

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

**NO. 34423 & 34424**

**STONE BROOKE LIMITED PARTNERSHIP, and  
HEATHERMOOR LIMITED PARTNERSHIP,**

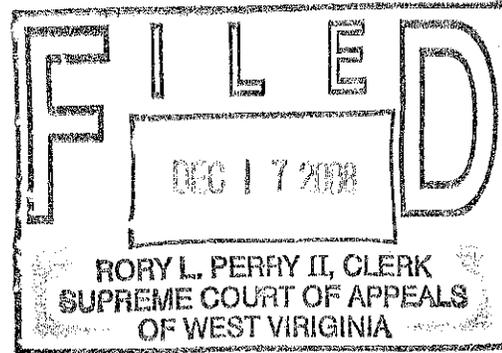
**Petitioners / Appellants,**

**v.**

**PHYLLIS SISINNI, as Assessor of  
Brooke County, and**

**JOSEPH ALONGI, as Assessor of  
Hancock County,**

**VIRGIL T. HELTON,  
West Virginia Tax Commissioner,**



**Respondents / Appellees.**

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**TAX COMMISSIONER'S BRIEF**

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**Respectfully submitted,**

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West Virginia Tax Commissioner,**

**Respondents / Appellees.**

**TAX COMMISSIONER'S BRIEF**

**I.**

**INTRODUCTION**

The Tax Commissioner's<sup>1</sup> Appraiser appeared at the Hancock County Commission and the Brooke County Commission sitting as Boards of Equalization and Review due to the unusual circumstances of these combined cases. The Assessors of Hancock County and Brooke County appraised the rental units in question consistent with their obligations pursuant to West Virginia Code Section 11-3-2.<sup>2</sup> However, due to the unique characteristics<sup>3</sup> of the properties, both Assessors

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<sup>1</sup> Virgil T. Helton, was the Tax Commissioner at the time of the filing of the Appeal. Secretary Helton, has subsequently been appointed by the Governor as Cabinet Secretary of the Department of Revenue; however, this appointment does not affect the case, inasmuch as, it will continue to proceed against the Tax Commissioner.

<sup>2</sup> West Virginia Code Section 11-1C-10, described the Tax Commissioner's responsibilities regarding valuation of industrial and natural resource property which is not the type of property at issue here. The apartments are commercial property, which is not the type of commercial property

asked that a Tax Division appraiser appear and offer assistance in the valuation of the residential apartment buildings at issue. These properties are unique because of the presence of rent restrictions which prevent the units from commanding the highest rental price that the open market will allow; however, to counterbalance the rent restrictions, the Taxpayers receive investment tax credits.

In Heathermoor and Stone Brooke, the Assessors both developed a cost approach to value the property at issue. Additionally, they introduced the testimony of Dwight Goff<sup>4</sup>, an appraiser employed by the Tax Commissioner, who developed an income approach, which differed from the purported income approach developed by the Taxpayers. Specifically, the Tax Commissioner's income approach included a value for the investment credits which the Taxpayers receive while the Taxpayers ignored the value of the investment tax credits.

The Tax Commissioner would request that the two appeals be denied because (1) the Circuit Courts correctly found that the Assessors were within their discretion to utilize the cost approach and the Taxpayers have not proven that the Assessors' valuations were clearly erroneous, and (2) the methodology utilized by the Taxpayers do not arrive at a fair market value because it ignores the value of the investment tax credits which Heathermoor and Stone Brooke receive.

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assessed by the Tax Commissioner. Moreover, there is no statutory provision which substitutes the Tax Commissioner as the appraiser of commercial real estate like the property whose valuation is at issue before this Court.

<sup>3</sup> As Appellants acknowledged in their brief, this Court has not addressed the issue of how low income housing tax credits apartments should be assessed. (Hereinafter sometimes, "LIHTC.") Moreover, unlike some jurisdictions, West Virginia does not have any statutory guidance with regards to how these apartments should be assessed.

<sup>4</sup> In testifying regarding the difference between his income value and the cost value arrived at by the Brooke County Assessor, Mr. Goff testified that he felt that the Assessor's appraisal was in line with the value of the property. (Stone Brooke Tr. at 13).

## II.

### STATEMENT OF THE CASE

#### A. HEATHERMOOR

On February 14, 2006, the Heathermoor Limited Partnership (hereinafter referred to as either “Heathermoor”, “Taxpayer” or “Appellant”) appeared before the Hancock County Commission, sitting as the Board of Equalization and Review (hereinafter sometimes referred to as “the Hancock County Board”) to contest the County’s valuation of Heathermoor. The Heathermoor property at issue here is a six apartment building complex on 7.66 acres, containing forty-nine (49) one, two and three bedroom apartments and a manager’s unit that is not rent restricted. *See* Transcript of the Hancock County Commission sitting as a Board of Equalization and Review hearing of February 14, 2006 at p. 7 (hereinafter “Heathermoor Tr. \_\_”). Heathermoor presented a report from its appraiser, Dave McConahy, who is the same appraiser that performed the appraisal for Stone Brooke Limited Partnership, which is a similar apartment complex challenging its valuation by the Brooke County Assessor. Mr. McConahy testified that using the income approach, he had valued the property at one million, two hundred seventy-six thousand dollars (\$1,276,000.00). (Heathermoor Tr. at 7). Mr. McConahy testified that his appraisal examined the income received through rentals, as well as miscellaneous income from the property (*ie.*, revenue from the laundry) and deducted expenses. (Heathermoor Tr. at 11-12). Absent in the Taxpayer’s appraisal was any inclusion of value for the investment tax credits which the Taxpayer receives. The failure of the Taxpayer’s appraisal to include some value for the investment tax credits that the property receives is directly at odds with his testimony : “And you wouldn’t build this if these are the only rents that you could get.” (Heathermoor Tr. at 12). Additional support for the inclusion of some value regarding the investment credits also comes from Mr. McConahy’s testimony that Heathermoor was “awarded these tax credits as a vehicle to help us with investing partners coming to the deals.” (Heathermoor Tr. at 4).

Further, Mr. McConahy testified that a second Heathermoor apartment complex is coming online. (Heathermoor Tr. at 10). While he appears to suggest that Heathermoor II will hurt Heathermoor and Stone Brooke, this testimony is speculative and irrelevant to the value for Heathermoor in the present tax year. (Heathermoor Tr. at 10). Moreover, the construction of additional affordable housing units appears to contradict the Taxpayer's position that the units have no value beyond the restricted rents and the property's laundry income.

Hancock County's Assessor, Joe Alongi, and his appraiser, Mr. Trzaskoma, testified before the Hancock County Board regarding the County's appraisal which placed a value of three million, nine hundred and sixty-three thousand, five hundred dollars (\$3,963,500.00) on the property. Assessor, Mr. Alongi, further testified that the value was based upon the cost approach. (Heathermoor Tr. at 2). The value derived from the cost approach performed by the Assessor's office was based upon data from the Taxpayer for the property which has only been on the Hancock County's books for two years. (Heathermoor Tr. at 2).

Dwight Goff, an appraiser with the West Virginia Tax Department, also testified. Mr. Goff's appraised value for the property was two million, nine hundred and twenty-four thousand dollars (\$2,924,000.00). Mr. Goff testified that his appraised value, unlike the valuation arrived at by the Taxpayer's appraiser, Mr. McConahy, included the tax credits the owners received in exchange for receiving less than market rate rents from the tenants. (Heathermoor Tr. at 12-14). The big difference in his appraisal and the Taxpayer's was his inclusion of value to reflect the investment tax credits which the property owners receive. (Heathermoor Tr. at 13). Mr. Goff's inclusion of value to reflect the tax credits is consistent with the Tax Department's inclusion of all income, including both direct and indirect income. Furthermore, Mr. Goff testified that he saw a great deal of value in the tax credits themselves. (Heathermoor Tr. at 24). In summary, Mr. Goff's testimony

pointed out the flaws in the Taxpayer's appraisal, which resulted from a failure to include value for the tax investment credits.<sup>5</sup>

The Hancock County Board reconvened on February 17, 2007 and voted to accept the County Assessor's valuation of the property. This vote was memorialized in a letter from the Hancock County Board to the Taxpayer dated February 27, 2007. Thereafter, the Appellant appealed to the Circuit Court asking for a rejection of the Assessor's valuation and acceptance of its appraisal. Subsequently, Judge Mazzone affirmed the Hancock County Assessor's decision to use the cost approach to value the property.

**B. STONE BROOKE**

On, February 14, 2008, Stone Brooke Limited Partnership (hereinafter "Stone Brooke", "Appellant" or sometimes "Taxpayer") appeared before the Brooke County Commission sitting as the Board of Equalization and Review to contest the County's valuation of Stone Brooke, a six apartment building complex on 2.99 acres, containing forty-three (43) one, two and three bedroom apartments (hereinafter sometimes "the property") and an office building. (See Transcript of the Brooke County Commission sitting as a Board of Equalization and Review hearing of February 14, 2006 at pp.6, 7 and 25 (hereinafter "Stone Brooke Tr. \_\_\_"). The Taxpayer's appraised value presented to the Brooke County Board was six hundred thousand dollars (\$600,000) (Stone Brooke Tr. at 18). See also Dave McConahy Report dated January 1, 2006 at page 24. Thereafter, Stone Brooke increased its appraisal and acknowledged that its appraisal introduced to the Board was erroneous. Specifically, in its *Petition For Appeal* to the Circuit Court of Brooke County, Stone

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<sup>5</sup> Heathermoor argues that the Hancock County Assessor concluded that the cost approach to valuation may not be the most appropriate method. See *Petition For Appeal* at "Statement of the Case", paragraph 2. Heathermoor is making the proverbial mountain out of a mole hill. Mr. Alongi would not have introduced the cost approach to valuation if it were not an accurate calculation and based on the Taxpayers own data. Mr. Alongi's statement was a simple recognition that sometimes the cost approach is more accurate and sometimes the income approach is more accurate. Mr. Alongi's comment cannot be construed as endorsing an income approach to valuation as done by Heathermoor which ignores the federal tax credits received by the Taxpayer.

Brooke acknowledged that the appraisal that it introduced before the Board, which valued the property at \$600,000, was erroneous and that the correct value was \$1,000,000. *Petition For Appeal* p.2. Further, prior to presenting the matter to Judge Mazzone for decision, Stone Brooke again revised its appraisal upward now suggesting that the property's true and actual value should be \$1,159,000, which is nearly double the number presented to the Board of Equalization and Review in Brooke County. *See Petitioner's Initial Brief* at p.1.

The Brooke County Assessor valued the subject property utilizing the cost approach based upon data received from the Taxpayer for this relatively recently constructed apartment complex. (Stone Brooke Tr. at 18). The Brooke County Assessor appraised Stone Brooke at \$1,784,100, resulting in an assessed value of \$1,070,046. (Stone Brooke Tr. at 11). The Taxpayer did not challenge the data used in the Assessor's cost value but rather challenged its application as the appropriate methodology to use to appraise the property. Moreover, the Assessor appraised this property as she appraises all property in her jurisdiction (Stone Brooke Tr. at 12). Furthermore, the Brooke County Assessor's appraisal is lower than the amount of fire insurance<sup>6</sup> which the Taxpayer has on the apartment complex (Stone Brooke Tr. at 20) and is lower than the appraisal done by the Tax Commissioner.

The Tax Commissioner's appraiser, Mr. Goff, appeared at the hearing at the request of the Assessor to introduce evidence regarding the appraisal which he performed. Notwithstanding the fact that the Tax Department's appraisal was more than the Assessor's, Mr. Goff testified that he felt that the Assessor's appraisal was in line with the value of the property. (Stone Brooke Tr. at 13). Appraiser Goff took issue with the Taxpayer's appraisal because the Taxpayer failed to include any

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<sup>6</sup> The Taxpayer's representative acknowledged that the fire insurance on the property is based upon replacement cost, which is in excess of the Assessor's appraisal. (Tr. at 19 and 20). As Appraiser Goff testified, the amount of fire insurance "would be another measure of value, what a third party would consider just compensation." (Tr. at 20).

value for the investment tax credits which Stone Brooke is receiving. Mr. Goff testified that “the biggest portion of value here isn’t coming from the cash flow, anyway, it’s coming from the tax credits”. (Stone Brooke Tr. at 16). Mr. Goff went on to testify that the credits are precisely why these affordable housing units are constructed. (Stone Brooke Tr. at 19). After reviewing the evidence before it, the Brooke County Board accepted the Assessor’s appraisal. Judge Mazzone reviewed the Taxpayer’s challenge to the assessment, reviewed the appraisals presented by the Petitioner, the Tax Commissioner and the Assessor. Judge Mazzone affirmed the Assessor’s valuation which was less than the appraisal offered by the Tax Commissioner.

Heathermoor and Stone Brooke filed separate *Petitions For Appeal* which were, subsequently, granted by this Court. The two cases were consolidated for argument.

The valuations for the two separate apartment complexes for the 2006 tax year are summarized below.

	<u>APPRAISED VALUE</u>	<u>SOURCE</u>
<b><u>HEATHERMOOR</u></b>		
Hancock County Assessor - Mr. Trzaskoma	\$ 3,963,500	Heathermoor Tr. P. 2
Tax Department- Dwight Goff	\$ 2,924,000	Heathermoor Tr. P. 15
Taxpayer Valued as of <b>January 1, 2006</b>	\$ 1,276,000	Heathermoor Tr. P. 7
<b><u>STONE BROOK</u></b>		
Brooke County Assessor - Dan Tassej, Chief Appraiser	\$ 1,784,100	Stone Brooke Tr. P.11
Tax Department- Dwight Goff	\$ 1,900,000	Stone Brooke Tr. P. 16
Taxpayer’s Three Values :		
Dave McConahy, Appraiser Testimony at BE&R Hearing	\$ 600,000	Stone Brooke Tr. P. 9

Taxpayer's <i>Petition For Appeal</i> to Circuit Court	\$ 1,000,000	<i>Petition For Appeal</i> at Page 2, Paragraph 4
Taxpayer's <i>Brief</i> to Circuit Court	\$ 1,159,000	<i>Petitioner's Initial Brief</i> at P. 1

Contrary to the assertion contained in the Appellants' brief, the Tax Department has not conceded that the cost approach to valuation is an improper methodology under these circumstances. Rather the Briefs before the Circuit Court sought to uphold the value introduced by the Tax Commissioner's Appraiser, this was based upon respect for the work done by Mr. Goff and in response to the flawed approach done by the Taxpayers.

Upon further review of this Court's decision in *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000) and *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, \_\_\_ S.E.2d \_\_\_, 2008 WL 4868290 (W.Va. Nov. 5, 2008), it is clear that discretion with regards to the methodology chosen belongs to the Assessors, where as here the Taxpayers failed to prove by clear and convincing evidence that the Assessors' valuations were not supported by substantial evidence. Moreover, the Taxpayers failed to demonstrate that their approach, which ignores the value of the tax credits received, arrives at the fair market value of these properties.

### III.

#### STATEMENT OF ISSUES

- A. **WHETHER THE CIRCUIT COURT'S AFFIRMANCE OF THE VALUATION OF THE HANCOCK AND BROOKE COUNTY ASSESSORS WHICH WERE UPHeld BY THEIR RESPECTIVE BOARDS OF EQUALIZATION AND REVIEW IS CONSISTENT WITH, IN RE TAX ASSESSMENT AGAINST AMERICAN BITUMINOUS POWER PARTNERSHIP, L.P., AND IN RE TAX ASSESSMENT OF FOSTER FOUNDATION'S WOODLANDS RETIREMENT COMMUNITY**

**B. WHETHER THE APPELLANTS CAN SHOW THAT THE ASSESSORS' VALUATIONS ADOPTED BY THEIR RESPECTIVE BOARDS OF EQUALIZATION AND REVIEW AND AFFIRMED BY THE CIRCUIT COURT WERE CLEARLY ERRONEOUS.**

**IV.**

**STANDARD OF REVIEW**

This Court's review of a decision of the Board of Equalization and Review regarding a challenged tax assessment is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act. Further, this Court's review of a Circuit Court's ruling on legal issues is *de novo*. *Syl. Pt.1, American Bituminous, supra*. On the other hand, findings of fact from the court below are subject to deferential review and will not be overturned if supported by substantial evidence on the record. *Syl. Pt. 4, Petition of Maple Meadow Mining Company for Relief from Real Property Assessment for Tax Year 1992*, 191 W.Va. 519, (1994). In November of 2008, this Court restated its long held position that an assessment made by a board of equalization and review and approved by a circuit court will not be reversed on appeal when supported by substantial evidence unless the underlying decision is plainly wrong. *Syl. Pt.3, Bayer MaterialScience, LLC. v. State Tax Commissioner*, \_\_\_ S.E.2d \_\_\_, 2008 WL 4967058 (W.Va.2008).

In addition, pursuant to *Syl. Pt.5<sup>7</sup> of American Bituminous*, the assessing officer has discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review

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<sup>7</sup> Title 110, Series 1P 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 exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion. Therefore, inasmuch the Assessor of Hancock and Brooke Counties are the Assessing Officer in this case, the discretion of the methodology chosen is conferred upon the Assessors.

absent a showing of abuse of discretion. The Supreme Court recently reaffirmed this very point. *Syl. Pt. 7, In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, No. 33891, (Nov. 5, 2008).

V.

**DISCUSSION**

**A. JUDGE MAZZONE CORRECTLY RULED THE ASSESSORS' VALUATION METHODOLOGY IS ENTITLED TO DEFERENCE.**

The Appellants and the Tax Commissioner below both argued before the Circuit Court that the appropriate method to value the Heathermoor and Stone Brooke apartment units was by utilizing an income approach as opposed to the cost approach utilized by the Assessors. However, Judge Mazzone correctly gave the Assessors' utilization of the cost approach the appropriate weight because it is the Assessors' decision regarding the appropriate valuation method which is entitled to deference.

Appellants point to Syllabus Point 5 of, *In Re Tax Assessment Against American Bituminous Power Partners*, as support for the proposition that the assessing officer must use the most accurate method of appraising commercial and industrial property which is correct as far as it goes, but what the Appellants leave out is critical to a full and complete analysis of the issue before this Court. Specifically, in *American Bituminous*, the assessing officer was the Tax Commissioner who is charged with the assessment of the industrial property. In the two cases before this Court, the Tax Commissioner sent an appraiser at the Assessors' request to provide guidance; but, that guidance did not transform the Tax Commissioner into the assessing officer. Unlike *American Bituminous*, the Tax Commissioner is not charged with assessing residential apartments; therefore, the discretion with regard to appraising residential units belongs to the two Assessors.

As will be discussed, herein, Appellants cannot demonstrate that the two Assessors abused their discretion. Specifically, the cost approach is one of the three recognized methods which are authorized for use by the legislative regulations to appraise property. Moreover, here like in *American Bituminous*, the property being appraised is relatively new property making the cost approach a reliable indicator of value. The data used for the cost approach came from the Taxpayer. Unlike *American Bituminous*, where the Court affirmed the Tax Commissioner's exclusive use of the cost approach to arrive at its appraisal, the Taxpayer did not present a cost valuation that differed from the Assessors' cost valuation.<sup>8</sup>

Moreover, the cost valuation utilized by the Brooke County Assessor yielded a value which is less than the amount of fire insurance Stone Brooke has on the property. Stone Brooke's witness acknowledged that the fire insurance on the property is at replacement cost (Stone Brooke Tr. at 20). Further, Stone Brooke's witness acknowledged that the amount of fire insurance is in excess of the county's value. (Stone Brooke Tr. at 20). Thus, as Mr. Goff, the Tax Division's appraiser, testified with regard to the fire insurance "then there would be another measure of value, what a third party would consider just compensation." (Stone Brooke Tr. at 22).

Furthermore, the fact that neither the Tax Commissioner's appraiser nor Stone Brooke's appraiser utilized the cost approach to appraise the property, does not mean the Brooke County Assessor abused her discretion when she used the cost approach to value the property. As further support for the Assessor's appraisal, the Tax Commissioner's appraiser Mr. Goff, testified that the Assessor's appraisal was not out of line. (Stone Brooke Tr. at 13). Moreover, the Tax Commissioner's appraiser, arrived at an appraisal value of \$1,971,000.00 which is higher than the Assessor's appraisal. (Stone Brooke Tr. at 16).

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<sup>8</sup> In addition, to the methodology dispute in, *American Bituminous*, the Tax Commissioner and the Taxpayer arrived at different values as a result of employing the cost approach. The Tax Commissioner appraiser yielded a value of \$44,444,444.00 while the Taxpayer's cost value was \$36,664,228.00.

The Assessors for Brooke County and Hancock County both performed a cost approach to value based on relatively recent cost data provided by the respective apartment complexes. Neither apartment complex has challenged the accuracy of the Assessors' valuations. Therefore, the cost calculations must be mathematically correct.

As a practical matter, a second cost calculation performed by the Tax Department based upon the same cost data from the same Taxpayers would not have been of much value to anyone. Consequently, the Tax Department performed an income approach to valuation at the request of the two Assessors. The Tax Department **included** the value of the investment tax credits for both apartment complexes. The Tax Department's use of the income method added some value to the equation. In Brooke County the Tax Department's income valuation was within seven percent of the Assessor's cost valuation. The close proximity between the Tax Department's valuation and the Brooke County Assessor's valuation would tend to support each other - as opposed to the Taxpayer's three significantly different "true and actual" valuations.

As will be discussed more fully herein, Stone Brooke's income approach and the Tax Commissioner's income approach are markedly different, and therefore in reality there is more of a difference between the two than a similarity. It is presumably these differences, as well as a higher tax bill, which has caused Stone Brooke to seek a reversal of the Circuit Court and the adoption of its new appraisal. While Stone Brooke acknowledges in its Brief that the appraisal that its witness introduced before the Board of Equalization and Review, undervalued the property by half, what Stone Brooke attempts to minimize is the fact that two upward revisions were made at the Circuit Court which can only be viewed as weakening their argument that its appraisal<sup>9</sup> should be accepted. *See Brief of Appellants* at pg. 3, footnote 1.

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<sup>9</sup> In addition, to the mathematical errors which undervalued the Taxpayer's property, the appraiser for the Taxpayer used the wrong assessment date utilizing 1-1-06 instead of 7-01-06. (*See Transcript* at page 6).

In Hancock County , the Assessor and the Taxpayer have a huge variance between valuations. The Assessors' valuation is more than triple the Taxpayer's valuation. The disparity between the two valuations demonstrates the impact of ignoring the largest component factor of the project's cash flow— the federal investment tax credits received by Heathermoor's investment syndicate. The Tax Department's income valuation demonstrates the magnitude of the impact of the investment tax credits on valuation - utilizing the federal investment tax credits increased the valuation by approximately 129%. This Court should not create new law by authorizing LIHTC Taxpayers to ignore the greatest part of a project's cash flow for *ad valorem* tax purposes.

Further, nothing in *American Bituminous*, gives a taxpayer's decision regarding methodology equal footing with the assessing officer. As Syllabus Point 5 states, "the exercise of such discretion will not be disturbed upon judicial review absent a showing of an abuse of discretion."

Judge Mazzone followed this Court's directions as set forth in *American Bituminous* and concluded that the Hancock County Assessor and the Brooke County Assessor had properly employed the cost approach to valuation for the apartment complexes as authorized by the legislative regulations. Judge Mazzone also concluded that the valuations were properly supported by adequate evidence in the record.

In addition, the Appellants argue that the cost approach to valuation overstates the value of low income housing units, Appellants argue that the rent restrictions over a thirty-year period should preclude using the actual and undisputed costs incurred in construction. Appellants should not be permitted to ignore facts that increase valuation - such as their own construction cost data — while relying on facts that decrease valuations— such as the restricted rents. Appellants voluntarily chose to participate in the Low Income Housing Tax Credit Program. Appellants voluntarily agreed to the rent restrictions for thirty years. Appellants voluntarily accepted the federal income tax

credits which made the entire project possible. Valuations should reflect all aspects of the LIHTC Program.

This Court should affirm Judge Mazzone's decisions. However, if this Court rejects the use of the cost approach to valuation, then an income approach to value must include an analysis of all factors which can influence valuation.

**B. ASSUMING THAT THE COURT FINDS THAT THE ASSESSORS DID NOT VALUE THE PROPERTIES AT FAIR MARKET VALUE, WHICH IS DENIED, THE APPELLANTS DID NOT ESTABLISH VALUE AS REQUIRED BY CLEAR AND CONVINCING EVIDENCE.**

Even if the Court were to find that the Appellants carried their heavy burden and have proven that the Circuit Court erred by accepting the Assessors' valuations derived by utilizing the cost approach, the Appellants cannot show that their appraisals should be adopted.<sup>10</sup> The Taxpayers purport to use an income approach; however, their approach deliberately ignores a substantial portion of value received by these Taxpayers-namely the federal income tax credits. Thus, as discussed herein, the Taxpayers' appraisals do not value their properties at fair market value. In *Foster Foundation*, this Court reiterated that a tax assessment of property is required to be proportionate to the property's value: "[A]ll property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law."<sup>11</sup> W. Va. Const. art. X, § 1. West Virginia Code § 11-3- 1 (1977) (Repl. Vol. 2008) further instructs that "[a]ll property shall be assessed annually . . . at its true and actual value." We have interpreted the term "value" with respect to tax assessments as meaning "worth in money' of a piece of property- -its market value."

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<sup>10</sup> The Taxpayers do not contest the calculation involved in the cost approach; rather, the Taxpayers challenge the applicability of the cost approach to their specific properties.

<sup>11</sup> As will be discussed more fully herein, West Virginia law does not exempt the tax credits received, which is in contrast to other states that have enacted such statutory exemptions.

Syl. pt. 3, in part, *Killen v. Logan County Comm'n*, 170 W. Va. 602, 295 S.E.2d 689 (1982), *overruled on other grounds by In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, \_\_\_ S.E.2d \_\_\_, 2008 WL 4868290 (W.Va. Nov. 5, 2008).

The difference between the appraisal done by the Appraiser, Dwight Goff<sup>12</sup>, who was employed by the Tax Commissioner and the Taxpayers' Appraiser is that the Taxpayers' Appraiser did not include the value of the tax credits which are received in exchange for the agreement to restrict the rents to enable occupancy by individuals who meet the federally established income criteria.

It is uncontroverted that the federal income tax credits which are provided to entities such as these Taxpayers who construct low income housing are valuable. As acknowledged by the Taxpayers, the tax credits are essential to the building of the low income housing in question. The Taxpayers' appraiser, Dave McConahy, who testified for both Heathermoor and Stone Brooke testified that, "you wouldn't build this if these are the only rents that you could get." (Heathermoor, Tr. at 12). Additionally, Mr. McConahy testified that the tax credits "are an integral part of the financing, the construction, all that." (Stone Brooke, Tr. at 16). Notwithstanding this testimony, Mr. McConahy did not include the tax credits in the values performed for the Appellants. Mr. Goff found the Taxpayers' appraisals to be inadequate because "the rents are considered here, but I don't see anything – the vast majority of these projects<sup>13</sup> – and there's a whole different variety of flavors of these affordable housing. This particular one is involved – involves investment tax credits, and that is a major portion of how these things are funded. And in spite of that, none of that was – is reflected in this report." (Stone Brooke Tr. at 14).

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<sup>12</sup> Both Mr. Goff and the Taxpayers' Appraiser used the restricted rents as opposed to the fair market rents which would be available if these properties were not LIHTC properties.

<sup>13</sup> The dashes (–) do not reflect a failure to provide a complete reference to the transcript, but rather reflect areas where the transcription may not reflect all that a witness said.

Appellants suggest that the tax credits should not be considered, because they only last for 10 years, while the rent restrictions are in place for at least 15 years. Thus, Appellants argue that inclusion of the tax credits overvalues their property. This is untrue because (1) there is no question that the properties' tax credits have not lapsed and (2) their value is demonstrated because in some instances taxpayers agree to restrictions for a much longer period of time than the 10 years mandated under federal regulations.

As Mr. Goff testified, "but the biggest portion of value here isn't coming from the cash flow, anyway, it's coming from the tax credits."<sup>14</sup> (Stone Brooke Tr. at 16). In *Town Square Limited Partnership v. Clay County Board of Equalization*, 704 N.W.2d 896 (S.D. 2005) the Court ruled that the tax credits should be included in the value, observing that even though the tax credits were only available for 10 years, *Town Square* agreed to 40 years of rent restrictions. The Appellants' Appraiser's testimony confirms that the rent restrictions on this type of housing can last for 30 years. (Stone Brooke Tr. at 17).

In ruling that the tax credits should be included to arrive at the value of the low income housing, the Illinois Court in *Rainbow Apartments v. Illinois Property Tax Appeal Bd.*, 762 N.E.2d 534, (Ill.App. 4 Dist., 2001), stated,

Rainbow does not obtain its entire income from market-determined rents; it allocates to its partners the tax credits as an additional cash-flow stream derived from its ownership interest in the property. Next, those tax credits are practically equivalent to a government subsidy. They allow the partners to reduce their tax liabilities dollar-for-dollar. In addition, the area's market rents did not justify developing the project without the tax-credit incentive.

*Rainbow Apartments*, 762 N.E.2d at 536.

Therefore, the Illinois Court rejected Rainbow's attempt to exclude the tax credits from the value.

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<sup>14</sup> Mr. Goff further testified that the "value came up to 1.9, which is even more than what the county had." (Stone Brooke Tr. at 16).

Furthermore, consistent with this Court's opinion in *Foster Foundation* the inclusion of the tax credit in the valuation is like the Court's finding that the 501(c)(3) status of the Woodland facility should be taken into consideration. Failure to include the tax credit would be contrary to the Court's finding in *Foster Foundation* where the Court stated that each of the unique characteristics of the Woodlands was among the numerous factors required to be considered in rendering a tax appraisal of commercial property.

**C. THE STATES DIFFER WITH REGARD TO WHETHER THE TAX CREDITS RECEIVED IN EXCHANGE FOR AGREEING TO RENT RESTRICTIONS FOR LOW INCOME HOUSING SHOULD BE INCLUDED IN VALUE**

The Appellants cite to several cases from other jurisdictions in which the rent restrictions are taken into consideration to determine value, while the tax credits have been excluded from the properties valuations. See *Holly Ridge Ltd. P'ship v. Prichett*, 936 So.2d 694, (Fla. App.5 Dist. 2006); *Cottonwood Affordable Housing v. Yavapai County*, 72 P.3d 357 (Ariz. Tax Ct. 2003); *Maryville Props., L.P. v. Nelson*, 83 S.W.3d 608 (Mo. App. W.D. 2002); *Cascade Court Ltd. P'ship v. Noble*, 20 P.3d 997 (Wash. App. Div.1 2001)). However, a number of states reach the opposite result by including the federal tax credits, as well as the rent restrictions, in the value of the low income housing developments. See *Parkside Townhomes Assoc. v. Board of Assessment Appeals of York County*, 711 A.2d 607 (Pa. Cmwlth); *Rainbow Apartments v. Illinois Property Tax Appeal Bd.*, 762 N.E.2d 534, 536 (Ill.App. 4 Dist.,2001); *Pine Pointe Housing, L.P. v. Lowndes County*, 561 S.E.2d 860 (Ga. App.2002); *Spring Hill, L.P., v. Tennessee State Board of Equalization*,<sup>15</sup> 2003 WL 23099679 (Tenn. Ct.App. 2003)); *Town Square Limited Partnership v. Clay County Board of*

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<sup>15</sup> The *Spring Hill* decision is an unpublished decision in Tennessee for which a Westlaw cite is provided and a copy of the case is attached for the Court's convenience. The case is provided due to the split in other jurisdictions, as well as, the fact that this is an issue of first impression for this Court.

*Equalization*, 704 N.W.2d 896 (S.D. 2005) and *Huron Ridge LP. v. Ypsilanti Township*, 737 N.W.2d 187, (Mich.App. 2007) Moreover, a minority of states refuse to take into consideration their rent restrictions because they were voluntarily agreed to by the owner. See *In re Appeal of Greens of Pine Glen Ltd.*, 576 S.E.2d 316 (N.C. 2003) and *Alliance Towers Ltd. v. Star County Board of Revision*, 523 N.E.2d 826 (Ohio 1988).

This Court should adopt the analysis of the Courts who have found that the tax credits must be included in the value along with the rent restrictions, because otherwise, the value is artificially depressed. As the Court in *Huron Ridge* stated, “we also agree with those states that have found that the appraised value of the property for property tax purposes would be artificially depressed if the value of the tax credits is not included. See *Pine Pointe Housing, supra*, 254 Ga. App: at 200, 561 S.E.2d 860.” *Huron Ridge LP v. Ypsilanti Township*, 737 N.W.2d 187, 199, (Mich.App. 2007).

Likewise, the *Parkside* Court found that the tax credits should be included in the valuation because the tax credits inclusion comported with economic reality. Explaining its decision to include the tax credits to arrive at value, the *Parkside* Court stated, “tax related benefits associated with investment property ownership inherently affect value and the court is not constrained to determine FMV as though the property lacked tax shelter features.” *Parkside Townhomes Associates v. Board of Assessment Appeals of York County*, 711 A.2d 607, 611 (Pa.Cmwlt.,1998). Additionally, the *Rainbow* Court stated the following with regard to its decision to include the tax credits in addition to the rent restrictions

Ignoring the effect of the tax credits would distort the earning capacity, and thus the fair cash value, of the property as low-income housing. (“The taxing authority must weigh both the positive and the negative aspects of the subsidy agreement and adjust the actual income figure to accurately reflect the true earning capacity of the property in question”).

. . . A willing buyer would most certainly consider the availability of section 42 tax credits when determining the fair cash value of the property.

*Rainbow Apartments*, 762 N.E.2d at 536-537 (citation omitted).

Furthermore, the *Pine Pointe*<sup>16</sup> Court included the value of the tax credits because,

Evidence shows that the Section 42 tax credits were pertinent to the fair market value of the property. The credits have value to a taxpayer with federal income tax liability and can be “passed through” a partnership structure to those taxpayers. Because Section 42 tax credits are generated by a designated property, a third party would pay for the value as part of that property's sale price in a bona fide, arm's length transaction. Furthermore, the tax credits go hand in hand with restrictive covenants that require the property to charge below-market rent.

*Pine Pointe*, 561 S.E.2d at 863.

The *Pine Pointe Court* went on to say:

If viewed in isolation, the rental restrictions would artificially depress the value of the property for tax valuation purposes. The fair market value determined by the trial court is supported by an appraisal that takes into account both the value of the tax credits and the rental income from the property as reduced by the rental restrictions.

*Id.*

Similarly, the *Town Square Court* agreed with the holdings in *Rainbow*, *Pine Pointe* and *Parkside* concluding that ignoring the income tax credits, would artificially depress the value of the property for tax purposes.

The cases upon which the Appellants' rely are either distinguishable and or as discussed herein wrongly decided. The Appellants' reliance on *Holly Ridge* should be completely discounted, because the Court's exclusion of the tax credits was based upon a statutory enactment. There is no statute in West Virginia, like in *Holly Ridge*, which requires the exclusion of the federal income tax

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<sup>16</sup> The *Pine Pointe Court* did not find the Georgia's statute prohibiting the inclusion of tax credits in the valuation dispositive because the statute had no retroactive application.

credits from the value ascribed to LIHTC property. Last session, the West Virginia Legislature, passed Senate Bill 696, which excluded tax credits from the consideration of housing, like that at issue in this case; however, Governor Manchin vetoed the Bill and no further action was taken by the Legislature.

This Court should not adopt the reasoning of *Cottonwood* or *Maryville*, which are relied upon by the Appellants because these Courts erred “in overlooking or underestimating the value of the credits during the ten-year payout period.” *Huron Ridge*, 737 N.W.2d at 197. In criticizing the *Cottonwood* decision, the *Huron* Court went on to say the following “the Arizona court overlooked the possibility of an appraisal method, like the one at issue here, that would include the value of the remaining tax credits in the property’s assessed value, during the ten-year payout period, in a manner that reflects their diminishing value. See *Cottonwood*, *supra*, 205 Ariz. at 429, 72 P.3d 357.” *Huron Ridge*, 737 N.W.2d at 197.

Furthermore, the *Huron Ridge* Court found, the *Maryville* Court’s logic is inconsistent. As the *Huron Ridge* Court explained on the one hand,

The [Maryville] Court acknowledged the existence of a market for low-income housing tax credit property during the ten-year period in which the credits are available. In fact, the court noted that the value of the remaining credits would fuel competition for such properties in light of the fact that the credits are more valuable to investors in higher tax brackets. *Maryville*, *supra*, 83 S.W.3d at 615 and n. 2.

*Huron Ridge*, 737 N.W.2d at 197.

On the other hand, the *Huron* Court observed that *Maryville* inconsistently said the following with regard to the tax credits, “Nevertheless, the court ruled that the tax credits do not contribute to the fair market value of the property because a prudent owner of tax-credit property would not sell at the fair market value during the ten-year period. *Id.* at 616-617.” *Huron Ridge*, 737 N.W. at 197.

Simply stated, the credits cannot have value during the ten year period when the credits are available and at the same time have no value during that time.

The *Cascade* Court merely indicated that, inasmuch as that it found that the tax credits were intangible personal property, they were not subject to taxation under Washington law. As will be discussed herein, the tax credits are not intangibles for purposes of arriving at the value of property.

**D. THE TAX CREDITS ARE NOT INTANGIBLE PROPERTY WHICH IS EXEMPT FROM TAXATION**

The investment tax credits are not intangible property which are exempt from taxation. Appellants' argument to the contrary is misplaced. West Virginia Code Section 11-3-7a<sup>17</sup> provides that chattel interests in real property are interests in tangible personal property and are to be assessed and taxed as such. This provision goes on to say: "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." A chattel interest as defined by *Black's Law Dictionary 7th Edition (1999)* "A movable or *transferable* property interest." As discussed herein, the tax investment credits are transferable.

There is no dispute that the tax credits are transferrable. The dispute is what legal significance should attach to the credits when valuing the property. Assuming *arguendo* that the Court finds that West Virginia Code Section 11-3-7a does not resolve the issue of whether the tax credits can be included in the valuation, this Court should follow *Huron Ridge*, which found that

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<sup>17</sup> For 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.

W. Va. Code, § 11-3-7a

the tax credits are not intangible property which are exempt from taxation. Specifically, the *Huron Ridge* Court stated

Most states, including Michigan, exempt intangible property from taxation of real property by state constitution or by legislation. See Const. 1963, art. 9, § 3 (requiring Legislature to tax real and tangible property). Nonetheless, the courts of most of these states have held that the value of nontaxable intangible assets may be included in the assessment of real property or tangible business property if the intangibles “are deemed to be directly related to the tangible property, but not [where they] are deemed to be related to the business in which the tangible property is used.” . . . 90 A.L.R.5th 547, § 2(a), pp. 562-563. Thus, the proper inquiry is whether the tax credits are intangible assets and, if so, whether they directly relate to the subject property.

*Huron Ridge*, 737 N.W.2d at 195.

The *Huron Ridge* Court found that the tax credits at issue are not intangible property by applying the rule established in *Rainbow Apartments*. The *Huron Ridge* Court stated the following with regard to the *Rainbow* test,

The Illinois Court of Appeals held that “[IRC § ] 42 tax credits are not intangible property because they do not constitute a right to a payment of money, have no independent value, and are not freely transferable upon receipt.” *Rainbow Apartments, supra*, 326 Ill.App.3d at 1108, 260 Ill.Dec. 875, 762 N.E.2d 534. Though, pursuant to IRC § 42, the tax credits are transferable to the project's equity investors, the Illinois court recognized that this transfer is not an actual sale. Rather, the credits remain within the limited partnership, and the investors “buy securities giving them an interest in the limited partnership.” *Id.*

*Huron Ridge*, 737 N.W.2d at 195.

Further the *Pine Pointe* Court found that the tax credits are *intangible benefits* associated with the ownership of the real property, “the Georgia court found that the tax credits provide a “stream of value tied solely to the property,” similar to anticipated rental income. *Id.*” See *Huron Ridge*, 737 N.W.2d at 195. In *Town Square*, there was no analysis of whether the tax credits were intangible, because intangible property is not exempt from taxation in South Dakota. However, at

footnote 4 the *Town Square* Court stated the following, “even if these tax credits could be designated as intangible property, a distinction can be made between taxing intangible property and considering such credits as a value increasing feature.” *See Town Square* , 704 N.W.2d at 903.

Thus, the inclusion of the tax credits in the income approach does not impermissibility tax intangible property. Assuming *arguendo*, that West Virginia Code Section 11-3-7a does not compel taxation of the tax credits in arriving at a fair market value, taxation of these tax credits is not the impermissible imposition of tax on an intangible. Rather, the inclusion of the tax credits in the valuation merely considers such credits as a value enhancing feature. This conclusion is further supported by *Beaver County v. WilTel, Inc.*, 995P.2d 602 (Utah, 2000), which found no impermissible taxation of the enhanced unitary value of WilTel’s operations. In *Beaver*, the Court found that the enhanced value attributable to the unitary workings of WilTel’s tangible property, should be valued as value is attributed to a good view or a good location, when assessing a piece of property. A piece of real estate’s view and zoning are inherent features of the property, which are unquestionably a part of its value. Similarly, the tax credits involved in these low income housing developments, likewise enhance the value of the land and should be taxed to arrive at the fair market value of the property.

**E. APPELLANTS REQUEST THAT ALL LIHTC PROPERTIES BE ASSESSED BY A MANDATED METHODOLOGY IS CONTRARY TO AMERICAN BITUMINOUS AND ASKS THIS COURT TO INVADE A POLICY PREROGATIVES OF THE LEGISLATIVE AND EXECUTIVE BRANCH**

Consistent with *American Bituminous* this Court should leave the Assessors’ with discretion to choose the property valuation method appropriate for the residential property in their counties. The Court’s deference to the Tax Commissioner who was the Appraising Officer in *American*

*Bituminous* reflects the wisdom of allowing the methodology choice to the Assessing Officer to meet the difference in facts and circumstances that arise. Simply stated, this Court should not adopt the Taxpayers' one size fits all approach.

Furthermore, policy decisions with regard to exemptions from assessing all property at its true and actual value lie within the combined wisdom of the Executive and Legislative Branch. Any exemption to valuing property at its true and actual value should be left to the wisdom of the Legislative and Executive Branches.

Commenting on the public policies arguments regarding the exclusion of the value of the tax credits, with regard to low income housing projects, the *Huron Ridge* Court stated

Certainly there are public policy arguments in favor of excluding the value of the tax credits from the property tax assessments of low-income housing projects operated under IRC § 42. Some state legislatures have acted to shield low-income housing tax credit property from higher state property taxation out of concern that higher taxation will impede the development of much needed low-income housing. The Michigan Legislature is the proper institution in which to make such public policy determinations, not the courts.

*Huron Ridge*, 737 N.W.2d at 199.

Therefore, the assessments of the Hancock and Brooke County Assessors, as well as the ruling of Judge Mazzone should stand.

## VI.

### CONCLUSION

The Assessors of Brooke County and Hancock County were within their discretion to employ the cost approach to valuation based upon the recent construction cost data supplied by the property owners. The accuracy of the mathematical calculations has not been challenged. Therefore, the decisions of the Circuit Courts of Brooke County and Hancock County are adequately supported by

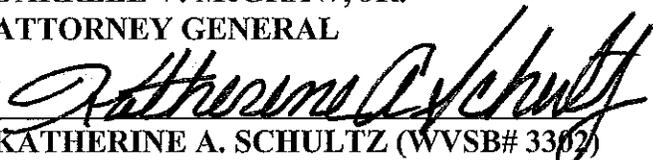
the evidence in the record and should be affirmed. If this Court should decide to mandate the use of the income approach to valuation for low income housing properties, then all factors should be considered in those valuations.

Respectfully submitted,

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

**NO. 34423 & 34424**

**STONE BROOKE LIMITED PARTNERSHIP, and  
HEATHERMOOR LIMITED PARTNERSHIP,**

**Petitioners / Appellants,**

**v.**

**PHYLLIS SISINNI, as Assessor of  
Brooke County, and**

**JOSEPH ALONGI, as Assessor of  
Hancock County,**

**VIRGIL T. HELTON,  
West Virginia Tax Commissioner,**

**Respondents / Appellees.**

**CERTIFICATE OF SERVICE**

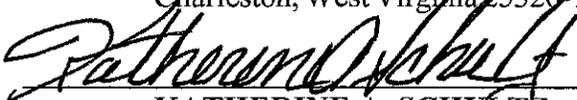
I, Katherine A. Schultz, Senior Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "Tax Commissioner's Brief" was served via United States Mail, postage prepaid, this 17<sup>th</sup> day of December, 2008, addressed as follows:

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