

12-0992

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA  
Division II

LEE TRACE,

Petitioner,

v.

CIVIL ACTION NO. 11-AA-2  
JUDGE WILKES

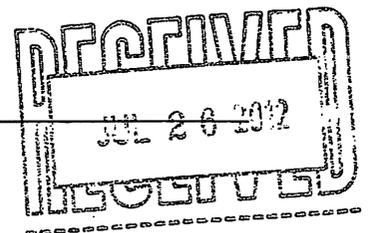
GEARL RAYNES, AS ASSESSOR  
FOR BERKELEY COUNTY, WEST  
VIRGINIA,  
and  
BERKELEY COUNTY  
COUNCIL, SITTING AS BOARD OF  
REVIEW AND EQUALIZATION,  
and  
BERKELEY COUNTY COUNCIL,

Respondents.

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**FINAL ORDER**

This matter came before the Court this 24 day of July 2012, for final adjudication on the Petition for Appeal. A hearing was held on April 23, 2012, where all parties were present and the Court heard argument on the merits of the Petition, thereafter the Court ordered proposed findings of fact and conclusions of law to be filed within 45 days. Upon the appearance of Petitioner, Lee Trace, LLC (hereinafter "Petitioner"), by counsel, Thomas Moore Lawson, and Respondent, Gearl Raynes, as Berkeley County Assessor, by counsel, Michael D. Thompson, and Respondents Berkeley County Council and Berkeley County Council sitting as Board of Equalization and Review (hereinafter "Board"), by counsel, Norwood Bently, III; and upon the record and the pertinent legal authorities the Court rules as follows.



### **Procedural History**

1. On March 18, 2011, Lee Trace, LLC filed a Petition for appeal of the decision of the Berkeley County Council sitting as Board of Equalization and Review. Therein, the Petitioner challenged his 2010 and 2011 tax year assessments.
2. On May 23, 2011, a hearing was held where the Court granted the Parties' request to allow for discovery to supplement the record. The record was supplemented through discovery, including appraisals submitted by both the Board and the Petitioner which can be found in the court file.
3. After some continuances and filings by the parties, this Court issued an order on March 23, 2012 which denied the Petitioner's requested relief in regards to the 2010 tax assessment, substituted the new assessor as a named party, and set a hearing for argument on the remaining parts of the Petition.
4. On April 16, 2012, the Court issued an order making the March 23, 2012 order appealable in regards to its denial of the challenge to the 2010 tax year assessment.
5. On April 23, 2012, a hearing was held where all parties presented arguments regarding the merits of the remaining issues in the Petition.
6. The parties have now filed proposed findings of fact and conclusions of law, and the Court finds the remaining issues ripe for adjudication.

### **Findings of Fact**

7. Petitioner owns real property at 15000 Hood Circle, Martinsburg, West Virginia 25403, consisting of approximately 17.02 acres, identified as Berkeley County, West Virginia Tax Map 36 / 0010 0000 0000 and by Deed recorded in the Office of the County Clerk of

Berkeley County, West Virginia, in Deed Book 838, at Page 231, with a Deed of Correction filed on September 28, 2006, at Deed Book 849, Page 244 (hereinafter "Property"). *See* Response to Allegations Set Forth in Petition ("Response") ¶1; Petitioner's Exhibit 6E of Certified Record; Application for Review of Property Assessment, dated February 10, 2011 of Certified Record.

8. Petitioner purchased the Property for \$1,122,504.00. *See* Application for Review of Property Assessment, dated February 10, 2011 of Certified Record.
9. In 2007, construction began on an apartment complex on the Property. *See* Petition for Appeal; Application for Review of Property Assessment, dated February 10, 2011 of the Certified Record. The apartment complex, now complete, consists of 156 apartment units, and carried a construction cost of \$12,927,378.00. *See* Application for Review of Property Assessment, dated February 10, 2011 of Certified Record.
10. As of February 10, 2011, the completed complex was insured against fire in the amount of \$17,000,000.00. *See* Application for Review of Property Assessment, dated February 10, 2011 of Certified Record.
11. In 2009, while the complex was being constructed, the Assessor assessed the Property at a value of \$677,050.00. Response ¶4. In accordance with law, this valuation represented the Assessor's determination of sixty percent of the true value of the Property on July 1, 2008. At that time the complex was still under construction.
12. In 2010, the Assessor assessed the Property at a value of \$7,895,530.00. Response ¶5. In accordance with law, this valuation represented the Assessor's determination of sixty percent of the true value of the Property on July 1, 2009.

13. In 2011, the Assessor assessed the Property at a value of \$7,593,430.00 (hereinafter the “2011 Assessment”). Response ¶26. In accordance with law, this valuation represented the Assessor’s determination of sixty percent of the true value of the Property on July 1, 2010.
14. In arriving at the 2011 Assessment, the Assessor utilized a cost approach<sup>1</sup> to the Property’s value. *See* Deposition of Tamera Edgar, October 24, 2011, pp. 31-33, 49.
15. On January 18, 2011, Petitioner, through counsel, provided operating statements for 2008 and 2009 which contained some data regarding income.
16. On or about February 14, 2011, Petitioner filed an Application for Review of Property Assessment to the Council sitting as the Board of Equalization and Review.
17. On or about February 22, 2011, the Board held a hearing on the application for review filed by Petitioner.
18. At the hearing, Petitioner made a presentation regarding how the Property’s assessment compared directly to other apartment complex’s property assessments. However, Petitioner did not submit any appraisal of the Property to show its value.
19. At the hearing, the Assessor (through a deputy) confirmed that she had utilized the cost approach. Response ¶ 31.
20. On or about February 23, 2011, after the hearing but prior to the Board’s decision, Petitioner provided some additional income information. *See* February 23, 2011 letter to Tamera Edgar of the Certified Record.

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<sup>1</sup> *See infra*, Conclusions of Law II for a description of this type of approach.

21. It was noted before this Court, and also before the Board, that some other apartment complexes' valuations had been reduced by the Board based upon consideration of income.
22. Shortly after the hearing, and at the apparent request of the Board, following Petitioner's request at the hearing, an official from the Assessor's office completed a revised assessment that utilized realty rates to determine a capitalization rate in lieu of unavailable market data, and also utilized actual rent of the Property in lieu of economic rent. This income-type approach assessment (though differing from that described in the Code of State Rules) yielded a value of \$5,207,940 – representing, pursuant to law, sixty percent of the true value of the Property on July 1, 2010. *See* February 24, 2011 Ruling in the Certified Record.
23. On February 24, 2011, the Board issued a ruling in the form of a letter which reduced the previously assessed value from \$7,895,530.00 to \$6,400,690.00. *See*, Certified Record of Hearing held on February 22, 2011. The letter states that this “fair value is reached by averaging the value by income approach [\$5,207,940] and the value by cost approach [\$7,895,530].” *Id.*
24. The Court takes notice that \$6,400,690 is not actually the average of 7,895,530 and 5,207,940. The mathematical average of these two numbers is \$6,551,735.<sup>2</sup>
25. Petitioner has now petitioned for appeal from this determination, and requests that that assessment of property should be set a \$3,492,696.00.

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<sup>2</sup>  $\$7,895,530 + \$5,207,940 = \$13,103,470$  ;  $\$13,103,470 \div 2 = \$6,551,735$

### Conclusions of Law

In the Court's view, Petitioner's challenges to the Assessor's procedures under the West Virginia Code of State Rules, can be reduced to two grounds: (1) the Assessor's use of the cost approach (as opposed to income or market data); and (2) the Assessor's/ Board's lack of consideration of income in setting the assessed value. *See* Petition; W.Va. C.S.R. § 110-1P-2.2.1. After consideration, the Court finds the Board of Equalization and Review's determination was within its discretion and should be affirmed in part. This conclusion is based upon the findings that the Assessor's actions, as well as the Board's attempted actions, were proper, and that substantial evidence supports an average of the two values.

The Court initially notes the recent change in law which affects this decision. In 2010, the West Virginia Legislature passed SB 401, which altered W.Va. Code § 11-3-1, *et. seq.* The majority of this law went into effect on June 14, 2010 (ninety days from passage). However, § 25(f), which governs the procedure upon appeal to this Court, mandates that the changes made specifically to § 25 apply to "tax years beginning after December 31, 2011." A tax year is defined as the calendar year following the July 1<sup>st</sup> assessment date. W.Va. Code §§ 11-3-1; 11-5-3. Clearly, by the language of §25(f), this part of the amendments was intended to apply to tax year 2012.<sup>3</sup>

The Petition in the instant case challenges the 2010 assessment and the 2011 tax year, and thus require this Court to review the assessment for July 1, 2010, which was required to be complete by January 13, 2011. So, the 2010 amendments to § 25 from SB 401 do *not* apply to this appeal; however, the rest of the amendments from that bill do apply to this matter.

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<sup>3</sup> Otherwise the legislature would have used the typical effective language (i.e. "effective on/ after <date>").

Therefore, references made herein to *W.Va. Code § 11-3-1, et. seq.* refer to the law with the 2010 amendments, except those references made to § 25.

## I. Tax Assessments and Appeals in West Virginia

Tax assessments implicate Constitutional principles. The West Virginia Constitution requires tax assessments to be done in an equal and uniform manner. Article X, §1 of the Constitution of West Virginia provides,

Taxation shall be equal and uniform throughout the state... No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.

West Virginia Code § 11-3-1, *et. seq.* mandates the procedure for tax assessments in West Virginia under these constitutional guidelines.

### A. Tax Assessments

The property tax scheme in West Virginia requires assessment of property at “its true and accurate value” in order to determine the tax. *W.Va. Code § 11-3-1*. To accomplish this, the value is established as of July 1, representing the “assessment date,” and in accordance with *W.Va. Code § 11-3-19*, which provides: “[t]he assessor shall complete his assessment and make up his official copy of the land and personal property books in time to submit the same to the board of equalization and review not later than February first of the assessment year.” Also, in accordance with Article 10 Section 1b of the *West Virginia Constitution* the true and actual value of property ascertained by the assessor as of the July 1 assessment date is converted to assessed

value or sixty (60) percent of the “true and actual value.” *See, Moore v. Johnson Services Co.*, 158 W.Va. 808 (1975).

Then, the county commission or county council convenes as a board of equalization and review not later than February 1 of the tax year to review and equalize assessments. W. Va. Code § 11-3-24. The Board adjourns between February 15 and the end of February. *Id.*

Even though the assessment date is July 1 of the previous year (and the value is based upon that date), taxes are collected in arrears: the first half taxes not due until September 1 and the second half taxes due March 1 of the next year.

Under this general statutory procedure, an Assessor must make value determinations for properties as prescribed by the Code of State Rules, which has the force and effect of law. Syl. Pt. 2, *State ex rel. Maple Creative LLC v. Tincher*, 226 W. Va. 118 (2010). The West Virginia Code of State Rules, § 110-1P-2.2.1, recognizes three different appraisal methods for determining fair market value of “commercial and industrial real and personal property for ad valorem tax purposes.” This subsection provides: “...the Tax Commissioner will consider and use where applicable, three (3) generally accepted approaches to value: (A) cost, (B) income, and (C) market data.” W.Va. C.S.R. §110-1P-2.2.1 (emphasis added).

The cost approach is the “appraisal process in which replacement cost of improvements, less all types of depreciation, is added to a land value in determining a fair market value for improved real property.” W.Va. C.S.R. § 110-1P-2.3.4. The income approach is “the appraisal process of discounting an estimate of future income into an expression of present worth.” W.Va. C.S.R. § 110-1P-2.3.12. The market data approach is the appraisal process of “considering the selling prices of comparable properties.” W.Va. C.S.R. § 110-1P-2.2.1.3.

The income approach requires a specific calculation: “The selection of an overall capitalization rate will be derived from current available market data by dividing annual net income by the current selling price of comparable properties. The present fair market value of the property shall then be determined by dividing the annual economic rent by the capitalization rate.” W.Va. C.S.R. § 110-1P-2.2.1.2 Under this type of valuation, economic rent means “the rental amount which a space or property would attain in the open market at the time of appraisal, whether it is lower, higher or the same as the actual contract rent.” W.Va. C.S.R. § 110-1P-2.3.6.

Also, appraisals must consider a variety of other factors. *See* W. Va. C.S.R. §§ 110-1P-2.1.1, 2.1.1.1 – 2.1.1.10, 2.1.3, 2.1.3.1 – 2.1.3.12. Significantly, this series of regulations provides that each of the enumerated factors should be considered, but “some . . . may be given more weight than others.” W. Va. C.S.R. § 110-1P-2.1.4

This series of the West Virginia Code of State Rules is clearly intended by its language to give discretion in choosing the method for valuation. *See, In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250 (2000). *See also, Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009).

W.Va. C.S.R. § 110-1P.2.2.2 embodies this intent found throughout the statutes and rules, and states in pertinent part,

[w]hen possible, the most accurate form of appraisal should be used, but because of the difficulty in obtaining necessary data from the taxpayer, or due to the lack of comparable commercial and/or industrial properties, choice between the alternative appraisal methods may be limited.

This consistently deferential language has led the West Virginia Supreme Court to affirmatively state 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 (2000); Syl. Pt. 4, *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009).

#### B. Challenges to Tax Assessments

The instant action is an appeal of this assessment procedure as it pertains to the Petitioner for tax year 2011 which is controlled by the statutory scheme set up for challenges to tax assessments. West Virginia Code § 11-3-1 *et. seq.* (and specifically §25).

“Upon receiving an adverse determination before the county commission, a taxpayer has a statutory right to judicial review before the circuit court.” *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000); W. Va.Code § 11-3-25. “The proper procedures for appeal from a county court [county commission] decision are outlined in West Virginia Code § 58–3–1 *et seq.* The provisions of this article are to be read *in pari materia* with § 11–3–25...” Syl. Pt. 5, *Tax Assessment Against Purple Turtle, LLC v. Gooden*, 223 W.Va. 755 (2009). So, to the extent West Virginia Code § 11–3–25 does not afford procedural mandates, West Virginia Code § 58–3–1 *et seq.* controls. These statutory, procedural mandates, which require a review of the record, are mandatory. *Id.* at 760. Conclusions of law are reviewed *de novo*, Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995), and factual questions are reviewed on the record. W.Va. Code § 11-3-25.

“[R]eview before the circuit court is confined to determining whether the challenged property valuation is supported by substantial evidence ... or otherwise in contravention of any regulation, statute, or constitutional provision.” *In re Tax Assessment Against American*

*Bituminous Power Partners, L.P.*, 208 W.Va. at 254. “In all cases, it is incumbent upon the circuit court, as it is upon the county commission and the assessor, to set the assessed value of all parcels of land at the amount established by the State Tax Commissioner. W. Va. Code § 18–9A–11.” Syl. Pt. 3, *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009).

Yet, the valuation set by the Assessor is “accorded great deference and is presumed to be correct.” *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 701 (2009). Therefore, the West Virginia Supreme Court has delineated that “[a] taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous.” Syl. Pt. 6, *Stone Brooke Ltd. Partnership*, 224 W.Va. 691. See also, Syl. Pt. 2, in part, *Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County*, 189 W.Va. 322, 431 S.E.2d 661 (1993).

“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. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.” Syl. Pt. 5, *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250 (2000); Syl. Pt. 4, *Stone Brooke Ltd. Partnership*, 224 W.Va. 691 (2009).

“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 Ltd. Partnership*, 224 W.Va. 691 (2009).

Accordingly, the Court will examine whether the actions by the Board and the Assessor were proper under these standards and then discuss if the valuation set by the Board is supported by substantial evidence. *See, In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. at 254.

## II. The Assessor and the Board's Actions

Petitioner's claim here is *not* that the Assessor did not consider all of the factors under the cost approach to appraisals, but that the Assessor violated the law in this assessment by failing to consider the income approach. The Petitioner also claims that the Board's reduction based upon an estimate of what an income approach would result in was improper. Petitioner argues that both of these actions are in contravention to the regulation and constitute an erroneous assessment.

First, the Court must find that the Assessor's choice of the cost approach was within his discretion under the plain language of statutes and rules, as well as the clear authority from the West Virginia Supreme Court of Appeals.

It is clear that an Assessor may choose one of the generally accepted methods. *See* § 110-1P-2.2.1; *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009). The West Virginia Code of State Rule state that "the Tax Commissioner [and Assessor on his behalf] will consider and use *where applicable*, three (3) generally accepted approaches to value..." § 110-1P-2.2.1 (emphasis added). This is plain language that the Court must give effect to. *See Century Aluminum of West Virginia, Inc. v. Jackson County Com'n*, --- S.E.2d ----, 2012 WL 1987157 (W.Va., 2012).

Petitioner argues, however, that this language requires the Assessor to choose a method of valuation only after “she has performed and considered all three methods.” The Court disagrees with this reading of the rule, and it is further not contemplated by opinions of the West Virginia Supreme Court. The Court finds the most reasonable interpretation is made by reading the language “where applicable” as applying to the entire immediately preceding phrase “will consider and use.” Petitioner’s interpretation that “where applicable” modifies only the word “use,” creates an absurd result. An assessor cannot consider the income method if there is no income to use. It is easy to see that this would not make sense in a variety of situations. Indeed, it is much more practically reasonable to read the “where applicable” language as generally modifying the entire phrase. This makes practical sense and allows the Assessor and Tax Commissioner discretion, which is intended by the property scheme as a whole. *See, Stone Brooke*, 224 W.Va. 691.

The West Virginia Supreme Court took up this issue in *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250 (2000). In that case, the tax commissioner and assessor’s offices used two methods: the income approach and the cost approach, and then decided to use the cost approach as the more appropriate value. *Id.* at 253. The County Commission reduced the appraised value by \$500,000 in an attempt to average it with the lower income approach number. *Id.* at 254. In review of the circuit court’s ruling on this matter, the West Virginia Supreme Court of Appeals interpreted the language of this rule, and specifically found that this choice of the income, cost, or market data, methods are squarely within the discretion of the Tax Commissioner. *Id.* at 257-58.

Even more notably, the Supreme Court addressed this issue as it regards apartment complexes in *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009).

Under similar facts, the Court in *Stone Brooke* specifically found that in each of the consolidated cases the use of only cost approach appraisals was proper under the discretion granted by the regulations. The Court appeared to understand the other factors to be considered applicable to the process under this approach, remanding the matters for the circuit courts to insure that the factors were considered. See W. Va. C.S.R. §§ 110-1P-2.1.1, 2.1.1.1 – 2.1.1.10, 2.1.3, 2.1.3.1 – 2.1.3.12.

So, contrary to Petitioner’s arguments, under the clear authority binding upon this matter, the Assessor may, in his discretion, choose one of the generally accepted methods for the valuation of property. Therefore, the Assessor’s choice to choose the cost approach, in this situation, is squarely within his discretion – especially in light of the substantial evidence supporting both the choice and the value. See, Conclusions of Law, below. The record before the Court allows no argument regarding abuse of discretion. So, this discretionary decision “will not be disturbed upon judicial review” Syl. Pt. 4, in part, *Stone Brooke*, 224 W.Va. 691.

Also, the Court must find that the Board has discretion to request an income estimate and average the two values. Petitioner suggests that Board’s method of considering the income of the property and reducing the Assessor’s cost approach assessment number was improper.

First, a Board of Equalization and Review clearly has authority to equalize assessments by increasing or decreasing them. The Board is granted with enough discretion in order to fulfill its role as outlined in West Virginia Code § 11-3-1, *et. seq.* See, Section I, *supra*. This includes equalizing values based upon the complaints of the taxpayer. See W.Va. Code § 11-3-24(c) (“...and shall cause to be done whatever else is necessary to make the assessed valuations comply with the provision of this chapter.”); § 24(d) (“If the board determines that any property or interest is assess at more or less than sixty percent of its true and actual value as determined

by this chapter, it shall fix it at sixty percent of its true and actual value...”). This is explicit authority for the Board’s actions of reducing the value.

So, the Court finds that the Board’s actions of getting an estimate of what an income approach may yield and averaging it with a cost approach in order to equalize the assessment in light of other similar property valuations (“averaging the value by income approach and the value by cost approach”) is within its authority.

However, while the Board may in its discretion reduce the amount in consideration of a different approach, it may not be done arbitrarily. So, the Court will address whether the value set by the Board is appropriate.

### III. The Property Valuation set by the Board

Petitioner argues that the Board’s value alteration was unfounded and arbitrary. In reviewing the record, the Court finds the assessment by the Board to be arbitrary.

First the Court notes that it will not usurp the statutory authority of the Board to equalize assessments. Accordingly, the Court will first determine if the Board’s value or attempt to set the value is appropriate.

The Board’s value reached by an attempted averaging is not supported by any evidence. The Board’s stated attempt in the very document which set the amount was to average the two assessment amounts. See Findings of Fact ¶ 23. However, as noted *supra*, the number arrived at is not an average of the yields from the income and cost approaches.

The Board did come up with an estimate of what an income approach might yield (using the above described hybrid method with the assistance of the Assessor’s office), and then attempted reduced the Assessor’s value determination by “averaging” the income-type

assessment with the previously completed cost assessment (presumably in order to equalize this assessment with others as is the Board's statutory duty). Yet, this led to a value of \$6,400,690, which is not an accurate average of the two values. It appears that a mathematical error must have occurred. While the Board may in its discretion reduce the assessed value to equalize the assessment – it should not be arbitrarily done, especially in light of the strong presumption of correctness and deference afforded the assessor's determinations. *See, Stone Brooke*, 224 W.Va. 691.

Under this unique situation, the Court finds it best, legally and equitably, to set the value at the actual average.

The Court notes a couple of the major factors in the record that support this value. Lee Trace is a complex either significantly newer (more recently built) or significantly larger than any of the comparable complexes. So, this value, slightly higher, than possibly others, would be proper. Also, the value for the purposes of fire insurance is set at \$17,000,000.00, which would yield an assessment of 10,200,000 (60%) – significantly above the value determined by the Assessor and the Board.

On the other hand, Petitioner's appraisal is completed by someone not licensed to appraise property in West Virginia.<sup>4</sup> This fact, along with the other evidence in the record, renders Petitioner's appraisal unpersuasive.

Most notably, the appraisal submitted by the County, done by a licensed appraiser and done in a manner which considers a large number of factors and approaches, finds in the market

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<sup>4</sup> This was all but admitted in open court by Petitioner's counsel. Also, his name or "Temporary License" number do not appear on the 2012 West Virginia Real Estate Appraiser Roster issued by the West Virginia Real Estate Appraiser Licensing and Certification Board and this appraisal was completed in 2012. *See*, W.Va. Code §30-38-1, *et seq.*

value to be \$10,950,000. This amount clearly and directly supports the Board's attempt to average the two numbers, as 60% of this market value yields \$6,570,000.00 (which is similar to what the mathematical average is).

So, the Court finds that the Board's affixing of the number was arbitrary, and Petitioner has met the burden, to wit: "average" was not mathematically correct. Further, the Court finds that substantial evidence, as well as equitable factors, support a mathematical average of the income approach and cost approach assessments.

Therefore, the most accurate way to fix this arbitrary number is to fix the math. A mathematical average appropriately considers all the factors and gives the due deference to the Board's statutory authority to equalize assessments.

Accordingly, the Court finds that the value supported by the evidence is the mathematical average of the cost and income approaches to assessment, which is \$6,551,735.00.

The Court notes that there are several other outstanding issues raised by the parties, including motions to further supplement the record and remove the Assessor as a named party. However, with the rulings herein, the other issues before the Court in this matter are rendered MOOT.

The Court also notes that Petitioner makes no challenge to the factors under W. Va. C.S.R. § 110-1P-2.1.1. to 2.1.4, *See, Stone Brooke Ltd. Partnership*, 224 W.Va. 691 (2009); except as to "2.1.1.9 The income, if any which the property actually produces and has produced within the next preceding three (3) years..." However, the Board's reduction of the assessed value based upon income data and an estimate of what an income approach might yield if the necessary data directly considers this factor and this Court's assessment value reached by

averaging therefore considers income. With no dispute regarding the remaining factors, the Court finds that all of the required factors have been considered.

Accordingly, the Court GRANTS IN PART, AND DENIES IN PART Petitioner's Petition for Appeal, and the ruling of the Berkeley County Council sitting as Board of Equalization and Review, regarding the 2011 tax assessment, is AFFIRMED IN PART AND REVERSED IN PART.

Therefore, it is hereby ADJUDGED and ORDERED that upon this FINAL ORDER the Petition for Appeal GRANTED IN PART and DENIED IN PART, and the assessment value for Lee Trace Apartments, 15000 Hood Circle, Berkeley County, Martinsburg, West Virginia, is hereby set at \$6,551,735. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to the following counsels of record:

***Counsel for Petitioner:***

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Martinsburg, WV 25401



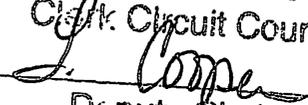
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CHRISTOPHER C. WILKES, JUDGE  
TWENTY-THIRD JUDICIAL CIRCUIT  
BERKELEY COUNTY, WEST VIRGINIA

ATRUE COPY  
ATTEST

Virginia M. Sine  
Clerk, Circuit Court

By:



Deputy Clerk