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,
Malcolm 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 R. Terrini and Mary L. Terrini,
Michael D. Cajohn and Jennifer L. Cajohn,
Kevin R. Banning, all individuals,

Petitioners below, 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 below, Respondents.

Appeal from the
Circuit Court of Pocahontas County
(Civil action no. 2020-P-31)

BRIEF OF PETITIONERS

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SECOND ASSIGNMENT OF ERROR

The Pocahontas County Circuit Court erred in concluding that the *Uniform Common Interest Ownership Act* ("UCIOA") prohibits the owner of real estate in the condominium form of ownership from dividing his parcel solely for the purpose of classification under W. Va. Code § 11-4-18 to obtain a "split assessment" and a "split tax ticket."

THIRD ASSIGNMENT OF ERROR

For purposes of W. Va. Code § 11-4-18, the Pocahontas County Circuit Court erred in failing to treat real estate in the condominium form of ownership the same as real estate in the fee form of ownership in violation of W. Va. Code § 36B-1-105(b)(1), W. Va. Code § 36B-1-106(b) and other West Virginia law.

II. STATEMENT OF CASE

The Lodge at Silver Creek on Snowshoe Mountain in Pocahontas County, West Virginia, is a large, integrated condominium building with three wings containing 239 residential units, eight

[1] According to the *Guide for County Assessors State of West Virginia* (State Tax Department Property Tax Division July 2011), "[p]roperty may be divided according to its use for assessment classification purposes. This action is known as a 'county court split.' (*See* W. Va. Code § 11-4-2, 11-4-18 and 11-4-3)." Neither the parties nor the lower court has referred to the concept as a "county court split". For ease of reference, the "split assessment" described in W. Va. Code § 11-4-18 embraces the "split tax ticket" on which it is based and *vice versa*.

commercial units and a core of common areas. Of the Lodge's residential units, approximately 10 percent in 2019 were owner-occupied and classified as Class II in accordance with the Tax Limitation Act because their owners occupied them exclusively as their primary residence. Most of the owners of those Class II parcels of real estate for that year are Petitioners in this case. A small portion of the common areas is used to operate a bar and grill called The Locker Room for the unit owners, their guests and members of the general public.

In 2019, Respondent, the Pocahontas County Assessor, unilaterally re-classified Petitioners' parcels[2] from Class II to Class III without notice, approximately doubling their *ad valorem* tax liabilities. After Petitioners complained, the Assessor sought from Respondent, the State Tax Commissioner, a property tax ruling under W. Va. Code § 11-3-24a and W. Va. Code § 11-3-25. In Property Tax Ruling 21-16 (the "Property Tax Ruling"), the State Tax Commissioner, without Petitioners' participation, framed the issue as follows: "Whether the commercial use of areas consisting of common elements of a condominium requires that all units of the condominium sharing an ownership interest in such common elements be treated as commercial property for *ad valorem* property tax purposes." JA-000035.

The State Tax Commissioner responded in the "affirmative". He claimed that because UCIOA itself prohibits the separate assessment and taxation of the common elements of a condominium, then any commercial use of the Lodge's common areas must be imputed to all of the units irrespective that they are exclusively owner-occupied. The State Tax Commissioner concluded that UCIOA itself requires the Assessor to impute any commercial use of the common elements to each unit in the common interest community irrespective whether the unit is owner-

[2] The majority of residential units in the Lodge are classified as Class III because they are used as long- and short-term leased properties. The Lodge contains eight commercial units that are classified as Class III. None are in dispute in this case.

occupied and concluded the units were "properly classified by the Assessor as Class III for *ad valorem* property tax purposes for the 2021 tax year." JA-000039.

On December 18, 2020, Petitioners appealed the Property Tax Ruling[3] to the Pocahontas County Circuit Court. JA-000011. Petitioners claimed, first, that the commercial use of the common elements was *de minimis* and, thus, insufficient to disqualify the individual Petitioners from claiming Class II for their owner-occupied parcels, and, second, that in every event they were entitled under W. Va. Code § 11-4-18 to have "split assessments" and "split tax tickets" proportionately allocated between Class II and Class III uses of their parcels.

The circuit court denied Petitioners relief in its final order handed down on July 24, 2023, 19 months after Petitioners appealed[4]. JA-000705. The final order is packed with error. The circuit court, at great lengths, denied Petitioners' rights under Article X §§ 1, 1a and 1b of the WEST VIRGINIA CONSTITUTION that Respondents classify and tax parcels of real estate in the condominium form of ownership in the same manner as those in the fee form. The circuit court certainly misapplied UCIOA to this case, concluding without basis that UCIOA precludes the "individual unit owner" from making "a separate conveyance of any portion of the common areas" of a condominium "so as to qualify for a split ticket" under W. Va. Code § 11-4-18. Final Order at ¶ 20 JA-000714.

This appeal is from the July 24, 2023 final order. JA-000705-717. Petitioners ask the Intermediate Court of Appeals to reverse the final order and to remand to the Pocahontas County Circuit Court with instructions to give each of the individual Petitioners the relief that they seek:

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[3] Petitioners included as a petitioner their unit owners association, The Silver Creek Association, Inc., by virtue of the association's authority to "institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community". W. Va. Code § 36B-3-102(4).

[4] The lower court's delay in issuing the Final Order effectively has required Petitioners to incur higher *ad valorem* taxes on their parcels for the tax years 2022 and 2023.

equal treatment under W. Va. Code § 11-4-18 and "split" assessments" and tax tickets for their parcels of real estate.

III. SUMMARY OF ARGUMENT

The lower court agreed with Respondents' claim that UCIOA and W. Va. Code § 11-4-18 prohibit owners of parcels of real estate in the condominium form of ownership from taking advantage of W. Va. Code § 11-4-18 to obtain "split assessments" and "split tax tickets" for their parcels in accordance with W. Va. Code § 11-4-18. *See* Property Tax Ruling. Both Respondents and the lower court are incorrect.

First, in applying W. Va. Code § 11-4-18, Respondents denied Petitioners equal protection of W. VA. CONST. Art. X §§ 1, 1a and 1b. The Tax Limitation Amendment to the West Virginia Constitution and its implementing statutes guaranty that "[n]o one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value". Parcels of real estate in the condominium and fee forms of ownership are of the same species for classification and *ad valorem* taxation purposes. This Court should review the lower court's rulings according to a standard of strict scrutiny.

Second, contrary to the lower court's rulings, UCIOA and W. Va. Code § 11-4-18 contain no provision that prohibits the equal treatment of parcels of real estate in the condominium and fee forms of ownership for purposes of W. Va. Code § 11-4-18. West Virginia Code § 36B-1-105(b)(1) does not "inextricably tie" a unit owner's interest in the common areas to his unit that would prevent him from obtaining a "split assessment" and a "split tax ticket" in accordance with W. Va. Code § 11-4-18. A unit owner in the condominium form of ownership of real property, in fact, is able to make for the separate conveyance of any portion of the condominium devoted to commercial use.

Third, the West Virginia Legislature intended, and W. Va. Code § 36B-1-105(b)(1), W. Va. Code § 36B-1-106(b) and other law require, that parcels of real estate in the condominium and fee forms of ownership be treated the same for classification, assessment and taxation purposes.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request that this Court grant the parties the opportunity to give oral argument under W. Va. R. App. P. 20(a) because the assignments of error and the issues of law on which they are based are of first impression in West Virginia. This case involves issues of law of fundamental public importance because the classification and taxation of parcels of real estate under UCIOA and W. Va. Code § 11-4 affect hundreds of thousands of West Virginia taxpayers; this Court's failure to reverse the incorrect rulings of the Pocahontas County Circuit Court, unless the Supreme Court of Appeals reverses, likely will lead to adverse tax effects on those taxpayers. This case also implicates W. VA. CONST. Article X §§ 1, 1a and 1b because Respondents' actions violate Petitioners' rights to be taxed equally with other taxpayers similarly situated.

V. STANDARD OF REVIEW

The facts are undisputed. Therefore, the Circuit Court's entry of summary judgment in favor of Respondents is reviewed *de novo*. *Penn Va. Operating Co., LLC v. Yokum*, 242 W. Va. 116 (citing *Grant Thornton v. Kutak Rock*, 228 W.Va. 226, 233, 719 S.E.2d 394, 401 (2011) ("Upon appeal, the entry of a summary judgment is reviewed by this Court *de novo*.") *Penn Va. Operating Co., LLC v. Yokum*, 242 W. Va. 116, 120 (2019).

VI. ARGUMENT

A. STATEMENT OF FACTS

Petitioners owned, occupied and used their residential units[5] in the Lodge exclusively for residential purposes for the applicable assessment, classification and tax year of 2021 based on the assessment date of July 1, 2020. JA-000033-35. The Lodge's amenities include a swimming pool and an exercise facility. The Association leases a small portion of the common area to its wholly owned subsidiary, Silver Creek Enterprises, LLC, which operates The Locker Room as a bar and grill for the unit owners, their guests and the general public. JA-000290.

Former Pocahontas County Assessor Tom Lane re-classified Petitioners' parcels of real estate for 2019 from Class II to Class III because of The Locker Room's commercial use. The Assessor claimed that The Locker Room's commercial use rendered Petitioners' parcels of real estate ineligible for Class II classification. The Assessor without notice to Petitioners entered Petitioners' parcels of real estate on the 2019 Land Book as Class III properties. JA-000013-16.

Petitioners asked the Assessor to restore the classifications to Class II. He refused. Petitioners applied to the Pocahontas County Commission for exoneration to correct the entries from Class III to Class II. The Pocahontas County Commission refused to restore Petitioners' parcels of real estate to Class II. The Assessor then asked the State Tax Commissioner for a property tax ruling under W. Va. Code § 11-3-24a and W. Va. Code § 11-3-25. JA-000011-29.

The State Tax Commissioner issued the Property Tax Ruling on November 16, 2020. The State Tax Commissioner explained that the Assessor determined that "because the [Uniform Common Interest Ownership Act] prohibits the separate assessment or taxation of the common

[5] Properly speaking, UCIOA defines a "unit" in the condominium form of ownership together with its undivided allocated interest in the "common elements" or "common areas" as a "parcel of real estate" "for all purposes." W. Va. Code § 36-1-105(b).

elements of a common interest ownership community, any commercial use of those common elements would require that each of the units sharing an ownership interest in them be treated as commercial property". JA-000038-39. The State Tax Commissioner framed the "issues" for his analysis and ruling: "Whether the commercial use of areas consisting of common elements of a condominium sharing an ownership interest in such common elements be treated as commercial property for *ad valorem* tax purposes. JA-000034. The State Tax Commissioner ruled in the "affirmative," concluding that

> the law prohibits the separate assessment and taxation of the common elements of a condominium created under the West Virginia Uniform Common Interest Ownership Act; that the commercial use of such elements must therefore be imputed to each unit in the common interest community; accordingly, 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.

JA-00038-39.

The State Tax Commissioner concluded 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." JA-000039.

B. FIRST ASSIGNMENT OF ERROR

The Pocahontas County Circuit Court denied Petitioners equal protection of W. VA. CONST. ART. X §§ 1, 1a and 1b by affirming Respondents' refusing Petitioners the ability to segregate their parcels of real estate in the condominium form of ownership under W. Va. Code § 11-4-18 to obtain "split assessments" and "split tax tickets" in the same manner as owners of parcels in the fee form.

The lower court in ¶¶ 13 through 26 (JA-711-716) of the Final Order extensively discusses and then purports to apply the "[d]ifferent levels of judicial scrutiny . . . used in analyzing equal protection challenges to legislation, based on the classifications and interests involved . . ." JA-

000715 at ¶ 24. The lower court states that "[c]ondominium ownership is clearly not a suspect classification under equal protection jurisprudence . . ." *Id.* at ¶ 25. Petitioners did not and do not challenge the legislative acts, that is, both W. Va. Code § 11-4-18 and UCIOA, in this case as unconstitutional.

How the lower court formed this understanding is baffling. The lower court's lengthy analysis has no bearing on the central issue: whether Respondents are correctly enforcing the text of the applicable laws to Petitioners who hold their parcels of real estate in the condominium form of ownership. Petitioners are challenging Respondents' discriminatory enforcement of neutral laws. As Petitioners argued below, Respondents have unlawfully and unconstitutionally enforced laws in a manner that improperly subjects Petitioners to higher taxation, an outcome that W. VA. CONST. Article X §§ 1, 1a and 1b forbids. *See Petitioners' Supplemental Memorandum of Law in Support of their Motion for Summary Judgment* at JA-000673-688[6].

Just as owners of the same species of real estate in the fee form of ownership are, Petitioners as owners of real estate in the condominium form of ownership are entitled to rights and protections expressed in W. VA. CONST. Article X §§ 1, 1a and 1b:

> Subject to the exceptions in this section contained, **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. **No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value** . . .

(emphasis supplied).

[6] Petitioners encourage the Court to pay special attention to Petitioners' *Supplemental Supplemental Memorandum of Law in Support of their Motion for Summary Judgment* (JA-000673-688).

"Section 1, Article X, of the Constitution of this State is clear and unambiguous and prohibits the taxing of any one species of property higher than any other species of equal value." Syl. Pt. 1, *In re Kanawha Valley Bank*, 144 W. Va. 346, 347, 109 S.E.2d 649, 651 (1959).

Petitioners do not claim that W. Va. Code § 11-4-18 and UCIOA are unconstitutional; Petitioners claim that Respondents' enforcement of the applicable laws is unconstitutional. Respondents and the lower court have taken actions that results in the taxing of Petitioners' parcels of real estate higher than "any other species of equal value" merely because Petitioners hold the real in the condominium form of ownership. Respondents incorrectly claim that W. Va. Code § 11-4-18 and UCIOA require unequal treatment. Respondents' claims are based on a convoluted and perverse understanding of those statutes. "Where there is intentional discrimination against a taxpayer by knowingly applying a different formula to the computation of its taxes from that generally used for all other taxpayers in similar circumstances, such discrimination cannot be excused as a sporadic deviation and the aggrieved taxpayer is entitled to have its taxes computed in the same manner and on the same basis as the favored taxpayers." *In re U.S. Steel Corp.*, 165 W. Va. 373, 268 S.E.2d 128 (1980); *Town of Burnsville v. Cline*, 188 W. Va. 510, 425 S.E.2d 186, 1992 W. Va. LEXIS 267 (W. Va. 1992).

Under the guise of UCIOA, Respondents are unlawfully discriminating against Petitioners by denying them equal protection of W. Va. Code § 11-4-18. As Petitioners elaborate *infra*, there is no statutory provision, including any in UCIOA, that requires Respondents to disqualify Petitioners from taking advantage of W. Va. Code § 11-4-18 merely because they are owners of real estate in the condominium form of ownership. Petitioners have a constitutional right to equal protection of W. VA. CONST. Article X §§ 1, 1a and 1b. Accordingly, given *de novo* review of this case, this Court must discard the lower's court conclusions below and strictly scrutinize

Respondents' discriminatory, disparate and unequal enforcement of W. Va. Code § 11-4-18 in this case.

C. SECOND ASSIGNMENT OF ERROR

The Pocahontas County Circuit Court erred in concluding that UCIOA prohibits the owner of real estate in the condominium form of ownership from dividing his parcel solely for the purpose of classification under W. Va. Code § 11-4-18 to obtain a "split assessment" and a "split tax ticket".

UCIOA in no way prohibits the owner of real estate in the condominium form of ownership from dividing his parcel solely for the purpose of classification. For background, by virtue of W. VA. CONST. Article X §§ 1, 1a and 1b, W. Va. Code § 11-8-5 creates four classifications for the purpose of levying property, personal and real, at different rates for *ad valorem* taxation purposes:

> Class I. All tangible personal property employed exclusively in agriculture, including horticulture and grazing; All products of agriculture (including livestock) while owned by the producer; All notes, bonds, bills and accounts receivable, stocks and any other intangible personal property
>
> Class II. All property owned, used and occupied by the owner exclusively for residential purposes; All farms, including land used for horticulture and grazing, occupied and cultivated by their owners or bona fide tenants
>
> Class III. All real and personal property situated outside of municipalities, exclusive of Classes I and II
>
> Class IV. All real and personal property situated inside of municipalities, exclusive of Classes I and II

W. Va. Code § 11-8-5; *also see* JA-000035-36.

West Virginia Code § 11-4-3 defines a Class II[7] parcel of real estate as "used and occupied by the owner thereof exclusively for residential purposes", meaning "actual habitation by the

[7] The State Tax Commissioner claims that Class II property is a preferred class because it is levied at a lower rate that Class III or Class IV property. JA-000036.

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. . ." *See* W. Va. Code § 11-4-3. The exclusively residential use and occupancy of a parcel of real estate must be "primary and immediate, not secondary or remote". *See Central Realty Company v. Martin,* 126 W. Va. 915, 30 S.E.2d. 720 (1944).

The statutory authority for Respondents to authorize the entry of a "split assessment" of resulting in a "split tax ticket" for of a parcel of real estate in the condominium form of ownership is found in W. Va. Code § 11-4-18:

> 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 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 (emphasis supplied).

West Virginia Code § 11-4-2, *Form of Landbooks*, as first enacted in 1932 on its face did not require the taxing authorities to segregate, divide or split a parcel of real estate based on its different uses[8]:

> 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 owned, used and occupied by the owner exclusively for residential purposes; (2) all farms including land used for agriculture, horticulture and grazing occupied by the owner or *bona fide* tenant; (2) all other real property; and, for each entry there shall be shown; (4) the value of land, the value of buildings, and the aggregate value; (5) the character and estate of the owners, the number of acres or lots, and

[8] The Court should keep in mind that in 1932 there was no such creature as the condominium form of ownership. In 1963, the West Virginia Legislature enacted the first statute abrogating the common law of real property to authorize the condominium form of ownership, the *Unit Property Act*.

> the local description of the tracts of lots; (6) the amount of taxes assessed against each tract or lot for all purposes.

Similarly, former W. Va. Code § 11-4-3 [1932] defined "used and occupied by the owner thereof exclusive for residential purpose" in absolute terms as the

> actual habitation by the owner as a place of abode to the exclusion of any commercial use. If a license is required for an activity on the premises or if an activity is conducted thereon which involves the use of equipment of a character not commonly employed solely for domestic as distinguished from commercial purposes, the use shall not be constructed to be exclusively residential

Former W. Va. Code § 11-4-3 [1932] defines "used and occupied by the owner thereof exclusively for residential purpose" as the "actual habitation by the owner as a place of abode to the exclusion of any commercial use".

The concept of a "split assessment" of resulting in a "split tax ticket" for a parcel of real estate was unrecognized in West Virginia before the Tax Limitation Amendment was adopted in 1982. With its passage, "in cases where property is used for multiple purposes, the law allows for split classification of the property, so that the higher tax classification may be applied only to so much of the property as is not used exclusively for the owner's residential purposes." *See* Property Tax Ruling 19-29.

West Virginia Code § 11-4-3(a)(2) currently 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 . . ." (emphasis supplied). The 1984 amendments to former W. Va. Code § 11-4-2 [1932] and former W. Va. Code § 11-4-3 [1932] permitted *portions* of a parcel of real property (as opposed to the parcel in its entirety) to be segregated based on use (*e.g.*, residential or commercial) for the purposes of tax classification. It was precisely the purpose of

the 1984 amendments that permit the owners of mixed-use parcels of real property to split their tax tickets under W. Va. Code § 11-4-18.

Thus, "[i]mplicit in [W. Va. 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 purpose, from any other use or occupancy of the property." *See* Property Tax Ruling 19-29. "This, in turn operates to the Taxpayer's advantage inasmuch as it affords the Taxpayer some relief from having to pay a higher tax rate on the entire property." *Id.*

In modern application, when applying for "split" treatment under W. Va. Code § 11-4-18, the taxpayer must show only that the "division requested is one which the owner would make for the separate conveyance of portions of the tract or lot." W. Va. Code § 11-4-18. The showing required under W. Va. Code § 11-4-18 is only whether the division can be theoretically made. The statute does not require that the taxpayer, in fact, "make for the separate conveyance of portions of the tract or lot".

These statutory provisions disclose that the West Virginia Legislature intended to require that assessors gather data on the partial use of parcels of real estate to allow the splitting of tax tickets when "portions" of those parcels are divided between Class II and Class III or IV uses. The State Tax Commissioner himself acknowledges this fundamental purpose of the relevant statutes in other published rulings. "As W. Va. Code § 11-4-2 (*supra*) provides, the split should only be applied to the portion in square feet that is used for purposes other than the owner's residential purposes. Therefore, Class III tax rate should be applied only to the portion of the property that is used for purposes other than the property owners' residential purposes."

Other tax rulings are consistent with Petitioners' position. In Property Tax Ruling 21-02, the State Tax Commissioner acknowledges that the “property in question was split in prior tax years" for a parcel of real property that contained both a residential dwelling and a restaurant; *see also,* Property Tax Ruling 16-50 (in cases where property is used for multiple purposes, the law allows for a split classification of the property, so that the higher tax classification may be applied only to so much of the property as is not used exclusively for the owner’s residential purposes); Property Tax Ruling 17-13 (allowing for a split classification on a single structure to allow the portion of the structure used as rental property to be classified as Class III while the portion of the same structure used and occupied by the owner remained Class II); Property Tax Ruling 16-50 (allowing a split ticket for property containing both a commercial structure as well as an owner used and occupied residence.); Property Tax Ruling 14-11 (allowing the assessor to classify 1.0 acre of a 10.29 acre tract as Class III property when 250 square feet of the tract is used for commercial purposes and the remainder of the tract is used and occupied by the owners exclusively for residential purposes).

The application of these statutory provisions to real estate held in the condominium form of ownership ought to be uncomplicated and uncontroversial. The Supreme Court of Appeals of West Virginia has held that "[t]he starting point of all real estate law is that "a parcel of land includes all interests and estates therein from the center of the earth to the heavens." *W. Va. DOT v. Veach*, 239 W. Va. 1, 16 (2017). A "parcel of real estate" has obtained particularized meaning in our laws. Under the entire Code of West Virginia, the term "real estate" or "real property" is required to "include lands, tenements and hereditaments, all rights thereto and interests therein." W. Va. Code § 2-2-110(a)(5).

The common interest form of ownership was first authorized by the Unit Property Act ("UPA") in 1963 and then replaced the UPA with the Uniform Condominium Act ("UCA") in 1980 and then, UCA's successor, UCIOA in 1986. The condominium form of ownership formally unites the fee form of ownership of a "unit," which the taxpayer owns real estate exclusive of other unit owners, and the "common areas," which the taxpayer owns jointly as tenants in common with other unit owners. In the instance of the Lodge, the "unit owners" own their "units" and also their proportionate allocated interests in the "common areas." UCIOA provides that "[i]n a condominium or a 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.

W. Va. Code § 36B-1-105(b)[9].

UCIOA's drafters remark in their comments on the 1982 uniform act that "[t]he classification of the unit and its allocated interests as real property or as personal property is significant for purposes of such matters as tenure, sales, recordation, transfer taxes, property taxes, estate and inheritance taxes, testate and intestate succession, mortgage lending, the perfection, priority and enforcement of liens, and rights of redemption." *Comment* 1 to Section 1-105 of

[9] The predecessor enactment authorizing the condominium form of ownership in West Virginia, the *Unit Property Act* codified in Chapter 36A, remains the operating statute for many condominiums created before the effective date of UCIOA, that is, July 1, 1986. "With regard to assessments and taxes, W.Va. Code, 36A-7-1 [1963], of the Unit Property Act provides: 'Each unit and its proportionate undivided interest in the common elements as determined by the declaration and any amendments thereof shall be assessed and taxed for all purposes as a separate parcel of real estate entirely independent of the building or property of which the unit is a part. Neither the building, the property nor any of the common elements shall be assessed or taxed separately after the declaration and declaration plan are recorded, nor shall the same be subject to assessment or taxation, except as the units and their proportionate undivided interests in the common elements are assessed and taxed pursuant to the provisions of this article." *Pope Props. v. Robinson*, 230 W. Va. 382, 386-387 (2011).

UCIOA [1982] (*National Conference of Commissioners on Uniform Laws*) JA-000151-152. The drafters continue:

> When separate tax assessments become mandatory under this Section, the assessment for each unit must be based on the value of that individual unit, under whatever uniform assessment mechanism prevails in the state or locality. Importantly, no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively, even though, in the context of planned communities, the common elements owned by the association might be subject to taxation as a separately owned parcel of real estate, in the absence of this provision.

Id. at *Comment 5* JA-000153.

West Virginia Code § 11-4-18 must be read and enforced *in pari materia*[10] with statutes on the same subject, including W. Va. Code § 11-4-2, W. Va. Code § 11-4-3 and W. Va. Code § 36B-1-105(b). Accordingly, W. Va. Code § 11-4-18 requires the Assessor to specify "all real property *or whatever portion thereof in square feet* that is owned, used, and occupied by the owner exclusively for residential purposes . . ." These statutes apply with equal force and effect to parcels of real estate in the condominium form of ownership.

Respondents erred and the lower court agreed that "[s]ince the common elements could not possibly be conveyed separate from the units, division under W. Va. Code § 11-4-18 could not

[10] The Supreme Court of Appeals of West Virginia has held: "[I]t is a fundamental rule of statutory construction that sections and acts *in pari materia*, and all parts thereof, should be construed together, and compared with each other. No one act, or portion of all the acts, should be singled out for consideration apart from all the legislation on the subject. Under this rule, each statute or section is construed in the light of, with reference to, or in connection with, other statutes or sections. Recourse is had to the several statutes or sections for the purpose of arriving at a correct interpretation of any particular one. The object of the rule is to ascertain and carry into effect the intention of the legislature. It proceeds upon the supposition that the several statutes were governed by one spirit and policy, and were intended to be consistent and harmonious in their several parts and provisions. However, no mere collation of other statutes is decisive in determining what a particular statute means. Moreover, as in the case of all other rules of statutory construction, the necessity of applying the rule as to the construction of statutes *in pari materia* exists only where the terms of the statute to be construed are ambiguous, or its significance doubtful. Statutes *in pari materia* may not be resorted to control the clear language of the statute under consideration." *State v. Epperly*, 135 W. Va. 877, 882, 65 S.E.2d 488, 491 (1951)(citing 50 *Am. Jur.*, *Statutes*, Section 348).

apply." *See* the Property Tax Ruling at 6 JA-000038 and Final Order at ¶ 20 JA-000713-714. That conclusion is incorrect. UCIOA gives the Association the express power to convey the common elements under two statutes. "[T]he association . . . may acquire, hold, encumber, and convey in its own name any right, title, or interest to real estate . . ." W. Va. Code § 36B-3-102(a)(8). "In a condominium or planned community, portions of the common elements may be conveyed . . ." W. Va. Code § 36B-1-112(a). Despite this clear statutory authority, the State Tax Commissioner failed to acknowledge in his analysis that the Association has these express powers under UCIOA to convey the portion of the common elements that its subsidiary, Silver Creek Enterprises, LLC, occupies for the operation of The Locker Room.

The State Tax Commissioner makes the additional extraordinary claim in the Property Tax Ruling that "[i]t is likewise questionable whether section 11-4-18 could apply, as the section contains the stricture 'in no case shall any single structure be divided,' **which itself seems to preclude a division of separate uses of an integral parcel**'." *See* the Property Tax Ruling at 6 JA-000038 (emphasis supplied). This Court should view this position with high skepticism. If the State Tax Commissioner claims that W. Va. Code § 11-4-18 "precludes a division of separate uses of an integral parcel", that, indeed, would be earth-shattering, a claim that the lower court belittles. Final Order at ¶ 17 JA-000714.

To use Pocahontas County as an example, Petitioners below showed that every other split tax assessment or ticket in Pocahontas County for 2019 and 2020 appears to exist only for a single parcel of real estate.[11] *See Exhibits C* and D to *Petition for Appeal of Property Tax Ruling 21-1* JA-

[11] This information is based on the documentary evidence supplied to Petitioners from Assessor Lane in response to their November 20, 2020, written request under the *Freedom of Information Act*. In that FOIA request, Petitioners asked for "[e]ach and every entry in each of the 2019 and 2020 Land Books for Pocahontas County, West Virginia, including name, account number, address, legal description, and all other data entered thereon by custom or by law, that was entered with 'segregation of real property according the classification' with respect to the tax parcel or parcel described in the entry pursuant to W. Va. Code § 11-4-18."

000040-137. In but one example, a Pocahontas County taxpayer in 2019 had his tax ticket split between his "residence on 2nd floor" (Class II) and his business on the "1st floor" (Class IV)"JA-000041. If the Property Tax Ruling is affirmed, then all 144 parcels with split tax tickets in 2019 and all 143 parcels with split tax tickets in 2020 should be prohibited from taking advantage of W. Va. Code § 11-4-18. If this Court affirms the Property Tax Ruling in this aspect, then all of the split tax tickets would be unlawful because all of them are single parcels of real estate. *See generally* JA-000040-137.

Petitioners retort that the so-called "stricture" — "in no case shall any single structure be divided" — would be no obstacle to splitting the tax ticket for a parcel of real estate in an integrated condominium building such as the Lodge. What the State Tax Commissioner has characterized as a "stricture" or a bar to giving the individual Petitioners the benefits under W. Va. Code § 11-4-18 is no bar under UCIOA. The opposite is true. A characteristic of the condominium form of ownership is that "units"[12] "together with" their respective interests in the common elements", by virtue of UCIOA are already divided, segregated or split as W. Va. Code § 11-4-18 contemplates. A building such as the Lodge, although a single integrated building on essentially a single parcel of land is already divided because that is the essence of condominiumization.

The State Tax Commissioner also incorrectly claims that "UCIOA expressly prohibits this treatment for condominium property, when it states that 'each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.'" *See* the Property Tax Ruling at 5 citing W. Va. Code § 36B-1-105. The State Tax Commissioner continues: "This is because the code states that 'no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no development

[12] Under UCIOA "unit" means "a physical portion of the common interest community designated for separate ownership or occupancy . . ." W. Va. Code § 36B-1-1-3(33).

rights.'" *Id.* The State Tax Commissioner incorrectly claims that "[u]nder the express terms of the UCIOA, the county commission could no more make such a division of what is considered an integral parcel of real estate than it could made a division of the interior walls or hallways, wiring or plumbing that are considered 'common elements' in a condominium from any of the units." *See* the Property Tax Ruling at 6. All of these claims are incorrect. They are based on conflation made on Respondents' misapprehension of UCIOA, common interest ownership and its statutory treatment of the assessment, classification and taxation of real estate in the condominium form of ownership.

In other classification cases, the State Tax Commissioner has gone so far to conclude that the following activities *require* a split classification of the parcel of real estate:

> Use of a portion of the property to carry on a trade or a business;
>
> Use of a portion of the property as a residence by persons other than the owner (including relatives of the owner) for rent or compensation;
>
> Use of a detached structure on the property for non-residential purposes. Either by the owners or others; and
>
> Use of detached structure on the property as a residence by persons other than the property owner (including relatives of the owner), even without rent or compensation.

See Property Tax Ruling 13-11.

There are no informative decisions of our courts in West Virginia. The judiciary of Colorado, a jurisdiction that adopted its version of UCIOA in 1983, analyzed Section 1-105 of the uniform act in the context of that state's *ad valorem* taxation system:

> The valuation and assessment of a condominium's common elements and the ARL's approach thereto was addressed by another division of this court in *Manor Vail Condo. Ass'n v. Bd. of Equalization*, *supra*. In *Manor Vail*, a condominium association owned common elements including a lobby, a restaurant, meeting

> and conference rooms, and a swimming pool. The condominium owners received notices of valuation on their units including a line item for 'commercial improvements' assessing each unit's proportionate share of the restaurant and meeting rooms at the commercial rate of 29 percent as opposed to the lesser residential rate of 10.26 percent. The actual value of the condominium unit was comprised of multiple components: the land value, the value of the residential improvements of the unit itself, and the unit's proportionate share of the assessed value of the common area. The *Manor Vail* division held that the legislative scheme contemplates a variety of uses and classifications of property (agricultural, residential, commercial, or mining) and that the property value should be apportioned and allocated according to those uses. Thus, the different classifications will determine the assessment ratio to be applied to actual value when computing the assessed value.

Jet Black, LLC v. Routt County Bd. of County Comm'rs, 2006 Colo. App. LEXIS 1653 (2006) citing *Manor Vail Condo. Ass'n v. Bd. of Equalization*, 956 P.2d 654 (Colo. 1998).

In *Manor Vail,* the Colorado court set forth a detailed regime to incorporate the commercial use into the unit owners assessments without imputing such a classification upon residential owners, specifically and informatively, in condominium building with a restaurant:

> Thus, for this example, if one of the association's non-residential common elements is a restaurant with an actual value of $500,000, according to ARL procedures, the condominium unit's proportionate share of the value of the restaurant will be $10,000. Because $10,000 of the condominium unit's actual value of $100,000 will be allocated to the restaurant, the valuation for assessment of this $10,000 then will be computed at the non-residential ratio of 29 percent. See 39-1-104(1), C.R.S. 1997. The remaining $90,000 will be allocated to the other components of the condominium unit's actual value with valuation for assessment computed at the lower residential rate applicable to that tax year.

Manor Vail Condo. Ass'n v. Bd. of Equalization, 1998 Colo. App. LEXIS 57, 1998 Colo. J. C.A.R. 1323 (Colo. 1998)(citing C.R.S. §§ 39-1-104(1.5) and 39-1-104.2). The *Manor Vail* court also noted the difference, as argued above, between an assessment and classification in the context of common interest community taxation:

> Nevertheless, taxpayer contends the Administrator's procedures violate 38-33.3-105(2), which prohibits the separate assessment of common elements. It claims that a condominium unit's proportionate share of value of the association's non-residential common elements must be included in the residential improvement component of value, regardless of their non-residential character. And, it further argues that the non-residential common elements must be assessed at the valuation for assessment ratio reserved for residential property. In this regard, taxpayer equates the procedure of **separately valuing the non-residential common elements with separately assessing them. Because we do not consider the two concepts to be equivalent, we reject taxpayer's interpretation. See Gilpin County Board of Equalization v. Russell**, 941 P.2d 257 (Colo. 1997) (“assessment" means the process of placing a value for tax purposes upon the property of a particular taxpayer);

Manor Vail Condo. Ass'n v. Bd. of Equalization, 1998 Colo. App. LEXIS 57, 1998 Colo. J. C.A.R. 1323 (Colo. 1998) (emphasis supplied). The practical effect of the *Manor Vail* holding to the case at hand is that county assessors are not to schedule common element properties separately in their records nor issue separate notices of valuation or tax bill for them. *Id.* citing Uniform Common Interest Ownership Act 1-105, comment 5, 7 Part II Uniform Laws Annot. 25-26 (1997 Master ed.) (source of 38-33.3-105, C.R.S. 1997) ("Importantly, no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively, even though . . . the common elements owned by the association might be subject to taxation as a separately owned parcel of real estate, in the absence of this provision."). The evidence and case law in this case establish that merely because the Association owns non-residential common elements, does not mean that classification must be imputed on the individual unit owners.

The lower court ruled, incorrectly, that owners of real estate in the condominium form of ownership "may not convey their interests in the common elements of the condominium separately from their units" and have "no ability to . . . make . . . a separate conveyance of the portions of the common areas that are used for commercial purposes, because of the very nature of condominium

ownership." Final Order at ¶ 20 JA-000713-14. The circuit court adds, again incorrectly, that W. Va. Code § 36B-1-105(b)(1) "inextricably tie[s] an individual unit owners' interest in the condominium's common areas to his or her unit." Final Order at ¶ 20 JA-000714.

These conclusions are false and delusional, that is, apart from the reality of the legal authorities themselves. Just the opposite of them are true. UCIOA quite literally authorizes the division and alienation of the common elements from the units. "In a condominium or planned community, portions of the common elements may be conveyed . . . by the association in persons entitled to cast at least eighty percent of the votes in the association . . ." W. Va. Code § 36B-3-112(a).

The lower court also disqualifies an owner of a parcel of real estate in the condominium form of ownership from taking advantage of W. Va. Code § 11-4-18 because "he or she is generally one of many persons holding interest in those common areas," implying there would be difficulty in obtaining concurrence. Final Order at ¶ 20 JA-000714. There is no requirement in W. Va. Code § 11-4-18 that the owner actually divide his parcel for purposes of use segregation. What is required of the analysis is a determination whether the owner's division of the parcel is possible. The analysis is indifferent to the numerosity of the owners.

Respondents do not ever disqualify owners of a parcel of real estate in the fee form of ownership from taking advantage of W. Va. Code § 11-4-18 merely because of their numerosity. Neither should Respondents, or the lower court, consider the numerosity of owners of a condominium parcel in permitting Petitioners or taxpayers like them from taking advantage of the statute. The lower court has created an impermissible double standard, giving favor to the ownership of real estate in the fee form over the ownership of real estate in the condominium form where no double standard is required or lawful.

D. THIRD ASSIGNMENT OF ERROR

For purposes of W. Va. Code § 11-4-18, the Pocahontas County Circuit Court erred in failing to treat real estate in the condominium form of ownership the same as real estate in the fee form of ownership in violation of W. Va. Code § 36B-1-105(b)(1), W. Va. Code § 36B-1-106(b) and other West Virginia law.

UCIOA not only does not require unequal treatment of the condominium form of ownership; UCIOA prohibits it. In applying W. Va. Code § 11-4-18, Respondents and the lower court identify no legal or physical differences between parcels of real estate in the condominium and fee forms of ownership that make them different species of property to merit unequal treatment under W. VA. CONST. Article X §§ 1, 1a and 1b.

Second, UCIOA *forbids* the Respondents from treating identical physical property merely because one is held in the condominium form of ownership and the other is held in the fee form. UCIOA provides that

> (b) In condominiums and cooperatives, no zoning, subdivision, or other real estate use law, ordinance, or regulation may prohibit the condominium or cooperative form of ownership or impose any requirement upon a condominium or cooperative which it would not impose upon a physically identical development under a different form of ownership.
>
> (c) Except as provided in subsections (a) and (b) of this section, the provisions of this chapter do not invalidate or modify any provision of any building code, zoning, subdivision, or other real estate use law, ordinance, rule, or regulation governing the use of real estate.

W. Va. Code § 36B-1-106(b) and (c). The drafters of UCIOA caution against unequal treatment:

> If there is any doubt in a particular state whether a unit occupied as a residential dwelling is entitled to treatment as any other residential single-family detached dwelling under the homestead status, this Section should be modified to ensure that units are similarly treated.

Comment no. 6, Section 1-105 of Uniform Common Interest Ownership Act [1982](*National Conference of Commissioners on Uniform State Laws*).

Third, there is nothing in the statutes that would require unequal treatment. W. Va. Code § 11-4-3(a)(2) defines "'used and occupied by the owner thereof exclusively for residential purpose' as actual habitation by the owner of 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." West Virginia Code § 11-4-2(1) prescribes a "form of landbook and the information and itemization to be entered therein, which shall include "a separate entry of '[a]ll real property **or whatever portion thereof in square feet** that is owned, used, and occupied by the owner exclusively for residential purposes . . .'" (emphasis supplied). Thus, the Assessor is required under W. Va. Code § 11-4-2 to enter "whatever portion" of a parcel of real estate, whether in the condominium or fee form of ownership for different purposes, including for possible division or segregation of uses under W. Va. Code § 11-4-18.

Accordingly, for purposes of assessment and taxation, a “parcel of real estate” existing in the common interest form of ownership under Chapter 36B and a parcel of real estate existing in the fee form of ownership under common law must be treated the same under W. VA. CONST. Article X §§ 1, 1a and 1b .

VIII. CONCLUSIONS AND PRAYER FOR RELIEF

For all the foregoing reasons, Petitioners, The Silver Creek Association, Inc., Russell D. Jessee and Cinnamon M. Jessee, Jeffrey S. Banks and Drenna Banks, Malcolm 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 R. Terrini and Mary L. Terrini, Michael D. Cajohn and Jennifer L. Cajohn and Kevin R.

Banning, pray that this Honorable Court reverse, vacate and remand the final order of the Pocahontas County Circuit Court in this case and to enter judgment in favor of Petitioners. Further, Petitioners ask this Court to direct Respondents or the lower court, as the case may be, to mould relief in favor of Petitioners in accordance with its holdings, including without limitation to classify the individual Petitioners' parcels of real estate as Class II and Class III in accordance with W. Va. Code §§ 11-4-2, 11-4-3 and 11-4-18 for the applicable *ad valorem* tax year and all subsequent years for which the factual conditions of Petitioners parcels of real estate are the same. Further, Petitioners ask this Court to grant Petitioners all of their reasonable lawyers' fees and costs. Further, Petitioners ask this Court to grant Petitioners such other relief that this Court believes is reasonable and prudent to give Petitioners the relief they requested.

The Silver Creek Association, Inc.,
a West Virginia non-profit corporation,
Russell D. Jessee and Cinnamon M. Jessee,
Jeffrey S. Banks and Drenna Banks,
Malcolm 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 R. Terrini and Mary L. Terrini,
Michael D. Cajohn and Jennifer L. Cajohn,
Kevin R. Banning, all individuals,

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