IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

The Silver Creek Association, Inc.,
Russell D. Jessee, Cinnamon M. Jessee,
Jeffrey S. Banks, Drenna Banks,
Malcolm J. Cooper, Colleen K. Cooper,
Duval Lee Fuqua, Dorthea A. Fuqua,
Raymond Bruce James, Harriet Hawks,
Louis J. Constanzo, David Christopher,
Linda Christopher, William C. White, II,
William R. Terrini, Mary L. Terrini,
Michael D. Cajohn, Jennifer L. Cajohn,
and Kevin R. Banning,

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

Case No.: 23-ICA-372

RESPONDENT POCAHONTAS COUNTY ASSESSOR JOHNNY A. PRITT'S SUMMARY RESPONSE TO BRIEF OF PETITIONERS

Teresa W. Helmick
Prosecuting Attorney
WV State Bar No. 5750
900 Tenth Avenue
Marlinton, WV 24954
(304) 799-6424
thelmick@court.state.wv.us
Counsel for Respondent Pritt

I. STATEMENT OF FACTS

The Lodge at Silver Creek ("Silver Creek") is a 239-residential unit condominium, one of three types of common interest community as West Virginia Code § 36B-1-103 of the Uniform Common Interest Ownership Act ("UCIOA") defines those terms. Silver Creek is a single building with three multistory residential wings surrounding a core that houses common elements, which includes a variety of areas used for both commercial enterprises and residential amenities. West Virginia Code § 36B-1-103(4) of the UCIOA defines "Common Elements" as "all portions of the [condominium] other than the units." The commercial enterprises of Silver Creek include two restaurants, a retail store, office space, an arcade, a limited lottery location and a coffee shop. The residential amenities include a swimming pool and an exercise room.

Prior to 2016, all areas of Silver Creek except residential units were assessed for ad valorem property taxes to Snowshoe Mountain, Inc. ("Snowshoe"), the successor declarant of Silver Creek and the owner at that time of all non-residential units and common elements. A lawsuit was filed by The Silver Creek Association, Inc. ("SCA") against Snowshoe in 2014, which was ultimately settled by Snowshoe conveying a large portion of the common elements to SCA by deed dated April 26, 2016, and recorded in the Pocahontas County Clerk's office in Deed Book 358, Page 659 (the "Deed").

Subsequent to the recording of the Deed, SCA and the Pocahontas County Assessor requested a taxability ruling from the West Virginia Tax Commissioner regarding the assessment of the common elements that were conveyed in the Deed. JA-000483. That taxability ruling (PTF 18-49) was appealed by SCA in Civil Action No. 18-AA-01 (the "2018 case") wherein SCA requested that the portion of Silver Creek that was conveyed by the Deed, be treated as common

elements and not separately assessed and taxed as individual commercial units, citing Section 36B-1-105 as the basis of its argument. At the conclusion of the 2018 case, the SCA prevailed in its appeal when the Circuit Court ruled that those areas were to be treated as common elements of Silver Creek rather than separate units, thereby causing the common elements to be assessed as a portion of each individual residential unit, and the Court cited the UCIOA as the basis of its decision.[1]

As a result of prevailing in the 2018 case, SCA subjected some condominium owners to the ad valorem property tax classification change that is at issue in this current case. Most of the 239 units in Silver Creek were already classified as Class III prior to the 2018 case because they were not exclusively used by the owners for residential purposes but were instead rented by the owners to visitors of Silver Creek. However, a select few unit owners, including the individual Petitioners in this case, did not rent out their individual units. Therefore, their units were originally classified as Class II prior to the conclusion of the 2018 case because their assessment included only the units but not common elements. However, after it was ordered by the Court that the common elements be taxed as a portion of each unit, the few unit owners that were using their units exclusively for residential purposes were reclassified as Class III because they no longer met the definition of Class II since a large portion of the common elements is used for commercial businesses. It is that classification change that is the basis of this action.

II. ARGUMENT IN RESPONSE TO PETITIONERS' ASSIGNMENTS OF ERROR

This case is a relatively simple one. Furthermore, ad valorem property taxes are relatively simple. Ad valorem property taxes are derived from ascertaining the value of the property through

[1] "[T]he Court finds the Property is not a "unit" within the Lodge at Silver Creek and furthermore, said Property is common elements." JA-000482.

an appraisal, determining the class of the property through information given by the owner as to the use of the property, and finally applying the levy rate for the particular class to the value. Beyond that relatively simple calculation, there can be some special rules that apply such as split tickets where a singular parcel of real property has two uses. Homestead exemption and farm valuation rules can also cause two parcels of real property in the same class to be taxed at different rates. The provisions of West Virginia Code § 36B-1-105 is another special rule that calls for different treatment of a certain type of real property as it relates to real property taxes. Treating taxpayers differently is allowed under all of these special circumstances and not a violation of the West Virginia Constitution or the United States Constitution.

Despite the three assignments of error that complicate the issue by making the same basic argument in three different ways, this case involves a singular issue of first impression being the application of the provisions of West Virginia Code § 36B-1-105 as it relates to the split ticket provisions of West Virginia Code §§ 11-4-2 and 11-4-18. The second assignment of error is the most concise explanation of the legal issue before the Court.

a. FIRST ASSIGNMENT OF ERROR

The Pocahontas County Circuit Court did not deny the Petitioners equal protection of West Virginia Constitution Article X §§ 1, 1a and 1b by refusing Petitioners the ability to obtain split tickets.

Petitioners' use of the term "equal protection" in reference to West Virginia Constitution Article X §§ 1, 1a and 1b is confusing as it is unclear if Petitioners' are referring to the equal protection of the laws found in the United States Constitution in Article XIV, Section 1 or the requirement that taxation shall be equal and uniform found in West Virginia Constitution Article X §1. Furthermore, it is unclear why Petitioners reference West Virginia Constitution Article X

§§ 1a and 1b as they seem to have no bearing on the issues before the Court, and Petitioners do not explain the significance of these two sections of Article X of the West Virginia Constitution.

The United States Supreme Court has held that a state may divide different types 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 (1989). In that case, the Court stated that "[i]f 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. In this case, the different treatment of condominium owners under the UCIOA is not arbitrary nor capricious and is resting on a reasonable consideration of difference or policy and thus not a violation of Petitioners' constitutional rights.

b. SECOND ASSIGNMENT OF ERROR

The Pocahontas County Circuit Court did not err in concluding that the UCIOA prohibits the owner of real estate in the condominium form of ownership from dividing his or her parcel solely for the purpose of classification under West Virginia Code § 11-4-18 to obtain a "split ticket."

i. Classification of Property

The foundation for the classification of property for levy purposes is West Virginia Constitution Article X, § 1. Those classifications are codified in West Virginia Code, § 11-8-5, which provides:

> 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 municipalities, exclusive of Classes I and II.

When applying the tax rate to the tax classification, a Class II parcel is half the rate of a Class III parcel. Therefore, a taxpayer has a significant incentive to have his or her property classified as Class II rather than Class III. However, in order for residential property to qualify for Class II, it must be "owned, used and occupied by the owner exclusively for residential purposes."

ii. Split Tickets

In cases where property is used for multiple purposes, the law allows for a split classification of the property. West Virginia Code, § 11-4-2 provides, in part:

> 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;...

Implicit in this Code section 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 on the assessment. This is often referred to as a "split ticket."

iii. Assessments Under the UCIOA

Because Silver Creek is covered by the UCIOA, tax assessments are also covered by that act for the purposes of assessing units in a condominium. Section 36B-1-105 of the West Virginia Code provides:

(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 taxes 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 along 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. [Emphasis added.]

Section 36B-1-103(4) defines "common elements" as follows:

(3) "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.

iv. Reconciling the Tax Laws with the UCIOA

The UCIOA expressly prohibits split ticket assessments 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." 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." W.Va. Code § 36B-1-105.

Because Section 11-8-5 requires that the residential use of property by its owner must be the exclusive use of the property in order for it to qualify for Class II treatment, any commercial use of a parcel of real estate would disqualify it from Class II, as stated above. Since each unit is inseparable from the common elements, the commercial use of the common elements of Silver Creek would render every unit commercial property, thereby disqualifying each from receiving Class II tax treatment.

In the instant case, the Petitioners sought and received a ruling from the Circuit Court holding that certain areas of Silver Creek used for commercial purposes should be treated as common elements, and therefore could not be separately assessed or taxed. The natural consequence of that treatment is that the commercial use of the common elements must be imputed to the unit holders' interest in those common elements, and their units classified in accordance with that use. Because the units can no longer be said to be used exclusively for residential purposes, they are disqualified from treatment as Class II property, used and occupied by the owner thereof exclusively for residential purposes under W.Va. Code § 11-8-5. Because the different uses of the units cannot be separately assessed and taxed under the express terms of the UCOIA, the units must be classified as Class III commercial property for ad valorem tax purposes. To argue that split tickets would be allowed for condominiums despite the language in Section 36B-1-105 requiring that each unit and its interest in the common elements is a separate parcel of real estate and that no common elements may be separately taxed or assessed is illogical and strips that pertinent language in the statute of its meaning.

"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." Syl. Pt. 1, UMWA by Trumka v. Kingdon, 174 W. Va. 330, 325 S.E.2d 120 (1984). Thus, the language of Section 36B-1-105 is both more specific and more recently enacted than the language of Section 11-4-2 giving precedence to Section 36B-1-105. Upon review of the entire statutory scheme at issue in this case, the prohibition of Section 36B-1-105 must be applied when assessing condominiums for ad valorem tax purposes, and thus, no split tickets may be allowed for assessments of condominium units. Because the unit and its interest in the common elements must be one assessment, and because a portion of the common elements is used for commercial businesses, each unit must be classified as Class III because they do not meet the definition for Class II as being used exclusively for residential purposes.

The tax laws must be applied accurately regardless of the financial impact on individual taxpayers or groups of taxpayers. Nevertheless, it does appear that Petitioners have mislead the Court by stating that this case will impact "hundreds of thousands of West Virginia taxpayers." Petitioners give no basis for the conclusions that hundreds of thousands of taxpayers will be negatively impacted. In Pocahontas County which has one of the highest concentrations of condominiums in West Virginia, this ruling will not even impact hundreds much less thousands or hundreds of thousands. The decision to affirm or overrule the Circuit Court Ruling will only impact taxpayers who own a condominium unit ***and*** who do not rent out their unit to others ***and*** whose unit is located within a condominium that has commercial space included in the common elements.

Petitioners also make reference to the size of the commercial space within the common elements. Specifically, the Locker Room is the only business named by Petitioners throughout

their brief as well as their other pleadings, implying that it is the only significant commercial space found in the common elements. That is not true. There are several commercial areas within the common elements. Petitioners further describe the commercial space as "a small portion of the common area." In fact, the commercial space is large in both square footage and financial impact. The commercial space is over 8,000 square feet and the Locker Room alone had gross sales of $576,018.81 in 2020. JA-000509.

c. THIRD ASSIGNMENT OF ERROR

The Pocahontas County Circuit Court did not err in failing to treat real property in the condominium form of ownership the same as real property in the fee form of ownership and did not violate W.Va. Code § 36B-1-105(b)(1) or W.Va. Code § 36B-1-106(b) or other West Virginia law.

Please see Respondent Pritt's response to First Assignment of Error and Second Assignment of Error. For the sake of judicial economy, Petitioner Pritt will not duplicate his arguments here.

III. CONCLUSION AND PRAYER FOR RELIEF

None of Petitioners' three assignments of error are meritorious. The Circuit Court did not misapply the law to the facts. For the foregoing reasons, Respondent Pritt asks this Honorable Court to affirm the Order of the Circuit Court.

JOHNNY A. PRITT
By Counsel

/s/Teresa W. Helmick
Teresa W. Helmick
Prosecuting Attorney
WV State Bar No. 5750
900 Tenth Avenue
Marlinton, WV 24954
(304) 799-6424
thelmick@court.state.wv.us
Counsel for Respondent Pritt

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

The Silver Creek Association, Inc.,
Russell D. Jessee, Cinnamon M. Jessee,
Jeffrey S. Banks, Drenna Banks,
Malcolm J. Cooper, Colleen K. Cooper,
Duval Lee Fuqua, Dorthea A. Fuqua,
Raymond Bruce James, Harriet Hawks,
Louis J. Constanzo, David Christopher,
Linda Christopher, William C. White, II,
William R. Terrini, Mary L. Terrini,
Michael D. Cajohn, Jennifer L. Cajohn,
and Kevin R. Banning,

Petitioners

Case No.: 23-ICA-372

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

CERTIFICATE OF SERVICE

I do hereby certify that on this the 11th day of January 2024, I served a true and correct copy of the foregoing **RESPONDENT POCAHONTAS COUNTY ASSESSOR JOHNNY A. PRITT'S SUMMARY RESPONSE TO BRIEF OF PETITIONERS**, upon Mark Sadd, Counsel for the Petitioners, and Cassandra L. Means-Moore and Seth E. Harper, Counsel for Respondent Matthew R. Irby by the electronic filing system.

/s/Teresa W. Helmick
PROSECUTING ATTORNEY
TERESA W. HELMICK
WV State Bar No. 5750
900 Tenth Avenue
Marlinton, WV 24954
(304) 799-6424