IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BERKELEY COUNTY COUNCIL,

Defendant Below, Petitioner,

vs. No. 20-1022

MARTINSBURG IRS OC, LLC,

Plaintiff Below, Respondent.

PETITIONER'S BRIEF

Counsel for Berkeley County Council,
Defendant Below, Petitioner,

Anthony J. Delligatti, (WV State Bar No. 12345)
Jeffery T. Mauzy, (WV State Bar No. 11178)
400 W. Stephens Street, Suite 201
Martinsburg, West Virginia 25401
Phone: (304) 264-1900 Ext. 8
adelligatti@berkeleywv.org
jmauzy@berkeleywv.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

ASSIGNMENTS OF ERROR 4

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 9

STATEMENT REGARDING ORAL ARGUMENT 12

STANDARD OF REVIEW 13

ARGUMENT 13

I. The Circuit Court abused its discretion by reducing the Berkeley County Assessor's Assessment without joining the Berkeley County Assessor, whose assessment is contested. 15

II. The Circuit Court abused its discretion by a) applying wrong standard of review, b) applying the wrong standard of proof, and c) by finding that the Board of Assessment Appeals erred by not finding that the Assessor violated the law for choosing the cost approach to valuation. 17

III. The Circuit Court erred when it made the clearly erroneous finding of fact that the Assessor did not take into account all types of depreciation in its appraisal, because the property record card indicates that depreciation was applied. 19

IV. The Circuit Court abused its discretion by adopting the "retrospective leased fee" appraisal conducted by Martinsburg, IRS, O.C. LLC's hired appraiser that failed to comply with West Virginia law for valuing commercial property for ad valorem tax purposes. 22

1) The circuit court improperly discounted the square footage of the buildings subject to taxation. 23

2) The circuit court improperly adopted an assessment that failed to account for many improvements to the land and failed to use comparable sales in this market that had similar features. 24

3) The circuit court improperly reduced the assessment to a leased fee interest based on projected lower revenues, and failed to add a corresponding assessment for the leasehold interest. 25

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996) 13
Great A & P Tea Co. v. Davis, 167 W. Va. 53, 278 S. E.2d 352 (1981) 26
In re Elk Sewell Coal, 189 W. Va. 3, 427 S.E.2d 238 (W. Va. 1993). 16
In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W. Va. 250, 539 S.E.2d 757 (2000) 14, 18
In re Tax Assessments Against the S. Land Co., 143 W.Va. 152, 100 S.E.2d 555 (1957) 13
Lee Trace LLC v. Raynes, 232 W. Va. 183, 751 S.E.2d 703 (2013). 9, 10, 15
Mackin v. Taylor Cty. Ct., 38 W. Va. 338, 18 S.E. 632 (1893) 15
Musick v. Univ. Park at Evansdale, LLC., 241 W. Va. 194, 820 S.E. 2nd 901 (2018), ... 26
Pope Props. v. Robinson, 230 W. Va. 382, 738 S.E.2d 546 (2013) 9, 15
Stone Brooke Ltd. P'ship v. *Sisinni*, 224 W. Va 691, 688 S.E.2d 300 (2009) 15
W. Pocahontas Properties, Ltd. v. Cty. Comm'n of Wetzel Cty., 189 W. Va. 322, 431 S.E.2d 661 (1993). 13, 17
Yockey v. Woodbury Cty., 130 Iowa 412, 106 N.W. 950, 953 (1906) 15

Statutes

W. Va. Code § 11-1C-5a 14
W. Va. Code § 11-3-24b 5
W. Va. Code § 11-3-25 16
W. Va. Code § 11-3-25. 8

Regulations

W. Va. CSR § 110-1P-1 14
W. Va. CSR § 110-1P-2.1.1 14
W. Va. CSR § 110-1P-2.1.3 14
W. Va. CSR § 110-1P-2.1.4 14
W. Va. CSR § 110-1P-2.14 25
W. Va. CSR § 110-1P-2.15 25
W. Va. CSR § 110-1P-2.2.1 9
W. Va. CSR § 110-1P-3.2.1.1 19
W. Va. CSR § 110-1P-3.4.3.1 17
W. Va. CSR § 189-2-1 14
W. Va. CSR § 189-2-2.4 20
W. Va. CSR § 189-4-6. 19
W. Va. CSR §.110-1P-3.3 ..... 25, 27

ASSIGNMENTS OF ERROR

1. **The Circuit Court abused its discretion by reducing the Berkeley County Assessor's Assessment without joining the Berkeley County Assessor, whose assessment is contested.**

2. **The Circuit Court abused its discretion by a) applying wrong standard of review, b) applying the wrong standard of proof, and c) by finding that the Board of Assessment Appeals erred by not finding that the Assessor violated the law for choosing the cost approach to valuation.**

3. **The Circuit Court erred when it made the clearly erroneous finding of fact that the Assessor did not take into account all types of depreciation in its appraisal, because the property record card indicates that depreciation was applied.**

4. **The Circuit Court abused its discretion by adopting the "retrospective leased fee" appraisal conducted by Martinsburg, IRS, O.C. LLC's hired appraiser that failed to comply with West Virginia law for valuing commercial property for ad valorem tax purposes.**

STATEMENT OF THE CASE

This is an appeal of Berkeley County Circuit Court's reversal of the Berkeley County Board of Assessment Appeals denial of Martinsburg IRS, OC, LLC's appeal of it 2019 real property tax assessment. Martinsburg IRS, OC LLC ("Martinsburg IRS") owns a gated, guarded, secure 24.59-acre commercial site with 224,971 square feet of interior space that is equipped with its own 8 MW power station, a chiller plant, hundreds of parking spaces, and a gas filling station.[1] This parcel of commercial real estate known as 295 Murrall Drive, Kearneysville, Berkeley

[1] Property record card. App at 79-81.

County, West Virginia 25430 ("Property") was occupied by the Internal Revenue Service at the time of this assessment. The commercial buildings were built in 1995 and it sits in between old Route 9 and the new four lane divided highway section of Route 9 providing the property with easy access to Route 9 going east and west, and Interstate 81 going north and south. Martinsburg IRS purchased the property in 2005 for $30,120,000.00 prior to the construction of the new four lane divided highway with an exit near the property, and claims that within 13 years of the property being worth over $30 million, the value of the property has decreased over 75% to $7.24 million.[2] The Honorable Larry Hess, Assessor of Berkeley County, assessed the facility at $16,164,120 ("Assessment"), 60% of true value, based on a $26,940,000 appraisal of its July 1, 2018 value.[3] At the time of the assessment the United States Department of the Treasury leased the property and payed Martinsburg IRS $2,599,992 annually in rent payments.[4] Moreover, the federal government also reimbursed Martinsburg IRS for all property taxes that Martinsburg IRS paid (more than $300,000 per year).[5]

Martinsburg IRS appealed the Assessment to the Berkeley County Board of Assessment Appeals ("Board"),[6] arguing that the assessment was clearly erroneous and that the assessed value should have been $4,344,000.[7] The Board conducted a hearing taking testimony from both

---

[2] Property record card. App at 79.
[3] Property record card. App at 79-81.
[4] Respondent's Appraisal App. at 182, 198. *See also* income statements. App. at 246, 247.
[5] Respondent's Appraisal App. at 182, 198. Martinsburg IRS brought in revenue of close to $3 million per year from this property at the time of this Assessment, but claims the Assessment should be $4,344,000. The primary basis of Martinsburg IRS's argument is that the cash cow that was the IRS lease and tax reimbursement would soon come to an end, so the Assessment should take into account potential future lost revenue as the next tenant may pay less.
[6] The Berkeley County Council sits annually as the Berkeley County Board of Assessment appeals in accordance with W. Va. Code § 11-3-24b, to hear property valuation disputes between taxpayers and the Assessor or the State Tax office.
[7] Respondent's Appraisal App. at 120.

Martinsburg IRS's appraiser Michael Miller and John Streett a commercial appraiser in the Assessor's Office. Mr. Street testified that all three valuation approaches (cost, income, and market) were considered, but that the cost approach was used. Mr. Street presented an Integrated Assessment System ("IAS") property record card that showed three buildings and multiple improvements.[8]

Various square footages have been cited in this case, but the property record card correctly notes 224,971 square feet with 153,222 square feet above grade.[9] Mr. Miller, in his appraisal further reduced the square footage to 122,475 square feet of "net rentable area" because he claims the 8mw power plant should not be included in the assessment because he believes it is personal property.[10] However, the Assessor must assess all improvements on the land as well as improvements to the land. Presumably, because the equipment was assumed to be titled to the US Government there has been never been an assessment of the power plant equipment, only the building that it is stored in, which Martinsburg IRS clearly owns. Moreover businesses must pay taxes on personal property as well as real property. If it is the case moving forward, that the IRS

[8] The record card indicates many improvements in addition to the structures including multiple fences, flood lights, parking areas, walkways, and a gas station booth. Property Record Card App. at 79-81.

[9] Property Record Card App. at 79-81. In his testimony, Mr. Streett often referred to the square footage as 153,222 square feet. This is because he was discounting the two areas taxed as "crawl" spaces. In reality those spaces were below the first floor are not well suited for office space, but are conditioned space used to store and cool operating computer equipment. That 71,749 square feet accounts a very small portion of the value in the Assessor's appraisal. Pictures of the data center area that Respondents attribute no value to and claim is not rentable are in the Appendix at page 131.

[10] Transcript of Board of Assessment Appeals App. at 298-299. The 8 MW power station is a 23,538 square foot diesel electric generating facility. The property is classified as in the assessment as warehouse, which is valued at a lower rate than office space. The issue of its classification never came up, but most power generating facilities are assessed as industrial by the State Tax Department. The electricity generating equipment appears to not have been assessed.

does own that equipment, the Berkeley County Council hopes that the Assessor in conjunction with the State Tax Office assesses and taxes that equipment going forward as it likely has substantial value.

After depreciating the value of the buildings from their replacement costs,[11] the Assessor concluded that the property had a land value of $10,278,100 and a building value of $16,662,100 for a total appraised value of $26,940,200.[12]

Martinsburg IRS presented evidence of a "retrospective leased fee interest" evaluation of the property based a reduced square footage of "net rentable area" and argued that the real value of the property on July 1, 2018 was only $7.2 million primarily because of less future revenue as the IRS would be vacating the property in 2019.[13] The reason that Martinsburg IRS chose not to consider the cost approach according to Miller is because: "A building like this is pretty old, you know, 25 years. It's hard to estimate depreciation on an older building like that."[14]

The Board found that Martinsburg IRS failed to prove by clear and convincing evidence that the tax assessment was erroneous.[15]

Martinsburg IRS appealed the Board's decision to the Circuit Court of Berkeley County asserting 20 separate errors by the Board of Equalization and Review. Rather than naming the

---

[11] The Assessor applied physical depreciation and functional obsolescence to the buildings anywhere from 63% to 73% of their new replacement costs. Property record card. App at 79-81. The property record card references RCN or Real Cost New which is the cost based on the base year the system was used, multiplying that by the cost multiplier get the current replacement cost. The Record Card also notes "cond" (condition of the property) and "Phys" (physical) and "Fun" (functional) and has a rating for each of the depreciation. If the property was vacant the Assessor would have put a lower number in for functional and the depreciation would have been more than was applied. The codes go from 1-5 from least functional to most functional and from 1 to 5 from worst physical condition to best physical condition.

[12] Property record card. App at 79-81.

[13] *See Generally* Respondent's appraisal. App. at 119-245.

[14] Board of Assessment Appeals Transcript. App at 295.

[15] Board of Assessment Appeals Order. App. at 110-112.

adverse party below on appeal to Circuit Court, Martinsburg IRS sued the Berkeley County Council acting as the Board of Assessment Appeals.[16] The Assessor was never made a party to the appeal, and the administrative tribunal was the only party to the suit in the Circuit Court. The Court found that "Errors by the Berkeley County Council Sitting as the 2019 Board of Assessment Appeals . . . led to a decision affirming the Assessment, which is invalid, unequitable, and contrary to controlling West Virginia law."[17] Additionally, the court below adopted by reference Martinsburg IRS's over 50 page findings of fact and conclusions of law.[18]

The circuit court's primary finding of error was that the Assessor used the cost approach but that the income or market approaches used by Martinsburg IRS's appraiser better reflected the true value of the property.[19] Additionally, the Court found that 1) the Assessor did not apply proper depreciation; 2) the Assessor did not take into account the leased fee interest, or reduce the valuation because the tenant was soon to vacate the property; 3) the leased fee interest appraisal by Martinsburg IRS's appraiser that reduced the square footage and disregarded certain improvements was proper; and 4) the Assessor should have compared sales of similar commercial buildings in out of state markets. The circuit court reduced the assessment by over 73% from $16,164,120 to $4,344,000, which in turn reduced Martinsburg IRS's tax bill by more than $280,000 from $382,184.45 to $102,142.08.[20] Over 80% of that property tax bill goes to the Berkeley County Board of Education, and the County Council receives most of the rest, with a

---

[16] Petition to Circuit Court. App. at 9-11.
[17] September 14, 2020 Order. App. at 429
[18] Martinsburg IRS proposed findings of Fact and Conclusion of law. App. at 352-405
[19] September 14, 2020 Order. App. at 429
[20] The government "or the aggrieved taxpayer may appeal a question of valuation to the Supreme Court of Appeals if the assessed value of the property is $50,000 or more, and either party may appeal a question of classification or taxability." W. Va. Code § 11-3-25. Here, both questions of valuation and taxability are at issue as the circuit court discounted certain parts of the property as not taxable.

small portion going to the state. The Berkeley County Council seeks an opinion from this Court reversing the Circuit Court's order reducing the assessment from $16,164,120 to $4,344,000.

Summary of Argument

This Court has held that:

> 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. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.[21]

W. Va. CSR § 110-1P-2.2.1 provides that the Assessor will consider and use, where applicable, one of three generally accepted approaches to valuing commercial property: (1) cost; (2) income; and (3) market. The Assessor is given great discretion in choosing which method to use:

> In challenging an assessor's *ad valorem* tax valuation, the submission by the taxpayer of an alternative valuation is not enough. As [the West Virginia Supreme Court] confirmed in syllabus point 9 of *Mountain America,* there is a presumption that valuations for taxation purposes fixed by an assessor are correct. The taxpayer must prove that an error has been made.[22]

Here, Martinsburg IRS proved no errors by either the Assessor by clear and convincing evidence, nor did the Circuit Court find that the Board of Assessment Appeals abused its discretion in affirming the Assessment. To the contrary, the circuit court applied the incorrect standard of review, gave no deference to the Board of Assessment Appeals's decision, and did not start from the assumption that the Assessment was correct. Rather, the court below abused its discretion, and substituted the Assessor's Assessment for an assessment that it believed better represented the true and actual value of the property.

---

[21] *Lee Trace LLC v. Raynes*, 232 W. Va. 183, 193, 751 S.E.2d 703, 713 (2013).
[22] *Pope Props. v. Robinson*, 230 W. Va. 382, 389, 738 S.E.2d 546, 553 (2013).

First, the circuit court erred by ruling on the legality of the Assessor's assessment without providing the Assessor of Berkeley County an opportunity to defend his Assessment. Rather, Martinsburg IRS appealed the Board of Assessment Appeals order and substituted the Berkeley County Assessor with the Berkeley County Council sitting as the Board of Assessment Appeals as the adverse party. At minimum, this Court should reverse and remand this case to give the Assessor of Berkeley County an opportunity to defend his Assessment.

Second, the circuit court erred by finding that it was unlawful for the Assessor to choose the cost approach rather than the income or market approach to valuation. In fact, "[o]nce an Assessor has selected an appraisal method and applied it to appraise and assess a parcel of commercial real property, the valuation placed upon the property by the assessor is accorded great deference and is presumed to be correct."[23] The West Virginia Code of State Rules § 110-1P-2.2.1, the rules upon which assessors are bound to conduct appraisals, recognizes three different appraisal methods for determining the fair market value of "commercial and industrial real and personal property for ad valorem tax purposes." The circuit court did not find that the Assessor abused his discretion choosing the cost approach. Rather the circuit court broadly opined that:

> 1) Errors by the Berkeley County Council Sitting as the 2019 Board of Assessment Appeals ("the Board") led to a decision affirming the Assessment, which is invalid, unequitable, and contrary to controlling West Virginia law;
> 2) The Board erroneously determined that the Assessment was valid;
> 3) The Subject Property, 295 Murall Drive, Kearneysville, Berkeley County, West Virginia 25430, was appraised in excess of its true and actual market value;
> 4) The Assessment and the Board's decision are contrary to the provisions of controlling West Virginia law, regulations, and methodologies for determining market value for commercial properties similar to the Subject Property in this case . . .[24]

---

[23] *Lee Trace LLC v. Raynes*, 232 W. Va. 183, 194, 751 S.E.2d 703, 714 (2013).
[24] Circuit Court 9/14/2020 Order. App at 430.

Because there was no evidence that the Assessor abused his discretion in choosing the cost approach and because the circuit court failed to find that the Board of Assessment Appeals abused its discretion in affirming the cost approach, the circuit court abused its discretion by finding that the cost approach should not have been used to determine the Assessment. Furthermore, the circuit court incorrectly states that the Board of Assessment Appeals determined that the Assessment was valid. While the Board of Assessment appeals upheld the Assessment, it found that Martinsburg IRS failed to prove by clear and convincing evidence that the Assessor violated a statute or regulation in making the Assessment, and failed to prove by clear and convincing evidence that the assessment was erroneously high.

Third, the circuit court erred by finding that the Assessor failed to apply proper depreciation in deriving the Assessment. The circuit court found that no depreciation was applied,[25] but the property record card indicates that the Assessor did take into account all types of depreciation and the reduced values of the improvements compared to the new cost.[26] Because the circuit court incorrectly found that the Assessor failed to apply any depreciation and used that as a reason to reject the Assessor's Assessment, the circuit court based its decision on clearly erroneous finding of fact. Accordingly, the circuit court's reduced assessment based on the false finding that depreciation was not applied must be reversed.

Fourth, the Appraisal adopted by the circuit court does not comply with West Virginia law in assessing property. Mr. Miller's appraisal improperly discounts the square footage of the buildings subject to taxation to the "Net Rentable Area."[27] Nothing in the law permits the Assessor

---

[25] Circuit Court 9/14/2020 Order. App at 430; Martinsburg IRS proposed findings of Fact and Conclusion of law. App. at 373.
[26] Property record card. App at 79-81.
[27] *See Generally* Respondent's appraisal. App. at 119-245.

to simply discount square footage. Nonetheless, the Appraisal adopted by the Circuit Court adopts completely discounts a building housing an 8 megawatt power plant on the site from taxation because it is not rentable area as well as the entire below grade data center and chiller plant.[28] Additionally, Mr. Miller improperly calculated a land value by failing to account for improvements to the land when calculating the land value. Mr. Miller also improperly reduced the assessment's leased fee interest, discounting the value of the property as of July 1, 2018 because the IRS ended its lease and no new tenant occupied the building when Mr. Miller conducted his appraisal in 2019. And lastly Mr. Miller used sales outside of West Virginia and not close in space or time as comparable sales. For all of those reasons the Circuit Court should have disregarded Mr. Miller's appraisal; however, the circuit court adopted Mr. Miller's appraisal in ordering a reduced assessment. Accordingly, the circuit court's order reducing the assessment by over 73% must be reversed.

STATEMENT REGARDING ORAL ARGUMENT

Rule 20 oral argument is proper in this case because this appeal involves an area of public concern, the valuation and assessment of commercial properties for ad valorem tax purposes. This case has implications for the funding stream of municipalities, counties, and boards of education. Accordingly, Petitioner requests oral argument under Rule 20 of the West Virginia Rules of Civil Procedure.

[28] Martinsburg IRS proposed findings of Fact and Conclusion of law. App. at 352-405.

STANDARD OF REVIEW

The Supreme Court "reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. . . [,] challenges to findings of fact under a clearly erroneous standard [, and] conclusions of law . . . de novo."[29]

"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."[30]

If the purported error of the Assessor "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 . . . where the assessment is supported by substantial evidence."[31]

ARGUMENT

West Virginia Constitution Article X, Section 1, provides that "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." W. Va. Code § 11-3-1 explicitly requires:

> All property, except public service businesses ...shall be assessed annually as of July 1 at sixty percent of its true and actual value; that

---

[29] Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).
[30] Syl. Pt. 2, in part, *Western Pocahontas Props., Ltd. v. County Comm'n of Wetzel County*, 189 W.Va. 322, 431 S.E.2d 661 (1993)
[31] Syl. pt. 2, *In re Tax Assessments Against the S. Land Co.*, 143 W.Va. 152, 100 S.E.2d 555 (1957), overruled on other grounds by *In re the Assessment of Shares of Stock of the Kanawha Valley Bank*, 144 W.Va. 346, 109 S.E.2d 649 (1959).

> is to say, at the price for which the property would sell if voluntarily offered for sale by the owner thereof, upon the terms as the property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if the property were sold at a forced sale.

W. Va. Code § 11-1C-5a permits the Tax Commissioner to promulgate rules regarding the valuation of real or personal property subject to legislative rule-making review, which Assessors must then comply after adoption. The Tax Commissioner has promulgated such rules and the legislature has them codified within the West Virginia Code of State Regulations.[32]

The West Virginia Code of State Rules § 110-1P-2.2.1, the rules upon which assessors are bound to conduct appraisals, recognizes three different appraisal methods for determining the fair market value: (1) cost; (2) income; and (3) market data from sales. Additionally, appraisals must consider a variety of other factors including depreciation.[33] The regulations governing the valuation of commercial property provides that each of the enumerated factors should be considered, but some may be given more weight than other factors.[34] This Court has held that:

> 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. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.[35]

The West Virginia Supreme Court of Appeals has further recognized that "the Tax Commissioner has permitted an Assessor to select any one of these three methods by which to value commercial real property for ad valorem taxation purposes, with a preference not for any one particular

---

[32] W. Va. CSR § 110-1P-1 *et. seq.*; W. Va. CSR. § 189-2-1 *et. seq.*
[33] W. Va. CSR § 110-1P-2.1.1; W. Va. CSR § 110-1P-2.1.3.
[34] W. Va. CSR § 110-1P-2.1.4.
[35] Syl. Pt. 5 *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000).

method but only for 'the most accurate form of appraisal."[36] Then, "Once an Assessor has selected an appraisal method and applied it to appraise and assess a parcel of commercial real property, the valuation placed upon the property by the assessor is accorded great deference and is presumed to be correct."[37]

Beyond the deference given to assessments and the presumption of correctness of assessments, "[i]n challenging an assessor's *ad valorem* tax valuation, the submission by the taxpayer of an alternative valuation is not enough . . . there is a presumption that valuations for taxation purposes fixed by an assessor are correct. The taxpayer must prove that an error has been made."[38] Here, the Assessor made no such error, the Board found no such error, and the circuit court broadly found that assessment is "contrary to controlling West Virginia law,"[39] not that that the Board abused its discretion in finding no error.

I. The Circuit Court abused its discretion by reducing the Berkeley County Assessor's Assessment without joining the Berkeley County Assessor, whose assessment is contested.

> A county court is not a party to an appeal . . . for reassessment of lands by a landowner, from the decision of a county court refusing to reduce the valuation of his land made by a commissioner under said act . . .[40]

---

[36] *Stone Brooke Ltd. P'ship* v. *Sisinni*, 224 W. Va 691,700, 688 S.E.2d 300, 309 (2009).

[37] *Lee Trace LLC v. Raynes*, 232 W. Va. 183, 194, 751 S.E.2d 703, 714 (2013).
[38] Pope Props. v. Robinson, 230 W. Va. 382, 389, 738 S.E.2d 546, 553 (2013).
[39] Circuit Court 9/14/2020 Order. App at 430.
[40] Syl. Pt. 1 *Mackin v. Taylor Cty. Ct.*, 38 W. Va. 338, 18 S.E. 632 (1893); See also *Yockey v. Woodbury Cty.*, 130 Iowa 412, 106 N.W. 950, 953 (1906) citing *Mackin*: "A tribunal acting judicially has no direct interest in maintaining the regularity or validity of its proceedings. Such matters are to be litigated by the parties affected by the proceedings."

W. Va. Code § 11-3-25 (b) permits an applicant before the board of assessment appeals to appeal a ruling to circuit court. Similarly, the "state by its prosecuting attorney or other attorney representing the Tax Commission [or the Assessor]" may appeal a ruling by the board of assessment appeals. Although taxing authorities (city, county, board of education, etc.), because their revenue is at stake, may intervene or appear at any stage of the appeal of an assessment without appearing below,[41] the adverse parties to a tax appeal are the property owner and the government agent that assessed the property. For certain classes of property the county assessor conducts appraisals, and for other types of properties the State Tax Department conducts the appraisals.

Here, the Berkeley County Assessor had no opportunity before the circuit court to defend its Assessment. Rather, that was left up to the tribunal itself, the Berkeley County Board of Assessment Appeals. If the tables were turned, and the Board of Assessment Appeals reduced an assessment,[42] surely the Assessor or State Tax Department contesting the Board of Assessment Appeals' decision in circuit court would have to make the taxpayer a party to the suit, and the Board of Assessment Appeals could not stand in the interest of the taxpayer. Or, take for instance a recent decision by the Berkeley County Board of Assessment Appeals where the Board reduced an assessment by the State Tax Department, but not by what the taxpayer wanted. Both sides didn't get what they wanted before the Board. It would be proper to appeal the decision of the Board to the circuit court against the other parties, but not against the tribunal itself.

---

[41] Syl. Pt. 2, *In re Elk Sewell Coal*, 189 W. Va. 3, 427 S.E.2d 238 (W. Va. 1993).

[42] For instance the Berkeley County Board of Assessment Appeals found that an assessment based on an appraisal done by the West Virginia State Tax Department was erroneous and reduced the assessment. Should the State Tax Department appeal the Board's decision, it would need to include the adverse party below in the appeal.

Because the Board of Assessment Appeals should not be a party to an appeal of its decisions, and because the Assessor was not a party to the appeal to the circuit court, the circuit court did not have the authority to reduce the Assessment. Accordingly, this Court must reverse the circuit court order and remand the case for further proceedings permitting the Assessor the opportunity to defend his Assessment.

II. The Circuit Court abused its discretion by a) applying wrong standard of review, b) applying the wrong standard of proof, and c) by finding that the Board of Assessment Appeals erred by not finding that the Assessor violated the law for choosing the cost approach to valuation.

Although the Circuit Court found that the "Board erroneously determined that the [a]ssessment was valid," the Board actually found that Martinsburg IRS failed to prove by clear and convincing evidence that the assessment was erroneous, and found that the Assessor did not abuse his discretion when he chose to use the cost approach to valuation.[43] This Court has set forth the standard of review for tax assessments:

> As a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct. Thus, a tax assessment . . . will be presumed to be correct when the assessor, in assessing the . . . property: (1) relies upon the legislative rules prescribing the methods by which property is to be assessed; and (2) uses, as a guide, information furnished by the tax department, such as a list of comparable sales of similar property. The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous.[44]

The Assessor may use one of three approaches to fair market value cost, income, and market.[45] This Court has repeatedly found that:

---

[43] Board of Assessment Appeals Order. App. at 110-112.
[44] Syl. Pt 2. *W. Pocahontas Properties, Ltd. v. Cty. Comm'n of Wetzel Cty.*, 189 W. Va. 322, 431 S.E.2d 661 (1993).
[45] W. Va. CSR § 110-1P-3.4.3.1.

> Title 110, Series 1P of the West Virginia Code of State Rules confers upon the State Tax Commissioner [and assessor] 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.[46]

The circuit court did not find that the Assessor abused his discretion in choosing the cost approach. Rather, the Court found the Assessor's assessment erroneous, because it did not apply the approaches adopted by Martinsburg IRS's hired appraiser. While the Assessor claimed there was not enough market data of comparable sales and income from comparable properties to use the sales or income approaches, Martinsburg IRS argued that there is sufficient data available and offered its own opinion of value using the income approach. Because the Assessor did not abuse his discretion in choosing the cost approach, the Court should not have dismissed the cost approach outright.

If for instance there was clear and convincing evidence that the Assessor made some clear error in applying the cost approach, such as in formulating the multiplier, in depreciating, in calculating replacement cost, or in calculating square footage, then, it could be an abuse of discretion for the Board not to find error and correct the Assessment. In such a case, the circuit court should fix the error, not adopt an entirely different valuation method. The only reason to change the valuation method is if it was clear error to choose that method. Here, Martinsburg IRS, claims that it is just too difficult to apply depreciation to such an "old" building (23 years at the time of the Assessment), and that other approaches should be used. Nonetheless, the condition of the property and depreciation must be considered and applied regardless of the valuation method

---

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

used.[47] If there was an error in applying the cost approach the circuit court is to fix the error, not adopt a new approach to valuation. Because, the circuit court applied the wrong standard of review by finding that the Board of Assessment Appeals violated the law for upholding the Assessor using the cost approach to valuation, and there was no error in choosing that method, this Court must reverse the order below and affirm the Board of Assessment Appeals.

III. The Circuit Court erred when it made the clearly erroneous finding of fact that the Assessor did not take into account all types of depreciation in its appraisal, because the property record card indicates that depreciation was applied.

To determine the true value of real property using the cost approach an assessor must determine the new replacement cost of all improvements less any depreciation, plus the value of the land.[48] Here, the Assessor did consider each type of depreciation by using the Commercial/Industrial Data Collection Card and Property Record Card as required by the Property Valuation Training and Procedures Commission and followed the procedures of Title 189, Series 2. Title 189, Series 2, of the West Virginia CSR lays out "procedural regulations, as approved by the Property Valuation Training and Procedures Commission on August 31, 1990, provide for the data collection necessary direction to assure consistent statewide procedures for the visitation and collection of data for different species of property." The Property Data Card was tailored by the West Virginia State Tax Commissioner to comply with the Rules. In addition, the Rules and procedures clearly and unambiguously instruct assessors to utilize the Property Record Card to consider and record all necessary factors and to utilize mass appraisals for commercial and industrial property.[49] While the Assessor may be able to consider other factors, he complies with the law if he completes the information and questions contained on the Property Data Card.

---

[47] *See Generally* W. Va. CSR § 110-1P.
[48] W. Va. CSR § 110-1P-3.2.1.1.
[49] W. Va. CSR § 189-4-6.

Assessors must follow the statutory and regulatory framework set out by the West Virginia Legislature. The Property Valuation Training and Procedures Commission's Rules make a few items clear: (1) the purpose of the rules is to ensure consistent procedures; (2) all appraisals, including commercial and industrial, are part of the mass appraisal program in West Virginia; (3) the information required to be filled out on the Property Record Card is specifically designed to consider the factors listed in W. Va. CSR § 110-1P-3.1.1 that Martinsburg IRS argues on multiple occasions were not considered by the Assessor.[50]

W. Va. CSR § 189-4-6, is titled "recommended commercial/industrial data collection procedures" and explicitly instructs the Assessor to "make optimum use of existing appraisal and assessment record...which should include the current property record cards and any other application information." W. Va. CSR § 189-4-6.1.1. Martinsburg IRS produced no evidence that Assessor failed to use the completed Property Record Card as required by the Rules.

The Property Record Card is designed to consider the factors of W. Va. CSR § 110-1P-3.1.1. When a commercial/industrial property is appraised for the very first time, the Assessor is required to complete a Commercial/Industrial Date Collection Card, which then is updated on an annual basis. This Card and details the exact information that the Petitioner argues the Assessor

[50] W. Va. CSR § 189-2-2.4 provides:

> During the mass appraisal program, the specific property data is recorded on a specially designed property record card. Each card is designed and formatted in such a way as to accommodate the listing of information and to facilitate data processing. In keeping with the economy and efficiency of a mass appraisal program, the card is formatted to minimize writing by including a sufficient amount of site and structural descriptive data which can be checked and/or circled.

refused to consider.[51] The Data Collection Card and the Property Record Card must be read in *para materia* because the Data Collection Card provides specific factors and definitions that are referred to on the Property Record Card. This Data Collection Card is in the format produced by the State of West Virginia that every assessor in West Virginia must utilize in determining fair market value and corresponds with numeric definitional codes on the Property Record Card.

The court below found that the Assessor erred by not considering obsolescence due to the fact that the IRS vacated the property subsequent to the July 1, 2018 Assessment. The court went on to find that it is "contrary to common sense, West Virginia law and practices employed by the Berkeley County Assessor's office as recently as 2013" to "completely ignore any fact not in existence at" the time of the Assessment.[52] To the contrary, the Assessor must only consider facts in existence at the time. Just as a baker should not declare bread stale before it is baked, or an conductor declare a train late before the track is built, the Assessor should not assess a property as vacant on the chance that it may become vacant.

On July 1, 2018, the date upon which the Assessor is required to place a value on the property for the 2019 tax year, the property was fully occupied and utilized by the IRS- the same use the Petitioner claims is the property's highest and best use. The State's IAS system automatically factors in physical depreciation and functional obsolescence depending on the age of the type of structure on the Property Data Card; thus, physical depreciation and functional obsolescence were used to decrease the assessed value and reduced values of the improvements compared to the new cost ranged from 63% to 76%.[53] Because the Assessor did apply physical

---

[51] Property record card. App at 79-81.

[52] Martinsburg IRS proposed findings of Fact and Conclusion of law. App. at 393.

[53] Property record card. App at 79-81.

depreciation, as well as obsolescence, the only potential error that the Board could have made was in failing to find that Martinsburg IRS proved by clear and convincing evidence that the depreciation applied was erroneous. The order adopted by the circuit court says "there is no supporting evidence provided by the Assessor to support the conclusion that no functional or economic obsolescence existed."[54] Despite the fact that the burden is on the taxpayer to prove by clear and convincing evidence that the level of depreciation was erroneous, the Assessor clearly applied physical depreciation and functional obsolescence to all of the improvement on the land and to the land in accordance with the depreciation tables set forth in Marshal and Swift Commercial Building Depreciation Tables.[55] Mr. Streett simply testified that no further depreciation was warranted.

Because the circuit court incorrectly found that the Assessor did not depreciate, the circuit court's order must be reversed.

IV. The Circuit Court abused its discretion by adopting the "retrospective leased fee" appraisal conducted by Martinsburg, IRS, O.C. LLC's hired appraiser that failed to comply with West Virginia law for valuing commercial property for ad valorem tax purposes.

Martinsburg IRS offered the sworn expert testimony of its appraiser Michael Miller, MAI and an appraisal report that he prepared to establish that the true and actual fair market value of the Property as of July 1, 2018 was $7,240,000 and its assessed value was $4,344,000 for the 2019 tax year. The primary basis of Mr. Miller's appraisal being so much lower than the price paid for the property and the so much lower than the Assessor's appraised value is due to what Mr. Miller predicted was decreased future revenue generation. As of July 1, 2018 when the Assessment was

[54] Martinsburg IRS proposed findings of Fact and Conclusion of law. App. at 373.
[55] Property record card. App at 79-81.

conducted, the IRS payed Martinsburg IRS almost $2.6 million annually in rent payments, and the IRS also reimbursed Martinsburg IRS for all property taxes (about $240,000 per year).[56] Mr. Miller surmised that future revenue would substantially diminish after the IRS vacated the building as it did not have a tenant lined up.[57]

1) The circuit court improperly discounted the square footage of the buildings subject to taxation.

Mr. Miller reduced the square footage of property in calculating his appraisal and chose not to afford any value to other things on the property such as the security gate, fencing, power plant, gas station, the below grade conditioned level that was used to store computer equipment, etc.[58] His testimony and the Appraisal were entered into evidence without objection. The circuit court adopted Mr. Miller's appraisal in its entirety. However, Mr. Miller's appraisal failed to comport with the rules for assessing commercial property in many important aspects in addition to simply ignoring the cost approach to valuation.

The stated purpose of Mr. Miller's appraisal was to develop a "retrospective market value of the subject property's leased fee interest." In doing so, Martinsburg IRS discounted much of the square footage and came up with what it called "net rentable area." The proper way is to take into account all interior square footage and then classify that square footage and apply some depreciation based on the condition and its use.

Martinsburg, IRS discounted entirely the data storage level of two of the buildings, and additionally discounted the power plant portion of the facility entirely to come up with what it

---

[56]Respondent's Appraisal App. at 182, 198. *See also* income statements. App. at 246, 247.
[57]*See Generally* Respondent's appraisal. App. at 119-245
[58] *Id.*

called a net rentable area. While the rules permit reducing the value of some portions of a property based on obsolescence, the rules do not contemplate erasing entirely a portion of a commercial facility because the next occupant may not find parts of the property to be useful. Again, the property was being rented out to the United States Department of the Treasury at the time of this assessment, including the power plant. Nonetheless, Martinsburg IRS bases all of its valuation on the "net rental space," which is not permitted under the Code of State Rules.

2) The Circuit Court improperly adopted an assessment that failed to account for many improvements to the land and failed to use comparable sales in this market that had similar features.

To determine the land value, the Assessor taxed the total acreage of that land after categorizing it into primary, secondary, and residual property, along with the improvements to the land[59] such as storm water management systems, light poles, parking lots, walkways, fencing, etc. Martinsburg IRS's appraiser instead compared sales of vacant undeveloped commercial properties in Virginia and Maryland to value the land and failed to consider the improvements to the land, or the sale of commercial land in West Virginia.[60] Properties from other markets where property values differ and different land use regulations and zoning are in effect should not be used as comparable sales when assessing commercial property. To determine the value of the improvement on the land, the commercial buildings, Martinsburg IRS compared the subject property to out-of-state properties that were not comparable gated and guarded secure facilities with the amenities that this facility has such as a below grade conditioned data storage level, fenced, gated and

[59] Improvements to the land do not include the improvements on the land such as the buildings. Rule 3.1.2.2 states, "Improvements on the land are buildings and structures. They are valued separate and apart from the land."
[60] Respondent's appraisal. App. at 226-233.

guarded entrances, power station, fueling station, etc.[61] The Court adopted Martinsburg IRS's analysis *it toto*.

3) The circuit court improperly reduced the assessment to a leased fee interest based on projected lower revenues, and failed to add a corresponding assessment for the leasehold interest.

The circuit court incorrectly adopted the leased fee interest analysis from Martinsburg IRS's appraiser. A leased fee "means the interest remaining in one who has granted possession and occupancy to another for a designated term under a lease contract. Generally, it is the interest of the owner in his or her property after it has been leased."[62] Whereas the other side of that coin is a leasehold or leasehold estate, which means "an interest in real property created by a lease contract. The leasehold is the right to occupy and use the property for the term fixed in the lease, at a stated rental, and subject to conditions set forth in the contract."[63]

---

[61] Respondent's appraisal. App. at 226-233.
[62] W. Va. CSR § 110-1P-2.14
[63] W. Va. CSR § 110-1P-2.15; W. Va. CSR §.110-1P-3.3 sets forth the valuation of leaseholds:

> 3.3. Valuation of leaseholds in industrial and commercial real properties.
> 3.3.1. General.
> 3.3.1.1. 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.
> 3.3.1.2. 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 leasehold interest being a chattel real shall be listed and taxed as Class III or Class IV tangible personal property depending on the location of the freehold.

This Court has held that "A leasehold interest can be taxable under certain circumstances," but that the Assessor may presume leaseholds have no value when the taxpayer does not ask for the leasehold to be assessed:

> The county assessor may presume that leaseholds have no value independent of the freehold estate and proceed to tax all real property to the freeholder at its true and actual value; the burden of showing that a leasehold has an independent value is upon the freehold taxpayer and the taxpayer must request in a timely manner the separate listing of freehold and leasehold interests.[64]

3.3.1.3. 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.
3.1.4. In valuing a leasehold:
3.3.1.4.a. The 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
3.3.1.4.b. The 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.
3.3.1.5. In deciding whether a leasehold has value, and if so, what value to assign, the appraiser shall:
3.3.1.5.a. Estimate the value of the entire property, as though not encumbered by the lease; then
3.3.1.5.b. Estimate the value of one (1) of the partial interests, either the leasehold estate of the lessee or the leased fee of the lessor.
3.3.1.5.c. 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.
3.3.1.6. To value a leasehold interest, the appraiser shall consider the present (discounted) worth of the rent saving, when the contractual rent at the time of appraisal is less than the current market rent. If the land is improved by the lessee, then the value of the leasehold interest shall be the value of the saving in ground rent, if any, in addition to the value (not cost) of the improvements of the lessee. If the contractual rent is greater than the currently established market rent, the appraiser shall subtract present worth of the difference from the value of the improvement.
3.3.1.7. When a property is under long-term lease to a prime tenant, such as a nationally-known chain store concern, and the estimated useful life of the building exceeds the term of the lease, the appraiser may use the "Property Residual Technique" of evaluation along with other generally accepted appraisal techniques, i.e., cost and market approaches.

[64] *Musick v. Univ. Park at Evansdale, LLC.*, 241 W. Va. 194, 820 S.E. 2nd 901 (2018);,Syl. Pt. Pt. 2, *Great A & P Tea Co. v. Davis*, 167 W. Va. 53, 278 S. E.2d 352 (1981)

Under this legal standard, Martinsburg IRS's argument is without merit because there is absolutely no evidence that Martinsburg, IRS made a request to separate the listing of leased fee and leasehold interest, nor did Martinsburg IRS provide adequate information to the Assessor to determine whether a leased fee valuation was appropriate. Furthermore, this sort of assessment can be done using any of the three standard valuations methods, and is only used rarely when there is a marketable long term lease. Here, there was not a marketable lease that the IRS could sell on the open market. To the contrary, the lease was soon to end.

More importantly, when a leasehold estate is assessed, it is done in conjunction with one of the three standard valuation methods and is a means to apportion the property taxes of the freehold estate between the lessor and the lessee. The owner/lessor pays taxes on the leased fee portion of the freehold estate and the tenant/lessee pays taxes on the leasehold portion of the freehold estate.[65] Here, Martinsburg IRS did not and its lessee, the Treasury Department, never asked to have two separate assessments. Were that the case and a long term marketable contract in effect, then it could have been appropriate to use a leased fee / leasehold estate assessment. Although, Mr. Miller calculated Martinsburg IRS's leased fee portion of the freehold estate, he failed to provide an appraisal of the leasehold itself.

For these reasons the Circuit Court abused its discretion by adopting an appraisal that does not comport with the Code of State rules for valuing commercial property.

CONCLUSION

On September 14, 2020, the Berkeley County Circuit Court entered an order that overturned a decision by the Board of Assessment Appeals. The portion of the Order written by

[65] W. Va. CSR §.110-1P-3.3

the Court was very brief, but it adopted the taxpayer's over 50 page long Proposed Findings of Fact and Conclusions of Law in its entirety. The Court-written portion of the Order contained only a few lines of broad conclusory statements. Therefore, the reasoning behind the Court's decision must be derived from the taxpayer's submission.

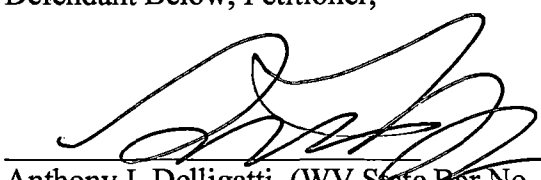
The Court erred in its Order by failing to include the Berkeley County Assessor, an indispensable party, and instead proceeding with the body that made the decision as the party opponent of the taxpayer. The Court committed further error by dismissing the Assessment prepared by the Assessor as simply "invalid." The reasons given in the Order fail to acknowledge the actions the Assessor's Office performed or their compliance with the law. For example, the Order found that the Assessor did not consider depreciation for functional obsolescence when the facts prove otherwise. Instead, the Assessor was found lacking for not adopting the approach of the taxpayer to valuation set forth by its hired appraiser.

However, it would have been improper for the Assessor to have done so. Respondent's paid expert's approach to valuing the property utilized data from properties that were not comparable to the subject property, discounted many improvements to the land and on the land as having no value, and provided a leased fee valuation without also providing the leasehold valuation. It distorted data regarding the subject property, ignored large portions of land and office space, and applied an appraisal contrary to West Virginia law for conducting assessments.

Based on the foregoing, the Petitioner asks this Court to overturn the Circuit Court's decision in the underlying case; restore the assessment by the Assessor as the appropriate valuation of the subject property for the 2019 tax year; and for such other relief as the Court deems appropriate.

Respectfully submitted,

Counsel for Berkeley County Council,
Defendant Below, Petitioner,



Anthony J. Delligatti, (WV State Bar No. 12345)
Jeffery T. Mauzy, (WV State Bar No. 11178)
400 W. Stephens Street, Suite 201
Martinsburg, West Virginia 25401
Phone: (304) 264-1900 Ext. 8
adelligatti@berkeleywv.org
jmauzy@berkeleywv.org

CERTIFICATE OF SERVICE

I, Anthony J. Delligatti, do hereby certify that on this 19 day of March 2021, I have served the foregoing "Petitioner's Brief" by mail to opposing counsel:

William P. Bresnahan, Esq.
W.Va. Bar # 9010
Bresnahan, Finnegan & Bresnahan, P.C.
1000 Gamma Drive, Suite 206
Pittsburgh, PA 15238

Anthony J. Delligatti