IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

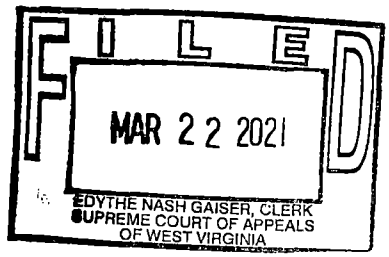
BERKELEY COUNTY COUNCIL,

Defendant Below, Petitioner,

vs. No. 20-1019

GOVERNMENT PROPERTIES
INCOME TRUST 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

Cases

Statutes

Regulations

ASSIGNMENTS OF ERROR

1. **The Circuit Court erred in reducing the Berkeley County Assessor's assessment, because the property owner failed to join an indispensable party, the Berkeley County Assessor, whose assessment was contested.**

2. **The Circuit Court erred by reversing the Board of Assessment Appeals, by finding the Assessment erroneous, when it was not, and adopting the taxpayer's appraisal, that violated West Virginia law.**

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 Government Income Properties Trust LLC's appeal of its 2019 real property tax assessment. Government Income Properties Trust LLC ("Government Properties") owned a 4.42-acre commercial site with a building containing 37,605 square feet of interior space, known as 882 TJ Jackson Drive, Falling Waters, Berkeley County, West Virginia.[1] The Honorable Larry Hess, assessor of Berkeley County, assessed the facility at $2,527,320.00 (60% of true value), based on a $4,212,200.00 appraisal of its July 1, 2018 value.[2]

Government Properties appealed the assessment to the Board of Assessment Appeals ("Board"), arguing that the assessment was clearly erroneous and that the assessed value should have been $540,000.00, based on a fair market value of $900,000.00.[3]

The Board held a hearing on the matter on October 22, 2019.[4] During the hearing, the parties presented testimony from both the Assessor's Office (John Streett) and Government Properties' appraiser (Paul Griffith) and certain exhibits were admitted without objection.[5] On

---

[1] App. at 324.
[2] App. at 325.
[3] App. at 7-13.
[4] App. at 102.
[5] App 249 -271.

October 31, 2019, the Board found Government Properties failed to prove by clear and convincing evidence that the tax assessment was erroneous.[6]

Government Properties appealed the Board's decision to the Circuit Court of Berkeley County.[7] Rather than naming the adverse party below on appeal to Circuit Court, Government Properties sued the Berkeley County Council acting as the Board of Assessment Appeals.[8] 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.

On appeal, Government Properties argued that the Assessor's valuation of the property was flawed.[9] Broadly, it claimed that the assessment was contrary to law and used improper methodologies.[10] Government Properties claimed that the Assessor had failed to consider the sales and income approaches to valuation and relied solely on the cost approach.[11] With respect to the cost approach, the taxpayer argued that the Assessor failed to consider functional obsolescence and economic obsolescence in determining depreciation.[12] Ultimately, Government Properties contended that the Board erred by considering the evidence presented by the Assessor and by not giving greater weight to the taxpayer's paid appraisal.[13]

The Board's position on appeal was that Government Properties failed to prove by clear and convincing evidence that the Assessor used improper methodology in arriving at the assessment.[14] It pointed to testimony and written statements that the Assessor had considered the

---

[6] App. at 102-104.
[7] App. at 1-13.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] App. at 10-12.
[12] *Id.*
[13] *Id.*
[14] App. at 40.

factors Government Properties claimed he had not.[15] Further, the Board argued that Government Properties' appraisal took an improper approach to valuation under West Virginia law, so it was justified in not giving it greater weight than the assessment.[16] As a result, the taxpayer failed to prove by clear and convincing evidence that the assessment should be revised.[17]

The Court found 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, 882 TJ Jackson Drive, Falling Waters, Berkeley County, West Virginia 25419, 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; . . .[18]

The Circuit Court adopted Government Properties' Proposed Findings of Fact and Conclusions of Law *in toto* as part of its September 14, 2020 Order.[19] Paragraph 15 of those Proposed Findings recounted the testimony of the appraiser regarding the condition and sale of the subject property.[20] It included that the building was vacated in December 2017, remained vacant for 15 months, and was sold recently for $650,000.[21]

The Circuit Court reduced the assessment by over 78% from $2,527,320.00 to $540,000, which in turn reduced Government Properties' tax bill by $46,988 from $59,755.95 to $12,767.95.

---

[15] App. at 44-46; 50-52.
[16] App. at 47-50.
[17] App. at 52-63.
[18] App at 383-384.
[19] App. at 382.
[20] App. at 327.
[21] *Id.*

Over 80% of that property tax revenue goes to the Berkeley County Board of Education, and the County Council receives most of the rest, with a small portion going to the state.[22]

The Berkeley County Council seeks an opinion from this Court reversing the Circuit Court's Order that reduced the assessment from $2,527,320.00 to $540,000.00.

SUMMARY OF ARGUMENT

The Circuit Court erred in this case by failing to require a necessary party to the appeal from the Board of Assessment Appeals, the Berkeley County Assessor, to be included as a party so that he could defend his own assessment. Moreover, the Court erred in the decisions it reached by dismissing the assessment without regard to the deference owed to such assessments. The Court compounded this error by adopting, instead, the flawed approach to determining value employed by the Respondent's appraiser, despite the fact that it did not comply with the West Virginia regulations that the Assessor is required to follow.

First, the Circuit Court erred by ruling on the legality of the assessment without providing the Assessor of Berkeley County an opportunity to defend his assessment. Rather, Government Properties appealed the Board of Assessment Appeals 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 the assessment was erroneous and by adopting Government Properties' faulty appraisal method instead. 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

[22] *See* Berkeley County Assessor, *2018 Tax Levy Rates, Berkeley County, W. Va.*, http://www.theassessor.org/forms/2018_tax_rates.pdf.

> industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.[23]

West Virginia Code of State Rules § 110-1P-3.2.1 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) sales. 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.[24]

Here, Government Properties proved no errors by either the Assessor or the Board of Assessment Appeals by clear and convincing evidence. The Circuit Court declared that the Board erred by concluding the assessment was valid, and that the Board's decision and the assessment were "contrary to the provisions of controlling West Virginia law, regulations, and methodologies for determining market value for commercial properties."[25] In fact, it was the Circuit Court who erred by completely disregarding the assessment by the Assessor. The Court further erred by adopting an approach to valuation that *was* contrary to West Virginia law, regulation and methodologies.

In this case, the Assessor ultimately chose to use the cost approach to determine the true value of the property, after considering all three approaches. The Circuit Court did not find that the Assessor abused its discretion in choosing the cost approach. Rather, the Court found the Assessor's assessment invalid, because it did not apply the approaches adopted by the taxpayer's

---

[23] *Lee Trace LLC v. Raynes,* 232 W. Va. 183, 193, 751 S.E.2d 703, 713, (2013).
[24] *Pope Props. v. Robinson*, 230 W. Va. 382, 389, 738 S.E.2d 546, 553 (2013) (emphasis added).
[25] App. at 383-384..

hired appraiser. While the Assessor determined there was not enough market data of comparable sales and income from comparable properties to use the sales or income approaches, Government Properties argued that there was sufficient data available and offered its own opinion of value using a hybrid sales/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.

Moreover, the approach used by Government Properties' Appraisal was a hybrid approach where it used both the sales and income approaches to formulate a final appraised value. This Court has found that it is an abuse of discretion for a Board of Equalization and Review, or a Circuit Court to adopt and apply a hybrid approach to a valuation that did not comport with W. Va. Code of State Rules § 110-1P-3.2.1.2 and § 110-1P-3.3.6.9.[26] Here the Court adopted a hybrid approach that did not comport with the Code of State Rules, and it was an abuse of discretion to adopt that methodology.

Additionally, to determine the true value of real property using the cost approach, the assessor must determine the new replacement cost of all improvements less any depreciation, plus the value of the land.[27] The Assessor, in accordance with the Code of State Rules valued the entire acreage based on a land study, and classified portions of the site as primary, secondary, residual property, and undeveloped. Each classification is assessed at a different value per acre. Undeveloped land is assessed at 50% of the value of primary land. On the other hand, the Circuit Court adopted and applied an approach that found that over an acre of the 4.42 acre lot is simply not subject to taxation.

---

[26] *Lee Trace LLC v. Raynes,* 232 W. Va. 183, 194, 751 S.E.2d 703, 714, (2013). *Note: References to the CSR have changed since this opinion from W. Va. CSR § 110-1P-2 *et seq.* to 110-1P-3 *et seq.*

[27] W. Va. CSR § 110-1P-3.2.1.1.

Similarly, Government Properties argued, and the Court below adopted, the notion that only the "net rentable area" of a commercial property should be assessed and subject to taxation. The Assessor, after calculating the new replacement cost for the building, did depreciate for physical deterioration and functional obsolescence, and appraised the improvements on the land at less what it would cost to build new because of the depreciation. 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 was 68%.

The Court also took into account information that could not have been considered at the time of the assessment because the events took place over a year afterward. This involved the sale of the property after July 1, 2019.

Because the Assessor's approach was proper based on the law and regulations, the only potential error that the Board could have made was in failing to find that Government Properties proved by clear and convincing evidence that the depreciation applied was erroneous. As shown, the Government Properties approach was not proper under the law and, therefore, not sufficient meet that evidentiary burden. As a result, the Board properly denied Government Properties' appeal.

The Circuit Court erred by finding the Assessor's assessment erroneous and by using the improper method of Government Properties instead, and by using those findings as the basis for determining the Board erred.

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.

STANDARD OF REVIEW

The Supreme Court "reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard . . . [, reviews] challenges to findings of fact under a clearly erroneous standard[, and] conclusions of law are reviewed *de novo*."[28]

"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."[29]

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."[30]

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 is to say, at the price for which the property would sell if voluntarily offered for sale by the owner thereof,

---

[28] Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).
[29] 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.
[30] 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).

> 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."

The West Virginia Code of State Rules § 110-1P-3.2.1, 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.[31] 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.[32] 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.[33]

The Court 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 method but only for 'the most accurate form of appraisal."[34] Then, "[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."[35]

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

---

[31] W. Va. CSR § 110-1P-3.1.1; W. Va. CSR § 110-1P-3.1.3.
[32] W. Va. CSR § 110-1P-3.1.4.
[33] Syl. Pt. 5, *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000).
[34] *Stone Brooke Ltd. P'ship* v. *Sisinni*, 224 W. Va 691,700, 688 S.E.2d 300, 309 (2009).
[35] *Lee Trace LLC v. Raynes*, 232 W. Va. at 194, 751 S.E.2d at 714.

taxpayer of an alternative valuation is not enough. As this 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."[36] Here, the Assessor made no such error, the Board found no such error, and the Circuit Court broadly found that the assessment was "contrary to controlling West Virginia law,"[37] not that that the Board abused its discretion in finding no error.

1. The Circuit Court erred in reducing the Berkeley County Assessor's assessment, because the property owner failed to join an indispensable party, the Berkeley County Assessor, whose assessment was contested.

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" 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,[38] 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

[36] *Pope Props. v. Robinson*, 230 W. Va. 382, 389, 738 S.E.2d 546, 553 (2013).
[37] App. at 383.
[38] Syl. Pt. 2, *In re Elk Sewell Coal*, 189 W. Va. 3, 427 S.E.2d 238 (W. Va. 1993).

assessment,[39] 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.

2. The Circuit Court erred by reversing the Board of Assessment Appeals, finding the Assessment erroneous, and adopting the taxpayer's appraisal that violated West Virginia law.

1. The Assessor's Approach to the Assessment was Proper.

Although the Circuit Court found that the "Board erroneously determined that the [a]ssessment was valid,"[40] the Board actually found that Government Properties failed to prove by clear and convincing evidence that the assessment was erroneous.[41] The Assessor may use one of three approaches to fair market value: cost, income, and market ("sales").[42] 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 discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.[43]

The Circuit Court did not find that the Assessor abused its discretion in choosing the cost approach.[44] Rather, the Court found the Assessor's assessment erroneous, because it did not apply the approaches adopted by Government Properties' hired appraiser.[45] While the Assessor claimed there was not enough market data of comparable sales and income from comparable properties to

---

[39] 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.
[40] App. at 383.
[41] App. at 103.
[42] W. Va. CSR § 110-1P-3.4.3.1.
[43] Syl. Pt. 5, *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000).
[44] App. at 383.
[45] App. at 322-383.

use the sales or income approaches,[46] Government Properties argued that there was sufficient data available and offered its own opinion of value using the sales approach.[47] Because the Assessor did not abuse his discretion in choosing the cost approach, the Court should not have dismissed the cost approach outright.

During the Board of Assessment Appeals hearing in October 2019, the Assessor's Office presented testimony and evidence by Deputy Assessor John Streett.[48] Government Properties, and therefore the Court in its September 2020 Order, found fault with the assessment for several reasons. Both broadly claim that the assessment violated statutes and regulations and used improper methodologies.[49] The Order claims the assessment lacked uniformity and failed to consider depreciation.[50] Each of these complaints, however, is contrary to the record.

Streett utilized the "cost approach," because, he testified, he did not have sufficient information to develop either the "sales approach" or the "income approach."[51] The Assessor's written explanation stated he considered the "sales approach."[52] However, the Assessor opined that there were no valid sales directly comparable to the subject property:

> "The sales approach was considered. There were six sales of a land use code '353 (office building low-rise, 1-4 stories) during the timeframe for this hearing. Two properties are coded foreclosure sales by this office. One sale was a multi-parcel sale. One sale is coded 'not an open market' sale and one was a change after sale (due to remodel). There was one sale that is considered an open market sale by this office. It is 1369, sq. one story frame office building built in 989 and located on Randolph Street in Martinsburg on a .15 ac lot. The size and construction of this building does not compare to the subject property nor is the location as desirable as

[46] App. at 222-227.
[47] App. at 252-257.
[48] App. at 257-270.
[49] App. at 322-381.
[50] *Id.*
[51] App. at 258-260.
[52] App. at 222-227.

> the subject. It is the opinion of the Assessor's office that there were no valid sales directly comparable to the subject property."[53]

The Assessor also explained that the "income approach" was considered, but not selected or developed, because of insufficient information:

> "The income approach was considered. Letters were mailed to those properties that are coded '353' office buildings asking for income and expense information. The one office building that is listed as a valid sale by this office was not returned to this office. Hence, our office was not able to develop a capitalization rate since Legislative Rule 10-1P states, "The selection of an overall capitalization rate shall 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." Since the subject property has been vacant for over a year there would be no income to capitalize for this property. Consequently, all 3 approaches to value were considered. The cost approach was chosen for the 2019 tax year."[54]

As this shows, the Assessor did take into account each of the three methods, but chose the one he determined to be most accurate. West Virginia CSR § 110-1P-3.2.2.a anticipates situations such as this: "When possible, the Tax Commissioner should use the most accurate form of appraisal, but because of the difficulty in obtaining necessary data from the taxpayer, or due to the lack of comparable commercial or industrial properties, the choice between the alternative appraisal methods may be limited."

Government Properties argued below, and the Court agreed, that its appraiser had found comparable properties for some comparisons.[55] However, Streett testified as to why he did not use such other properties.[56] His testimony was consistent with the CSR: "In determining appraised value, primary consideration shall be given to the trends of price paid for like or similar property

---

[53] App. at 223.
[54] *Id.*
[55] App. at 252-257.
[56] App. at 258-260.

in the area or locality in which the property is situated."[57] The Assessor is justified in deciding that properties in Allentown, Pennsylvania or in Morgantown, West Virginia, as some of the properties used by Government Properties were,[58] are not comparable enough to the market in Berkeley County.

He was also justified in determining that local transactions were not appropriate for consideration based on their circumstances. The Code and CSR make clear that "The market value of commercial and industrial real property is the price at or for which the property would sell if it was sold to a willing buyer by a willing seller in an arms-length transaction without either the buyer or the seller being under any compulsion to buy or sell."[59] The Assessor determined that the purported comparable sale, a property on Charles Town Road, was not an arms-length sale because it was a foreclosure sale.[60] Street testified that sales by banks tend to be at greatly reduced prices compared to a true arms-length transaction in the open market.[61] Therefore, it was not appropriate as a source of comparison.[62] Though the Court's Order states that it was not a transfer from a bank, the records in the Berkeley County Clerk's Office appear to differ. [63] Given the definition of market value, surely the Assessor has discretion to consider whether a sale of property subject to some financial distress meets that definition.

---

[57] W. Va. CSR § 110-1P-3.
[58] App. at 207-209.
[59] W. Va. CSR § 110-1P-3; See also W. Va. Code § 11-3-1.
[60] App. at 259.
[61] App. at 266.
[62] The sale also took place after July 1, 2018.
[63] The Court's order states that the sale was not a sale by a bank, because the Gov't Prop appraisal says the grantor was Charles Town Road LLC. However, the deed that appears to be the operative transfer document lists the grantor as Wells Fargo Bank. Deed Book 1223 Page 108.

"An assessor need not perform a useless act of considering an appraisal method where the assessor does not have sufficient data to perform that appraisal method."[64] Therefore, the Assessor had clear discretion to choose the "cost approach" under West Virginia law, because he lacked sufficient information to fully develop and consider the "income" and "sales" approaches.

Regarding depreciation, the Court found that the assessment failed to take into consideration functional obsolescence and economic obsolescence.[65] However, Streett testified "Cost approach was considered for the 2019 tax year. This included functional obsolescence and external obsolescence was taken – were taken into account. Based on the definition of functional obsolescence and economic obsolescence, our office did not believe that any adjustments were needed other than normal depreciation on improvement."[66] Though it may not be clear from this testimony, the "normal depreciation" referred to by Streett did include both physical and functional obsolescence, which can be seen on the Property Record Card.[67] The testimony referred to the fact that no additional depreciation was applied beyond what was calculated according to the procedures followed by all assessor's offices. When the Assessor decides that additional adjustments due to functional or economic obsolescence over and above what was already calculated are not appropriate, this does not equate to failing to consider such aspects of depreciation. It should be noted, despite the testimony of the appraiser to the contrary, the taxpayer's own appraisal states, on page 42 under the heading "Functional Utility," "Based on our inspection and consideration of its current and/or future use, there do not appear to be any significant items of functional obsolescence."[68]

---

[64] *Lee Trace LLC*, 232 W. Va. at 194, 751 S.E.2d at 714.
[65] App. at 352.
[66] App. at 258-259.
[67] App. at 240.
[68] App. at 149.

This Court has addressed what is meant by the requirement that the different aspects all be considered. In *Century Aluminum of West Virginia, Inc. v. Jackson County Commission*, 229 W. Va. 215, 224-255, 728 S.E.2d 99, 108-109 (2012) the Court stated:

> Absent from the legislative rule requiring the Tax Commissioner to consider functional and economic obsolescence is any directive regarding how the Tax Commissioner must go about "considering" economic and functional obsolescence. *See* W. Va.C.S.R. § 110–1P–2.2.1.1. Moreover, West Virginia Code of State Rules § 110–1P–2.2.1.1 does not require the Tax Commissioner to make any adjustment to the valuations made regarding property because of physical deterioration, functional obsolescence and economic obsolescence. *See id.* Rather, all that is required of the Tax Commissioner in applying the cost approach to valuation is that the Tax Commissioner will think about or contemplate three types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence.

Though interested parties may disagree with the Assessor's decision of how much to adjust for obsolescence, that decision does not constitute an abuse of discretion – it is an *exercise* of discretion.

The Circuit Court found the assessment erroneous for simply following the procedures required by West Virginia law. It also found error in failing to consider information concerning events that transpired over a year after the date of assessment.

The Circuit Court adopted Government Properties' Proposed Findings of Fact and Conclusions of Law in its entirety as part of its September 14, 2020 Order.[69] Paragraph 15 of those Proposed Findings, under the heading "Proposed Undisputed Facts," recounted a portion of the testimony of the appraiser regarding the condition and sale of the subject property.[70] It included that the building was vacated in December 2017, remained vacant for 15 months, and was sold

[69] App. at 382.
[70] App. at 327.

recently for $650,000.[71] [72] The Court relied on this information throughout its Order.[73] While at first glance this information may seem relevant, it was actually improper to rely on these facts because they could not have been considered by the assessor and could not help determine the value of the property on July 1, 2018.

The only information regarding the building that could have been considered from this portion of testimony was that the building was vacant on July 1, 2018 and had been for approximately 6 months. The fact that it remained vacant after that period for any length of time and the fact that it sold in July 2019 are completely irrelevant to the value of the building on July 1, 2018. The fact of the sale would not have even been relevant on July 1, 2019, much less the year prior. Instead, these pieces of information only distort the determination to reflect what it might have been worth in October 2019.

This distortion is amplified by considering the sale price of the building. That is because this was not an arms-length transaction on the open market as the assessor is required to consider under W. Va. CSR § 110-1P-3.1.1 and W. Va. Code § 11-3-1.[74] This was a sale at auction by a seller who was obviously eager to sell for virtually any amount to end its involvement with the property. As with the Charles Town Road property discussed above, the assessor would not have

---

[71] App at 327.

[72] The exact timeframe of the vacancy and sale are unclear as the October 22, 2019 testimony of the appraiser was that the building sold within the last 90 days, but the time stated for the building remaining vacant was 15 months. Based on the testimony, Petitioner assumes that the sale took place after July 1, 2019.

[73] *See, e.g.*, App. at 331, 345-347, 368-373.

[74] When the appraisal discussed the sale of the subject property it mentioned that the sale price was over 25% less than its conclusion of market value, but inexplicably said of the property *of their own client*, "We have been unable to ascertain the reason for this difference, as to whether it may be attributable to a distressed seller or other factor."

been able to rely on this sale as conclusive evidence of the value of the building even if the sale took place prior to the assessment.

Despite all of this, however, the Court's Order specifically finds fault with the assessment, because it does not take into account this information. So, the assessment was determined to be faulty, because the Assessor failed to consider information that is irrelevant and did not even exist at the time of assessment.

The Court's Order explains why this is appropriate relying on language from *Kline v. McCloud*, 174 W. Va. 369, 326 S.E.2d 715 (1984), including, "We further hold that the price paid for property in an arm's length transaction, while not conclusive, is relevant evidence of its true and actual value." However, this holding out of context relays nothing of the factual background of the case being cited. In fact, a reading of the background shows that the cited holdings have no bearing on whether it is proper to consider sales that have taken place *after* the assessment, as they are cited to prove.[75]

Kline was a suit brought in circuit court by taxpayers of Randolph County challenging the assessment of property owned by Westvaco, seeking to have the property valued at a higher amount. The assessment for the 1982 tax year was based on the valuation set by a 1965 appraisal by the State Tax Commissioner.[76] One type of evidence the taxpayers used to demonstrate the value of the property was deed values reflecting how much Westvaco paid for parts of the land.[77] Based on the following excerpt, it seems unlikely these transactions took place between July 2, 1981 and February 1982:

> In February, 1982, the appellants applied for relief to the Board of Review, which set the matter for hearing. During the hearing, the appellants introduced deeds given

[75] *Id.*
[76] *Id.*, 174 W. Va. at 370, 326 S.E.2d at 716.
[77] *Id.*, 174 W. Va. at 371, 326 S.E.2d at 717

> to Westvaco by the McMullans, former owners of the land. One deed conveying 11,776 acres recited a consideration of $2,148,994, or approximately $180 an acre. A second tract covering 23,366 acres was subject to a lease purchase agreement involving a rental of $480,000 a year pending the purchase at a price of six million dollars, or approximately $260 an acre. The appellants also introduced entries from the 1982 land books for the tracts involved, showing that Westvaco's assessments on the various tracts ranged from a low of $9.60 per acre to a high of $33 per acre. Westvaco admitted purchasing the property, and indicated that it paid $8,000 a year in taxes on the property. One of Westvaco's witnesses was Sherman Stalnaker, who had been the assessor of Randolph County for twenty-one years. He testified that he used a 1965 State Tax Department appraisal as the basis for his valuation, and that he did not change the valuation on property when it was sold.[78]

Furthermore, a full review of the opinion reveals that the case certainly does not stand for the proposition that property sales over a year after the date of assessment are relevant to that assessment. Nonetheless, the Circuit Court in this case relied on the language of the *Kline* holding to justify its decision to take into account information it considered relevant, but which the assessor could not have relied upon. The *Kline* case says nothing that justifies such a position.

Thus, the Circuit Court erred by finding the assessment by the county assessor invalid.

2. The Valuation Approach Adopted by the Court was Improper.

Rather than accepting the assessment made by the Assessor, the Circuit Court chose to accept the method of valuing of the property proposed by the taxpayer. That approach was contrary to the requirements of West Virginia law and regulations. Not only did the taxpayer's appraiser use techniques that failed to comply with the rules assessors are required to follow, it also relied on events that took place over a year after the time when the assessor was required to value the property. The Court also took into account these events that could not have been a part of the assessment and should not have been considered.

---

[78] *Id.*

At the Board hearing, Government Properties offered the sworn expert testimony of its appraiser Paul D. Griffith, MAI, CRE, FRICS 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 $900,000 and its assessed value was $540,000 for the 2019 tax year.[79] His testimony and appraisal were entered into evidence without objection.[80]

As previously discussed, the appraisal was flawed and improper for the purposes of determining the value of the property on July 1, 2018, because it was based, in part, on information that did not exist yet on that date. However, the problems with the appraisal go much deeper than that. Griffith essentially used a hybrid approach to determine value, contrary to West Virginia law.

As noted previously, the written appraisal at one point states that there was no apparent significant functional obsolescence.[81] However, later, and through the testimony of Griffith, the appraisal pushed by the taxpayer asserts that 31,606 square feet of the 37,605 square feet of the building is essentially useless as functionally obsolete, because the building is too big.[82] As a result, the appraiser asserted that there was $2,150,000 in functional obsolescence and $2,970,840 in physical depreciation for a total of $5,120,000 in total depreciation.[83] In other words, of the entire building – 37,605 square feet – only 6,000 square feet is functional and that the remainder of the building should be ignored for purpose of assessment. The Petitioner's Appraisal leads to an indefensible depreciated replacement cost value of only $508,635 for the building and a cost approach value of $1,000,000 for the entire property.

---

[79] App. at 325.
[80] *Id.*
[81] App. at 149.
[82] App. at 254.
[83] *Id.*

The appraisal also based its valuation of the land portion of the property on only 3.40 acres of the 4.42 acres total.[84] This was based on the determination that approximately 1 acre of the land is "unusable" because of the location of a power line.[85] However, the Assessor is not allowed to simply disregard part of a property as if it does not exist.

Title 189, Series 2, of the West Virginia CSR lays out "procedural regulations . . . [that] 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 CSR. 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.[86]

The Assessor is required by the regulation to appraise the entirety of the property. But, the Property Record Card requires that the property be classified as (1) primary, (2) secondary, (3) residual, and (4) undeveloped.[87] Once an assessor enters the appropriate size of the property into each classification, the Integrated Assessment System ("IAS") automatically adjusts the value compared to the set land values of the established neighborhood. Thus, 100% of the gross land is assessed, but the land is divided into 4 different classifications and each classification is assigned a different value.[88] In this particular case, the Assessor placed the acre of land located under the power line into "undeveloped land."[89] Undeveloped land is 50% of the value of primary land.[90]

---

[84] App. at 250.
[85] *Id.*
[86] *See* W. Va. CSR § 189-4-6.
[87] App. at 240.
[88] *Id.*
[89] *Id.*
[90] *Id.*

Thus, the Assessor has already taken into account that the taxpayer does not have full ability to use the land and reduced the value accordingly.

The appraisal was also contrary to West Virginia law because it adopted a hybrid approach to valuation rather than relying strictly on one of the three approaches assessors must consider. Government Properties argued, and the Court below adopted, the notion that only the "net rentable area" of a commercial property should be used for determining the square footage used to find comparable properties for consideration under the sales approach.[91] According to the CSR, the sales[92] approach is determined merely by "considering the selling prices of comparable properties."[93] Under the income approach, on the other hand, "A property's present worth is directly related to its ability to produce an income over the life of the property."[94] The appraisal's version of the sales approach admittedly considered not only sales of other properties, but it considered the future income potential of the subject property as well. This results in an approach to valuation that attempts to integrate aspects of the income approach into the sales approach. This Court has made clear that a hybrid approach is unacceptable. In *Lee Trace*, the Court declared:

> We do, however, take issue with the circuit court's affirmation of the Board's reduction in value based upon an estimate averaging the cost approach value initially used by the Assessor with a "hybrid" income approach analysis subsequently performed by the Assessor at the request of the Board. Specifically, we find that it was an abuse of discretion for the Board to utilize a "hybrid" income approach value that did not comport with the requirements of W. Va. Code of State Rules § 110–1P–2.2.1.2 and § 110–1P–2.3.6.[95]

In the present case, the appraisal merges one approach into another to create something just as appropriately termed "hybrid."

---

[91] App. at 328-329.
[92] The CSR refers to this as the Market approach. *See* W. Va. CSR § 109-1P-3.2.1.3.
[93] W. Va. CSR § 109-1P-3.2.1.3.
[94] W. Va. CSR § 109-1P-3.2.1.2.
[95] *Lee Trace, LLC v. Raynes*, 232 W. Va. at 193–94, 751 S.E.2d at 713–14.

As discussed in the previous section, the Court also relied upon information about the sale of the subject property that took place around July 2019, over one year past the assessment date. Not only did the Court consider the assessment erroneous for failing to take this information into account, the Court also relied heavily on this information in reaching its conclusion as to what the proper value of the property was on July 1, 2018.[96]

For these reasons, the Circuit Court abused its discretion by adopting an appraisal that does not comport with the Code of State Rules requirements 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 the Court was very brief, but it adopted the taxpayer's 60-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.

---

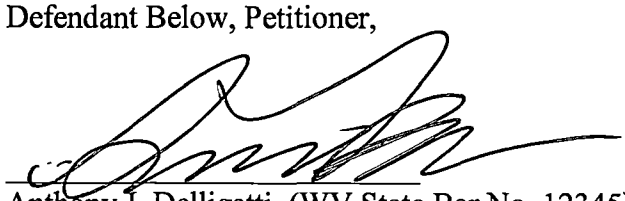
[96] *See, e.g.*, App. at 345-346, 360, 366, 368-373.

However, it would have been improper for the Assessor to have done so. Government Properties' paid expert's approach to valuing the property utilized data from properties that were not comparable to the subject property. It distorted data regarding the subject property, ignored large portions of land and office space, and crossed into the domain of a hybrid approach, contrary to West Virginia law.

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