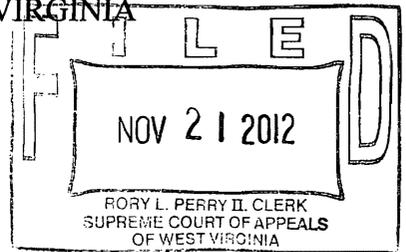


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0992



LEE TRACE LLC,

Petitioner,

v.

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.

Appeal from a final order  
Of the Circuit Court of  
Berkeley County (11-AA-2)

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**Petitioner's Brief**

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## **ASSIGNMENTS OF ERROR**

1. THE CIRCUIT COURT ERRED IN INCREASING THE 2011 ASSESSED VALUE OF PETITIONER'S PROPERTY SET BY THE BERKELEY COUNTY COUNCIL SITTING AS A BOARD OF EQUALIZATION AND REVIEW.
2. THE CIRCUIT COURT ERRED IN FINDING THAT THE 2011 ASSESSED VALUE OF PETITIONER'S PROPERTY WAS \$6,551,735.00 WHICH WAS NOT SIXTY PERCENT (60%) OF ITS TRUE AND ACTUAL VALUE.
3. THE CIRCUIT COURT ERRED IN CALCULATING THE 2011 ASSESSED VALUE OF THE PROPERTY BY AVERAGING AN ADMITTEDLY IMPROPER 2011 INCOME APPROACH ASSESSMENT WITH THE 2010 COST APPROACH ASSESSMENT.
4. THE CIRCUIT COURT ERRED IN FINDING THAT THE VALUATION SET BY THE ASSESSOR IS ACCORDED GREAT DEFERENCE AND IS PRESUMED TO BE CORRECT WHEN THE ASSESSOR, BY HIS OWN ADMISSION, HAS NOT DONE A PROPER ASSESSMENT.
5. THE CIRCUIT COURT ERRED IN IGNORING EVIDENCE OF THE PROPERTY'S VALUE SUBMITTED BY PETITIONER AND, INSTEAD, RELYING ON IRRELEVANT AND UNRELIABLE EVIDENCE OF THE PROPERTY'S VALUE.
6. THE CIRCUIT COURT ERRED IN SETTING A 2011 ASSESSED VALUE FOR THE PROPERTY IN VIOLATION OF THE REQUIREMENTS OF ARTICLE X, §1 OF THE CONSTITUTION OF WEST VIRGINIA AND WEST VIRGINIA CODE §11-1C-1(A).

## STATEMENT OF THE CASE

This is an appeal of the Final Order of the Circuit Court of Berkeley County, West Virginia (the "Circuit Court") dated July 24, 2012 regarding the 2011 Property Tax Assessment on an apartment building owned by Petitioner Lee Trace LLC ("Petitioner") in Berkeley County, West Virginia (the "Property"). (A.R. 1144).

The Property is located at 15000 Hood Circle, Martinsburg, West Virginia 25403, and consists of approximately 17.02 acres. (A.R. 83). In 2009 a garden-style apartment complex was constructed on the Property which is similar in characteristics to many other apartment properties in Berkeley County. (A.R. 7, 402). For the 2009 tax year, Respondent Assessor for Berkeley County, West Virginia (the "Assessor"<sup>1</sup>) assessed the Property at a value of \$677,050.00. (A.R. 7, 17). For the 2010 tax year, the Assessor assessed the Property at a value of \$7,895,530.00 (the "2010 Assessment") and failed to provide the required statutory notice to the Petitioner of the increased assessment. (A.R. 17). In spite of this failure, both the Respondents Berkeley County Council, Sitting as Board of Review and Equalization and Berkeley County Council (collectively "Council") and the Circuit Court denied Petitioner's appeal of the 2010 Assessment as untimely. (A.R. 102, 879). Petitioner has appealed those decisions to this Court and that appeal is currently pending. For the 2011 tax year, the Assessor assessed the Property at a value of \$7,593,430.00 (the "2011 Assessment"). (A.R. 279). The 2011 Assessment is based on a valuation date of July 1, 2010.

In arriving at the 2011 Assessment (and the 2010 Assessment), the Assessor used only the cost approach to value. (A.R. 540). The Assessor admitted in deposition that she did not consider the income of the Property or an income approach valuation of the Property in

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<sup>1</sup> As used herein, the term the "Assessor" shall refer to the prior Assessor, Patricia Kilmer, the current Assessor, Gearl Raynes, and/or any member of the Assessor's staff.

conducting those assessments. (A.R. 540-41, 592-93). She admitted that such failure was wrong and in violation of the West Virginia Code of State Rules (“State Rules”) § 110-1P-2. (A.R. 540-45, 592-93). For properties similar to the Property, however, the Assessor used an income approach to value instead of a cost approach to value. (A.R. 582, 591). The Assessor admitted in deposition that the income approach to value used for these other properties resulted in significantly lower assessed values. (A.R. 552).

Thereafter, Petitioner appealed the 2011 Assessment to the Council seeking to adjust the 2011 Assessment by using the income approach, thus reducing the tax assessed value of the Property as stated above. (A.R. 279).

The Council asked the Assessor, on the day of the final hearing, to provide the Council with a value which took into account the income of the Property. (A.R. 169, 1148). The Assessor provided the Council with a value of \$5,207,940.00 based on what she then claimed was her income approach assessment of the Property. (A.R. 169, 1148). The Assessor has now admitted that this income approach assessment was improperly calculated. (A.R. 1098). Nevertheless, and even though the value is demonstrably high, the Council did not even adopt this value but arbitrarily arrived at a new assessed value by averaging the value arrived at originally by the Assessor using the cost approach and the Assessor’s admittedly erroneous income-based value. (A.R. 1148). Using this method, the Council set a 2011 assessed value for the Property of \$6,400,690.00. (A.R. 1148). Neither the Council nor the Assessor provided any justification or basis for either (a) the calculation of the new income approach valuation or (b) the averaging of the value arrived at by the cost approach with this new value. The Assessor testified this was the first time the Assessor or the Council had calculated an assessment by averaging values in this manner. (A.R. 585).

Petitioner then filed a petition to the Circuit Court of Berkeley County, West Virginia, pursuant to West Virginia Code §11-3-25, appealing the decision of the Council. (A.R. 5). The Circuit Court affirmed in part and reversed in part the ruling of the Council regarding the 2011 Assessment. (A.R. 1161). Although finding that Petitioner had met its burden of proving that the assessed value set by the Council was arbitrary, the Circuit Court increased the assessed value from that set by the Council to \$6,551,735.00 for the 2011 tax year. (A.R.1161). The Circuit Court arrived at this amount by averaging the 2010 cost approach assessment (not the 2011 cost approach assessment) with the admittedly erroneous 2011 income approach assessment. (A.R. 1148).

The Circuit Court made a number of other rulings in its final order. Specifically, the Circuit Court found that the value set by the Assessor in the 2011 Assessment was entitled to a presumption of correctness, even though the Assessor admitted that she violated the law when she performed the 2011 Assessment. (A.R. 1154). The Circuit Court also ruled that the Assessor was not required to consider an income approach to value when conducting the 2011 Assessment, in spite of the plain language of the State Rules. (A.R. 1155-56). The Circuit Court rejected and ignored the evidence presented by Petitioner including a validly conducted appraisal and the assessments of comparable properties. (A.R. 1159). The Circuit Court incorrectly found that the appraiser who performed the appraisal for Petitioner was not licensed in West Virginia. The Circuit Court justified its valuation of the Property by relying on the amount for which the Property was insured for fire insurance purposes (even though that insurance covered equipment and personal property) and a clearly erroneous appraisal which included income and expense data from after the valuation date. (A.R. 1159).

If the 2011 Assessment of the Property had been conducted using a proper income approach, the 2011 Assessment would have been \$3,492,696.00. (A.R. 12, 1148).

### SUMMARY OF ARGUMENT

The Circuit Court erroneously set the assessed value of the Property for 2011 at \$6,551,735.00. The Circuit Court derived this amount by averaging the 2010 cost approach assessment with an income approach assessment that the Assessor and the Circuit Court admitted was improper. This determination is clearly erroneous. Averaging two approaches to value is not a valid way to arrive at an assessed value. In addition, the use of the 2010 cost approach assessment was apparently a clerical error by the Circuit Court. The 2010 cost approach assessment is not relevant to assessment of the Property in 2011. See West Virginia Code §11-3-1. Lastly, it was clearly erroneous for the Circuit Court to use an income approach which both the Assessor and the Circuit Court admitted was not properly performed.

The Circuit Court also determined, contrary to the law, that the Assessor's valuation of the Property was entitled to a presumption of correctness even though the Assessor admitted it was unlawful and improper. This Court has previously held that a proper assessment must be performed before there can be a presumption that the assessment is correct. In re Tax Assessments Against Pocahontas Land Corp., 158 W.Va. 229, 235-36, 210 S.E.2d 641, 646-47 (1974), *citing* Consolidated Gas Co. v. Mayor, Etc. of Baltimore, 101 Md. 541, 61 A. 532 (1905).

The Circuit Court erroneously determined that the Assessor was not required to consider an income approach to value. Both the State Rules and the contrary precedent of this Court require the Assessor to consider the income of the Property and an income approach to value.

Moreover, the income of the Property and the income approach to value are certainly applicable to the value of the Property. The Assessor's Manual<sup>2</sup> provides for an income approach to value when assessing commercial property. In addition, the Assessor admitted that she assessed many other comparable properties using the income approach to value.

The Circuit Court ignored all the proper evidence of value of the Property. The Circuit Court ignored the appraisal presented by Petitioner, claiming, incorrectly, that the appraiser was not licensed to appraise property in West Virginia. The Circuit Court claimed it made this ruling based on its review of an online listing of appraisers with the West Virginia Real Estate Appraiser Licensing and Certification Board ("WVALCB"). However, Petitioner's appraiser had a temporary appraisal license and those licenses are not listed online by the WVALCB. Counsel for Petitioner advised the Court that Petitioner's appraiser had a temporary appraisal license at the hearing on April 23, 2012.

The Circuit Court also ignored the evidence of assessments of other comparable properties, including several properties with apartment and townhome complexes that had lower per unit assessments than the Property.

The Circuit Court relied on evidence that was not relevant to the Property's value. The Circuit Court relied on the amount that the Property was insured for fire insurance purposes, even though that amount was a replacement value estimate and included personal property and equipment. The Circuit Court also relied on an appraisal from the Council which was based on income data more than a year after the valuation date of July 1, 2010, and used amounts billed instead of amounts collected in its income determination.

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<sup>2</sup> The Assessor's manual was provided by the Tax Commissioner to all county assessors in West Virginia ("Assessor's Manual"). The Assessor and her staff refer to that manual as the "Bible." (A.R. 539). The Assessor admitted that she did not follow the requirements or procedures set forth in her own "Bible," including, specifically, those requirements and procedures related to income appraisals. (A.R. 544-45, 552, 555).

The Circuit Court’s assessment is also clearly erroneous and an abuse of discretion because it will result in real property taxes that equal two and one-half months’ net income for the Property.

Lastly, the Circuit Court violated Petitioner’s equal protection rights under the United States and West Virginia Constitutions. The Assessor has admitted that she used the income approach to value for the assessment of other similar apartment and town home complexes and the assessment of apartment complexes was not equalized on an income basis. (A.R. 552, 582). This violates the constitutional and statutory requirements that taxes be “equal and uniform” and “citizens will be treated fairly.” Article X, §1 of the Constitution of West Virginia; West Virginia Code §11-1C-1(a).

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This case presents issues of fundamental public importance that will affect all property owners in West Virginia and involves constitutional questions. In this case, this Court will determine, *inter alia*, if assessors can use different methods of valuation for similar properties resulting in vastly unequal valuations, in violation of the West Virginia Code of State Rules and the West Virginia Constitution. For these reasons, this case is appropriate for a Rule 20 oral argument and decision.

**ARGUMENT**

**I. STANDARD OF REVIEW**

The Supreme Court of Appeals reviews the Circuit Court's Final Order and ultimate disposition of a tax assessment challenge under an abuse of discretion standard. Mountain

America, LLC v. Huffman, 224 W.Va. 669, 678, 687 S.E.2d 768, 777 (2009). This Court also reviews challenges to a circuit court's findings of fact under a "clearly erroneous" standard, but conclusions of law are reviewed "*de novo*." In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, 223 W.Va. 14, 18-19, 672 S.E.2d 150, 154-155 (2008), *citing* Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996) and Walker v. West Virginia Ethics Com'n, 201 W.Va. 108, 492 S.E.2d 167 (1997). The interpretation of a statute, or the constitutionality of a statute, as written or as applied, as in this case, presents a purely legal question subject to *de novo* review. In re Foster Foundation's, 223 W.Va. at 19, 672 S.E.2d at 155, *citing* Appalachian Power Co. v. State Tax Dept. of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995) and Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995).

## **II. THE CIRCUIT COURT'S DECISION WAS WRONG AS A MATTER OF LAW AND CLEARLY ERRONEOUS AS TO THE FACTS**

In West Virginia, the assessed value of a property must be set at sixty percent (60%) of its true and actual value. See Mountain America, 224 W.Va. at 676, n.8, 687 S.E.2d at 775. "True and actual value" means fair market value, which is what the property would sell for if it were sold on the open market. Id. at 687, 786, n.25, *citing* Kline v. McCloud, 174 W.Va. 369, 326 S.E.2d 715 (1984).

The Circuit Court ruling was clearly erroneous in setting the 2011 assessed value of the Property at \$6,551,735.00. The determination was clearly erroneous for the following reasons: (a) the Circuit Court arrived at the above amount by averaging the Assessor's 2010 cost approach to value assessment with an admittedly improper income approach to value assessment done by the Assessor in 2011; (b) the Circuit Court determined that the value set by the Assessor should be "accorded great deference and presumed to be correct," even though the Assessor admitted it's valuation was erroneous; (c) the Circuit Court determined that the Assessor was not

required to consider an income approach to value for the Property, even though it was required by the State Rules and the Assessor's Manual and actually done for other comparable properties; (d) the Circuit Court ignored all the evidence of value presented by Petitioner; (e) the evidence relied on by the Circuit Court was not relevant to the Property's value; (f) the Circuit Court's assessment would result in taxes which would equal approximately one and one-half months of the Petitioner's gross income for the Property; and (g) the Circuit Court violated Petitioner's equal protection rights under the United States and West Virginia Constitutions.

**A. The Circuit Court erred in averaging the Assessor's 2010 cost approach assessment with an admittedly improper 2011 income approach assessment.**

The Circuit Court's approach of averaging two different valuation methodologies for no other reason than to "split the baby" is in and of itself clearly erroneous and by such a method a trier of fact cannot possibly arrive at the true and correct value of the Property. When different methods of appraisal do not yield similar results, averaging the different results does not remedy the error. In re Nat'l Bank of West Virginia at Wheeling, 137 W.Va. 673, 688, 73 S.E.2d 655, 664 (1952) ("If either method is approximately correct, the other methods clearly are erroneous. Yet the sum total of the errors is reflected in the average of the three methods."), *overruled on other grounds by* In re Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649 (1959).

Even assuming, *arguendo*, that the Circuit Court's averaging of two different assessment methodologies for 2011 was a valid way to reach an assessed value, the Circuit Court mistakenly used the 2010 cost approach in its calculations instead of the 2011 cost approach. The Circuit Court claimed there was a mistake by the Council in its mathematics of averaging its cost and income approaches to value. It was the Circuit Court that was in error, however, not the Council. In its Findings of Fact, the Circuit Court initially and correctly noted that the 2010 Assessment was \$7,895,530.00 and the 2011 Assessment was \$7,593,430.00. (A.R.1146-47). However, the

Circuit Court subsequently incorrectly stated that the 2011 Assessment was \$7,895,530.00<sup>3</sup> and averaged that amount with the 2011 income approach assessment (\$5,207,940.00) to come up with its value of the Property (\$6,551,735.00). (A.R.1148). The Circuit Court then erroneously concluded that the Council had made a mathematical error. (A.R.1160). This mistake by the Circuit Court resulted in the Circuit Court increasing the 2011 Assessment by approximately \$150,000.00. The 2010 cost approach assessment is not relevant to the 2011 Assessment. See West Virginia Code §11-3-1.

As part of its calculation of the assessed value of the Property, the Circuit Court also used the 2011 income approach assessment that the Assessor admitted was erroneous. The 2011 income approach assessment of the Property was performed by the Assessor during the appeal process of the 2011 Assessment and 2010 Assessment and specifically when these appeals were before the Council. To date, the Assessor has not explained how the 2011 income approach assessment was performed. However, the Assessor has admitted that the 2011 income approach assessment was not correctly done, calling it a “hybrid” income approach assessment. (A.R.1158). The Circuit Court confirmed this stating that the 2011 income approach assessment “differ[ed] from that described in the Code of State Rules.” (A.R.1158).

Therefore, the Circuit Court’s calculation of the value of the Property for assessment purposes was clearly erroneous in every respect.

**B. The Circuit Court erred in giving a presumption of correctness to the value set by the Assessor, even though the Assessor admitted its valuation was erroneous.**

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<sup>3</sup> The Circuit Court, in the Final Order, makes specific reference to the Board’s letter ruling of February 24, 2011 but incorrectly states that this letter ruling “reduced the previously assessed value from \$7,895,530.00 to \$6,400.690.00.” (A.R.1148). The letter of February 24, 2011 actually states that the value is reduced from the previously assessed value of \$7,593,430.00 to \$6,400.690.00. (A.R. 169).

One of the bases used by the Circuit Court to support its opinion of value was the valuation set by the Assessor. The Circuit Court found that “the valuation set by the Assessor is ‘accorded great deference and is presumed to be correct.’” (A.R. 1154, *citing Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 701, 688 S.E.2d 300 (2009)). However, as stated by this Court, “there must be a proper assessment before there can be a presumption that the assessment is correct, and where it appears that there was no proper assessment there can be no presumption in favor of the correctness of the assessment.” *In re Pocahontas Land*, 158 W.Va. at 235-36, 210 S.E.2d at 646-47, *citing Consolidated Gas*, 101 Md. at 541, 61 A. at 532. In this case, the Assessor admitted that the 2011 Assessment was not in accordance with the State Rules. (A.R. 540; 1098). When there is a violation of a statute or, in the instant case, the State Rules (which have the force and effect of law<sup>4</sup>) governing the assessment of property, there is no presumption of correctness or deference to the assessor’s determination. *In re Foster Foundation’s*, 223 W.Va. at 34, 672 S.E.2d at 170, *citing In re Tax Assessments Against the S. Land Co.*, 143 W.Va. 152, 100 S.E.2d 255 (1957). Thus, in the instant case, *In re Pocahontas Land*, “the burden was not on the appellant to show . . . that the assessments were erroneous.” *In re Pocahontas Land*, 158 W.Va. at 235-36, 210 S.E.2d at 646-47.

**C. The Circuit Court erred in finding that the Assessor was not required to consider an income approach to value.**

As part of its determination, the Circuit Court found that the Assessor is not required to consider the income approach to value as part of its assessment of the Property. This

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<sup>4</sup> As found by the Circuit Court, the State Rules governing an assessor’s duties in valuing real property are ‘legislative rules’ as defined by the State Administrative Procedures Act, W.Va. Code § 29A-1-2(d) [1982], and such legislative rules have the force and effect of law. *State ex rel. Maple Creative LLC v. Tinchler*, 226 W.Va. 118, 121, 697 S.E.2d 154, 157 (2010).

determination was clearly erroneous and contradicted by: 1) the requirements of the State Rules; 2) contrary precedent of this Court; 3) the Assessor's Manual; and 4) the Assessor's use of the income approach to value comparable (and competing) properties.

The West Virginia Code of State Rules §110-1P-2.1.1 *et. seq.* states:

Additional, for purposes of appraisal of any tract or parcel of real property used for commercial or industrial purposes, including chattels real, the appraisal shall consider the following factors:...

**2.1.1.9 The income, if any which the property actually produces and has produced within the next preceeding three (3) years....**

2.1.4 Each of these factors [above] should be considered in the appraisal of a specific parcel. Some, however, may be given more weight than others.

(emphasis added).

Further, in §110-1P-2.2.1, the State Rules state:

**In determining an estimate of fair market value, the Tax Commissioner will consider and use, where applicable, three (3) generally accepted approaches to value: (A) cost, (B) income, and (c) market data.**

(emphasis added).

The Circuit Court concedes that the Assessor is required to consider the “the income, if any, which the property actually produces...” However, the Circuit Court interprets §110-1P-2.2.1 in the State Rules to give an assessor the option to ignore the income approach to value. Specifically, the Circuit Court interprets the phrase “where applicable” to apply to both “consider and use.” (A.R. 1156). This interpretation by the Circuit Court is contradicted by the requirement in §110-1P-2.1.1.9 to consider the income of the Property. By definition, considering the income approach to value means considering the income of the Property.

In addition, such an interpretation is inconsistent with this Court's decision in Stone Brooke, 224 W.Va. at 691, 688 S.E.2d at 300. In Stone Brooke, this Court reversed and remanded each of the consolidated cases back to the circuit court to determine if each of the

enumerated factors in W. Va. C.S.R. §§110-1P-2.1.1 to 2.1.4 had been considered, calling them “requisite factors.”

Therefore, it is quite apparent to this Court that, despite the fact that all of the factors set forth in W.Va. C.S.R. §§110-1P-2.1.1 to 2.1.4 are required to be considered when appraising commercial real property, such an analysis is rarely completed.

Id. at 706, 315.

One of these “requisite factors” is “the income, if any, which the property actually produces and has produced within the next preceding three (3) years.” Id. at 704, 313. Once an assessor has considered all of the “requisite factors,” and only after an assessor has done this, does an assessor have the discretion to select the most accurate appraisal method for the property under consideration. See Id.

This Court’s decision in Bayer MaterialScience, LLC v. State Tax Com’r, 223 W.Va. 38, 672 S.E.2d 174 (2008), is consistent with the above. In Bayer, this Court found that the Tax Commissioner had correctly followed the regulations governing valuation of, in that case, industrial real property, because it appraised the property in accordance with, and considered, the various methodologies and approaches. The Court then concluded, “Other than disagreeing with the appraised values the Tax Commissioner obtained by following the appraisal methods prescribed by these regulations, Bayer has not demonstrated by clear and convincing evidence that the Tax Commissioner’s appraisal of . . .[the] real property was wrong.” Bayer, infra at 54-55, 190-91. Thus, an assessor only has the discretion to choose among the various methodologies to the extent he complies with the State Rules. Bayer, infra at 54-55, 190-91.

Even assuming arguendo that the Circuit Court’s interpretation of §110-1P-2.2.1 is correct and the Assessor is only required to “consider AND use” the income approach to value “where applicable,” there can be no dispute that the income approach to value is applicable in

this instance. The Assessor's manual and her assessment of similar, comparable properties using an income approach to value confirm that the income approach to value is applicable to the Property. The Assessor's Manual provides for the Assessor to do an income approach to value for commercial properties. (A.R. 539-45). The Assessor also admitted that she had assessed other comparable properties (including other apartment complexes) using an income approach to value. (A.R. 582, 591). Thus, there can be no dispute that the income approach to value was applicable to the Property and the 2010 Assessment and 2011 Assessment.

Not only is the Assessor required to consider the income produced by the Property, but the Assessor had an affirmative duty to seek, from the taxpayer or elsewhere, whatever data was necessary to perform her functions.

The county assessor, a constitutional officer, is charged with the responsibility of assessing properties in the county at their true and actual value. Code, 1931, 11-3-1, as amended. See Hazelwood Company v. Pitsenbarger, Assessor, 149 W.Va. 485, 141 S.E.2d 314 (1965). In the accomplishment of that required endeavor **it is incumbent upon the assessor to seek out all information which would enable him to properly fulfill his legal obligation.** See Younger v. Meadows, 63 W.Va. 275, 59 S.E. 1087 (1907).

In re Shonk Land Co., 157 W.Va. 757, 761, 204 S.E.2d 68, 70 (1974) (emphasis added); accord Kline, 174 W.Va. at 372, 326 S.E.2d at 718 (1984) (“In determining the fair market value of a piece of land, a county assessor must seek out all information which would enable him to properly fulfill his legal obligation”).

Even if the Circuit Court's interpretation of the State Rules and Stone Brooke were correct, and the Assessor is only required to consider an income approach to value “where applicable” under that interpretation the Assessor is not free to ignore income data when available, as here.

In the instant case, the Assessor did not request income data until December 2010. As the Circuit Court noted, Petitioner then promptly supplied that income data. (A.R. 878, 1147). The Circuit Court, however, then stated: “An assessor cannot consider the income method if there is no income to use.” This conclusion by the Circuit Court is blatantly inconsistent with the facts as found by this Court.

Based on Stone Brooke and the State Rules, an assessor must “consider” the income of the Property and an income approach to value in its assessment of the Property.

**D. The Circuit Court ignored all the proper evidence of value of the Property.**

**1. The Circuit Court ignored Petitioner’s Appraisal**

In reaching its decision, the Circuit Court relied on the appraisal submitted by the Council but refused to consider the appraisal submitted by Petitioner, stating “Petitioner’s appraisal is completed by someone not licensed to appraise property in West Virginia.” (A.R. 1159). In a footnote, the Circuit Court stated:

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 complete in 2012.

(A.R.1159).

No such admission was made by Petitioner’s counsel (A.R. 974). Further, temporary licenses are not listed on the online roster referred to by the Circuit Court<sup>5</sup>. While Petitioner’s appraiser did in fact have a temporary license at the time he performed his appraisal work, such is not necessary. The testimony of an expert appraisal witness is not governed by the Code of West Virginia or licensure regulations but rather by Rule 702 of the Rules of Evidence. Teter v.

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<sup>5</sup> As the issue of the roster was brought up by the Circuit Court *sua sponte* for the first time in the Order, there is no evidence of this in the record. That temporary licenses are not listed on the online roster was confirmed with the West Virginia Real Estate Appraiser Licensing and Certification Board.

Old Colony Co., 190 W.Va. 711, 723-24, 441 S.E.2d 728, 740-41 (1994); West Virginia Div. of Highways v. Butler, 205 W.Va. 146, 149-151, 516 S.E.2d 769, 772-774 (1999).

**2. The Circuit Court erred in ignoring evidence of assessments of comparable properties**

The taxes based on the value set by the Circuit Court are \$41,998 per unit. (A.R. 289). Of competitive garden-style apartment properties in Berkeley County, the next highest assessed value on a per unit basis is \$36,840, a complex built in the same time period as the Property. (A.R. 906).

The Circuit Court cited as support for its decision that the Property was newer and larger than any of the comparable complexes. (A.R. 1159). Even assuming *arguedo* these “factors” were true, neither factors justifies the significant difference in assessed value. As pointed out by Petitioner’s appraiser, (which the Circuit Court refused to consider), the size of the complex can be accounted for by viewing the assessed value on a per unit basis. Moreover, the Circuit Court was clearly erroneous in stating that the only comparable properties were significantly smaller and older than the Property. (A.R.1159). This is directly contrary to the uncontroverted evidence. As discussed above, and in the report by Petitioner’s appraiser, Stoney Pointe, a comparable property to the Property and built during the same period as the Property, has a per unit assessed value of \$36,840. (A.R. 906). Pheasant Run, a townhouse-style instead of garden-style apartment, with units thirty percent (30%) larger than those on the Property, and thus of a higher value per unit, was assessed at \$41,016.00 per unit. (A.R. 906).

The Circuit Court’s refusal to consider Petitioner’s appraisal or these comparables was clearly erroneous and a violation of equal protection under Article X, §1 of the Constitution of West Virginia and West Virginia Code §11-1C-1(a).

**E. The Circuit Court erred by relying on evidence that was not relevant to the Property's value.**

**1. The Circuit Court improperly relied on the fire insurance value**

The Circuit Court attempted to justify its finding of an assessed value of \$6,551,735.00 by pointing out that the value established for fire insurance purposes was \$17,000,000.00 which, at sixty percent (60%), would result in an assessed value of \$10,200,000.00. However, a value for fire insurance purposes is just another replacement cost approach and has no relationship whatsoever to the fair market value – as required by state law. Moreover, the value established for fire insurance purposes includes personal property and equipment not assessable for real property tax purposes. Although Petitioner has not found a case in West Virginia addressing this issue, a New York court recognized that fire insurance coverage should not be given great weight in determining assessed value for real property tax purposes. Senpikie Mall Co. v. Assessor, 136 A.D.2d 19, 21, 525 N.Y.S.2d 104, 105 (N.Y.A.D. 4 Dept. 1988).

**2. The Circuit Court relied on a clearly erroneous appraisal**

The Circuit Court also relied on the appraisal submitted by the Council. Because it determined Petitioner's appraiser was unlicensed in West Virginia and thus his report was unworthy of any consideration, the Circuit Court made no evaluation whatsoever of the two appraisal reports. Had it done so, it would have found the following:

- The Council's appraiser used data from September 2011, more than a year after the valuation date of July 2010, resulting in overstated income and understated expenses (A.R. 485-92);
- The Council's appraiser, in his income approach valuation, used income figures that were approximately \$200,000.00 over actuals, a difference of nearly thirty percent (30%) (A.R. 494, 941);

- The Council's appraiser used income figures based on billings, not collections (A.R. 492);
- The Council's appraiser made no attempt to compare the per unit tax assessment to the per unit assessment for comparable properties (A.R. 445); and
- Petitioner's appraiser based his income approach on actual income and expenses for the relevant time period, which is the twelve-month period prior to the valuation date of July 1, 2010. (A.R. 936-37).

The Circuit Court's reliance on both the fire insurance value and the Council's appraisal was clearly erroneous.

**F. The Circuit Court's assessment will result in taxes on the Property that equal approximately one and one-half month's gross income.**

Apartment buildings are bought and sold based on the income they can produce. It is agreed by all authorities that the income approach to value is the best way to determine fair market value for income-producing commercial properties. This has been stated succinctly as follows:

Evidence of income derived, or which can be derived, from real property may at times constitute more persuasive evidence of the price at which the income-producing property can be sold in ordinary circumstances than evidence of actual sales of more or less similar property under more or less similar conditions, for we know that in ordinary circumstances investors will pay for income-producing property a price measured in large part by the amount and certainty of the income which can be obtained from such property. On the other hand, we also know that an investor will not pay more for an income-producing property than the amount for which he could acquire at less cost property which would with equal certainty produce an equal income, either by purchase in the open market or by purchasing unimproved property and erecting upon it a similar improvement.

People ex rel. Parklin Operating Corporation v. Miller, 287 N.Y. 126, 129-130, 38 N.E.2d 465, 467 (1941).

The resulting taxes for the Property based on the assessed value set by the Circuit Court for tax year 2011 are \$200,823.78. The gross income for the Property for the period of July 1, 2009 through July 1, 2010 was \$1,761,066.00 per year. Thus, the real estate taxes represent approximately one and one half month's worth of gross income from the Property. Based on common sense alone, to set the assessed value at such an amount is clearly erroneous, and thus the Circuit Court's decision constitutes an abuse of discretion.

**G. The Circuit Court violated Petitioner's equal protection rights under the United States and West Virginia Constitutions.**

In the Final Order, the Circuit Court recognized that "[t]ax assessments implicate Constitutional principles" and that the West Virginia Constitution requires that tax assessments be done in an equal and uniform manner. (A.R. 1150). However, the Circuit Court then ignores these principles and never addresses Petitioner's assertion that these principles were violated by assessing the Property by a different method and at a much higher valuation (on a per unit basis) than comparable properties.

Because the Assessor used an income approach to value for other similar properties in Berkeley County which resulted in lower assessments for those properties, this created a result of grossly unequal valuations in violation of the Article X, §1 of the Constitution of West Virginia, West Virginia Code §11-1C-1(a) and the State Rules.

Although, as discussed above, the State Rules do not mandate the use of one particular method of valuing commercial real property, an assessor is required to treat similar properties similarly. Article X, §1 of the Constitution of West Virginia; West Virginia Code §11-1C-1(a).

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 §11-1C-1(a) states:

All property in this state should be fairly and equitably valued wherever it is situated so that all citizens will be treated fairly and no individual species or class of property will be overvalued or undervalued in relation to all other similar property within each county and throughout the state.

The State Rules relating to the assessment of commercial properties requires that all similar properties be assessed in a uniform manner and requires that the income approach be used as part of the assessment of commercial properties, such as the Property. See West Virginia Code of State Rules § 110-1P-2.

The Circuit Court violated the above requirements of the Constitution, Code and State Rules when it treated the Property differently from other similar apartment complexes. For the 2011 tax year, for numerous properties similar to the Property (including the apartment complexes known as Polo Greene, Martin's Landing, Timber Leaf, and Fountainhead), the Assessor did not use the cost approach but instead used the income approach. (A.R. 582, 591). The Assessor through its employee Tamera Edgar ("Ms. Edgar") admitted this resulted in lower assessed values for these properties than would have been arrived at using the cost approach. (A.R. 552).

Furthermore, Ms. Edgar admitted during her deposition that the assessments of the Property and other similar properties were not equalized on an income basis.

Q. And so I'm asking you with -- in the context of equalizing property values, is it fair to say that you did not equalize property values for apartment houses because you didn't use income information for all of them? You just used it for some of them.

A. Well, I used the income for the ones that requested it. I believe that they're equalized in that when I go out and I do review, that they are all graded consistently in the same manner.

**Q. But they weren't equalized on an income base?**

**A. No, they were not.**

(A.R. 552).

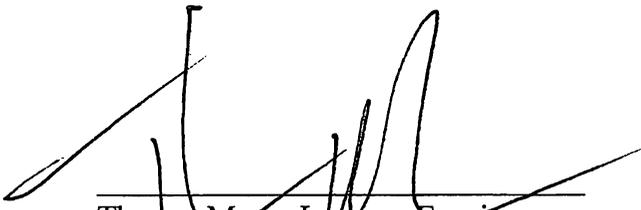
Further, as pointed out by Petitioner's appraiser, comparable garden-style apartment complexes, in age and other amenities, viewed on a per unit basis to adjust for size differences, were valued significantly lower than the Property whereas the Property's per unit valuation was more akin to the valuation of superior townhouse style units.

Therefore, there can be no dispute that the Assessor violated the West Virginia Constitution, the West Virginia Code, and the West Virginia Code of State Rules, in performing the 2011 Assessment.

## CONCLUSION

The Circuit Court's order denying the Petition for Appeal and failing to decrease the 2011 tax assessment should be reversed, and Petitioner's 2011 Assessment should be reduced to \$3,492,696.00, or alternatively, this matter should be remanded for further proceedings.

Respectfully submitted,  
LEE TRACE LLC  
By Counsel



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### CERTIFICATE OF SERVICE

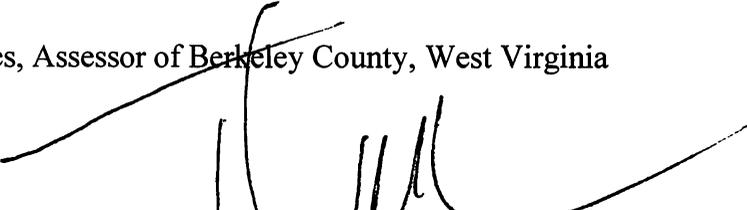
I hereby certify that on this 20<sup>th</sup> day of November, 2012, true and accurate copies of the foregoing Petitioner's Brief were deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows:

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