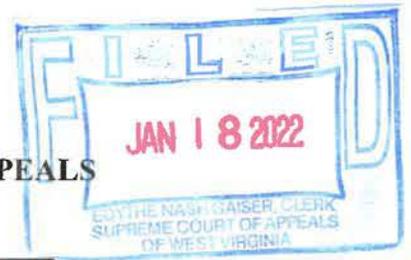


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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
APPEAL Nos. 21-0521 and 21-0517**

MARK MUSICK, ASSESSOR OF MONONGALIA COUNTY,

Petitioner Below, Petitioner,

v.

BETA THETA PI FRATERNITY OF W.V.U., INC.,

Petitioner Below, Respondent,

AND

MATTHEW R. IRBY, WEST VIRGINIA
STATE TAX COMMISSIONER

Respondent Below, Petitioner,

v.

BETA THETA PI FRATERNITY OF W.V.U., INC.,

Petitioner Below, Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities ii

I. Argument 1

 a. The circuit court did not properly apply W. Va. Code § 11-3-9(a)(15) because because the local Beta Theta Pi fraternity had its national charter revoke and BTP Housing Corp is not associated with a fraternity affiliated with West Virginia University. 1

 b. The Circuit Court incorrectly determined that the Administrative Decision and Ruling of the State Tax Commissioner was wrong because the BTP Housing Corp was not owned on behalf of any organization affiliated with West Virginia University and it is not housing any members of Beta Theta Pi..... 3

 c. During the relevant tax year, the property owned by BTP Housing Corp was not housing members of “the organization.” 4

II. Conclusion..... 5

TABLE OF AUTHORITIES

Cases	Page
<i>Central Realty Co. v. Martin</i> , 126W. Va. 915, 30 S.E. 2d 720 (1944).....	1, 3
<i>Matkovich v. University Healthcare Foundation, Inc.</i> , 238 W. Va. 345, 795 S.E.2d 67 (2016).....	5
<i>Meadows v. Wal-Mart Stores, Inc.</i> , 207 W. Va. 203, 530 S.E.2d 676 (1999).....	2
<i>Patterson Memorial Fund v. James</i> , 120 W. Va. 155, 197 S.E. 302 (1938).....	1
<i>State v. Epperly</i> , 135 W. Va. 877, 65 S.E.2d 488 (1951).....	2, 4
<i>Hardesty v. Aracoma – Chief Logan No.4523, Veterans of Foreign Wars of U.S. , Inc.</i> 147 W. Va. 645, 129 S.E.2d 921 (1963).....	2
<i>In re Tax Assessment of Woodlands</i> , 672 S.E.2d 150 (W. Va. 2008).....	4
Statutes	
W. Va. Code §11-3-9(a)(15).....	<i>passim</i>

I. ARGUMENT

a. **The Circuit Court did not properly apply W. Va. Code § 11-3-9(a)(15) because the local Beta Theta Pi fraternity had its national charter revoke and BTP Housing Corp is not associated with a fraternity affiliated with West Virginia University.**

The Circuit Court failed to properly apply the unambiguous requirements found in W. Va. Code § 11-3-9(a)(15) by finding that BTP Housing Corp was exempt from *ad valorem* taxation. W. Va. Code § 11-3-9(a)(15) sets out specific requirements that, when applied, do not exempt BTP Housing Corp from *ad valorem* property taxation. BTP Housing Corp incorrectly argues that the language found in the statute which specifically relates to the requirement that an organization hold the property on behalf of an affiliated fraternal organization and house members of *the* organization are simply “addition[s] or explanation section[s].” (Beta Brief p. 7). This is untrue. Additionally, BTP Housing Corp is inconsistent in its argument when it follows the previous argument by calling for “strict application of the statute” along with a “rational” application. (Beta Brief p. 7); *See also, Central Realty Co. v. Martin*, 126 W. Va. 915, 30 S.E. 2d 720 (1944); *Patterson Memorial Fund v. James*, 120 W. Va. 155, 197 S.E. 302 (1938). The application of W. Va. Code § 11-3-9(a)(15) that BTP Housing Corp is requesting is contrary to plain application of the statute.

Strict and rational application of the statute would require the Court to apply the statute as this Petitioner lays out in its previous brief. *See Petitioners' Appeal Brief*. BTP Housing Corp attempts to argue that nothing past the first portion of the statute that reads “[a]ll real estate not exceeding one acre in extent, and the buildings thereon, used exclusively by any college or university society as a literary hall, or as a dormitory or clubroom if not used with a view to profit. . .” should be applied. However, application of the statute requires that BTP Housing Corp must meet the all elements found in W. Va. Code § 11-3-9(a)(15). The situation before

this Court was specifically contemplated by the Legislature when the statute was constructed.. The Circuit Court has very clearly not applied the significance that each portion of a statute is required to be given. Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999). As previously stated, a “cardinal rule of statutory construction is that significance and effect must, if possible, be given too every section, clause, word or part of the statute. *Id.* A statutory provision, such as the one here, that is clear, unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but “will be given full force and effect.” Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). As a result, the argument made by BTP Housing Corp that anything after “including, but not limited to” does not need to be applied in this situation is clearly wrong and the decision reached by the Circuit Court as a result of that argument should be reversed.

BTP Housing Corp attempts to distinguish the case before the Court to the facts and holding of *State ex rel. Hardesty v. Aracoma – Chief Logan No. 4523, Veterans of Foreign Wars of U.S., Inc.*, 147 W. Va. 645, 129 S.E.2d 921 (1963), however, this comparison is unfounded. In *State ex rel. Hardesty*, this Court found that the requirements of the exemption can still be met even though an organization has permitted guests into its restaurant facilities. *Id.* The reliance on *Aracoma* is misplaced because it bears no resemblance to the facts before the Court *sub judice*. In the present case, the BTP Housing Corp did not permit guests for a short period of time equivalent to that of a restaurant visit. Rather, the BTP Housing Corp was not housing members of the fraternity as the local chapter lost its national charter and it was effectively renting to West Virginia University students not affiliated with Beta Theta Pi.

BTP Housing Corp clearly falls outside of holding in *State ex rel. Hardesty*. The current housing situation of BTP Housing Corp more closely resembles the holding found in *Central*

Realty Company. See Central Realty Company v. Martin, 126 W. Va. 915, 30 S.E. 720 (1944) (holding that an organization was not exempt from taxation when it rented out its hotel completely to commercial purposes.) BTP Housing Corp does not house a single member of Beta Theta Pi and Beta Theta Pi no longer is affiliated with West Virginia University. Therefore, the Circuit Court did not apply the unambiguous and plain language found in W. Va. Code § 11-3-9(a)(15) in accordance with Legislative intent¹.

b. The Circuit Court incorrectly determined that the Administrative Decision and Ruling of the State Tax Commissioner was wrong because the BTP Housing Corp was not owned on behalf of any organization affiliated with West Virginia University and it is not housing any members of Beta Theta Pi.

During the relevant tax year, BTP Housing Corp was not holding the property on behalf of any fraternity affiliated with West Virginia University as required by W. Va. Code § 11-3-9(a)(15). The fraternal organization of Beta Theta Pi no longer had an active chapter that is affiliated with West Virginia University as its charter was revoked in 2014. JA. 000091. Furthermore, Beta Theta Pi does not expect to seek a recharter until 2024. BTP Housing Corp cannot house any members of the organization in accordance with the statute because there are no members of Beta Theta Pi that exist².

BTP Housing Corp alleges that the Tax Ruling was clearly wrong because both elements necessary to be a charitable organization are met by replacing the word “charitable” for the

¹ BTP Housing Corp alleges that it is quoting the statute as found in the W. Va. Code book. While this is the correct authority, BTP Housing Corp still continues to add an additional comma to its version of W. Va. § 11-3-9(a)(15). This error was also adopted by the Circuit Court in its order.

² BTP Housing Corp alleges that it is housing members of other fraternal organizations of West Virginia University. While this Petitioner continues to assert that the statute requires BTP Housing Corp to house members of an active Beta Theta Pi chapter, which it cannot do, BTP Housing Corp has also presented no evidence that it is housing any members of any affiliated fraternal organization at West Virginia University.

word “fraternal.” See *In re Tax Assessment of Woodlands*, 672 S.E.2d 150 (W. Va. 2008). This substitution is impermissible. BTP Housing Corp cannot simply substitute words allow it to claim an exemption from *ad valorem* taxation. It is not within the discretion of BTP Housing Corp to substitute words to fit the argument it sets forth. Additionally, it is not within the discretion of the Circuit Court to interpret and change statute which are clear and unambiguous. Plainly stated, the statute contains an affiliation requirement which is ignored by the impressible substitution utilized by the Circuit Court. As stated above, those statutes which are clear and unambiguous “will be given full force and effect.” *Epperly*, 135 W. Va. at 65, 65 S.E.2d at 488. Therefore, the Circuit Court incorrectly determined the Tax Ruling was wrong by failing to apply the statute as written and substituting unnecessary language when the statute is unambiguous.

c. During the relevant tax year, the property owned by BTP Housing Corp was not housing members of “the organization.”

The unambiguous requirements found in W. Va. Code § 11-3-9(a)(15) require an organization holding the property on behalf of an affiliated fraternity to house members of “the organization.” Because Beta Theta Pi lost its national charter, there exist no members of the organization. See JA. 000091. Therefore, BTP Housing Corp cannot house any members of the organization in accordance with the requirements in the statute. This Petitioner asserts that because BTP Housing Corp fails to meet a single element of W. Va. Code § 11-3-9(a)(15), BTP Housing Corp cannot successfully claim an exemption from *ad valorem* property taxation and the analysis need not continue past this analysis.

However, BTP Housing Corp argues that multiple exemptions are permitted under W. Va. Code § 11-3-9(a)(15) and focuses on the first portion of the statute described above. The Circuit Court also incorrectly adopted this error. The plain and unambiguous language of the statute

does not contemplate that multiple exemption may apply. BTP Housing Corp points to the phrase “including, but not limited to” as evidence to support the application of multiple exemptions. W. Va. Code §11-3-9(a)(15). It would be against Legislative intent to refuse to apply an exemption that was specifically contemplated by the statute.

The requirements in W. Va. Code § 11-3-9(a)(15) are clear and unambiguous. Through the use of simple statutory application, BTP Housing Corp does not meet any of the requirements found in the statute. BTP Housing Corp is not holding the property on behalf of any fraternal organization affiliated with West Virginia University. BTP Housing Corp is not leasing to any qualifying organization as Beta Theta Pi lost its local charter designation and was not affiliated with West Virginia University. JA. 000091; *see also Matkovich v. University Healthcare Foundation, Inc.*, 238 W. Va. 345, 795 S.E.2d 67 (2016). Additionally, because Beta Theta Pi was no longer affiliated with West Virginia University during the relevant tax year, BTP Housing Corp cannot house members of the organization. BTP Housing Corp does not meet any of the requirements of the statute and the Circuit Court did not apply the unambiguous requirements to arrive at the correct conclusion.

d. CONCLUSION

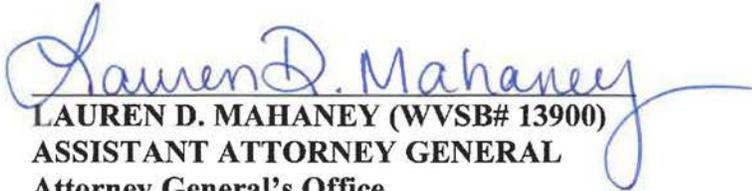
For the Foregoing reasons, this Petitioner respectfully asks this Court to reverse the decision of the Circuit Court. The decision does not comply with the statutory requirements found in W. Va. Code § 11-3-9(a)(15). Therefore, this Petitioner, the State Tax Commissioner, respectfully requests that this Honorable Court reverse the decision of the Circuit Court and deny the *ad valorem* property taxation exemption sought.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lauren D. Mahaney, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Petitioner's Reply Brief" was served by depositing the same, postage prepaid in the United States Mail, this 18th day of January, 2022, addressed as follows:

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