IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 23-ICA-372

THE SILVER CREEK ASSOCIATION, INC., A WEST VIRGINIA NON-PROFIT CORPORATION; RUSSELL D. JESSEE AND CINNAMON M. JESSEE; JEFFREY S. BANKS AND DRENNA BANKS; MALCOM J. COOPER AND COLLEEN K. COOPER; DUVAL LEE FUQUA AND DORTHEA A. FUQUA; RAYMOND BRUCE JAMES AND HARRIET HAWKS; LOUIS J. CONSTANZO, DAVID CHRISTOPHER, AND LINDA CHRISTOPHER; WILLIAM C. WHITE, II, WILLIAM TERRINI, AND MARY L. TERRINI; MICHAEL D. CAJOHN AND JENNIFER L. CAJOHN; KEVIN L. BANNING, ALL INDIVIDUALS,

Petitioners,

v.

MATTHEW R. IRBY, IN HIS OFFICIAL CAPACITY AS STATE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA; AND JOHNNY A. PRITT, IN HIS OFFICIAL CAPACITY AS ASSESSOR OF POCAHONTAS COUNTY, WEST VIRGINIA,

Respondents.

On Appeal from the Circuit Court of Pocahontas County, Civil Action No. 2020-P-31

BRIEF OF THE RESPONDENT STATE TAX COMMISSIONER

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INTRODUCTION

The Circuit Court of Pocahontas County's final decision affirming Property Tax Ruling 21-16 ("PTR 21-16") and granting summary judgment in favor of the Respondents West Virginia State Tax Commissioner and the Pocahontas County Assessor should be affirmed. Contrary to the assignments of error tendered by the Silver Creek Association, Inc. and the individual property owners ("Petitioners"), the real property valuations of the individual owners' condominium properties, which include common areas utilized for commercial purposes, are entirely consistent with Equal Protection principles, the Uniform Common Interest Ownership Act ("UCIOA"), and West Virginia statutory law. For these reasons, the three overlapping assignments of error should be rejected.

COUNTERSTATEMENT

Prior Litigation and Property Tax Rulings. The Circuit Court properly acknowledged that the current litigation took place before the backdrop of prior litigation related to the ownership of a certain portion of the Lodge at Silver Creek. JA-000706 to 000707.

In 2014, the Silver Creek Association ("Association") filed a Complaint for Declaratory Relief in the Circuit Court of Pocahontas County asking it to declare that certain residential units and the commercial space owned by Snowshoe Mountain, Inc. and/or its predecessor, Silver Creek Properties, Inc., were units as defined by the UCIOA. JA-00474. The 2014 litigation was resolved via a Settlement Agreement in 2016 in which the Association and Snowshoe Mountain agreed, among other things, to convey certain spaces in the Lodge at Silver Creek to the Association. JA-00474 to 00475.

After the settlement, the Pocahontas County Assessor assessed and attributed real property tax to the Association for the 2017 tax year. JA-00475. In 2018, the Association and the Assessor

jointly requested a property tax ruling from the Tax Commissioner on whether the common areas could be taxed to the Association under the UCIOA or whether the areas in question were to be incorporated into the assessments of the individual unit owners. JA-000483 to JA-000488. In Property Tax Ruling 18-49 ("PTR 18-49"), the Tax Commissioner determined that the areas should be treated as units held out for future development and should be assessed and taxed separately from the occupied units of the condominium. *Id.* The Association then appealed PTR 18-49 to the circuit court, which held that - because the Association was not a declarant under the terms of the UCIOA - the areas in question were not units and must be deemed common elements of the condominium. As a result, the common elements could not be separately assessed and taxed. JA-000472 to JA-000482.

Following the resolution of the litigation stemming from PTR 18-49, the Assessor reclassified the individual units at issue in this matter as Class III Commercial Property. This reclassification was the basis for the Assessor seeking another property tax ruling that resulted in the issuance of PTR 21-16 that is currently under review.

The Silver Creek Lodge and Common Commercial Elements. Silver Creek is a 237-unit condominium, which consists of a single building with three multi-story residential wings surrounding a core that houses common areas. JA-00012. Silver Creek is a common interest community as defined by the UCIOA, codified at West Virginia Code § 36B-1-101 *et seq. Id.*

It is undisputed that a "portion of the common areas is used to operate a bar and grill…" and that the Lodge includes "eight commercial units." Petrs's Br. at 1-2. The April 28, 2016, restated declaration provides that each unit automatically has an undivided interest in the common elements, which includes a Commercial Laundry (649 sq. feet), Old Bellman Station (289 sq. feet), Locker Room Sports Bar (3,064 sq. feet), Creek Co. Store Antiques (345 sq. feet), and Creek Co.

Store Food (821 sq. feet). JA-000385 to 00386. Gross sales for the Locker Room alone for the 2019 and 2020 calendar years totaled $616,264.62 and $576,018.81, respectively. JA-000383. Common areas are also leased to Snowshoe Mountain, including Troll Hole (2,000 sq. feet) and the Mezzanine (1,395 sq. feet). JA-000382 to 000383.

The specific units at issue in this appeal comprise of approximately 10 percent of Silver Creek's residential units. Petrs's Brief at 2. They consist of owner-occupied residential units with shared ownership in common elements that are commercial in nature. The majority of Silver Creek's unit owners rent out their units and have not challenged their classification as commercial property. JA-000601.

Assessor's Request for Property Tax Ruling Regarding Classification for the 2021 Tax Year. On October 7, 2020, the West Virginia State Tax Division received a request from the Assessor for a ruling on whether certain property owned at Silver Creek is eligible for Class II residential classification instead of Class III commercial classification. JA-000387 to 000391.

On November 16, 2020, former Tax Commissioner Dale Steager issued PTR 21-16, which ruled that "the law prohibits the separate assessment and taxation of the common elements of a condominium created under" the UCIOA. JA000393 to 000398. The ruling further held that "the commercial use of such common elements must therefore be imputed to each unit in the common interest community." JA-000398. PTR 21-16 provided that "when property used for commercial purposes is treated as a common element in a common interest community, each unit sharing an interest in such common element must be treated as commercial property." *Id.* PTR 21-16 ultimately concluded that the "units in the Silver Creek condominium were therefore properly classified by the Assessor as Class III for *ad valorem* property tax purposes for the 2021 tax year." *Id.*

The Petitioners petitioned to the Circuit Court of Pocahontas County seeking judicial review of PTR 21-16 as it pertained to the 2019, 2020, and 2021 tax years. JA-000148 to 000153. Because the Petitioners did not request a property tax ruling from the Tax Department for the 2019 or 2020 tax years, the lower court properly dismissed the Petitioners' claims as to those years. JA-000717. The Petitioners have not tendered an assignment of error in that regard.

In their Petition for Appeal to the lower court, the Petitioners asserted two assignments of error. First, the Petitioners alleged that the use of the common elements was *de minimis* and, thus, insufficient to disqualify the individual owners from qualifying for Class II residential classification. JA-000019. The circuit court properly rejected this argument and held that "the operation of the Locker Room generates significant annual revenue by offering its goods and services to the public at large, rather than just to the owners of units within the Lodge at Silver Creek." JA-000716. The court further opined that "this area of the condominium is not merely incidental to the residential use of the unit owners, but rather an explicitly commercial use of that property…" JA-000717. There has been no assignment of error asserted as it pertains to the Petitioners' *de minimis* argument. Second, the Petitioners asserted that they were entitled under West Virginia Code § 11-4-18 to have a split assessment allocated between the commercial and residential uses of their parcels. It is this second assignment of error below that forms the basis for the current appeal.

On July 24, 2023, the circuit court granted the Motions for Summary Judgment separately filed by the Assessor and the Tax Commissioner and denied the cross motion filed by the Petitioners thus rejecting all the relief requested by the Petitioners as it pertained to the 2021 tax year. JA-000705 to 0000717. Thereafter, the Petitioners filed an appeal to this Court requesting a reversal of the final order. The Petitioners filed an opening brief on November 27, 2023, asserting

three assignments of error.[1] This response brief is filed in accord with the Court's October 3, 2023, scheduling order.

SUMMARY OF ARGUMENT

A fundamental question lies at the heart of every *ad valorem* tax appeal - what purpose is the property being used for? In this matter, the question becomes whether the common elements of a condominium used for commercial purposes are Class III property for *ad valorem* taxation purposes and whether common elements of the condominium can be separately assessed and taxed. For the reasons detailed below, the commercial use of the condominium's common elements requires that all condominium units that share an ownership interest in the common elements be treated as Class III commercial property. Furthermore, the UCIOA prohibits split classification of the condominium property.

The Petitioners' First Assignment of Error fails because there has been no violation of West Virginia law requiring equal and uniform taxation. To convolute what is a simple legal analysis, the Petitioners ignore that their properties, which are admittedly not used exclusively for residential purposes, are classified consistent with the West Virginia Code. The Petitioners also incorrectly urge the Court to adopt a strict scrutiny standard of review. This argument runs contrary to well-established legal authority that provides for a rational basis review. The Petitioners' equal

[1] The Petitioners also request that they be awarded "all of their reasonable lawyers' fees and costs." Petr's Br. 25. But the general rule is that "each litigant bears his or her own attorney's fees." Syl. pt. 2, *State ex rel. Hicks v. Bailey*, 227 W. Va. 448, 449, 711 S.E.2d 270, 271 (2011) (cleaned up). The Petitioners cite no "contrary rule of court or express statutory or contractual authority," that would shift the burden of this litigation to the Tax Commissioner. *Id.* Plus, the appellate rules provide that "costs shall not be awarded for or against the State" "or agency or officer thereof" except when "authorized by law." W. Va. R. App. P. 24(c). Even then, the only cost subject to shifting is the filing fee provided by "subdivision (a)." *Id.* And the "costs" subject to this limitation include "attorney fees" that are that are allowed by statute as part of "the recovery of the costs of a proceeding." Syl. pt. 1, *Quicken Loans, Inc. v. Brown*, 236 W. Va. 12, 15, 777 S.E.2d 581, 584 (2014). The Petitioners offer no basis for deviating from this rule. Their request for costs and fees should be rejected.

protection argument further fails on the merits. There has been no allegation that any similarly situated taxpayers – namely other property owners that fall within the ambit of the UCIOA with property that is both residential and commercial in nature – have been treated differently. Rather, the Petitioners attempt to compare themselves with dissimilar properties.

The Petitioners' Second Assignment of Error fails because it is premised upon an inaccurate reading of the UCIOA. While West Virginia Code § 11-4-18 does allow for split tax tickets when portions of the same property are used for different purposes, that is not the proper code section under which the analysis for condominiums must take place. The UCIOA is found in § 36B-1-101 *et seq.* of the West Virginia Code. Sections 36B-1-105(b)(1) and 36B-1-105(b)(2) deal specifically with condominiums and make it abundantly clear that in a situation where a condominium owner also owns an interest in common elements, those common elements must be taxed together with the residence and that no separate tax assessment may be rendered for the common elements. The well-settled principle in statutory construction that a specific statute must be given precedence over a more general one means that the Petitioners' reliance on West Virginia Code § 11-4-18 is misplaced.

The Petitioners' Third Assignment of Error fails because it is premised upon another inaccurate reading of the UCIOA. Citing to West Virginia Code § 36B-1-105(b)(1) and West Virginia Code § 36B-1-106(b), the Petitioners claim that, for the purposes of taxation and assessment, Chapter 36B requires that a parcel of real estate in the fee form of ownership be treated the same as real estate in the common interest form of ownership. However, the Petitioners' flawed argument fails to acknowledge that West Virginia Code § 36B-1-105(b) and West Virginia Code § 36B-1-106 require different treatment because the two code sections pertain to two distinct subjects. Specifically, West Virginia Code § 36B-1-106 deals with the applicability of local

ordinances, regulations, and building codes. It does not impose any restrictions on tax laws. Meanwhile, West Virginia Code § 36B-1-105 specifically addresses titles and taxation. As the more specific statute, West Virginia Code § 36B-1-105's prohibition on separately taxing common elements prevails. The remainder of the Petitioners' third assignment of error fails as well as it is merely a reiteration of its first two flawed assignments of error.

The property tax ruling under challenge and the classification of the Petitioners' properties as Class III commercial property are entirely consistent with all applicable legal authority. For this reason, the final decision of the Circuit Court affirming the property tax ruling should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and record, and oral argument would not significantly aid the decisional process. If the Court determines that oral argument is necessary, then argument under W. Va. R. App. R. 19 is appropriate because the appeal involves assignments of error in the application of settled law. This appeal is further appropriate for disposition by memorandum decision under W. Va. R. App. R. 21.

The Petitioners' request for W. Va. R. App. R. 20 oral argument on the partial basis that the outcome will "affect hundreds of thousands" of West Virginia taxpayers has no valid basis. Petr's Brief at 5. Rather, the current appeal involves an issue discreet to PTR 21-16 – the proper tax classification of properties that fall within the ambit of the UCIOA and have both residential and common interest commercial components. PTR 21-16 doesn't even broadly implicate the unit owners at Silver Creek. As the Petitioners state in their opening brief, only approximately 10 percent of Silver Creek's units are owner-occupied. Petrs's Brief at 2. For perspective, the amount in controversy equates to roughly $2,000 collectively for the current taxpayers. JA-000392. The Petitioners' constitutional arguments likewise lack merit and can be easily disposed of.

STANDARD OF REVIEW

The assignments of error involve only questions of law, so the Court reviews them all *de novo*. *In re H.W.*, 247 W. Va. 109, 115, 875 S.E.2d 247, 253 (2022). However, "[a]n inquiring court—even a court empowered to conduct *de novo* review—must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." *Murray Energy Corp. v. Steager*, 241 W. Va. 629, 636, 827 S.E.2d 417, 424 (2019) (citing to *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 466 S.E.2d 424 (1995)).

ARGUMENT

All applicable legal authority substantiates the final decision entered by the Circuit Court of Pocahontas County, which affirmed PTR 21-16 and granted summary judgment in favor of the Tax Commissioner and the Assessor. Despite the Petitioners' efforts to cast this appeal as complex, the fundamental question before the Court is uncomplicated. Like all property tax valuation challenges, this matter hinges on what purpose the subject property is used for. In this matter, the question is whether the common elements of a condominium used for commercial purposes are Class III property for *ad valorem* taxation purposes and whether common elements of the condominium can be separately assessed and taxed. The Circuit Court correctly concluded that the commercial use of the condominium's common elements requires that all condominium units that share an ownership interest in the common elements be treated as Class III commercial property.

I. The Petitioners' First Assignment of Error Lacks Merit Because the Property Tax Ruling Issued By the State Tax Commissioner and the Taxation of the Individual Owners' Properties Are Consistent with Equal Protection Principles.

PTR 21-16 and the classifications at issue are entirely consistent with the Equal and Uniform Clause contained in the West Virginia Constitution, which 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. Const. art. X, § 1. There is no question that the keystone of the West Virginia property tax system is contained in Article X, Section 1 of the West Virginia Constitution. However, a state may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable. *Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County*, 488 U.S. 336, 109 S.Ct. 633 (1989). "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law." *Id.* at 344 (citing to *Brown–Forman Co. v. Kentucky*, 217 U.S. 563, 20 S.Ct. 578 (1910)). In this matter, the classifications of the Petitioners' properties were reasonable and based upon the unique characteristic of being regulated by the UCIOA and sharing interest in common elements that are commercial in nature.

A. The Individual Owners' Properties are Properly Classified as Class III Commercial Property.

The Petitioners' argument attempts to divert from the fact that their properties were correctly classified consistent with West Virginia statutory law. The Petitioners request that their property be valued as Class II residential property as opposed to Class III commercial property, but such tax treatment runs contrary to West Virginia's classification statute and the UCIOA. PTR 21-16 properly concluded that - because the common elements of the property are used for commercial purposes - all units sharing an ownership interest in the common areas must be treated as commercial property for *ad valorem* tax purposes. Simply put, if the property is *not* being used exclusively for residential purposes according to the applicable statutes, then the subject properties do not qualify for Class II residential classification. Petitioners' arguments to the contrary are based on an inaccurate reading of the UCIOA, which is fully addressed below in Section II.

West Virginia's property tax classifications are codified at West Virginia Code § 11-8-5. The West Virginia Code classifies Class II as "[a]ll property owned, used and occupied by the owner *exclusively for residential purposes*[.]" W. Va. Code § 11-8-5 (emphasis added). Meanwhile, Class III is comprised of "[a]ll real and personal property situated outside of municipalities, exclusive of Classes I and II[.]"[2]

Proper tax classification is important because the tax rate on a Class II parcel is half the rate as a Class III parcel. The West Virginia Constitution expressly permits the taxation of "property owned, used and occupied by the owner thereof exclusively for residential purposes" at a lower rate than other property not used exclusively for residential or agricultural purposes and is instead used, in whole or in part, for commercial purposes. W. Va. Const. art. X, § 1.

For residential property to qualify for Class II, it must be "owned, used, and occupied by the owner exclusively for residential purposes." W. Va. Code § 11-8-5. The "use" and "occupancy" of the property must be by the title owner. W. Va. Code § 11-4-3. The exclusive residential use must be "primary and immediate, not secondary or remote." *Central Realty Company, et al. v. Martin*, 126 W. Va. 915, 30 S.E.2d 720, 724 (1944). As it pertains to "[u]sed and occupied by the owner thereof exclusively for residential purpose," West Virginia Code § 11-4-3(a)(2) provides that this "means actual habitation by the owner or the owner's spouse of all or a portion of a parcel of real property as a place of abode *to the exclusion of any commercial use*…" W. Va. Code § 11-4-3(a)(2) (emphasis added).

[2] The subject properties likewise cannot be classified as Class I, which includes "[a]ll tangible personal property employed exclusively in agriculture, including horticulture and grazing; [a]ll products of agriculture (including livestock) while owned by the producer; [and] [a]ll notes, bonds, bills and accounts receivable, stocks and any other intangible personal property[.]" W. Va. Code § 11-8-5.

Therefore, to qualify for the preferential tax treatment afforded to Class II property, two requirements must be met. First, the property must be used and occupied by the owner. Second, the use of the property must be exclusively for residential purposes. Consistent with West Virginia Code § 11-4-3(a)(2), the conduct of a business on the property is a commercial activity that would disqualify the property from Class II treatment.

In this matter, the question becomes whether the Petitioners are using their real property exclusively for residential purposes as opposed to a commercial purpose. The undisputable facts in this matter show that the Petitioners have not used their property exclusively for residential purposes. Petr's Brief at 1-2. Rather, the Petitioners' property indisputably incorporates common elements that are commercial in nature.

In addition to the uncontested facts showing that the Petitioners' properties include commercial elements, the prior litigation history related to Silver Creek supports the conclusion that the subject properties are not used exclusively for residential purposes. The Petitioners wholly ignored this litigation history in their brief to this Court. They further failed to acknowledge that the very tax classifications they now dispute were borne out of their own successful pursuit of prior litigation. Plainly stated, they got what they wanted in prior litigation. But now, unsatisfied with the tax consequences of the relief they obtained, the Petitioners are attempting to advance a flawed equal protection claim that lacks any basis in law.

The litigation history is certainly relevant to the current dispute. Specifically, prior to 2014, the common commercial elements at issue were not part of the Lodge at the Silver Creek complex. JA-000474 to 00475. Although these elements were located within the Silver Creek Lodge building, they were expressly carved out of the condominium complex and owned by Snowshoe Mountain. *Id.* However, in 2014, the Lodge at Silver Creek sued Snowshoe Mountain over the

admittedly commercial areas within the condominium complex. *Id*. As a result of that litigation, Snowshoe Mountain conveyed the commercial areas to Silver Creek. *Id.*

After that litigation was resolved, a former Pocahontas County Assessor classified the commercial areas as a separate unit and taxed the commercial areas for *ad valorem* purposes to the Association for the 2017 tax year. By classifying the commercial space as a separate unit, the use of the commercial space for the operation of a bar and other retail establishments did not affect the classification of the current individual owners as Class II property. Specifically, none of these individual owners were taxed as commercial property prior to the 2018 tax year.

However, for the 2018 tax year, Silver Creek and the Assessor jointly requested a property tax ruling from the Tax Commissioner regarding whether the commercial space should be taxed as an individual unit to the Association or as common areas and added to the valuation of the individual condominiums, which would increase the taxes owed for the individual condominiums. The Pocahontas County Circuit Court ultimately ruled that the commercial space should be viewed as a part of the common areas, which are by law an inseparable part of the individual condominiums. JA-000472 to 000482.

Following the litigation, the Assessor classified the eleven condominiums currently before the Court as commercial properties for *ad valorem* tax purposes. Because these properties have an undivided interest in the property housing a bar and retail establishments, JA-000382 to 000386, these properties are not used *exclusively for residential purposes* and cannot be classified as Class II property under West Virginia law. *See* W. Va. Code § 11-8-5.

Despite their properties not being used exclusively for residential purposes, the Petitioners assert that they are nonetheless entitled to Class II classification for a portion of their property and should be afforded a split assessment. However, as detailed below in Section II, this relief is wholly

unavailable due to West Virginia statutory law. In sum, all applicable legal authority supports the classification of the individual property owners' parcels as Class III commercial property.

B. The Valuations of the Petitioners' Properties Are Consistent with Equal Protection Principles and the Petitioners' Efforts to Apply a Strict Scrutiny Standard Should be Rejected.

The Petitioners incorrectly assert that, due to the classification of their properties as Class III commercial property, they have been denied equal protection. They specifically allege that by being disallowed a split tax ticket, they are treated differently. The unavailability of a split tax ticket to the Petitioners is fully addressed below in Section II. For purposes of the Equal Protection assignment of error, the Petitioners have failed to show disparate treatment with any similarly-situated property owners – namely, any other properties that fall within the ambit of the UCIOA which have both residential and commercial elements. What's more is the Petitioners urge this Court to apply a strict scrutiny standard when there is no legal basis to conclude that condominium ownership is a suspect classification.

Rational Basis is the Appropriate Standard. The Petitioners' argument that this Court must analyze the classifications under the strict scrutiny standard lacks any legal foundation. Strict scrutiny is the most rigorous form of judicial review and is typically utilized when it is alleged that a fundamental right has been infringed upon or a law discriminates based on suspect criteria. "[S]uspect criteria include race, national origin, and alienage." *Appalachian Power Co.*, 195 W. Va. at 594, 466 S.E.2d at 445. In this matter, the Petitioners as condominium unit owners are not a suspect class. And the Petitioners have cited to no West Virginia authority which determines that the taxation of property or condominium ownership constitutes a fundamental right.

Contrary to the Petitioners' argument, this case implicates rational basis review, "which applies to all classifications not affecting a fundamental right or some suspect or quasi-suspect

criterion." *Id.* It is the typical standard for "an equal protection challenge . . . involving economic rights," *Murray Energy,* 241 W. Va. at 643, 827 S.E.2d at 431, and even where those challenges are brought under the equal and uniform language of Article X, section 1 of the West Virginia Constitution. *E.g.*, *Steager v. Consol Energy, Inc.*, 242 W. Va. 209, 220-21, 832 S.E.2d 135, 146-47 (2019). Rational basis is the lowest level of scrutiny. Under this standard, a governmental classification will be sustained so long as it "is rationally related to a legitimate state interest." *Appalachian Power Co*. 195 W. Va. at 594, 466 S.E.2d at 445 (internal citations omitted); *Murray Energy*, 241 W. Va. at 643, 827 S.E.2d at 431 (internal citations omitted). The West Virginia Supreme Court of Appeals had held that "[a] state by its legislature may make reasonable classifications in enacting statutes provided the classifications are based on some real and substantial relation to the objects sought to be accomplished by the legislation, and a person who assails any such classification has the burden of showing that it is essentially arbitrary and unreasonable." *Appalachian Power Co.* 195 W. Va. at 579, 466 S.E.2d at 430 (internal citations omitted). Further underscoring the "considerable caution" warranted in utilizing equality provisions to scrutinize challenges to tax legislation, the Supreme Court of Appeals opined that courts "should venture into [the] thicket" of the State's equality provisions "only with utmost trepidation and only for a very good reason." *Id.* at 596, 466 S.E.2d at 447. There is no good reason here.

Federal authority additionally supports a rational basis standard. In a challenge to the United States Equal Protection provision, the Supreme Court of the United States has held that "unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest."

Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S.Ct. 2326, 2332 (1992) (*quoting McGowan v. Maryland*, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105 (1961)). Rather, a rational basis standard applies when tax statutes are subject to review. As the *Nordlinger* Court explained "[t]his standard is especially deferential in the context of classifications made by complex tax laws" and provides States "large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Id.* at 11 (*quoting Williams v. Vermont*, 472 U.S. 14, 22, 105 S.Ct. 2465, 2471 (1985)) (internal quotations omitted). Plainly stated, the Petitioners have the standard all wrong.

The Classifications Survive Rational Basis Scrutiny. The distinction between properties that are regulated and not regulated by the UCIOA is reasonable and furthers the legitimate state interest of applying laws in harmony. If accepted, the Petitioners' argument would render meaningless the provision of the UCIOA which provides that "[i]n a condominium or planned community…[i]f there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate." W. Va. Code § 36B-1-105. That section goes on to state that "each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no development rights." *Id.*

It is well settled that "the Legislature will not enact a meaningless or useless statue." Syl. pt. 4, *State of West Virginia ex rel. Hardesty v. Aracoma-Chief Logan No. 4523*, 147 W. Va. 645, 645, 129 S.E.2d 921, 922 (1963). The Supreme Court of Appeals of West Virginia has additionally held that "'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 312, 465 S.E.2d 399, 414 (1995). The Legislature's adoption of the UCIOA includes the express

provision that no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no development rights. The relief requested by the Petitioners would render this statutory language meaningless.

In a similar vein, the Petitioners' argument ignores that the requirement of equality and uniformity contained in West Virginia's Constitution is modified by the phrase "as directed by law." W. Va. Const. art. X, § 1. The West Virginia Constitution pointedly leaves to the Legislature wide latitude in directing how to arrive at the value of property subject to tax. Nonetheless, the Petitioners urge this Court to impose a classification that is at conflict with West Virginia statutory law.

The Petitioners' equal protection argument further fails because there has been no allegation that the classification imposed upon their properties differs from other similarly situated taxpayers. Rather, the Petitioners attempt to compare themselves to other property owners that are not regulated by the UCIOA. These apples and oranges comparisons cannot substantiate an equal protection violation.

The Petitioners Rely Upon Distinguishable Legal Authority. To make their flawed argument, the Petitioners rely on distinguishable legal authority. Specifically, the Petitioners' reliance on *In Re U.S. Steel Corp.,* 165 W. Va. 373, 268 S.E.2d 128 (1980*),* and *Town of Burnsville v. Cline,* 188 W. Va. 510, 425 S.E.2d 186 (1992), to support an equal protection violation are misplaced.

In *U.S. Steel,* the McDowell County Assessor refused to follow the procedures set forth by law to value U.S. Steel's coal producing properties. *U.S. Steel*, 165 W. Va. at 375-376, 268 S.E.2d at 130. Specifically, the McDowell County Assessor refused to accept the values as determined by

the State Tax Division for the natural resource property at issue. A deviation of the sort in *U.S. Steel* has not occurred in this matter.

Meanwhile in *Town of Burnsville,* taxpayers complained that similarly situated taxpayers were paying no Business and Occupation tax while the tax was being selectively enforced against others. *Town of Burnsville,* 188 W. Va. at 513, 425 S.E.2d at 189. Selective enforcement of the variety in *Town of Burnsville* does not exist in this matter.

The Petitioners additionally rely upon *In re Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649 (1959), which is factually distinguishable. In that case, the West Virginia Supreme Court of Appeals determined that the Kanawha County Assessor improperly fixed the assessed value of bank stock at 100 percent of its appraised value while other species of personal property in Kanawha County was assessed at a lower rate. There is no evidence before the Court that other property regulated by the UCIOA and sharing interests in common elements has been classified differently. Therefore, there is no differential treatment between taxpayers as was present in *In re Kanawha Valley Bank.*

Simply put, equal protection guarantees do not intrude upon the State's flexibility if similarly situated property is treated the same. In this matter, the Petitioners' property is unique based upon it being regulated by the UCIOA and sharing interest in common elements that are commercial in nature. There has been no allegation that the same principles adopted in PTR 21-16 have not been uniformly applied to other common interest owners with these same circumstances. Plainly stated, PTR 21-16 is consistent with a reasonable system of taxation that harmonizes all applicable legal authority.

II. The Petitioners' Second Assignment of Error Fails Because the Circuit Court Correctly Concluded that the Uniform Common Interest Ownership Act Prohibits the Petitioners' Requested Tax Treatment.

The Circuit Court properly found that, under the UCIOA, owners of a condominium unit cannot receive a split tax ticket when common elements are present and their use is not exclusively residential in nature.[3] For this reason and the reasons explained below, this Court should uphold the ruling of the lower court. PTR 21-16 properly concluded that, because the common elements of the property are used for commercial purposes, all units sharing an ownership interest in the common areas must be treated as commercial property for *ad valorem* tax purposes. As detailed above, if the property is not being used exclusively for residential purposes according to the applicable statutes, then Petitioners' units do not qualify for the preferential valuation. *See* W. Va. Code § 11-8-5.

The undisputable facts in this matter show that the Petitioners have not used their property exclusively for residential purposes. Rather, the Petitioners' property incorporates common elements that are commercial in nature. The Locker Room, a sports bar/restaurant located within the development, has annual revenues in excess of half a million dollars. JA-000383. It is open to the public and not just to unit owners at Silver Creek. JA-000716. This activity is clearly commercial in nature. Thus, the Petitioners' property cannot be classified as Class II residential.

The Petitioners rely greatly on West Virginia Code § 11-4-18 as a basis for receiving a split ticket in this case. But that reliance is not well placed. West Virginia Code § 11-4-18 states:

> In the manner prescribed in section seventeen of this article, the county court may, upon the application of the owner, divide, consolidate, or both, as the case may be, any tracts or lots for the purpose of entry upon the land books of the county. This shall apply

[3] There is no dispute that Silver Creek is a common interest community as defined by the UCIOA in West Virginia Code § 36B-1-101 *et seq.* JA-000012.

> solely to the segregation of real property according to the classification contemplated by the "Tax Limitation Amendment." No such division shall be made unless there is in actual fact a distinction in use, and unless the division requested is one which the owner would make for the separate conveyance of portions of the tract or lot, but in no case shall any single structure be divided and only contiguous tracts or lots shall be consolidated.

W. Va. Code § 11-4-18.

The Petitioners also rely on West Virginia Code § 11-4-3(a)(2) which defines "used and occupied by the owner thereof exclusively for residential purposes" as the "actual habitation by the owner or the owner's spouse, or a qualified resident of all *or a portion of* a parcel of real property as a place of abode to the exclusion of any commercial use. . ." W. Va. Code § 11-4-3(a)(2) (emphasis added). The Petitioners reason that the emphasized language is properly read to allow the portion of the Petitioners' properties used solely for residential purposes to be split off from the portion of the property used for commercial purposes. This would, therefore, allow them to utilize the preferred Class II designation for a majority of their property.

In cases where property is used for multiple purposes, the law does allow for split classification of the property. Implicit in West Virginia Code § 11-4-2 is the Assessor's authority to split the classification of real property for *ad valorem* tax purposes by separating the portion that is owned, used, and occupied by the owner exclusively for residential purposes from any other use or occupancy of the property.

But West Virginia Code § 11-4-18 cannot be taken in a vacuum. Specifically, West Virginia Code § 11-4-18 must be read and construed in *pari materia* with the language in the UCIOA and West Virginia Code § 36B-1-105(b). While West Virginia Code § 11-4-18 deals with the general topic of real estate assessment, West Virginia Code § 36B-1-105(b) deals more specifically with separate titles and taxation involving condominiums or planned communities. And the general rule

of statutory construction requires that "a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." *Miller v. WesBanco Bank Inc.*, 245 W. Va. 363, 859 S.E.2d 306 (2021), quoting Syl. Pt.1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984). Similarly, West Virginia Code § 36B-1-105(b) controls as the more recent "expression of the legislative will." *Wiley v. Toppings*, 210 W. Va. 173, 175, 556 S.E.2d 818, 820 (2001). West Virginia Code § 36B-1-105 states:

> (a) In a cooperative, unless the declaration provides that a unit owner's interest in a unit and its allocated interests is real estate for all purposes, that interest is personal property. (That interest is subject to the provisions of all homestead exemptions from taxation provided by law, even if it is personal property.)
>
> (b) In a condominium or planned community:
>
> (1) If there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.
>
> (2) If there is any unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no development rights.
>
> (c) Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes.
>
> (d) If there is no unit owner other than a declarant, the real estate comprising the common interest community may be taxed and assessed in any manner provided by law.

W. Va. Code § 36B-1-105.

Pursuant to the West Virginia Code, "[d]eclarant" means "any person or group of persons acting in concert who: (i) As part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of; or (ii) reserves or succeeds to any special declarant

right." No evidence was introduced below showing that either of the above elements were met and, as such, the Circuit Court properly found that "[i]t is undisputed that no declarant retains development rights regarding the portion of the Lodge at Silver Creek occupied by The Locker Room." JA-000711.

The UCIOA defines "common elements" as follows:

> "Common elements" means: (i) In a condominium or cooperative, all portions of the common interest community other than the units; and (ii) in a planned community, any real estate within a planned community owned or leased by the association, other than a unit.

W. Va. Code §36B-1-103(4).

West Virginia Code § 11-4-2 allows the Assessor to split the tax ticket between owner-occupied residential property and the portion, in square feet, of the structure that is used for non-residential purposes. However, that option is expressly prohibited for condominium property under the UCIOA. The West Virginia Code unambiguously provides that "[i]n a condominium or planned community…[i]f there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate." W. Va. Code § 36B-1-105. That section goes on to state that "each unit must be separately taxed and assessed, and *no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no development rights.*" *Id.* (emphasis added).

West Virginia Code §§ 36B-1-105(b)(1) and (2) act so that, specifically for condominiums, the unit and their interest in the common elements make up one parcel or tract for tax purposes and that only a declarant that reserved development rights could seek a separate tax or assessment, or a split ticket. Again, there was no evidence that any declarant still exists let alone of one that had retained development rights as the statute requires. The more specific statute must win out

over the general statute. Here, that means that for condominiums, no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no developmental rights.

Even if, as the Petitioners claim, West Virginia Code § 11-4-18 is the proper statute that controls assessing condominiums separate from their common elements, the Petitioners still do not have enough to prevail here. Despite the Petitioners' reliance upon West Virginia Code § 11-4-18, it is inapplicable in the instant case for the reasons stated in PTR 21-16. This statute does not contemplate application of split tickets to a common interest ownership situation. What West Virginia Code § 11-4-18 does provide is quite different from what the Petitioners urge this Court to adopt. Specifically, West Virginia Code § 11-4-18 authorizes a division of a single tract into two separate tracts for tax purposes if two different purposes are served on clearly defined portions of the tract. For example, under this statute, a taxpayer could divide their property into two separate tracts, which would then be appraised and assessed separately. That could be the tract of land with a personal residence and a separate business. Simply stated, West Virginia Code § 11-4-18 does not itself authorize the splitting of a tax ticket – it merely authorizes the property owner to petition the county commission to divide a single tract into separate tracts.

The Petitioners' reliance on West Virginia Code § 11-4-18 is fatal to the Petitioners' argument in multiple regards. At the outset, the record does not reflect that the Petitioners have ever petitioned the county commission to divide their property. Secondly, the Petitioners would be unable to succeed on such a petition as the UCIOA expressly prohibits such a division.[4]

[4] The Petitioners also challenge PTR 21-16 to the extent that it states that "it is likewise questionable whether section 11-4-18 could apply" because that section provides that "in no case shall any single structure be divided." JA-000397. The parties certainly disagree over that portion of West Virginia Code § 11-4-18. But the circuit court did not weigh in on this issue at all. This Court need not either. This portion of PTR 21-16 was neither dispositive nor conclusive of the

While West Virginia Code § 11-4-18 is not the appropriate legal authority when seeking a split ticket, the splitting of a tax ticket is authorized under West Virginia Code § 11-4-2. Specifically, in cases where property is used for multiple purposes, the law does allow for split classification of the property. The Assessor does have authority to split the classification of real property for *ad valorem* tax purposes by separating the portion that is owned, used, and occupied by the owner exclusively for residential purposes from any other use or occupancy of the property.[5] However, the clear language of the UCIOA expressly prohibits this treatment for condominium property.

When analyzing the split ticket issue, it warrants emphasis that Silver Creek itself sought, and received, a judicial ruling that the commercial spaces in question were, in fact, deemed "common elements" under the UCIOA. The Assessor originally treated the owner's association as the owner of the properties in question and generated separate tax bills. The owner's association protested that they were, in fact, common elements, and obtained a ruling to that effect from the Circuit Court. Now unhappy with the ramifications of the very relief they previously sought, they ask for something different, which cannot be done consistent with prevailing legal authority.

It is additionally notable that the Petitioners could restructure their ownership to obtain the favorable tax treatment they seek. The Association could, under West Virginia Code § 36B-3-112, convey portions of the common elements if approved by a minimum of 80 percent of unit owners.

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ultimate ruling. Rather, PTR 21-16 is firmly rooted in the UCIOA's taxing prohibitions set forth in West Virginia Code § 36B-1-105(b).

[5] West Virginia Code § 11-4-2 provides that the "Tax Commissioner shall prescribe a form of landbook and the information and itemization to be entered therein, which shall include separate entries of: (1) All real property of whatever portion thereof in square feet that is owned, used and occupied by the owner exclusively for residential purposes, including mobile homes, permanently affixed to the land and owned by the owner of the land…"

The commercial common areas could then be titled to the Association or a third party and the Association or a third party alone would get the tax bill for the commercial common elements. However, the Petitioners do not seem inclined to exercise that option and instead want this Court to render a decision that runs counter to West Virginia statutory law.

The Petitioners also make arguments related to the unfair treatment/double standard that allegedly exists between condominium unit owners and owners who own property in fee. However, there is no double standard here. Different types of property and different types of ownership are treated differently for tax purposes. Is there a double standard because the Petitioners cannot claim their condominium units under the preferred Class I agricultural status? Is there a double standard where a person who rents a townhome cannot deduct mortgage interest when their shared wall neighbor who owns the townhome can? Clearly not. It is axiomatic that different types of property can and are taxed differently. The correct comparison here isn't single family fee owners versus condominium unit owners. The proper comparison is the Silver Creek condominium unit owners versus other West Virginia condominium unit owners. If any condominium unit owner has common elements that are commercial in nature, they are not eligible for a split ticket assessment where their residential portion is split off from the commercial elements portion.

This Court should not be persuaded by the Petitioners' reliance upon non-binding and distinguishable legal authorities. The Petitioners devote a significant portion of their brief extolling the virtues of a Colorado case that deals with Colorado laws. The Petitioners' reliance upon a non-binding and factually distinguishable Colorado case in which a condominium association filed an action challenging the county's methodology for assessing a condominium's nonresidential common elements is of no moment. *See Manor Vail Condo. Ass'n v. Bd. of Equalization of Cnty.*

of Eagle, 956 P.2d 654 (Colo. App. 1998). Colorado's tax code specifically provides that "[c]ommon property or common elements within a common interest community as defined in the 'Colorado Common Interest Ownership Act', article 33.3 of title 38, C.R.S., shall be appraised and valued pursuant to the provisions of section 38-33.3-105, C.R.S." Co. State Code § 39-1-103(10).

Following the passage of that statute, the Colorado State Property Tax Administrator promulgated new procedures to account for and to allocate the value of common elements within a common interest community. These procedures provided for an apportionment of value to the units within the common interest community. Simply put, West Virginia does not have this mechanism for valuation and assessment either by statute or by legislative rule. Despite the Petitioners' attempt to create a mechanism lacking a legal basis, there is no difference between a separate assessment and an apportioned assessment. As repeatedly discussed by the Tax Division, the UCIOA expressly prohibits separate assessments. Stated another way, the apportionment of value methodology utilized by Colorado could only be implemented in West Virginia through a legislative change.

The Petitioners also cite several Property Tax Rulings ("PTRs") that purportedly support their cause. They cite PTR 21-02 (split ticket granted for a residence and separate business) (Supp. JA-000718 to 000721); PTR 16-50 (allowing a split ticket to only the portion not used exclusively as owner's residence) (Supp. JA-000722 to 000725); PTR 17-13 (allowing for split classification of the rental portion of a property) (Supp. JA-000726 to 000729); PTR 16-50 (allowing for a split ticket for property containing both a commercial structure and owner used and occupied residence) (Supp. JA-000722 to 000725); and PTR 14-11 (allowing for actual land used by a cell phone tower to be classified as Class III instead of the standard one acre) (Supp. JA-000730-000733). However, PTRs are very limited and fact specific and as such, their applicability to other cases is very narrow.

Most importantly for the current purposes, none of the examples listed by the Petitioners involve a condominium, which would then make them subject to the UCIOA. The lower court properly concluded that it was "not for this court to rewrite the statutory requirements for obtaining a separate assessment and separate tax treatment for a portion of a tract of real property." JA-000714.

In sum, the Petitioners' Second Assignment of Error fails because it is premised upon an inaccurate reading of the UCIOA, non-binding legal authority, and factually distinguishable Property Tax Rulings.

III. The Third Assignment of Error Asserted by the Petitioners Fails Because the Circuit Court Properly Concluded the Petitioners' Properties Were Treated Uniquely Because They Fall Within the Ambit of the UCIOA.

The Petitioners' third assignment of error is largely a reiteration of its first and second assignments of error. But in addition to failing for the reasons detailed in Sections I and II, this assignment of error lacks merit because the Petitioners premise it upon another inaccurate reading of the UCIOA. Citing to West Virginia Code § 36B-1-105(b)(1) and West Virginia Code § 36B-1-106(b), the Petitioners claim that, for the purposes of taxation and assessment, Chapter 36B requires that a parcel of real estate in the fee form of ownership must be treated the same as real estate in the common interest form of ownership. Petr's Br. at 24. However, the Petitioners' reliance on those two different code sections is flawed. West Virginia Code § 36B-1-105(b)(1) and West Virginia Code § 36B-1-106(b), when read properly, do require different treatment because the two code sections pertain to two very different subjects.

The Petitioners' use West Virginia Code § 36B-1-106(b) to claim that the Tax Commissioner cannot "impose any requirement upon a condominium or cooperative which it would not impose upon a physically identical development under a different form of ownership." W. Va. Code § 36B-1-106(b). The fatal flaw in this argument is that this section deals with the

applicability of local ordinances, regulations, and building codes. *Id.* Importantly, West Virginia Code § 36B-1-106(b) does not impose any restrictions on tax laws. Plainly stated, West Virginia Code § 36B-1-106(b) and (c) have no application to tax statutes like West Virginia Code § 11-4-18.

Meanwhile, West Virginia Code § 36B-1-105 is the section of the UCIOA that specifically addresses titles and taxation. West Virginia Code § 36-1-106(b) and (c) must be read together with West Virginia Code § 36B-1-105's prohibition on separately taxing common elements. And the more specific provision prevails. *See e.g Miller*, 245 W Va. at 363, 859 S.E.2d at 306 (internal citations omitted). This is especially true because both sections are part of the same article and were passed at the same time.

The remainder of the Petitioners' third assignment of error fails as well. As thoroughly argued above in Section II, the UCIOA prohibits the relief requested by the Petitioners – namely a split tax assessment. And due to the prohibitions contained in the UCIOA, the classification of the Petitioners' properties as Class III commercial property was consistent with all applicable legal authority because they were not used exclusively for residential purposes. Likewise, the classification was entirely consistent with Equal Protection principles as detailed above in Section I. The Petitioners repeatedly fail to acknowledge that real estate falling within the ambit of the UCIOA is not similarly situated to other forms of ownership. The Petitioners' Third Assignment of Error must be rejected.

CONCLUSION

For the foregoing reasons, the Tax Commissioner respectfully requests that this Court affirm the decision of the Circuit Court of Pocahontas County.

Respectfully submitted,

MATTHEW R. IRBY, in his official capacity as State Tax Commissioner of the State of West Virginia,

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IN THE INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

NO. 23-ICA-372

THE SILVER CREEK ASSOCIATION, INC., A WEST VIRGINIA NON-PROFIT CORPORATION; RUSSELL D. JESSEE AND CINNAMON M. JESSEE; JEFFREY S. BANKS AND DRENNA BANKS; MALCOM J. COOPER AND COLLEEN K. COOPER; DUVAL LEE FUQUA AND DORTHEA A. FUQUA; RAYMOND BRUCE JAMES AND HARRIET HAWKS; LOUIS J. CONSTANZO, DAVID CHRISTOPHER, AND LINDA CHRISTOPHER; WILLIAM C. WHITE, II, WILLIAM TERRINI, AND MARY L. TERRINI; MICHAEL D. CAJOHN AND JENNIFER L. CAJOHN; KEVIN L. BANNING, ALL INDIVIDUALS,

Petitioners,

v.

MATTHEW R. IRBY, IN HIS OFFICIAL CAPACITY AS STATE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA; AND JOHNNY A. PRITT, IN HIS OFFICIAL CAPACITY AS ASSESSOR OF POCAHONTAS COUNTY, WEST VIRGINIA,

Respondents.

On Appeal from the Circuit Court of Pocahontas County, Civil Action No. 2020-P-31

CERTIFICATE OF SERVICE

I, Cassandra L. Means-Moore, do hereby certify that on this 11th day of January 2024, the foregoing Respondent's Brief of the State Tax Commissioner was electronically filed with the Clerk of the Court using the File & Serve Xpress system, which constitutes service on the following:

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