

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

STONE BROOKE LIMITED PARTNERSHIP,

Petitioner,

v.

CIVIL ACTION NO. 06-P-5

PHYLLIS SISINNI, as  
Assessor of Brooke County,  
and VIRGIL T. HELTON,  
West Virginia Tax Commissioner,

Respondents.

**MEMORANDUM OF OPINION AND ORDER**

**I.**

**FACTUAL/PROCEDURAL HISTORY**

Petitioner Stone Brooke Limited Partnership ("Stone Brooke") is the owner of six apartment buildings with rent-restricted units. The Petitioner is appealing the Brooke County Assessor's valuation of the Stone Brooke property for *ad valorem* tax purposes for the tax year 2006.

The Brooke County Assessor valued the property at \$1,784,100.00 using the cost method of appraisal. The Petitioner requested an adjustment to the assessed value, and the Brooke County Assessor sought an appraisal from the State Tax Commissioner. The State Tax Commissioner valued the property at \$1,971,000.00 using the income method of appraisal. The Petitioner's appraiser valued the property at \$1,159,000.00, also using the income method of appraisal. The disparity between the State Tax Commissioner's figure and the figure reached

by the Petitioner's appraiser is explained by the fact that the State Tax Commissioner included the value of federal low-income housing tax credits in its appraisal, while the Petitioner's appraiser excluded the value of the credits.

The Brooke County Commission, sitting as the Board of Equalization and Review, adopted the Brooke County Assessor's cost-based appraisal of \$1,784,100.00. Stone Brooke filed its Petition for appeal pursuant to W.Va. Code § 11-3-25 on March 24, 2006. The present matter was consolidated for hearing with Circuit Court of Hancock County Civil Action No. 06-AA-2. Oral argument was held on the appeals on May 30, 2007. The Court has now reviewed the entire record and is prepared to issue its decision.

## **II. STANDARD OF REVIEW**

"[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 re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W.Va. at 254-55, 539 S.E.2d at 761-62 (footnote omitted). The West Virginia Administrative Procedures Act provides:

The Court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency;

- or
- (3) Made upon unlawful procedures; or
  - (4) Affected by other error of law; or
  - (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
  - (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W.Va. Code § 29A-5-4(g) (2007). Upon an appeal from the Board of Equalization and Review:

If, upon the hearing of such appeal, it is determined that any property has been valued at more than its true and actual value, or illegally classified or assessed, the circuit court shall, by an order entered of record, correct the assessment, and fix the property at its true and actual value. . . . If it is ascertained that any property is valued too low the circuit court shall, by an order entered of record, correct the valuation and fix it at its true and actual value.

W.Va. Code § 11-3-25 (2003). In evaluating the appeal, assessor valuations are presumed to be correct. The burden is on the taxpayer to show that the assessment is erroneous by clear and convincing evidence. In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W.Va. 250, 254, 539 S.E.2d 757, 761 (2000).

### **III.** **DISCUSSION**

The first question raised in the present appeal is whether the Brooke County Assessor erred by adopting the cost approach to valuation of rent-controlled rental property instead of the income approach. If the Court believes error occurred, it

is faced with the question of whether the income approach should include or exclude the value of low income federal tax credits.

Was it error to use the Cost Approach?

The first question is whether the Brooke County Assessor and/or the Board of Equalization and Review erred in utilizing the cost approach to valuation as opposed to the income approach. The Petitioner and the Respondent State Tax Commissioner both assert that the Board erred by adopting the cost-based method of appraisal for these rent-controlled rental properties. They assert that the income method of valuation is the appropriate method for this type of property.

The appraised value (market value) of commercial and industrial 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 seller being under any compulsion to buy or sell. W.Va. Code R. § 110-1P-2.1.1 (1991). The applicable regulations regarding ascertaining market valuation of commercial and industrial real and personal property state that 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. Code R. § 110-1P-2.2.1 (1991).

The regulations provide that "when possible, the most accurate form of appraisal should be used, but because of the difficulty in obtaining necessary data

from the taxpayer, or due to the lack of comparable commercial and/or industrial properties, choice between the alternative appraisal methods may be limited." W.Va. Code R. § 110-1P-2.2.2 (1991). All parties in this case agree that no sufficient market data exists for these properties, making the third approach inapplicable. The dispute is whether the cost approach, as opposed to the income approach, is the most accurate method of appraisal.

The Petitioner asserts that the cost method is not appropriate because the building was constructed with the same materials and costs as a "market rate" apartment building, yet is rent restricted for a period of 30 years. The result, according to the Petitioner, is that a cost-based method of valuation will overstate the true and actual market value of such a building.

Respondent Assessor Phyllis Sissinni asserts that the cost method is appropriate. She asserts that the cost method is appropriate because the building was recently built, therefore, the cost method would be the most accurate assessment of true and actual value.

The West Virginia Supreme Court of Appeals has not addressed the issue of how to properly value properties that are utilized in the low income housing tax credit ("LIHTC") program. The Circuit Court of Fayette County, West Virginia has determined that the income approach "is an appropriate, realistic, accurate, fair, and correct method" and that the cost approach "does not . . . arrive at the true and actual value" of the LIHTC property. In re: 1994 Property Tax Assessment of Twin Oaks Plaza, Civil Action No. 94-C-78, order entered February 8, 1999 at

conclusions of law pars. 8-9.

On the other hand, a Jefferson County Circuit Court decision supports the position that the assessor is not required to utilize the income approach:

[The Court finds] [t]hat 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. . . . 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.

Shepherds Glen Limited Partnership v. Mary R. Bordier, Assessor, Civil Action No. 03-C-71, Circuit Court of Jefferson County, order entered September 22, 2003, at pars. 14 and 15.

The burden is on the Petitioner to prove by clear and convincing evidence that the Assessor's valuation method was clearly erroneous. The Court **FINDS and CONCLUDES** that the evidence is insufficient to establish by a clear and convincing standard that the Assessor's adoption of the cost method was erroneous. The applicable regulations state that there are three generally accepted approaches to value. W.Va. Code R. § 110-1P-2.2.1 (1991). There is nothing within the regulations that states that one approach should be utilized to the exclusion of others in valuing property that is utilized in the LIHTC program.

Because the Court has found no error in utilizing the cost approach, it need not reach the question of whether the tax credits should be included in a

valuation based upon the income approach.

**IV.**  
**CONCLUSION**

It is hereby **ORDERED** that the decision of the Brooke County Commission, sitting as the Board of Equalization and Review, adopting the Brooke County Assessor's cost-based appraisal of \$1,784,100.00, is **AFFIRMED**.

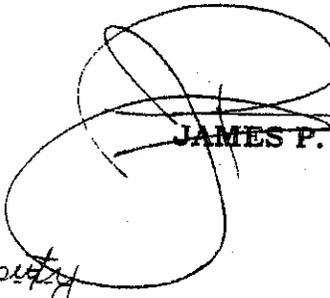
All exceptions and objections are noted and preserved.

It is further

**ORDERED** that the Circuit Clerk provide attested copies of this order upon entry to Karen E. Kahle, Esquire, Steptoe & Johnson, PLLC, 1233 Main Street, Suite 3000, P.O. Box 751, Wheeling, WV 26003-0751; David B. Cross, Esquire, Prosecuting Attorney of Brooke County, 727 Charles Street, Wellsburg, WV 26070; and A.M. "Fenway" Pollack, Esquire, Office of the Attorney General, Building 1, Room W-435, 1900 Kanawha Boulevard, East, Charleston, WV 25305.

**ENTERED** this 28<sup>th</sup> day of January, 2008.

Notary Public for West Virginia  
My Commission Expires \_\_\_\_\_  
I hereby certify that the foregoing is a true and correct copy of the original as the same appears in the records of the Court.  
Attest:  
Clerk of the Court  
Brooke County, West Virginia

  
**JAMES P. MAZZONE, JUDGE**

By: *Shirley Jack*, Deputy