

No. 34423 -- *Stone Brooke Limited Partnership v. Phyllis Sisinni, Assessor, et al.*
No. 34424 -- *Heathermoor Limited Partnership v. Joseph Alongi, Assessor, et al.*
No. 34863 -- *Pine Haven Limited Partnership v. Ottie Adkins, Assessor*

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SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Ketchum, J., concurring:

I concur completely with the majority opinion. I write separately to make two observations.

First, I believe that the Tax Commissioner should adopt specific regulations or guidelines for county tax assessors to rely upon when appraising the value of low-income multi-family housing. Putting a “fair market value” on such housing is exceptionally difficult. These are unique properties that are rarely available on the open market, have government-mandated restricted rents, and have management, maintenance, and physical requirements that usually differ from conventional rental properties.

There are four classes of government-mandated restricted rent, low-income multi-family housing. The housing in the present case is a low-income housing tax credit (“LIHTC”) project. The other three classes are: (a) subsidized mortgage projects; (b) those which proportionately encompass both LIHTC and subsidized-mortgage projects; and (c) projects that include a mix of restricted-rent and market-rate rental units.

At least 18 states have court decisions addressing LIHTC appraisal schemes.¹

I don't believe judges who ordinarily have no appraisal expertise should opine as to the proper evaluation procedure for these unique properties.

These are very complicated programs that have many technical rules governing a property's operation. The appraisal of the value of these properties does not fit into the routine evaluation process under the market, income, or cost approaches to calculating the value of real properties. The real estate market for subsidized housing is very different from the market for other rental property because of the restrictions on rent and the lack of a market for the sale of these properties. The Tax Commissioner's existing regulations are not

¹The decisions are not consistent in their holdings regarding whether restricted rents and/or tax credits should be considered in valuation. See, e.g., *Woda Ivy Glen Ltd. Partnership v. Fayette Cty. Bd. of Revision*, 121 Ohio St.3d 175, 902 N.E.2d 984 (2009); *Huron Ridge LP v. Ypsilanti Tp.*, 275 Mich.App. 23, 737 N.W.2d 187 (Mich.App.,2007); *Brandon Bay Ltd. Partnership v. Payette Co.*, 142 Idaho 681, 132 P.3d 438 (2006); *Town Square Ltd. Partnership v. Clay County Bd. of Equalization*, 704 N.W.2d 896 (S.D. 2005); *Great Bridge Properties, LLC v. Town of Ossipee*, 2005 WL 697951 (N.H. Super., 2005); *Cottonwood Affordable Housing v. Yavapai County*, 205 Ariz. 427, 72 P.3d 357 (Ariz.Tax, 2003); *Spring Hill, L.P. v. Tennessee State Bd. of Equalization*, 2003 WL 23099679 (Tenn.Ct.App.,2003); *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 576 S.E.2d 316 (N.C., 2003); *Pine Pointe Housing LP v. Lowndes Co. Bd. of Tax Assessors*, 254 Ga.App. 197, 561 S.E.2d 860 (2002); *Willow Street Associates LLP v. Board of Tax Assessment Review*, 798 A.2d 896 (R.I., 2002); *Maryville Properties, LP v. Nelson*, 83 S.W.3d 608 (Mo.App., 2002); *Cascade Court L.P. v. Noble*, 105 Wash.App. 563, 20 P.3d 997 (2001); *Rainbow Apartments v. Illinois Property Tax Appeal Bd.*, 326 Ill.App.3d 1105, 762 N.E.2d 534 (Ill.App. 2001); *In the Matter of Ottawa Housing Assoc., L.P.*, 27 Kan.App.2d 1008, 10 P.3d 777 (2000); *Deerfield 95 Investor Associates, LLC v. Town of East Lyme*, 1999 WL 391099 (Conn.Super.,1999); *Pedcor Investments-1990-XIII, L.P. v. State Bd. of Tax Com'rs*, 715 N.E.2d 432 (Ind.Tax, 1999); *Parkside Townhomes Associates v. Board of Assessment Appeals of York County*, 711 A.2d 607 (Pa.Cmwlt.,1998); *Bayridge Assoc. L.P. v. Dep't of Revenue*, 321 Or. 21, 892 P.2d 1002 (1995).

designed to evaluate these unique restricted-rent properties, although they do require consideration of actual rents in arriving at a value. *See W.Va. C.S.R. §§ 110-1P-2.1.1.9* [1991]. In this case, the actual rents are government-mandated restricted rents.

The taxing authorities in the more progressive states are adopting regulations or valuation guides that directly address the proper evaluation methods for the appraisal of these type properties.² Although at least 22 states have adopted statutes addressing the appraisal of LIHTC properties, I'm not sure that legislators have any more expertise in this arcane area in evaluating restricted income projects than appellate court judges. The Tax Commissioner should use reliable appraisal experts, learned treatises, evaluation guides of other states, and studies to develop a West Virginia guide for the fair valuation and tax assessment for the appraisal of restricted-rent properties.

My second observation is that, in reviewing the record and arguments, the Court was concerned that the record is devoid of any evidence showing that the cost approach was done correctly. In footnote 15 of the majority opinion, Justice Davis instructs the circuit courts on remand to determine if the assessors correctly applied the cost approach, including giving consideration to physical deterioration, functional depreciation, and economic obsolescence as required by *W.Va. C.S.R. § 110-1P-2.2.1.1*. There was no mention in the record of economic obsolescence, which encompasses "legislation that restricts or

²*See, e.g.*, Washington Department of Revenue, "Low-Income Housing Valuation Guide: Property Tax Assessment of Multifamily Low-Income Housing Properties" (September 2008).

impairs property rights[.]” *W.Va. C.S.R. § 110-1P-2.2.1.1*. Every learned appraisal treatise and court case examining the term “economic obsolescence” holds that government-mandated restricted rents are a form of economic obsolescence that lowers the value of real estate. This factor, which favors the landowners in this case, was completely ignored by the assessors’ appraisers.

When government-mandated restricted rents are fully and fairly considered in both the income approach and the cost approach to value (as defined in *W.Va. C.S.R. §§ 110-1P-1 to -2.5.3.4*), the appraisal value under each approach should be similar.