IN THE SUPREME COURT OF APPEALS WEST OF VIRGINIA

BERKELEY COUNTY COUNCIL,

Defendant Below, Petitioner,

v. No. 20-1019

GOVERNMENT PROPERTIES INCOME TRUST LLC,

Plaintiff Below, Respondent.

RESPONDENT'S AMENDED SUMMARY RESPONSE

Counsel for Government Properties Income Trust, LLC
Plaintiff Below, Respondent

Eric Hulett (WV State Bar No. 6332)
Christopher M. Hunter (WV State Bar No. 9728)
JACKSON KELLY PLLC
500 Lee St., E., Suite 1600
P.O. Box 553
Charleston, WV 25322
(304) 340-1319
eric.hulett@jacksonkelly.com
chunter@jacksonkelly.com

Edward F. Hirshberg (WV State Bar No. 14131
RYAN LAW FIRM, PLLC
301 Grant Street, Suite 270
Pittsburgh, PA 15219
Phone: (412) 577-2489
Fax: (412) 255-3701
Edward.Hirshberg@ryanlawyers.com

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AMENDED SUMMARY RESPONSE OF GOVERNMENT PROPERTIES INCOME TRUST LLC

AND NOW, comes the Respondent, Government Properties Income Trust LLC, by and through their Counsel, Eric J. Hulett, Esq. and Christopher M. Hunter, Esq., of Jackson Kelly, PLLC, and Edward F. Hirshberg of Ryan Law, PLLC, and files the following Amended Summary Response, pursuant to Court order of January 25, 2022, and consistent with W. Va. R.A.P. 10(e).

Counterstatement of Standard of Review

"This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo.*" Syl. Pt 1., *Mt. Am., LLC v. Huffman*, 687 S.E.2d 768, 771 (W. Va. 2009).

Specific to the issue before the Court, West Virginia taxpayers must prove by clear and convincing evidence that the taxing authority's assessment value is inaccurate, and once that is done, the burden falls upon the taxing authority to prove that its assessment value is accurate. *Mt. Am., LLC v. Huffman*, 687 S.E.2d 785 ("[O]nce a taxpayer makes a showing that tax appraisals are erroneous, the Assessor is then bound by law to rebut the taxpayer's evidence.") *See also In re Tax Assessments Against Pocahontas Land Co.*, 303 S.E.2d 691,

699 (W. Va. 1983) ("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.") (emphasis added).

Argument In Response To Petitioner's Assignments Of Error

I. Any alleged failure to join the Berkeley County Assessor is unsupported by statute or caselaw, and is irrelevant where the interests of the Assessor were zealously represented by the Berkeley County Council.

The proper procedure for appeal from a county commission decision is outlined in West Virginia Code § 58–3–1 *et seq.* (the "Administrative Appeal Code"). *Tax Assessment Against Purple Turtle, LLC v. Gooden*, 679 S.E.2d 587, 593 (W. Va. 2009). These provisions are to be read *in pari materia* with West Virginia Code § 11–3–25[1] (the "Tax Assessment Appeal Code"), which addresses the appeal process for property tax assessments made pursuant to the property revaluation set forth in W. Va. Code § 11–1C–1 *et seq.* *See Purple Turtle* at 679 S.E.2d 593.

Neither code requires naming the assessor directly as a party to the appeal.

Petitioner, the Berkeley County Counsel sitting as the Board of Appeals (the "Board" or "Board of Assessment Appeal"), offers no caselaw to the contrary, beyond a 1906 nonbinding case from Iowa and an 1893 decision, *Mackin v. Taylor County Ct.*, 18 S.E. 632 (W. Va. 1893), whose referenced code predates the jurisdiction of the Tax Assessment Appeal Code by over a century. *See* W. Va. Code Ann. § 11-3-25(f) ("Effective date. -- The amendments to this section enacted in 2010 shall apply to tax years beginning after December 31, 2011."). Conversely, the Tax

[1] W. Va. Code §11-3-25 was repealed by H.B. 2496, which passed the House and Senate during the 2021 regular legislative session. However, at all relevant times, W. Va. Code §11-3-25 controlled the subject matter and procedure of the subject litigation.

Assessment Appeal Code dictating the process by which a taxpayer may appeal the decision of a Board of Appeals is clear:

> [A]ny person claiming to be aggrieved by any assessment in any land or personal property book of any county who shall have appeared and contested the valuation . . . may, at any time up to thirty days after the adjournment of the [county commission], apply for relief to the circuit court of the county in which such books are made out; **but he shall, before any such application is heard, give ten days' notice to the prosecuting attorney of the county, whose duty it shall be to attend to the interest of the State, county and district in the matter...**

In re Elk Sewell Coal, 427 S.E.2d 238, 241 (W. Va. 1993) (citing W. Va. Code § 11–3–25)(a) (emphasis added). The controlling statute makes no requirement of naming the assessor himself as a party to the appeal. *See, e.g.*, the Administrative Appeal code, W. Va. Code Ann. § 58–3–1 *et seq*. To the extent that the Tax Assessment Appeal Code references the necessary parties, the statute designates counsel to represent the rights of the "State, county and district" broadly: "The right of appeal from any assessment by the Board of Equalization and Review or order of the Board of Assessment Appeals as provided in this section may be taken either by the applicant or by the state, and in case the applicant, by his or her attorney, **or in the case of the state, by its prosecuting attorney or other attorney representing the Tax Commissioner.**" W. Va. Code Ann. § 11-3-25(b) (emphasis added).

Here, the "State, county and district" have been duly represented by counsel for Berkeley County Council. The prosecuting attorney of the County and the Berkeley County Assessor (the "Assessor") have been noticed on all pleadings throughout the litigation and chose to allow the County Council to defend the case.

Further, such practice is common: "County commissions have often been made parties to these types of appeals. Indeed, County Commissions have made numerous appearances in these types of appeals before this Court." *Mt. Am., LLC v. Huffman*, 687 S.E.2d 782. Examples are

legion. *See, e.g., Bayer Material Science, LLC v. State Tax Commissioner,* 672 S.E.2d 174 (W. Va. 2008) (**Kanawha County Commission as party**); *In re: Tax Assessment of Foster Foundation's Woodlands Retirement Community,* 672 S.E.2d 150 (W. Va. 2008) (**Cabell County Commission as party**); *In re Stonestreet,* 131 S.E.2d 52 (W. Va. 1963) (**defendants were Commissioners of the County Court of Calhoun County**); *Tug Valley Recovery Center, Inc. v. Mingo County Commission,* 261 S.E.2d 165 (W. Va. 1979) ("The respondents are elected members of the **Mingo County Commission**, and in this capacity, sat as a Board of Equalization and Review during the month of February 1978").

To that end, the Assessor has not filed an amicus brief, as other interested parties have. *See Amicus Curiae Brief on Behalf of the Board of Education of the County of Berkeley.* The Petitioner may not use the Assessor's failure to pursue its alleged rights as a red-herring by which to overturn the decision of the Circuit Court. Particularly where neither statute nor caselaw mandate such joinder, and the rights of the "State," and "state," have been duly represented. *See* W. Va. Code § 11–3–25)(a),(b).

II. The Circuit Court properly reversed the Board of Assessment Appeals, correctly found the assessment erroneous, and appropriately adopted the Respondent Property-Owner's appraisal report and expert testimony.

A taxpayer must prove by clear and convincing evidence that the taxing authority's assessment value is inaccurate, and once that is done, the burden falls upon the taxing authority to prove that its assessment value is accurate. *Mt. Am., LLC v. Huffman*, 687 S.E.2d 785; *In re Tax Assessments Against Pocahontas Land Co.*, 303 S.E.2d 699. Review of the Board of Assessment Appeal's decision before the circuit court focuses on determining whether the challenged property valuation is supported by substantial evidence, *Killen v. Logan County Comm'n,* 170 W. Va. 602, 295 S.E.2d 689 (1982), or otherwise in contravention of any regulation,

statute, or constitutional provision. *In re Tax Assessments Against the Southern Land Co.*, 100 S.E.2d 555 (W. Va. 1957); *In re Kanawha Valley Bank*, 109 S.E.2d 649 (W. Va. 1959).

Under this Court's precedent, review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is roughly the same scope permitted under the West Virginia Administrative Procedures Act at W. Va. Code § 29A–5–4(g), which provides as follows:

> (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. **It shall reverse, vacate or modify the order or decision of the agency** if the substantial rights of the petitioner or petitioners have been prejudiced because of the administrative findings, inferences, conclusions, decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> . . .
>
> (4) Affected by other error of law; or
>
> (5) **Clearly wrong in view of the reliable, probative and substantial evidence on the whole record**; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In re Tax Assessment Against Am. Bituminous Power Partners, 539 S.E.2d 761–62 (W. Va. 2000) (emphasis added).

A. Respondent Property-Owner Provided Clear and Convincing Evidence Uncontested by Petitioner.

Here, the Circuit Court reviewed the record before it and determined that the Respondent Property-Owner, through uncontradicted expert report and testimony, demonstrated by clear and convincing evidence that the current assessment was erroneous.[2] The burden of proof thus shifted, and the Circuit Court further determined that the Assessor failed to sufficiently rebut the taxpayer's

[2] More detailed description of the Respondent Property-Owner's expert appraisal and expert testimony is provided below. Also included is a deeper drill-down into the relevant statutes and codes. For clarity and brevity, such discussion is incorporated herein as is set forth in full.

evidence. Simply, the Circuit Court acted within its discretion to "reverse, vacate or modify the order or decision of the agency" where the court determined that the Board's holding was "[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record." W. Va. Code § 29A–5–4(g). No abuse of discretion occurred.

B. Respondent Property Owner's Expert Appraisal Testimony and Report

At the Board hearing, Respondent property owner introduced the expert testimony of Respondent's Appraiser (the "Appraiser") and the Expert Appraisal Report (the "Appraisal") into evidence. App. at 249-257.[3] The Property site consists of 4.42 acres, only 3.4 usable. *Id.* Property improvements were constructed specifically for a government entity, the sole tenant in the Property's history. *Id.* While the Property improvements themselves consist of a gross building area of 37,605 square feet, the presence of an obsolete computer system installed specifically for the tenant results in a loss of 6,800 square feet of rentable space. *Id.* Attempts to lease the Property have been unsuccessful since the prior tenant vacated in 2017, the Property's size being a prime hindrance in the current market and attributing to significant functional obsolescence. *Id.* Despite the owner's best efforts, the Property remained vacant for fifteen months until its late 2020 sale for $650,000.00. *Id.*

C. True and Actual Value

For taxation purposes, property is to be assessed "at its true and actual value," W. Va. Code § 11–3–1, also defined as "market value" or "the price paid for property in an arm's length transaction." *Bayer Material Science, LLC v. State Tax Com'r,* 672 S.E.2d 174, 188 (W. Va. 2008). "'Value,' 'market value' and 'true and actual value' shall have the same meaning and shall mean the price at or for which a particular parcel or species of property

[3] The Appellate Record will herein be referenced as "App."

would sell if it were sold to a willing buyer by a willing seller in an arm's length transaction without either the buyer or the seller being under any compulsion to buy or sell[.]" W. Va. Code Ann. § 11-1A-3.

The methods by which the Tax Commissioner (and thus the Assessor) determines the "true and actual value" of real property are set forth in W. Va. C.S.R. §§ 110–1P–1 *et seq.* *Id.* The Tax Commissioner's rules and regulations "clarify and implement State law as it relates to the appraisal at market value of commercial and industrial real and personal property[.]" W. Va. C.S.R. § 110-1P-1.1.1 (hereinafter, collectively, the "Rules").

Concurrently, commercial real property is to be valued by an assessor in accordance with W. Va. Code § 11-1C-5 and Section 3.2 of the Rules. *See* WVCSR §§ 110-lP-3.2 *et seq.* This section requires that an appraiser "shall consider and use where applicable, three (3) generally accepted approaches to value: (A) cost, (B) income, and (C) market." *Id.* at §§ 110-lP-3.2.1 *et seq.*

D. The Cost Approach

In his testimony before the Board, the Appraiser considered the cost, market, and income approaches to valuing the Property, but determined the income approach to be inapplicable. App. at 252-257.

The cost approach to value is defined in Section 3.2.1.1 of the Rules for the valuation of commercial property:

> To determine fair market value under this approach, replacement cost of the improvements is reduced by the amount of accrued depreciation and added to an estimated land value. In applying the cost approach, the Tax Commissioner shall consider three (3) types of depreciation: **physical depreciation, functional obsolescence. and economic obsolescence.**

WVCSR § 110-1P-3.2.1.2 (emphasis added). The Rules define "**economic obsolescence**" as "a loss in value of property arising from outside forces such as changes in use, legislation that restricts

or impairs property rights, or changes in supply and demand relationships" and "**functional obsolescence**" as "the loss of value due to factors such as excess capacity, changes in technology, flow of material, seasonal use, part-time use or other like factors. Functional obsolescence includes loss of value due to the inability of an item to perform adequately the function for which the item was designed." *Id.* at §§ 110-lP-2.5; 110-lP-2.8.

Utilizing the cost approach, the Appraiser estimated the land value based on four comparable sales, two located on the same street as the Property and one in nearby Falling Waters, to reach a $480,000.00 valuation for the Property's land as vacant. App. at 252. He then used the Marshall Swift Valuation for Class C average quality office building to develop the replacement cost for the buildings and improvements on the Property.

After explaining the lack of market-standard upgrades to the rentable portion of the building, the Appraiser considered the depreciation and functional obsolescence attributable to the Property due to weak market demand for the over-improved office space. *Id.* at 252-254. Specifically, the building was built for a single government tenant, improvements including a massive data center constructed to house large computer hard drives and equipment needed for government operations. Although necessary in 1997, when constructed, the data center is now obsolete due to the advancements of computer processor technology. Indeed, such data centers are now considered separate from the typical office market. App. at 250-256. The obsolescence, functional and operational, were highlighted as the Property "ha[d] been on the market . . . for about 15 months post-government exiting, and there were no takers and demand was very weak" -- finally selling for $650,000.00 as a "speculative investment" to a buyer prepared "to gut it and re-demise it based on [market] demands." *Id.* at 253-256.

Factoring in the depreciation and obsolescence of the existing improvements, the Appraiser concluded a fair market value under the cost approach of $1 million as of July 1, 2018. *Id.* at 253-254. The details and data supporting the Appraiser's cost approach to value conclusion are set forth in the Appraisal, entered into the record absent objection and incorporated herein by reference. *See* App. at 108-221.

E. The Sales Comparison Approach

The "Market data" or "sales approach" is applied by considering the selling prices of comparable properties." *Stone Brooke Ltd. Partn. v. Sisinni*, 688 S.E.2d 300, n. 9308 (W. Va. 2009) (citing W. Va. C.S.R. § 110–1P–2.2.1.3). Under this approach, the Appraiser identified and analyzed four vacant office buildings that had been sold for redevelopment. App. at 254. Most weight was given to a $1 million sale in Martinsburg on September 4, 2018, due to its striking similarities with the Property at issue. *Id.* at 255-256. Specifically, this office property and the subject Property, both built in the 1990s, had lot areas just above 4 acres with roughly 30,000 sq. ft. of rentable space. *Id.* Both were formerly occupied by a single government tenant for whom the property was designed and constructed, each vacating prior to sale. *Id.* Indeed, both had similar layouts, highly specific government use, and were recently sold vacant at a price of $30 per sq. ft. to buyers for the purpose of renovation and conversion to another use more consistent with the market. *Id.* Under the sales comparison approach, the Appraiser concluded a valuation of $900,000 for the Property as of July 1, 2018. *Id.* at 256.

The Appraiser testified to a final conclusion based upon a reconciliation of the sales approach and cost approach, valuing the Property as of July 1, 2018 at $900,000.00. *Id.* at 256-257; 170. In reaching his conclusion, the Appraiser duly considered and complied with the requirements of West Virginia law for the valuation of commercial property, and his

opinion of "market value" is identical to the definition quoted above from the West Virginia Code and Rules. W. Va. Code§ 11-lA-l(i); *Id.* at §§ 110-1P-3.1.1 *et seq.* The Appraisal and testimony highlight the comprehensive detail and due consideration Respondent's Appraiser gave to all of the factors and valuation methods which must be considered in order to determine the market value of commercial property in West Virginia.

III. The Assessor's Methodology and Approach Failed to Rebut the Clear and Convincing Evidence Provided Uncontested by Petitioner

The Assessor's testimony and evidence introduced at the administrative hearing failed to properly and adequately comply with the requirements of West Virginia law listed above. To begin, the Assessor did not view the inside of the Property and had not recently viewed its exterior, if ever. Rather, his review consisted of "the IAS on a property record card . . . the tax map . . . the Certificate of Transfer and Sales Receipt Form received from the County Clerk...[and] cost of new construction . . . from the City of Martinsburg." App. at 257-258. He explained the valuation method utilized by the Assessor's Office, which consisted of obtaining a cost study factor of 2.05, and the subsequent usage of "sales to do a land study. Where the property has improvements, we perform a land residual ticket." *Id.* at 258. The Assessor indicated that "the land table for the neighborhood . . . was not adjusted for the 2019 tax year [.]" *Id.*

The Assessor alleged that all three approaches to value were considered. *Id.* at 258-260. For the cost approach, he stated that "functional obsolescence and external obsolescence . . . were taken into consideration" and **"based on the definition of functional obsolescence and economic obsolescence our office did not believe that any adjustments were needed other than the normal depreciation on the improvement."** *Id.* at 258-259 (emphasis added).

Under the comparable sales approach, he testified that although there were 6 sales of office buildings, "it is the opinion of the Assessor's Officer that there were no valid sales directly comparable to the subject property." *Id.* at 260. Finally, for the income approach, he again testified about six recent sales and stated that "letters were mailed to those properties that were coded 353 office buildings asking for income and expense information" but that "the one office building that was 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." *Id.* The Assessor further testified that "since the subject property was [vacant]. . . there would be no income (inaudible) for this property for the current tax year" so the income approach was not used. *Id.* Based upon these assertions, he concluded that "consequently all three approaches to value were considered" and "the cost approach was chosen to be used for the 2019 tax year." *Id.*

A. The Assessor Failed to Properly or Realistically Consider the Cost Approach

The testimony and exhibits introduced at the Hearing by the Assessor did not consider or properly develop several of the factors required by West Virginia law for the valuation of commercial property. First, the information obtained by the Assessor in order to affirm the assessment consisted of the IAS system, record card, tax maps, certificate of transfer and sales form, a "land study," a "monitoring report," a "comparable sales chart," a building permit, and a "cost study." *See* App. at 222-246. The Assessor testified specifically to the importance of the cost study factor in calculating his cost approach to value. Strangely, the "cost study" utilizes an "Indicated **Residential** Cost Modifier: 2.05." App. at 239 (emphasis added). The subject Property is commercial and any reliance upon a residential cost modifier is an overt error.

Furthermore, the Board, Respondent's Appraiser, and the Assessor all placed statements on the record regarding the size of the Property, the current limited market demand for comparably sized office buildings, and how these factors resulted in a reduced sales price

for a similar vacant, 20-year old, single-tenant, government-designed building which required over $3 million in renovations. *Id.* at 252-257. As the Assessor himself stated, the "factors that affect this [P]roperty also affect every other commercial office space in the county," and the sales price for comparable vacant office building properties tends towards discount because the sellers "just want to get them off their books." *Id.* at 264-266.

Again, the Rules define "**economic obsolescence**" as "a loss in value of property arising from outside forces such as **changes in use**, legislation that restricts or impairs property rights, or **changes in supply and demand relationships**" and "**functional obsolescence**" as "the loss of value due to factors such as **excess capacity, changes in technology**, flow of material, seasonal use, part-time use or other like factors. Functional obsolescence includes loss of value due to the inability of an item to perform adequately the function for which the item was designed." WVCSR §§ 110-1P-2.5; 110-1P-2.8.

The uncontroverted record shows that the over-improved subject Property sat vacant for 15 months due to its size, lack of market-standard upgrades to the rentable portion of the building, and weak market demand. App. at 250-256. The massive data center constructed in 1997 to house computer hard drives and equipment needed for government operations was not only technologically obsolete but also obsolete to the real estate office market. *Id.* The similar struggles and discounted sales price of a comparably vacant office property illustrated the subject Property's limitations. *Id.* at 252-257.

Despite these facts, the Assessor claimed that "functional obsolescence and external obsolescence were taken into consideration" but "**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 the improvement.**" *Id.* at 259 (emphasis

added). Such conclusion ignores the very statutory definitions of functional and economic obsolescence (i.e., changes in use, changes in supply and demand relationships and "the loss of value due to factors such as excess capacity [and] changes in technology [.]") WVCSR §§ 110-1P-2.5; 110-1P-2.8.

Further, it is elementary that this obsolescence directly impacts the "market value" of the Property or "the price paid for property in an arm's length transaction." *Bayer Material Science, LLC v. State Tax Com'r,* 672 S.E.2d 188. As evidenced by the subject Property's eventual sale for $650,000. App. at 249-257.

Although the Assessor nominally utilized the cost approach to determine the Assessment, his analysis failed to consider the facts of the property before him, the depreciation factors required by law, and the true fair market value. The Assessor's application of physical depreciation, functional obsolescence and economic obsolescence are incomplete and erroneous; the Circuit Court was proper to reverse.

B. Assessor's Failure to Properly Consider Sales Approach.

The Assessor's argument for not utilizing the sales approach is that the data needed to comply with the Rules was not available to them. However, the comparable sale of another property in Martinsburg, the numerous other comparable sales introduced (but ignored) by the Assessor, and the data readily availableto the Assessor's Office through the IAS system reveal the shallowness of this argument. The Assessor dismissed the sales relied upon by Respondent's Appraiser in their comparable sales analysis, arguing that under Rules section 3.1.1., sales one, three and four cannot be considered comparable because they are not located within the same County as the Property. App. at 265. However, the Rules state that when determining the "market value for commercial real property . . . primary consideration shall

be given to the trends of price paid for like or similar property in the area or locality in which the property is situated." WVCSR § 110-lP-3.l.l. The only limitation placed on the price paid is that the sale date of a comparable property must be "within the previous eight years." *Id.* at § 3.1.1.5. There are no provisions that state that a sale is "comparable" only if the property sold is within the same County as the subject Property. Rather, the properties need only be "like of similar" and located in "the area or locality."

All sales within the Appraisal have comparable site, building, zoning, occupancy characteristics, and building age as the Property, and all were sold within a year from the July 1, 2018 valuation date. Sale 4 was located the furthest from the Property, and a result was given limited weight and a 25% downward adjustment to reflect its location. App. 166-169.

Despite any distance between the location of sales one and three and the Property, they are located in similar market areas, and adjustments were made to reflect differences between them and the Property. *Id.* at 159-169; 200. The similarities between these properties outweigh their distance from the Property. Indeed, their value per square foot calculations fall in line with the same value for sale two, the Martinsburg property that is almost identical to the subject Property. *Id.* While locating sales may have required the Assessor to look outside his County, there is nothing in the Rules that forbids him from doing so or negates the fact that these sales qualify as "comparable property sales" under West Virginia law.

CONCLUSION

For taxation purposes, property is to be assessed at its true and actual value, also defined as "market value" or "the price paid for property in an arm's length transaction." *Bayer Material Science, LLC v. State Tax Com'r,* 672 S.E.2d 174, 188 (W. Va. 2008). In other words, "'value,' 'market value' and 'true and actual value' shall have the same meaning

and shall mean the price at or for which a particular parcel or species of property would sell if it were sold to a willing buyer by a willing seller in an arm's length transaction without either the buyer or the seller being under any compulsion to buy or sell[.]" W. Va. Code Ann. § 11-1A-3. The Board's decision affirming the Assessor's value was contrary to the controlling regulations and methodologies for determining market value for commercial properties under West Virginia law. The Assessor's value ignores the relevant statutes and is utterly out of sync with market value. The Circuit Court decision recognized the same. Accordingly, Respondent respectfully requests that this Honorable Court enter an Order affirming the lower court decision regarding the Property's Assessment for the 2019 tax year.

February 4, 2022.

Respectfully submitted,

Christopher M. Hunter (WVSB No. 9728)
Eric Hulett (WVSB No. 6332)

JACKSON KELLY PLLC
500 Lee St., E., Suite 1600
P.O. Box 553
Charleston, WV 25322
(304) 340-1319
eric.hulett@jacksonkelly.com
chunter@jacksonkelly.com

Edward F. Hirshberg, (WVSB No. 14131)
RYAN LAW FIRM, PLLC

301 Grant Street, Suite 270
Pittsburgh, Pa 15219
Phone: (412) 577-2489
Fax: (412) 255-3701
Edward.Hirshberg@ryanlawyers.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Amended Summary Response of Government Properties Income Trust LLC* has been served upon the following by email and/or U.S. mail first class this 4th day of February 2022.

Ms. Penny Shewell
Berkeley County Council
400 West Stephen Street, Suite 201
Martinsburg, WV 25401
pshewell@berkeleywv.org

Larry A. Hess
Berkeley County Assessor
400 West Stephen Street, Suite 208
Martinsburg, WV 25401
Lhess@berkeleywv.org

Anthony J. Delligatti
Legal Director
Berkeley County Council
400 W. Stephen Street; Suite 201
Martinsburg, WV, 25401
adelligatti@berkeleywv.org

Howard E. Seufer, Jr.
Kimberly S. Croyle
Joshua A. Cottle
Bowles Rice, LLP
600 Quarrier Street
Charleston, WV 25301
hseufer@bowlesrice.com

RYAN LAW FIRM, PLLC

Edward F. Hirshberg, Esquire