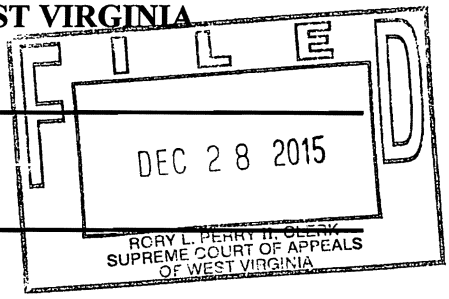
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 15-0934



CHARLESTON

UNIVERSITY PARK AT EVANSDALE, LLC,
Petitioner Below,

Petitioner,

v.

No. 15-CAP-8,
Circuit Court of Monongalia County (Judge Lawrance S. Miller, Jr., by special assignment)

MARK A. MUSICK, in his capacity as the Monongalia County, West Virginia, Assessor, Respondent Below,

Respondent.

BRIEF OF *AMICUS CURIAE* WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS

In Support of Petitioner and Urging Reversal of the Decision Below

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1. IDENTITY OF THE AMICUS CURIAE, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE[1]

The West Virginia University Board of Governors (the "Board of Governors," "*amicus*" or "*amicus curiae*") submits this Brief as *amicus curiae* based upon its concern regarding the adverse effect that assessment of private leasehold interests in public-private partnerships in a manner contrary to established law would have on the Board of Governors and other public participants in public-private partnerships. The Board of Governors joins the Petitioner in urging the Court to reverse the decision below and to remand the case to the Circuit Court with instructions to correct the assessment of the Petitioner's leasehold interest in University Park (defined below) for tax year 2015.

The issues concerning the assessment of the leasehold interest of the private party to a public-private partnership are of extreme significance to the Board of Governors and West Virginia University ("WVU"), the state institution of higher education governed by the Board of Governors. In recent years, WVU, like colleges and universities around the United States, has experienced declining support from state tax dollars. At the same time, the colleges and universities have been required to upgrade their facilities to meet the needs and demands of today's higher education students and to compete for the best and brightest of them. To address this problem, colleges and universities have turned to public-private partnerships.

A. Board of Governors; WVU

The Board of Governors is an agency of the State of West Virginia (the "State") and the governing body of WVU, a State institution of higher education, organized and operating pursuant to Chapter 18B of the Code of West Virginia of 1931, as amended.

[1] The undersigned counsel hereby certifies to the Court that no party to the instant appeal has authored in whole or in part or financially contributed to the preparation of this Brief. *See* W. Va. R. App. P. 30(e)(5).

WVU is one of the United States' 76 land-grant universities. As a land-grant university, WVU's mission is to promote access to higher education and apply research to meet the needs of West Virginians. Specifically, WVU's mission is to "deliver high-quality education, excel in discovery and innovation, model a culture of diversity and inclusion, promote health and vitality, and build pathways for the exchange of knowledge and opportunity between the state, the nation and the world." *See* https://about.wvu.edu/wvu-facts. The Fall 2013 enrollment at WVU's main campus in Morgantown, West Virginia, was 29,466: 22,757 undergraduate students, 5,077 graduate students, and 1,632 professional students from 113 nations, every state in the United States and all 55 counties in the State. WVU employs more than 8,400 faculty, staff and graduate assistants.

B. Interest in Case

In 2012, WVU updated its Student Housing Master Plan (the "Housing Master Plan"), which outlined challenges with then existing WVU-provided student housing and determined that student housing was a barrier to WVU's 2020 Strategic Plan and limited WVU's ability to attract the best and brightest students. The Housing Master Plan also outlined strategies for meeting the challenges with WVU student housing, which included constructing 1,100 new beds on the Evansdale campus and utilizing public-private partnerships. *See* http://assets.slate.wvu.edu/resources. The use of public-private partnerships is particularly important, because, even as WVU's student population has increased in recent years, WVU's receipt of State-appropriated funds has decreased.

University Park at Evansdale ("University Park") is one of the public-private partnerships utilized by WVU in implementing its Housing Master Plan. The Board of Governors and Petitioner entered into a Lease and Development Agreement dated December 23, 2013 (as

supplemented and amended, the "Agreement") for University Park. University Park was constructed upon real property (the "Site") owned by WVU, which leased the Site to University Park at Evansdale, LLC ("UPE") to construct the facility under the terms of the Agreement. Title to all construction in progress, improvements, equipment, furniture, materials and other assets constructed, installed or placed upon the Site by UPE immediately and automatically transferred to and became the exclusive property of WVU, without need for further documentation or action by either WVU or UPE.

The majority of University Park is subleased by UPE back to WVU pursuant to the terms of a Sublease Agreement, also dated December 23, 2013 (as supplemented and amended, the "Sublease"), which runs conterminously with the Agreement. WVU directly operates, maintains, and otherwise utilizes the subleased premises for on-campus student housing and various other purposes that are consistent with and in furtherance of WVU's mission. WVU operates the housing units on parity with all WVU-owned, on-campus student housing. UPE retains the right to lease and manage the commercial/retail portion of University Park, subject to the prior written approval of the Board of Governors, to private for-profit business entities to provide amenities expected by the students living in WVU's on-campus housing. WVU pays as rent to UPE under the Sublease all the revenues received from renting the housing units at University Park. UPE pays as rent to WVU under the Agreement a portion of the net revenues from University Park. In addition, UPE may not sell, assign, convey or transfer its leasehold interest in University Park without the prior written consent of WVU. Upon expiration of the Agreement and Sublease, UPE will retain no interest in the Site or the improvements constituting University Park and will not be afforded an option to purchase any ownership interest in University Park.

The structure of the University Park public-private partnership is similar to other public-private transactions that WVU has undertaken. In all instances, WVU owns the underlying real property; the real property is leased to a private third party, which agrees to construct certain facilities that are owned by WVU; the majority of the property and constructed facilities are subleased back to WVU to operate, manage, and otherwise utilize as on-campus housing or other uses appropriate for WVU to advance its academic mission. In each instance, some small percentage of the constructed facilities may, subject to WVU approval, be leased to other third parties. Also in each instance, the private entity's leasehold interest in the property and constructed facilities is neither a bargain lease nor freely assignable by the private entity.

Public-private partnerships are crucial, not only to WVU's ability to meet its student housing needs, but also to WVU's ability to carry out its mission and its 2020 Strategic Plan. WVU and other public entities utilizing public-private partnerships need a stable legal and regulatory environment in which to develop, construct and operate their public-private projects. The assessment of property taxes is an important aspect of such environment. In entering into the Agreement, which is neither a bargain lease nor freely assignable, WVU relied upon the Supreme Court's decision in *Maplewood Community, Inc. v. Craig*, 216 W. Va. 273, 607 S.E.2d 379 (2004).

C. Authority to File

Amicus curiae has filed a motion concurrently with this Brief requesting leave to file.

2. RELIEF SOUGHT BY *AMICUS CURIAE*

Amicus curiae asks that this Court reverse the decision below and remand the case to the Circuit Court with instructions to correct the assessment of the Petitioner's leasehold interest in University Park for tax year 2015.

3. ARGUMENT

The *amicus curiae* asserts that the issue presented, first to The County Commission of Monongalia County, sitting as the Board of Equalization and Review, and then to the Circuit Court of Monongalia County regarded the valuation of UPE's leasehold interest in University Park, not taxability. The *amicus curiae* further asserts that the valuation should have been determined as prescribed by *Maplewood. Id.*

A. The issue before the Board of Equalization and Review and the Circuit Court of Monongalia County below involved valuation for taxability, not exemption from taxability.

There is a distinction between exemption from taxation and valuation for taxation at zero value. That distinction was illustrated by the history of the assessments against Mon Elder Services, Inc. ("Mon Elder"), described in *Maplewood. Id.* After the Monongalia County Assessor refused to exempt the Mon Elder senior living facility from property taxation as charitable, Mon Elder and the Assessor jointly requested that the State Tax Commissioner issue a ruling on whether the facility was exempt from property taxes because the Monongalia County Building Commission owned the property, which was used for charitable purposes. The State Tax Commissioner concluded that the Monongalia County Building Commission, which owned the property, was exempt from property tax based on its status as a political subdivision.

Likewise, the Assessor in this case correctly determined that the fee interest in University Park, which is owed by WVU, is exempt from property taxes. Pursuant to Article X, § 1 of the State Constitution, the Legislature has exempted certain property from taxation, including property belonging exclusively to the State. *W.Va. Code* § 11-3-9(a)(2) exempts all property, real and personal, belonging exclusively to the State from ad valorem property taxation, without any qualification or limitation thereto respecting the use of such property, and constitutes a de

facto exemption for all property owned by the State, its agencies and instrumentalities. Real and personal property owned by the Board of Governors or WVU, as a branch of state government, is therefore exempt from ad valorem taxation. *See, e.g.*, *Hartigan v. Bd. of Regents of W.Va. Univ.*, 49 W.Va. 14, 15, 38 S.E. 698, 699 (1901) (WVU is a public corporation, a branch of the State government, an instrumentality which the State has brought into being to aid it in carrying out this duty of educating the people); Pt. 2, *State ex rel. Board of Governors of W. Va. University v. Sims*, 134 W. Va. 428, 59 S.E.2d 705 (1950) (Board of Governors is a public and governmental body and as such is an arm of the State); Pt. 1, *City of Morgantown v. Ducker*, 153 W. Va. 121, 168 S.E.2d 298 (1969) (Board of Governors of West Virginia University is a State agency, and, as such, is an arm of the State); Pt 1, *Univ. of W.Va. Bd. of Trs. v. Graf*, 205 W. Va. 118, 516 S.E.2d 741 (1998) (Board of Governors is a State agency, and, as such, is an arm of the State). *Also see*, *Graf v. West Virginia University*, 189 W. Va. 214, 429 S.E.2d 496, 503 (1992) (stating that "West Virginia University, [is] an agency of the State"); and footnote 22, *ACT v. University of WV Bd. of Trustees*, 210 W. Va. 456, 557 S.E.2d 863 (2001).

Although the Monongalia County Assessor concluded that the Building Commission's fee interest in the Mon Elder facility was exempt from taxation, the Assessor assessed taxes against Mon Elder's leasehold interest in the facility. After failing to have its interest exempted for charitable purposes, Mon Elder then challenged the valuation of its leasehold interest in the property, first with the Board of Equalization and Review and then with the Circuit Court. Rather than finding there was no jurisdiction, the Supreme Court in *Maplewood* remanded the matter for a determination on whether Mon Elder's leasehold interest had independent value separate from the underlying property. 216 W. Va. 273, 607 S.E.2d 379. That is precisely what Petitioner is requesting in this case.

B. In accordance with current West Virginia law, leasehold interests are subject to ad valorem property taxation as tangible personal property only when the leasehold has a separately determinable market value and it is freely assignable.

Although remanding the case for further determination, the Supreme Court in *Maplewood* set forth the parameters for separately valuing a leasehold interest:

> In *Great A & P Tea Co. v. Davis*, 167 W.Va. 53, 278 S.E.2d 352 (1981), this Court recognized that "[i]t would appear from the statutory scheme [chapter eleven, articles three, five] that a separate leasehold is taxable if it has a separate and independent value from the freehold." 167 W.Va. at 55, 278 S.E.2d at 355. In syllabus point two of *Davis* this Court held:
>
> The county assessor may presume that leaseholds have no value independent of the freehold estate and proceed to tax all real property to the freeholder at its true and actual value; the burden of showing that a leasehold has an independent value is upon the freehold taxpayer and the taxpayer must request in a timely manner the separate listing of freehold and leasehold interests.
>
> *Id.* at 53, 278 S.E.2d at 354.
>
> Subsequent to the *Davis* case, the state tax department developed an eight-step process for valuing leasehold interests in real estate that is referred to as the "Leasehold Appraisal Policy." Pursuant to that process, steps one and two require an initial determination of whether a leasehold estate was created and secondly whether the lessee has a marketable right to assign or transfer the lease. The remaining six steps in the process are directed at arriving at a value for the leasehold estate. Critical to applying this policy, however, is appreciation of the fact that "the separate value of a leasehold, if any, is based on whether the leasehold is economically advantageous to the lessee, that is a so-called bargain lease, and is freely assignable so that the lessee may realize the benefit of such bargain in the market place."

607 S.E.2d 379 at 392, *citing* "Valuation of Leasehold Interests," State Tax Commissioner's Annual In-Service Training Seminar for Assessors, June 14, 1989. The Agreement in this case was structured in the context of the above criteria. WVU and other public entities need the ability to engage in public-private partnerships if they are to fulfill their important public missions with decreasing funds. They also need to engage in those partnerships within a stable

legal and regulatory environment. The Monongalia County Assessor's decision not to follow the criteria set forth in *Maplewood* and the Tax Department's policy results in instability, difficulty in pursuing public-private partnerships and an impediment to WVU's carrying out its 2020 Strategic Plan and land-grant university mission.

4. CONCLUSION

For the above-stated reasons and those stated in Petitioner's brief, *amicus curiae* asks that this Court reverse the decision below and remand the case to the Circuit Court with instructions to correct the assessment of the Petitioner's leasehold interest in University Park for tax year 2015.

Respectfully submitted,

WEST VIRGINIA UNIVERSITY
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MARK A. MUSICK, in his capacity As the Monongalia County, West Virginia, Assessor, Respondent Below,

Respondent.

CERTIFICATE OF SERVICE

I, John A. Mairs, do hereby certify that service of the foregoing ***Brief of Amicus Curiae West Virginia University Board of Governors*** was made upon counsel of record this the 28th day of December 2015 by mailing a true and exact copy thereof via first class United States Mail, postage prepaid, in an envelope addressed as follows:

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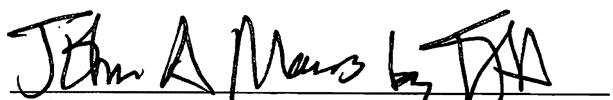

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