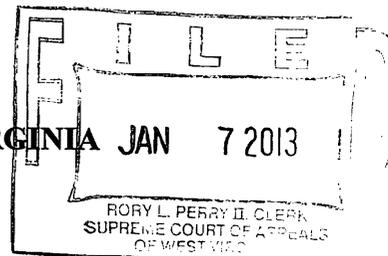


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 12-0992



**LEE TRACE LLC,**

**Petitioner,**

v.

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

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

**and**

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

**and**

**BERKELEY COUNTY COUNCIL.  
Respondents.**

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**BRIEF OF RESPONDENT BOARD OF REVIEW AND EQUALIZATION  
and  
BERKELEY COUNTY COUNCIL**

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## TABLE OF CONTENTS

Statement of Case.....	page 1
Summary of Argument.....	page 5
Statement Regarding Oral Argument and Decision.....	page 6
Argument.....	page 6
Conclusion.....	page 16
Certificate of Service.....	page 16

## TABLE OF AUTHORITIES

### CASES

<i>Bayer Material Science. LLC v. State Tax Commissioner</i> , 223 W.Va.38, 672 S.E.2d 174 (2008).....	page 9, 10
<i>Burgess v. Porterfield</i> , 196 W.Va. 178, 469 S.E.2d 114 (1996).....	page 6
<i>Consolidated Gas Co. v. Mayor</i> , 101 Md. 541, 61 A. 532 (1905).....	page 9
<i>In re National Bank of West Virginia at Wheeling</i> 137 W.Va. 673, 73 S.E.2d 655 (1952).....	page 8
<i>In re Tax Assessment Against Pocahontas Land Corp.</i> , 158 W.Va. 229, 210 S.E.2d 641 (1974).....	page 9
<i>In re Tax Assessment of Foster Foundation’s Woodlands Retirement Community</i> , 223 W.Va. 14, 672 S.E.2d 150 (2008).....	page 6
<i>Kline v. McCloud</i> , 174 W.Va. 369, 326 S.E.2d 715 (1984).....	page 13
<i>Mountain America, LLC v. Huffman</i> , 224 W.Va. 669, 687 S.E.2d 768 (2009)..	page 6, 7
<i>Stone Brooke Ltd. Partnership v. Sisinni</i> , 224 W.Va. 691, 678 S.E.2d 300 (2009).....	page 7, 10
<i>Walker v. West Virginia Ethics Commission</i> , 201 W.Va. 108, 492 S.E.2d 167 (1997).....	page 6
<i>Western Pocahontas Props. Ltd. V. County Commission of Wetzel County</i> , 189 W.Va. 322, 431 S.E.2d 661 (1993).....	page 9

### STATUTES and RULES

West Virginia Code § 11-3-24.....	page 7, 10
West Virginia Code of State Rules § 110-1P-2.....	page 2
§ 110-P-2.2.1.....	page 9
§ 110-P-2.2.1.3.....	page 9

## STATEMENT OF THE CASE

Petitioner, Lee Trace LLC (hereinafter, Petitioner), owns a complex of 156 apartment units, situate on slightly more than 17 acres at 15000 Hood Circle, Delmar Orchard Road, in Martinsburg, Berkeley County, West Virginia. Petitioner has insured the complex for purposes of fire insurance at \$17,000,000.00. Construction costs, as of February 11, 2011, amounted to \$12,927,378.00 on land which cost the Petitioner \$1,122,504.00. The undeveloped land was assessed for Tax Year 2009, as of July 1, 2008, at \$677,040.00. On July 1, 2009, the Assessor placed an assessed value on the property of \$7,895,530.00 for Tax Year 2010, accounting for both the buildings constructed and the land value. The Respondent Assessor provided the Petitioner the statutorily required notice of the increase in assessment. Petitioner disagrees with this assertion and has appealed the Circuit Court's decision upholding the Respondent Assessor's Notice as sufficient and timely. The record reflects that Petitioner did not seek to have the Respondent County Council sitting as the Board of Review and Equalization adjust the 2010 tax assessment until eleven months after the notice was given and just short of one year past the *sine die* adjournment of the Board in February, 2010.

With regard to the 2011 tax assessment, the Assessor placed an assessment value of \$7,593,430.00 on the property in question. For both the 2010 and 2011 assessments, the Respondent Assessor utilized the cost approach to value. While the Respondent Assessor's employee admitted under questioning that the income approach was not considered in this case, she went on to explain that the reason for failing to consider the income approach to value was because the data was not available to develop a "cap rate" used in the calculation due to the lack of any comparable sales in Berkeley County for the period in question. Thus, it was not possible

for her to meet the specific requirements pertinent to performance of an income approach provided for in Legislative Rule § 110-1P-2. Notwithstanding the inability to develop the specific “cap rate” required by the Rule, the Assessor’s office employee did use, with some apartment properties, what she termed a “hybrid” “cap rate” provided by certain national publications. Income approaches were used in those instances where taxpayers objected to the Assessor’s cost approach result for assessment prior to the meeting of the Board of Review and Equalization during February, 2011. The hybrid method as described above was used in all such cases, apparently. Petitioner complains that Respondent Assessor violated the West Virginia Code of State Rules by not using the income approach to value for determining its 2011 Assessment. Its implied contention that there would have been no problem had the Respondent Assessor utilized the “hybrid” method to determine the assessment overlooks the fact that use of any method not consistent with the Rule would be a violation.

At the Board’s request, the Respondent Assessor provided, on the day of Petitioner’s final hearing, an assessment using the income approach to value derived through the “hybrid” method. The result was an assessment of \$5,207,940.00. The Respondent Board, then, averaged the assessment derived from the cost approach and the one from the income approach to arrive at an adjusted assessment of \$6,400,690.00.

Petitioner, then, timely appealed to the Circuit Court. There was an insufficient record from the Board’s deliberations and the hearing held with regard to Petitioner’s request for an adjustment of the assessment. There was no explanation on the record of how the Assessor arrived at the value derived from the cost approach or the value derived from the hybrid income approach. In order to flesh out or supplement the record for the Circuit Court, the Court

permitted discovery. It was during the discovery deposition of the Assessor's employee who performed the appraisal and subsequent assessment of the subject property that the details concerning this particular assessment were laid upon the record.

The record indicates, as the Petitioner has pointed out in its petition and brief, that the Assessor's office did not initially consider the income approach to value with regard to the subject commercial property. Petitioner did not provide the Assessor's office with income information until late in January, 2010, and, then, provided only two of the three years required by the Legislative Rule. What the Petitioner failed to point out were the reasons given by the Assessor's office for not having considered the income approach in setting the values. In the Appendix at page 537, Edgar Deposition Testimony, October 24, 2011, beginning at page 21, line 17, the following questions and answers took place:

Q (by Counsel for Petitioner): All right. When you did the income based appraisals only after people asked for them, is this the way you used that information where it says by dividing annual net income by the current selling price of comparable properties?

Is that the method that you have used historically when you did an income based appraisal?

A: That's not how I derived the cap rate.

Q: All right. How did you develop a cap rate?

A: We mentioned this before. I used Realty Rates.

Q: All right. Do you understand the difference between what you did using Realty Rates out of a book for different market areas as opposed to what's set forth here in the statute?

A: I understand that. But 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.

Q: All right. So – and each time when you did the income based appraisal after people had asked you to do it, you did look to see if there was a sale and then determined that there was not. Therefore, you could not follow the instruction of the statute.

A: To my knowledge, I have not had an open market sale of apartment complexes recently in this county.

Thus, it was not that the Assessor ignored the Legislative Rule. Rather, the data required by the Rule was not available. The Assessor could not have derived the cap rate in compliance with the Rule which provides that the Assessor shall divide the annual income by the current selling price of comparable properties since there were not comparable sales in Berkeley County during that time frame.

No issues were raised by Petitioner as to the adequacy of the Assessor's Office assessment based on the cost approach which was the method used by the Assessor for the 2011 assessment. The Petitioner complains only that the income approach was not utilized initially and when utilized was not done according to the requisites set out in the Legislative Rule. Additionally, it complains that the Circuit Court erred in finding that the Assessor's assessment was entitled to a presumption of correctness even after the employee performing the appraisal and assessment via the hybrid income approach method admitted that she did not comply with the Legislative Rule. Further, Petitioner finds fault with the Circuit Court's finding that the Assessor had discretion in whether to use and consider the income approach to determine the assessment. Also, Petitioner finds error in the Circuit Court's rejection of the Petitioner's appraisal submitted long after the Assessor's appraisal and assessment and long after the Respondent Board rendered its decision in this matter.

The Petitioner contends that the Respondent Board should not have averaged the 2011 assessment values determined respectively by the cost approach and the hybrid income approach

and, further argues that the Circuit Court made a clerical error in setting the assessment value at \$6,551,735. The Respondent Board had determined the average of the two was \$6,400,690. The Circuit Court does appear to have used the 2010 assessment of \$7,895,530 instead of the 2011 assessment of \$7,593,430 in averaging the two assessment values.

### **SUMMARY OF ARGUMENT**

The Respondent Assessor performed a cost approach to value appraisal and subsequent assessment for the 2011 tax year correctly and accurately. Petitioner raised no objections to the methodology or accuracy of this assessment.

The fact that the Assessor did not initially utilize the income approach to value method in determining an appraisal value and finding an assessment by multiplying that value by 60% is of no consequence. The Supreme Court of Appeals of West Virginia has found that the Assessor has discretion to determine which of the three methods recognized by the Legislative Rule is appropriate for assessing commercial property in West Virginia. Further, the Court has found that it will not mandate the use of any one of the approaches available. In that regard, the Court has noted that the necessary data and information from which the statutorily required calculations are to be made is not always available to the Assessor and, yet, the assessment may properly be made.

The Circuit Court's finding that the Assessor's assessment was entitled to a presumption of correctness is not error simply because the Assessor did not utilize the income approach to value in making the assessment. Nor, is it error for the Respondent Board to have asked for, received, and used a value based upon the income approach during its hearing on this matter, even when that approach was not in compliance with the Legislative Rule.

Petitioner argues that 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 expense data from after the valuation date.” Petitioner’s Brief at page 4. The Circuit Court found that the appraisal offered by the Assessor “clearly and directly supports the Board’s attempt to average the two numbers, as 60% of this market value yields \$6,570,000 (which is similar to that the mathematical average is).” Circuit Court’s Final Order, July 24, 2012, at pages 16 and 17. “Further, the Court finds that substantial evidence, as well as equitable factors, support a mathematical average of the income approach and cost approach assessments.” Circuit Court’s Final Order, July 24, 2012, at page 17. The Circuit Court may have relied on the appraisal and the amount of fire insurance for support but, clearly did not rely solely on those facts to make its determination.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Respondent Board urges that the issues raised in this appeal are neither new to West Virginia’s case law nor so significant and fundamental as to require oral argument. Rather, the issues raised are amenable to determination based upon the briefs.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

Final orders and dispositions by Circuit Courts are reviewed 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 Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997). Assessments made by boards 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 CLEARLY ERRONEOUS AS TO THE FACTS**

- i. The Circuit Court did not commit error by finding the averaging of the Assessor's 2011 Cost Approach Assessment with the 2011 Income Approach Assessment Performed at the Request of the Respondent Board of Review and Equalization during its February, 2011 Session to be appropriate.

Petitioner argues that 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." The averaging performed by the Respondent Board and affirmed by the Circuit Court was not done to "split the baby". Rather, it was done because the Board, after considering all the evidence, and believing that perhaps the cost approach to value in an economy such as existed in Berkeley County in 2010 and 2011 might reflect a somewhat too high assessment value of the real property in question but, also, believing that the value reflected as a result of the income approach method was too low given the cost of construction, the purchase price of the land, the supportive nature of the Respondent Assessor's independent appraisal, and the amount of fire insurance

purchased on the property. The Respondent Board had the authority to lower or raise the assessment to whatever, in its discretion, it believed reflected 60% of the true and accurate value of the property. *West Virginia Code* § 11-3-24. This it did by averaging the two values before it.

The Petitioner attempts to support its contention that the averaging of the values derived through differing methodologies is improper by citing to the Court the case *In re Nat'l Bank of West Virginia at Wheeling*, 137 W.Va. 673, 73 S.E.2d 655 (1952). However, *Nat'l Bank of West Virginia* involved the assessment of shares of stock, not real property. Shares of stock may be valued any number of ways and there are, as the Court noted, many factors which go into an appraisal and assessment of the value of shares of stock. The Court did, indeed, frown on the averaging of values reached by the differing methodologies used in that case because the methods used yielded widely differing values and because all factors were not considered by the averaging accomplished by the Circuit Court of Ohio County. Many more factors were considered by the county court (commission) which it used in exercising its discretion to set a value different than that set by the Assessor. In the instant case, the two approaches to value, also, yielded different values. But, they involve different considerations and those considerations may need some subjective manipulation based on factors such as, for instance, the state of the local economy and the demand for housing by consumers largely employed outside the local market area. The value of shares of stock is not influenced by local economic dynamics or the make-up of the employment market for Berkeley County and, thus, the differing values of stock shares yielded by the different methodologies used

are not amenable to averaging for the purpose of equalizing assessments.

The Circuit Court in this case did pick up an incorrect figure from the 2010 assessment to average with the 2011 income approach figure. This was a mistake but, does not detract from the Circuit Court's finding that the averaging performed by the Respondent Board was appropriate and a proper exercise of the Board's discretion.

- ii. The Circuit Court did not err in finding that the value set by the Assessor on the subject property is entitled to a presumption of correctness.

Petitioner's assertion that there should be no presumption of correctness accorded to the Assessor's 2011 assessment is based on the Assessor's failure to perform an income approach to value in determining such assessment. Petitioner argues that "there must be a proper assessment before there can be a presumption that the assessment is correct." *In re Tax Assessment Against Pocahontas Land Corp.*, 158 W.Va. 229, 210 S.E.2d 641, citing *Consolidated Gas Co. v. Mayor*, 101 Md. 541, 61 A.532 (1905). Petitioner, then, makes the mistaken assumption that, because the Respondent Assessor did not appraise and subsequently assess the subject property by use of the income approach to value, the assessment was incorrect; that, because the Code of State Rules, Title 10, Series 1P provides that "the Tax Commissioner [and Assessor on his behalf] will consider and use where applicable, three (3) generally accepted approaches to value ..." § 110-P-2.2.1.

- iii. The Circuit Court did not err in finding that the Assessor was not required to consider an income approach to value.

In a *Per Curium* opinion this Court, in the 2008 case, *Bayer Material Science, LLC v. State Tax Commissioner*, 223 W.Va. 38, 52, 672 S.E.2d 174, 188, the Court found that the Tax

Commissioner has discretion under Title 110, Series 1P of the West Virginia Code of State Rules in selecting the most accurate and appropriate method for appraisal of commercial and industrial properties from among the three approaches defined in sections 110-1P-2.2.1.1, 2.2.1.3 and 2.2.1.2.

Moreover, despite the Petitioner's reference to the West Virginia Supreme Court's 2009 case, *Stone Brooke Limited Partnership v. Sisinni, infra.*, contending that an appraisal must utilize each of the required appraisal factors, that is not what the opinion states. Justice Davis, in that opinion, wrote that the Supreme Court would not mandate one specific method to be used to assess commercial and industrial properties. The Court concluded "that the Tax commissioner has afforded discretion to the assessing officer to select the most accurate appraisal method for the commercial property under consideration. . . ." The facts will also show that the Assessor did perform the income approach after she received the requested information and during the Board's 2011 session, as noted above. The Board, then, utilized both the cost approach and the income approach, by averaging the two, to arrive at a compromise value which is what the Petitioner is now appealing to this Court.

"As a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct. . . . The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous." *Bayer, Infra*, citing Syl. Pt. 2, in part, *Western Pocahontas Props., Ltd. v. County Comm'n of Wetzel County*, 189 W.Va. 322, 431 S.E.2d 661 (1993).

Petitioner contends that the appraisal reached by use of the cost approach was an erroneous method of appraising its property by virtue of the Assessor having not utilized the

other two approaches to value. It contends, most specifically, that the Assessor did not follow the requirements or procedures related to income appraisals. Respondent Council, at the time of its session as a Board of Review and Equalization, had no reason to doubt the correctness of the value reached by the income approach. The Board's decision to average the results of the two approaches, cost and income, was based (1) upon its understanding that it could rely upon the Assessor's appraisal; and, (2) that it had full discretion to find the appraised value of the property for the 2011 tax year, the matter having been brought before them by the taxpayer, pursuant to West Virginia Code § 11-3-24.

The Petitioner has failed to meet its burden of showing that the assessment was erroneous. The Petitioner must demonstrate that the assessment was erroneous by clear and convincing evidence. Its insistence that the use of all three methods provided by the West Virginia Legislature for assessing commercial and industrial properties is required for each assessment made and that the Assessor does not have discretion in that regard is not persuasive much less clear and convincing.

Petitioner's companion argument that it provided timely income information to the Respondent Assessor to consider and, therefore, the Assessor could have and should have turned the property books over to the County Council sitting as the Board of Review and Equalization with the assessment based upon use of the income approach to value lacks credibility. Even if the income data had been provided in a timely manner and it was not, there were no comparable sales of commercial apartment complexes in Berkeley County during the pertinent period of time from which an income approach could have been performed consistent with the requirements of the Code of State Rules.

iv. The Circuit Court did not ignore proper evidence of the property's value.

Petitioner complains that the Circuit Court "relied on the appraisal submitted by the Council but refused to consider the appraisal submitted by Petitioner..." The fact is that the Circuit Court did consider the appraisal offered by Petitioner and because the author of the appraisal was not licensed to perform appraisals in West Virginia "along with the other evidence in the record", the Circuit Court found "Petitioner's appraisal unpersuasive." Circuit Court, Final Order, July 24, 2012, at page 16.

Petitioner argues that the Circuit Court ignored a wide disparity in the assessments of comparable properties and the subject property. Petitioner's own figures have varied widely as to the same properties given as examples to the Respondent Assessor and Respondent Board during Tax Years 2011 and 2012 Board sessions. In making its claims to the Board during the 2011 session, Petitioner offered conclusory assertions as to the similarities of its examples to the subject property but, no detail. The Board was not persuaded by the argument as to unit price differentials in allegedly similar complexes without supportive detail as to age of the facilities, size and number of units and number of rooms per unit, materials used in construction, and amenities provided. Additionally, as noted previously herein, there was no attack by Petitioner on the validity or accuracy of the cost approach to value utilized by the Respondent Assessor in assessing the subject property. The broad swipe at unit price disparity without good detail failed to meet the high burden required of a taxpayer in challenging the Assessor's findings.

Petitioner complains that 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.” The Circuit Court’s language addressing the amount of fire insurance coverage provided to the subject property hardly suggests that factor as determinative but, rather, as supportive of the Respondent Assessor’s values and the Respondent Board’s decision. “The Court notes a couple of the major factors in the record that support this value. Lee Trace is a complex either significantly newer (more recently build) or significantly larger than any of the comparable complexes. So, this value, slightly higher, than possibly others, would be proper. Also, the value for the purposes of fire insurance is set at \$17,000,000.00, which would yield an assessment of [\$] 10,200,000 (60%) – significantly above the value determined by the Assessor and the Board.” Circuit Court, Final Order, July 24, 2012 at page 16.

The amount of fire insurance coverage sought by Petitioner and provided by the insurance carrier is one factor which the Board and the Circuit Court may consider in their overall analysis of the appropriateness of the Assessor’s assessment. It is a relevant factor, contrary to Petitioner’s assertion.

Petitioner complains that the Circuit Court’s assessment will result in taxes on the property that equal approximately one and one-half month’s gross income and “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.” Petitioner makes this bold assertion without any explanation of its own costs and expenses, its own management regime, its own pricing and its own decision to locate within the corporate limits of the City of Martinsburg with all the tax implications of that decision. Petitioner fails to support its contention that the Circuit Court abused its discretion with anything other than its own characterization of “common sense.” Proof of abuse of discretion? Respondent thinks not.

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

As to the Petitioner's allegations regarding equal and uniform taxation, the law in West Virginia, as set out in *Kline v. McCloud*, 174 W.Va. 369, 326 S.E. 2d 715 (1984), is that Petitioner must ". . . show more than the fact that other property is valued at less than true and actual value. . . To obtain relief, he must prove that the under valuation was intentional and systematic." The *Kline* Court went on to further explain that our taxation system ". . . unfortunately will always have some inequality and nonuniformity attendant with such governmental function. It seems that perfect equality in taxation would be utopian, but yet as a practicality, unattainable. We must satisfy ourselves with a principle of reason that practical equality is the standard to be applied in these matters, and this standard is satisfied when the tax system is free of systematic and intentional departures from this principle."

Petitioner has offered no evidence that any such alleged overvaluing of its property by the Assessor is the result of any systematic and intentional departures from the principle that practical equality is the standard to be applied in our system.

Nevertheless, the allegation that both the United States Constitution and the Constitution of our own State of West Virginia have been violated deserves some scrutiny. The facts show conclusively that whenever the Respondent Assessor's Office did perform an income approach to value, it did so at the request of the taxpayer prior to the close of the Assessor's books. It did so by obtaining the proper income and expense data from the taxpayer on a timely basis. It did so by the same use of a cap rate, not consistent with the Code of State Rules, but, by using a cap rate from a regional or national publication or publications. Nor, did the Respondent Assessor

use the income approach on all apartment complexes in Berkeley County but, only on those which asked. In the end, Petitioner benefited from the same methodology applied to other apartment complexes which had asked to be assessed using the income approach to value except that Petitioner provided his income and expense data too late for the Respondent Assessor to perform the calculations before it closed its books for the tax year. Thus, the Petitioner sought the assistance of the Respondent Board of Review and Equalization. The Board asked for and received an assessment utilizing the income approach. The same non-compliant cap rate used on other properties in Berkeley County was used by the Assessor to obtain the income approach value provided to the Board. The Board, however, in its discretion, decided that use of the income approach value for the assessment of this property which cost more than \$12,000,000 to construct would not appropriately reflect 60% of the true and actual fair market value of the Lee Trace apartment complex. Instead, the Respondent Board averaged the income approach value with the cost approach value, finding that the average of these two was a fairer and more accurate assessment.

Petitioner contends that the appropriate assessment of this property would be \$3,492,696. It makes this contention without any support or explanation of how the figure was derived. That the true and actual value of a relatively new and very attractive property which cost in excess of \$12,000,000 to construct and which has admittedly yielded a gross income, during the first year of occupancy, of \$1,761,066.00 has a fair market value of greater than \$3.5 million should be evident. Petitioner was not treated in a discriminatory or different manner than any other similarly situated taxpayer. Its assessment and its resulting taxes were derived according to law in a manner uniform with all other similar properties in Berkeley County. There is no violation

of any constitutional provisions, either federal or state and there is no violation of any governing statute or rule.

### CONCLUSION

There being no sufficient evidence that the Circuit Court abused its discretion with regard to its conclusions set out in its Final Order. Nor are there any clearly erroneous findings made by the Circuit Court. There is no evidence that the Respondent Board acted in any manner which could be characterized as plainly wrong. There is substantial evidence to support the Circuit Court's final order disposing of this case.

Accordingly, Respondent Board of Review and Equalization and Berkeley County Council request this Honorable Court to deny the petition for appeal.

**BOARD OF REVIEW AND EQUALIZATION**  
**and BERKELEY COUNTY COUNCIL**

By Counsel

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### CERTIFICATE OF SERVICE

I, Norwood Bentley III, do hereby certify that I have served a true and accurate copy of the foregoing Brief of Respondent Board of Review and Equalization, by e-mail on this the 5<sup>th</sup> day of January, 2013, and by United States mail, postage pre-paid, all as directed hereinbelow, on the 7<sup>th</sup> day of January, 2013.

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