. *Appendix* at 000065.

Mr. Holmes rejected the Cost Approach because the apartment buildings were too old for this approach to be relevant or meaningful. *Appendix* at 000098. Mr. Holmes testified that, although he considered the Market Approach, he could not place significant reliance on its use because there exist only three published sales of only two parcels during the prior three years, all of them of owner-occupied Class II parcels that Pope Properties neither owned nor

controlled.[3] *Appendix* at 000098. Mr. Holmes testified that not only were the Class II parcels incomparable to the 79 Parcels for the Market Approach to be employed, but, further, that the universe of three sales of two parcels was too small even if they had been comparable. *Appendix at 000105.*

At the heart of this case is that the Assessor refused to consider the Income Approach based on her nonsensical reading of the Unit Property Act. This is a crucial point that the Petitioner begs this Court to closely examine.

Mr. Holmes systematically (as opposed to automatically) eliminated both the Cost and Market Approaches. He testified that of the three approaches, by far the most accurate method for appraising the 79 Parcels is the Income Approach. *Appendix* at 000065. The Income Approach, he said, establishes the fair market value based on the present worth of future benefits to be derived through income production (such as rent from a parcel) over the remainder of its economic life. *See Standard on Mass Appraisal of Real Property* in Exhibit 5 to the Hearing Transcript in *Appendix* at 000275. Mr. Holmes testified that it was reasonable to consider the 79 apartments as solely income-producing because Pope Properties had operated them exclusively as such for almost 21 years. *Appendix* at 000098.

Ironically, it is the Assessor who has automatically ignored two approaches by her blanket rule, hitherto unknown in the statutes, regulations or the case law, to appraise all condominium parcels[4] in Kanawha County using the Market Approach regardless of the

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[3] The Assessor admitted that all three sales of these allegedly comparable sales were of Class II parcels. *See* Hearing Transcript at 114. Class III has a tax rate that is double the tax rate for Class II properties. *Id.*

[4] Mr. Duffield testified in no uncertain terms that the Assessor refuses to use income or cost data to appraise any given condominium parcel in Kanawha County. That would include the condominium parcel in which the Assessor's own counsel, Karen McElhinny, has written her client's briefs. Her law firm, Shuman, McCuskey & Slicer PLLC, occupies a condominium

incompetence of the market data or the existence or superiority of the income or cost data available.

Fourth, Respondent argues that "Mr. Holmes testified that he performed an oral appraisal of Pope Properties' condominium units, but he failed to provide the Board or the Kanawha County Assessor with a complete copy of the materials he considered in his appraisal." *See* Brief of Respondent at p. 4. The statement insinuates that Mr. Holmes did not provide a written statement of his conclusions. That is false. The Assessor fails to tell this Court that all of the relevant information and data provided to Mr. Holmes by Petitioner were included in his detailed "General Property Income Analysis" reports placed into evidence at the beginning of his testimony during the hearing. *Appendix* at 000230-245. Ironically, all of this income data are the very same information that Petitioner had vainly tried to give to the Assessor for months before the hearing. Despite the existence of the income data, the Assessor repeatedly refused to accept or consider it or the Income Approach and instead automatically adopted the Market Approach simply because the parcels are condominiums. *Appendix* at 000192. This exposes as flatly false the Assessor's claim that she carefully considered each of the three approaches. By her admissions, the Assessor never considered the income from and costs for the 79 Parcels nor the Income Approach.

Fifth, the Assessor blatantly misrepresents: "Mr. Holmes failed to comply with the Uniform Standards for Professional Appraisal Practice (USPAP) because he failed to have a signed certification for his appraisal." *See* Brief of Respondent at p. 4. The Assessor knows full well that Mr. Holmes gave "oral" reports of his appraisals for the 79 Parcels because this very point, debated at length during the hearing, was conceded; USPAP specifically sanctions

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parcel at 1411 Virginia Street East, the income from which, given the Assessor's blanket rule, is never considered because it is held in the condominium form of ownership. Ms. McElhinny's statement contradicts that of her client's.

an "oral" report of an appraisal. *See Appendix* at 000125-128. *See, also* USPAP Standard specifically recognizing the validity of an "oral" appraisal at *Appendix* at 000283. The Assessor is also fully aware that the Standard she cites requiring a "signed certification" is within the section of USPAP that is applicable to *written* appraisals. *See* USPAP Standards at *Appendix* at 000284-293. There is no requirement that an oral appraisal report have a "signed certification."

With these falsehoods, the Assessor is attempting only to demean Petitioner's evidence and expert testimony and to show that Petitioner did not meet its burden. But just the opposite is true. All of Petitioner's evidence and testimony on the Income Approach was literally uncontested. The Assessor offered no rebuttal evidence or testimony on the Income Approach because she believed she did not have to stoop so low. The Assessor has gambled her defense entirely on the ludicrous notion that West Virginia law precludes her even from considering such income data because the 79 Parcels are held in the condominium form of ownership.

Sixth, the Assessor insists that Mr. Holmes testimony was based on his opinion that "you should look at the 79 units combined when valuing them instead of looking at one single unit." *See* Brief of Respondent at p. 5. That is false. Mr. Holmes did arrive at a value for "each individual unit separately" by properly considering for and allocating the income to each of the 79 Parcels and by calculating each Parcel's proportionate costs so that he could make conclusions about their fair market values using the Income Approach. Mr. Holmes testified that he performed his calculations this way because the 79 apartments have been "operated as a whole" by Petitioner for 21 years and because "all [the] expenses that are charged against the property are equally split among all the individual units and it's operated as a single income producing property." *Appendix* at 000074-75. The Assessor offered no evidence at the hearing

that this was an improper application of the Income Approach as applied to valuing each of the 79 Parcels. *Appendix* at 000062.

Seventh, the Assessor misleads this Court when she claims that the only reason that Mr. Holmes rejected the Market Approach was his concern that if the 79 Parcels were marketed at the same time, it would flood the market and decrease their value. *See* Brief of Respondent at p. 5. That is false. In truth, Mr. Holmes repeatedly expressed his opinion that the miniscule number of alleged comparables (only three sales of two Class II parcels over a period of three years) comprised insufficient data to use the Market Approach for the 79 Parcels that have not changed hands for 21 years. *Appendix* at 000026, 000074. Mr. Holmes testified that this universe of so-called comparable information was simply too small to use the Market Approach particularly when ample current income data exist. *Appendix* at 000098.[5] Mr. Duffield did not dispute Mr. Holmes's opinion that the three sales in three years that she used were insufficient data to support the Market Approach. When asked by the Board if the three sales were sufficient data, Mr. Duffield replied, tellingly: "[I]t's all I had available at the time." *Appendix* at 000095. Not such a ringing endorsement. Of course, it was not all that was available at the time; ample current income data were always available but simply ignored.

Eighth, the Assessor falsely states: "the record demonstrates that, after considering the cost approach, the income approach, and the market data approach, the Kanawha County Assessor used the market data approach because, in reviewing the relevant information available, as well as looking at the treatment of other condominium complexes within the county, the Assessor deemed the market data approach the most appropriate methodology." *See* Brief of Respondent at p. 6. That is false. The record supports no such allegation. To the

[5] Mr. Holmes also repeatedly opined that it was improper for the Assessor to use Class II owner-occupied parcels as "comparables" for valuing Class III commercial parcels that are not owner-occupied.

contrary, Mr. Duffield freely admitted during the hearing that all condominiums in Kanawha County are automatically appraised using the Market Approach. *Appendix* at 000112, 000127, and 000154. It would have been impossible for the Assessor to have carefully considered all three approaches when she automatically pre-determined that she would use the Market Approach as she does with all condominiums in Kanawha County because she believed West Virginia law forbade her from considering or using the Income or Cost Approaches. *See* discussion, *infra.*

## II. REPLY TO RESPONDENT'S "ARGUMENT"

### A. The record is clear that the Assessor abused her discretion when she did not actually "consider" the three valuation approaches with respect to the 79 assessments at issue.

The Assessor must "choose and apply the most accurate method of appraising commercial properties." *Stone Brooke Limited Partnership v. Sisinni*, 224 W. Va. 691, 688 S.E.2d 300 (2009)(*citing American Bituminous Power Partners,* 208 W.Va. 250, 539 S.E.2d 757 (2000)). *W. Va. C.S.R.* § 110-1P-2 specifically provides:

> [i]n determining an estimate of fair market value, the tax commissioner will consider **and use where applicable**, three generally accepted approaches to value: a) cost, b) income, and c) market data.

*Id.* at § 2.2.1 (*emphasis added*).

The Assessor repeatedly claims that she carefully considered all three approaches. In her brief, the Assessor falsely claims that she "carefully considered the legislative regulations for the valuation of commercial real property including all of the methods available for appraisal of condominiums in Kanawha County, and concluded that Pope Properties' 79 condominiums are best assessed by the market data approach using comparable sales in the

area." *See* Brief of Respondent at 24-25. The only citation the Assessor offers for her claim is drawn from the final Order, which in truth is an unsupported conclusory assertion. *Id.*

There was not one shred of evidence offered at the hearing that the Assessor considered any factors other than that the Parcels are held in the condominium form of ownership. By the Assessor's own statements, her claim cannot be true; she did not carefully consider all three approaches in her assessments of the 79 Parcels but rather automatically used only the Market Approach only because they are held in the condominium form of ownership. She states hers is a blanket rule that she applies to **all** condominium parcels in Kanawha County irrespective of their use their character. *Appendix* at 000112, 000127, 000154. The Assessor's admitted practice of blindly applying a blanket rule to all condominium parcels in Kanawha County regardless of the information available is grossly improper and a dereliction of duty. It is plainly wrong and an abuse of her discretion. Applying such a blanket rule is directly contrary to *W. Va. C.S.R.* § 110-1P-2, which provides that "important considerations affecting the value of land" are the property's "location, size, shape, topography, accessibility, present use, highest and best use, easements, zoning, availability of utility, **income imputed to the land** and supply and demand for land of a particular type." *Id.* (*emphasis supplied).* Moreover, *W. Va. C.S.R.* § 110-1P-2 specifically provides that each and every one of the above factors "should be considered in the appraisal of **a specific parcel.**" *Id.* (*emphasis supplied*). In the instant case, it is undisputed that Petitioner repeatedly attempted to give information to the Assessor regarding the income attributable to the Parcels but the Assessor refused to accept or consider it. *Appendix* at 000192. Further, there was no evidence offered at the hearing that the Assessor considered *any* of the factors in *W. Va. C.S.R.* § 110-1P-2, let alone all of them.

Blind application of the Assessor's rule violates case law interpreting *W. Va. C.S.R.* § 110-1P-2, which specifically holds that the Assessor is **not** permitted to have a "preference for any one particular method but only for the most accurate form of appraisal." *Stone Brooke Limited Partnership v. Sisinni*, 224 W. Va. 691, 688 S.E.2d 300 (2009). The Assessor is clearly giving "preference" to the Market Approach when she values all condominium parcels using that approach regardless of the use of the parcels or available income data. West Virginia law requires the Assessor to consider all three approaches as to each individual assessment and does not allow her to create a blanket rule applicable to all condominium parcels. The only person who actually considered all three approaches for the 79 Parcels at issue was Mr. Holmes who properly determined that by far the most accurate approach for valuing the 79 Parcels is the Income Approach.

The Assessor repeatedly admits that in all instances she is required to use "the most accurate form of appraisal." *See* Brief of Respondent at 11, 12. However, she fails to explain how this philosophy can possibly be carried out by her when she blindly applies a blanket rule requiring use of the Market Approach with respect to all condominium parcels simply based upon their form of ownership and regardless of the quality or quantity of the income data available to her. Making wholesale decisions based upon the form of ownership is simply not permitted by West Virginia law. In fact, form of ownership is not even one of the many factors that the Assessor is required or permitted by law to consider with respect to an appraisal under *W. Va. C.S.R.* § 110-1P-2.

**B. West Virginia law does not require that condominiums be valued differently from other property simply because they are condominiums.**

The Assessor clings to *W. Va. Code* § 36A-7-1 as dispositive. It provides that condominium parcels "shall be assessed and taxed for all purposes as a separate parcel of real

estate entirely independent of the building or property of which the unit is a part." *Id.* This provision is the only authority that the Assessor cites in support of her legal theory.

*W. Va. Code* § 36A-7-1 has nothing to do with valuing or appraising condominium parcels; the provision simply and only requires separately assessing and taxing them and brings nothing more to this case. Petitioner has never disputed this narrow point, isolating it to the realm of So What?

For this point, the Assessor oddly cites two non-West Virginia cases, *3333 Moores River Drive Assoc. v. City of Lansing*, 372 N.W.2d 523 (Mich. 1985) and *Pierre Chouteau Condominiums v. State Tax Commissioner*, 662 S.W.2d 513 (Mo. 1984). Yet, these cases actually support Petitioner's position on the principal issues in direct contradiction to Respondent's.

In *City of Lansing*, the parties agreed that the "highest and best use" of the property was as individual condominium units for owner occupancy. *Id.* at 525. They also stipulated that the Market Approach was the best approach to value the Parcels. *Id.* Neither circumstance is found in the instant case. The *City of Lansing* court noted that there were 34 sales of comparable parcels over a two-year period, which the Court found was a sufficient number to allow a "reasonable determination" as to the market value of the parcels. *Id.* at 261. In the instant case, there at best are only three alleged "comparable" sales of two owner-occupied parcels among 102 parcels over a three-year period, which, according to Mr. Holmes, is an insufficient and incomparable number to allow for a "reasonable determination" of value under not only *City of Lansing* but West Virginia law.

The Assessor cites *Pierre Chouteau, supra*, solely for the proposition that its holding supports the use of the Market Approach to value condominium parcels. *See* Brief of

Respondent at p. 20. That is simply not the holding of that case. In that case, the Court recounted that the parcel owners had not questioned the appraised values of the apartments on them and were instead simply raising more general claims of discrimination. *Id.* at 514. In the instant case, Petitioner is complaining that Respondent has wrongly classified the Parcels as non-commercial when they, as income-producing properties, clearly are commercial and that she has unlawfully precluded any consideration of either the Income or Cost Approach solely because she claims that *W. Va. Code* § 36A-7-1 mandates it.

The most illuminating aspect of *Pierre Chouteau* is the concurrence of Judge Donnelly as to distinctions between form of ownership and uses of parcels for assessment purposes. He wrote that the parcel owners were not challenging the values as "calculated in the abstract" and that it was not a case about the appropriate valuation method. *Id.* In addition, he specifically challenged several findings of the administrative body there similar to the Board of Equalization and Review. Judge Donnelly wrote:

> I question the Commission's holding, on both the facts and the law. It apparently sanctions recognition of a subclass of residential property consisting of condominiums. This is contrary to law. **It would consider the form of ownership, which is questionable.**

*Id.* at 516 (*emphasis supplied*). Judge Donnelly wrote that "[i]t would follow that there is an invidious discrimination if condominium property is in fact assessed at a higher percentage of market value than virtually identical high-rise property held for rental." *Id.* at 517.

In the instant case, the Assessor essentially has wrongly created a subclass of parcels because of their form of ownership, not their use or character. There is no authority in any West Virginia statute, case, rule or regulation for the Assessor to do this. Consequently, Petitioner is the victim of "invidious discrimination" insofar as its Parcels are not assessed

fairly or equally when compared to similar apartment complexes within Kanawha County that are held in the fee form of ownership.

Respondent sloughs off the Maryland, Illinois, and Minnesota decisions that Petitioner cites in vivid support of its position with the fleeting claim that that they are "inapposite cases from other jurisdictions". *See* Brief of Respondent at p. 17. She evades analysis perhaps because she has nothing to offer in rebuttal.

That would be unsurprising given that each of those states has a common interest ownership statute similar to the Unit Property Act, including provisions that largely mirror *W. Va. Code* § 36A-7-1, mandating separate assessments of each condominium parcel. *See Minn. Stat.* § 515.22; *Ill. Rev. Stat.* 1983, ch. 30, par. 301 *et seq.;* and *Md. Ann. Code* art. 81, § 19(a)(1). Those statutes did not tempt the courts in those cases to fashion out of whole-cloth a rule that condominium parcels cannot be commercial as a matter of law. The reason is probably because it would be first, unfathomable, then, if fathomable, absurd, and understanding its absurdity, catastrophic to thousands of property owners who own condominium parcels in West Virginia.

As far as Petitioner can figure, the Kanawha County Assessor is alone in her unique legal theory within the United States.

**C. The 79 parcels are obviously both "apartments" and "commercial property."**

A prominent thread in the Assessor's string of errors in this case is her astounding refusal to accept or concede the obvious fact that the 79 Parcels are "commercial property" or that they are "apartments."

The 79 Parcels are obviously commercial properties. *Black's Law Dictionary* defines "commercial property" as: "[i]ncome producing property (*e.g.*, office buildings, apartments,

*etc.*)." *Black's Law Dictionary* (6th ed.) at p. 271. It is undisputed that the 79 Parcels have always been "income producing" properties since Petitioner purchased them 21 years ago and that Petitioner has never sold a unit there. *Appendix* at 000043-45.

West Virginia law specifically recognizes that condominium parcels can be "commercial" property. The Unit Property Act defines "building" as:

> [a]ny multi-unit building or buildings or complex thereof, whether in vertical or horizontal arrangement, as well as other improvements comprising a part of the property and used or intended to be used for residential, **commercial** or industrial purposes or for any other lawful purpose or for any combination of such uses.

*W. Va. Code* § 36A-1-2(a). (*emphasis supplied).*

In her latest brief, the Assessor finally concedes that this statute exists and that some condominiums can be "commercial." Her concession is new territory. Even getting the Assessor to acknowledge that condominium parcels *can* be commercial has taken a hearing before the Board of Equalization and Review, an appeal to the Kanawha County Circuit Court and an Appeal to this Court. A whole section of the Assessor's brief before the Circuit Court was devoted to the notion that "Condominiums Are Not Commercial Property." *Appendix* at 000347.

Yet, Respondent is nothing if not tenacious. She argues that *W. Va. Code* § 36A-1-2(a) is inapplicable because it refers to "condominiums that are used for commercial purposes, such as an office building." *See* Brief of Respondent at p. 22.

Evasion being her sole weapon, Respondent now argues that Petitioner's property is different merely because "Pope's condominiums are buildings intended to be used for residential purposes". *Id.* Thus, Respondent now is arguing that if a building is "residential", it cannot also be "commercial." There is no legal authority that property cannot be both

"residential" and "commercial." To the contrary, the Code of State Rules defines "commercial property" as "income producing real property used primarily but not exclusively for the sale of goods or services, including, but not limited to offices, warehouses, retail stores, **apartment buildings**, restaurants and motels." *W. Va. C.S.R.* § 110-1P-2.3.3 (*emphasis supplied*). Apartment buildings can be both "residential" and "commercial" to the extent that the apartments are leased to the people who reside there. Petitioner's condominium apartments are no different in that they have always been income-producing, and Petitioner has always leased them to other people as places to reside. Respondent makes an unfounded, unreal and unlawful distinction for assessment purposes based solely on form of ownership.

Not only is it clear that the 79 Parcels are commercial properties, it is also clear that they are "apartments". They also happen to be "residential". Both the Assessor and the Board of Equalization and Review took the position at the hearing that condominium parcels simply cannot be "apartments" and that the two are "completely different legal creatures." *Appendix* at 000154.

In a desperate ploy, the Assessor now goes so far as to make the incredible statement that "there is a *legal* distinction between condominiums and apartment buildings." *See* Brief of Respondent at p. 14. Her sole basis for making this claim is *W. Va. Code* § 36B-1-103, which defines "condominium" as:

> [a] common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions.

*Id.*

The Assessor argues that this definition, combined with the fact that a condominium declaration can be "revoked" under *W. Va. Code* § 36A-6-1 somehow demonstrates that "there is a legal distinction between the terms 'condominium' and 'apartment building'." *See* Brief of

Respondent at p. 14. This is pure fantasy, detached from any polestar of statutory construction. The statute upon which the Assessor relies for this ridiculous proposition does not even contain the word "apartment." Why would it? One term (condominium) refers to a form of ownership while the other (apartment) is the physical layout of a building divided into parts sharing certain functions.

Contrary to Respondent's *non sequitur* argument, in *Gant v. Gant,* 329 S.E.2d 106 (W. Va. 1985), this Court specifically acknowledged in *obiter dicta* that a "condominium parcel" can be an "apartment" when it held that one spouse in a divorce proceeding "has been the owner of a valuable **condominium apartment** in Reno." *Id.* at 110 (*emphasis supplied*).

The term "apartment" is also integral to the following definition of "condominium" in *Black's Law Dictionary*:

> [c]ondominium ownership is a merger of two estates in land into 1) the fee simple ownership of **an apartment** or unit in the condominium project, and tenancy in common with other co-owners in the common elements.

*See Black's Law Dictionary* (6th ed.) at p. 295 (*emphasis supplied).* Not surprisingly, even though this definition from *Black's* was a major point that Petitioner raised in its brief, Respondent simply ignored it.

Building on her flawed argument that residential condominiums cannot be "commercial," the Assessor also relies for the first time upon a regulation applicable to, of all things, the business franchise tax. *W. Va. C.S.R.* § 110-23-3.4.5.1.c.1. This too is new ground and, thankfully, only bolsters Petitioner's case. That regulation defines the term "residential property" as including "apartments, condominiums, single family dwellings, multiple family dwellings, apartment complexes, nursing homes, and housing developments." *See* Brief of Respondent at p. 23. This regulation establishes that condominiums and apartments can be

"residential"; it is silent whether they can be "commercial" too. But obviously they can be both, unless the Assessors wishes to concede that apartment complexes and nursing homes somehow cannot be commercial. Respondent wants to eat her cake and have it too.

**D. Class is important and not just simply "levy classification."**

The Assessor argues that Class II versus Class III is a "red herring" because they are merely levy classes but classes are important to this case for several reasons.

First, the Assessor argues that the 79 Parcels are not "apartments" because to concede that they are "apartments" would be to concede that they are "commercial" given that the legal definitions of "commercial property" include "apartment buildings". *W. Va. C.S.R.* § 110-1P-2.3.3. Thus, the Assessor argues that because the Parcels are not "apartments" and because the parcels are not "commercial," the Parcels must be "residential". During the hearing, Mr. Duffield cited to a section of the Mass Appraisal Procedures of the International Association of Assessing Officers (IAAO), which provides that "the sales comparison approach [that is, the Market Approach] is the best approach for single family residential properties." Hearing Transcript at p.123. Based on this section, Mr. Duffield took the position that, with respect to all Class II properties, most often single-family residential properties, he then must use the Market Approach.

Where the Assessor falls off of the beam is in her abject failure to recognize that the condominium parcels at issue are not Class II "single family residential properties." Rather, they are Class III income-producing commercial apartments. With respect to income-producing commercial property, the same IAAO standards that Mr. Duffield relies on provide that "[t]he income approach is the most appropriate method to apply when valuing commercial property if sufficient income data are available." *Id.* at Exhibit 5 at p. 10.

Second, class is important because, according to Mr. Holmes, a person who owns and occupies her property will almost always pay more for it than a person who is holding it for income-producing commercial purposes Whether a parcel is Class II or Class III is an excellent indicator of its use and character. This is why Mr. Holmes testified that it was improper to use Class II properties as comparables for valuing Class III properties in the instant case. *Appendix* at 000105.

At the hearing before the Board, Mr. Holmes testified that, although he considered the Market Approach, he could not place significant reliance on its use because there were only three published sales of two units[7] during the prior three years and all three of those sales were owner-occupied Class II parcels.[8] *Appendix* at 000098. Mr. Holmes testified that it is simply wrong to use the sales of Class II parcels as comparable sales in appraising Class III commercial parcels because Class II parcels by definition are owner-occupied properties. *Appendix* at 000105. *See, also, W.Va. Code* § 11-8-5. Mr. Holmes testified that not only were the properties in the wrong class, but, further, that the universe of comparable sales was too small even if they had been in the right class. *Id.* Mr. Holmes was correct.

The Assessor is required to use the "most accurate form of appraisal" in fixing the fair market value of a particular parcel. *Stone Brooke Limited Partnership v. Sisinni,* 224 W.Va. 691, 688 S.E.2d 300 (2009). In the instant case, using three sales of two class II owner-occupied parcels as "comparables" was simply not the most accurate form of appraisal. The data used were, in fact, incomparable and, thus, incompetent to be employed as comparables for

[7] One Class II parcel was sold twice.

[8] The Assessor admitted that all three sales of these allegedly comparable sales were of Class II parcels. *See* Hearing Transcript at 114. Class III has a tax rate that is double the tax rate for Class II properties. *Id.*

the appraisals of the Parcels as a matter of law. As Mr. Holmes further testified, the data were also insufficient in quantity to be meaningful, an opinion that the Assessor never opposed.

The Assessor falls far short of her burden when she simply disregards competent income evidence that should be used to appraise income-producing properties in favor of incompetent evidence and blind application of a rule that all condominiums must be appraised using the market approach regardless of the value of the "comparable" information that may be available.

## CONCLUSION

The Assessor was required by law to consider all three statutory approaches to appraising property under West Virginia law and to consider all of the factors set forth in *W. Va. C.S.R.* § 110-1P-2.1.1. Instead, she blindly applied a blanket rule applicable to all condominiums in Kanawha County and she did not consider the actual use of the property or anything other than the sales of three incomparable "comparables" and the form of ownership in valuing Petitioner's properties. As a result, the Assessor is unlawfully discriminating against Petitioner and all condominium parcel owners based upon form of ownership alone. This is unlawful and must be corrected by this honorable Court.

POPE PROPERTIES/CHARLESTON
LIMITED LIABILITY COMPANY
By its counsel

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**SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 11-1398**

**Pope Properties/Charleston Limited Liability Company,**

**Petitioner,**

**v.**

**The Honorable Phyllis Gatson**
**in her capacity as Kanawha County Assessor,**

**Respondent.**

**CERTIFICATE OF SERVICE**

We, Mark A. Sadd and James C. Stebbins, counsel for Petitioner, Pope Properties/Charleston Limited Liability Company, do hereby certify that on this 27th day of January, 2012, we served a copy of the foregoing **REPLY OF PETITIONER** upon:

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by depositing the same to them in the U. S. Mail, postage prepaid and sealed in an envelope.

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