

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

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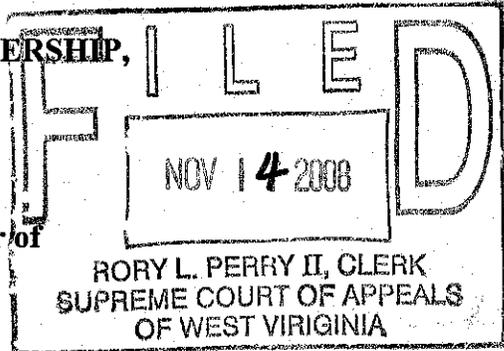
**Consolidated Nos. 34423 & 34424**

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**STONE BROOKE LIMITED PARTNERSHIP,**  
**Petitioner/Appellant,**

v.

**PHYLLIS SISINNI, As Assessor of**  
**Brooke County, et al.,**  
**Respondents/Appellees.**



**HEATHERMOOR LIMITED PARTNERSHIP,**  
**Petitioner/Appellant,**

v.

**JOSEPH ALONGI, as Assessor**  
**of Hancock County, et al.,**  
**Respondents/Appellees.**

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**BRIEF OF APPELLANTS**

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## I. INTRODUCTION

At issue in these consolidated appeals is the tax treatment of Low Income Housing Tax Credits ("LIHTCs") under West Virginia law. Appellant in No. 33423, Stone Brooke Limited Partnership ("Stone Brooke"), and Appellant in No. 33424, Heathermoor Limited Partnership ("Heathermoor"), appeal from the separate memorandums of opinion and orders of the Circuit Courts of Brooke County and Hancock County, respectively, which affirmed the decisions of their County Commissions sitting as Boards of Equalization and Review (collectively, the "Boards"), adopting their respective County Assessors' (collectively, the "Assessors") cost method of appraisal for *ad valorem* tax purposes for tax year 2006. The Circuit Courts committed reversible error in affirming the Assessors' adoption of the cost method because, as even Appellee West Virginia Tax Commissioner has conceded, the income method of appraisal is the appropriate method for appraising the type of rent-restricted apartment buildings that comprised Stone Brooke and Heathermoor in the relevant tax year.

The Circuit Courts compounded their errors by failing to hold that under the income appraisal method Federal Low Income Housing Tax Credits ("LIHTCs") should be excluded and rent restrictions should be considered in the valuation process. Although the Circuit Courts held that they were not required to decide the question of how to treat these items because they did not adopt the income method, the parties fully briefed the issue below and it is ripe for decision by this Court as a matter of law.

Given the Circuit Courts' errors and on the record below, Stone Brooke and Heathermoor request that this Court reverse the judgments of the Circuit Courts and direct them to enter judgment orders fixing the Stone Brooke and Heathermoor properties at the values proposed by their appraisers.

## II. STATEMENT OF THE CASES

### A. The Stone Brooke Action

Stone Brooke owns a 2.99 acre parcel improved in 2004 with six apartment buildings, containing a total of forty-three residential units, and one maintenance building. (Report of Appraisal by David E. McConahy hereinafter “Stone Brooke McConahy Report” 4.) The six buildings contain 42,318 square feet, including eight one-bedroom units, twenty-three two-bedroom units, and twelve three-bedroom units. (*Id.*) The property is an affordable housing complex; that is, the only tenants permitted to live there must fall within a certain income bracket (purely need-based housing). (Hr’g Tr. 4, 20, Feb. 14, 2006.) The property was developed with the assistance of the LIHTC program. (*Id.* 14.) Accordingly, rents that may be charged to tenants are restricted for thirty years on the property, even though the tax credits will dissipate in fifteen years. (*Id.* 17.)

The Assessor’s chief appraiser, Dan Tassej, valued the property at \$1,784,100 for *ad valorem* tax purposes for the 2006 tax year. (Hr’g Tr. 11, Feb. 14, 2006.) Of importance, he employed the cost method, rather than the income method, of appraisal to make his valuation. (Commercial/Industrial Review Document at 18.) His methodology consisted of checking the assessed value of Heathermoor (notwithstanding the fact that the Heathermoor assessment was under appeal), and employing the State’s computer assisted mass appraisal system. (Hr’g Tr. 12, 21, Feb. 14, 2006.) Explaining his valuation, Mr. Tassej stated that “we felt that everything was up to par with everybody else’s property.” (*Id.* 12.)

Stone Brooke requested an adjustment to the assessed value in accordance with West Virginia Code Section 11-3-24. Because the property at issue was affordable housing, the Assessor sought assistance from the Tax Commissioner. (*Id.* 13.) For the Tax Commissioner, Mr. Dwight Goff, an employee of the Property Tax Division of the West Virginia Tax

Department, valued the property at \$1,971,000.00, using the income method of appraisal. His two-page report titled "Discussion concerning the valuation of Stone Brooke Lmtd. Ptnshp. for 2006 Tax Year" ("Goff Discussion") shows that he included direct income from the property (rent paid by tenants); what he referred to as "indirect income" from the federal tax credits; and any favorable financing that would be transferable upon disposition of the property. (Goff Discussion 1-2.)

Stone Brooke's appraiser, David E. McConahy, valued the property at \$1,159,000.00 as reported in his Report of Appraisal dated January 1, 2006 (Stone Brooke McConahy Report 4.)<sup>1</sup> Like the Tax Commissioner, Mr. McConahy used the income method. (*Id.* 20-25.) In contrast to the Tax Commissioner, however, Mr. McConahy did not include the value of LIHTCs to the investors when evaluating the property. (Hr'g Tr. 24-25, Feb. 14, 2006.) He explained that a cost method of appraisal is not valid because of the restricted rents. (Stone Brooke McConahy Report 25.) Although not at issue in this action, Mr. McConahy further explained that the sales approach to valuing the property was also unreliable as there simply were no comparable sales. (*Id.* 25.) Mr. McConahy explained that the income approach was the most reliable because "investors purchase such properties based upon returns." (*Id.*)

The Board adopted the Assessor's cost method of appraisal, which valued the property at \$1,784,100.00.

#### **B. The Heathermoor Action**

Heathermoor is the owner of a 7.66 acre parcel, improved in 2000 with apartment buildings containing forty-nine rent-restricted residential units and one manager's unit, together

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<sup>1</sup>The Stone Brooke McConahy Report contains a mathematical error. The Income Capitalization Worksheet erroneously refers to thirteen instead of twenty-three two-bedroom units. The circuit court accepted a recalculation, which placed the value at approximately \$1,159,000.00, rather than the value of \$600,297.00 actually in the report.

with a community building. (Hr'g Tr. 7, Feb. 14, 2006.) The buildings contain approximately 50,448 square feet and there are eight single bedroom, twenty-six two-bedroom, and sixteen three-bedroom units. (Report of Appraisal by David E. McConahy, hereinafter "Heathermoor McConahy Report.") The property participates in the LIHTC Program, providing affordable, quality low-income housing. (*Id.*; Hr'g Tr. 7, Feb. 14, 2006.)

The Assessor valued the property at \$3,963,500 for *ad valorem* tax purposes for the 2006 tax year. The Assessor relied exclusively on the cost method of appraisal, conceding at hearing that this method "may not be the most appropriate." (*Id.* 2, 26.)

Heathermoor requested an adjustment to the assessed value in accordance with West Virginia Code Section 11-3-24. After Heathermoor sought an adjustment to the assessed value, the Assessor sought the State Tax Commissioner's opinion of the property's value. (*Id.* 12-13.) Using the income method of appraisal and "consider[ing] all income attributable to the property, whether that income be direct or indirect," (*Id.* 13,) Mr. Goff testified that he valued the property at \$2,924,000. (Hr'g Tr. 15, Feb. 14, 2006; Goff Exhibit titled *Discussion concerning the valuation of Heathermoor Lmtd. Ptshp. for 2006 Tax Year.*)

Heathermoor's appraiser, also Mr. McConahy valued the property at \$1,276,000.00, also using the income method. (Heathermoor McConahy Report at 24; Hr'g Tr. 12, Feb. 14, 2006.) It was undisputed that "there were no sales with these types of properties in West Virginia that are comparable," so the market data or comparable sales method of appraisal was not considered. (Hr'g Tr. 12, Feb. 14, 2006.)

Mr. McConahy also presented evidence of per unit tax assessments for other apartment units in Weirton. Specifically, for tax year 2005, Lynwood Manor was assessed \$359 per apartment unit and Four Seasons was assessed \$369 per unit (there was no evidence that either of

these apartment complexes had any rent-restricted units). (McConahy Report 5.) For the same tax year, the subject property (ALL rent-restricted units, save the manger's unit) was assessed nearly four times that amount, at \$1,314 per unit. (*Id.*) Mr. McConahy observed that this was "the highest amount [he] ever noted for suburban apartments in West Virginia, Ohio and Pennsylvania." (*Id.*) Indeed, the assessed amount was about double the average unit assessment of other West Virginia complexes in which the developer was involved. (Hr'g Tr. 5, Feb. 14, 2006.)

Construction of this apartment complex was completed in 2004. (Heathermoor McConahy Report 1.) On behalf of Heathermoor, Bruce Moffat testified that "if you look at the cost of this property, the type of product that we build, we use the same materials, the same square footage sizes as a market-rate apartment complex that can justify higher rents[.] ..." (Hr'g Tr. 5, Feb. 14, 2006.) He further testified that investors receive the LIHTCs as an incentive to invest, "[s]o they're not designed as normal market rate property, as it's really an investment property in order to provide housing. There's a minor return on the tax rate." (Hr'g Tr. 4, Feb. 14, 2006.)

Mr. Moffat further testified that the developer of Heathermoor has developed several other low income housing complexes in West Virginia and that the appraisal of Heathermoor "is actually about double of what our average unit assessed cost is xxxx [sic] in properties we have throughout the state." (Hr'g Tr. 5, Feb. 14, 2006.)

The Board adopted the Assessor's cost method of appraisal, which valued the property at \$3,963,500.00.<sup>2</sup>

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<sup>2</sup> The transcriber's not indicates: "I put xxxx when something was being said but I could not hear what to type. I put inaudible at other times. This was extremely difficult to hear and the voices were similar." (*Id.* at 1.)

**C. Consolidated Appeals to the Circuit Courts**

On March 24, 2006, Stone Brooke and Heathermoor independently petitioned for appeal to the Circuit Courts of Brooke County and Hancock County, respectively, pursuant to West Virginia Code Section 11-3-25. By agreement of the parties, an order was entered on March 1, 2007, transferring Heathermoor to the docket of the Honorable James P. Mazzone. The cases were consolidated for hearing and oral argument was held on May 30, 2007.

On January 30, 2008, the Circuit Courts entered separate memorandums of opinion and orders authored by Judge Mazzone. The Circuit Courts appropriately recognized that this Court has not addressed the issue of how to properly value properties that are used in the LIHTC program and that there is a split among the lower courts that have. *Compare In re: 1994 Prop. Tax Assessment of Twin Oaks Plaza*, Civil Action No. 94-C-78 (Fayette Cty., W. Va., Feb. 8, 1999), with *Shepherds Glen Ltd. P'shp. v. Bordier*, Civil Action No. 03-C-71 (Jefferson Cty., W. Va. Sept. 22, 2003) (copies attached hereto).

The Circuit Courts held, however, that the taxpayers must prove by clear and convincing evidence that the Assessors' valuation method was clearly erroneous. The Circuit Courts concluded that Stone Brooke's and Heathermoor's evidence is insufficient meet that burden, reasoning that there are three generally accepted approaches to value under the West Virginia Code of State Regulations Section 110-1P-2.2.1 and that the regulations do not state that one approach be used to the exclusion of the others in valuing property used in the LIHTC program.

Because the Circuit Courts found no error in the Assessors' use of the cost method, it did not reach the question of whether tax credits should be included in a valuation based upon the income approach.

### III. STATEMENT OF THE ISSUES

A. Whether the Circuit Courts committed reversible error in affirming the Assessors' adoption of the cost method because, as the Circuit Courts indicated in their memorandums of opinion and orders, even the Respondent West Virginia Tax Commissioner has asserted in this action that the income method of appraisal is the appropriate method for apartment buildings with rent-restricted residential units.

B. Whether the Circuit Court committed reversible error in failing to hold that under the income method LIHTCs should be excluded and rent restrictions should be considered in the valuation process.

### IV. STANDARD OF REVIEW

This Court recently articulated the standard of review in tax appeals as follows:

"This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." Syl. pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996). *Accord* Syl. pt. 2 *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997) ("In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.").

With respect to the questions of law . . . , we employ a *de novo* standard of review: "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

Finally, we utilize a plainly wrong standard to review the . . . assignment of error challenging the assessed value of . . . property:

"[a]n assessment made by a board of review and equalization and approved by the circuit court will not be reversed when supported by substantial evidence unless plainly wrong." Syl. pt. 1, *West*

*Penn Power Co. v. Board of Review and Equalization*, 112 W. Va. 442, 164 S.E. 862 (1932)” Syl. pt. 3, *Western Pocahontas Properties, Ltd. v. County Comm’n of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993).

Syl. pt. 4, *In re Petition of Maple Meadow Mining Co. for Relief from Real Prop. Assessment For the Tax Year 1992*, 191 W. Va. 519, 446 S.E.2d 912 (1994). *But see In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 255, 539 S.E.2d 757, 762 (2000) (“[J]udicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code, ch. 29A. In such circumstances, a circuit court is primarily discharging an appellate function little different from that undertaken by this Court; consequently, our review of a circuit court’s ruling in proceedings under [W. Va. Code] § 11-3-25 is *de novo*.” (footnote and citation omitted)).

*In re: Tax Assessment of Foster Found.’s Woodland’s Ret. Cmty.*, No. 33891 (W. Va. Nov. 5, 2008) (footnotes omitted).

## **V. DISCUSSION**

### **A. Background Regarding the LIHTC Program and Real Property Valuation**

#### **1. The LIHTC Program**

The LIHTC Program is the federal government’s most significant federal subsidy program. Adam McNeely, *Improving Low Income Housing: Eliminating the Conflict Between Property Taxes and the LIHTC Program*, 15 J. Affordable Hous. & Cmty. Dev. L. 324, 324 (2006) The program represents a public/private partnership among the federal government, state governments, and private sector. *Id.* at 325.

Under the LIHTC Program, federal income tax credits are awarded by designated state agencies to low income housing developers based on submitted proposals. *Id.* After receiving a credit allocation, a developer sells the credits to investors in return for capital to pay for the project. *Id.* Projects that have received an allocation of tax credits must be operated in compliance with requirements set forth in the Internal Revenue Code. *Id.*

Only a “qualified low income project” can receive LIHTC credits. *Id.* at 326. Generally, residential rental property constitutes a qualified low-income project, but commercial property does not. *Id.* The LIHTC imposes a “minimum set-aside requirement,” which obligates the project owner to set aside a minimum number of rent-restricted units in exchange for receiving the credits. *Id.* Owners must set aside either twenty percent or more of the building’s residential units to be rent restricted and occupied by households whose income does not exceed fifty percent of the area median gross income, or forty percent or more of the units to be rent restricted and occupied by households whose income does not exceed sixty percent of the area median gross income. *Id.*

Although the investors only receive tax credits over a ten-year period, they must agree to comply with the minimum set-aside requirement and the rental limitations for a minimum of fifteen years or face loss of the tax credits for all years prior to the violation. *Id.*

## 2. Real property valuation

The West Virginia Constitution provides that “all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law.” W. Va. Const. art. X, § 1. “The taxation of real and personal property is a complex process.” *In re 1994 Assessments of Prop. of Righini*, 197 W. Va. 166, 475 S.E.2d 166, 169 (1996). “Reduced to its basic elements . . . the process involves the valuation of property and applying a rate of taxation upon that valuation.” *Id.*, 475 S.E.2d at 169. All property in West Virginia must be assessed annually at its “true and actual value,” defined as “the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale[.]” W. Va. Code § 11-3-1. Thus, the launching point for the

process, and the point at issue here, is that of valuing the property. *In re 1994 Assessments of Prop. of Righini*, 475 S.E.2d at 169.

Property in West Virginia is assigned a classification. Residential rental property falls within the commercial tax classification. W. Va. C.S.R. § 110-1P-2.3.3 (including within its examples of commercial property, "apartment buildings"). "The appraised value (market value) of commercial . . . real property is the price at or for which the property would sell if it was sold to a willing buyer by a willing seller in an arms-length transaction without either the buyer or the seller being under any compulsion to buy or sell." *Id.* § 110-1P-2 .1.1.

"In general, there are three recognized methods (plus their variations) by which to measure the fair market value of property to assess it: comparable sales; cost of component assets; and comparable investments yielding the same income." 72 Am. Jur.2d *State and Local Taxation* § 668. "Each method utilizes unique indicia of value, and the reliability of each method depends on distinct considerations." *Id.*

The law in West Virginia is in accord with these three general approaches. "In determining an estimate of fair market value, the Tax Commissioner will consider and use where applicable, three (3) generally accepted approaches to value: (A) cost, (B) income, and (C) market data." W. Va. C.S.R. § 110-1P-2.2.1. The cost approach determines fair market value by reducing the replacement cost of the improvements by the amount of accrued depreciation and adding it to an estimated land value. *Id.* § 110-1P-2.2.1.2. Under the income approach, a property's present worth is directly related to its ability to produce an income over the life of the property so that the selection of an overall capitalization rate is derived from current available market data by dividing annual net income by the current selling price of comparable properties. The present fair market value of the property is then determined by dividing the annual economic

rent by the capitalization rate. *Id.* The market data approach considers the selling prices of comparable properties. *Id.* § 110-1P-2.2.1.3. “[B]ecause of the difficulty in obtaining necessary data from the taxpayer, or due to the lack of comparable commercial and/or industrial properties,” *Id.* § 110-1P-2.2.2, and because the varying nature of property, it is at times reasonable to assess value by selecting one method alone and at other times by combining the methods, giving proportionate weights to the disparate indicia of value. 72 Am. Jur.2d *State and Local Taxation* § 668.

**B. The Circuit Court Committed Reversible Error Because the Income Method of Appraisal is the Appropriate Appraisal Method for this Type of Property.**

An Assessor is obligated under West Virginia law to use the most accurate appraisal method. *See In re Tax Assessment Against Am. Bituminous Power Partners*, 208 W. Va. 250, 539 S.E.2d 757, Syl. Pt. 5 (2000) (“Title 110, Series 1P [section 2.2.2.] of the West Virginia Code of State Rules confers upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties”). The Assessor’s use of a cost approach when the Tax Commissioner has asserted in this action that the income method of appraisal is the appropriate method for this type of property constitutes error as a matter of law as does the decision of the circuit court to accept such a methodology. *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12, 17 (1996) (“a circuit court by definition abuses its discretion when it makes an error of law”).

It is well established that the best measure of rental property’s value is the income method because the amount of income a property can generate is what would prompt an offer to purchase the property. *See, e.g., Montgomery Ward & Co. v. County of Hennepin*, 482 N.W.2d 785, 788 (Minn. 1992) (observing that the income approach “is based on the principle of anticipation, that a buyer of an income-producing asset will pay an amount equal to the income

that the property should reasonably be expected to generate, minus expenses, divided by a capitalization rate that investors would reasonably expect to obtain”); *In re PP&L, Inc.*, 838 A.2d 1, 9 (Pa. Commw. Ct. 2003) (the “income approach assumes that an investor would set a price for a property based on a projected income stream that would produce an acceptable return on the capital invested in its purchase.”); *Litt v. Rutherford Rent Bd.*, 483 A.2d 239, 246 (N.J. Super. Ct. Law. Div. 1984) (quoting *Parsippany Hills Assoc. v. Parsippany-Troy Hills*, 1 N.J. Tax 120, 122-23 (1980)) (“In valuing income producing property it is an accepted fact that a prospective purchaser’s primary concern is with the anticipated return on his investment and not with the cost of construction or the price for which similar properties may be sold.”).

Courts have held that “[t]he preferred valuation method for apartment buildings is capitalization of income, since investors purchase apartment buildings as income-producing properties.” *Helmsley v. Ft. Lee*, 394 A.2d 65, 71 (N.J. 1978). See *State Hous. Auth. v. Town of Northfield*, 933 A.2d 700 (Vt. 2007) (holding that income approach to valuation was appropriate, and that cost and market approaches were not, for subsidized housing complexes owned by State Housing Authority and its non-profit corporation); *1198 Butler St. Assocs. v. Bd. of Assessment Appeals*, 946 A.2d 1131, 1135-36 & n.4 (Pa. Commw. Ct. 2008) (affirming trial court’s adoption of taxpayer’s use of income approach to valuation of low income housing). This last point is supported by the weight of authority addressing the issue. Op. A.G. Ark., No. 2004-263, 2004 WL 2397149, \*3 (Oct. 25, 2004). See also Daniel F. Sullivan, *Valuation of Structure Based on Reproduction or Replacement Cost*, 8 Am. Jur. P.O.F.2d 399 (“the income approach is ordinarily the most appropriate one to use in valuing commercial properties of a type commonly owned by investors because of their capacity to produce rental income”); Daniel F. Sullivan, *Overassessment of Income-Producing Property—Neighborhood Shopping Center*, 3 Am. Jur.

P.O.F.2d 1 § 3 (explaining for properties purchased primarily for their capacity to produce income, including apartment buildings, office buildings and shopping centers, the income approach is often the most reliable indicator of market value, as it is generally the approach most heavily relied on by investors”); Jonathan Penna, *Fairness in Valuation of Low-Income Housing Tax Credit Properties: An Argument for Tax Exemption*, 11 J. Affordable Hous. & Cmty. Dev. L. 53, 59 (stating “[t]here is much support for using the income capitalization method to value LIHTC properties”).

On the other hand, “the appraisal literature and case law regarding rent-restricted low-income housing argue against the use of the cost method.” *Cascade Court Ltd. P’ship v. Noble*, 20 P.3d 997, 1002 n.33 (Wash. Ct. App. 2001). “[T]he cost method is generally preferred only where the properties being appraised ‘are not amenable to valuation by the income capitalization approach.’” *Id.* (quoting Appraisal Institute, *The Appraisal of Real Estate* 338 (11th ed.1996)). Therefore, “a cost approach to valuation is generally an inappropriate method to value low-income, government-subsidized housing projects.” *Pinelake Hous. Coop. v. Ann Arbor*, 406 N.W.2d 832, 839 (Mich. Ct. App. 1987). *Accord Canton Towers, Ltd. v. Bd. of Revision*, 444 N.E.2d 1027 (Ohio 1983) *Maples v. Kern County Assessment Appeals Bd.*, 117 Cal. Rptr. 2d 663, 668 (Cal. App. 5<sup>th</sup> Dist. 2002).

Here, as in *In re Weaver Inv. Co.*, 598 S.E.2d 591 (N.C. Ct. App. 2004), “[t]he County relied exclusively on the cost approach[.] [T]he County’s appraiser, failed to use the income approach to provide alternative or supporting evidence for its valuation. By rejecting the income approach, the County failed to use the ‘most reliable’ method of valuation[.]” *Id.* at 594.<sup>3</sup>

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<sup>3</sup>The fact that the Assessor used the State’s Computer Assisted Mass Appraisal (sometimes referred to as CAMA) System only highlights this error because the CAMA is geared to residential real estate, not residential rental (i.e. commercial) real estate. *See* W. Va.

Without a doubt, the Assessor abused his discretion in choosing the cost method over the income method. Indeed, as Mr. McConahy explains in his Appraisal report, the only valid methodology is the income method. *See, e.g., 72 Am. Jur.2d State and Local Taxation* § 668 (lack of available data may compel use of a single methodology).

C. **The Circuit Court Compounded its Error by Failing to Hold that Under the Income Method LIHTCs Should be Excluded and Rent Restrictions Should Be Considered in the Valuation Process.**

Because the Board upheld the Assessor's appraisal based upon the cost approach, and because the circuit court affirmed that decision, neither reviewing body below determined whether LIHTCs should be included in appraising a low income apartment complex using the income method. However, the Tax Commissioner took the erroneous position that tax credits should be included in the valuation of the subject property. *See Goff Discussion 1-2.* The parties fully briefed this issue below and it is properly before this Court.

In employing the income method, the impact of the tax credits and rental restrictions are critical issues. Under the income method, a property's present worth is tied directly to its ability to produce income. W. Va. C.S.R. § 110-1P-2.2.1.2. "The present fair market value of the property is determined by dividing the annual economic rent by the capitalization rate." *Id* The capitalization rate, the "rate used to convert an estimate of future income to an estimate of present market value," *Id* § 110-1P-2.3.2, is derived from current available market data by dividing annual net income by the current selling price of comparable properties." So, the *capitalization rate*=annual net income/selling prices of comparable properties and *Fair Market Value*=annual economic rent/capitalization rate.

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Dep't Tax and Rev., *Property Tax-State Tax Commissioner's Statement Concerning Methods By Which Residential Real Estate Is Appraised Statewide*, Admin. Notice 2007-16 (Feb. 1, 2007).

If the tax credits are included, the annual net income goes up; if the rental restrictions are not considered, the rent reflects a higher income than is actually produced. Consequently, when dealing with LIHTC properties, the tax credits should not count as income and rent restrictions should be considered in calculating the capitalization rate.

1. **LIHTCs should be excluded.**

The tax credits are intangible personal property and such property is not taxable in West Virginia. W. Va. Code § 11-1C-1b The Commissioner relies on West Virginia Code § 11-3-7a to argue that the credits should be considered. *See* Goff Discussion 1. This is an incorrect reading of Code § 11-3-7a.

West Virginia Code § 11-3-7a provides that “[f]or ad valorem property tax purposes, chattel interests in real property and chattel interest in tangible personal property are hereby defined to be interests in tangible personal property and are to be assessed and taxed as such. As so defined, chattel interest in real property and chattel interests in tangible personal property are not intangible personal property for ad valorem property tax purposes.” However, chattel interests do not encompass tax credits.

Chattel interests deal only with estates in land less than a freehold. That is, chattel interests are “interests in incorporeal hereditaments, not amounting to freeholds, as distinguished from freehold interests and are regarded as ‘chattels real,’ that is estates or interests which are annexed to or concern real estate[.]” 31 C.J.S. *Estates* § 16 (footnotes omitted) (emphasis added). *See also Black’s Law Dictionary* 743 (8<sup>th</sup> ed. 1999) (defining an incorporeal hereditament as “an intangible right in land, such as an easement.”).

A tax credit is not a chattel real as defined in West Virginia Code § 11-3-7a because it is not an interest in the land; hence, it must be an intangible and not taxable. Indeed, “[c]ourts in other states have found tax credits created by the LIHTC program to constitute intangible

property.” *Holly Ridge Ltd. P’ship v. Pritchett*, 936 So. 2d 694, 699 n.4 (Fla. Dist. Ct. App. 5<sup>th</sup> Dist. 2006) (citations omitted); *Cottonwood Affordable Hous. v. Yavapai County*, 72 P.3d 357 (Ariz. Tax Ct. 2003); *Maryville Props., L.P. v. Nelson*, 83 S.W.3d 608 (Mo. Ct. App. 2002); *Cascade Court Ltd. P’ship. v. Noble*, 20 P.3d 997 (Wash. Ct. App. 2001)). One court has observed that

[i]t is difficult to construct a satisfactory definition of intangible property for real estate valuation purposes, but certain important distinctions can be made. The assessor argues that zoning and location are intangible and yet they are obviously proper factors for consideration. Zoning and location, however, are characteristics of the property itself, not characteristics of the owners of the property. Likewise, just as with a below market lease or a tax abatement, zoning and location have a direct effect on the income or income producing potential of the property regardless of the identity or characteristics of the individual owner. LIHTCs are not characteristics of the property. Rather they are assets having direct monetary value. Their restricted transferability does not destroy their essential status as intangible property having value primarily to their owner. Objective standards should be used for determining fair market value in the market place. The particular circumstances of the owner are not a proper consideration.

*Maryville Props.*, 83 S.W.3d at 616. See *State Bldg. & Constr. Trades Council v. Duncan*, 162 Cal. App. 4<sup>th</sup> 289, 76 Cal. Rptr. 3d 507, 527 (2008) (observing that LIHTCs have no independent value in and of themselves; instead, they are an incidental benefit that investors receive when they purchase their limited partnership interest in the property).

Whether an intangible is taxed directly or indirectly through its value producing ability, it is still being taxed—violating the well-accepted principal that “courts should not uphold the doing of a thing indirectly which could not be done directly.” *State v. Price*, 113 W. Va. 326, 167 S.E. 862, 864 (1933). Accord *State v. Schermerhorn*, 211 W. Va. 376, 566 S.E.2d 263, 268 (2002) (per curiam). See also *In re Starcher*, 202 W. Va. 55, 501 S.E.2d 772, 785 (1998); *West Virginia Trust Fund v. Bailey*, 199 W. Va. 463, 485 S.E.2d 407, 421 (1997) *Cochran v. Cochran*, 130 W. Va. 605, 44 S.E.2d 828, 832 (1947); *Prager v. W. H. Chapman & Sons Co.*, 122 W. Va. 428, 9 S.E.2d 880, 884 (1940); *White v. Morton*, 114 W. Va. 29, 171 S.E. 762, 763 (1933);

*Claiborne v. Chesapeake & O. Ry. Co.*, 46 W. Va. 363, 33 S.E. 262, 263 (1899); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866); *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 449 (1830). Moreover, as further explained below, considering tax credits as income, either direct or indirect, violates the relevant Code of State Rules.

**2. Rent restrictions should be considered.**

Moreover, the rent restrictions should be considered in valuing the property. The Code of State Rules defines economic rent as “the rental amount which a space or property would attain in the open market at the time of appraisal, whether it is lower, higher or the same as the actual contract rent.” *Id.* § 110-1P-2.3.6. Here, the rental amount that the subject property, indeed, any similarly situated LIHTC property, would sustain in an open market is the same as the contract rate. *See, e.g., Metro. Holding Co. v. Bd. of Review*, 495 N.W.2d 314, 316-17 (Wis. 1993):

In using estimated market rents and expenses, the city assessor essentially pretended that Layton Garden was not hindered by the HUD restrictions and valued the property at the amount the property would bring in an arm’s-length transaction if Metropolitan were able to charge market rents. Layton Garden was, however, hindered by the HUD restrictions and it is undisputed that the HUD restrictions precluded Metropolitan from charging market rents. In fact, the city assessor admitted that Metropolitan could not have realized the assessed amount from a private sale in 1988. Furthermore, The Board’s counsel conceded, during oral argument, that she would pay less for a building encumbered with HUD restrictions than she would for an otherwise identical building that was not encumbered with HUD restrictions. The city assessor’s use of estimated market rents violated sec. 70.32(1), because the estimated market rents did not reflect the true market value of Layton Garden.

*See also Maryville Props. v. Nelson* 83 S.W.3d 608 (Mo. Ct. App. 2002) (restricted rents must be taken into account); *Greenfield Vill. Apartments, L.P. v. Ada County*, 938 P.2d 1245 (Idaho 1997) (LIHTC property valuation should take into consider restrictions on rent). Additionally, if a legislative rule is ambiguous, it should be construed strictly in favor of the taxpayers. “This Court has long followed ‘the historic rule that tax statutes are generally to be construed in favor of the taxpayer and against the taxing authority.’” *Doran & Assocs. v. Paige*, 195 W. Va. 115,

464 S.E.2d 757, 762 (1995) (citation omitted). *See also Wooddell v. Dailey*, 160 W. Va. 65, 230 S.E.2d 466, 469 (1976) (“Generally, tax laws are strictly construed, and when there is doubt regarding the meaning of such laws they should be construed in favor of the taxpayer.”). *See generally* 3A Norman J. Singer, *Sutherland Statutory Construction* § 66.01 (5th ed. 1992) (“[T]ax laws are to be strictly construed against the state and in favor of the taxpayer.”). Further, public policy supports Stone Brooke’s reading of the legislative rule.

This legislative Rule (§ 110-1P-2.3.6) was passed and in effect in 1991. Yet, the LIHTC program was only made permanent in 1993. The LIHTC was first created in 1986 as Section 252 of the Tax Reform Act of 1986, Pub. L. No. 99-514, § 100 Stat. 2085, 2189. After being amended several times, Congress made the LIHTC a permanent part of the tax code in the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103- 66, § 13142, 107 Stat. 312, 437, now codified at 26 U.S.C. § 42. Since it was not clear in 1991 that the LIHTC would become permanent, it was reasonable not to consider its impact in 1991. Now that it is permanent, the public policy of full housing of low income residents—coupled with all the benefits that flow from such housing—strongly militates in considering only rent restricted income.

**D. Public Policy Supporting Quality Low-Income Housing is Paramount to any Competing Administrative Policy.**

The Tax Commissioner also asserts that the “Property Tax Division has always, as a matter of policy, maintained that all income, both direct and indirect, derived from the ownership of an investment property be considered in its valuation.” *See Goff Discussion*. However, the pertinent Code of State Rules provision provides, “for purposes of appraisal of any tract or parcel of real property used for commercial . . . purposes, including chattels real, the appraisal shall consider the following factors: . . . [t]he income, if any, which the property actually produces and has produced within the next preceding three (3) years . . . .” W. Va. C.S.R. § 110-1P-2.1.1.9.

Moreover, the explicit public policy supporting low-income affordable housing should control over the public policy articulated by the Property Tax Division.

In interpreting an administrative regulation, the rules of statutory construction apply. *Snider v. Fox*, 218 W. Va. 663, 627 S.E.2d 353, 357 (2006) (quoting *Vance v. West Virginia Bureau of Employment Program*, 217 W. Va. 620, 619 S.E.2d 133, 136 (2005) (quoting *Farm Sanctuary, Inc. v. Dep't of Food & Agric.*, 74 Cal. Rptr. 2d 75, 80 (Cal. App. 2d Dist. 1998)) (“It is generally accepted that ‘[s]tatutes and administrative regulations are governed by the same rules of construction’”). See also *Feathers v. West Virginia Bd. of Med.*, 211 W. Va. 96, 562 S.E.2d 488, 494 (2001). See generally 2 Am. Jur.2d *Administrative Law* § 245. “Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.” *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384, Syl. Pt. 2 (1970) See also *Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 647 S.E.2d 848, 853 (2007) (“Where the statutory language is clear and unambiguous, it should be applied as written”); *Francis O. Day Co. v. Dir., Div. of Envtl. Prot. of W. Va. Dep't of Commerce, Labor & Envtl. Res.*, 191 W. Va. 134, 443 S.E.2d 602, Syl. Pt. 3 (1994) (“Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation”).

The Tax Commissioner’s position puts the proverbial “cart before the horse.” *State ex rel. McGraw v. Nat'l Fuels Corp.*, 215 W. Va. 532, 600 S.E.2d 244, 249 (2004) (per curiam). Under West Virginia Code of State Rules § 110-1P-2.1.1.9, “for purposes of appraisal of any tract or parcel of real property used for commercial . . . purposes, including chattels real, the appraisal shall consider the following factors: . . . [t]he income, if any, which the property actually produces and has produced within the next preceding three (3) years . . . .” Thus, the

*income* at issue is the income “the *property actually* produces.” LIHTC property does not actually produce a tax credit (what the Tax Commissioner calls indirect income in the Goff Discussion); rather the tax credit, in essence, produces the LIHTC property.

As for public policy, the public policy of both the federal and state governments is to encourage housing. United States Housing Act of 1937, ch. 896, 50 Stat. 888 (“It is the policy of the United States--(1) to promote the general welfare of the Nation by employing the funds and credit of the Nation, as provided in this chapter-- to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families; (B) to assist States and political subdivisions of States to address the shortage of housing affordable to low-income families; and (C) consistent with the objectives of this subchapter, to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability to public housing residents, localities, and the general public”); 42 U.S.C. § 1441 (“The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation”); W. Va. Code § 31-18D-2.

Indeed, “decent, safe, and affordable housing is critical to proper human development[.]” Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 Wake Forest L. Rev. 511, 540 (2007), and this Court has observed the “societal recognition that the home

shelters and is a physical refuge for [the family, which is the] basic unit of society[.]” *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169, 189 (2007) (quoting *State v. W.J.B.*, 166 W. Va. 602, 276 S.E.2d 550 556 (1981)). *Accord State v. Jason H.*, 215 W. Va. 439, 599 S.E.2d 862, 868 (2004) (Davis, J., joined by Maynard, C.J., dissenting). Additionally, affordable housing advances low-income neighborhood revitalization. Benson F. Roberts & F. Barton Harvey, III, *Comment on Jean L. Cummings and Denise DiPasquale’s The Low-Income Housing Tax Credit: An Analysis of the First Ten Years*, 10 Hous. Pol’y Debate 309, 309 (1999).

“Despite th[e] apparent success [of the LIHTC program], a competing state and local tax, the property tax, is undermining the LIHTC. Property taxes represent a significant operating expense to low income housing, even more so than to market-rate housing because of the restricted rent levels imposed under the LIHTC. As a result, property taxes can lead to the financial infeasibility of a project and thereby directly undermine the LIHTC’s purpose of increasing the supply of affordable housing.” *Id.* at 324-25 (1999) (footnote omitted). Because the application of the property tax methodology by the Tax Commissioner and Assessor undercuts a significant federal program, this Court should grant the appeal to ensure that the LIHTC program is not eviscerated by county property taxes.

**E. This Case Presents a Question of Substantial Importance.**

Justice Oliver Wendell Holmes observed that “[h]ousing is a necessary of life.” *Block v. Hirsh*, 256 U.S. 135, 156 (1921). *See also Lombard v. Louisiana*, 373 U.S. 267, 279 (1963) (Douglas, J., concurring). “Lack of affordable housing affects the ability of communities to develop and maintain strong and stable economies and impairs the health, stability and self-esteem of individuals and families.” W. Va. Code § 31-18D-2. It is, therefore, the public policy of both the federal and state governments to encourage housing. *See also United States Housing Act of 1937*, ch. 896, 50 Stat. 888; W. Va. Code § 31-18D-2. Indeed, this Court has observed

the “societal recognition that the home shelters and is a physical refuge for the basic unit of society[,] the family[.]” *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169, 189 (2007) (quoting *State v. W.J.B.*, 166 W. Va. 602, 276 S.E.2d 550 556 (1981)). “As federal resources for affordable housing development have continued to shrink, the Low Income Housing Tax Credit (LIHTC) program has assumed a central role in housing finance.” Roberta L. Rubin & Jonathan Klein, *Nonprofit Guaranties in Tax Credit Transactions: a New Era?* J. Affordable Hous. & Cmty. Dev. L. 314, 314 (2006). Indeed, West Virginia had a total of 10,547 LIHTC units between 1987 and 2006. [www.danter.com/taxcredit/lihtchh.htm](http://www.danter.com/taxcredit/lihtchh.htm).

**F. There is West Virginia Authority to Support Appellants’ Position and the Court Should Resolve the Split Among Circuit Courts.**

“[T]he responsibility for maintaining the law’s uniformity is a responsibility of appellate . . . judges[.]” *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7<sup>th</sup> Cir. 1987). *Accord Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1381 (Fed. Cir. 2001). *See also Braxton v. United States*, 500 U.S. 344, 347 (1991). Consequently, “[i]t is the is the responsibility of the respective state supreme courts to maintain uniformity within each state by resolving conflicts between decisions of the lower courts of the same state.” Eric Stein, *Uniformity and Diversity in a Divided-Power System: The United States’ Experience*, 61 Wash. L. Rev. 1081, 1086-87 (1986).

The circuit court’s decision here acknowledges and perpetuates a split of authority. For example, while the circuit court here held that the cost approach did result in a true and actual value, it recognized that the Circuit Court of Fayette County in *In re: 1994 Prop. Tax Assessment of Twin Oaks Plaza*, Civil Action No. 94-C-78 (Fayette Cty., W. Va. Feb. 8, 1999), held that the cost approach does not result in a fair market value of LIHTC property. For the reasons more fully set forth above, Appellants submit that the Circuit Court of Fayette County has adopted the

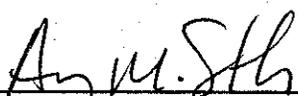
better view. In any event, the need for uniformity in the law counsels in favor of the Court providing guidance on this issue.<sup>4</sup>

## **VI. CONCLUSION**

For all of the foregoing reasons, this Court should reverse the judgment of the Circuit Courts and direct them to enter judgment orders fixing the Heathermoor and Stone Brooke properties at the values proposed by their appraiser using the income method.

Dated this 14<sup>th</sup> day of November, 2008.

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**Counsel for Appellants**

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<sup>4</sup> *Shepherds Glen Ltd. P'shp. v. Bordier*, Civil Action No. 03-C-71 (Jefferson Cty., W. Va. Sept. 22, 2003), which was also cited by the circuit court, is readily distinguishable. In that case, the court held only that the income method of appraisal is not necessary "where 'economic rent' data is not available to the assessor." *Id.* at ¶ 15. In this action on the other hand, adequate economic rent data is available. Indeed, the Tax Commissioner recognized that the income method is the appropriate method to use for this type of property.

**IN THE CIRCUIT COURT OF  
FAYETTE COUNTY, WEST VIRGINIA**

<b>IN RE: 1994 PROPERTY TAX ASSESSMENT OF TWIN OAKS PLAZA</b>	<b>CIVIL ACTION NO. 94-C-78-H</b>
<b>1996 PROPERTY TAX ASSESSMENT OF TWIN OAKS PLAZA</b>	<b>CIVIL ACTION NO. 96-C-91-H</b>
<b>1997 PROPERTY TAX ASSESSMENT OF TWIN OAKS PLAZA</b>	<b>CIVIL ACTION NO. 97-C-94-H</b>

**ORDER**

On the 11th day of January, 1999, came the Petitioner, by **Herschel H. Rose III**, its attorney, the Respondent appearing by **Carl L. Harris**, Assistant Prosecuting Attorney, Fayette County, West Virginia, pursuant to the Petitioner's Petitions for relief. Counsel made oral presentations as to their respective positions, memoranda of law and exhibits, having been previously filed.

These three civil actions are appeals from rulings by the County Commission of Fayette, sitting as a Board of Equalization and Review, as to the value of an apartment building situate in Fayette County, West Virginia, owned by the Petitioner. All three appeals have common issues of law and fact. Accordingly, it appears to the Court that these actions should be, and the same are hereby, consolidated for disposition.

These three civil actions are appeals from rulings by the County Commission of Fayette, sitting as a Board of Equalization and Review, as to the value of an apartment building situate in Fayette County, West Virginia, owned by the Petitioner. All three appeals have common issues of law and fact. Accordingly, it appears to the Court that these actions should be, and the same are hereby, consolidated for disposition.

**FINDINGS OF FACT**

1. The real property known as Twin Oaks Plaza is an eight story apartment building constructed in 1985. The building has a total of 43,480 square

ENTERED January 8, 1999  
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FAYETTE COUNTY  
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feet according to plans, including 27,927 square feet of rentable space. There are 60 rental units of which 16 are efficiency apartments consisting of 413 square feet, 43 are one bedroom units containing of 479 square feet and one is a 2 bedroom unit containing 722 square feet. Floors two through four contain the efficiency and one bedroom units, and the first floor has the manager's two bedroom unit, community room, laundry room, business office, maintenance room, mechanical room and two restrooms.

2. Twin Oaks Plaza is a H.U.D. Section 202 and Section 8 housing project where the monthly rental amounts are based on 30 percent of the tenants' annual income with the remaining rental being provided by government subsidy. The actual gross subsidized rent per month for 1992 was \$500.00, for 1993 it was \$502.00, and for 1994 it was \$516.00.

3. For tax year 1994, the State Tax Department appraised Twin Oaks Plaza at \$1,303,300.00.

4. For tax years 1996 and 1997, the State Tax Department appraised Twin Oaks Plaza at \$1,213,200.00, each.

5. In arriving at 1994, 1996 and 1997 appraisals, the State Tax Department primarily relied upon the cost approach to valuation. The cost approach involves a computation of the cost of replacing an improvement to real property, reduced by depreciation.

6. The Petitioner has calculated that the value of its property for tax year 1994 is \$800,000.00, and for tax years 1996 and 1997 it is \$755,000.00, each. These values were calculated by the Petitioner by using the income approach.

7. The Twin Oaks Plaza, constructed to qualify for participation in the H.U.D. Section 202 and Section 8 program, was built with various safety features and other amenities which, but for participation in the H.U.D. program, would, in all probability, not have been included in the design and construction of the building.

8. While adding substantial cost to the construction of the building, these safety features and other amenities do not now materially affect the fair market value of the fee simple estate of the Petitioner.

9. As a result of this anomaly, the cost of the construction of the improvements to Petitioner's real property substantially exceed, in the real, non-subsidized, world, the fair market value of those improvements.

10. The approach to valuation employed by the Petitioner which, as aforementioned, emphasizes the income approach, as confirmed by the market approach, establishes the true and actual value of Petitioner's property more realistically, accurately and fairly than does the cost approach employed by the Respondent.

11. In determining at the true and actual value of its property using the income approach, the Petitioner has employed market rents which reflect the fair market value of rental property in Fayette County, West Virginia during the relevant periods.

12. The Petitioner has established, by clear and convincing evidence, that the use of the contract subsidized rents in determining the true and actual value of the Petitioner's property, improperly includes the value of the housing program of

the United States Government and does not determine the true and actual value of the fee simple estate of the Petitioner, unencumbered by liens or subsidies.

### **CONCLUSIONS OF LAW**

1. Taxation shall be equal and uniform throughout the state and all property, both real and personal, shall be taxed in proportion to its value as directed by law. (West Virginia Constitution, Article X, Section 1)

2. The objective of the assessment of property in West Virginia is to determine the true and actual value of the property for ad valorem tax purposes.

3. The estate to be valued is the fee simple estate, i.e., the object of the assessment exercise is to determine the true and actual or fair market value of the fee simple estate of a parcel of real property.

4. True and actual value means fair market value -- what property would sell for if it were sold on the open market by a willing seller to a willing buyer. McCillen vs. Logan County Commission, 295 S.E.2d 689, 695 W.Va., (1982).

5. A rule promulgated by the West Virginia State Tax Department recognizes the validity of the cost, income, and market approaches to determine market value. 110 CSR 1P.2.2

6. The appraisal of the fee simple estate of real property shall not include the value of any encumbrances, enterprises being conducted on the real property, or government programs being conducted in conjunction with the real property.

7. The H.U.D. Section 202 and Section 8 subsidy of the rents paid by the tenants at Twin Oaks Plaza is a program of the United States Government and is not an element to be included in the valuation of the fee simple estate of the Twin Oaks Plaza.

8. In order to determine the true and actual value of the fee simple estate of the Twin Oaks Plaza, the income approach to appraising the property is an appropriate, realistic, accurate, fair and correct method by which to ascertain said value.

9. Conversely, the employment of the cost approach in determining the true and actual value of the fee simple estate of the Twin Oaks Plaza does not, as applied by the State Tax Department, arrive at the true and actual value of the fee simple estate of Twin Oaks Plaza.

10. Because of the rent subsidies paid by the United States Government as part of the H.U.D. Section 202 and Section 8 program, the rents contracted to be paid to Twin Oaks Plaza by the tenants and the federal government cannot be used by an appraiser, employing the income approach to valuation, to determine the true and actual value of the fee simple estate of Twin Oaks Plaza.

11. The market rents paid in the Fayette County must be used to determine the true and actual value of the fee simple estate of Twin Oaks Plaza.

12. The true and actual value of the Twin Oaks Plaza for the tax year 1994 is \$800,000.00, and for tax years 1996 and 1997 it is \$755,000.00, each.

Accordingly, it is **ORDERED** that the true and actual value for Twin Oaks Plaza for tax year 1994 is \$800,000.00 and for tax years 1996 and 1997 it is \$755,000.00, each.

It is further **ORDERED** the assessments for the tax years 1994, 1996 and 1997 be reissued and new assessments or appropriate refund of taxes paid, whichever is appropriate, be issued.

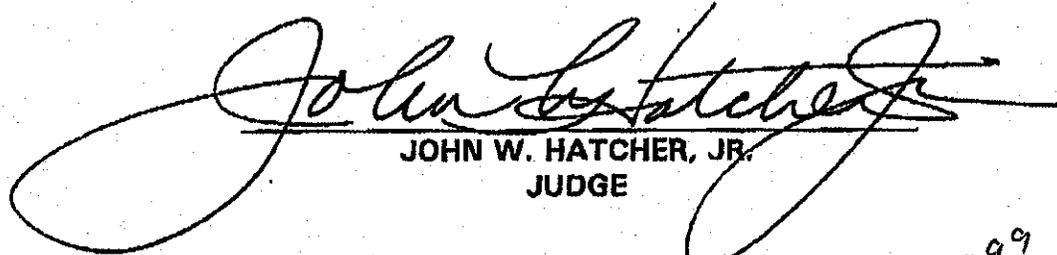
It is **ORDERED** that this Order be stayed until April 30, 1999 to allow the Respondent to seek appellate relief.

These cases are each **ORDERED** removed from the docket of this Court.

The Clerk shall place the original of this Order in the first case file shown on the face of this Order, and place attested copies thereof in the remaining two case files.

The Clerk shall mail attested copies of this Order to Herschel H. Rose, III, Attorney At Law, P. O. Box 549, Charleston, West Virginia 25322 and Carl L. Harris, Assistant Prosecuting Attorney, 108 East Maple Avenue, Fayetteville, West Virginia 25840.

**ENTERED** this the 8th day of February, 1999.

  
JOHN W. HATCHER, JR.  
JUDGE

2-8-99  
att TO  
HHR, III  
CAH

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

RECEIVED

SHEPHERDS GLEN LIMITED  
PARTNERSHIP, Et al.,  
Petitioners

Sept 20, 2003

JEFFERSON COUNTY  
CIRCUIT COURT

VS.

Civil Action No. 03-C-71

MARY R. BORDIER, ASSESSOR,  
Respondent.

**ORDER SUSTAINING ASSESSOR'S VALUATIONS  
OF PETITIONERS' PROPERTIES**

THIS MATTER came on for decision this 18<sup>th</sup> day of September, 2003, upon the papers and proceedings formerly read and had herein; upon the briefs filed by the parties herein together with proposed orders; upon the Court making the following findings of fact and conclusions of law:

1. Shepherd Glen Limited Partnership, Bolivar Court II Limited Partnership Patrick Henry Way Limited Partnership and PHA Limited Partnership are limited partnerships owning real property subject to ad valorem taxation in Jefferson County, West Virginia. These properties and their apartment names, tax district, tax map and tax parcel numbers, purchase dates, purchase prices, cost of added improvements, fire insurance coverage amounts, assessor's appraised market values and assessor's assessed values are as follows:

- A. Shepherd Glen Limited Partnership  
(Shepherd Glen Apartments)  
Shepherdstown District, Tax Map 8c-1, Parcel 63  
October 29, 1998 (Date of Purchase)  
\$ 1,519,619.61 (Purchase Price)  
\$ 271,615.00 (cost of added improvements)  
\$ 2,200,000.00 (Fire insurance coverage)  
\$ 1,309,200.00 (Assessor's appraised value)  
\$ 785,500.00 (Assessor's assessed value)
- B. Bolivar Court II Limited Partnership  
(Bolivar Court Apartments)  
Bolivar Corporation, Tax Map 1, Parcel 14.1  
October 29, 1998 (Date of Purchase)  
\$ 1,188,306.12 (Purchase Price)  
\$ 234,956.40 (cost of added improvements)  
\$ 1,700,000.00 (Fire insurance coverage)  
\$ 1,010,800.00 (Assessor's appraised value)  
\$ 606,500.00 (Assessor's assessed value)

C. Patrick Henry Way Limited Partnership  
(Spring Run Apartments)  
Charles Town District, Tax Map 8, Parcel 29.7  
October 29, 1999 (Date of Purchase)  
\$1,477,484.51 (Purchase Price)  
\$268,227.00 (cost of added improvements)  
\$1,900,000.00 (Fire insurance coverage)  
\$1,135,800.00 (Assessor's appraised value)  
\$681,500.00 (Assessor's assessed value)

D. PHA Associated Limited Partnership  
(Patrick Henry Apartments)  
Charles Town District, Tax Map 8, Parcel 29.4  
October 29, 1996 (Date of Purchase)  
\$ 951,812.00 (Purchase Price)  
\$ 666,401.07 (cost of added improvements)  
\$ 1,086,500.00 (Assessor's appraised value)  
\$ 550,000.00 (Assessor's assessed value)

2. That three of these properties were purchased by the Petitioners within the last five years: Shepherd Glen Apartments on October 29, 1998, Bolivar Courts Apartments on October 29, 1998, Spring Run Apartments on October 29, 1999; whereas the fourth property was purchased by the Petitioner on October 29, 1996.
3. That the Petitioner paid \$1,519,619.61 for the Shepherd Glen Apartments property and made \$271,615.00 in additional improvements therein for a total cost of \$ 1,791,234.61.
4. That the Petitioner insures the Shepherd Glen Apartments property for \$ 2,200,000.00.
5. That the Petitioner paid \$1,188,306.12 for the Bolivar Court Apartments property and made \$234,956.40 in additional improvements therein for a total cost of \$1,423,262.52.
6. That the Petitioner insures the Bolivar Court Apartments property for \$ 1,700,000.00.
7. That the Petitioner paid \$1,477,484.52 for the Spring Run Apartments property and made \$268,227.00 in additional improvements therein for a total cost of \$1,745,711.52.
8. That the Petitioner insures the Spring Run Apartments property for \$1,900,000.00.
9. That the Petitioner paid \$951,812.00 for the Patrick Henry Apartments and made \$666,401.07 in additional improvements therein for a total cost of \$1,618,213.07.
10. That the Petitioner insures the Patrick Henry Apartments property for \$2,500,000.00.
11. That the Assessor of Jefferson County arrived at the appraised values for the subject property by utilizing the CAMA computer assisted mass appraisal system, provided to all assessors by the State Tax Department.
12. That certificates of transfer of real property are received from the County Clerk listing recorded sales, consideration paid, description, tax map and parcel which are entered into the

CAMA appraisal system by data entry clerks in the Assessor's office. These sales of real estate become "comparable sales" that drive the CAMA appraisal system which values land in the county at a per acre or per running front foot value.

13. That field appraisers from the Assessor's office visit and measure structures or buildings, noting features such as type of construction (i.e. brick etc), rooms, mechanical features (i.e. A/C) and then give this field data to a data entry clerk in the Assessor's office for entry in the CAMA appraisal system. This field data is utilized by the CAMA appraisal system to value the building or structure's "replacement cost" which is then depreciated based upon the age of the building or structure to arrive at an appraised value for the building or structure.
14. That the Assessor of Jefferson County utilized the CAMA appraisal system, which employs both the "comparable sales" appraisal method and the "replacement cost" appraisal method to arrive at an appraised value for each of the subject properties.
15. That the Assessor of Jefferson County did not employ the "income approach" appraisal method to appraise the subject properties, as the State Tax Department Rule 110 C.S.R. 1P "Valuation of Commercial And Industrial Real And Personal Property For Ad Valorem Tax Purposes" does not mandate that this approach be utilized by assessors, nor does it require it's use where "economic rent" data is not available to the assessor.
16. That nowhere in the Code of West Virginia or the applicable rules are taxpayers required to furnish to assessors rental data.
17. That the four subject properties are so-called "Section 515" properties, that is to say, they are financed and administered under Section 515 of the Rural Housing Program. This program provided low interest loans to the limited partnerships, which are the Petitioners herein, to finance the purchase and or renovation of subject properties. In exchange for the low interest loans (1%) made to the partnerships, these partnerships agreed to subject these four properties to various recorded restrictions which are referred to as "federal restrictions." These restrictions are voluntary in the sense that the partnerships elected to participate in this program and accept its benefits while agreeing to restrict these properties. These restrictions include a limit on return on investment to the limited partners of not more than eight percent on investment and limits are placed on the rent that the partnerships may charge their tenants.
18. That with these so-called "federal restrictions" come some benefits. The general partner will take a syndication fee or developer's fee out at the initial closing which could be as much as \$ 300,000.00 on a \$ 1,500,000.00 project. The investors or limited partners receive federal income tax credits on the basis of 65 to 80 cents on a dollar invested, sheltering income earned elsewhere or even on this project. In essence the Section 515 program creates a lawful tax shelter.
19. That Petitioners' now assert through a hybrid income type approach to property appraisal that each of these four properties should be appraised with the value of the federal tax credits stripped out of the appraised value of these properties.
20. That Petitioners' appraiser performed a hybrid income type approach using what he termed was "basic rent" which was not "economic rent" or market rent as required by Section 2.2.1.2. "Income approach" as setforth in State Tax Department Rule 110, "Valuation of Commercial and Industrial Real And Personal Property For Ad Valorem Tax Purposes."

Having failed to employ "economic rent" or market rent in this hybrid income type approach, the Court must disregard the appraised value determined by Petitioners' appraiser on each of the subject properties.

21. That Petitioners' appraiser improperly selected a capitalization rate which he used in his hybrid income type approach, rather than calculate an appropriate capitalization rate "...by dividing annual net income by current selling prices of comparable properties.", as required by Section 2.2.1.2. Income approach," State Tax Department Rule 110, "Valuation of Commercial And Industrial Real And Personal Property For Ad Valorem Tax Purposes." He apparently selected his rate from a publication he referred to as "Corpaz." He compared the rate selected to three sales from Frederick County, Maryland and one from Berkeley County, West Virginia, but did not use those sales in his calculation as required by the rule. Likewise Frederick County, Maryland sales are not local sales and therefore cannot be considered "comparable sales" in this market. Having failed to properly calculate his "capitalization rate" the Court must disregard the appraised value determined by Petitioners' appraiser on each of the subject properties.
22. That the appraised values determined by Petitioner's appraiser on the four subject properties by use of this hybrid income type approach and "stripping out" the value attributed to the federal tax credits are extraordinarily low when compared to the recent purchase price of these same properties, the amount of fire insurance coverage and the assessors appraised values. For example:

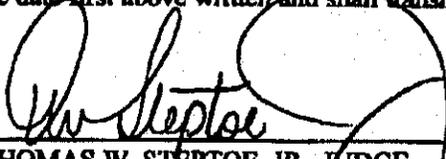
A.	<u>Shepherd Glen Apartments</u>	
	(Purchase Price)	\$ 1,519,619.61
	(cost of improvements added)	\$ 271,615.00
	(Total Cost)	\$ 1,791,234.61
	(Fire insurance coverage)	\$ 2,200,000.00
	(Petitioner's appraised value)	\$ 600,000.00
	(Assessor's appraised value)	\$ 1,309,200.00
B.	<u>Bolivar Courts Apartments</u>	
	(Purchase Price)	\$ 1,188,306.12
	(cost of improvements added)	\$ 234,956.40
	(Total Cost)	\$ 1,423,262.52
	(fire insurance coverage)	\$ 1,700,000.00
	(Petitioner's appraised value)	\$ 560,000.00
	(Assessor's appraised value)	\$ 1,010,800.00
C.	<u>Spring Run Apartments</u>	
	(Purchase Price)	\$ 1,477,484.52
	(Cost of improvements added)	\$ 268,227.00
	(Total Cost)	\$ 1,745,711.52
	(Fire insurance coverage)	\$ 1,900,000.00
	(Petitioner's appraised value)	\$ 550,000.00
	(Assessor's appraised value)	\$ 1,135,800.00
D.	<u>Patrick Henry Apartments</u>	
	(Purchase Price)	\$ 951,812.00
	(Cost of improvements added)	\$ 666,401.07

(Total Cost)	\$1,618,213.07
(Fire insurance coverage)	\$2,500,000.00
(Petitioner's appraised value)	\$ 550,000.00
(Assessor's appraised value)	\$1,086,500.00

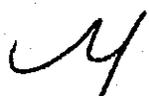
23. That the Court believes that the approach taken by the Ohio Courts, that market value should be determined uncomplicated by encumbrances, and free of deed restrictions and restrictive contracts with the federal government is the best approach. Debli Estates LTD v. Hamilton County Bd of Revision, et al., 68 Ohio St. 3d 192, 625 N. E. 2d 594 (1994); Villa Park LTD v. Clark County Bd of Revision, 66 Ohio St. 3d 215, 625 N. E. 2d 613 (1994); Loveland Pines v. Hamilton County Bd of Revision et al., 66 Ohio St. 3d 387, 613 N. E. 2d 191 (1993); Sunset Square LTD v. Miami County Bd of Revision, 50 Ohio St. 3d 42, 552 N.E. 2d 632 (1990); Alliance Towers, LTD v. Stark County Bd of Revision, et al., 37 Ohio St. 3d 16, 523 N.E. 2d 826 (1998); Canton Towers, LTD v. Bd of Revision, 3 Ohio St. 3d 4, 444 N.E. 2d 1027 (1983).
24. That the Respondent Assessor, Mary R. Bordier's appraisal and assessment of the subject properties enjoys the presumption of correctness. In Re S. Land Co., 143 W.Va. 152, 100 S. E. 2d 555 (1957); Killen v. Logan County Comm'n, 170 W.Va. 602, 295 S. E. 2d 689 (1982). That the burden is on Petitioners to show by clear and convincing evidence that her appraisal and assessment of the subject properties was erroneous. In Re Pocahontas Land Co., 172 W.Va. 53, 303 S. E. 2d 691 1983). As previously found in this order, the Petitioners have failed to do so.

Accordingly it is ORDERED and ADJUDGED that Petitioners' Petition For Appeal From Ad Valorem Tax Assessment is denied and Petitioners' exceptions thereto are note.

THE CLERK will enter the foregoing as of the date first above written and shall transmit attested copies to counsel of record.

  
 THOMAS W. STEPTOE, JR., JUDGE  
 23<sup>RD</sup> JUDICIAL CIRCUIT  
 JEFFERSON COUNTY, WEST VIRGINIA

The Clerk is directed to retire this action from the active docket and place it among causes ended.

  
 zcc  
 M. Caryl  
 M. Thompson  
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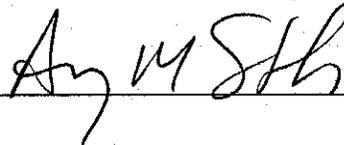
**CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of November, 2008, I caused to be served the foregoing "Brief of Appellants" upon the following counsel of record by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

A. M. "Fenway" Pollock  
Deputy Attorney General  
Building 1, Room W-435  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0220

David B. Cross  
Prosecuting Attorney of Brooke County  
727 Charles Street  
Wellsburg, WV 26070

James W. Davis, Jr.  
Prosecuting Attorney of Hancock County  
P.O. Box 924  
New Cumberland, WV 26047

  
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