

IN THE 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.

BRIEF OF RESPONDENT

Lower Court: Kanawha County Circuit Court
(Civil Action No. 11-AA-42)

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I. RESPONSES TO ASSIGNMENTS OF ERROR

- A. The Circuit Court of Kanawha County correctly affirmed the Board of Review and Equalization's assessment of Petitioner Pope Properties' 79 condominiums and appropriately characterized the 79 condominiums as non-commercial properties; furthermore, the issue of whether the condominiums are commercial or residential is irrelevant, all condominiums must be assessed and valued separately.*
- B. The Circuit Court of Kanawha County correctly upheld the Board of Review and Equalization's and the Kanawha County Assessor's decision, after considering other methods of valuation, to use the market data approach to value Pope Properties' 79 condominiums. Petitioner Pope Properties failed to show that the Kanawha County Assessor and the Board of Review and Equalization abused their discretion.*
- C. The Circuit Court of Kanawha County correctly found that the Kanawha County Assessor's decision to utilize sales prices of nearly identical units in the same building in unforced, arm's length transactions between willing buyers and sellers was an appropriate exercise of the Assessor's discretion. The Kanawha County Circuit Court correctly found that the three sales of similar units were comparable and the classification of the properties for levy purposes as Class II irrelevant because it does not affect the value of the property.*

II. STATEMENT OF THE CASE

Petitioner Pope Properties/Charleston Limited Liability Company ("Pope Properties") owns 79 condominium units that are located in Kanawha County. (Transcript at Appendix 000030.) In this appeal, Pope Properties challenges the Kanawha County Assessor's decision to value those 79 condominium units at \$63,700 for one-bedroom units and \$70,000 for two-bedroom units based upon arm's length sales of similar units in the same complex for \$64,000, \$70,000, and \$78,000. (Transcript at Appendix 000073-000076.) Instead, Pope Properties argues the Kanawha County Assessor should have used the income approach and

valued the condominiums at about \$20,000 less than the sales data would suggest they are worth. (Transcript at Appendix 000074.)

On February 22, 2011, which was the last day that the Kanawha County Commission was sitting as the Board of Review and Equalization, Pope Properties filed a written request for a hearing with the Board of Review and Equalization for the 2010-2011 tax year. (Transcript at Appendix 000009-000022.) The Board of Review and Equalization (“the Board”) heard oral argument from Pope Properties for many hours on February 22, 2011, beginning at 9:50 a.m. and concluding at 1:30 p.m. (Transcript at Appendix 000023-000220.) After considering the evidence and arguments submitted by Pope Properties through its Manager, Joseph M. Pope, its counsel, Jamie Stebbins, and its appraisal expert, Steve Holmes, the Board determined that the Kanawha County Assessor, after consideration of all three approaches, determined that the most accurate method of valuing Petitioner’s property is the market data approach. (Order of Board at ¶ 4, Appendix at 000296.) The Board also noted in its Order that Pope Properties “did not prove by clear and convincing evidence that the Assessor’s valuation of the Petitioner’s condominium units were incorrect” and that Pope Properties “did not prove by clear and convincing evidence that the Assessor abused her discretion in using the market comparison approach.” (Order of Board, at ¶¶ 7-8, Appendix 000296.)

Pope Properties appealed the Board’s decision to the Circuit Court of Kanawha County, and the Honorable Louis Bloom, after considering extensive memoranda filed by all

parties, permitted Pope Properties to present oral argument on its position. After a hearing that lasted quite a bit more than “a few moments” and which involved extensive questioning by the Court, the Circuit Court ruled that Pope Properties’ Petition for Appeal should be denied, and entered a detailed Final Order including Findings of Fact and Conclusions of Law. (Final Order, at Appendix 000001-000011.) In the Final Order, the Circuit Court found that the Kanawha County Assessor considered the three methods for valuing property and considered the other factors listed in West Virginia C.S.R. §110-1P-2.1.1. (Final Order at ¶¶ 5-6, Appendix 000005-000006.)

The Kanawha County Assessor and the Board of Review and Equalization properly considered all three approaches to valuing Pope Properties’ condominium units and ultimately determined that the market value approach is appropriate under the applicable West Virginia statutes, regulations, and the facts of this case. The 79 condominium units in question are part of a multi-unit building organized as condominiums under West Virginia Code §36A-6-7, *et seq.* (Transcript, Appendix 000042; Final Order at Appendix 000001, at ¶ 2.) Pope Properties owns 79 out of the 102 condominiums in the complex. (Transcript at Appendix 000042-000043.) In the instant Appeal, 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 that are nearly identical to Pope Properties’ units. Instead, Pope Properties contends that its 79 condominium units should be valued not using market data, but instead based upon

summaries of its income and expenses prepared by an outside appraiser that it paid to testify on its behalf, Steven Holmes. (Transcript, generally, at Appendix 000023-000221.)

At the hearing before the Board of Review and Equalization, 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. (Transcript at Appendix 000056-000116.) Instead, Mr. Holmes presented a computer printout showing present value calculations using only one year's worth of income and expenses, and he could not produce the raw data or documents from which he gleaned this information. (Transcript at Appendix 000056-000116.) 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, and he did not give the appraisal with sufficient information to enable users to understand the report properly. (Transcript at Appendix 000056-000116; 000186-000187; 000283-000295.)

Mr. Holmes admitted that there were three sales¹ within the 2008-2010 time period involving one and two-bedroom units in the Country Club complex that were similar to those owned by Pope Properties, but he rejected those because they were occupied by their owners and not rented out immediately prior to their sales. (Transcript at Appendix 000074-000075.) Mr. Holmes admitted that these three sales of similar units would provide a fair market value to value a single condominium. *Id.* The only reason presented by Mr. Holmes as to why to

¹Mr. Holmes testified that three comparable units sold in 2008-2010 for \$64,000, \$78,000 and \$70,000. (Transcript Appendix 000073-000074.)

he “suspected” that the value of the owner-occupied condominium units in the Country Club Village complex would be different than the identical units that had been rental property is that “if you put all 79 units on the market at the same time, I suspect that the value of the units individually would change.” (Transcript at Appendix 000067.) However, neither Pope Properties nor Mr. Holmes presented any testimony suggesting that there is any statute or regulation in West Virginia that would have forced Pope Properties to sell all 79 units as a collective unit instead of separately. (Transcript, generally, Appendix 000023-000221.) Furthermore, Mr. Holmes could not cite any literature, appraiser’s guide, statute, regulation, or other example that would support his opinion that you should look at the 79 units combined when valuing them instead of looking at one single unit. *Id.*

Stephen Duffield, the Chief Deputy for the Kanawha County Assessor’s Office, testified at the February 22 hearing that the Assessor’s Office, after considering other methods, used the market data or direct sales comparison approach “because in reviewing the information available as well as looking at our treatment of other condominium complexes within the county, that’s the methodology we deemed most appropriate.” (Transcript at Appendix 000134.) Mr. Duffield testified that in using the market value approach, the Assessor’s office considered three comparable sales that were similar if not identical to Pope Properties’ units in size and age. (Transcript at Appendix 000161.) Thus, 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 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. (Transcript at Appendix 000134, 000141, 000145; Order of Board at ¶ 4 at Appendix 000296.)

While the sales of comparable units that were used in the market data approach all happen to have been occupied by their owners immediately prior to their sale, it was explained at the hearing before the Board of Review and Equalization that the only difference between Class II and Class III properties is whether they are owner occupied or not owner occupied and this only affects the tax rate and does not affect the assessed value of the properties. (Transcript at Appendix 000135-000136.)

After considering the testimony presented by both parties in the hearing on February 22, and evaluating specifically which of the three assessment methodologies listed in West Virginia C.S.R. §110-1P-2.2.1 is appropriate, the Board of Review and Equalization determined that the Kanawha County Assessor did not abuse her discretion in selecting the market valuation approach to value Pope Properties' 79 condominium units. (Order of Board at ¶ 7 Appendix 000296.) The Circuit Court later approved that assessment making findings of fact and conclusions of law addressing the Assessor's consideration of the appraisal factors in the state regulations. (Final Order at ¶¶ 5-6, Appendix 000005-000006.) Pope Properties now appeals that Final Order.

III. SUMMARY OF ARGUMENT

The Kanawha County Assessor properly exercised her discretion in selecting the market data approach, and in using the data from three arm's lengths sales of nearly identical condominium units in the same condominium complex, to value Pope Properties' 79 condominium units. Pope Properties failed to meet its burden of proving by clear and convincing evidence that the assessment was erroneous; the oral appraisal presented to the Board by its appraiser, Steve Holmes, failed to comply with USPAP guidelines, and failed to comply with the Tax Commissioner's regulations concerning the factors to consider in valuing real property. Mr. Holmes and his client, Pope Properties, would mandate that the Assessor use the income approach to value Pope Properties' 79 condominiums that are all used as residential dwellings, but they failed to provide adequate data even to show that their appraisal was a correct application of the income approach. That is, Pope Properties and their appraiser failed to produce the raw data that would support their appraiser's calculations. Furthermore, the income approach is not the only method of valuing commercial or residential real property.

It was proper in this case for the Assessor to use the presumptively-correct means of determining market value of the Pope Properties' condominiums - the use of the prices recently paid for similar property in the same complex. This is consistent with the direction provided by the Tax Commissioner in the Regulations, and it is an appropriate way to determine the most accurate value for the properties at issue in this appeal. The issue of

whether or not the condominiums constitute commercial or residential real property is but a diversion - both types of property can be valued using any of the three methods of valuation - the market data approach, the income approach, or the cost approach. Here, because the Assessor had the three arms' length sales of very similar units in the same complex to use, the market data approach was the most accurate method to use in this situation.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary in this case because Pope Properties' appeal is frivolous, because the issue presented in this appeal - whether statutes and regulations mandate the use of the income approach to value real property - has previously been addressed by this Court, and because the facts and legal arguments are fully addressed in the briefs of the parties and the record.

V. ARGUMENT

- A. Under the Standard of Review as established by this Court, a taxpayer such as Pope Properties must prove by clear and convincing evidence that the tax assessment is erroneous; an assessment made by the Board of Review and Equalization and approved by Circuit Court will not be reversed when supported by substantial evidence unless plainly wrong.**

“The burden of proof is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous.” *Western Pocahontas Properties v. County Comm'n*, 431 S.E.2d 661, 669 (W.Va. 1993) (internal citations omitted).

“A taxpayer seeking relief from an erroneous tax assessment ...must establish entitlement to

relief by clear and convincing evidence.” Syl. Pt. 3, *SER Prosecuting Attorney of Kanawha County v. Bayer Corp.*, 223 W.Va. 146, 148, 672 S.E.2d 282, 284 (2008).

In addition, “a reviewing court will not interfere with the conclusions reached by an assessing body, unless the assessment made is clearly illegal or grossly and palpably wrong on the facts.” *Id.* Also, “[i]t is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct.” *Bankers Pocahontas Coal Co. v. County Court*, 62 S.E.2d 801, 804 (W.Va. 1950) (internal citations omitted). This Court has held that “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.” Syl. pt.1, *Stone Brooke Limited Partnership v. Sisinni*, 224 W.Va. 691, 692, 688 S.E.2d 300, 301 (2009). Furthermore,

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

Syl. pt. 2, *Stone Brooke Limited Partnership*, 224 W.Va. at 692, 688 S.E.2d at 301. In the case at bar, the Kanawha County Assessor’s and Board’s assessment of Pope Properties 79 condominiums, approved by the Circuit Court, is supported by substantial evidence and, as such, should be upheld.

B. The Circuit Court correctly affirmed the Kanawha County Assessor's and the Board's valuation of the 79 condominiums because the market data approach is an appropriate method to value the condominiums regardless of whether they are commercial or non-commercial, West Virginia's legislative scheme recognizes condominiums as distinct entities that must be valued separately, and because the 79 condominiums are not commercial property.

The assessment of the 79 condominiums by the Kanawha County Assessor and the Board, as approved by the Circuit Court, is supported by substantial evidence, and Petitioner Pope Properties has not met its burden of demonstrating by clear and convincing evidence that the assessment is erroneous. In its brief to this Court, Pope Properties tries to divert this Court's attention away from the substantial evidence that supports the assessment, i.e., the three arm's lengths sales, and the paucity of documentation presented by Pope Properties' hired gun appraiser to support his alternative assessment; instead, Pope Properties presents lengthy discussion on the topic of whether or not its condominiums are commercial property. The issue of whether or not Pope Properties' condominiums are commercial or residential is not dispositive of the issue of whether the assessment is erroneous. Even if the 79 condominiums are commercial property, which they are not, the market data approach is still an appropriate method by which to value them. Evidence in this case demonstrates that the Kanawha County Assessor's valuation was done in accordance with West Virginia law. West Virginia's statutory scheme requires that the Assessor value condominium units, such as the 79 condominiums at issue here, separately, and condominiums are a distinct legal entity from apartments. Furthermore, while it is not dispositive of the issues before this

Court, the condominiums are not commercial property, and the Circuit Court correctly characterized them as such.

1. The Issue of Whether Pope Properties' Condominiums are Commercial is Inapposite; Commercial Property May be Valued Using Any of the Three Methods, Including the Market Data Approach.

Regardless of whether or not Pope Properties' 79 condominiums are commercial, the Assessor can, in her discretion, use any of the three methods of valuation - market data, cost, or income - that she deems most accurate. Commercial property is not, as Pope Properties asserts, "entitled to be appraised using the Income Approach." (Brief of Appellant at p. 13) Instead, this Court has consistently rejected taxpayers' attempts to mandate that their commercial property be valued using the income approach and has instead held that, "Title 110, series 1P of the West Virginia Code of State Rules confers upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties...." Syl. Pt. 5, *In Re: Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757(2000); Syl. Pt. 4, *Stone Brooke Ltd Partnership*, 224 W.Va. at 692, 688 S.E.2d at 301.

In *Stone Brooke*, this Court addressed the issue of whether Low Income Housing Tax Credit (LIHTC) apartment complexes² should be valued using the income approach. 224 W.Va. at 697, 688 S.E.2d at 306. The taxpayers in *Stone Brooke* argued that law from

²The parties in *Stone Brooke* agreed that the LIHTC apartment complexes were "commercial property." 224 W.Va. at 697, 688 S.E.2d at 306. Yet, this Court still found that any of the three approaches to valuation - including the market data approach - could be used.

other jurisdictions and a vetoed Bill from the West Virginia Legislature mandated the use of the income approach for such properties. *Id.* However, this Court rejected the taxpayers' arguments, finding instead that, "the Tax Commissioner has permitted an assessor to select any one of these three methods by which to value commercial real property for ad valorem taxation purposes, with a preference not for any one particular method but only for 'the most accurate form of appraisal.'" 224 W.Va. at 699, 688 S.E.2d at 308 (quoting W.Va. C.S.R. §110-1P-2.2.2). This Court noted, "[a]lthough the Taxpayers have urged this Court to adopt the income approach as the only method by which LIHTC properties may be appraised, we are rather reluctant to do so in light of the Tax Commissioner's discretion to choose and apply the most accurate method of appraising commercial properties." 224 W.Va. at 701, 688 S.E.2d at 310 (internal quotations omitted)(citing Syl. Pt. 5, *American Bituminous Power Partners, L.P.*, 208 W.Va. at 250, 539 S.E.2d at 757.). This Court listed three reasons why it would not mandate the use of the income approach for LIHTC properties: (1) because the Taxpayers failed to demonstrate that the Tax Commissioner abused his discretion of adopting a regulation that permits assessors to consider the circumstances of each case and to select the most accurate form of appraisal, (2) because it would be "irresponsible and unrealistic" for this Court to require that one "solitary appraisal method" be used to appraise every parcel of LIHTC property, and (3) because this Court did not want to usurp the discretion afforded to the Tax Commissioner where there has not been a clear and definitive statement of Legislative intent. 224 W.Va. at 701, 688 S.E.2d at 310. This Court noted, "it may be

inferred...that the Legislature, by failing to reintroduce its vetoed legislation, approves of the present method of assessing LIHTC, as well as all commercial, properties by deferring to the assessing officer to select the most accurate appraisal method.” *Id.* (Emphasis added).

Similarly, in the case at bar it would be unrealistic and contrary to Legislative intent for this Court to mandate that assessing officers use the income approach in valuing all commercial property. Indeed, to do so would ignore the plain language of the Tax Commissioner’s regulations that define the appraised value of commercial property as, “the price at or for which the property would sell if it was sold to a willing buyer by a willing seller in an arms-length transaction without either the buyer or the seller begin under any compulsion to buy or sell.” *American Bituminous Power Partners, L.P.*, 208 W.Va. at 255, 539 S.E.2d at 762 (quoting 110 W.Va. C.S.R. §1P-2.1.1)³. In a situation such as that presented by Pope Properties’ 79 condominiums, where there are three arms-length sales of nearly identical condominiums in the same complex shortly before the property is to be valued, it would verge on the ridiculous to force the assessor to ignore these arms-length transactions and instead rely upon incomplete income and expense data supplied in summary form by Pope Properties. Neither the regulations, nor the statutes, nor this Court’s previous

³Additionally, West Virginia law requires that “All property shall be assessed annually . . . that is to say, at the price for which the property would sell if voluntarily offered for sale by the owner thereof, upon the terms as the property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if the property were sold at a forced sale.” W.Va. Code §11-3-1.

case law mandates that commercial property be valued using the income approach. As such, it is irrelevant as to whether or not Pope Properties' condominiums are commercial.

2. *West Virginia's Statutory Scheme Shows a Legislative Intent to Value Condominium Units Separately and Makes a Legal Distinction Between Apartments and Condominiums.*

West Virginia statutes make a legal distinction between condominiums and apartment buildings and mandate that condominiums be valued separately. The term "condominium" is defined by the Legislature in West Virginia 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. A common interest community is not a condominium unless the undivided interest in the common elements are vested in the unit owners.

W.Va. Code § 36B-1-103(8). Likewise, the statutory scheme provides a mechanism to revert back to a multi-unit form of ownership should that become desirable.⁴ As such, there is a legal distinction between the terms "condominium" and "apartment building." Pope Properties mistakenly relies upon a brief mention by this Court in *Grant v. Grant*, 174 W.Va. 740, 329 S.E.2d 106 (1985)(overruled in part by *Ware v. Ware*, 224 W.Va. 599, 687 S.E.2d 382 (2009)), of the term "condominium apartment" in reference to an asset held by Mr. Grant in Reno, Nevada as an indication that this Court believes that condominiums are apartments.

⁴ "Property may be removed from the provisions of this chapter by a revocation expressing the intention to so remove property previously made subject to the provisions of this chapter. No such revocation shall be effective unless the same is executed by all of the unit owners and by the holders of all mortgages, judgments or other liens affecting the units and is duly recorded." W.Va. Code §36A-6-1

329 S.E.2d at 110. Not only is this statement dicta, it also is inapplicable to the case at bar because it pertains to property held outside the State of West Virginia, it does not indicate that this Court believes that residential condominiums are synonymous with apartments, and it is taken from a domestic relations case. Despite Pope Properties' counsel's obvious diligent research, he could not identify any case in which this Court has indicated that condominiums are the same as apartments.

West Virginia law requires that each condominium unit must be assessed as a separate unit and not as proportion of a whole building:

Each unit and its proportionate undivided interest in the common elements as determined by the declaration and any amendments thereof **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.** Neither the building, the property nor any of the common elements shall be assessed or taxed separately after the declaration and declaration plan are recorded, nor shall the same be subject to assessment or taxation, except as the units and their proportionate and undivided interests in the common elements are assessed and taxed pursuant to the provisions of this section.

W.Va. Code §36A-7-1(Emphasis added). This requirement that each condominium unit be assessed separately evidences a legislative intent that they also be valued separately. *See, 3333 Moores River Drive Association v City of Lansing, 372 N.W.2d 523 (Mich. App. 1985)*(finding that statute that required separate assessment of each condominium unit also means that each unit must be valued separately because “the assessment process is so intertwined with the valuation process that the legislative intent is clear.”)

In the case at bar, the statutory requirement that the 79 condominium units must be valued separately makes the use of the income approach, as applied by Pope Properties' hired appraiser, Steve Holmes, inappropriate. Mr. Holmes' "oral appraisal" at the hearing before the Board demonstrates that he relied heavily on a presumption that all 79 of the Pope condominiums would be sold simultaneously, flooding the market and reducing the value of the condominiums. The only reason presented by Mr. Holmes as to why to he "suspected" that the value of the Pope condominium units in the Country Club Village complex would be different than the three nearly identical units in the same complex that sold in recent years is that "if you put all 79 units on the market at the same time, I suspect that the value of the units individually would change." (Transcript at Appendix 000067.) Mr. Holmes later testified, "If I'm looking at it from an investor's standpoint, I'm not buying one unit, because they're not for sale. I'm buying the complex that I have, which is seventy-nine units...." (Transcript at Appendix 000077) He also stated, "Looking at it, you're not looking at one single unit. You're looking at seventy-nine combined units. Seventy-nine combined units is the way it's operated." (Transcript at Appendix 000089) Mr. Holmes' testimony, when viewed in conjunction with the statute above, highlights the defect with his opinion concerning the valuation; Mr. Holmes' assessment looks at the income and expenses for the entire complex as a unit and does not value each individual condominium unit separately, as required by West Virginia Code §36A-7-1. Furthermore, one of the beneficial aspects of owning a group of condominiums over owning an apartment building is that you can sell off

units piecemeal if necessary to raise cash. As such, it was appropriate for the Kanawha County Assessor and the Board to reject Mr. Holmes' opinion and to instead rely upon the market data with the three arms' length sales of similar units to value the 79 condominiums.

Appellant fails to state a single West Virginia case with precedent that supports its novel position that its condominium units should be assessed as apartments. Instead, it mistakenly relies upon inapposite cases from other jurisdictions. Not only are these cases easily distinguishable from the matter at hand, but other, more germane cases support the Assessor's position.

In the Maryland case Pope cites, *Supervisor of Assessments v. Chase Associates*, 510 A.2d 568 (Md. 1986), the property at issue changed to a condominium form of ownership in between assessment cycles. The court in that instance was asked to determine the applicability of a Maryland statute which provided for a reassessment if there was a "change in use." *Id.* at 569. While conceding that a change to a condominium structure could increase the value of the property for assessment purposes, to conclude that the legislature intended the term "change in use" to include any event that might change the value of the property would stretch the word "use" well beyond the meaning it can bear, and would disregard the legislature's deliberate choice of a specific rather than a general drafting style." *Id.* at 572.

This case is irrelevant because the use that an owner puts to the property is only a minor issue for *possible consideration* in assessment in West Virginia and the issue in Maryland was the imposition of a mid-cycle assessment which hinged upon a change in use

of that property. As such, this decision has no bearing on this matter except for the persuasive opinion that a condominium form of ownership increases the value of a property above the value of a simple apartment building.

Next, in *Fairway Development Co. v. Bannock County*, 750 P.2d 954 (Idaho 1988), Appellant again attempts to make an out of state statute to apply to a West Virginia County Assessor. In *Fairway*, the Idaho Supreme Court interpreted a statute which required an assessor to give “major consideration” to the “actual and functional use” of the land. *Id.* at 956. In stark contrast, the very regulation that Pope Properties cites in this case, West Virginia C.S.R. §§110-1P-2.1.1-2.1.4, lists among the factors that should be considered in valuing a parcel “the highest and best use” of the property, a factor that is noticeably absent from the Idaho statute at issue in *Fairway*. Under the West Virginia Statutes and Regulations, many factors can be considered, including a property’s highest and best use, and West Virginia’s statute does not contain a requirement that the assessor give “major consideration” to the actual and functional use of the property as is the case in Idaho. As such, an Idaho court’s ruling on the applicability of an Idaho statute is entirely irrelevant to this matter.

Finally, Appellant cites *In re Application of County Collector*, 483 N.E.2d 414 (Ill. App. 1985), a case which is inapposite because it deals with the appropriate levy value under a Cook County, Illinois ordinance, not the appropriate valuation method. The taxpayer in that case was attempting to argue that his condominium that he was renting should still be

taxed at an owner-occupied residential rate. *Id.* In the case at bar, there is no dispute in this case that Appellant’s properties are to be taxed as Class III, non-owner occupied. Thus, not only is *in re Application of County Collector* distinguishable because it deals with a different set of facts and different statutes, it also fails to even be germane to the subject issue in our case.

Other cases from some neighboring jurisdictions with much more similar statutes to that in effect in our case provide better persuasive authority for how the Court should act in this case. In *3333 Moores River Drive Association v. City of Lansing*, 372 N.W.2d 523 (Ct. of App. Michigan 1985), a taxpayer appealed orders of the Michigan Tax Tribunal for certain *ad valorem* property tax assessments on condominiums it owned, some of which were rented. 372 N.W.2d at 524. Much like the property owner in our case, the property owner in the Michigan case argued “that the unsold units should be valued as a group rather than individually.” *Id.* at 525. The owner argued that the condominium act, NCL559.101, *et seq.*: MSA 26.50, *et seq.*, (a statute very similar to the one at issue in our lawsuit), “requires individual assessments, but argues that this does not necessarily require individual valuation.” *Id.* The Michigan Court rejected the property owner’s interpretation of the statute⁵ as not requiring individual evaluation stating:

⁵“For property tax and special assessment purposes, each condominium unit shall be treated as a separate single unit of real property and shall not be combined with any other unit or units and no assessment of any fraction of any unit or combination of any unit with other units or fractions of any unit shall be made, nor shall any division or split of the assessment or taxes of any single condominium unit be made notwithstanding separate or common ownership of the unit.” 372 N.W.2d at 525

This section indicates that each unit must be treated separately for property tax purposes. **While the statute does not expressly state that the units must be valued separately, the assessment process is so intertwined with the valuation process that the legislative intent is clear.**

Id. (Emphasis added.)” Thus, the Michigan Court went on to state, “We find the tribunal properly accepted the City’s final valuation based on a reasonable estimate of the value of each unit.” 372 N.W.2d at 525-526; *See also, Pierre Chouteau Condominiums v. State Tax Commission*, 662 S.W.2d 513 (Supp.Ct. MO 1984)(upholding the use of the market valuation approach to value condominiums).

In the case at bar, West Virginia Code §36A-7-1⁶ contains very similar language to the Michigan statute. Like in the Michigan legislative statute, the West Virginia Legislature has specified that, for property that has been designated a condominium by its owners, each unit must be assessed separately. And, just like in the Michigan statute, while the West Virginia statute does not expressly stated that the units must be valued separately, the assessment process is so intertwined with the valuation process, that it is clear that the West Virginia legislature intended each condominium unit to be valued separately. As such, it was not an abuse of the Assessor’s discretion utilize the market data approach to assess each

⁶It states, “Each unit and its proportionate undivided interest in the common elements as determined by the declaration and any amendments thereof 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. Neither the building, the property nor any of the common elements shall be assessed or taxed separately after the declaration and declaration plan are recorded, nor shall the same be subject to assessment or taxation, except as the units and their proportionate undivided interests in the common elements are assessed and taxed pursuant to the provisions of this section.”

condominium unit separately and to not use the income and expense data of the total complex.

The pertinent portions of the Unit Property Act, specifically West Virginia Code §36A-7-1, create a distinction between the assessment and valuation of condominiums when compared to other types of real property including rental apartments. It is the law that creates the distinction between the condominium and other types of real properties, not some arbitrary distinction by the Kanawha County Assessor. Just as in the Michigan and Missouri cases, the legislative intent is clear; the West Virginia Legislature in the Unit Properties Act intended each condominium unit to be assessed and valued separately. As such, the Assessor was correct to utilize the market data approach to value each condominium unit separately and not the income approach considering the income and expenses of the entire complex as a whole. At the very least, this is a reasonable interpretation of the statute and an appropriate use of the Assessor's discretion.

3. *The 79 Condominiums Are Not Commercial Property.*

Pope Properties resorts to mental gymnastics in order to argue that their condominium units are kind of like apartment buildings which are listed in West Virginia C.S.R. §110-1P-2.3.3 as an example of a commercial property and then argue (although it is stated nowhere in any case, statute or regulation) that because some apartment buildings may be commercial properties, and their condominium unit is sort of like an apartment building, then the Assessor should have used the income approach. However, the only relevant statute in this

case that directly deals with the assessment of condominium units is the one cited by the Assessor in this case, W.Va. Code § 36A-7-1, and that mandates that each condominium unit be assessed and valued separately. Because West Virginia Code §36A-7-1 is more specific to the matter at hand, i.e., the assessment of condominiums, it should take precedence over the more general provisions of the regulations cited by Pope Properties, West Virginia C.S.R. §§110-1P-2.1.1 - 2.1.4 and the provision of the Uniform Common Interest Ownership Act Pope Properties cites out of context, West Virginia Code §36B-1-106. West Virginia Code §36B-1-106 pertains to local ordinances and regulations, not to state laws regulating taxation and valuation. As such, it does not apply to the matter at hand.

Additionally, the definition of “building” quoted out of context by Pope Properties in its brief as support that its residential condominiums are commercial property is misapplied. The commercial purposes referred to in West Virginia Code §36A-1-2(a) refers to condominiums that are used for commercial purposes, such as an office building that is owned by a group of lawyers and accountants, with the lawyers owning one condominium unit in which they have their office and the accountants owning another condominium unit in which they have their office, and both owners owning the common areas such as the parking garage and elevator in common. While such commercial condominiums do exist, the 79 condominiums owned by Pope Properties at issue here are not the type of “buildings intended to be used for...commercial...purposes” referenced in the definition. Instead, Pope Properties’ condominiums are buildings intended to be used for residential purposes.

“Residential Purposes” is defined in the Uniform Common Interest Ownership Act as “use for dwelling or recreational purposes, or both.” W.Va. Code §36B-1-103(27). Additionally, elsewhere in the Tax Commissioner’s regulations, the term “residential property” is defined as

an abode and dwelling for human habitation intended to be inhabited for a permanent or indeterminate and lengthy period of time. The term does not include hotels, motels, inns, motor inns, lodges and similar short-term lodging accommodations, but does include apartments, condominiums, single family dwellings, multiple family dwellings, apartment complexes, nursing homes and housing developments. This term shall include property primarily used as such an abode and dwelling without regard to whether the property is also used for commercial purposes, so long as it is primarily used as a residence.” W.Va. C.S.R. §110-23-3.4.5.1.c.1.

(Emphasis added.)

The subject condominium units are properly classified as residential and not as commercial properties. *See, Alexander v. City of Detroit*, 205 N.W.2d 819 (Mich.App. 1973)(rev’d on other grounds 219 N.W.2d 41)(finding that condominiums are not commercial property). There is nothing stopping Pope Properties from selling some or all of their units to owners who might choose to live in those units. Additionally, they are used as dwellings by the occupiers. Forcing the Assessor’s office to treat any residential unit that has been rented out by a property owner as commercial property would remove the Assessor’s discretion and would create more arbitrary distinctions. Specifically, potential problems would be whether the Assessor’s Office should consider a single family home that a property owner rents out for a few weeks as part of a house swap and is paid for by that

time as a commercial property for part of the year and residential for another part of the year. Additionally, one could envision a single family home or even condominium unit that is purchased as an investment property to live in, remodel and ultimately “flip,” that is to sell for a higher price to derive a profit. Should these properties also be considered commercial or, given that they are homes, should they be considered as residential? The statutes and regulations within West Virginia have afforded assessors and taxing authorities discretion in determining how best to assess and value these properties for tax purposes. Certainly, Pope Properties has been unable to cite to a single statute, regulation, or case law that mandates that the Assessor’s Office utilize the income approach to value the 79 condominium units. As such, Pope Properties has failed to meet its burden and the Circuit Court’s Order should stand.

- C. Pope Properties has not met its burden of proving by clear and convincing evidence that the Assessor or the Board abused their discretion by using the market data approach to value the 79 condominiums or that the appraisals were wrong; the Assessor and the Board properly considered the other methods of valuation and settled on the market data approach as appropriate and the information submitted by Pope Properties was inadequate to form the basis for an alternative appraisal.**

Pope Properties has failed to prove by clear and convincing evidence that the assessment of its 79 condominiums was erroneous. The Assessor 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. (Board of Review and Equalization Order, at ¶¶ 2-4, Appendix 000296.) Furthermore, the Board of Review and Equalization determined that the Assessor did not abuse her discretion by using the market data method to value Pope Properties' 79 condominium units. *Id.*

The statutes and regulations do not mandate that assessors use the income approach to value commercial real property. This Court, in interpreting the regulations cited by Pope Properties in this case, W.Va. C.S.R. §§110-1P-2.2, 110-1P-2.2.1 and 110-1P-2.2.2 (1991), has held that these give the Tax Commissioner and/or the assessing officer the ability to select one of three methods and do not indicate a preference for any particular method. Syl. pt. 5, *American Bituminous Power Partners, LP*, 208 W.Va. at 250, 539 S.E.2d at 757; *Stone Brooke*, 224 W.Va. at 699, 688 S.E.2d at 308. Furthermore, the regulations direct that the assessing officer to give “primary consideration” to “the trends of price paid for like or similar property in the area or locality where the property is situated.” W.Va. C.S.R. §110-1P-2.1.1. This Court has recognized the importance of sales data from arms length transactions:

Furthermore, in *Crouch v. County Court of Wyoming County*, 116 W.Va. 476, 477, 181 S.E. 819, 819 (1935), we recognized that the price paid for real estate was a substantial indicia of its true and actual value, so long as the property changed hands in an arm's length transaction: The price paid for property is not conclusive as to value, but it may be a very important element of proof where there has been an open transaction between competent parties dealing at arm's length as appears from the evidence herein.

Kline v. McCloud, 326 S.E.2d 715, 718-719 (W.Va. 1984) (internal quotations omitted); *See also, Stone Brooke*, 224 W.Va. at 699, 688 S.E.2d at 308.

While West Virginia C.S.R. §110-1P-2.2.1 directs the Tax Commissioner to consider the three methods of valuation, it does not require that the Tax Commissioner use all three methods. This Court has defined “consider” as “to think carefully about, especially in order to make a decision; contemplate; reflect on.” *In Re: Tax Assessment Against American Bituminous Power Partners, LP*, 208 W.Va. 250, 256, 539 S.E.2d 757, 763 (2000). This Court noted:

As employed in the regulation, these two words have wholly divergent meaning: The Tax Commissioner is required to ‘consider’ the various approaches to valuation by contemplating the feasibility of utilizing each of the ascribed methods. On the other hand, these methods are to be ‘used’ or actually employed only where ‘applicable’.”

Id. Throughout Pope Properties’ brief, it uses the word “consider” as if it means “to use.” However, the word “consider” does not mean to agree or to use, it means to contemplate, and that is exactly what the Assessor did; the Assessor thought about using the income approach, and decided it was not the most accurate method of appraisal in this situation. As Mr. Duffield testified, “It’s my opinion that based on our review of all the applicable methods that the direct sales comparison method, it is appropriate for condominiums. And I believe the Code as we stipulated here today directs me to do it that way.” (Hearing Transcript at Appendix 000154.)

Pope Properties has failed to present competent evidence that would meet its burden of proving by clear and convincing evidence that the Assessor's valuation of the 79 condominiums was erroneous. Pope Properties' retained appraiser, Steven Holmes, failed to provide the Board or the Kanawha County Assessor with a complete copy of the materials he considered in his oral appraisal. (Transcript at Appendix 000056-000116.) Instead, Mr. Holmes presented a computer printout showing present value calculations that purported to use one year's worth of income and expenses, and he could not produce the raw data or documents from which he gleaned this information. (Transcript at Appendix 000056-000116.) When Commissioner Kent Carper asked Mr. Holmes to provide him with a copy of the data used to compile the computer forms, Mr. Holmes was unable to provide him with the data. (Transcript at Appendix 00110-000121) 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, and he did not give the appraisal with sufficient information to enable users to understand the report properly. (Transcript at Appendix 000056-000116; 000186-000187; 000283-000295.) It does not appear from Mr. Holmes' testimony before the Board (his "oral appraisal"), that he considered the factors contained in West Virginia. C.S.R. §110-1P-2 over and above the income and expenses for one year (not three, as the regulation requires). Specifically, he did not consider or use: the ease of alienation of the property, the quantity of size of the property, recent sales of comparable

property,⁷ the condition of the property, the income the property actually produces **within the next preceding three years**,⁸ the location of the property, the shape of the property, the topography of the property, the accessibility of the property, easements, zoning, availability of utility, and supply and demand for land of this type. Pope Properties, the party with the burden of proving by clear and convincing evidence that the valuation of the 79 condominiums was wrong, did not come forward with sufficient evidence of consideration of the factors established by the Tax Commissioner in his regulations to support an alternative valuation. Even if the Board was inclined to use the income approach and adjust the assessed value of the 79 condominiums, it could not have done so based upon the paucity of the information and documentation provided by Pope Properties and its retained appraiser. As such, the Board correctly upheld the Assessor's valuation of the property based upon arms' length sales of similar properties in the same complex.

In the case at bar, the Assessor had more than ample evidence that the market data approach, or the "direct sales comparison method," was appropriate. The Assessor had the

⁷Mr. Holmes was quick to argue that he did "consider" the sales of the other condominiums in the complex, but rejected them because they were owner occupied at the time of sale. (Transcript at Appendix 000065) In reality, Mr. Holmes' testimony and documentation shows that he really only considered the income and expense statements for one year provided by his client, Pope Properties, and failed to include the comparable sales in his analysis. (Transcript, generally)

⁸From the information supplied by Mr. Holmes and Pope Properties at the Hearing before the Board, it appears that Mr. Holmes only used one year's worth of income and expenses and then extrapolated from that year to predict the next four years' worth of income and expenses. (Transcript at Appendix 000087; 000230-000245).

sales prices of *nearly identical* units in the *very same* building in unforced sales during an arms-length transaction between willing buyers and sellers to use in determining the value of Appellant's property. (Hearing Transcript at p. 139.) Under West Virginia law, this is presumptively the best way to value real estate. W.Va. Code §11-3-1 (2011); W.Va. C.S.R. §110-1P-2.1.1 ("In determining the appraised value, primary consideration shall be given to the trends of price paid for like or similar property in the area or locality wherein such property is located."). Certainly, Pope Properties has not presented sufficient evidence to prove that the Assessor's use of arms length sales data in valuing Pope's condominium units was an abuse of the Assessor's discretion.

D. The Circuit Court correctly found that the three sales of similar units in the same complex were comparable; the classification of the properties for levy purposes as Class II is irrelevant because it does not affect the value of the property.

Appellant makes much ado over the fact that the Assessor compared owner occupied Class II properties against its non-owner occupied Class III properties for assessment purposes. However, this is really a "red herring." These tax classifications are simply in place to determine the *levy rate* of taxation on an assessed amount. Whether property is class I (the lowest) or class IV (the highest) it will still be appraised by the same methods, but the tax rate and the resulting tax which would become due and payable each year would be different. W.Va. Code §11-8-5; W.Va. Code §11-8-6e. That is, for Class II properties, to determine how much tax is owed, you must multiply the assessed value by .02, and for Class III properties, to determine how much tax is owed, you must multiply the assessed value by

.04. W.Va. Code §11-8-6e(b)(2). However, regardless of whether a property is Class II or Class III, the assessed value remains the same. It is only the tax rate that changes.

For example, a homeowner who lives in a \$100,000 home and makes it his primary residence is taxed at a class II, owner-occupied rate. Let's then assume that next year his employment transfers him to California and he can no longer occupy his home. Not wanting to sell, he decides to rent the property or perhaps leaves the property vacant until he is able to return to West Virginia. When he does so, his home will now be assessed at a class III, non owner-occupied rate. However, the assessed value of his home will remain the same, unless other factors such as sales of comparable homes near his house change. The Assessor will still value for tax purposes that home at the previous rate, and its market value will also stay the same based on comparable homes in the neighborhood, notwithstanding that those other homes in the neighborhood are still class II, owner occupied properties. The only difference is, again, the *rate* of tax that now must be paid on the home. W.Va. Code §11-8-5.

Similarly, in the case at bar, the levy rate based upon whether a condominium unit is owner occupied or not is irrelevant to the issue of how that unit should be valued. To conclude that the sale of a identical condominium unit in the same building is not comparable because the two units are taxed at difference rates would be error, and it certainly would not prove by clear and convincing evidence that the Assessor abused her discretion.

VI. CONCLUSION

For the reasons listed above, the Kanawha County Assessor respectfully requests that this Honorable Court uphold the Final Order entered by the Circuit Court of Kanawha County and affirm the assessment of Pope Properties' 79 condominium units, as valued by the Assessor and approved by the Board of Review and Equalization. Petitioner Pope Properties failed to meet its burden of proving by clear and convincing evidence that the assessment is erroneous. Furthermore, the assessment is supported by substantial evidence.

**THE HONORABLE PHYLLIS GATSON,
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IN THE 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,

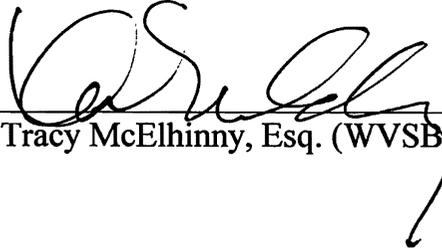
Respondent.

CERTIFICATE OF SERVICE

I, Karen Tracy McElhinny, counsel for Respondent Phyllis Gatson, Kanawha County Assessor, do hereby certify that I served true and exact copies of the foregoing "**Brief of Respondent**" on counsel of record, via the United States Postal Service, by placing the same in a stamped envelop addressed as follows:

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Dated this 6th day of January 2012.



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