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 SECOND REPLY BRIEF

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Defendant Below, Petitioner,

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Respondent, Martinsburg IRS, OC LLC ("Martinsburg IRS"), filed two responses to Petitioner's brief: a Summary Response filed by one set of attorneys, and a full-fledged brief filed by another set of attorneys. Due to this Court denying the Motion to Continue the briefing schedule, Petitioner filed a Reply Brief addressing the arguments set forth in the Response Brief filed by Mr. Bresnahan. In accordance with the Court's new scheduling order and recognizing that the Summary Response[1] filed by Mr. Hirshberg and Mr. Hunter is the brief the Court will review, Petitioner files the Second Reply Brief.

I. The Board of Assessment Appeals is a tribunal that hears disputes on valuation and is not suited to defend valuations.

[1] Martinsburg IRS's Summary Response is 24 pages, 9 pages longer than is permitted under W. Va. R. App. P. 38(c).

Martinsburg IRS argues that the Berkeley County Council / Board of Assessment Appeals has zealously represented the interests of the Assessor, thus the Assessor whose assessment is being contested need not be a party to the appeal.[2] W. Va. Code § 11-3-25 (b)[3] permits parties to appeal rulings of the Board of Assessment Appeals to Circuit Court. However, because the tribunal may not always see eye to eye, even with the prevailing party, appealing parties must make opposing parties before the Board of Assessment Appeals parties to an appeal in circuit court:

> 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 . . .[4]

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,[5] the adverse parties to a tax appeal are the property owner and the government agent that assessed the property. Take for instance an example of a case that recently came before the

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[2] Summary Response at p. 2.

[3] Footnote 1 of Martinsburg IRS's Summary Response incorrectly cites H.B 2496 as passing the House of Delegates and Senate. While that bill too would have repealed the board of assessment appeals and appeals from that board to circuit court, H. B. 2581 is the Bill that passed both houses and signed into law by the Governor. https://www.wvlegislature.gov/Bill_Text_HTML/2021_SESSIONS/RS/signed_bills/house/HB2581%20SUB%20ENR_SIGNED.pdf In H.B. 2581, beginning with the assessment on July 1, 2022, taxpayers may contest assessments before the Board of Equalization and Review and then appeal to the West Virginia Office of Tax Appeals, but tax payers will no longer be permitted to appeal to the board of assessment appeals, or appeal decision of the board of equalization and review to circuit court. Appeals from the Office of Tax Appeals are to the Supreme Court of Appeals.

[4] 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."

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

Berkeley County Board of Assessment Appeals. In that case the State Tax Department assessed industrial property, and the Board of Assessment appeals agreed with the taxpayer that the State Tax Department did not properly depreciate the property that was over a century old. The Board entered an order reducing the assessment, but not nearly as much of a deduction as the taxpayer had sought. In that case, neither the State Tax Department, nor the taxpayer got what they wanted and both could have appealed the Board's Order. If one or both appealed, it would not be proper for the Board of Assessment Appeals to stand in the shoes of, or to represent the interests of the respondent to the appeal.

II. Martinsburg IRS, in its response fails to cite to any facts that demonstrate it proved the Assessor's assessment was erroneous, and the Assessor met his burden of production.

Martinsburg IRS does not argue that the circuit court found facts that the Assessor erred in his methodology or cite to the record demonstrating such error by the Assessor; rather, Martinsburg IRS starts from the assumption that it did prove the assessment was erroneous and places the burden on the Assessor to rebut such evidence. 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.[6]

This Court has repeatedly found that:

> 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

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

> discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.[7]

Further, 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, acting as a board of equalization and review, where the assessment is supported by substantial evidence."[8]

Martinsburg IRS's response focuses on the failure to rebut "clear and convincing evidence" that it produced. The only facts it claims demonstrate clear and convincing evidence are not violations of laws or rules for assessments, but such facts as Martinsburg IRS had not relet the property, and that Martinsburg IRS projected less future income than at the time of the Assessment, because the IRS was ending its lease after this Assessment. Notably, the property was occupied by a paying tenant at the time of this Assessment and the IRS was paying a substantial amount in rent and even reimbursed Martinsburg IRS for property taxes paid.[9] 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 circuit court should not have dismissed the cost approach outright.

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

[8] [8] 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).

[9] Respondent's Appraisal App. at 182, 198. *See also* income statements. App. at 246, 247.

Martinsburg selectively cites *In re Tax Assessments Against Pocahontas Land Co.* for the proposition that the taxpayer initially bears the burden of proving that the assessment is not accurate by clear and convincing evidence, then "the burden of production fall upon the taxing authority to prove that its assessed value is accurate." The full paragraph from which this idea is pulled goes further, however, and tells us how much is required for the "burden of production:"

> It is obvious that where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous. Once this is done, it is incumbent upon the taxing authority to place some evidence in the record to show why its assessment is correct. This, of course, can be done by entering the official appraisement of the State Tax Commissioner as we suggested in *Tug Valley*.[10]

Therefore, the burden of production is not a contest weighing the assessor's evidence for his valuation versus the evidence from the taxpayer. The assessor must simply demonstrate that he used a valid methodology or basis for his assessment. The Assessor in this case provided written and verbal testimony and provided documentation to show that he relied on the standard methods used by Assessor's in West Virginia to arrive at the assessment. So, even if one believes the taxpayer met its initial burden of proof, the Assessor clearly met his as well by producing the official appraisement that complies with West Virginia law.

A major weakness with Respondent's entire argument on this point, however, is that it assumes Respondent did prove by clear and convincing evidence that the assessment was erroneous as an underlying principle of its argument. The primary basis for that assumption is that the Circuit Court said it did, and the Circuit Court was correct. Such circular reasoning jumps

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[10] *In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 61, 303 S.E.2d 691, 699–700 (1983).

straight over the fact that the Board of Assessment Appeals found that the taxpayer did not meet the burden of proof by clear and convincing evidence.

Although the burden is on the taxpayer to prove by clear and convincing evidence errors made by the Assessor, the Assessor did present evidence justifying its decisions in formulating its assessment.

First, it is not the duty of the Berkeley County Board of Assessment Appeals or the Berkeley County Council to justify, defend, or vindicate any assessments the Berkeley County Assessor makes. That being said, here, the Berkeley County Assessor did present evidence justifying its assessment. Respondent throughout the brief derides the property index card that is a summary of the work done by the Assessor in appraising a property. The Assessor does not use the property record card to come up with the assessment; the property record card is an output that shows various aspects of the assessment. Mr. John Streett, a deputy assessor presented documentary and written evidence as well as oral testimony.[11] Mr. Streett testified that all three valuation approaches (cost, income, and market) were considered, and provided a written accounting of that as well, but that he used the cost approach was because there were not sufficient comparable sales in the area, and the Assessor did not have enough data to use the income approach.[12] Mr. Streett presented evidence of a cost study, a land study, comparable sales study and an Integrated Assessment System ("IAS") property record card that showed how the Assessor classified and appraised improvements on the land and to the land and how the Assessor rated the

[11] Written summary in response to Respondent's report, App. at 262-267; Documentary evidence, App. at 268-288; Testimony, App. 301-311.
[12] Testimony App. 301-311.

quality of various parts of the property.[13] Mr. Street further testified that depreciation to form and function were applied, but that no further "adjustments are needed other than the normal depreciation on the improvement."[14] Were the property vacant at the time of the assessment additional depreciation due to functional obsolescence would have been applied, but the property was being rented at the time of this assessment.

III. If a circuit court finds that an assessor did not properly apply depreciation, then the Court's remedy is to apply proper deprecation not adopt a "retrospective leased fee" appraisal that completely discounts property that was being rented at the time of the assessment.

Martinsburg IRS argues that the "circuit court appropriately determined that the prior assessment's utilization of depreciation was inappropriate, or where appropriate failed to rebut the clear and convincing evidence" it produced.[15] First, Martinsburg IRS again fails to identify what clear and convincing evidence it is referring to. Second, as was demonstrated in Petitioner's Brief the Assessor did apply physical depreciation as well as obsolescence.

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. 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 reduce

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[13] 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.
[14] App. at 303.
[15] Summary Response at 7.

values of the improvements compared to the new cost from 63% to 76%.[16] Because the Assessor did apply physical 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."[17] 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.[18] The Assessor simply found that no further depreciation was warranted.

Even if Martinsburg IRS did prove by clear and convincing evidence that the amount of depreciation applied was erroneous, the circuit court should have simply applied a proper depreciation and corrected the error. Instead the circuit court adopted by reference all findings of fact and conclusions of law as set for the in Martinsburg IRS's over 50 page proposed order that adopts the retrospective leased fee valuation whole cloth.

IV. Verbosity is no substitute for veracity.

Martinsburg IRS argued below and argues again that their "100+ page appraisal is detailed and comprehensive."[19] The point of this argument appears to be that Respondent's loquacious valuation of the property is better, because the Appraisal is long and includes a lot of information.

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[16] Property record card. App at 79-81.
[17] Martinsburg IRS proposed findings of Fact and Conclusion of law. App. at 373.
[18] Property record card. App at 79-81.
[19] Summary Response at 12-13.

The evidence presented by the Assessor, on the other hand, was concise and only several pages in the record. Likewise, the Respondent's Brief and Proposed Findings of Fact and Conclusions of Law in the case below are longer and contain more citations to the record than Petitioner's, so Martinsburg IRS contends they are more convincing. This view fails to consider that the content of the words and methods used is more important than the number of words used and how many color photographs are included.

V. Although the Assessor takes into account vacancy and rentability when applying depreciation, the mere fact that a lease may expire in the year following an assessment is speculative and should not be included in an assessment.

At the time of the Assessment (July 1, 2018), the United States Department of the Treasury leased the property and payed Martinsburg IRS $2,599,992 annually in rent payments.[20] Moreover, the federal government also reimbursed Martinsburg IRS for all property taxes that Martinsburg IRS paid (more than $300,000 per year).[21] Respondent argues that because the Department of Treasury terminated the lease the year after this Assessment, then the actual value of the property was less at the time of the Assessment.[22] Nothing in the rules requires an assessor to make predictions on the future vacancy of a piece of property or permit a taxpayer to a reduced assessment because a vacancy arises later in the year. If this were the case, a flood of landlords would file appeals to the Board of Assessment Appeals simply because the property became vacant after the assessment.

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[20] Respondent's Appraisal App. at 182, 198. *See also* income statements. App. at 246, 247.
[21] 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.
[22] Summary Response at 17.

Martinsburg IRS presented evidence of a "retrospective leased fee interest" evaluation of the property based on 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.[23] Respondent now argues that market value of a "retrospective leased fee interest" is the same as a present fee simple appraisal. In fact, Respondent argues that "[t]he use of the term 'leased fee' is identical to fee simple."[24]

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.[25] 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.

That being said, leased fee valuations must still be based on present information and not be either retrospective where the assessment changes afterward based on events occurring after the assessment, or prospective, where the Assessor values the property based on the likelihood of various future contingencies. Nonetheless, just because a vacancy may occur in the future, does not mean the property is not marketable and will remain vacant. In fact, it is often the case that newer tenants pay higher rents than older tenants.

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[23] *See Generally* Respondent's appraisal. App. at 119-245.
[24] Respondent's brief at 23.
[25] W. Va. CSR §.110-1P-3.3

VI. The area that Martinsburg IRS completely discounts to come up with "Net Rentable Area" was being rented and used by the US Treasury Department at the time of the Assessment.

The lease ended in 2019 and the Assessment was conducted in 2018. Nonetheless Martinsburg IRS in its "retrospective" valuation 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 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 area," which is not permitted under the Code of State Rules. More over the space being rented at the time of the Assessment was the whole facility. Simply put, an assessment may not reduce the square footage of a structure, but may if the evidence supports it, apply more depreciation or obsolescence based on rentability or utility of that square footage.

VII. The Berkeley County Board of Education correctly points out some of the ramifications of permitting haphazard reductions in assessments based simply because a circuit court prefers one appraisal over another.

Amicus Curiae, the Berkeley County Board of Education, explains that permitting the reduction of assessments by 75% because a circuit court believes one appraisal to be better than another without showing error on the part of an Assessor or State Tax Department will open the flood gates to contested assessments and threatens the Board of Education's constitutional duty to provide a free, thorough, and efficient education to students within its school district. This would also impact municipalities and counties, whose revenue and budgets are derived from a uniform systematic system of assessing real and personal property.

The Board of Education emphasizes that the crux of Martinsburg IRS's argument from the beginning is not that the Assessor erred in valuing the cost to build the facility or that the Assessor applied an incorrect amount of depreciation to that cost to build, but that Martinsburg IRS's appraisal was better. This is why the Summary Response and the circuit court order are largely about comparing and contrasting one appraisal and another. However, that is not the role of boards of assessment appeals, circuit courts, or this Court. Rather, the taxpayer must prove an error at law was made and the board is to correct the error.

CONCLUSION

The portion of the Order written by 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." Rather, than affording the Assessor the discretion it has in assessing properties and determining whether the Respondent proved by clear and convincing evidence that the Assessor violated the law to come up with an unlawfully inflated valuation, the circuit court simply replaced the Assessor's assessment with that of Mr. Miller's. 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

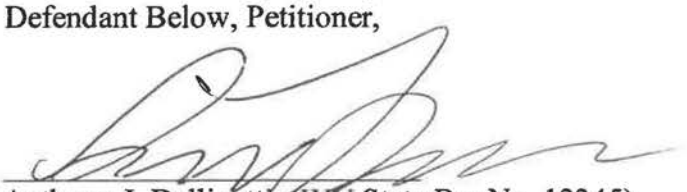
was found lacking for not adopting the approach of the taxpayer to valuation set forth by its hired appraiser. However, it would have been improper for the Assessor to have done so.

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, provided a leased fee valuation without also providing a corresponding leasehold valuation, and discounted the square footage of the buildings. 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,



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CERTIFICATE OF SERVICE

I, Anthony J. Delligatti, do hereby certify that on this 17th day of November, 2021, I have served the foregoing "Petitioner's Second Reply Brief" by electronic mail (with permission from counsel) to opposing counsel:

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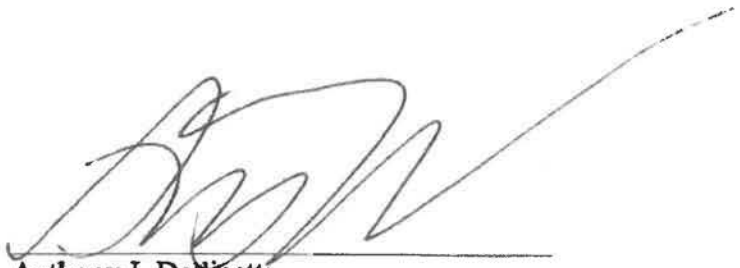

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