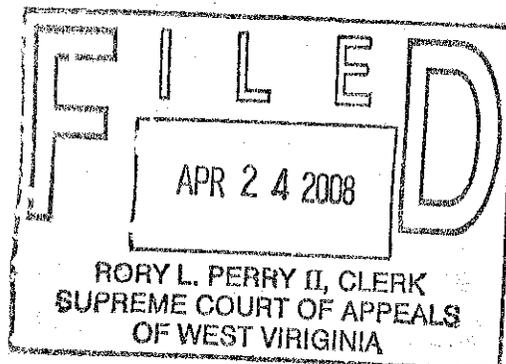


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33891



IN RE: TAX ASSESSMENT  
OF THE FOSTER FOUNDATION  
WOODLANDS RETIREMENT COMMUNITY

---

HONORABLE JOHN L. CUMMINGS, JUDGE  
CIRCUIT COURT OF CABELL COUNTY  
CIVIL ACTION NO: 07-C-214

---

BRIEF OF THE APPELLEE

Counsel for Appellant  
Daniel J. Konrad, Esq. (WVSB#2088)  
Chad D. Camper, Esq. (WVSB#10293)  
Huddleston Bolen, LLP  
611 Third Avenue  
Huntington, WV 25701  
(304) 529-6181

Counsel for Appellee  
William T. Watson, Esq.  
WV State Bar No. 3951  
Suite 203, The Frederick Building  
P. O. Box 1371  
Huntington, WV 25715  
(304) 522-6454

**TABLE OF CONTENTS**

	<b>Page No.</b>
<b>TABLE OF AUTHORITIES .....</b>	<b>i</b>
<b>I. INTRODUCTION .....</b>	<b>1</b>
<b>II. STATEMENT OF FACTS .....</b>	<b>2</b>
<b>III. STANDARD OF REVIEW .....</b>	<b>3</b>
<b>IV. ASSIGNMENTS OF ERROR .....</b>	<b>3</b>
<b>A. THE COUNTY COMMISSION AND THE CIRCUIT COURT ERRED IN HOLDING THAT THE FOSTER FOUNDATION FAILED TO MEET ITS BURDEN IN PROVING THE APPRAISED VALUE OF WOODLANDS FOR TAX YEAR 2007 EXCEEDING ITS TRUE AND ACTUAL VALUE.</b>	
<b>B. THE COUNTY COMMISSION AND THE CIRCUIT COURT ERRED IN NOT REDUCING THE APPRAISED VALUE OF WOODLANDS TO ITS TRUE AND ACTUAL VALUE AS REQUIRED BY WEST VIRGINIA LAW.</b>	
<b>C. THE COUNTY COMMISSION AND THE CIRCUIT COURT ERRED IN DENYING THE FOSTER FOUNDATION DUE PROCESS DURING ITS APPEAL OF AN EXCESSIVE AD VALOREM TAX ASSESSMENT.</b>	
<b>D. THE COUNTY COMMISSION AND THE CIRCUIT COURT ERRED IN FAILING TO ACCOUNT FOR THE UNIQUE CHARACTERISTICS OF WOODLANDS IN DETERMINING ITS TRUE AND ACTUAL VALUE.</b>	
<b>V. DISCUSSION OF LAW AND ARGUMENT .....</b>	<b>6</b>
<b>VI. CONCLUSION .....</b>	<b>9</b>

**TABLE OF AUTHORITIES**

**CASES:**

<b><u>Burgess v. Porterfield</u>, 469 S.E.2d 114 (W.Va. 1996) .....</b>	<b>3</b>
<b><u>Kline v. McCloud</u>, 326 S.E.2d 715 (W.Va. 1984) .....</b>	<b>4</b>
<b><u>In Re: Tax Assessment Against American Bituminous Power Partners, L.P.</u>, 539 S.E.2d 757 (W.Va. 2000) .....</b>	<b>4, 5, 7</b>

**STATUTES:**

<b>W.Va. Code §11-3-1 .....</b>	<b>1, 4</b>
<b>W.Va. Code §30-38-1 .....</b>	<b>5</b>
<b>W.Va. Code §11-3-24 .....</b>	<b>7</b>

**OTHER:**

<b>110 C.S.R. §1P-1 .....</b>	<b>1</b>
<b>Board of Equalization Hearing February 9, 2007 .....</b>	<b>2, 6</b>

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**IN RE: TAX ASSESSMENT  
OF THE FOSTER FOUNDATION'S  
WOODLANDS RETIREMENT COMMUNITY**

**CIVIL ACTION NO. 07-C-214  
Judge John L. Cummings**

**FROM THE CIRCUIT COURT OF CABELL COUNTY**

**BRIEF OF APPELLEE**

**I. INTRODUCTION**

This is the Brief of Appellee, The County Commission of Cabell County sitting as the Board of Equalization and Review (the "Commission" and/or "Board"); in response to the Brief filed by Appellant, Foster Foundation's Woodlands Retirement Community ("Foster Foundation" and/or "Woodlands").

The County Assessor has the duty to see that the laws concerning the assessment of the collection of all taxes are faithfully enforced. One primary focus of the Assessor is to insure that County real property taxes are accurately assessed and collected.

Pursuant to West Virginia Code §11-3-1 et seq., all property must be assessed at its true and actual value which is further defined as the value which a willing buyer would pay a willing seller in an arm's length transaction. See West Virginia Code §11-3-1. The goal is to establish a market value. The West Virginia Tax Commissioner has adopted regulations which Assessors must follow in order to determine the market value of real property. See 110 C.S.R. §1P-1 et seq. The legislative regulations specifically list three separate approaches to be considered in determining the fair value

or the market value of real property: Market Sales, Cost Less Depreciation, and Income Capitalization. Market sales are accomplished by comparing the subject property to other properties recently sold, of similar structure and size, improvements and location. With respect to the cost approach, the Assessor is to determine the total cost to construct a replacement facility and then will deduct the amount of physical depreciation that the property has experienced as well as the value of related personal property and finally adding the value of the land to determine a total estimated property market value. These are the two methods that were utilized by the Cabell County Assessor to ascertain the assessed value of the Appellant's property. A review of the transcript of the February 9, 2007 Board of Equalization hearing indicates that Mr. Brent Daniels, a staff member of the Assessor's Office compared the Appellant's property to Courtyard Apartments and the Maplewood facility located in Harrison County to establish the comparables and to justify the Assessor's assessment valuation (Transcript pages 19 and 20).

## **II. STATEMENT OF FACTS**

The Foster Foundation is a 501(c)(3) non-profit organization engaged in the operation of Woodlands, which is a home for the aged not conducted for private profit. By letter dated January 2, 2007, the Cabell County Assessor's Office notified the Foster Foundation that for the tax year 2007 the assessed value of the Woodlands would be based upon an appraised value of \$38,137,300.00. On or about January 31, 2007, the Foster Foundation filed an Application for Review of Property Assessment with the County Commission challenging the Assessor's appraised value of \$38,137,300.00 for tax year 2007. By letter dated January 24, 2007, the Foster Foundation was informed that its hearing before the Cabell County Commission would be on February 9, 2007 and that it must submit clear and convincing evidence to prove the assessment was in fact erroneous.

The Foster Foundation retained the services of Robert K. Withers, a licensed appraiser, to conduct an appraisal of the Woodlands and Mr. Withers determined that the fair market value of the Woodlands was \$14,900,000.00. On February 9, 2007, the hearing on the Foster Foundation's Application for Review was conducted before the Board. After all of the evidence, testimony, oral and written arguments were entered into the record, the Board informed the Foster Foundation that it would be notified by mail as to the Board's decision. At the hearing, the Foster Foundation learned that the Woodlands had been assessed by Mr. Brent Daniels, an employee of the Assessor's Office, who had originally assessed the property at an appraised value of \$38,137,300.00. On February 22, 2007, the Board, after hearing the evidence, testimony and oral and written arguments, entered an Order reducing the appraised value of the Woodlands to \$29,759,000.00 for the tax year 2007. By letter dated February 26, 2007, the County Commission notified the Foster Foundation of its February 22, 2007 Order. Based upon the Order of the County Commission, the Plaintiff filed its Petition for Appeal seeking relief from the alleged excessive assessment of the Woodlands' value. On or about June 26, 2007, a hearing was conducted before the Honorable Judge John L. Cummings in the Circuit Court of Cabell County regarding the assessed value of the Woodlands Retirement Community for tax year 2007. By Order dated September 6, 2007, Judge Cummings ruled that the Foster Foundation failed to prove by clear and convincing evidence that the County Commission erroneously valued its property and denied the Foster Foundation's request to have the assessed value of the Woodlands reduced to its alleged fair market value of \$14,900,000.

### **III. STANDARD OF REVIEW**

#### **A. THE APPLICABLE STANDARD OF REVIEW IS DE NOVO.**

This case presents questions of law and questions of law are reviewed de novo. Syl. Pt. 4,

Burgess v. Porterfield, 469 S.E.2d 114 (W.Va. 1996).

#### IV. APPELLEE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

Judge Cummings, by his Order dated September 6, 2007, correctly concluded that Woodlands failed to prove by clear and convincing evidence that the Assessor erroneously valued its property.

The Cabell County Assessor has the duty to see that the laws concerning the assessment of ad valorem real property taxes are faithfully enforced.

Pursuant to West Virginia Code §11-3-1, et seq., all property must be assessed annually at its true and actual value. "True and actual value" is defined as the value which a willing buyer would pay a willing seller in an arm's length transaction. See West Virginia Code §11-3-1, also Kline v. McCloud, 326 S.E.2d 715 (1984).

In determining the fair market value of a piece of land, the County Assessor must seek out all information which would enable him to properly fulfill his legal obligation. *Id.*

As discussed in In Re: Tax Assessment Against American Bituminous Power Partners, L.P., 539 S.E.2d 757, (2000) W.Va., the burden upon the taxpayer to demonstrate error with respect to the State's valuation is heavy in these proceedings:

"It is a general rule that valuation for taxation purposes fixed by an assessing officer are presumed to be correct, the burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear. Syl. Pt. 7, In Re: Tax Assessments Against Pocahontas Land Co., 172 W.Va. 53, 303 S.E.2d 691 (1983)." Syl. Pt. 1, Western Pocahontas Properties, Ltd. v. County Comm'n of Wetzel County, 189 W. Va. 322, 431 S.E.2d 661 (1993). In challenging a tax valuation, "the burden [of proof] clearly falls upon . . . [the taxpayer] to demonstrate through clear and convincing evidence that the tax assessments were erroneous." In Re: Maple Meadow Min. Co., 191 W. Va. 519, 523, 446 S.E.2d 912, 916 (1994); see also Pocahontas Land, 172 W. Va. At 61, 303 S.E.2d at 699 ("It is obvious that where a taxpayer protests his assessment before a board, he bears the burden of

demonstrating by clear and convincing evidence that his assessment is erroneous.”); Syl. Pt. 2, in part, Western Pocahontas Properties, Ltd., supra (“The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous.”).

The West Virginia Supreme Court on several different occasions has stated that the law presumes the Assessor’s valuations to be correct and places the burden of proving an incorrect assessment before the Board of Equalization and Review on the taxpayer. These decisions hold that the taxpayer must prove by competent evidence that the Assessor or the Tax Commissioner arrived at an incorrect value. Only after the taxpayer has met his or her burden, then the Assessor or the Tax Commissioner must show that the values are in fact correct.

(1) “Therefore, the tax commissioner’s appraisal should be presumed to be correct and the assessed value should correspond to the appraisal value in the usual case. An objection to any assessment value may be sustained only upon the presentation of competent evidence, such as that equivalent to testimony of qualified appraisers that the property has been under or over appraised by the tax commissioner and wrongly assessed by the assessor. The objecting party, whether it be the taxpayer, the tax commissioner or another third party, must show by a preponderance of competent evidence that the assessment is incorrect.” Ray Killen, as President, Logan County Board of Education, Etc., et al v. Logan County Commission, Etc., et al., 295 S.E.2d 689, 170 W.Va. 602, (1982).

(2) “It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear.” In Re: Tax Assessments Against Pocahontas Land Co., et al., 303 S.E.2d 691, 172 W.Va. 53, (1983).

(3) “As we have previously recognized, there is a presumption that valuations for taxation purposes fixed by the assessing officer are correct, and the burden is on the taxpayer to demonstrate by clear and convincing evidence that the assessment is erroneous.” Western Pocahontas Properties, Ltd., and Littleton Fuel Company v. The County Commission of Wetzel County, West Virginia, et al., 431 S.E.2d 661, 189 W.Va. 322 (1993).

West Virginia Code §30-38-1, with particular reference to subsection (c)(5), provides that “an employee of ...a political subdivision of the State of West Virginia does not have to be licensed

and certified to perform appraisals.”

With respect to Woodland’s argument that the Assessor improperly considered the cost and market valuation methods as opposed to the income method in evaluating the Woodlands’ property, the West Virginia Supreme Court in In Re: Tax Assessment Against American Bituminous Power Partners, L.P. stated the Tax Commissioner was required to “consider” the various approaches to valuation by contemplating the feasibility of utilizing each of the described methods. On the other hand, these methods are to be “used” or actually employed only where “applicable.”

The Court went on to hold that “the exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.”

Woodlands argues that because it is a 501(c)(3) nonprofit home for the aged that the use and operations of its property basically has a negative effect on market value or marketability and cites the premises in support thereof of its policy to continue to provide care to its residents regardless of ability to pay. It is submitted, based upon information and belief, that Woodlands, in its long history of providing such care has had only one resident that became unable to have the ability to pay. Further, again based on information as provided by Don Faherty, Director of Foster Foundation, there exists a waiting list of approximately 470 people trying to get into the facility.

Consequently, the argument that Foster Foundation is experiencing a steady decline in their net operating income which reduces its value is not meritorious. The value of the bricks and mortar and the land should take precedence over its income-producing abilities. By their own admission as contained in an Article published in *The Huntington Quarterly*, Woodlands covers 170 acres of land with facilities exceeding 300,000 square feet (not including the newly completed sixth wing) and buildings valued at more than \$30,000,000.00. The Maplewood facility in Harrison County, a

similar property to Woodlands the quality of construction and functional utilization sold for roughly \$15,000,000.00 yet with only a fourth of the building and a tenth of the land compared to Woodlands (Transcript p. 20).

## **V. DISCUSSION OF LAW AND ARGUMENT**

### **A. THE PROCESS BY WHICH A TAXPAYER MUST APPEAL AN AD VALOREM PROPERTY TAX ASSESSMENT DOES NOT IMPERMISSIBLY VIOLATE DUE PROCESS.**

Woodlands argues that the Commission has an impermissible conflict of interest in serving as both a decision maker on the Foster Foundation's appeal of an excessive tax assessment and a beneficiary of an increased tax revenue resulting from a higher assessed value of Woodlands.

This argument is totally without merit. For Cabell County in the year of 2007, there were over 27,000 pieces of property whose values were increased. However, only 21 property owners requested a hearing on their assessment before the Board and of that number all but one had their valuations lowered or had their dispute resolved before the hearing or did not show up for their appointment. The County surely would recognize that yes, technically, a perceived conflict of interest could exist but in reality there is none. It must be remembered that for each ad valorem tax dollar collected, the Commission gets 16 cents whereas the School Board gets 67 cents. There is no real incentive for the Commission sitting as the Board to keep assessments excessively high. The Legislature, pursuant to the provisions of Code Section 11-3-24, has designated the County Commission to meet for the purpose of reviewing and equalizing the assessments made by the Assessor. If this Court should rule that this conflict of interest argument should prevail, then all 55

counties will be affected and the Legislature would have to designate some other independent body to take on the responsibilities of the Board. It is argued that such a result would create chaos throughout the State. The system as it presently exists has proved to be fair, just and equitable.

**B. THE IMPOSITION OF A CLEAR AND CONVINCING STANDARD OF PROOF ON TAXPAYERS WHO CONTEST AN AD VALOREM TAX ASSESSMENT BEFORE A COUNTY COMMISSION DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS.**

With respect to Woodlands' argument that the imposition of a clear and convincing standard of proof on taxpayers who contest an ad valorem tax assessment before a County Commission constitutes a denial of due process, the Appellant cites in its own brief, the case of In Re: Tax Assessment Against American Bituminous Power Partners, L.P., 539 S.E.2d 757 (W.Va. 2000), wherein the Court ruled that the burden is upon the taxpayer to demonstrate error with respect to the Assessor's valuation and must produce clear and convincing evidence (emphasis added) to that effect. The Court has spoken on this issue through its decisions and thus established the standard of burden of proof.

The Board advised the taxpayers through its notice letters what the burden of proof is to avoid the taxpayers coming in and saying "well, I just think the assessment is too high" without any further proof substantiating their position.

The West Virginia Supreme Court on several different occasions has stated that the law presumes the Assessor's valuations to be correct and places the burden of proving an incorrect assessment before the Board of Equalization and Review on the taxpayer. These decisions hold that the taxpayer must prove by competent evidence that the Assessor or the Tax Commissioner arrived at an incorrect value. Only after the taxpayer has met his or her burden, then the Assessor or the Tax

Commissioner must show that the values are in fact correct.

(1) "Therefore, the tax commissioner's appraisal should be presumed to be correct and the assessed value should correspond to the appraisal value in the usual case. An objection to any assessment value may be sustained only upon the presentation of competent evidence, such as that equivalent to testimony of qualified appraisers that the property has been under or over appraised by the tax commissioner and wrongly assessed by the assessor. The objecting party, whether it be the taxpayer, the tax commissioner or another third party, must show by a preponderance of competent evidence that the assessment is incorrect." Ray Killen, as President, Logan County Board of Education, Etc., et al v. Logan County Commission, Etc., et al., 295 S.E.2d 689, 170 W.Va. 602, (1982).

(2) "It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear." In Re: Tax Assessments Against Pocahontas Land Co., et al., 303 S.E.2d 691, 172 W.Va. 53, (1983).

(3) "As we have previously recognized, there is a presumption that valuations for taxation purposes fixed by the assessing officer are correct, and the burden is on the taxpayer to demonstrate by clear and convincing evidence that the assessment is erroneous." Western Pocahontas Properties, Ltd., and Littleton Fuel Company v. The County Commission of Wetzel County, West Virginia, et al., 431 S.E.2d 661, 189 W.Va. 322 (1993).

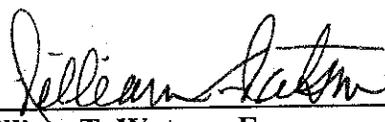
## V. CONCLUSION

Woodlands has failed by clear and convincing evidence to prove that the Assessor's valuation was incorrect.

**WHEREFORE**, the Appellee, the County Commission of Cabell County sitting as the Board of Equalization and Review, respectfully requests that this Honorable Court allow Judge Cummings' ruling to stand, and leave the issue of conflict of interest for the Legislature to determine the best method of resolving the competing concerns of all involved.

**CABELL COUNTY COMMISSION; BOB  
BAILEY, PRESIDENT, W. SCOTT BIAS,  
COMMISSIONER, AND NANCY CARTMILL,  
COMMISSIONER**

**By Counsel**



---

**William T. Watson, Esq.**  
**WV State Bar I. D. No. 3951**  
**Suite 203, The Frederick Building**  
**940 Fourth Avenue**  
**P. O. Box 1371**  
**Huntington, WV 25715**  
**Telephone: (304) 522-6454**

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

IN RE: TAX ASSESSMENT  
OF THE FOSTER FOUNDATION'S  
WOODLANDS RETIREMENT COMMUNITY

CIVIL ACTION NO. 07-C-214  
HONORABLE JOHN L. CUMMINGS

CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on the 22<sup>nd</sup> day of April, 2008, a true copy of the foregoing "**Brief of the Appellee**" was served upon the following counsel by depositing the same, postage prepaid, in the United States Mail:

Daniel J. Konrad, Esq. (WVSB #2088)  
Chad D. Camper, Esq. (WVSB #10293)  
HUDDLESTON BOLEN LLP  
611 Third Avenue  
Huntington, WV 25701



---

WILLIAM T. WATSON, ESQ.