

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34863

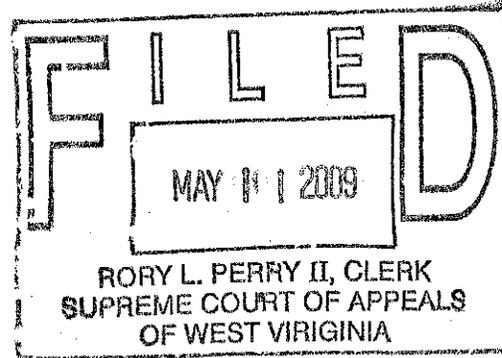
PINE HAVEN LIMITED PARTNERSHIP,

Respondent/Appellee

v.

**OTTIE ADKINS, ASSESSOR, and
THE COUNTY COMMISSION OF
CABELL COUNTY,**

Petitioners/Appellants



PETITIONERS'/APPELLANTS' BRIEF

Respectfully submitted,

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TABLE OF CONTENTS

	Page No.
I. INTRODUCTION.....	1
II. STATEMENT OF THE CASE.....	2
III. STATEMENT OF ISSUES.....	4
A. WHETHER THE CIRCUIT COURT’S REVERSAL OF THE VALUATION OF THE CABELL COUNTY ASSESSOR WHICH HAD BEEN UPHELD BY ITS BOARD 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 WOODLANDS RETIREMENT COMMUNITY.	
B. WHETHER THE APPELLEE CAN SHOW THAT THE ASSESSOR’S VALUATION UPHELD BY ITS BOARD OF EQUALIZATION AND REVIEW WHICH WAS REVERSED BY THE CIRCUIT COURT WAS CLEARLY ERRONEOUS.	
IV. STANDARD OF REVIEW.....	4
V. DISCUSSION	5
A. BACKGROUND REGARDING THE LIHTC PROGRAM AND REAL PROPERTY VALUATION.	
1. THE LIHTC PROGRAM	
2. REAL PROPERTY VALUATION	
B. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BECAUSE PETITIONER’S INCOME METHOD OF APPRAISAL IS NOT THE APPROPRIATE METHOD FOR THIS TYPE OF PROPERTY.	
C. ASSUMING THE COURT FINDS THAT THE ASSESSOR ABUSED HIS DISCRETION, WHICH IS DENIED, THE RESPONDENT/APPELLEE’S VALUE DOES NOT ESTABLISH THE TRUE AND ACTUAL VALUE AS REQUIRED BY CLEAR AND CONVINCING EVIDENCE.	
VI. CONCLUSION	12

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Heathermoor Limited Partnership v. Joseph Alongi, et al. West Virginia Case No. 08-058	1
In Re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W.Va. 250, 539 S.E.2d 757, 762 (2000)	4, 8, 9
In Re 1994 Assessments of the Prop. Of Righini 197 W. Va. 166, 169, 475 S.E.2d 166, 169 (1996)	5, 6
Kline v. McCloud, 326 S.E.2d 715 (1984)	7
In Re Tax Assessments Against Pocahontas Land Co. 172 W. .Va. 53, 303 S.E.2d 691 (1983)	8, 9
Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County, 189 W.Va. 322, 431 S.E.2d 661 (1993)	8
In Re Maple Meadow Min. Co. 191 W.Va. 519, 523, 446 S.E.2d 912, 916 (1994)	8
Ray Killen, as President, Logan County Board Of Education, Etc., et al., Logan County Commission, Etc., et al. 295 S.E.2d 689, 170 W.Va. 602 (1982)	8
Pine Pointe Housing L.P. v. Lowndes County Bd. Of Tax Assessors 561 S.E.2d 860 (2002)	11
<u>STATUTES</u>	
W.Va. Code § 11-3-25	2, 4
W.Va. Code § 29A-5-4(9)	4
W.Va. Code § 11-3-1	6, 7
W.Va. C.S.R. §110-1P-2.3.3	6
W.Va. C.S.R. §110-1P-2.1.1	6
W.Va. C.S.R. §110-1P-2.2.1	6
W.Va. C.S.R. §110-1P-2.2.1.2	7, 10
W.Va. C.S.R. §110-1P-2.2.1.3	7
W.Va. C.S.R. §110-1P-2.2.2	7
W.Va. C.S.R. §110-1P-2.3.6	11
28 U.S.C.S. 42(d) 7(a)	11

OTHER AUTHORITIES

Adam McNeely, Article, Improvising Low Income Housing,
Eliminating The Conflict Between Property Taxes &
The LIHTC Program, 15 J. Affordable Housing &
Community Develop. L. 324, 324 (2006)

4

72 Am. Jr. 2d State & Local Taxation §668

6, 7

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PETITIONERS' APPELLANTS' BRIEF

I. INTRODUCTION

For purposes of clarification, a substantial portion of the arguments presented herein have been taken verbatim from the arguments presented in Case No. 08-058 styled Heathermoor Limited Partnership v. Joseph Alongi, as Assessor of Hancock County, et al., as submitted by the State Tax Commissioner in his Response to "Petition for Appeal."

Ottie Adkins, Assessor (the "Assessor"), and The Cabell County Commission (Petitioners) petition for appeal from the Order Granting Summary Judgment on behalf of Pine Haven Limited Partnership, et al. (Petitioners below, Respondents herein), reversing the decision of the Cabell County Commission sitting as the Board of Equalization and Review (the "Board"), which adopted the Assessor's cost method of appraisal and valuations as follows: The Parks - \$2,952,100, the Hamlets - \$3,015,000, and Pine Haven - \$2,017,000. The Court set the valuation based on the income method of appraisal as follows: Pine Haven - \$500,000.00; The Hamlets - \$900,000.00; and

the Parks - \$750,000.00.

The Circuit Court committed reversible error by not giving deference to the Assessor's methodology of valuation and compounded its error by failing to take into consideration that LIHTCs do in fact increase the value of the property.

It is represented unto this Court that the issue of how to properly value properties that are used in the LIHTC Program is ripe for decision by reason that there exists a split of authority among the Circuit Courts of West Virginia.

II STATEMENT OF THE CASE

The properties which are the subject matter of this appeal were developed under the Low Income Housing Tax Credit ("LIHTC") Program through the West Virginia Housing Development Fund.

The Respondent/Appellee appeared before the County Commission of Cabell County sitting as the Board of Equalization and Review (hereinafter the "Board") on February 19 and February 22, 2008 and contested the Assessor's valuation of their properties. The Board denied the Respondent/Appellee's challenges and upheld the Assessor's appraised values of the properties for tax year 2008 as follows:

1. The Parks Limited Partnership - \$2,952,100.00;
2. The Hamlets Limited Partnership - \$3,015,000.00; and
3. Pine Haven Limited Partnership - \$2,017,000.00.

Pursuant to the provisions of West Virginia Code §11-3-25, the Respondent/Appellee then filed individual appeals in the Circuit Court of Cabell County. Pine Haven's appeal was assigned Civil Action Number 08-C-0223 and was assigned to Judge David M. Pancake; The Hamlets' appeal

was assigned Civil Action Number 08-C-0224 and was assigned to Judge John L. Cummings; and, The Parks' appeal was assigned Civil Action Number 08-C-0225 and was assigned to Judge Pancake. Following a hearing conducted on May 22, 2008, Judge Pancake on May 28, 2008 Ordered that The Hamlets' appeal be transferred from Judge Cummings to Judge Pancake, Ordered the three cases consolidated, Ordered that all three cases be assigned Civil Action Number 08-C-0223, and established a schedule to govern briefing and argument of the consolidated matters. Petitioners'/Respondents' below Memorandum of Law in this matter was filed pursuant to said Scheduling Order entered by the Court on May 28, 2008.

On July 15, 2008, an agreed order between the parties permitting the filing of a corrected transcript of the hearings before the Board of Equalization and Review on February 19 and 22, 2008 was entered. A duplicate of the July 15 order was again entered on August 20, 2008. The corrected transcript states in the Reporter's Certificate on page 73 and that it is "[g]iven under my hand and official seal this 7th day of July, 2008".

On July 11, 2008, the Respondent/Appellee filed its motion for summary judgment together with a memorandum of law. On August 8, 2008, the Petitioners/Appellants filed their response to the Respondent/Appellee's motion for summary judgment, as well as their memorandum of law in opposition to that motion, and on September 2, 2008, the Respondent/Appellee filed its reply to the Petitioners/Appellants' response. All of these memoranda were timely filed.

Thereafter, the parties appeared before the Court and Judge Pancake granted the Respondent/Appellee's Motion for Summary Judgment and issued his Order dated November 12, 2008.

Petitioners/Appellants filed their Petition for Appeal which was granted by this Court by

Order dated April 30, 2009 and further Ordered that this case be consolidated with No. 34423, Stone Brooke v. Sissinni, Assessor, and No. 34424, Heathermoore Ltd. v. Alongi, Assessor, for purposes of argument, consideration, decision and opinion.

III. STATEMENT OF ISSUES

- A. WHETHER THE CIRCUIT COURT'S REVERSAL OF THE VALUATION OF THE CABELL COUNTY ASSESSOR WHICH HAD BEEN UPHELD BY ITS BOARD 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 WOODLANDS RETIREMENT COMMUNITY.
- A. WHETHER THE APPELLEE CAN SHOW THAT THE ASSESSOR'S VALUATION UPHELD BY ITS BOARD OF EQUALIZATION AND REVIEW WHICH WAS REVERSED BY THE CIRCUIT COURT WAS CLEARLY ERRONEOUS.

IV. STANDARD OF REVIEW

This Court has held that "judicial 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." In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W. Va. 250, 539 S.E.2d 757, 762 (2000). The Administrative Procedures Act provides in relevant part as follows:

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 of 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).

This Court reviews a circuit court's ruling in proceedings under Section 11-3-25 *de novo*. *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 539 S.E.2d at 762.

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, Article, *Improving Low Income Housing: Eliminating the Conflict Between Property Taxes and the LIHTC Program*, 15 J. Affordable Housing & Community Develop. 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 side 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-side 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 taxation of real and personal property is a complex process.” *In re 1994 Assessments of the Prop. Of Righini*, 197 W. Va. 166, 169, 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.* At 169, 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 the Prop. Of Righini*, 197 W. Va. at 169, 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-2.2.1.2.1. 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 Not The Appropriate Method For This Type Of Property.

The Respondent/Appellee argued before the Circuit Court that the appropriate method to value the apartment units was by utilizing an income approach as opposed to the cost approach utilized by the Assessor.

The Assessor has the duty to see that the laws concerning the assessment of ad valorem real property taxes are faithfully enforced. Pursuant to West Virginia Code §11-3-1, *et seq.*, all property must be assessed annually at its true and actual value. “True and actual value” is defined as the value which a willing buyer would pay a willing seller in an arm’s length transaction. See West Virginia Code §11-3-1, also Kline v. McCloud, 326 S.E.2d 715 (1984).

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

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

“It is a general rule that valuation for taxation purposes fixed by an assessing officer are presumed to be correct, the burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear. Syl. Pt. 7, In Re: Tax Assessments Against Pocahontas Land Co., 172 W.Va. 53, 303 S.E.2d 691 (1983).” Syl. Pt. 1, Western Pocahontas Properties, Ltd. v. County Comm’n of Wetzel County, 189 W. Va. 322, 431 S.E.2d 661 (1993). In challenging a tax valuation, “the burden [of proof] clearly falls upon . . . [the taxpayer] to

demonstrate through clear and convincing evidence that the tax assessments were erroneous.” In Re: Maple Meadow Min. Co., 191 W. Va. 519, 523, 446 S.E.2d 912, 916 (1994); see also Pocahontas Land, 172 W. Va. At 61, 303 S.E.2d at 699 (“It is obvious that where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous.”); Syl. Pt. 2, in part, Western Pocahontas Properties, Ltd., supra (“The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous.”).

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

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

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

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

West Virginia Code §30-38-1, with particular reference to subsection (c)(5), provides that

“an employee of ...a political subdivision of the State of West Virginia does not have to be licensed and certified to perform appraisals.”

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.”

Respondent cannot demonstrate that the Assessor abused his discretion. Specifically, the cost approach is one of the three recognized methods which is used to appraise property. Moreover, here like in American Bituminous, the property being appraised is relatively new making the cost approach a reliable indicator of value.

Furthermore, the fact that the Respondent did not utilize the cost approach to appraise the property, does not mean the Assessor abused his discretion when he used the cost approach to value the property.

C. Assuming The Court Finds That The Assessor Abused His Discretion, Which Is Denied, The Respondent/Appellee’s Value Does Not Establish The True And Actual Value as required by clear and convincing evidence.

Even if the Court were to find that the Respondent has proven that the Circuit Court did not err by not giving the Assessor’s choice of methodology deference, the Respondent cannot show that its appraisal method should be adopted. The reasoning being that the Respondent’s methodology does not achieve the statutory imperative of appraising all non-exempt property at its true and actual value. What should not be ignored is that the low income residential apartments at issue here would not have been built if the restricted rents were not coupled with the investment tax credits.

As argued below by the Respondent and affirmed by the Circuit Court, it was presented that

the LIHTC the property owner receives are not rental monies, and do not constitute income. That is plainly wrong. Under West Virginia law, the market value of property such as is before the Court is not just the below market rents charged by the Respondent. It is precisely because the Respondent is charging below market rents that the Federal Government subsidizes the endeavor by allowing the owners to "earn" money through LIHTC. Additionally, subject to Internal Revenue Service Rules and Regulations the LIHTC do travel with the property, thereby adding to the value of the property.

West Virginia Code R. § 110-1P-2.2.1.2 defines the income approach as follows:

Income approach. - A property's present worth is directly related to its ability to produce an income over the life of the property. The selection of an overall capitalization rate will be 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 shall then be determined by dividing the annual **economic rent** by the capitalization rate.

Economic rent is defined in the regulations 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**." W. Va. Code R. § 110-1P-2.3.6 (1991) (emphasis added). The regulations differentiate between the actual rent a property brings in and what it would bring in on the open market. The Respondent would suggest only the actual contract rent it receive should be factored into the income approach. However, the law clearly contemplates that "economic rent" may be different than "contract rent." The apartment units at issue would rent for more money per month if the owners had not agreed to offer eligible tenants lower rents in exchange for tax credits. The rents for the units are artificially low. Using these artificially low rents as the only measure of income would create an artificially low valuation. The Georgia Court of Appeals in Pine Pointe Housing L.P. v. Lowndes County Bd. Of Tax Assessors, 561 S.E.2d 860, (2002) followed this same

line of reasoning in a case directly on point with the issue before the Court. Moreover, pursuant to 28 U.S.C.S. 42(d)7(a) the investment tax credits run with the property.

VI. CONCLUSION

Based on the foregoing, it is painfully obvious that there are mutual issues of fact in dispute in this case and the lower Court erred in granting Respondent/Appellee's Motion for Summary Judgment.

Your Petitioners/Appellants herein would respectfully request that the Circuit Court's decision be reversed, and, further, that the Assessor's valuation of the Respondent/Appellee's properties be affirmed utilizing the cost approach methodology.

**Respectfully submitted,
Ottie Adkins, Assessor,
And The County Commission
Of Cabell County,**

By Counsel



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CERTIFICATE OF SERVICE

I, William T. Watson, counsel for the Petitioners/Appellants, do hereby certify that a true and exact copy of the foregoing Petitioners'/Appellants' Brief was served via United States mail, postage prepaid, this 8th day of May, 2009, addressed as follows:

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