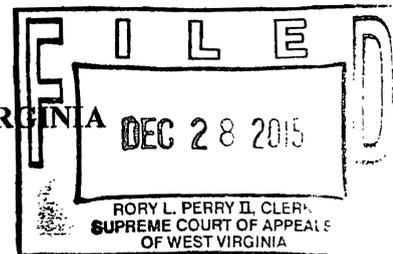


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**UNIVERSITY PARK AT EVANSDALE, LLC,
Petitioner Below,**

Petitioner,

v.

**No. 15-0934
(No. 15-CAP-8, Circuit
Court of Monongalia County)**

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

Respondent.

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

Assignment No. 1. The Circuit Court erred when it ruled that Petitioner challenged the taxability, *rather than the assessed value*, of its leasehold interest in University Park.

Assignment No. 2. The Circuit Court erred when it failed to apply the framework established by this Court in *Maplewood Cmty., Inc. v. Craig*, to correct and fix the erroneous assessment of Petitioner's leasehold interest in University Park.

Assignment No. 3. In assessing Petitioner's leasehold interest in University Park, Respondent improperly used a methodology reserved for assessing freehold interests, and the Circuit Court erred when it failed to correct and fix the resulting erroneous assessment.

II. STATEMENT OF THE CASE

A. Preliminary Statement

University Park is a new student-housing facility in Morgantown, West Virginia. It is owned by the West Virginia University Board of Governors ("WVU BOG"), and it is leased to Petitioner under a long-term lease.

In West Virginia, leasehold interests - like Petitioner's interest in University Park - are assessable for personal property tax purposes unless they are tax-exempt. According to the leasehold appraisal methodology created by the State Tax Commissioner and the framework established by this Court in *Maplewood Cmty., Inc. v. Craig*, 216 W. Va. 273, 607 S.E.2d 379 (2004), county assessors are required to assign an assessed value to each leasehold interest based upon the ascertainable market value of the leasehold interest that is separate and independent from the freehold interest. A leasehold interest has a separate and independent value from the freehold interest only if and to the extent it is both freely assignable and a bargain lease. If a

leasehold interest is not both freely assignable and a bargain lease (i.e., it has no separate and independent value from the freehold interest), its assessed value should be *zero*.

In January 2015, Respondent assessed Petitioner's leasehold interest in University Park at \$9,035,617 for tax year 2015. Petitioner challenged the value of that assessment before the Monongalia County Commission sitting as the Board of Equalization and Review (the "BER") on the grounds that its leasehold interest was neither freely assignable nor a bargain lease, and its assessed value should therefore be zero. At the BER's February 17, 2015, hearing, Respondent acknowledged that Petitioner's leasehold interest is neither freely assignable nor a bargain lease. He also acknowledged that when he assessed Petitioner's leasehold interest, he was aware of this Court's holding in *Maplewood*¹ and the methodology prescribed by the State Tax Commissioner for assessing leasehold interests,² but he nonetheless made the assessment using a methodology reserved for assessing freehold interests.

The BER rejected Petitioner's challenge on the grounds that, instead of a valuation issue within its jurisdiction, Petitioner had raised a taxability issue within the State Tax Commissioner's jurisdiction. Petitioner appealed the BER's decision to the Circuit Court, and in an August 26, 2015, order, the Circuit Court affirmed the BER's decision on the same grounds. This Court should reverse the Circuit Court's order, and the case should be remanded, because

¹ As discussed below, Respondent engaged the Charleston, West Virginia, law firm of Lewis Glasser Casey & Rollins, PLLC to advise him in connection with this assessment, and that law firm informed Respondent of this Court's holding in *Maplewood* before the assessment was made. [J.A. 75-76]. In other words, before he made the assessment, Respondent knew that leasehold interests were assessable in West Virginia only if and to the extent they were both freely assignable and a bargain lease.

² The \$9,035,617 assessment is erroneous for two reasons. First, it is erroneous because Petitioner's leasehold interest in University Park is neither freely assignable nor a bargain lease and therefore has no separate and independent market value from the freehold interest. And second, as discussed more fully below, the \$9,035,617 assessment is also erroneous because Respondent improperly used a methodology reserved for valuing freehold interests rather than the methodology prescribed by the West Virginia State Tax Commissioner for valuing leasehold interests.

Petitioner did in fact challenge the valuation of the assessment, not its taxability, and the Circuit Court was required to correct and fix the erroneous assessment.

B. Statement of Facts and Procedural History

1. Petitioner has a leasehold interest in University Park.

University Park is a new student-housing facility developed as part of a public-private partnership between West Virginia University (“WVU” or the “University”) and Petitioner. WVU BOG leased Petitioner its 6.96 acre property (and any improvements to be constructed) for an initial 40 year term. [J.A. 56, 61, 288, 303]. Petitioner, in turn, obligated itself to construct University Park at its sole risk and expense. [J.A. 61-62, 307]. As each brick (i.e., all materials, supplies, and equipment) came on-site, ownership automatically vested in WVU BOG so that, by the time construction was completed in August 2015, WVU BOG had fee ownership of the completed University Park, a 434,046 square foot development made up of 1,310 residential student-housing beds and a small commercial component. [J.A. 3, 5, 61-62, 316, 330-331]. Petitioner has a leasehold interest in University Park with no reversionary interest and no option to purchase at the end of the lease. [J.A. 59, 330-31, 347-48].

Under a sublease that was executed and runs concurrently with the lease, Petitioner subleased the entire residential portion of University Park – approximately 97% of the development – back to WVU BOG so that University Park can fulfill its essential purpose: service as new and replacement on-campus student-housing managed, operated, secured, and leased by the University. [J.A. 56, 313-23, 720, 722, 725, 727-29]. Petitioner retained a conditional right to operate or lease the commercial portion of University Park – the remaining 3% of the development – which it leases to entities providing amenities to the student tenants and surrounding community. [J.A. 60-61, 319-21, 363].

Both WVU BOG and Petitioner considered it to be critical that each remained committed to University Park and its intended use. Under the agreements for University Park, neither WVU BOG nor Petitioner is permitted to sell, assign, convey, or transfer its interest without the other's consent. [J.A. 59-60, 345, 731]. The agreements for University Park also limit Petitioner's ability to operate or sublease the commercial component; for all practical purposes, WVU BOG has veto authority over Petitioner's operation and subleasing of that space. [*Id.*].

2. *West Virginia University Board of Governors receives fair market value for the lease.*

Under the agreements for University Park, there are three types of rent paid by Petitioner. The first type is "construction period rent," which was paid by Petitioner to WVU BOG in the amount of \$10 per month during the construction of University Park. [J.A. 304]. The second type is "lease year rent," which is a percentage of the combined revenues from the residential student-housing and commercial components less associated expenses, debt service payments, and deposits to reserve accounts. [J.A. 304-05]. Over the initial 40-year lease term, Petitioner estimates that it will pay WVU BOG in excess of \$90 million in lease year rent. [J.A. 61]. The third type, which is not specifically identified in the agreements, is "additional rent" reflecting the value of University Park, an \$89.6 million improvement that Petitioner transferred to WVU BOG with no recourse to itself or its lenders. [J.A. 61-62, 307-08, 331-32].

3. *Respondent ignored the facts, ignored the law, and ignored the advice of his own counsel when he assessed Petitioner's leasehold interest.*

To assist Respondent with the proper assessment of Petitioner's leasehold interest in University Park for tax year 2015, Petitioner's representatives met with him on several occasions to provide and explain the relevant documents. [*See, e.g.*, J.A. 76, 537, 542-43, 560, 573-75, 580-87 (attaching transactional documents); *see also* J.A. 546-87 (correspondence between

Petitioner's counsel and Respondent)). Petitioner explained that, under the framework established by this Court in *Maplewood*, a leasehold interest has assessable value only if it is freely assignable and a bargain lease. [J.A. 542-43, 573-75].

Respondent received the same advice from the law firm of Lewis Glasser Casey & Rollins, PLLC ("Lewis Glasser"), which he retained to advise him on the assessment of Petitioner's leasehold interest in University Park. [J.A. 75-76]. Like Petitioner, Lewis Glasser advised Respondent that a leasehold interest is "taxable" only if it is both freely assignable and a bargain lease. [*Id.*]. Moreover, Respondent was directed to the State Tax Commissioner's leasehold appraisal methodology by Jan Mudrinich at the State Tax Department in late November 2014. [*See, e.g.*, J.A. 486].

Had Respondent applied the legal framework identified by Petitioner, Lewis Glasser, and the State Tax Department to the analysis of the agreements for University Park, he would have concluded that Petitioner's leasehold interest is neither freely assignable nor a bargain lease. Respondent then would have been required to list Petitioner's leasehold interest in University Park on the Monongalia County personal property books with an assessed value of zero.

Instead, in January 2015, Respondent mailed Petitioner a notice of increase in assessment advising that he had set the assessed value of Petitioner's leasehold interest in University Park for tax year 2015 at \$9,035,617. [J.A. 531]. As Respondent confirmed before the BER, he had applied a methodology reserved for assessment of freehold interests when he assessed Petitioner for the value of the construction-in-place at University Park.

Based on information that Mr. Nesselroad presented my commercial appraiser, Chris Michael, when he asked what's on – as of July 1 of 2014, what was the completion – percentage complete of the construction. And I think that was – 20.6 percent is what was submitted. And they took that of the total value that was submitted of what the project would be to get it appraised at 60 percent of that to get the assessed value. ... Based on the partial completed construction of the

personal property, yes, that's what we do [to assess the value of a leasehold interest.].

[J.A. 72-73].

4. *Petitioner challenged Respondent's assessment of its leasehold interest before the Monongalia County Commission sitting as the Board of Equalization and Review.*

Petitioner challenged Respondent's assessment of its leasehold interest in University Park before the BER at a February 17, 2015, hearing. [J.A. 102, 117-118]. Petitioner provided the BER with several of the agreements it had previously provided Respondent and additionally offered testimony from Mark J. Nesselroad, an owner in Petitioner's managing entities. [J.A. 54-69 (testimony of Mr. Nesselroad); J.A. 288-366 (University Park lease and development agreement); J.A. 722-741 (University Park sublease)]. Mr. Nesselroad testified before the BER regarding what is plainly set out in the agreements themselves:

WVU acquired 6.96 acres of land through the lease and development agreement. Leases the land and the improvements and personal property to [Petitioner] through the sublease [sic] and the management agreement. Through the sublease, we lease it – 97 percent of the project, the residential premises, back to West Virginia University. And through a management and operating agreement, WVU manages it as 100 percent on-campus student housing. ... [Petitioner cannot assign or sublease its interest in University Park] without restrictions or limitations. ... If we have a tenant ready to occupy commercial premises, we will submit that tenant in writing as well as the lease to West Virginia University. It's also subject to Exhibit C of this lease and development agreement which provides for restrictions and limitations on the types and uses of those subtenants. Then we'll get formal approval or disapproval from West Virginia University.

[J.A. 56, 59-61]. Mr. Nesselroad further testified regarding the consideration paid to WVU BOG for the lease. WVU BOG received fee ownership of University Park, which cost approximately \$89.6 million to construct, and over the initial 40-year lease term, Petitioner will pay WVU BOG more than \$90 million in lease year rent. [J.A. 61-62].

Respondent also testified before the BER and, in doing so, made several remarkable concessions. [J.A. 69-86]. Respondent conceded that neither he nor anyone in his office used the methodology required by the West Virginia State Tax Commissioner for valuation of leasehold interests when he assessed Petitioner for its leasehold interest in University Park.

Q. Did you or anybody else in your office use the formula that the state tax commissioner directed assessors to use when assessing leasehold interests in West Virginia when you assessed the leasehold value of the lease at University Park?

A. No.

[J.A. 74-75]. Moreover, Respondent conceded that his own counsel had informed him before the assessment that a leasehold interest is only “taxable” if it is both freely assignable and a bargain lease. [J.A. 75-76]. Respondent then looked at the agreements for University Park – which had been provided to him months earlier – and conceded that Petitioner’s leasehold interest in University Park was neither freely assignable nor a bargain lease. [J.A. 76, 79-80].

5. *The Monongalia County Commission sitting as the Board of Equalization and Review misunderstood the nature of Petitioner’s challenge.*

Between the agreements for University Park, Mr. Nesselroad’s testimony, and Respondent’s concessions, Petitioner presented the BER with clear and convincing evidence that the assessment of its leasehold interest in University Park was unlawful for two reasons: Respondent failed to apply the binding leasehold appraisal methodology, and Respondent failed to assess Petitioner’s leasehold interest at its true and actual value of zero. The BER, however, erroneously believed that, because Petitioner contended its leasehold interest lacked assessable value, Petitioner had presented a taxability question over which it lacked jurisdiction. [J.A. 89-94, 103, 117-118]. Concluding that it lacked jurisdiction to consider Petitioner’s challenge, the

BER tacitly affirmed Respondent's unlawful assessment of Petitioner's leasehold interest in University Park. [*Id.*].

6. *The Circuit Court made the same error as the Monongalia County Commission sitting as the Board of Equalization and Review.*

Petitioner provided the Prosecuting Attorney of Monongalia County with statutory notice of its intention to appeal the BER's decision on March 9, 2015. [J.A. 1036]. Eleven days later, on March 20, 2015, Petitioner filed its *Petition for Appeal of an Order of the Monongalia County Board of Equalization and Review* (the "Appeal"). [J.A. 1-45]. On April 16, 2015, Petitioner transferred the certified record of proceedings before the BER to the Circuit Court. [J.A. 96-744 (certified record); J.A. 1246 (docket sheet notation of transfer)].

The Appeal temporarily stalled before the Circuit Court. The Honorable Judge Philip Gaujot was disqualified and the Honorable Judge Lawrance S. Miller, Jr., was appointed in his place [J.A. 745]; Respondent filed a motion to dismiss, which was subsequently denied [J.A. 746-53 (Mot.); J.A. 1065-78 (Order)]; and North Central West Virginia Property Owners Association, Inc. (the "Amicus") was given leave to participate as an *amicus curiae* [J.A. 773-74 (Mot. to Intervene); J.A. 803-12 (Order)]. By August 18, 2015, however, Petitioner and Respondent had fully briefed cross-motions for summary judgment, and the Circuit Court had heard oral argument. [J.A. 840-49 (Resp.'s Mot. for Summ. J.); J.A. 850-66 (Resp.'s Mem. in Support of Mot. for Summ. J.); J.A. 867-1064 (Pet'r's Mot. for Summ. J.); 1079-88 (Resp.'s Supplemental Mem. in Support of Mot. for Summ. J.); 1089-1108 (Pet'r's Resp. in Opp. To Resp.'s Mot. for Summ. J.); J.A. 1126-67 (Aug. 18, 2015, Tr.)].

On August 26, 2015, the Circuit Court entered its *Opinion Order Denying Petition for Appeal* (the "August 26 Order"). [J.A. 1182-1214]. Although wide-ranging, the August 26 Order denied Petitioner's Appeal for essentially the same reason as the BER. The Circuit Court

concluded that Petitioner's challenge presented a question of taxability that Petitioner was required to first present to the State Tax Commissioner to preserve appellate review. [J.A. 1214]. Because Petitioner had presented its challenge to the BER, the Circuit Court held that it lacked jurisdiction to consider Petitioner's Appeal. [J.A. 1212-14].

Petitioner filed its *Petitioner's Motion to Alter or Amend "Opinion Order Denying Petitioner [sic] for Appeal"* on September 10, 2015, [J.A. 1215-39], which the Circuit Court denied by Order entered September 18, 2015 (the "September 18 Order") [J.A. 1240-42]. Petitioner timely filed its notice of appeal with this Court on September 25, 2015, in which it appeals from the Circuit Court's August 26 Order.

III. SUMMARY OF THE ARGUMENT

The Circuit Court's August 26 Order should be reversed for three reasons.

First, like the BER, the Circuit Court erroneously concluded that Petitioner had challenged the taxability of its leasehold interest in University Park. Based on this conclusion, the Circuit Court held that Petitioner had challenged the assessment of its leasehold interest before the wrong administrative body (the BER rather than the State Tax Commissioner) and that it did not have jurisdiction to consider the Appeal. In fact, however, Petitioner had challenged the valuation of its leasehold interest before the proper administrative body (the BER) and had thus preserved its challenge for appellate review.

Second, in concluding that Petitioner had challenged the taxability, rather than valuation, of its leasehold interest in University Park, the Circuit Court failed to follow this Court's decision in *Maplewood*. Had it followed *Maplewood*, the Circuit Court not only would have concluded that Petitioner had challenged the valuation of its leasehold interest in University Park, but also that the leasehold interest was neither freely assignable nor a bargain lease. The

effect of these conclusions would have been to require the Circuit Court to correct and fix the assessed value of Petitioner's leasehold interest at its true and actual value of zero.

Third, and finally, the Circuit Court erred when it failed to correct and fix the assessment of Petitioner's leasehold interest based on Respondent's failure to follow binding leasehold appraisal methodology. Regardless of the value assigned to its leasehold interest, Petitioner was entitled to have the assessment made by application of the correct procedures. Respondent's acknowledgment that he knowingly and intentionally disregarded binding leasehold appraisal methodology rendered the assessment of Petitioner's leasehold interest unlawful and required its correction by the Circuit Court.

As a result of these errors, either standing alone or operating in conjunction, the Circuit Court failed to correct and fix an assessment of Petitioner's leasehold interest that Respondent conceded was unlawful and made in knowing disregard of binding leasehold appraisal methodology.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for Rule 19 oral argument because it involves assignments of error in the application of settled law. W. Va. R. App. P. 19(a)(1). The Circuit Court disregarded settled law from this Court regarding the validity of an assessment derived in contravention of any regulation, statute, or constitutional provision.

This case is also appropriate for Rule 20 oral argument because it involves issues of first impression and of fundamental public importance. W. Va. R. App. P. 20(a)(1)-(2). Although the distinction between questions of valuation and taxability in challenges to assessment is clear from applicable statutes and this Court's decisions, this Court has not previously ruled on the

issue. Additionally, this appeal presents issues affecting the assessment of leasehold interests in property owned by tax-exempt entities, including public universities across West Virginia.

After either Rule 19 or Rule 20 oral argument, Petitioner requests entry of a decision through signed opinion.

V. JURISDICTION AND STANDARD OF REVIEW

A. Jurisdiction

This Court has jurisdiction under W. Va. Code § 58-5-1, which allows for an appeal “from a final judgment of any circuit court.” The August 26 Order became a final judgment for purposes of appeal when the Circuit Court entered its September 18 Order denying Petitioner’s motion to alter or amend judgment.³ On September 25, 2015, Petitioner timely filed its notice of appeal within thirty days of both the August 26 Order and the September 18 Order.

This Court also has jurisdiction under W. Va. Code § 11-3-25(d), which allows for appeal of a valuation challenge where the assessed value of the property is \$50,000 or more. Respondent assessed Petitioner’s leasehold interest in University Park in the amount of \$9,035,617, which satisfies this threshold.

B. Standard of Review

“A taxpayer challenging an assessor’s tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous.” Syl. Pt. 5, in part, *In re Tax Assessment of Foster Found.’s Woodlands Ret. Cmty.*, 223 W. Va. 14, 672 S.E.2d 150 (2008). In general, “an

³ Under Rule 72 of the West Virginia Rules of Civil Procedure, the time for filing an appeal commences with the entry of an order granting or denying a motion to alter or amend judgment under Rule 59(e). W. Va. R. Civ. P. 72. In its September 18 Order, the Circuit Court held that a Rule 59(e) motion to alter or amend judgment is not available in an appeal from a county commission sitting as a board of equalization and review. [J.A. 1240-42]. Although the Circuit Court did not reach this question, it follows that the Circuit Court likely would have held that Petitioner’s September 10, 2015, motion to alter or amend judgment did not suspend the time for filing an appeal to this Court. Petitioner respectfully submits that the Circuit Court’s analysis on this point is in error but, because Petitioner timely filed its notice of appeal within thirty days of the August 26 Order, it need not be considered by this Court.

assessor's valuation of property is presumed to be correct." *Id.* at 25, 672 S.E.2d at 161. Nonetheless, "[w]here it appears that there was no proper assessment there can be no presumption in favor of the correctness of the assessment." Syl. Pt. 2, *In re Tax Assessments Against Pocahontas Land Corp.*, 158 W. Va. 229, 210 S.E.2d 641 (1974).

As a statutory appeal brought under W. Va. Code § 11-3-25, review is limited to the record upon which the BER's decision was based. Syl. Pt. 3, *In re Morgan Hotel Corp.*, 151 W. Va. 357, 151 S.E.2d 676 (1966). According to that record, "the circuit court is confined to determining whether the challenged property valuation is supported by substantial evidence, or otherwise in contravention of any regulation, statute, or constitutional provision." *In re Tax Assessment Against Am. Bituminous Power Partners*, 208 W. Va. 250, 254, 539 S.E.2d 757, 761 (2000). This scope of review is similar to that applied under the West Virginia Administrative Procedures Act, W. Va. Code § 29A-1-1 *et seq.*, which requires reversal of an administrative decision if it is:

1. In violation of constitutional or statutory provisions; or
2. In excess of the statutory authority or jurisdiction of the agency; or
3. Made upon unlawful procedures; or
4. Affected by other error of law; or
5. Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
6. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. at 255 & n. 8, 539 S.E.2d at 762 & n. 8.

In reviewing an appeal from a county commission sitting as a board of equalization and review, this Court has recognized that "a circuit court is primarily discharging an appellate function little different from that undertaken by this Court; consequently, [this Court's] review of a circuit court's ruling in proceedings under [W. Va. Code] § 11-3-25 is *de novo*." *Id.* at 255, 539 S.E.2d at 762.

C. Scope of Relief

Statutory authority to correct and fix erroneous assessments is limited to the Circuit Court. W. Va. Code § 11-3-25; *see also In re Tax Assessments Against Pocahontas Land Corp.*, 158 W. Va. at 240, 210 S.E.2d at 648-49 (holding that this Court lacks the authority to correct and fix an assessment). As a consequence, this Court's correction of Respondent's erroneous assessment must be accomplished through an Order remanding the matter to the Circuit Court.

VI. ARGUMENT

A. The Circuit Court erred when it ruled that Petitioner challenged the taxability, rather than the assessed value, of its leasehold interest in University Park.

The jurisdictional question in this appeal – which was wrongly-decided by the BER and the Circuit Court – is whether the argument that Petitioner's leasehold interest lacks separate and independent assessable value presents a challenge to valuation or to taxability. This is not simply an academic issue. At an administrative level, challenges to tax assessments must be brought before either the State Tax Commissioner, if concerning taxability or classification, or before a county commission sitting as a board of equalization and review, if concerning valuation.⁴ Failure to bring a challenge before the proper administrative body forecloses both the right to the assessment's correction and the right to appeal.

The BER erroneously concluded that Petitioner's challenge – that its leasehold interest lacks separate and independent assessable value – presented a challenge to taxability outside its jurisdiction. [J.A. 89-94, 103, 117-118]. The Circuit Court agreed. [J.A. 1214]. The problem, however, with the BER and Circuit Court's conclusions is that they misapply the distinction

⁴ "A county assessor in assessing property for taxation purposes acts in a ministerial, or administrative, capacity, and likewise a county court, sitting as a board of equalization and review, acts in such capacity." Syl. Pt. 1, *In re Tax Assessments Against the So. Land Co.*, 143 W. Va. 152, 100 S.E.2d 555 (1957), overruled in part on other grounds, *In re Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649 (1959).

between valuation and taxability under West Virginia law. Valuation concerns the dollar amount at which property is taxed, whereas taxability concerns whether property is taxed at all (e.g., exemption). Petitioner at no point argued exemption to either the BER or Circuit Court. Instead, Petitioner's challenge to the assessment of its leasehold interest in University Park was based on its valuation: Petitioner contended that the value of University Park was fully reflected in the freehold interest owned by WVU BOG and, thus, its leasehold interest lacked separate and independent assessable value. [*See., e.g.,* J.A. 877-79]. Had either the BER or the Circuit Court properly considered Petitioner's challenge as being based on an improper valuation, it would have been compelled to correct and fix the assessment at zero.

1. The State Tax Commissioner's regulations governing leasehold appraisals are valuation regulations rather than taxability regulations.

Given that both the BER and Circuit Court concluded that Petitioner's assessment challenge presented a challenge to taxability, it is notable that the State Tax Commissioner's regulations governing leasehold appraisals are found under the heading "Appraisal of **Valuation** of Commercial and Industrial Real Property" and that the applicable subsection is entitled "**Valuation** of leaseholds in industrial and commercial real properties." W. Va. C.S.R. § 110-1P-3 (emphasis added). It is similarly notable that the statutory language governing leasehold assessments refers to valuation rather than taxability. "[I]n cases of the assessment of leasehold estates a sum equal to the **valuations** placed upon such leasehold estates shall be deducted from the total value of the estate, to the end that the **valuation** of such leasehold estate and the remainder shall aggregate the true and actual **value** of the estate." W. Va. Code § 11-5-4 (emphasis added).

The references to valuation in the controlling regulations for leasehold assessments stand in contrast to the references to exemption in the regulations concerning certification of taxability

questions to the State Tax Commissioner. Those regulations are entitled “**Exemption** of Property From Ad Valorem Property Taxation” and, among other things, provide the procedures for entry of real and personal property on the land and personal property books and the procedure for objection by a taxpayer “believ[ing] that the property is exempt or not otherwise subject to taxation.” W. Va. C.S.R. §§ 110-3-5 & 110-3-6 (emphasis added). Significantly, when an assessor certifies a question to the State Tax Commissioner under W. Va. C.S.R. § 110-3-6.2.2, the taxpayer must furnish to the State Tax Commissioner “[t]he reason why the taxpayer believes the property to be **exempt** from taxation or erroneously classified. This shall include the particular statutory **exemption(s)** enumerated in W. Va. Code §11-3-9.” (emphasis added). In this case, Petitioner did not challenge the classification of its leasehold interest or claim a statutory exemption under W. Va. Code § 11-3-9. Rather, Petitioner consistently asserted that its challenge is one of valuation.

Certainly, as discussed *infra*, language is not always dispositive in the context of taxation. Nonetheless, it is telling that the controlling statute and regulation for leasehold assessments refer to “valuation” whereas the controlling regulations for taxability rulings refer to “exemption.”

2. Challenges to taxability pertain to exemptions from the levy.

The distinction between taxability and valuation advanced by Petitioner is supported by consideration of the relationship between the three basic components of taxation: assessment, levy, and collection. The process of taxation begins with the assessment. With few and inapplicable exceptions, the assessor enters the value of the real and personal property in his jurisdiction into his property books at sixty percent of its true and actual value. W. Va. Code §§ 11-3-1 & 11-5-1. Once the assessor has determined the assessed value of the property in his

jurisdiction (and the board of equalization and review has completed its work), the assessor extends the levy rates set by the various levying bodies against all non-exempt property. W. Va. Code § 11-3-9 (exemptions);⁵ W. Va. Code § 11-3-19 (extension of levies); W. Va. Code § 11-8-1 *et seq.* (levies). After this process is completed, the assessor turns his property books over to the county sheriff for the collection of taxes, which are set by the application of levy rates to the assessed value. W. Va. Code § 11-3-19. Under this system, successful challenges to valuation affect the amount of tax to be collected (because they affect the dollar amount against which the levy rate is extended), whereas successful challenges to taxability prohibit the collection of tax regardless of amount (because they prevent the extension of the levy rates at all).⁶

This statutory scheme demonstrates that challenges to taxability are typically limited to questions of exemption and are entirely independent of value. Indeed, the Legislature provided the outlines for this scheme in the West Virginia Code: “[r]eal property which is exempt from taxation ... shall be entered upon the assessor’s books, together with the true and actual value thereof, but no taxes may be levied upon the property or extended upon the assessor’s books.” W. Va. Code § 11-3-9(c) (emphasis added). Moreover, in *Maplewood*, this Court unambiguously held that “[t]he West Virginia Constitution provides that all property is subject to taxation **unless expressly exempted.**” 216 W. Va. at 279, 607 S.E.2d at 385 (emphasis added) (citing W. Va. Const. Art. X, § 1).

⁵ Only real and personal property specifically meeting one of the exemptions set forth in State law is exempt from taxation. In this case, Petitioner did not claim an exemption, which stands in contrast to the facts in *Maplewood* where both Maplewood Community, Inc. and Mon Elder Services, Inc. asserted that their interests were exempt under W. Va. Code § 11-3-9(a)(12). 216 W. Va. at 280-86, 607 S.E.2d at 386-92.

⁶ In limited cases, questions of taxability concern whether property has situs in a particular jurisdiction so as to subject it to taxation. See *In re Wheeling Steel Corp. Assessment Personal Property Brooke Cty. 1951 Taxes*, 137 W. Va. 653, 73 S.E.2d 644 (1952). Situs is not an issue in this appeal since Petitioner’s leasehold interest is in real property located in Monongalia County, West Virginia.

Other cases similarly demonstrate the connection between questions of “taxability” and exemption. In *New Vrindiban Cmty., Inc. v. Rose*, this Court held that “where a question of taxability arises ... and such question involves the constitutionality of a statute granting **exemption** from taxation, the matter shall be heard *de novo* by the circuit court before this Court will pass on the constitutionality of the statute granting the exemption.” 187 W. Va. 410, 413-14, 419 S.E.2d 478, 481-82 (1992) (emphasis added). In *Book Agents of Methodist Episcopal Church v. State Bd. of Equalization*, the Supreme Court of Tennessee held that “the test of taxability is exclusive use for **exempt** institutional purposes.” 513 S.W.2d 514, 523 (Tenn. 1974) (emphasis added). And, in *In re Feiler’s Estate*, the Pennsylvania Court of Common Pleas distinguished between valuation and taxability, which it defined as “whether assets are taxable in the first place, or are **exempt**.” 65 Pa. D. & C.2d 524, 527 (Pa. Com. Pl. 1974) (emphasis added).

As the statutory and case law demonstrate, the argument that property lacks separate and independent value – as is true for Petitioner’s leasehold interest in University Park – does not convert an assessment challenge from one of valuation to one of taxability. Petitioner’s challenge was to valuation – specifically, the assessed value of its leasehold interest in University Park – and was brought before the proper administrative forum for hearing and preservation of judicial review.

3. *Extension of challenges to taxability beyond claims of exemption leads to absurd and inconsistent results.*

For leasehold interests, which generally lack ascertainable market value, the failure to acknowledge that claims of zero assessable value present questions of valuation (as opposed to questions of taxability) can lead to absurd and inconsistent results. *See Great A & P Tea Co. v. Davis*, 167 W. Va. 53, 56, 278 S.E.2d 352, 355 (1981) (stating general rule for leasehold interests) Assume, for example, the following scenario based in the facts of this appeal:

Petitioner certifies a request for taxability ruling to the State Tax Commissioner (as the Circuit Court concluded was required) in which it requests a determination that its leasehold interest in University Park has no separate and independent value from the freehold and, thus, an assessed value of zero. In support of this request, Petitioner cites the *Maplewood* framework and demonstrates that its leasehold interest in University Park is neither freely assignable nor a bargain lease. At the same time, Petitioner argues before the BER that, under W. Va. Code § 11-4-11, Respondent improperly assessed it for the value of construction labor in addition to the value of the construction materials. In support of this challenge, Petitioner cites the fact that Respondent assessed it for 60% of the cost of the construction-in-place as of July 1, 2014, without first deducting the value of construction labor.

Depending on the State Tax Commissioner and BER's determinations, Respondent could potentially be subject to two competing (and equally binding) decisions. W. Va. Code § 11-3-24 (BER returns property books to the assessor to be levied); W. Va. Code § 11-3-24a (State Tax Commissioner's decision binding upon the assessor). In that case, whose decision would control – that of the State Tax Commissioner or that of the BER? This potential for conflict is avoided only if challenges to taxability are understood as claims of exemption and the BER's jurisdiction to consider challenges to valuation is acknowledged to extend even to those cases where the value is alleged to be zero.⁷

It is thus apparent that Petitioner's assertion before the BER – that its leasehold interest in University Park lacks separate and independent value from the freehold owned by WVU BOG – presented a challenge to valuation rather than to taxability. A claim of absence of value is as much a challenge to valuation as is a claim of value of 1¢; contrary to the BER and Circuit Court's holdings, there is no tipping point at which a taxpayer's challenge to an assessment is converted from one of valuation to one of taxability. Petitioner's challenge to the assessment of

⁷ Notably, if challenges to taxability are understood as pertaining to exemption, the State Tax Commissioner's decision does not provide the assessor with a competing and equally binding valuation but rather prohibits the assessor from extending the levy (regardless of the underlying value).

its leasehold interest in University Park went to valuation and was properly presented to the BER and then to the Circuit Court on appeal.

4. *The value of Petitioner's leasehold interest in University Park for property tax purposes is distinct from any revenue from the public-private partnership between Petitioner and WVU BOG.*

In refusing to correct Respondent's assessment of Petitioner's leasehold interest in University Park, both the BER and the Circuit Court went beyond the limited question of the value of Petitioner's leasehold interest to also consider the potential revenue from the public-private partnership between Petitioner and WVU BOG.⁸ [J.A. 64-69, 1190]. For purposes of *ad valorem* property taxation of leasehold interests, however, the only relevant question is whether Petitioner's leasehold interest in University Park has assessable value. As discussed *infra*, this question is answered by determining whether the leasehold interest is marketable; that is, whether the leasehold is freely assignable and a bargain lease. In practical terms, is the leaseholder paying less than fair market value in rent and, if so, can he assign the lease for that fair market value and retain the difference? For a leasehold to have separate assessable value, both questions must be answered in the affirmative.

For Petitioner's leasehold interest in University Park, however, both questions are answered in the negative. Petitioner pays fair market rent to WVU BOG for its leasehold in the form of 50% or more of gross revenues less certain expenses, debt service payments, and deposits to reserve accounts. Over the initial 40-year lease term, this amount is estimated to exceed \$90 million and will accrue to WVU BOG in addition to the \$89.6 million value of University Park itself, which WVU BOG received without expending any funds for its construction or improvement. Moreover, even if Petitioner did not pay fair market rent (and it

⁸ Although an income-based approach may be appropriate for valuation of certain fee interests, it is not appropriate for the valuation of leasehold interests under the controlling statutes and regulations.

does), it is prohibited from transferring its leasehold without WVU BOG's and lender's consent.⁹ Regardless of any revenue generated from the public-private partnership between Petitioner and WVU BOG for purposes of business and occupation taxes and income taxes, Petitioner's leasehold interest in University Park has no separate assessable value for purposes of *ad valorem* property taxes.

B. The Circuit Court erred when it failed to apply the framework established by this Court in *Maplewood Cmty., Inc. v. Craig*, to correct and fix the erroneous assessment of Petitioner's leasehold interest in University Park.

In *Maplewood*, this Court considered an appeal of an assessment on nearly identical facts to those here and adopted two critical (and dispositive) holdings. First, this Court tacitly held that the argument that a leasehold interest lacks separate and independent value raises a challenge to valuation that is properly presented to a county commission sitting as a board of equalization and review. 216 W. Va. at 286-87, 607 S.E.2d at 392-93. Second, this Court adopted a two-part test for evaluating whether a leasehold interest has separate and independent value; that is, whether it is freely assignable and a bargain lease. *Id.* at 286, 607 S.E.2d at 392. Had the Circuit Court followed these holdings from *Maplewood*, it would have been required to correct and fix the assessment of Petitioner's leasehold interest in University Park at zero.

1. *Maplewood Cmty., Inc. v. Craig*, 216 W. Va. 273, 607 S.E.2d 379 (2004), considered an appeal from an assessment made on nearly identical facts.

Maplewood was a consolidated appeal of the assessments of two senior living facilities: the Maplewood facility operated by Maplewood Community, Inc., in Harrison County and the Village at Heritage Point facility (the "Village") operated by Mon Elder Services, Inc., ("Mon

⁹ As the Circuit Court noted, the term "transfer" is defined in the agreements for University Park to exclude subletting. [J.A.1190 n. 7]. Nonetheless, Petitioner's ability to operate or sublease the commercial component – 3% of University Park – is limited elsewhere in the agreements, which for all practical purposes give WVU BOG veto authority over Petitioner's operation and subleasing of that space. [J.A. 59-60, 345, 731].

Elder”) in Monongalia County. 216 W. Va. at 276-79, 607 S.E.2d at 382-85. Both Maplewood Community and Mon Elder had challenged assessments from the Harrison County and Monongalia County assessors, respectively, to the State Tax Commissioner on the basis that they were tax-exempt as 501(c)(3) entities under the Internal Revenue Code. *Id.* This Court rejected those taxability challenges because neither Maplewood Community nor Mon Elder satisfied the “charitable purposes” prong for exemption under *Wellsburg Unity Apartments, Inc. v. Cty. Comm’n*, 202 W. Va. 283, 503 S.E.2d 851 (1998). *Id.* at 286, 607 S.E.2d at 392.

Critically, however, Mon Elder had raised another challenge to the assessment of its property before the Monongalia County Commission sitting as a board of equalization and review. *Id.* at 279, 607 S.E.2d at 385. Like Petitioner, Mon Elder’s only property interest in the Village was a leasehold interest; like Petitioner, the real property and improvements comprising the Village were owned by a tax-exempt governmental body, the Monongalia County Building Commission; like Petitioner, Mon Elder paid rent to the Monongalia County Building Commission under a long-term lease;¹⁰ like Petitioner, Mon Elder had no right to transfer, lease, sub-lease, or convey its leasehold interest without the Monongalia County Building Commission’s consent; and, like Petitioner, Mon Elder had no right to acquire the Village upon expiration of the lease. *Id.* at 277-78, 607 S.E.2d. at 383-84. Based on those facts, Mon Elder argued that its leasehold interest in the Village lacked assessable value independent of the

¹⁰ Mon Elder’s rental payments were intended to amortize the principal and interest on tax-exempt bonds issued by the Monongalia County Building Commission for the Village’s construction. *Maplewood*, 216 W. Va. at 277-78, 607 S.E.2d at 383-84. As a distinction, WVU BOG has fee ownership of University Park, an \$89.6 million improvement that Petitioner financed and transferred to WVU BOG with no recourse to itself or its lenders. [J.A. 61-62, 307, 330-31]. The consequence is that Petitioner’s rental payments to WVU BOG reflect value above and beyond the cost of constructing University Park.

As another distinction, Mon Elder subleased the residential units in the Village directly to senior citizens whereas Petitioner subleases the residential portion of University Park back to WVU BOG to manage, operate, secure, and lease on par with other on-campus residential student-housing. [J.A. 56, 722-41]. Although irrelevant to the assessment of Petitioner’s leasehold interest in University Park, the sublease reinforces the extent to which University Park is designated for use by the University as on-campus residential student-housing.

freehold interest owned by the Monongalia County Building Commission. *Id.* at 279, 607 S.E.2d at 385.

2. **Maplewood Cmty., Inc. v. Craig, 216 W. Va. 273, 607 S.E.2d 379 (2004), tacitly held that challenges like Petitioner's are to valuation and adopted a binding, two-part test for determining whether leasehold interests have assessable value.**

In considering Mon Elder's appeal in *Maplewood*, this Court made two binding holdings that were disregarded by the Circuit Court.

First, although this Court rejected Mon Elder's challenge to the taxability of its leasehold interest in the Village, it recognized Mon Elder's challenge to the valuation of that interest as a separate and distinct challenge for resolution. *Maplewood*, 216 W. Va. at 287, 607 S.E.2d at 393 (remanding the challenge to valuation for development of the factual record). By remanding the issue of separate assessable value to the trial court, this Court tacitly held that Mon Elder had made a challenge to valuation that was properly presented to the Monongalia County Commission sitting as the board of equalization and review. The significance of this holding from *Maplewood* cannot be overstated: Petitioner made the exact same argument as Mon Elder – lack of separate assessable value of its leasehold interest – to the exact same administrative body – the Monongalia County Commission sitting as a board of equalization and review. *Maplewood* was binding upon the Circuit Court, which erred by disregarding it to hold that Petitioner's identical challenge before the BER had been brought before the wrong administrative body. [*See, e.g.,* J.A. 1208 (erroneously concluding that this Court remanded the question of taxability, rather than valuation, to the trial court)].

Second, this Court further refined the “marketability” standard for valuation of leasehold interests and arrived at a two-part test.¹¹ This Court explained that critical to the application of the statewide leasehold appraisal policy “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.’” *Maplewood*, 216 W. Va. at 286, 607 S.E.2d at 392 (emphasis added). Although the Circuit Court noted that the authority cited for this two-part test in *Maplewood* does not contain the phrases “bargain lease” or “freely assignable,” [J.A. 1208, 1210], this Court adopted it either independently or by reference to an inadvertently miscited authority. Regardless of its provenance, the Circuit Court was bound by this two-part test and had no authority to disregard it. [J.A. 1208-11].

Indeed, had the Circuit Court followed this Court’s holdings from *Maplewood*, it would have determined that Petitioner had made a challenge to the valuation of its leasehold interest, which it had properly preserved for review by filing an appeal with the BER. The Circuit Court then would have analyzed whether Petitioner’s leasehold interest had separate and independent value by applying the two-part test from *Maplewood* and considering whether the lease was freely assignable and a bargain lease. Based on the uncontroverted evidence, including Respondent’s concessions, the Circuit Court would have had no alternative but to conclude that Petitioner’s leasehold interest in University Park lacks separate and independent value and to correct and fix its assessed value at zero.

¹¹ The controlling regulation, discussed *supra*, provides that “[a] leasehold in real property is taxable for ad valorem property tax purposes, if it has a separate and independent value from the freehold. ... [U]nder circumstances involving long-term leaseholds where the leasehold itself is a marketable asset of value, the leasehold shall be valued as set forth in this rule.” W. Va. C.S.R. § 110-1P-3.3.1.

3. References to “taxability” in this Court’s prior decisions are fact-specific or reflect a colloquial usage without legal significance.

The Circuit Court attached significance to the placement of this Court’s discussion of Mon Elder’s leasehold interest in *Maplewood* under the subheading “Taxability of Mon Elder’s Leasehold Interest.” [J.A. 1207-09]. The Circuit Court likewise attached significance to this Court’s holding in *Great A & P* stating that “a 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. [J.A. 1204-05]. The problem with the Circuit Court’s reliance, however, is that these terms – “taxability” and “taxable” – either had special significance in the context of the decision or were used colloquially.

i. The term “taxable” had special significance in *Great A & P*.

Use of the term “taxable” in *Great A & P* is easily understood by reference to that decision’s facts. In *Great A & P*, a corporation had argued that it was not required to list leasehold interests on its personal property return and, thus, that those interests were tax-exempt. 167 W. Va. at 56, 278 S.E.2d at 355. Accordingly, this Court’s use of the term “taxable” in *Great A & P* must be understood as an affirmation of the basic principle of West Virginia law that all property is subject to taxation unless expressly exempted. *Maplewood*, 216 W. Va. at 279, 607 S.E.2d at 385 (citing W. Va. Const. Art. X, § 1).

ii. The terms “taxable” and “taxability” have traditionally been used colloquially and without legal significance.

The terms “taxable” and “taxability” are shortcuts to the discussion of taxation’s three basic components: assessment, levy, and collection. It is simpler to refer to property being “taxable” than to distinguish between whether property has assessable value or is exempt from the levy, and it is unsurprising that this Court has done so. Indeed, several other courts have

been confronted with difficulties arising from the colloquial usage of language in the context of taxation.

In an appeal before the Supreme Court of Georgia, a significant issue was the meaning of the term “assessment,” which caused one of the concurring justices to note the traditional lack of precision accompanying that term’s usage.

Of course, a great deal of the confusion is brought about by the loose use of the word ‘assessment.’ Common usage has brought it to mean anything relating to the imposition of taxes, and it is not uncommon to use the expression as synonymous with levying a tax, imposing a tax, fixing tax liability, or determining value. But, in the ad valorem taxing process, the present case is a good illustration of what occurs. First, of course, there must be a law imposing the tax. Second, there must be a determination of tax liability against the person or corporation. Third, there must be a determination of the value of the property taxed ad valorem, and fourth, the necessary proceeding to enforce the tax. Upon analysis, it will appear clear that only the third step is the assessment step, that is, where the value of the property is determined the act of assessment is performed.

Georgia R.R. & Banking Co. v. Redwine, 208 Ga. 261, 271, 66 S.E.2d 234, 240 (1951) (Pharr, J., concurring).

Similarly, in an appeal before the Supreme Court of Vermont, the meaning of the term “taxability” had special significance for the burden of proof in a tax deficiency enforcement action.

In arguing that the presumption of taxability ... does not apply here, plaintiff confuses the distinction between taxability on the one hand, and assessment of the tax (here as a deficiency) on the other. ... Part of plaintiff’s difficulty may arise from the fact that “assessing” a tax and “imposing” a tax may be used interchangeably. It is, therefore, necessary to examine the context in which these terms are employed, since even the legislature appears to make no distinction. In a given instance, “impose” may refer to the receipts from the sale of property, that is, the tax is *imposed* on the receipts. On the other hand, “impose” may be a reference to the person or entity responsible for payment of the tax. In the latter sense the tax is *imposed* on the purchaser. ... The second difficulty with the plaintiff’s position is, again, one of terminology. He does not distinguish between “taxability” and payment of the tax. “Taxability” refers to the property subject to the tax, not to the person responsible for its payment.

Bud Crossman Plumbing & Heating v. Comm'r of Taxes, 142 Vt. 179, 188-89, 455 A.2d 799, 802-03 (1982).

These cases make clear that the term “taxability” may be used, without any particular precision, to refer colloquially to a number of different concepts. Nonetheless, as discussed in Section VI(A) *supra*, the legal significance of the term “taxability” is tied closely to claims of exemption.

C. In assessing Petitioner’s leasehold interest in University Park, Respondent improperly used a methodology reserved for assessing freehold interests, and the Circuit Court erred when it failed to correct and fix the resulting erroneous assessment.

As this Court held in *In re Tax Assessment Against Am. Bituminous Partners*, “review before the circuit court is confined to determining whether the challenged property valuation is supported by substantial evidence ... **or otherwise in contravention of any regulation, statute, or constitutional provision.**” 208 W. Va. at 254, 539 S.E.2d at 761 (emphasis added) (internal citation omitted). Indeed, in *Lee Trace v. Haynes*, this Court determined “that it was an abuse of discretion for the [board of equalization and review] to utilize a ‘hybrid’ income approach value that did not comport with the requirements of W. Va. Code of State Rules § 110-1P-2.2.1.2 and § 110-1P-2.3.6.9.” 232 W. Va. 183, 194, 751 S.E.2d 703, 714 (2013) (per curiam).

Respondent’s error in this matter is even more striking than the error that confronted this Court in *Lee Trace*. Despite being advised by the State Tax Department of the binding leasehold appraisal methodology set forth in legislative rule W. Va. C.S.R. § 110-1P-3.3, Respondent simply took 60% of the cost of construction-in-place as of the July 1, 2014, assessment date. [J.A. 72-73, 486]. The practical effect is that Respondent arrived at the assessed value of Petitioner’s leasehold interest in University Park by applying a methodology reserved for assessing freehold interests.

- 1. In assessing Petitioner's leasehold interest in University Park, Respondent was required to follow the West Virginia State Tax Commissioner's leasehold appraisal methodology set forth in legislative rule W. Va. C.S.R. § 110-1P-3.3.***

In this matter concerning a leasehold interest, Respondent was required to follow the State Tax Commissioner's leasehold appraisal methodology set forth in W. Va. C.S.R. § 110-1P-3.3. That legislative rule instructs assessors as follows:

A leasehold in real property is taxable for ad valorem property tax purposes, if it has a separate and independent value from the freehold. Where leaseholds are of short duration, the rent paid usually reflects income to the owner of the freehold commensurate with the fair market value of the real property. Under ordinary conditions, the leasehold itself will not have any ascertainable market value. Consequently, in normal circumstances, determine the appraised value of the freehold subject to a leasehold in the same manner that the appraised value of similar commercial or industrial real property not subject to a leasehold is determined. ... However, under circumstances involving long-term leaseholds where the leasehold is itself a marketable asset of value, the leasehold shall be valued as set forth in this rule. ... The appraised value of a freehold estate is the appraised value of the freehold determined without regard to the leasehold, minus the appraised value of the leasehold. ... In valuing a leasehold: [t]he total value of the property must be estimated and then allocated among the various interests in the property under the terms of the lease; and... [t]he appraiser shall determine whether or not value has been created as a result of a favorable lease, in addition to the total value of the property. ... In deciding whether a leasehold has value, and if so, what value to assign, the appraiser shall: [e]stimate the value of the entire property, as though not encumbered by the lease; then ... [e]stimate the value of one (1) of the partial interests, either the leasehold estate of the lessee or the leased fee of the lessor. ... The appraiser shall deduct the value of the partial interest arrived at from the value of the entire property to obtain the value of the other partial interest.

W. Va. Code R. 110-1P-3.3.

Whatever valuation would have been yielded by application of the State Tax Commissioner's leasehold appraisal methodology, Respondent was required to follow it in assessing Petitioner's leasehold interest in University Park. Nonetheless, despite having been informed of the leasehold appraisal methodology by the State Tax Department in late November 2014, Respondent conceded before the BER that neither he nor anyone in his office "use[d] the

formula that the state tax commissioner directed assessors to use when assessing leasehold interests in West Virginia.” [J.A. 74-75, 486]. Through this concession, Respondent provided clear and convincing evidence of the illegality of his assessment of Petitioner’s leasehold interest in University Park.

Under the West Virginia Administrative Procedures Act, which this Court has looked to for its scope of review in assessment matters, administrative decisions shall be reversed where in violation of statutory provisions or made upon unlawful procedures or in an arbitrary and capricious manner. *In re Tax Assessment Against Am. Bituminous Power Partners*, 208 W. Va. at 255 & n. 8, 539 S.E.2d at 762 & n. 8. Likewise, “[w]here it appears that there was no proper assessment there can be no presumption in favor of the correctness of the assessment.” Syl. Pt. 2, *In re Tax Assessments Against Pocahontas Land Corp.*, 158 W. Va. 229, 210 S.E.2d 641. There is no better evidence of the violation of statutory provisions and legislative rules than Respondent’s own admission that he failed to follow the binding methodology for assessment of leasehold interests. [J.A. 74-75]. The consequence of this admission is that Respondent’s assessment of Petitioner’s leasehold interest in University Park is no longer entitled to a presumption of correctness and should have been corrected by the BER and then the Circuit Court.

2. ***In addition to knowingly disregarding the West Virginia State Tax Commissioner’s leasehold appraisal methodology set forth in legislative rule W. Va. C.S.R. § 110-1P-3.3, Respondent failed to follow this Court’s holding from Great A & P Tea Co. v. Davis, 167 W. Va. 53, 278 S.E.2d 352 (1981).***

In *Great A & P*, this Court instructed assessors on how to value real property when there are both freehold and leasehold interests. 167 W. Va. 53, 278 S.E.2d 352. “The assessor of a county may assess the value of a leasehold as personal property separately in an amount such that **when the value of the freehold subject to the lease is combined with the value of the**

leasehold the total reflects the true and actual value of the real property involved.” Syl. Pt. 1, *id.* at 53, 278 S.E.2d at 352. (emphasis added). “Under ordinary conditions the freehold estate will not be reduced in value by virtue of the leasehold, nor will the leasehold itself have any ascertainable market value. Since this latter condition is the normal circumstance in West Virginia, when assessors assess freeholds subject to leaseholds the property is usually fully taxed.” *Id.* at 56, 278 S.E.2d at 355.

This process is essentially identical to the State Tax Commissioner’s leasehold appraisal methodology, W. Va. C.S.R. § 110-1P-3.3.1.5, and to the statutory requirement in W. Va. Code § 11-5-4. “[I]n cases of the assessment of leasehold estates a sum equal to the valuations placed upon such leasehold estates shall be deducted from the total value of the estate, to the end that the valuation of such leasehold estate and the remainder shall aggregate the true and actual value of the estate.” W. Va. Code § 11-5-4.

As applied to this matter, *Great A & P*, W. Va. Code § 11-3-9(c), and W. Va. Code § 11-5-4 required Respondent to enter the true and actual value of WVU BOG’s freehold interest in University Park in the real property books and to enter the true and actual value of Petitioner’s leasehold interest in University Park in the personal property books. Taken together, the assessed value of the freehold interest and the assessed value of the leasehold interest would be required to equal the unencumbered fair market value of University Park. So long as the leasehold interest did not have separately assessable value (as is the case here, where the leasehold is neither freely assignable nor a bargain lease), then the assessment of WVU BOG’s freehold interest in University Park reflected the full assessed value. Petitioner’s leasehold interest, although required to be entered on the personal property books, should have been listed at zero.

Respondent, however, failed to follow this Court's holding from *Great A & P* just as he failed to follow the State Tax Commissioner's leasehold appraisal methodology set forth in legislative rule W. Va. C.S.R. § 110-1P-3.3. [J.A. 72-75]. As a consequence, under the Administrative Procedures Act-style review applied by this Court, Respondent's assessment of Petitioner's leasehold interest in University Park must be reversed and remanded to the Circuit Court for correction. *In re Tax Assessment Against Am. Bituminous Power Partners*, 208 W. Va. at 255 & n. 8, 539 S.E.2d at 762 & n. 8.

3. ***Instead of following the West Virginia State Tax Commissioner's leasehold appraisal methodology set forth in legislative rule W. Va. C.S.R. § 110-1P-3.3 or this Court's holding from Great A & P Tea Co. v. Davis, 167 W. Va. 53, 278 S.E.2d 352 (1981), Respondent applied a methodology reserved for assessing freehold interests.***

Petitioner's argument in this appeal is not that it was unlawfully assessed for property it does not own. Rather, Petitioner's argument is that, despite knowing that Petitioner's sole interest in University Park is a leasehold interest, Respondent acted in disregard of the binding methodology for leasehold appraisals and instead applied a methodology reserved for assessing freehold interests. [See, e.g., J.A. 76, 537, 542-43, 560, 573-75, 580-87 (attaching transactional documents); see also J.A. 546-87 (correspondence between Petitioner's counsel and Respondent)].

Indeed, Respondent described the property for which he assessed Petitioner as "INCOMPLETE CONSTRUCTION." [J.A. 72-73, 531]. Further, Respondent conceded before the BER that he arrived at the value for which he assessed Petitioner by taking the "percentage complete of the construction" and his office "took that of the total value that was submitted of what the project would be to get it appraised at 60 percent of that." [J.A. 72-73]. Regardless of how appropriate this method might be for valuing freehold interests, it is patently improper for

valuing leasehold interests like that of Petitioner in University Park. *See* W. Va. C.S.R. § 110-1P-3.3.

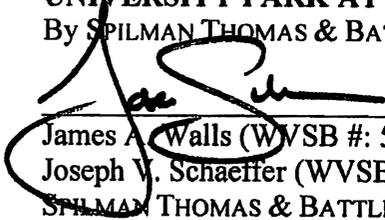
Moreover, there is no exception allowing an assessor to disregard binding leasehold appraisal methodology in favor of freehold appraisal methodology where the freeholder is tax-exempt but the leaseholder is not. First, the State Tax Commissioner has not adopted such an exception, instructing in its Valuation of Leasehold Interests guidance that, “[i]n the case of publicly owned [i.e., tax-exempt] property, the lessor’s interest ... would be tax-exempt, while the lessee’s interest, **if marketable**, would be taxable.” W. Va. State Tax Dep’t, State Tax Comm’r’s Annual In-Service Training Seminar Leasehold Interest Workshop, Valuation of Leasehold Interests (1989) (emphasis added). [J.A. 488-501]. By emphasizing marketability, the State Tax Commissioner made clear that an assessor may not simply impute the value of the freehold owned by a tax-exempt body to a leaseholder. Second, this issue was settled in *Maplewood* when then-Monongalia County Assessor John Pyles was presented with an assisted living facility, the Village, in which the freehold was owned by a county building commission and the leasehold was owned by a private non-profit. 216 W. Va. at 277-78, 607 S.E.2d at 383-84. Just as Respondent did for Petitioner’s leasehold interest in this matter, Assessor Pyles assessed the leaseholder using a common freehold appraisal methodology (cost of construction). *Id.* at 278-79, 607 S.E.2d at 385-86. In remanding the matter to the circuit court, however, this Court expressed its disapproval of Assessor Pyles’ use of that methodology. Instead, this Court emphasized that leasehold appraisal methodology requires an assessor to consider marketability, defined as consisting of free assignability and a bargain lease, to determine whether a leasehold has assessable value. *Id.* at 286, 607 S.E.2d at 392.

Respondent's disregard of binding leasehold appraisal methodology in favor of methodology reserved for valuing freehold interests formed a separate and independent valuation-based challenge to the assessment of Petitioner's leasehold interest. The Circuit Court should have considered this valuation-based challenge as part of the Appeal to correct and fix the assessment of Petitioner's leasehold interest and, having failed to do so, its August 26 Order should be reversed.

VII. CONCLUSION

WHEREFORE, for the foregoing reasons and those apparent to the Court, Petitioner respectfully requests that the Court enter an Order reversing the Circuit Court's August 26 Order, remanding this matter to the Circuit Court with instructions to correct and fix the assessment of Petitioner's leasehold interest in University Park for tax year 2015 at its true and actual value of zero, and granting such other relief as the Court deems just and proper.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**UNIVERSITY PARK AT EVANSDALE, LLC,
Petitioner Below,**

Petitioner,

v.

**No. 15-0934
(No. 15-CAP-8, Circuit
Court of Monongalia County)**

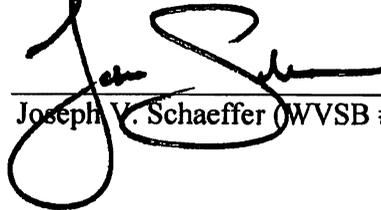
**MARK A. MUSICK, in his capacity
As the Monongalia County, West Virginia,
Assessor, Respondent Below,**

Respondent.

CERTIFICATE OF SERVICE

I, Joseph V. Schaeffer, hereby certify that service of the foregoing **PETITIONER'S BRIEF** has been made by hand-delivery on this 28th day of December, 2015, upon the following:

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