

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0992

**LEE TRACE LLC,
Petitioner,**

v.

**Respondent Brief In Support of The
Final Order of The Circuit Court of
Berkeley County
(11-AA-2)**

**GEARL RAYNES, AS ASSESSOR FOR
BERKELEY COUNTY, WEST VIRGINIA,**

**BERKELEY COUNTY COUNCIL SITTING AS
BOARD OF REVIEW AND EQUALIZATION,
and**

**BERKELEY COUNTY COUNCIL,
Respondents.**

**RESPONDENT ASSESSOR'S
BRIEF**

**Michael D. Thompson, Esq.,
Counsel for Respondent Assessor Gearl Raynes
Thompson & Pardo, PLLC
119 East Liberty Street
Charles Town, WV 25414
West Virginia Bar No. 3747
Phone: (304) 728-8808
FAX: (304) 885-0170
Email: mthompson@thompsonpardo.com**

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STATEMENT OF THE CASE

Petitioner Lee Trace LLC (“Petitioner”) owns an apartment complex consisting of 156 apartment units located on 17.02 acres at 15000 Hood Circle, Martinsburg, West Virginia, designated on Tax Map 36/0010 0000 0000 (the “Property”). (A.R.6, 411. 1145). The property was appraised and assessed by the Berkeley County Assessor’s Office as land only for the tax year 2009, as construction on the apartment complex was not yet complete. However, by the July 1, 2009, statutory assessment date for tax year 2010, construction of the apartment buildings and other structures was complete, and the assessed value on the property for tax years 2010 and 2011 reflect a completed project (A.R. 717). Petitioner listed the “(f) ace amount of fire insurance carried” on the “Application for Review of Property Assessment” dated February 10, 2011 as \$17,000,000.00. (A.R. 279). On the same document Petitioner declared the cost of construction of the apartment complex to be \$12,927,378.00 (A.R. 279). The Respondent Assessor’s predecessor in office, assessed the subject property for tax year 2010, based upon the statutory assessment date of July 1, 2009, at \$7,895,530.00 (the “2010 Assessment”). (A.R. 17). The Respondent Assessor’s predecessor in office, assessed the subject property for tax year 2011, based upon the statutory assessment date of July 1, 2010 at \$7,593,430.00 (A.R. 11). Petitioner failed to seek review before the Respondent Berkeley County Council sitting as a Board of Review and Equalization for its 2010 tax assessment during February, 2010, when that body was in session. (A.R. 24-29) However, in February, 2011, Petitioner sought review of the assessment of the subject property for the tax year 2010 claiming inter alia that Petitioner did not receive proper notice of its right to appeal the 2010 assessment, and that the Assessor had made clerical errors in the 2010 assessment (A.R. 24). This request for review of the 2010 assessment of the subject property, pursuant to W.Va. Code§11-3-2a, was denied by the Berkeley County

Council (A.R. 385). Petitioner appealed this denial of review of the 2010 tax assessment of the subject property by the Berkeley County Council to the Circuit Court of Berkeley County. By order dated March 23, 2012, the Judge of the Circuit Court of Berkeley County denied the Petitioner's appeal concluding that the notice sent by the Berkeley County Assessor was adequate under W.Va. Code § 11-3-2a, that the issues raised by Petitioner concerning alleged "clerical error or mistake" made by the Respondent Assessor did not constitute "clerical error or mistake" as set forth in W.Va Code § 11-3-27, and therefore the conclusion of the Berkeley County Council in refusing to consider Petitioner's request for relief for the 2010 tax assessment as not timely filed, was correct and was affirmed. (A.R. 883-886). Petitioner subsequently appealed this decision of the Circuit Court (Docket No. 12-0638).

While the Berkeley County Council declined to hear Petitioner's appeal of the 2010 tax assessment of the subject property, the Berkeley County Council Sitting As A Board Of Review And Equalization (hereinafter Board) did hear Petitioner's appeal of the 2011 tax assessment of Petitioner's property. Petitioner argued at the hearing before the Board that the Respondent Assessor's predecessor in office had appraised and subsequently assessed Petitioner's property based on "...a market-based..." approach, and that "...no consideration..." was given to an income-based appraisal whereas..."complexes that are comparable to ours, they were done on an income-based..." approach. (A.R.706). An appraiser from the Respondent Assessor's office proffered that the assessor's office uses a cost approach and a sales approach to value apartment complexes (A.R. 715). It was explained by the appraiser from the Respondent Assessor's office that she didn't "...have a data base of income from apartment complex owners to build an income approach..." (A.R715). The appraiser from the Respondent Assessor's office admitted that counsel for the Petitioner had recently sent her "...some information for Lee Trace, but it's

actually not all that I need to do an income approach for the 2011 tax year.” (A.R.715). Later in her deposition the appraiser from the Respondent Assessors’ s office testified that she could not develop a capitalization rate to do an income approach as required by W.Va. Code of State Rules §110-1p-2.2.1.2. “...by dividing annual net income by the current selling price of comparable properties...” because “...if you do not have a sale of an apartment complex during that year, you’re not going to be able to develop a cap rate using this method. You can’t do it if you don’t have the information.” (A.R.758). The appraiser pointed out “...to my knowledge, I have not had an open market sale of apartment complexes recently in this county.” (A.R.758). In her deposition testimony the appraiser noted that Petitioner only provided operating statements for 2008 and 2009 (which disclosed only contract rent charged Petitioner’s tenants) by letter dated January 25, 2011, shortly before the commencement of Board of Review and Equalization in February, 2011 (A.R.758). Petitioner’s final disclosure of 2010 rental and expense information was not received until on or about February 22, 2011 during Board of Review and Equalization. (A.R.759). As the Respondent Assessor’s predecessor in office was required by W.Va. Code §11-3-24 to turn over to the Board of Review and Equalization the completed property book at its first meeting in February, 2011, this late disclosure of the Petitioner’s 2010 information was not timely. The appraiser from the Respondent Assessor’s office testified in her deposition that the Respondent Assessor utilizes sales (market data) approach and cost approach appraisals to appraise commercial property, but will do an income approach appraisal if requested by the taxpayer (A.R.628-629, 648-649,714). She explained that was at the direction of Mr. Amburgey of the State Tax Department (A.R 648). In her proffer to the Board at the February 3, 2011 session and later in her deposition, the appraiser from the Respondent Assessor’s office explained that, if requested the income approach appraisal is done during the Board of Review

and Equalization. (A.R. 648-649, 714). The appraiser from the Respondent Assessor's office proffered to the Berkeley County Council at the February 3, 2011 session of the Board of Review and Equalization that while an income approach appraisal was performed on other apartment complexes, these other apartment complexes were older than Petitioner's apartment complex, which was new and appropriately appraised using the sales (market data) and cost approach appraisal. (A.R.713, 726). Apparently it was agreed by Petitioner's counsel and the Berkeley County Council, that Petitioner's counsel would furnish additional income approach information to the appraiser from the Respondent Assessor's office who would calculate a value for Petitioner's property using an income approach appraisal (A.R. 726). This additional income and expense information for 2010 was furnished by Petitioner to the appraiser from the Respondent Assessor's office on or about February 22, 2011 (A.R.759). The appraiser from the Respondent Assessor's office performed an income approach appraisal utilizing this furnished information on behalf of and at the request of the Board. (A.R. 389, 394, 405). The Board took the income approach appraisal it requested and the Respondent Assessor's appraised value as reduced to assessed values or sixty (60%) percent of the values and averaged the two and determined the assessed value of the Petitioner's property to be \$6,400,690.00. Petitioner now disputes the income approach appraisal performed by the appraiser from the Respondent Assessor's office which determined the value of the Petitioner's property to be \$5,207,940.00 (Petitioner's Brief, 3). However, Petitioner's counsel agreed with the Board to furnish additional income and expense information to the appraiser from the Respondent Assessor's office to make the income approach appraisal of Petitioner's property on behalf of and at the request of the Board of Review and Equalization, and not on the behalf of the Respondent Assessor. There is no suggestion that income approach appraisal performed by the appraiser from the Respondent

Assessor's office was performed differently than performed upon request for other taxpayer's owning commercial property. However, as testified to by the appraiser in her deposition, the income approach appraisals performed by her for other properties, upon request during Board of Review and Equalization, was a hybrid income approach utilizing actual contract rent, not "economic rent" as required by W.Va. Code of State Rule §110-1p-2.2.1.2; §110-1p-2.3.6 (A.R. 759-760), and by utilizing a commercial capitalization rate and not by dividing annual net income by the current selling price of comparable properties as required by W.Va. Code of State Rule §110-1p-2.2.1.2 (A.R. 537-538, 554-555, 758). As explained by the appraiser from the Respondent Assessor's office she did not have any sales of comparable apartment complex to construct a capitalization rate as required by the rule nor did she have a database of income from apartment complex owner's to build an income approach. (A.R. 537-538, 554-555, 715).

Petitioner then appealed the determination made by the Board to the Circuit Court of Berkeley County (A.R. 5-21). Petitioner asserted in its Petition for Appeal that the assessed value of the Petitioner's property based upon an income approach appraisal for tax year 2010 was "...no more than \$3,676,726.00...", " and \$3,492,696.00..." for tax year 2011. (A.R.14). The Circuit Court of Berkeley County took up the issue of the correctness of the 2011 tax year assessment of the Petitioner's property. Noteworthy is the fact that Petitioner asserts that the value of its property, which is a newly constructed apartment complex is considerably less than the cost of its construction and the face amount of the fire insurance on the structures of the property.

Petitioner in its Petition for Appeal, Statement of the Case, asserts that the Circuit Court of Berkeley County "...found that they value set by the Assessor in the 2011 was entitled to presumption of correctness, even though the Assessor admitted that she violated the law when

she performed the 2011 Assessment.” (Petitioner’s Brief, 2, citing A.R. 1154). A review of the order of the Circuit Court of Berkeley County discloses that the Judge of the Circuit Court of Berkeley County found that the Respondent Assessor’s value was set on Petitioner’s property utilizing the cost approach method of appraising property, authorized by W.Va. Code of State Rule §110-1p-2.2.1., further finding that the Respondent Assessor has discretion in selecting the appropriate appraisal method. (A.R. 1154, 1155-1157). Petitioner in its Petition for Appeal, Statement of the Case also asserts that “...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...” (Petitioner’s Brief, 4, citing A.R. 1155-56). However the Circuit Court of Berkeley County found in its final order “... (a) n assessor cannot consider the income method if there is no income to use...” (A.R. 1156). This reference to “...no income to use...” is no doubt a reference to late disclosure by Petitioner during the course of the 2011 session of the Board of Review and Equalization of 2010 income and expense information for Petitioner’s property, that was disclosed after the Respondent Assessor delivered the property books to the Board of Review and Equalization as required by W.Va. Code §11-3-24.

Petitioner in its Petition for Appeal, Statement of the Case, asserts that the Circuit Court of Berkeley County “...rejected and ignored the evidence presented by Petitioner including a validly conducted appraisal and the assessments of comparable properties...”, and “(t) he Circuit Court incorrectly found that the appraiser who performed the appraisal for Petitioner was not licensed in West Virginia.” (Petitioner’s Brief, 4, citing A.R. 1159). As pointed out by counsel for the Respondent Assessor, Petitioner provided the only formal written appraisal in this case supposedly supporting its position, on the 17th day of April, 2012, some six days prior to final argument in this case on April 23, 2012. (A.R. 891-898, 899-917, 974-1062). As pointed out to

the court, Petitioner's appraiser, L. Steven. Noble of Noble Valuations, LTD only had a temporary license from the W.Va. Real Estate Appraiser Licensing and Certification Board for a portion of 2011 (A.R. 900), the date of Mr. Noble's "Certification" of his appraisal was April 17, 2012 (A.R. 902), and at page 10 of the report entitled, "Intended Use and Scope of Work", Mr. Noble reports that "(t)he date of the report is April 17, 2012, but he began the engagement in December 2010, and observed the property on December 22, 2010, when photographs of the property were taken. (A.R. 912). The court in its order noted that Mr. Noble, Petitioner's appraiser was "...not licensed to appraise property in West Virginia." (A.R. 1159). The Court further notes in footnote 4 that "...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." (A.R. 1159). The Circuit Court cited to W. Va. Code §30-38-1 et. seq. in footnote 4, which statute requires licensure for certain persons who render appraisal reports on real property in West Virginia. (A.R. 1159). However, the Circuit Court considered Mr. Noble's appraisal, but found that Mr. Noble's lack of a license; "... (t) his fact, along with the other evidence in the record renders Petitioner's appraisal unpersuasive." (A.R. 1159). Based on this finding it would appear that the Circuit Court considered Petitioner's appraisal performed by Mr. Noble of Noble Valuations, Ltd. of Roanoke, Virginia, but having considered it, found it unpersuasive because of other evidence in the record as well as Mr. Noble's lack of a temporary license in West Virginia from the West Virginia Real Estate Appraiser Licensing and Certification Board.

The Circuit Court of Berkeley County in its order of July 24, 2012 concluded that 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." (A.R.1149). The Circuit Court further found "...a Board of Equalization and Review clearly has authority to equalize assessments by increasing or decreasing them." (A.R.1157). The Circuit Court concluded, "...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 cost approach") is within its authority." (A.R. 1158). The Court noted that the assessed value of \$6,400,690.00 was "...not an accurate average of the two values." (A.R. 1159). The Circuit Court then set the "...mathematical average of the cost and income approaches to assessment, which is \$6,551,735.00. " (A.R. 1160).

Petitioner in Petitioner's Brief, Statement of the Case, asserts that the Circuit Court improperly "...justified its valuation of the Property by relying on the amount for which the property was insured for fire insurance purposes..." and "...a clearly erroneous appraisal which included income and expense data after the valuation date." (Petitioner's Brief, 4, citing A.R. 1159). However, a review of the July 24, 2012 order in this case, discloses that the Circuit Court did not find that the face amount of the fire insurance, or the appraisal by a licensed West Virginia appraiser submitted by the County were determinative, but rather they merely support the assessed value arrived at by the Board by averaging the Respondent Assessor's cost approach assessment with the hybrid income approach assessment requested by the Board.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case does not present fundamental issues that require oral argument, and is appropriate for memorandum decision.

SUMMARY OF ARGUMENT

The Circuit Court of Berkeley County correctly set the value of Petitioner's property. Petitioner asserts that averaging of valuations obtained by two different appraisal methods was improper and clearly erroneous. However, averaging of the appraisals that have a credible basis has been deemed by some courts to be an appropriate technique to arrive at true market value of property. Lake Charles Harbor and Terminal Dist. v. Henning, 409 F. 2d 932 (5th Cir. 1969); Webb v. Schleutker, 891 N.E. 2d 1144 (Ind. 2008); Aletto v. Aletto, 371 Pa. Super. 230, 537 A.2d 1383 (1988); Williamson v. Williamson, 402 Pa. Super. 276, 586 A.2d 967 (1991).

The Circuit Court correctly concluded that the valuation set by the Assessor is accorded great deference and is presumed to be correct. (A.R. 1154) Petitioner argues that the Assessor's assessment of the Petitioner's property should not be accorded this presumption of correctness, claiming that the Assessor violated the regulation requiring the Assessor to employ all three designated methods of appraising property, whereas the Assessor applied only the cost approach appraisal method. Petitioner argues that the Assessor was required to employ the income approach appraisal method, and having not done so, the Assessor's determination of assessed value based on the cost approach method should not enjoy a presumption of correctness. As argued herein, Petitioner failed to provide to the Assessor all of its income and expense information necessary to conduct an income approach appraisal prior to the time the Assessor delivered the property books to the Board of Review and Equalization on February 1, 2011, and therefore Petitioner should not be heard to complain that that the Assessor performed only a cost

approach appraisal on its property. It was the Assessor's cost approach appraisal of Petitioner's property that generated an assessed value that the Circuit Court correctly concluded enjoyed the presumption of correctness. Later during the Board of Review and Equalization hearing process, Petitioner provided the remaining income and expense information to the Board of Review. The Board requested that the appraiser from the Assessor's office produce an income approach appraisal once the Petitioner had produced the remaining income and expense information. This income approach appraisal was done for the Board at its request. The Circuit Court correctly concluded in its final order that the Assessor could not be required to conduct an income approach appraisal where sufficient data was unavailable to do so, as in the instant case. The Circuit Court further concluded that the Assessor had discretion to select the most accurate appraisal method of the three methods provided by Title 10, Series 1P of the W.Va. Code of State Rules, and that due to insufficient information available to the Assessor prior to the delivery of the property books to the Board of Review, the cost approach appraisal method was properly chosen by the Assessor.

Petitioner asserts that the Circuit Court ignored the appraisal submitted by its expert appraiser. However, a reading of the final order of the Circuit Court indicates that the Circuit Court considered the appraisal report submitted by Petitioner but found it unpersuasive, giving it little credit or weight.

Petitioner further asserts that he Circuit Court ignored evidence of comparable apartment complexes and claims that the Circuit Court failed to consider an appraisal analysis that compared its property with these other apartment complexes on a per unit assessment basis. However, as argued herein, such an appraisal basis is not an authorized appraisal method, and is inaccurate given the variations in size of apartment units, the age, design, condition, and

depreciation of such apartment units, as well as the value of other on-campus facilities such as tennis courts, swimming pools, gymnasiums, laundry rooms, and playgrounds available to tenants at some apartment complexes, but not at others.

Petitioner further asserts that the Circuit Court relied on evidence that was not relevant to the value of Petitioner's property, such as the face amount of the fire insurance on Petitioner's property. However, the Assessor argues herein that the "Application for Review of Property Assessment" form, which is the form mandated by the State Tax Department for review of assessments by the Board of Review and Equalization, requires that the taxpayer seeking review of its assessment disclose the face amount of fire insurance carried. Furthermore, several cases, including the case cited by Petitioner, suggest that the face amount of fire insurance carried on a taxpayer's property is relevant, and may be given some weight but not great weight in value determination. Senpikie Mall Co. v. Assessor, 136 A.D. 2d 19, 21 525 N.Y.S. 2d104, 105 (N.Y. A.D. 4 Dept. 1988); In the Matter of the Application of Shults v. Comm'n of Assessment and Taxation, 85 A.D. 2d 928, 447 N.Y.S. 2d 78 (1981); British Columbia Breweries Ltd v. King County, 17 Wash 2d 437, 135 P. 2d 870 (1943). Petitioner also asserts that the Circuit Court improperly relied on an appraisal submitted by the Respondent Berkeley County Council that included data that was after the valuation date of July 1, 2010. The Assessor argues herein that in its final order, the Circuit Court treated this appraisal report prepared by Darrell Ralston of Charleston, West Virginia as merely confirmatory of the assessed value determined by the Respondent Board. The Assessor also argues herein that the date of this Ralston appraisal is July 1, 2010, and while Ralston considered data after that date, nothing in W.Va. Code § 11-3-1, that established the assessment date as July 1st of each year, prevents use of data collected after the assessment date. The Assessor further argues that the apparent purpose of establishing an

assessment date is to determine ownership of a property as of a definite date to facilitate the identification of the owner to receive a tax ticket and any statutory notices.

Petitioner asserts that the Circuit Court's determination of its property assessment is clearly erroneous and an abuse of discretion because the tax bill on the property is so large. The Assessor argues herein that it would have been inappropriate to consider or speculate as to the amount of taxes to be paid by Petitioner on its property as a measure of whether its assessment was incorrect. The Circuit Court certainly did not err by not engaging in such consideration of Petitioner's tax bill as a percentage of income and whether this was an indicator of an incorrect assessment.

Petitioner argues that the Circuit Court by its final order deprived Petitioner of equal protection rights under the United States and West Virginia Constitutions by sustaining the Assessor's choice of appraisal method, whereby the Assessor exercised its discretion to appraise Petitioner's property utilizing the cost approach, while utilizing the income approach on some other apartment complexes. As previously argued by the Assessor, Petitioner did not provide to the Assessor all of the necessary income and expense information necessary for an income approach appraisal prior to the Assessor delivering the property books to the Board on February 1, 2011. As a consequence, the assessed value of Petitioner's property was determined by a cost approach appraisal which the Circuit Court concluded enjoyed the presumption of correctness. However, during the session of the Board, that body requested that the Petitioner furnish the remaining income and expense information and that the appraiser from the Assessor's office conduct an income approach appraisal. This income approach appraisal was done for the Board and was not the assessment determined by the Assessor, and was not the responsibility of the Assessor. The Board in turn averaged the two appraisal-assessed values. Petitioner now asserts

that the Circuit Court has deprived it of equal and uniform taxation pursuant to Article X § 1 of the West Virginia Constitution and the Fourteenth Amendment to the United States Constitution. Petitioner asserts that its property is overvalued in comparison to other similar apartment complexes that are correctly valued. A review of West Virginia cases where an equal and uniform taxation claim was asserted under Article X § 1 of the West Virginia Constitution discloses that in those cases the taxpayer/claimant argued that the other similar properties in the same class were undervalued. Mountain America LLC v. Huffman, 224 W.Va. 669, 685, 687 S.E. 2d 768, 784-86 (2009); Petition of Maple Meadows Min. Co. for Relief from Real Property Assessment, 191 W.Va. 519, 523-527, 466 S.E. 2d 912, 916-920 (1994).

Likewise, a review of property tax valuation and assessment cases decided by the United States Supreme Court under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution discloses that in these cases the taxpayer/claimant argued that the other similar properties were undervalued as compared to the taxpayer/claimant's property. Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336, 339-45, 109 S. Ct. 633, 635-639, 102 L.Ed. 2d 688 (1989); Charleston Federal Sav. & Loan Assn' v. Alderson, 324 U.S. 182, 184-185, 188-92, 65 S.Ct 624, 626-27, 628-30 (1945). Indeed, this Court has suggested that "unintentional sporadic deviations from an established system" cannot constitute a basis for a constitutional claim of equal and uniform taxation under Article X § 1 of the West Virginia Constitution. Petition of Maple Meadow Min. Co. for Relief, 191 W.Va. at 526, 446 S.E. 2d at 919; Matter of U.S. Steel Corp., 165 W.Va. 373, 378, 268 S.E.2d 128, 132 (1980). Even the United States Supreme Court noted that the Equal Protection Clause "tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes." Allegheny Pittsburgh Coal Co. 488 U.S. at 343, 109 S.Ct. at 638. Therefore, under the facts of

this case, the Petitioner's claim does not rise to the level of a violation by the Circuit Court of either Article X§ 1 of the West Virginia Constitution or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. STANDARD OF REVIEW

The Supreme Court of Appeals of West Virginia reviews the Circuit Court's final order and ultimate disposition 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, 154-55 (2008), citing Syl. Pt. 4, Burgess v. Porterfield, 196 W.Va. 178, 469 S.E. 2d 114 (1996). Accord Syl. Pt. 2, Walker v. West Virginia Ethics Comm'n, 201 W.Va. 108, 492 S.E. 2d 167 (1977). 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. Stone Brooke Ltd. Partnership v. Sisinni, 224 W.Va. 691, 688 S.E. 2d 300 (2009); Mountain America LLC v. Huffman, 224 W.Va. 669, 687 S.E. 2d 768 (2009).

II. THE CIRCUIT COURT'S DECISION WAS NOT WRONG AS A MATTER OF LAW AND WAS NOT CLERALLY ERRONEOUS AS TO THE FACTS

A. The Circuit Court did not Err in Averaging the Assessor's 2010 Cost Approach Assessment with the 2011 Income Approach Assessment Performed at the Request of

the Berkeley County Council Sitting as a Board of Review and Equalization during the February 2011 Session of the Board of Review and Equalization.

As previously asserted, the Berkeley County Assessor appraised and assessed Petitioner's apartment complex property for the tax year 2011 utilizing a cost approach for the structures and a market data approach appraisal for the land (A.R. 706, 715). Petitioner complained at the first session of the Berkeley County Council Sitting as a Board of Review and Equalization (herein after "the Board") that its property was not appraised and assessed utilizing an income approach appraisal like other comparable properties had received (AR 706). As argued below and as pointed out by the Respondent Assessor's appraiser, she did not have a data base from apartment complex owners upon which to build an income approach appraisal, nor did she have any sales of any apartment complexes by which she could develop a capitalization rate to do an income approach appraisal as required by W.Va. Code of State Rules § 110-1P-2.2.1.2, and that Petitioner had not provided any income and operating statement for its property for 2010 (A.R. 715, 758-59). As further pointed out below, the Respondent Assessor's predecessor in office was required by W.Va. Code § 11-3-24 to turn over to the Board of Review the completed property book at its first meeting in February 2011, and the Petitioner's late disclosure of its 2010 income and operating statement for the subject property, after the Board had begun to meet, was not timely. Even though Petitioner had not timely filed his 2010 income and expense information for its property, it was apparently requested by the Board, and it was further requested by the Board that once received the appraiser perform an income approach appraisal for their benefit. This income approach appraisal was performed by the appraiser, not as the appraisal and assessment of the Respondent Assessor, but solely for the benefit of the Board at its request. Apparently, the Board took this income approach appraisal and reduced it to sixty percent (60%) to arrive at an assessed value, and then averaged the assessed value derived in this manner with

the assessed value determined by the Respondent Assessor's predecessor in office utilizing the cost approach appraisal of the structure and market data approach on the land of Petitioner's property. Having invited the Board to consider an income approach appraisal of its property as had been performed in a similar fashion for other apartment complex properties in past years, Petitioner should not now be heard to complain that the Board and the Circuit Court of Berkeley County erred in utilizing the assessed value figure derived by this income approach method. Page v. Columbia Natural Resources, Inc., 198 W.Va. 378, 480 S.E. 2d 817 (1996). If Petitioner disagreed with this income approach appraisal methodology, it should have brought this disagreement to the Board during its February 2011 session, or produced its own income approach appraisal to that Board.

Petitioner further asserts that the Circuit Court of Berkeley County erred by averaging the assessed valuations of its property derived from two different valuation methodologies to arrive at a true and correct assessed value of Petitioner's property. Petitioner cites In re Nat'l Bank of West Virginia at Wheeling, 137 W.Va. 673, 688, 73 S.E. 2d 655, 664 (1952), overruled on other grounds by In re Kanawha Valley Bank, 144 W.Va. 346, 109 S.E. 2d 649 (1959) for the proposition that averaging the results of two appraisals is clearly erroneous and by such a method the Circuit Court of Berkeley County could not arrive at the true and correct value of Petitioner's property. It may be that the cited language in In re Nat'l Bank of West Virginia is merely dicta, as it is not included in the syllabus of the case. However, even if the cited language is not dicta, and not overruled by In re Kanawha Valley Bank, supra, what was criticized by our Court in In re Nat'l Bank of West Virginia, supra, was not the averaging of valuations of property that were "approximately correct" but rather averaging valuations that were "erroneous." Id. At 688, 73 S.E. 2d at 644. Averaging is not objectionable where the Court finds a credible basis for the

appraisals that were averaged. Several courts from other jurisdictions have dealt with averaging of two different appraisals. Lake Charles Harbor and Terminal Dist. v. Henning, 409 F.2d 932 (5th Cir. 1969); Webb v. Schleutker, 891 N.E. 2d 1144 (Ind. 2008); Aletto v. Aletto, 371 Pa. Super. 230, 537 A.2d 1383 (1988); Williamson v. Williamson, 402 Pa. Super. 276, 586 A.2d 967 (1991); Hoyt v. Hoyt, 563 N.Y.S. 2d 585, 142 A.D. 2d 126 (1988); Redmond v. Redmond, 229 Kan. 565, 629 P.2d 142 (1981); T-Mobile USA Inc. v. Utah State Tax Comm'n, 254 P.3d 752 (Utah, 2011). As stated in Warren v. Waterville Urban Renewal Authority, 235 A.2d 295, 305 (Me. 1967) the fact-finder "... was not restricted to a choice between the two estimates of the two warring experts ..." Indeed, the fact finder is "free to accept all of the testimony, portions of the testimony, or none of the testimony regarding the true and correct value of the property" and may assign "equal weights to the two experts, and averaging the two figures arrive at an estimated fair market value ..." Aletto v. Aletto, at 242, 537 A.2d at 1389. As the United States Court of Appeals for the Fifth Circuit said in Lake Charles Harbor and Terminal District v.

Henning:

It is well established that as to expert witnesses the testimony of each will be accorded equal weight when such testimony appears to be grounded on well established facts and is supported by sound reasoning and good judgment.

Strict application of the formula will produce what substantially amounts to averaging when differences in judgment alone divide the opinions of experts.

Id., 409 F.2d at 937. In the case at bar it is apparent that the Circuit Court of Berkeley County, as did the Board, assigned equal weight to the testimony of the appraiser from the Respondent Assessor's office, insofar as the valuation and assessment of the Petitioner's property based upon

the cost approach appraisal and market data approach appraisal performed to derive the assessment determined by the Respondent Assessor and accorded equal weight to the testimony of the appraiser from the Respondent Assessor's office as to the income approach appraisal and assessed valuation performed by her at the request of the Board. Noteworthy is that Petitioner did not object to this income approach appraisal being performed by the appraiser from the Respondent Assessor's office at the request of the Board, and even provided Petitioner's 2010 operating and expense statement to facilitate this request. Furthermore, Petitioner did not produce any expert witnesses at the 2011 Board hearings to challenge or supplement the dual appraisals.

Accordingly, this Court should conclude that averaging these two appraisals by the Circuit Court and by the Board is not wrong *per se*, as a matter of law, nor was it clearly erroneous or an abuse of discretion.

B. The Circuit Court did not err in giving a presumption of correctness to the value set by the Assessor on Petitioner's property.

Petitioner contends that the Circuit Court erred in its final order of July 24, 2012 when it concluded that "the valuation set by the assessor is presumed to be correct." (A.R. 1154, citing Stone Brooke Ltd. Partnership, supra, at 701, 688 S.e.2d at 300 (2009). Petitioner argues that in accordance with this Court's decision in In re Tax Assessment Against Pocahontas Land Corp., 158 W.Va. 229, 235-36, 210 S.E. 2d 641, 646-47, citing Consolidated Gas co. V. Mayor, 101 Md. 541, 61 A. 532 (1905), that "there must be a proper assessment before there can be a presumption that the assessment is correct," Petitioner contends that the assessment of its property was not in accordance with State Rules, and therefore when there is a violation of the

State Rules there can be no presumption of correctness or deference to the Assessor's determination. In re Foster Foundation's Woodlands Retirement Community, *supra* at 34, 672 S.E. 2d 150, 170, citing In re Tax Assessment against the S. Land Co., 143 W.Va. 152, 100 S.E. 2d 255 (1957). However, Petitioner, in Petitioner's Brief pages 10-11, does not specifically state the particular violation of the State Rules which is the basis this contention. Petitioner does suggest by its reference to the record in this case that the basis of its claim is an allegation that the Respondent Assessor failed to consider the income approach appraisal technique when it appraised and assessed Petitioner's property. However, as previously noted herein, the Respondent Assessor's appraiser testified in her deposition that she could not do an income approach appraisal of Petitioner's property because she did not "have a data base of income from apartment complex owners to build an income approach;" that Petitioner had sent her "some information for Lee Trace, but it's actually not all that I need to do an income approach for the 2011 tax year;" (A.R. 715); and finally she testified that she could not develop a capitalization rate to perform an income approach because, "if you do not have a sale of an apartment complex during that year, you're not going to be able to develop a cap rate using this method." (A.R. 758). In her deposition testimony, the Respondent Assessor's appraiser noted that Petitioner only provided some information needed by letter dated January 25, 2011, shortly before the commencement of the Board. (A.R. 758). Petitioner's final disclosure of 2010 rental and expense information was not received until about mid February, 2011, during the Board of Review and Equalization. (A.R. 759). As the Respondent Assessor's predecessor in office was required by W.Va. Code § 11-3-24 to turn over to the Board the completed property book at its first meeting in February, 2011, this late disclosure of the Petitioner's 2010 information in mid-February 2011 was not timely. Accordingly, the Respondent Assessor's predecessor in office could not do an

income approach appraisal of Petitioner's property for good and apparent reasons. However, the Respondent Assessor's predecessor in office did perform a valid appraisal and assessment of Petitioner's property utilizing the cost approach appraisal technique and market data approach appraisal technique, which assessment was presented to the Board with the property book as required by W.Va. Code § 11-3-24. As hereinafter argued, this Court in Stone Brooke, supra at 700, 638 S.E. 2d at 309, made it clear that the Court would not require the Tax Commissioner to employ one appraisal method over another appraisal method, but rather to exercise discretion in selecting the most accurate method from the three approaches to appraising real estate. This Court in Stone Brooke, cited Shepherds Glen Limited Partnership v. Bordier, No. 03-C-71, a circuit court case out of Jefferson County, where an assessor declined to employ the income approach appraisal method because sufficient information was not available to employ an income approach appraisal method. Id. Therefore, the Circuit Court of Berkeley County in its final order of July 24, 2012 did not err, and its decision finding that the Respondent Assessor's valuation of Petitioner's property enjoyed a presumption of correctness was not an abuse of discretion or clearly erroneous.

- C. The Circuit Court did not err in finding that the Assessor was not required to consider an income approach to value in appraising Petitioner's property where the Assessor did not have sufficient information to perform an income approach appraisal.

Petitioner contends that the Circuit Court of Berkeley County erred by not requiring the Assessor to consider an income approach to value in appraising Petitioner's property. However, the Circuit Court of Berkeley County in its final order of July 24, 2012, by interpreting the W.Va. Code of State Rules § 110-1p-2.2.1, together with this Court's decision in Stone Brooke, supra,

concluded that neither the language of the Rule, nor the Court’s decision in Stone Brooke require the “assessor to choose a method only after ‘she has performed and considered all three methods.’” (A.R. 1156). The Circuit Court noted that the modifying language contained in the Rule, “where applicable”, modified the “entire immediately preceding phrase ‘will consider and use,’” which made “practical sense and allows the Assessor and Tax Commissioner discretion.” (A.R. 1156). The Circuit Court further observed, no doubt with this case in mind, “[a]n assessor cannot consider the income method if there is no income to use.” (A.R. 1156). In essence, the Circuit Court concluded that an assessor need not perform a useless act of considering an appraisal method where the assessor does not have sufficient data to perform that appraisal method. As heretofore discussed, Petitioner provided its operating statements for 2008 and 2009 by letter dated January 25, 2011, shortly before the commencement of the Board of Review and Equalization, when the Respondent Assessor’s predecessor in office was required to deliver the property book to that body at its first meeting, as required by W.Va. Code § 11-3-24. (A.R. 758). As heretofore mentioned, Petitioner did not deliver its 2010 expense and income information to the Board of Review until mid-February 2011. (A.R. 759). Petitioner argues that the Respondent Assessor has an affirmative duty to seek out information from the taxpayer or elsewhere that would enable him to properly fulfill his obligation in assessing properties in his county, citing In Re Shonk Land Co., 157 W.Va. 757, 761, 204 S.E.2d 68, 70 (1974)., citing Hazelwood Company v. Pitsenbarger Assessor, 149 W.Va. 485, 141 S.E.2d 314 (1965); Younger v. Meadows, 63 W.Va. 275, 59 S.E. 1087 (1907). While that is what this Court said in Shonk, more recently this court in Stone Brooke, *supra*, quoting from Jefferson County Case Shepherds Glen Limited Partnership v. Bordier, *supra*, stated that ““economic rent data [was] not available to the assessor’ and because ‘nowhere in the code of West Virginia or the applicable rules are

taxpayers required to furnish to assessors rental data' Id. at [paragraphs] 15 and 16." Stone Brooke, at 700, 688 S.E. 2d at 309. Further, in Stone Brooke, this Court, citing Bayer Material Science LLC v. State Comm'r, 223 W.Va. 38, 54, 672 S.E. 2d 174, 190 (2008), again recognized that necessary information may not be available to assessors. Id. at 700, 688 S.E. 2d at 309. Indicative of the problem of securing rental information to perform income approach appraisals is Petitioner's treatment of its own financial information was provided to the Assessor or to the Circuit Court as "confidential financial information," which was protected by the entry of a protective order. (A.R. 1, 12).

Accordingly, this Court should conclude that the Circuit Court of Berkeley County did not err in concluding that the Respondent Assessor was not required to consider an income approach to value in appraising Petitioner's property where the Respondent Assessor did not have sufficient information to conduct such an income approach appraisal.

D. The Circuit Court did not ignore all proper evidence of the value of Petitioner's property.

1. The Circuit Court did not err by giving little credit or weight to the appraisal submitted by the Petitioner to the Circuit Court just prior to final argument in this case.

Petitioner asserts that the Circuit Court erred by "refusing to consider the appraisal submitted by the Petitioner." In fact, the Circuit Court did consider Petitioner's appraisal submitted shortly prior to final argument in this case, but concluded in the final order of July 24, 2012 that

Petitioner's appraisal is completed by someone not licensed to appraise property in West Virginia. [Footnote omitted.] This fact, along with the other evidence in the record, renders Petitioner's appraisal unpersuasive.

(A.R. 1159). Clearly there is a significant difference between Petitioner's assertion that the Circuit Court ignored or refused to consider Petitioner's appraisal and the Circuit Court's actual conclusion finding Petitioner's appraisal "unpersuasive" because Petitioner's appraiser was unlicensed and other evidence in the record supported an opposite conclusion. In other words, the Circuit Court did consider the appraisal prepared by Petitioner's appraiser and found it unconvincing. The cases cited by Petitioner, Teter v. Old Colony Co., 190 W.Va. 711, 411 S.E.2d 728 (1994) and W.Va. Div. of Highways v. Butler, 205 W.Va. 146, 516 S.E. 2d 769 (1999) deal with the exclusion of expert witness testimony in open court. In both cases this Court held that Rule 702 of the West Virginia Rules of Evidence, not W.Va. Code § 37-14-1 et. seq., controlled insofar as the testimony of expert witnesses was concerned. Neither case has any applicability here, as the Circuit Court did consider the appraisal prepared by Petitioner's appraiser, finding it "unpersuasive." (A.R. 1159).

2. The Circuit Court did not ignore assessments of comparable properties.

Petitioner argues that the Circuit Court erred in ignoring evidence of assessments of comparable properties. In support of this argument, Petitioner engages in a comparison of Petitioner's property with other claimed comparable apartment complexes using an assessed value per unit basis. Petitioner further asserts that the Circuit Court's conclusion that Petitioner's property is "either significantly newer (more recently built) or significantly larger than any of the other complexes" even if true would not justify the "significant difference" in assessed value on a per unit basis. However, engaging in such a comparison between apartment complexes on an

assessed value per unit basis is not a method of appraisal recognized by West Virginia regulation or statute. It is, however, a very rough measure that does not account for the size of the apartment unit (i.e. studio, one bedroom, two bedroom, three bedroom with a single bathroom, multiple bathrooms, or with a den or family room); the numbers of each type of apartment unit; associated amenities such as a porch, balcony, deck, or fireplace; on-campus facilities such as tennis courts, swimming pool, gymnasium, laundry room, or playgrounds; the age, design, type of construction, quality of construction, present condition or depreciation. (A.R. 298-313, 415-455, 463-467, 477-482). Indeed, there was a wide variation between the “Summary” of “assessed per value unit” analysis for other apartment complexes provided by Petitioner to the Board in February 2011 and the assessed value per unit provided by Petitioner’s appraiser in April 2012 for the same July 1, 2010 assessment date for the 2011 tax year. (A.R. 302, 906). For example, in the “Summary” presented to the Board in February 2011, Petitioner shows Stoney Point’s assessed value per unit as \$25,261.86, whereas in Petitioner’s appraiser’s report it is shown as \$36,840.00. (A.R. 302, 906). Another example, in the “Summary” presented to the Board in February 2011 by Petitioner shows Spring Mills assessed value per unit as \$33,489.77, but the assessed value per unit provided by Petitioner’s appraiser in April 2012 for the same July 1, 2010 assessment date for the 2011 tax year was \$21,243.00. (A.R. 302, 906). Not surprisingly, the Circuit Court was not persuaded by the assessed value by apartment unit appraisal approach.

Accordingly, this Court should conclude that the Circuit Court of Berkeley County did not err by giving Petitioner’s appraisal little credit or weight, and should further find that the Circuit Court did not ignore proper evidence of the value of Petitioner’s property.

E. The Circuit Court did not err by considering other evidence in the record, including evidence of fire insurance value and other appraisals.

1. Petitioner asserts that the Circuit Court "...attempted to justify its finding of an assessed value of \$6,551,735.00 by pointing out the value established for a fire insurance purpose was \$17,000,000.00..." It is important to note that the "Application for Review of Property Assessment" form, which is the form mandated for use by the West Virginia Tax Department for taxpayer's seeking review of their assessments before the Board of Equalization, requires disclosure by the taxpayer of the "face amount of fire insurance carried" on the property to be reviewed. (A.R. 122). In support of its contention that "(t)he Circuit Court improperly relied on the fire insurance value" of its property, Petitioner cites 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). However, a review of that case does not support Petitioner's contention. Rather the Supreme Court of New York, Appellate Division, Fourth Department, merely observed that "(t)he Judicial Hearing Officer properly declined to give great weight to the principal amounts of the mortgage loans and to the fire insurance coverage on the property." Id. However, the holding of the New York Court did not suggest that a court could not consider and give some weight to such evidence of fire insurance coverage, only that it should not receive great weight. In a memorandum decision, that same court in the case In the Matter of the Application of Shults v. Commission of Assessment and Taxation, 85 A.D. 2d 928, 447 N.Y.S 2d 78 (1981) observed that "(t) he value placed upon real estate for insurance purposes is an admission, subject to explanation and not conclusive, but entitled to be weighed by the trier of fact along with all other evidence of value." Along a similar line the Supreme Court of Washington in British Columbia Breweries, LTD v. King County, 17 Wash. 2d 437, 135 P. 2d 870 (1943), concluded that "...the amount of insurance carried by an appellate upon the property in

question constitutes...’an item to be considered’” Id. at 453, 135 p.2d at 877. The Supreme Court of Washington in the British Columbia Breweries case concluded that “...the trier of the fact is justified in inferring that appellant had insured its building against loss by fire in a sum considerably in excess of what it now contends the building were worth.” Id. at 456, 135 p. 2d at 878. The conclusion to be reached is that the value placed on the property for fire insurance purposes is a matter properly considered by the Circuit Court of Berkeley County and given some weight. A review of the record in this case, and the final order of July 24, 2012, does not disclose that the Circuit Court of Berkeley County gave the fire insurance policy value great weight, but rather gave it some weight in confirming the assessed value determined by the Berkeley County Council, Sitting As A Board of Review and Equalization. Accordingly this court should conclude that the Circuit Court of Berkeley County did not err in its final order of July 24, 2011 in considering and giving some weight to the fire insurance policy on Petitioner’s property.

2. The Circuit Court did not rely on the appraisal submitted by the Council.

Petitioner asserts that the Circuit Court of Berkeley County relied on the appraisal prepared by Darrell Ralston of Charleston, West Virginia and submitted by the Respondent Berkeley County Council as evidence in this case. It should be noted that the Ralston appraisal was not prepared until after the Board of Review and Equalization hearings, and was submitted to supplement the record for the appeal to the Circuit Court of Berkeley County. Petitioner alleges that a portion of the Ralston appraisal which deals with an income approach valuation, is erroneous because it utilizes data generated after the July 1, 2010 valuation date, misstates

income by approximately \$200,000.00, is based in part on billings not collections, and did not employ as a comparison of per unit tax assessments with other comparable properties.

A review of the July 24, 2011 final order in this case discloses that the Circuit Court of Berkeley County did not rely on or utilize that Darrell Ralston appraisal to determine the value of Petitioner's property, but rather found the value determined by Mr. Ralston to be confirmatory of the assessed value determined by the Respondent Berkeley County Council Sitting As A Board of Review and Equalization. (A.R. 1159-1160). Petitioner's complaints relating to the Ralston appraisal do not address the value found by Mr. Ralston for Petitioner's property utilizing the Cost Approach appraisal method (A.R. 469-475). Utilizing this Cost Approach appraisal method, Mr. Ralston determined the value of Petitioner's property to be \$12,240,000.00. Petitioner complains that in that portion of the Ralston appraisal report dealing with an Income Approach method, Mr. Ralston considered data generated after the July 1, 2010 assessment date. However, W.Va. Code §11-3-1, which establishes the "...first day of July..." each year as the date of assessment, does not prohibit the use of data concerning value that is generated after the assessment date. The apparent purpose of statutorily selecting the first day of July each year is to permit the assessor to determine ownership as of that date, thereby establishing that owner who will then receive a tax ticket the following year, and any statutory notices required by law. In the case of personal property not in West Virginia on July 1st, but acquired thereafter, or moved into West Virginia thereafter, it precludes the assessor from attempting to assess such personal property for that tax year. Mr. Ralston in his appraisal report declares that the date of appraisal as "July 1, 2010", which appraisal date is confirmed in his letter of December 15, 2011 sent to former Assessor Kilmer. (A.R. 413, 411). Accordingly this court should conclude that the Circuit Court of Berkeley County did not use the Ralston appraisal submitted by the Respondent

Berkeley County Council to establish the value of Petitioner's property but rather to confirm the value established by the Board of Review and Equalization, and therefore the Circuit Court did not err.

F. The Circuit Court did not err and abuse its discretion by not considering Petitioner's tax bill on the subject property.

It was not appropriate for the Circuit Court of Berkeley County, as part of the appeal of the Respondent Berkeley County Council's determination of assessed value of Petitioner's property to consider the issues of what Petitioner's tax bill might be. Accordingly the Circuit Court did not err and abuse its discretion by not considering what Petitioner's tax bill might be.

G. The Circuit Court did not violate Petitioner's equal protection rights under the United States and West Virginia Constitutions.

Petitioner asserts in its assignment of error "G.", that "(t)he Circuit Court violated Petitioner's equal protection rights under the United States and West Virginia Constitutions." Later in the closing paragraph Petitioner asserts that "...the Assessor violated the West Virginia Constitution." It is most extraordinary to allege that a Circuit Court judge acting in an appellate capacity, violated by its ruling, the equal protection rights of a litigant under United States and West Virginia Constitutions. While unusual, courts have applied the equal protection clause to government activity "...whether legislative, executive, or judicial..." Commonwealth Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., 177 S.W. 3d 718, 724

(2005); See United States v. Sheriff of Lancaster Co., 561 F. Supp. 1005, 1010 (E.D. Va. 1983). Petitioner asserts that in its final order of July 24, 2011 "...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, Petitioner's Brief, p.19). Petitioner then argued that "...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." Yet the Circuit Court did clearly state in its final order of July 24, 2011 in its "Conclusions of Law", section "I.", as suggested by Petitioner that "(t)ax assessments implicate Constitutional principles..." and the Circuit Court quoted specifically from the provision of Article X §1 of the West Virginia Constitution that assessments be done in an equal and uniform manner. (A.R. 1150). The Circuit Court then recited in the closing paragraph of section "I." of its "Conclusions of Law" that it "...will examine whether the actions by the Board and the Assessor were proper under these standards..." (A.R. 1155). The implication of these conclusions set forth in the final order of July 24, 2011 is that the Circuit Court considered the Constitutional principle of equal and uniform assessments in section "II." "The Assessor and the Board Actions" and did not find any such violation of "Constitutional principles."

As previously argued by the Assessor, the Circuit Court properly concluded that the Assessor's cost approach appraisal and assessment enjoyed a presumption of correctness. Petitioner had failed to provide to the Assessor all of the necessary income and expense information for the Assessor to conduct an income approach appraisal of its property prior to the Assessor delivering to the Board her property book on the first day of the February 2011 session of the Board. Therefore, the assessment that the Circuit Court concluded enjoyed the

presumption of correctness was the assessment derived from the cost approach appraisal performed by the assessor as reflected in the property book, delivered to the Board. During the 2011 session of the Board, the Board requested an income approach appraisal and requested that Petitioner provide the necessary income and expense information for 2010 and that the appraiser from the Assessor's office perform the income approach appraisal. Petitioner provided the necessary income and expense information, and the appraiser performed the income approach appraisal for the Board not for the Assessor. The Board averaged the assessed values from both appraisals to derive a new assessed value for Petitioner's property.

Petitioner asserts that the Circuit Court has deprived it of equal and uniform taxation, pursuant to Article X §1 of the West Virginia Constitution and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by treating its property differently than other similar apartment complexes. Petitioner asserts that the Circuit Court by its final order sanctioned the Assessor's office use of the cost approach appraisal method to appraise and assess its property, while utilizing an income approach appraisal method to appraise and assess other similar apartment complexes. As pointed out by the Assessor, the Petitioner failed to provide to the Assessor's office the necessary income and expense information to perform an income approach in timely fashion and should not be heard now to complain. However, more importantly, a review of West Virginia cases where an equal and uniform taxation claim was asserted under Article X §1 of the West Virginia Constitution discloses that in these cases the taxpayer/claimant argued that the other similar properties in the same class were undervalued. Mountain America LLC v. Huffman, 224 W.Va. 669, 685-687, 687 S.E. 2d 768, 784-786 (2009); Petition of Maple Meadows Min. Co. for Relief from Real Property Assessment, 191 W.Va. 519,

523-527,446 S.E. 2d 912,916-920 (1994); Kline v. McCloud, 174 W.Va. 369, 373-379, 326 S.E. 2d 128, 130-132 (1980). Petitioner asserts that the other similar apartment complexes are correctly valued utilizing an income approach appraisal, whereas its property is overvalued utilizing a cost approach appraisal. This argument that the other similar apartments are correctly valued factually places Petitioner's argument outside the body of case law above. Likewise, a review of property tax cases decided by the United States Supreme Court under the Equal Protection Clause of the Fourteenth Amendment discloses that in these cases the taxpayer/claimant argued that the other similar properties were undervalued. Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, 488 U.S. 336, 339-346, 109 S. Ct. 633, 635-639, 102 L. Ed. 2d 688 (1989); Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182, 184-185, 188-192, 65 S. Ct. 624, 626-627, 628-630 (1945); Cumberland Coal Co. v. Bd of Revision of Tax Assessments in Greene Co., Pa., 284 U.S. 23, 28-29, 52 S. Ct. 48, 48-51 (1931). Respondent Assessor would argue that if there is no under-evaluation of the other similar properties (apartment complexes) then there can be no equal and uniform taxation claim under Article X §1 of the West Virginia Constitution or Equal Protection Clause claim under the Fourteenth Amendment to the United States Constitution. Indeed this court has suggested that "...unintentional sporadic deviations from an established system..." cannot constitute the basis for a constitutional claim of denial of equal and uniform taxation under Article X §1 if the West Virginia Constitution. Petition of Maple Meadow Min. Co. for Relief, 191 W.Va at 526, 446 S.E. 2d 128, 132 (1980). The United States Supreme Court when analyzing such property tax equal protection claims has noted that the Equal Protection Clause "...tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes." Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, 488 U.S. at 343, 109 S. Ct. at 638.

Accordingly under the facts of this case there is no equal and uniform taxation claim pursuant to Article X §1 of the West Virginia Constitution or equal protection claim under the Fourteenth Amendment to the United States Constitution.

WHEREFORE Respondent Assessor would respectfully request that this Court deny Petitioner's Petition for Appeal.

Respondent Gearl Raynes
Assessor of Berkeley County, West Virginia
By Counsel



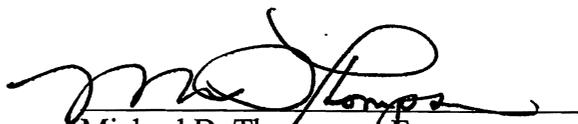
Michael D. Thompson, Esq.,
Counsel for Respondent Gearl G. Raynes
Assessor of Berkeley County, West Virginia
Thompson & Pardo, PLLC
119 East Liberty Street
Charles Town, WV 25414
W. Va. State Bar No. 3747
304-728-8808
email: mthompson@thompsonpardo.com

CERTIFICATE OF SERVICE

I, Michael D. Thompson, Esq., do hereby certify that I served a true copy of the attached Respondent Assessor's Brief upon the following counsel at their addresses shown by United States Mail postage prepaid this 3rd day of January, 2013.

Thomas Moore Lawson, Esq.
Lawson and Silek, P.L.C.
P.O. Box 2740
Winchester, VA 22604

Norwood Bently, III, Esq.,
Legal Director - Berkeley County Council
400 West Stephen Street, Suite 201
Martinsburg, WV 25401


Michael D. Thompson Esq.,
Counsel For Respondent Assessor