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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Business Court Division

LEE TRACE,

Petitioner,

v.

Civil Action Nos. 11-AA-2 and 14-AA-1
AND, 12-AA-4, 13-AA-4, 14-AA-2
Judge Wilkes

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.

FINAL ORDER REGARDING THE 2010 TAX YEAR ASSESSMENT

This matter came before the Court this 29th day of August 2014, upon the merits of the Petition for Appeal. A hearing was held on June 16, 2014, where all parties were present and the Court heard brief argument, thereafter the Court set a briefing schedule. The Petitioner, Lee Trace, LLC, by counsel, Thomas Moore Lawson, Esq.; and Respondent, Gearl Raynes, as Berkeley County Assessor, by counsel, Michael D. Thompson, Esq.; and Respondents Berkeley County Council and Berkeley County Council sitting as Board of Review and Equalization, by counsel, Norwood Bently, III, Esq.; have now fully presented their arguments and briefed the issues. The Court has also received a brief, Amicus Curiae from the Eastern Panhandle Business Association, by counsel, Michael E. Caryl, Esq. Upon the record and the pertinent legal authorities the Court rules as follows.

Procedural History

1. This matter has a lengthy procedural history. This case began when the Petitioner contacted the Assessor regarding the tax assessment at some time prior to the 2011 meeting of the Board of Review and Equalization (hereinafter "BRE"). While some communications are included in the record, it is not fully clear what all these communications consisted of. Nonetheless, this apparently did not result in a change in the assessment amount.
2. On or about February 14, 2011, Petitioner filed an Application for Review of Property Assessment to the Council sitting as the Board of Review and Equalization for both the 2010 and 2011 tax years.
3. In 2011, the BRE denied Petitioner's request to alter the 2010 assessment. The BRE also reduced the 2011 taxes based upon an estimation of the income approach which utilized a capitalization rate derived from regional sales.
4. Under case number 11-AA-2, on March 18, 2011, Lee Trace, LLC [hereinafter "Lee Trace" or "Petitioner"] filed a Petition for appeal of the decision of the BRE. Therein, the Petitioner challenged his 2010 and 2011 tax year assessments.
5. On May 23, 2011, a hearing was held where the Court granted the Parties' request to allow for discovery to supplement the record. The record was supplemented through discovery, including appraisals submitted by both the Board and the Petitioner.
6. This Court issued an order on March 23, 2012 which denied the Petitioner's requested relief in regards to the 2010 tax assessment, substituted the new assessor as a named party, and set a hearing for argument on the remaining parts of the Petition. Petitioner appealed this order.

7. This Court's March 23, 2012 order affirmed the decision of the BRE, and ruled that the right to challenge the 2010 Tax year had been waived by the passage of time after proper notice. In analyzing the issue, this Court found that the notice clearly notified the Petitioner that his taxes were being raised and that he may seek an adjustment. The Court also found that while the deadline to challenge the taxes were not included in the Notice, it was not necessary under the statute.
8. On April 23, 2012, a hearing was held where all parties presented arguments regarding the 2011 tax year portion of the Petition.
9. On July 24, 2012, this Court entered an opinion order entitled "Final Order," which granted in part and denied in part the Petitioner's requested relief in regard to the 2011 tax year assessments. That order affirmed the reasoning and decision of the BRE, but corrected a mathematical error.
10. Petitioner appealed that decision to the Supreme Court of Appeals of West Virginia. That appeal was consolidated with the appeal of this Court's first decision under 11-AA-2 regarding the 2010 tax year assessment (W.Va. Supreme Court numbers 12-0638 and 12-0992). The Appeal otherwise proceeding according to law, and on October 21, 2014, the Supreme Court issued a Per Curiam Opinion overturning this Court's decision [hereinafter "Opinion"].[1]
11. The Opinion found that the notice for the 2010 tax year was statutorily and constitutionally deficient. Thereupon, the Court overturned this Court's decision. The Supreme Court noted that the Statute requires that the Notice "advise the person…of his

[1] Justice Ketchum filed an opinion concurring in No. 12-0638 (2010 tax year) and dissenting in No. 12-0992 (2011 tax year).

or her right to appear and seek an adjustment in the assessment." The Supreme Court relied upon the language "right to appear," to conclude that the Notice was statutorily deficient. The Court also found that the Notice was constitutionally deficient under due process principles (citing and quoting procedural due process authority).

12. In regard to the 2011 tax year, the Opinion found that BRE's hybrid approach to account for income and reduce the assessment was improper. Further, the Opinion agreed with this Court that "an assessor need not perform a useless act of considering an appraisal method where the assessor does not have sufficient data to perform that appraisal method." The Supreme Court also found that the Assessor was within its discretion to utilize the cost approach assessment because it "is supported by substantial evidence in the record," and that "Lee Trace has not raised any error with respect to the methodology used by the Assessor in performing the cost approach analysis." Thereupon, the Court overturned this Court and found that "the 2011 tax assessment for the property at issue should be adjusted to reflect the Assessor's initial cost approach assessment value of $7,593,430.00." The Opinion remanded the matter to this Court for further proceedings consistent with the Opinion.

13. Upon remand, this Court held a hearing on November 18, 2013. At that hearing, the Petitioner raised a jurisdictional issue for the first time – that the State was without jurisdiction to raise his *ad valorem* property taxes due to the now adjudicated constitutionally deficient notice. Therefore, Petitioner argued, the assessments should both be set at the pre-notice levels, and the Assessor must send proper notice before the assessment can be raised. Upon review of the Supreme Court's Opinion, this Court ruled that the notice was deficient in giving Petitioner his right to challenge the tax assessment,

and that the remedy was to allow such a statutory challenge. This Court denied Petitioner's requested relief, and ordered that the Petitioner's 2010 tax year appeal must be heard by the next session of the Berkeley County Board of Review and Equalization. Also, due to the direct mandate to do so from the Supreme Court, this Court set the 2011 tax year assessment at $7,593,430.00. This Court also ordered the Assessor to recalculate the tax bill reflecting the payments and the new amount and to send notice to the Petitioner. Further, this Court ruled that because of the increase in amount, it would not begin to bear interest at the legal rate until thirty days after the sending of the notice.

14. The Petitioner filed a petition for Writ of Prohibition in regard to the Court's order from the November 18, 2013 hearing. Apparently making the same argument described herein under Paragraph 13. No copy of the petition for writ of prohibition appears in the file. However, On March 5, 2014, after briefing, the Supreme Court of Appeals of West Virginia issued an order refusing the Petition.

15. On February 5, 2014, Lee Trace appeared before the BRE in regard to the 2010 tax assessment. At the hearing Lee Trace noted its objection to the 2014 BRE hearing the appeal of the 2010 tax year assessment (the Writ of Prohibition filed before the Supreme Court of Appeals of West Virginia was still pending) and other objections previously made at previous stages. The Parties presented their evidence on the matter before the BRE, as more fully described below.

16. After the hearing, the BRE issued an order which ruled that "[w]hile the evidence presented by the Taxpayer is comprehensive and compelling in many respects, in our judgment, it falls short of the clear and convincing evidence which is required to find the Assessor's assessment erroneous."

17. Lee Trace now appeals the BRE's decision regarding the 2010 taxes to this Court. Upon filing the Petition for Appeal again, the matter was given a new number by the Clerk.
18. This matter, along with several subsequent years of Tax Appeals by Lee Trace, was recently consolidated and transferred to the Business Court Division.
19. At the hearing on June 19, 2014, for the purposes of judicial economy, the parties requested that the Court first consider the 2010 tax year assessment (assessment date of July 1, 2009). Thereafter, the Court set a briefing schedule which has now been completed.
20. It is of note that the other case numbers transferred to the Business Court Division herewith consist of challenges to several subsequent tax year assessments. 11-AA-2 was the original case number under which both the 2010 and 2011 taxes were challenged. Upon this most recent Appeal from the BRE, the Circuit Clerk appears to have assigned the 2010 tax year assessment case number 14-AA-1. Therefore this Court's rulings herein are final in regard to cases 11-AA-2 (insofar as it concerns the 2010 tax year assessment) and 14-AA-1, while the remaining case numbers, which deal with subsequent tax years, are still pending.
21. The parties have now completed briefing on the matter, and the Court finds the issues ripe for adjudication.

Findings of Fact

On February 5, 2014, a hearing was held before the County Council sitting as the Board of Review and Equalization. Pursuant to W.Va. Code §11-3-24, [2] the following relevant facts are

[2] This matter concerns the 2010 tax year and therefore the 2010 and 2014 amendments to this Article do not apply. All references made herein to this Article refer to this relevant, pre-2010 version.

derived from the certified record of this hearing found in Court file 14-AA-1, or upon the lack of dispute or agreement of parties.

I. Undisputed Facts:

1. Petitioner owns real property at 15000 Hood Circle, Martinsburg, West Virginia 25403, consisting of approximately 17.02 acres, identified as Berkeley County, West Virginia Tax Map 36 / 0010 0000 0000 and by Deed recorded in the Office of the County Clerk of Berkeley County, West Virginia, in Deed Book 838, at Page 231, with a Deed of Correction filed on September 28, 2006, at Deed Book 849, Page 244 (hereinafter "Property").
2. Petitioner purchased the Property for $1,122,504.00.
3. In 2007, construction began on an apartment complex on the Property. The apartment complex, now complete, consists of 156 apartment units, and carried a construction cost of $12,927,378.00.
4. As of February 10, 2011, the completed complex was insured against fire in the amount of $17,000,000.00.
5. For the 2009 tax year (assessment date of July 1, 2008), while the complex was being constructed, the Assessor assessed the Property at a value of $677,050.00. In accordance with law, this valuation represented the Assessor's determination of sixty percent of the true value of the Property.
6. For the 2010 tax year, the Assessor assessed the Property at a value of $7,895,530.00. In accordance with law, this valuation represented the Assessor's determination of sixty percent of the true value of the Property on July 1, 2009.

II. The February 5, 2014 Hearing

7. This Court must first take note of the missing portions of the transcript. The certified record in this matter contains a "transcript" which ends upon the second recess taken below. The parties have informed the Court that the recording of the remaining portion of the hearing is unavailable due to a technical malfunction. The Parties have also noted that they believe the record, so certified, is adequate for this Court make a determination, "from the evidence so certified." W.Va. Code § 11-3-25. Upon review of the record, the Court agrees – the record so certified is adequate even with the missing portion of the transcript.

8. At the hearing the parties presented exhibits, the deputy Assessor/ commercial appraiser, Ms. Edgar, testified, and Petitioner's expert, Mr. Noble, testified. The parties also made argument before the board.

9. The Assessor's evidence showed that the assessment relied upon the cost approach and utilized the computerized IAS statewide appraisal system. *See also,* Deposition of Tamera Edgar, October 24, 2011, pp. 31-33, 49. More specifically, the Assessor's evidence revealed, the following:

    a. In 2009, in order to arrive at the 2010 Assessment, the Assessor made a decision to rely upon the cost approach[3] to the Property's value.

    b. In 2009-2010, no income data was available for the property.

    c. Ms. Edgar visited the Property and collected significant data.

[3] *See infra,* Conclusions of Law II for a description of this type of approach.

d. Ms. Edgar utilized the West Virginia Tax Commissioner's Office's computerized mass appraisal system – referred to as IAS (former versions referred to as CAMA).

e. The IAS system makes adjustments to the value of the property for the "tax neighborhood" and/or the County it is in, based upon a State-wide study.

f. In Berkeley County the main adjustment factor is 1.85, and the system apparently multiplies certain values which make up the total property value by this number.

g. Ms. Edgar testified that a proper income approach was not possible because in 2010 there was no income data, and she still has no comparable sales data available.

10. The parties admit that the Petitioner did not begin accepting rents until either late 2008 or early 2009.

11. The Petitioner's evidence below showed that Mr. Noble, a qualified expert, finds the property to be of significantly less value on July 1, 2009. Further, Petitioner's evidence showed as follows:

a. Mr. Noble opined that the true and accurate value of the property cannot be ascertained by merely completing one approach, which does not properly consider income or market analysis or certain forms of depreciation such as economic obsolescence.

b. Mr. Noble also noted that in the 2009 to 2010 economy, especially in the case of rental properties, the cost to build on property was often much higher than the value of the property due to the depressed income that it could expect and the poor market for buying and selling real property.

c. Mr. Noble testified from what he heard at the hearing, that the IAS did not account for functional and economic obsolesce.

d. Mr. Noble testified that properties under any approach should be equalized with other comparable property values.

e. Mr. Noble testified that the rental income the property that the property produces has been significantly less than anticipated.

f. Mr. Noble's written testimony and exhibits show his expert opinion that the property is significantly overvalued.

III. Other Findings

12. The Court finds that there is no dispute regarding the Assessor's consideration of the factors under W.Va. C.S.R. § 110–1P–2.1.1 and W. Va.C.S.R. § 110–1P–2.1.3, except regarding §2.1.1.9, Income. Therefore, without dispute from the parties, the Court finds that the Assessor considered the required factors under this portion of the Rule, excepting 2.1.1.9.

13. Regarding "The income, if any, which the property actually produces and has produced within the next preceding three (3) years," § 2.1.1.9, the Court finds that there was very little income during the prior three years which made it unreliable in regard to the income ability of the property, as the complex began opening shortly before the July 2009 assessment date.

Standard

The instant action is an appeal of this assessment procedure as it pertains to the Petitioner for tax year 2010 which is controlled by the statutory scheme set up for challenges to tax assessments. West Virginia Code § 11-3-1 *et. seq.* (and specifically §25).

"Upon receiving an adverse determination before the county commission, a taxpayer has a statutory right to judicial review before the circuit court." *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000); W. Va. Code § 11-3-25. "The proper procedures for appeal from a county court [county commission] decision are outlined in West Virginia Code § 58–3–1 *et seq*. The provisions of this article are to be read *in pari materia* with § 11–3–25…" Syl. Pt. 5, *Tax Assessment Against Purple Turtle, LLC v. Gooden*, 223 W.Va. 755 (2009). So, to the extent West Virginia Code § 11–3–25 does not afford procedural mandates, West Virginia Code § 58–3–1 *et seq.* controls. These statutory, procedural mandates, which require a review of the record, are mandatory. *Id.* at 760. Conclusions of law are reviewed *de novo*, Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995), and factual questions are reviewed on the record. W.Va. Code § 11-3-25.

"In all cases, it is incumbent upon the circuit court, as it is upon the county commission and the assessor, to set the assessed value of all parcels of land at the amount established by the State Tax Commissioner." Syl. Pt. 3, *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009).

"Title 110, Series 1P of the West Virginia Code of State Rules confers upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties." Syl. Pt. 5, *American Bituminous Power Partners,* 208 W.Va. 250; *Stone Brooke Ltd. P'ship v. Sisinni*, 224 W. Va. 691, 699, 688 S.E.2d 300, 308 (2009).

Yet, upon the local assessor making a valuation, the assessor's assessment is "accorded great deference and is presumed to be correct." *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W.Va. 691, 701 (2009).

Accordingly, in challenging *ad valorem* property taxation, the taxpayer must show, by clear and convincing evidence, that the county assessor's proposed valuation is erroneous. Syl. Pt. 5, *In re: Tax Assessments of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (2008); *See also*, Syl. Pt. 6, *Stone Brooke Ltd. Partnership,* 224 W.Va. 691; Syl. Pt. 2, in part, *Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County*, 189 W.Va. 322, 431 S.E.2d 661 (1993); *Lee Trace LLC v. Gearl Raynes, Assessor, et al.*, 232 W.Va. 183, 751 S.E.2d 703 (2013).

Without a specific error, it appears that the assessed amount must be supported by substantial evidence: "[i]n a case involving the assessment of property for taxation purposes, which does not involve the violation of a statute governing the assessment of property, or a violation of a constitutional provision, or in which a question of the constitutionality of a statute is not involved, this Court will not set aside or disturb an assessment made by an assessor or the county court, acting as a board of equalization and review, where the assessment is supported by substantial evidence." Syl. Pt. 2, *Stone Brooke Ltd. Partnership*, 224 W.Va. 691 (2009).

After an inquiry regarding error, there is naturally a question of determining what the property's value should be.

> Pursuant to *In Re Pocahontas Land Co.,* 172 W.Va. 53, 61, 303 S.E.2d 691, 699 (1983), once a taxpayer makes a showing that tax appraisals are erroneous, the Assessor is then bound by law to rebut the taxpayer's evidence.

Mountain Am., LLC v. Huffman, 224 W. Va. 669, 686, 687 S.E.2d 768, 785 (2009).

Conclusions of Law

Petitioner now challenges the assessed value of its property for the 2010 tax year (assessment date of July 1, 2009). Petitioner preliminarily argues that due to the lack of proper sufficient notice for the 2010 tax year, the increase in assessment is void. In regard to the substance of the assessment, Petitioner argues that the Assessor erred in conducting the 2010 assessment and that the evidence he presented before the Board of Review and Equalization (hereinafter "BRE"), shows that the proper valuation should yield an assessment of $3,618,113.00. Amicus Curiae support Petitioner's position, and the Respondents argue that the assessment and BRE's decision was correct. Respondent Assessor also argues that the Court's previous ruling regarding the effect of the defective notice was correct. The Court stands upon its previous ruling that the remedy for the insufficient notice is a full and fair opportunity to challenge the assessment. Moreover, this Court finds, upon review of the evidence, that Petitioner cannot meet the heavy burden, and the Assessor's assessment is supported by substantial evidence.

I. The Effect of Insufficient Notice of Petitioner's Right to Appear

This Court has already ruled upon this issue. Nonetheless, the parties have argued the issue in the briefing of this matter. The Court stands upon its prior ruling; however, because the parties have briefed the issue, the Court will briefly review its ruling.

It is beyond dispute that the Supreme Court of Appeals found, in *Lee Trace LLC v. Gearl Raynes, Assessor, et al.*, 232 W.Va. 183, 751 S.E.2d 703 (2013), that the notice of increase in assessment was statutorily and constitutionally invalid, noting that it violated Petitioner's procedural due process rights. The Court notes that a hearing was already had on this matter

where all parties were given the opportunity to be heard, and the Court has already ruled on this matter. This Court stands upon its ruling. The Supreme Court's opinion specifically took issue with the Notice's failure to advise the Petitioner of the time and place of review. It is beyond dispute that the Notice directly stated the 2009 tax assessment amount, the 2010 tax assessment amount, and the 2010 tax assessment increase. The issue before the Supreme Court was whether Petitioner was given notice of its *opportunity to challenge* the tax assessment – which the Supreme Court found to be inadequate. However, the procedural due process violation of failing to give Petitioner notice of his opportunity to challenge the assessment, does not taint the portion of the notice which did comply with the statute – the assessment amounts. In other words, the Petitioner was not misinformed about the assessment increase, but rather was not informed of when and where to seek review. The remedy for this violation is to give Petitioner the opportunity to challenge the assessment.

> The proper remedy for reversible due process procedural defects in administrative proceedings is to remand the case to the appropriate tribunal with directions to order the administrative institution to remedy the defect.

Syl. Pt. 3, *White v. Barill*, 210 W. Va. 320, 321, 557 S.E.2d 374, 375 (2001); Syl. Pt. 4, *Clarke v. West Virginia Bd. of Regents*, 166 W.Va. 702, 279 S.E.2d 169 (1981)." Syl. Pt. 4, *Barazi v. West Virginia State College*, 201 W.Va. 527, 498 S.E.2d 720 (1997). Likewise, the Assessor aptly notes that United States Supreme Court opinions support this position. The Court finds that defects of this nature are not jurisdictional. Our Court has found procedural due process defects such as this to be curable, *see, Rawl Sales & Processing Co. v. County Com'n of Mingo County*, 191 W.Va. 127, 443 S.E.2d 595 (1994). Thus, indicating that they are not jurisdictional in nature. Therefore, the Court stands upon its ruling that Petitioner's remedy for a notice which was

constitutionally defective for failing to inform the taxpayer of time and place to challenge the assessment, is a full and fair opportunity to challenge the assessment. Petitioner has begun this process below. In so much as the briefs are requesting a reconsideration of this issue, that such reconsideration is HEREBY DENIED.

II. The Proper Assessment for the 2010 Tax Year

Petitioner's arguments here are multifaceted : (1) that the Assessment is erroneous because the Assessor did not consider income pursuant to § 2.1.1.9; (2) that the Assessor's cost approach analysis failed to account for physical depreciation, functional obsolescence, and economic obsolescence; (3) that the Deputy Assessor admitted to an erroneous assessment; and finally (4) that the Assessor failed to equalize the property with other properties.

The West Virginia Constitution requires that "all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law." Article X, Section 1. For *ad valorem* taxation purposes, property is to be assessed "at its true and actual value." W.Va. Code § 11–3–1. "True and actual value" has been defined as "market value" and "the price paid for property in an arm's length transaction." *Mountain American, LLC v. Huffman*, 224 W. Va. 669, 686-87, 687 S.E.2d 768, 785-86 (2009); see also, *Kline v. McCloud*, 174 W. Va. 369, 372, 326 S.E.2d 715, 719 (1984); *In re Tax Assessment of Foster Found.'s Woodlands Ret. Cmty.*, 223 W. Va. 14, 33, 672 S.E.2d 150, 169 (2008); *Lee Trace*, 751 S.E.2d 703, 712.

As for the method of achieving the assessment, the Supreme Court in *Lee Trace* explained,

> The West Virginia Code of State Rules § 110–1P–2.2.1 (1991) recognizes three different appraisal methods for determining the fair market value of "commercial and industrial real and personal

> property for ad valorem tax purposes." This subsection provides: "... the Tax Commissioner will consider and use, where applicable, three generally accepted approaches to value: (A) cost, (B) income, and (C) market data." W.Va. C.S.R. § 110–1P–2.2.1. Additionally, appraisals must consider a variety of other factors. *See* W. Va.C.S.R. § 110–1P–2.1.1 (1991) and W. Va.C.S.R. § 110–1P–2.1.3 (1991). This series of regulations provides that each of the enumerated factors should be considered, but "some ... may be given more weight than others." W. Va.C.S.R. § 110–1P–2.1.4 (1991).

232 W. Va. 183, 751 S.E.2d 703, 712 (footnotes omitted).

This Court, again, notes the Rule based requirements for completing the cost, income and market data approaches, respectively.

To determine fair market value under the cost approach, "replacement cost of the improvements is reduced by the amount of accrued depreciation and added to an estimated land value. In applying the cost approach, the Tax Commissioner will consider three types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence." W.Va. C.S.R. § 110–1P–2.2.1.1 (1991); *Lee Trace*, 751 S.E.2d at n6.

In determining the income approach, "[a] property's present worth is directly related to its ability to produce an income over the life of the property. The selection of an overall capitalization rate will be derived from current available market data by dividing annual net income by the current selling price of comparable properties. The present fair market value of the property shall then be determined by dividing the annual economic rent by the capitalization rate." W. Va.C.S.R. § 110–1P–2.2.1.2 (1991). Under this type of valuation, economic rent means "the rental amount which a space or property would attain in the open market at the time of appraisal, whether it is lower, higher or the same as the actual contract rent." W. Va.C.S.R. § 110–1P–2.3; *Lee Trace*, 751 S.E.2d at n7.

The market data approach will be applied by "considering the comparable selling price of comparable properties." W. Va.Code § 110–1P–2.2.1.3 (1991)..6 (1991); *Lee Trace*, 751 S.E.2d at n8.

In this case, Lee Trace first argues that the Respondent assessor failed to consider the Property's Income as required by the Code of State Rules. *See*, W.Va. C.S.R. § 110–1P–2.1.1.9. Respondents argue that it was impossible to create a capitalization rate on the data available so the Assessor did not err in not giving it any weight.

As noted above, the assessor is required to consider each factor under W.Va. C.S.R. § 110–1P–2.1.1 and W.Va. C.S.R. § 110–1P–2.1.3, no matter the approach used. "Some, however, may be given more weight than others." W. Va. C.S.R. § 110–1P–2.1.4. In this consideration, the Court is reminded of the strong presumption of correctness which an assessment enjoys. *Stone Brooke,* 224 W.Va. 691.

The Petitioner states that the Respondent Assessor had the income data prior to the most recent meeting of the BRE and could have altered its assessment. While the data may have been made available prior to the 2014 hearing, this does not render the Assessment erroneous. Assessors often work with taxpayers prior to a formal review of before the BRE, and now it is a matter of statutory procedure. *See*, W.Va. Code § 11-3-23a. However, for the 2010 tax year, it is not incumbent upon the Assessor to alter its Assessment. Rather, it is incumbent upon the taxpayer to show the BRE that the Assessor's assessment was erroneous by clear and convincing evidence. From July 1, 2009 through 2010, there was no income data available; therefore, it was not erroneous for the Assessor to not consider the income. *See*, §2.1.1.9 ("if any").

Most notable here, §2.1.1.9 refers, not to income generally, but the income actually produced or has produced "within the next preceding three (3) years." The parties admit that the Petitioner did not begin accepting rents until late 2008 or early 2009. So, there was virtually no income in the prior three years, and any income data could be skewed due to the mere partial operation of the commercial property. Likewise, this language renders Mr. Noble's assertions less persuasive. Mr. Noble's testimony advocates considering what rent the property could produce if fully occupied. Yet, the Rule requires rent actually produced or rent that has been produced in the next preceding three years. It does not appear unreasonable for an assessor to give these actual rent amounts little to no weight because of the property's newness and partial operation.

So, without relevant or reliable data, the Assessor did not err in giving it no weight. Just as the Supreme Court of Appeals ruled in regard to the 2011 appeal of Lee Trace's taxes, the Assessor "need not perform a useless act … where the assessor does not have sufficient data ..." *Lee Trace*, 751 S.E.2d at 713. So, the assessment does not appear erroneous on this ground.

Next, Petitioner argues that the Respondent Assessor erred in applying the cost approach by failing to consider physical depreciation, functional obsolescence, and economic obsolescence. Petitioner notes that W.Va. C.S.R. § 110–1P–2.2.1.1 requires the consideration of three types of depreciation: physical depreciation, functional obsolescence, and economic obsolescence. Petitioner argues that the Assessor's presentation before the BRE showed no evidence that Ms. Edgar considered these factors. The Assessor argues that Ms. Edgar did "contemplate" the three types of depreciation, even if an adjustment was not made.

It is of note here that the West Virginia Supreme Court of Appeals has determined that this Rule does not mandate any adjustment based on these factors, but rather, requires that an assessor "contemplate" them. *Century Aluminum of W. Virginia, Inc. v. Jackson Cnty. Comm'n*, 229 W. Va. 215, 216, 728 S.E.2d 99, 100 (2012).

In regard to this contention, the Court first notes the presumption of correctness which the Assessor enjoys requires that the taxpayer to show by clear and convincing evidence that the Assessor erred. Therefore, Petitioner's argument that the Assessor's presentation failed to show that it was considered is immaterial. The issue is whether the taxpayer can clearly show that the assessor did not contemplate it. *See*, Syl. Pt. 2, *Century Aluminum,* 229 W. Va. 215 ("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.").[4] Petitioner failed to clearly show that the Assessor erred in this way.

Furthermore, while the Court finds the Petitioner's appraisal and comparative data somewhat persuasive, these are not enough under the standard – the Petitioner must, first and foremost, show by clear and convincing evidence that the assessment was erroneous. Petitioner's expert valuation of the property shows to this court that two experts are in disagreement over the value of this property – not that the Assessor's process was in error.

Petitioner's expert testified regarding the property paperwork, and opined that the Assessor did not consider these forms of depreciation. While his testimony is somewhat

[4] Petitioner and Amicus Curiae appear to insinuate that this system, including this standard, are fundamentally unfair. While the Court notes that this standard is quite challenging – in that it would be difficult for any taxpayer to prove by clear and convincing evidence what was in the mind of an assessor – it is nevertheless this Court's duty under our system of government to faithfully apply the law given it from the higher court. *See, Western Tradition Partnership v. Attorney General of the State of Montana*, 363 Mont. 220, 271 P.3d 1 (2011) (Nelson, J., dissenting).

convincing, even he notes that it is "[f]rom what I can ascertain from the depositions and … property cards." Also, his testimony generally appears to advocate estimating values to get a capitalization rate and other procedures not in conformity with the Title 110, Series 1P of the West Virginia Code of State Rules.[5] Meanwhile, the Deputy Assessor's testimony before the BRE and at her previous deposition discussed how the IAS computer appraisal system used by all Assessors, has entry fields which can be used to account for these manners of depreciation. The Assessor contends that his office "contemplated" it. These fields in the IAS system which were completed by Ms. Edgar are some evidence of her consideration of these three types of depreciation.

The Court cannot ignore the tumultuous economic conditions of the time period, which lends credence to Petitioner's argument that more weight should be given to economic obsolescence. Yet, there is no evidence in the record regarding how the economic conditions of 2009 specifically affected the rental market or otherwise affected this specific property. Moreover, this conflicting evidence does not *clearly* show that the Assessor failed to "contemplate" this factor. While the IAS fields are not direct evidence of the consideration of these three forms of depreciation, in conjunction with the presumption of correctness, the evidence before the BRE is sufficient to sustain the assessment on this issue.

Next, Petitioner claims that Ms. Edgar admitted the error of not considering an income approach in a previous deposition, and has presented the same flawed methodology before the BRE. Respondent BRE takes issue with the deposition noting that it was unclear whether which assessment was being discussed – the July 1, 2010 assessment date for the 2011 tax year (2011 Assessment), or the July 1, 2009 assessment date for the 2010 tax year (2010). The BRE also

[5] *But see*, discussion *infra*, regarding consideration of comparable properties outside the State.

notes that the Rules do not require use of the income approach, no matter what an appraisal manual says, and that the Assessor properly exercised his discretion in utilizing the cost approach. The Assessor argues that, just as with the 2011 tax year, the Assessor need not perform a useless act of attempting to consider an income analysis when there is insufficient data to complete one. See, *Lee Trace*, 751 S.E.2d at 713. Further, the Assessor points out that the manual which Ms. Edgar was testifying about was an appraisal manual for a commercial appraisal firm, not a Legislative Rule under the West Virginia Code.

The Court finds the Respondents' position here more persuasive – the Code of State Rules clearly does not require use of the income approach. (For a discussion regarding consideration of "income" under any approach pursuant to W.Va. C.S.R. § 110–1P–2.1.1.9, *see* discussion, *supra*.) In fact our Supreme Court of Appeals has directly noted that "Title 110, Series 1P of the West Virginia Code of State Rules is clearly intended by its language to give the Assessor discretion in choosing the method for valuation." *Lee Trace, LLC v. Raynes*, 232 W. Va. 183, 751 S.E.2d 703, 713 (2013); *see also*, Syl. Pt. 5, *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000).

Moreover, in *Lee Trace*, the Court noted that "an assessor need not perform a useless act of considering an appraisal method where the assessor does not have sufficient data to perform that appraisal method." *Id.* It is undisputed that there was no comparable sale of property in Berkeley County. A comparable sale of property is necessary to complete a capitalization rate for the income approach and for the market data approach. Therefore, choosing the Cost approach, instead of the Income approach, was not only within the Respondent Assessor's discretion, but the Respondent Assessor did not commit any error by not completing a useless act.

Next, Petitioner states that the Respondent Assessor failed to equalize the Property with comparable properties. On this point, Petitioner offered some comparisons showing several other apartment complex properties which have a significantly lower assessment value, per rental unit. However, the Assessor's evidence too shows a methodology which considers the value of other properties – including the adjusting factor built into the IAS system. Mr. Noble's testimony and evidence, despite its somewhat persuasive comparisons, appears less persuasive in light of the fact that Respondent Assessor considered other properties via the IAS system. In any case, the Assessor's testimony shows that it considered other properties and utilized an appropriately similar methodology to value the Property.

As a general point, the Court finds the Assessor's evidence more influential for at least two reasons: the discussion of dates and the numbers of Mr. Noble's report. The Assessor and the BRE point out that Mr. Noble's exhibits and testimony often refer to calendar year 2010, and not July 1, 2009. In fact, even the written appraisal submitted states "As of July 1, 2010." Nonetheless, in his written submission and his testimony before the BRE the Board Members and counsel clear up that he is speaking to the July 1, 2009 date. However, it appears possible that in certain ways Mr. Noble may have relied upon 2010 data, in error. The Court does not discount Mr. Noble's expert testimony, and so does not conclude that his testimony was regarding the wrong date. Yet, this situation leads the Court to give higher weight to Ms. Edgar's expert testimony. Further, the numbers of Mr. Noble's report are relatively improbable: that a brand new 156-unit apartment complex with a large number of amenities at a declared cost of $12,927,378.00 and insured at $17,000,000.00, should only be valued at $6,030,188.00 (assessed value of $3,618,113.00). These numbers induce the Court to give it less weight.

Also of note is an argument proffered by the Amicus Curiae. The Eastern Panhandle Business Association argues (and Petitioner suggests) an interesting point – that assessors should consider properties outside of the subject county and outside this State in order to create a result for the Income or Market Approach provided that they are comparable. These parties argue that this case presents precisely the problem with limiting comparable sales to the same county or state – that a property could be subject to a substantially higher assessment which is not based upon true and accurate value, merely because there is no comparable sales data for creation of capitalization rate. Therefore, Amicus Curiae urges the Court to hold that it is arbitrary to not consider properties outside this County and this State.[6] The Assessor responds by noting W.Va. Code §11-4-8, and W.Va. C.S.R. §110-1P-3.1.1, which indicate the use of properties within the same county.

This Court notes that logically the more different a comparable property is in location (especially in another State), the less valuable its comparison is because of an increase in variables which affect value such as applicable tax regimes, supply and demand conditions, legal requirements, zoning, services, etc.

Upon review of the Rules, the Court finds that utilizing properties outside the State would not necessarily be outside these Rules. Further, considering properties outside the State may be a

[6] As the Assessor also points out, based upon the appeal of the 2011 taxes for this Property it appears possible that the Law does not support such an approach. Amicus's line of reasoning is similar to what this Court and the BRE applied to the property for the 2011 tax year. The BRE employed Ms. Edgar, the commercial appraiser in the Assessor's office, to come up with a hybrid income approach – deriving a capitalization rate from a regional publication which used regional sales of similar properties. The BRE then used this data to reduce or equalize the assessment number. Yet, on appeal, in *Lee Trace LLC v. Gearl Raynes, Assessor, et al.*, 232 W.Va. 183, 751 S.E.2d 703 (2013), the Supreme Court rejected this approach ("we find that it was an abuse of discretion for the Board to utilize a 'hybrid' income approach value that did not comport with the requirements…"). At that time the parties agreed that the hybrid approach did not comport with the Rules, and so the Supreme Court did not take up the issue of whether considering out of county or State properties comports with the Rules. Nonetheless, this hybrid approach is strikingly similar to what the Amicus Curiae urges – consideration of sales throughout the region instead of the County and/or State (the IAS alters county values based upon a study done throughout the State). *Lee Trace*, 232 W.Va. 183, therefore, casts some doubt upon this approach.

more effective way of determining the "true and accurate value. However, in this case there is nothing to show that the Assessor's method was erroneous – choosing the Cost Approach due to limited data was within the Assessor's discretion. In fact, Amicus and Petitioner point to no specific sales outside the State which are comparable. These factors lead this Court to the conclusion that relying only on properties within the same county, adjusted based upon a State wide-study, was neither arbitrary nor an error.

This issue, as with much of the Amicus Curiae's brief, takes issue with the fundamental fairness of assessments in West Virginia. Yet, the Supreme Court has held that "W.Va. Code § 11–3–24 (1979) (Repl.Vol.2008), which establishes the procedure by which a county commission sits as a board of equalization and review and decides taxpayers' challenges to their property tax assessments, is facially constitutional." Syl. Pt. 4, *In re Tax Assessment of Foster Found.'s Woodlands Ret. Cmty.*, 223 W. Va. 14, 16, 672 S.E.2d 150, 152 (2008). Moreover, this case does not present a fundamentally unjust process or result – a new apartment complex was appraised using the cost approach (while the IAS system made adjustments with a market consideration in mind), which gave it a higher value that its competitors.

So, Petitioner's allegations of error in the assessment, and its appraisal of the property do not sufficient show that the assessment was erroneous. Further, while it is clear that experts may disagree as to the value, the assessment value is supported by substantial evidence.

Accordingly, the Court DENIES Petitioner's Petition for Appeal, and the ruling of the Berkeley County Council sitting as Board of Equalization and Review, regarding the 2001 tax assessment, is AFFIRMED.

Therefore, it is hereby ADJUDGED and ORDERED that upon this FINAL ORDER the Petition for Appeal is DENIED, and the assessment value for Lee Trace Apartments, 15000 Hood Circle, Berkeley County, Martinsburg, West Virginia, for the 2010 tax year is shall not be altered. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to the following counsels of record:

Counsel for Petitioner:
Thomas Moore Lawson, Esq.
120 Exeter Drive, Suite 200
P.O. Box 2740
Winchester, VA 22604

Business Court Division Central Office
380 West South Street
Martinsburg, WV 25401

Counsel for Respondent, Berkeley County Assessor:
Michael D. Thompson, Esq.
119 East Liberty Street
Charles Town, WV 25414

Counsel for Respondent, Berkeley County Council:
Norwood Bently, III, Esq.
400 West Stephen Street, Suite 201
Martinsburg, WV 25401

Counsel for Amicus Curiae, the Eastern Panhandle Business Association:
Michael E. Caryl, Esq.
101 South Queen St.
PO Box 1419
Martinsburg, WV 25402

A TRUE COPY
ATTEST
Virginia M. Sine
Clerk Circuit Court
By: Marsha Melnick
Deputy Clerk

CHRISTOPHER C. WILKES, JUDGE
BUSINESS COURT DIVISION