Business Ct.

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

LEE TRACE LLC,

Petitioner,

VS.

Civil Action No.: 13-AA-4
Presiding: Judge Wilkes

BERKELEY COUNTY COUNCIL AS BOARD OF REVIEW AND EQUALIZATION, et al.,

Respondents.

FINAL ORDER

Initially, Petitioner represented that it would be appealing the November 20, 2015 Order, issued by the Supreme Court of Appeals of West Virginia to the Supreme Court of the United States, in the related, but separate civil actions 11-AA-2 and 14-AA-1. Accordingly, this Court stayed the above captioned cases. After the expiration of the deadline to file an appeal, the Court inquired and was informed that Petitioner no longer sought to appeal the matter.

The case was set for briefing and the Petitioner submitted its memorandum for each of the three cases. On September 9, 2016, the Court heard final arguments for civil action 12-AA-4 and the above captioned case.

I. Background

This case focuses on the 2013 Assessment of Lee Trace Apartments in Martinsburg, West Virginia, within a long line of tax appeal cases. Lee Trace, LLC, comes before this Court as

Petitioner to appeal the January 31, 2013, and October 24, 2013 decisions of the Berkeley County Council, sitting as the Board of Review and Equalization.

Lee Trace owns real property at 15000 Hood Circle, Martinsburg, Berkeley County, 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 ("Property"). The Property includes an Apartment Complex that was begun in 2008 and was completed in the spring of 2009.

On January 31, 2013, the Berkeley County Council, convened as the Berkeley County Board of Review and Equalization ("Board") to consider the assessments of property in the County, including the Property, which was assessed at $6,995,420.00 ("Assessment"). Pursuant to West Virginia Code §11-3-23a(d), Lee Trace timely informed the Board of Review and Equalization of its desire to appeal the 2013 Assessment by letter and Application for Review hand-delivered to the Clerk of the County Commission, on February 20, 2013.

The Board of Review and Equalization was scheduled to have a meeting the next day and then adjourn *sine die* on February 21, 2013. Because the Board received notice the day before the hearing, Counsel for the Board informed counsel for Lee Trace that the Board would hear the case when they met in October 2013.

Prior to the hearing before the Board, both Lee Trace and Larry A. Hess, Assessor for Berkeley County, West Virginia ("Assessor") served discovery requests and responses upon each

other. Pursuant to West Virginia Code §11-3-24b(c), Lee Trace filed objections with the Board. The appeal was subsequently heard by the Board of Assessment Appeals on October 24, 2013, but the Board failed to rule on the objection as required by West Virginia Code §11-3-24b(c).

During this hearing, the Petitioner did not question the methodology or accuracy of the cost approach to value utilized by the Assessor to make the Tax Year 2013 Assessment, but focused squarely on the Assessor's failure to use the income method and therefore a failure to equalize the Property with other apartment complexes.

The Assessor's chief commercial appraiser, Tamara Edgar, testified with regard to the site characteristics of the subject property; the appraisal value and the subsequent assessment reached by utilization of the cost approach to value, which included such elements as location, size, shape, topography, best use of the property, and many other factors. She further testified that those elements are entered into the CAMA data system and are all used in the development of an appraisal and assessment and she related each of these elements to the subject property. Ms. Edgar's testimony, also, included that she had considered each of the three required approaches to value commercial real property; that she had reviewed the income and expense statements and personal property returns and determined that for the first two years of its filings, the LLC estimated the value of the Lee Trace Apartment Complex at $17 million but, once litigation over the assessment began the value dropped to $6 million.

Ms. Edgar testified that there were no sales of comparable properties within Berkeley County during the time period pertinent to the 2013 Assessment, from which to obtain data for

calculation of the required capitalization rate, which precluded implementation of the income valuation method. As for the Petitioner's proposed valuation under the income method, Ms. Edgar pointed out that Petitioner used comparable sale properties from which to develop capitalization rates from Pittsburgh; Hagerstown; Washington County, Maryland; North Carolina; and York, Pennsylvania, and that the sales ranged from 2007 to mid-2010, all of which were older than the subject property.

Furthermore, Ms. Edgar testified that she disapproved of the amount of functional and external obsolescence suggested by the Petitioner in its analysis for a new building. Edgar also explained that the CAMA system relied upon by the Assessor determines physical depreciation based upon the age and condition of the building.

Following the hearing, on October 31, 2013, the Berkeley County Council, sitting as the Board of Review and Equalization, affirmed the Assessor's assessment and denied the Petitioner's appeal.

II. Standard for Appeal

Assessments are afforded a presumption of correctness and accordingly, the appealing taxpayer, Lee Trace, must prove by clear and convincing evidence that the Assessment was erroneous. Syllabus point 2, in part, *Western Pocahontas Properties Ltd. v. County Commission of Wetzel County,* 189 W.Va. 322, 431 S.E.2d 661 (1993).

> Title 110, Series IP of the West Virginia Code of State Rules confers upon the State Tax Commissioner (and county assessors) discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of

> such discretion will not be disturbed upon judicial review absent a showing, of abuse of discretion.

Syl. Pt. 5, *In re Tax Assessment Against Bituminous Power Partners, L.P.*, 208 W.Va. 250 (2000).

Furthermore, taxpayers advancing claims of disparate treatment relying upon the equal protection clause, must prove a systematic and intentional assessment scheme in order to prevail.

> [V]iolation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires `intentional, systematic undervaluation by state officials of other taxable property in the same class[,:]' and occasional errors of law or mistake in judgment are not alone sufficient to implicate the clause.

Allegheny Pittsburgh Coal Ca. v. Cty, Comm 'n of Webster Cty., W. Va., 488 U.S. 336, 343 (1989). Furthermore, the Supreme Court of Appeals of West Virginia has stated that

> The Equal and uniform clause of Section 1 of Article X of the West Virginia Constitution, requires a taxpayer whose property is assessed at true and actual value to show more than the fact that other property is valued at less than true and actual value. To obtain relief he must prove that the under valuation was intentional and systematic. Syl. Pt. 1, *Kline v. McCloud*, 174 W.Va. 369, 326 S.E.2d 715 (1984).

Syl. Pt. 11, *Mountain Am., LLC v. Huffman*, 224 W.Va. 669 (2009).

III. Discussion

In the Brief of Petitioner Lee Trace, Petitioner alleges that the Assessment is erroneous because the Assessor failed to consider the property's income, physical depreciation, functional obsolescence, and economic obsolescence, and failed to equalize the property with comparable

properties. Furthermore, the Brief of the Petitioner Lee Trace avers that the private appraisal submitted by Lee Trace represents the true and actual value of the property, which uses the income method to which Lee Trace is entitled. Elsewhere, Petitioner also argues that its due process rights were violated by the notice of hearing and discovery omissions. The Court will address this contention first.

A. Due Process (Notice of Hearing, Discovery Motion)

Lee Trace alleges that the Board failed to comply with the statutory appeals process by failing to provide notice of the February 21, 2013 hearing and that the Board denied its right to discovery. Respondent answers that Petitioner was not timely informed of the February 21, 2013 hearing because the Petitioner did not request an appeal until the day before the Board adjourned *sine die* and that the appeal was set for, noticed for, and held on October 24, 2013.[1]

In *Lee Trace, LLC v Raynes*, 232 W. Va. 183 (2013), the West Virginia Supreme Court of Appeals held that a defective notice that failed to advise Lee Trace of its appeal rights violated Lee Trace's constitutional and statutory due process rights. However, unlike *Raynes,* here the Petitioner was afforded a full opportunity to present its appeal due.

In *Rawls Sales & Processing Co. v. Cty. Comm'n of Mingo Cty.*, 191 W. Va. 127, 130 (1994), the taxpayers received defective notice in a newspaper but received actual notice and made an appearance before the Board. On appeal, the Supreme Court of Appeals of West Virginia held that any defect was waived or cured by the taxpayers' appearance before the Board.

1 The appeal was not heard, in any part, during the February 21, 2013 hearing.

> [T]he taxpayers admitted that they were informed of the actual assessments that were applicable to their properties prior to their appearance before the Board. Thus, the taxpayers had ample opportunity to argue against the final assessments before the Board of Equalization and Review. In *In re Tax Assessments Against Pocahontas Land Co.,* 172 W.Va. 53, 303 S.E.2d 691, 697 (1983), this Court recognized that a notice that is defective as to either date or content may be cured by the taxpayer's appearance before the board. "Even though W.Va.Code, 11-3-24, provides for newspaper publication where a general increase in property valuations is proposed by the Board, defective newspaper publication can be cured by adequate notice by mail or by the appearance of the affected taxpayer at a protest hearing." Syl. pt. 6, *In re Tax Assessments Against Pocahontas Land Co.,* 172 W.Va. 53, 303 S.E.2d 691 (1983). Consequently, we find no prejudicial error with respect to the notice that was published in this instance.

Rawl Sales & Processing Co. v. Cty. Comm'n of Mingo Cty., 191 W. Va. 127, 130 (1994).

Rawls examined the sufficiency of notice for a newspaper publication. The taxpayers conceded that the notice itself was proper, and disputed only the sufficiency of its contents. In the instant case, the taxpayers were entitled to personal notice for increase to their property individually. While the form is somewhat different in the case at hand, the reasoning is the same. Here, Petitioners received notice before the hearing, wherein they appeared and had ample opportunity to present evidence and cross examine all witnesses. Just as in *Rawls*, here there is no prejudicial error with respect to the notice.

As for Petitioner's discovery argument, the Respondent admits that the Board failed to rule on the Petitioner's objections and that the law clearly requires the Board to rule on said objections. However, Respondent contends that the oversight did not prejudice the Petitioner and therefore does not warrant a reversal or remand.

The purpose of §11-3-24b(c) is to assure access to evidence that may prove or disprove a taxpayer's allegation that an assessment was clearly erroneous or that the Assessor and/or Board was engaging in a systematic and intentionally disparate assessment scheme. Accordingly, some level of prejudice must be raised in order to determine whether the error is of consequence. Here, The Petition for appeal states that "[h]ad the Assessor responded in full to Lee Trace's discovery requests, those responses would have confirmed that other properties comparable to the Property were not assessed in the same manner as the Property." Petitioner has clearly been able to obtain this information and has presented it in detail by way of brief and oral argument. However, Petitioner has not argued with any detail how the Board's failure to rule on the objections has affected the proceeding. To remand this case back to the Board would serve only to delay the proceeding, as no remedy is needed. Consequently, the Court will not return this case to the Board for ruling upon the objections vaguely mentioned.

B. Failure to consider required statutory factors- income, depreciation

The second assignment of error this Court will review is Lee Trace's allegation that the Assessor failed to consider the required statutory income and deprecation factors. Lee Trace argues that the Assessor is required to consider a property's income under all three approaches used to determine a property's value.

Indeed, the West Virginia Code of State Rules requires that "for purposes of appraisal of any tract or parcel of real property used for commercial or industrial purposes, including chattels real, the appraisal shall consider" a number of factors including the "income, if any, which the

property actually produces and has produced within the preceding three (3) years…Each of these factors should be considered in the appraisal of a specific parcel. Some factors, however, may be given more weight than others." W. Va. C.S.R. §110-1P-3.1.1.9, 3.1.4. The Petition erroneously argues that this section of the State Rules "requires an assessor to conduct an income approach assessment." While the Assessor is mandated to consider income, he or she is not bound to use the data if, in his or her discretion, it is inappropriate, and further, is not required to use the income *method* of appraisal.

> Title 110, Series I P of the West Virginia Code of State Rules confers upon the State Tax Commissioner (and county assessors) discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing, of abuse of discretion.

Syl. Pt. 5, *In re Tax Assessment Against Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000).

Petitioner argues that the Assessor failed to consider income information, citing section number 29 of the certified record. The Court could not find any proof of a failure to consider or any reference of income information in Number 29 of the certified record, Lee Trace's responses to the Assessor's requests for production of documents, however, a review of the October 24, 2013 hearing before the Board provides relevant testimony from Ms. Edgar.

> Mr. Thompson: Income imputed to the land- you have been provided with that information, have you not, by either Mr. Lawson or his client?
>
> Ms. Edgar: Yes.

> Mr. Thompson: And, in that income, was that looked at by you and considered by you although you chose to disregard it, would you not consider the income approach?
>
> Ms. Edgar: Yes.
>
> Mr. Thompson: Did you make any use of that income information or reach conclusions based upon that?
>
> Ms. Edgar: Not that I can recall.

Berkeley County Council Transcript, October 24, 2013, Pg. 20. Ms. Edgar testifies that she did review and consider the income provided by Lee Trace, though she chose to disregard it. While this line of questioning does not prove an in-depth analysis of the income produced by the Property, it does meet the minimum requirements set by the West Virginia Code of State Rules and fails to satisfy Petitioner's burden of proving, by clear and convincing evidence, that the Assessment was erroneous, or that the Assessor has engaged in a systematic and intentionally discriminatory appraisal system.

Lee Trace also argues that the Assessor failed to consider the required factors of physical deterioration, functional obsolescence, and economic obsolescence when applying the cost approach to determine a property's values. The West Virginia Code of State Rules provides Assessors guidance in how to conduct valuation of commercial property.

> Adjustments.- When physically inspecting commercial and industrial personal property for appraisal, use three (3) types of depreciation: *should be* considered; physical deterioration depreciation, economic obsolescence and functional obsolescence.

W. Va. C.S.R. §110-1P-3.4.3.3. emphasis added.

While CSR §110-1P-3.4.3.3 does not require consideration of exactly these three methods of depreciation, still the record shows that Ms. Edgar testified to both physical and functional depreciation and pointed them out on the property cards.[2] There is no evidence that the Assessor failed to think about economical obsolescence and there is no suggestion in the record that economic obsolescence could have applied to the building in issue. Economic obsolescence is defined as "a loss in value of property arising from outside forces such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships." W. Va. Code of State Rules. There is nothing in the record to reflect that any outside force impacted the property and Petitioner fails to rebut this argument. Clearly the Assessor considered depreciation in conducting the Assessment.

Furthermore, based upon the testimony of Ms. Tamara Edgar on October 24, 2013, the record, and apparent from the pleadings, this Court finds that the Assessor considered all the factors listed in the 1991 version of §110-1P-2.1.1 through 2.1.4 as required by statute and case law. "When a circuit court reviews an appraisal of commercial real property made for ad valorem taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer's consideration of the required appraisal factors set forth in W.Va.C.S.R. §§ 110–1P–2.1.1. to 2.1.4. (1991)." Syl. pt. 7, *Stone Brooke Limited Partnership v. Sisinni*, 224 W.Va. 691, 688 S.E.2d 300 (2009).

In conclusion, Petitioner has not passed the heavy burden of proving, by clear and

2 Ms. Edgar also testified that she reviewed Mr. Noble's assessment and found that he had misapplied "a large amount of functional and external obsolescence for a brand new project."

convincing evidence, that the Assessment was erroneous, that the Board erred by affirming the Assessment, or that the Assessor was engaged in a systematic and intentionally discriminatory tax scheme.

C. Equalization

The third assignment of error this Court will review is whether the Assessor failed to equalize the Property. Petitioner complains that it was assessed via the cost method when other properties were assessed under the income method. Petitioner seeks to compel an Assessment under the income method using factors submitted by its private appraiser.

Indeed, West Virginia Law requires equalization of taxes among comparable properties. The West Virginia Supreme Court of Appeals has prohibited the use of more favorable valuation methods for choice taxpayers and not others in the same class: "It would be totally unacceptable to allow counties to use two systems of assessment, one for favored taxpayers and one for others." *Matter of U. S. Steel Corp.*, 165 W. Va. 373, 378-379 (1980). Furthermore, the Assessor has a "duty to examine and revise the lists of property taken by his deputies to see that the assessment is equal and uniform throughout his county." West Virginia Code § 11-2-6. It is undisputed that all levels of government within the State must apply uniform taxes. "Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law" West Virginia Constitution Article X, § I.

However, these mandates do not require every apartment complex to be assessed at the

same exact value. The instant case presents a unique situation that sets this Assessment apart from its neighbors'. It is important to understand what the Petitioner means when it says that other properties were given the benefit of the income method while it was assessed under the cost method. This income method is referring to the *hybrid* income method by which Petitioner's property was also initially assessed.

In *Lee Trace, LLC v. Raynes*, 232 W. Va. 183 (2013), the Petitioner in the instant action appealed the 2011 assessment value for the same property at issue here. Initially, the Assessor assessed the property at a value of $7,593,430.00 using a cost approach analysis. *Id.* Lee Trace sought to adjust the 2011 assessment by using the income approach, thus reducing the tax assessed value. *Id*.

> Deputy Assessor Tamera Edgar confirmed at the hearing before the Board of Review and Equalization that some other apartment complexes in the area had assessments reduced by the Board upon consideration of income when taxpayers specifically requested it, but that the income approach was not used to assess Lee Trace's property because the data was not available to develop a "cap rate" used in the calculation due to the lack of any comparable sales in Berkeley County for the period in question.

Id. Thus, the Assessor contended, it was not possible for her to meet the specific requirements pertinent to performance of an income approach provided for in Legislative Rule § 110–1P–2. *Id.*

The Board then asked the Assessor to provide it with a value that took into account the income of the property. *Id.* "Lee Trace provided additional income information for 2010 to the Assessor on the day following the hearing, and the Assessor then completed a revised assessment which utilized realty rates to determine a capitalization rate in lieu of unavailable market data,

and also utilized actual rent of the property in lieu of economic rent." The new hybrid approach set the Property's value at $5,207,940.00. *Id.* Based upon this data, the Board ruled that "a fair value is reached by averaging the value by income approach and the value by cost approach; that the fair total assessed value is $6,400,690."

Lee Trace appealed this order to the Circuit Court of Berkeley County, alleging that the Board of Review and Equalization's consideration of a hybrid income approach subsequently offered by the Assessor was improper, and that the Board's averaging of the cost approach and hybrid income approach was improper. *Id.* The Circuit Court affirmed the Board of Review and Equalization's method, but corrected its mathematical calculation. The Supreme Court of Appeals of West Virginia reversed the Circuit Court, agreeing with the Petitioner that the hybrid income approach was improper. However, The Court did not order the assessment should be conducted as proposed by the Petitioner. Instead, the Court raised the Assessment back to the Assessor's initial cost approach assessment value of $7,593,430.00, finding that the "cost approach assessment performed by the Assessor [was] supported by substantial evidence in the record." *Id.* [3]

This specific and personalized case law necessarily guides the above captioned case. In response to the Petitioner's instant argument, the Respondent answers that the Assessor's use of the hybrid approach to *other* properties does not make the 2013 assessment of the Property at issue erroneous. Respondent states that the hybrid method was a mistake in judgment but had no

3 The Court also noted that Lee Trace did not raise any error with respect to the methodology used by the Assessor in performing the cost approach analysis.

effect on the Petitioner's property values. Respondent notes that the Supreme Court of Appeals of West Virginia already addressed this issue and adjusted the assessment back to the original cost approach method without lowering it again in the name of equalization of other properties also incorrectly assessed.

The Court here agrees. The decision of the Supreme Court of Appeals of West Virginia corrected a misapplication of the law and certainly set the standard for ongoing assessments. However, the Petitioner's undesired correction does not trigger a requirement that the Assessor return to all previous assessment and reevaluate the properties by other means or return the Petitioner's assessment to the hybrid amount struck down in the name of equalization.

As for Petitioner's insistence that it is entitled to a valuation under the income method, this Court must clarify that an assessor is not required to perform an income approach to value property.

Lee Trace argues that the Assessor did have sufficient information to develop a cap rate based on sales outside Berkeley County. On February 24, 2012, during the second day of hearing before the Board, Lee Trace presented evidence and proffered testimony from M. L. Steven Noble, a licensed certified real estate appraiser, that the assessed value of the Property for the 2012 Tax Assessment should be no more than $4,000,000,00. Certified Record No. 6. However Mr. Noble's assessment was based on comparable properties *outside* the locality of Berkeley County. Petitioner offers up a report using sales from outside the state, but the Assessor is not required to use data outside its established locality. *Lee Trace v. Hess*, a non-binding but useful

memorandum decision, clarifies that an Assessor has the authority under the Code to choose the "locality," which can be within a state's borders.

> Any evidence produced by petitioner's expert witness and purporting to show a comparable sale involved a sale that originated outside of West Virginia. Petitioner's argument on this point is made in a single sentence, and it offers no authority requiring an assessor to look outside state borders to obtain evidence of comparable sales. We agree with respondents that "[i]n determining appraised value, primary consideration shall be given to the trends of price paid for like or similar property in the area or locality in which the property is situated." W.Va. C.S.R. § 110-1P-3.1.1 (emphasis supplied).

Lee Trace v. Hess, No. 14-0962 (W. Va. Supreme Court, November 20, 2015) (Memorandum Decision).

West Virginia Code of State Rules § 110-1P-2.2.1 (1991) provides three different appraisal methods for determining the fair market value of commercial properties such as the subject apartment complex. 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." The Code of State Rules also provides specific instruction as to how to apply the income approach: "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. § I 10-IP-2.2,1.2 (1991). If, then, there is no "comparable sale", there can be no development of the required capitalization rate and, thus, the Assessor cannot use the income approach to value the property.

Petitioner argues that, despite the lack of any comparable sales during the pertinent time period in Berkeley County, the Assessor could have and should have performed the income approach by utilizing sales of similar properties outside of this jurisdiction and from years ranging from 2007 to 2011. However, this Court is guided and convinced by the reasoning set forth by the West Virginia Supreme Court of Appeals in its November 20, 2015 Memorandum Decision advising that comparable sales outside of this state are not appropriately considered in this process. "We agree with respondents that determining appraised value, primary consideration shall be given to the trends of price paid for like or similar property in the area or locality in which the property is situated." *Lee Trace, LLC v. Hess, et al*, Memorandum Decision, Docket No. 14-0962 (Berkeley County 1 1-AA-2 and 14-AA-1), November 20, 2015.[4] Our state Supreme Court has ruled that it is "an abuse of discretion for the Board 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 § 10-1P-2.3.6." *Lee Trace LLC v. Raynes, et al*, 232 W.Va. 183 (2013). The method proposed by Lee Trace would likely fall within that abuse of discretion once again.

The Court does not agree with Petitioner's argument that the Assessor is required to perform an income approach to value the subject property or that a mistake in judgment as to neighboring taxpayers requires the Assessor to perform that same calculation for the Petitioner in the name of equalization.

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4 Furthermore, this Court recognizes that commercial property values may be assessed differently across state lines based on various factors including differing tax schemes, zoning, infrastructure, and regulations. These differences are especially evident in the Eastern Panhandle of West Virginia, where property values can vary wildly within a few miles between Pennsylvania, Maryland, Virginia, and West Virginia. Presumably for this reason, the legislature

> [V]iolation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires `intentional, systematic undervaluation by state officials of other taxable property in the same class[,:]' and occasional errors of law or mistake in judgment are not alone sufficient to implicate the clause.

Allegheny Pittsburgh Coal Ca. v. Cty, Comm 'n of Webster Cty., W. Va., 488 U.S. 336, 343 (1989). Furthermore, this Court has announced that

> The Equal and uniform clause of Section 1 of Article X of the West Virginia Constitution, requires a taxpayer whose property is assessed at true and actual value to show more than the fact that other property is valued at less than true and actual value. To obtain relief he must prove that the under valuation was intentional and systematic. Syl. Pt. 1, *Kline v. McCloud*, 174 W.Va. 369, 326 S.E.2d 715 (1984).

Syl. Pt. 11, *Mountain Am., LLC v. Huffman*, 224 W.Va. 669, 687 S.E.2d 768, 772 (2009). Here, there is no evidence of any intentional and systematic under valuation of other properties.

Even if the Assessor did use the non-compliant hybrid method for the other properties, it was performed prior to the *Lee Trace* Decision of 2013.

The Assessor, through Ms. Edgar's testimony, has articulated a reasonable justification for employment of the cost approach, and falls within the wide discretion appointed to the Assessor. "[S]election and application of the cost, income or market data approach, as appropriate in the valuation of commercial property, are within the discretion of the assessor." *Pope Properties/Charleston Liab. Co. v. Robinson, 230 W. Va. 382 (2013).* The Respondent argues that the Court has never interpreted the law to require an assessor to perform each of the

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bestowed upon Assessor the discretion to determine the bounds of their county's "locality."

optional approaches and that Ms. Edgar did not testify that she had sufficient information to perform both an income approach and to consider the income as part of the cost approach. Furthermore, the West Virginia Supreme Court of Appeals has specifically instructed that an Assessor has no duty to perform the useless task of considering appraisal methods with insufficient data for that method and Edgar testified that there were no sales of comparable properties during the year preceding the effective date of the assessment in order to develop a cap rate. *Lee Trace, LLC v Raynes*, 232 W. Va. 183 (2013).

This Court must conclude that the Assessor has presented substantial evidence with regard to his assessment of the subject property.[5] The Petitioner has failed to present the "clear and convincing" evidence necessary to prove that the Tax Year 2013 Assessment is erroneous.

IV. Conclusion

In conclusion, Petitioner has not passed the heavy burden of proving, by clear and convincing evidence, that the Assessment was erroneous, discriminatory, or that the Board erred by affirming the Assessment. Furthermore, the Court finds that the Petitioner did not suffer any prejudice by way of the Board's setting and hearing of the Petitioner's case.

THEREFORE, upon the record and pertinent legal authorities, the Court DENIES the Petition for Appeal and AFFIRMS the October 24, 2013 decision of the Berkeley County Council as Board of Review and Equalization. The Court notes the objections and exceptions of the parties to

5 Respondents also filed Supplemental Proposed Findings of Facts and Conclusions of Law. However, due to the Petitioner's objection and because the Court's briefing schedule did not provide for a supplemental memorandum, the Court did not consider the Respondents' Supplement Proposed Findings of Fact and Conclusions of Law in its preparation of this Order.

any adverse ruling herein.

This being a FINAL ORDER, the Court directs the Circuit Clerk to retire this matter from the active docket and place it among causes ended, and to distribute attested copies of this Order to the Business Court Division Central Office at the Berkeley County Judicial Center, 380 W. South Street, Suite 2100, Martinsburg, West Virginia, 25401; and all counsel of record.

ENTER this 14 day of November 2016.

CHRISTOPHER C. WILKES, JUDGE
BUSINESS COURT DIVISION

A TRUE COPY
ATTEST
Virginia M. Sine
Clerk Circuit Court
By: L. Cooper
Deputy Clerk