

Original

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

PINE HAVEN LIMITED PARTNERSHIP

Petitioner,

v.

**THE HONORABLE OTTIE ADKINS,
ASSESSOR OF Cabell COUNTY, and**

**THE COUNTY COMMISSION
OF CABELL COUNTY**

Respondents.

AND

THE HAMLETS LIMITED PARTNERSHIP

Petitioner,

v.

**THE HONORABLE OTTIE ADKINS,
ASSESSOR OF Cabell COUNTY, and**

**THE COUNTY COMMISSION
OF CABELL COUNTY**

Respondents.

AND

**THE PARKS LIMITED PARTNERSHIP
(PARKVIEW LP)**

Petitioner,

v.

**THE HONORABLE OTTIE ADKINS,
ASSESSOR OF Cabell COUNTY, and**

**THE COUNTY COMMISSION
OF CABELL COUNTY**

Respondents.

2008 NOV 12 P 3:17

ADELL CHANDLER
CIRCUIT CLERK
CIVIL ACTION NO. 08-C-223
CABELL CO
JUDGE DAVID M. PANCAKE

08-C-224
08-C-225

ORDER GRANTING SUMMARY JUDGMENT

On the 29th day of September, 2008, came the Petitioners, by Herschel H. Rose III, their counsel, and the Respondents, by William T. Watson, their counsel, upon motion by the Petitioners for summary judgment. Having considered the transcript of the hearings conducted by the Cabell County Commission sitting as a Board of Equalization and Review conducted February 19 and 22, 2008; the exhibits introduced at those hearings, including the appraisals introduced by the Petitioners; the memoranda of law timely filed by counsel for each side; the cases and statutes that were referred to and cited therein; the West Virginia Code of State Regulations referred to and cited therein; as well as the West Virginia constitutional provisions dealing with taxation and specifically real property; and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. The Petitioners, Pine Haven Limited Partnership, the Hamlets Limited Partnership and the Parks Limited Partnership, own and operate multi-unit apartment buildings which provide low income housing in Cabell County.
2. All of these projects were developed under the Low Income Housing Tax Credit ("LIHTC") Program through the West Virginia Housing Development Fund.
3. The LIHTC program was created by the Tax Reform Act of 1986 enacted by Congress as an alternative method of funding housing for low- and moderate-income households. The intent of this program is to make it economically feasible for private developers and investors to develop affordable housing to meet the demonstrated demand for quality housing at reduced rents for senior citizens and the working poor. The Petitioners set forth in great detail the provisions of the LIHTC program in *Petitioners' Memorandum of Law in*

Support of Their Motion for Summary Judgment and explain how the properties operate according to those provisions. *See id.* at 6-8.

4. The Assessor of Cabell County appraised all three of the subject properties for *ad valorem* tax purposes for tax year 2008.

5. The Petitioners appeared before the County Commission of Cabell County sitting as a Board of Equalization and Review (hereinafter the "Board") on February 19 and 22, 2008 and contested the Assessor's valuation of their property.

6. At the February 19 hearing, the Petitioners presented appraisals for each property performed by a licensed professional appraiser, Mr. David E. Bunch, who valued the property substantially below the Assessor's appraised values.

7. The Court takes judicial notice of the fact that Mr. Bunch has been qualified and designated an expert in many courts in the southern part of the state, both federal and state.

8. In those hearings, the Petitioners contended that the Cabell County Assessor failed properly to value these three properties for the tax year 2008, because he failed to recognize that these properties were participating in the LIHTC program. In effect, according to the Petitioners, the Assessor valued the properties in exactly the same way as he would an apartment building that was free to charge rental rates at whatever level the market would bear (i.e. "market rents").

9. By unanimous vote on February 22, 2008, the Board denied the Petitioner's challenges and upheld the Assessor's appraised values, which were \$2,952,100 for The Parks, \$3,015,000 for The Hamlets, and \$2,017,000 for Pine Haven.

10. By contrast, the Petitioners' appraisal concluded that these properties should be valued at \$750,000.00 for the Parks, \$900,000.00 for the Hamlets, and \$500,000.00 Pine Haven.

11. Pursuant to the provisions of W. Va. Code § 11-3-25, on March 24, 2008, the Petitioners timely filed their respective petitions relative to their real property assessments for the tax year 2008 in the Circuit Court of Cabell County.

12. Pine Haven's appeal was assigned Civil Action No. 08-C-0223 and was assigned to Judge David M. Pancake; The Hamlets' appeal was assigned Civil Action No. 08-C-0224 and was assigned to Judge John L. Cummings, and The Parks' appeal was assigned Civil Action No. 08-C-0225 and was assigned to Judge Pancake. On March 31, 2008, the Respondents filed their respective responses to each.

13. Following a hearing conducted on May 22, 2008, this Court on May 28, 2008 ordered that the Hamlet's appeal be transferred from Judge Cummings to Judge Pancake, ordered the three cases consolidated, and ordered that all three cases be assigned Civil Action No. 08-C-0223.

14. On July the 15th, 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 that it is "[g]iven under my hand and official seal this 7th day of July, 2008".

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

16. The Petitioners argue that the only way one can arrive at the actual value of these properties is through the income approach.

17. Each appraisal performed by Mr. Bunch included an explanation as to why the income approach was the most appropriate method to use. Each appraisal (at page 2) states:

Due to the subject property's specific restrictions, the cost approach and the sales comparison approach were not considered. The restrictions for the construction would make it cost prohibitive for a purchaser in the open market based on the funding restrictions. The sale would be influenced solely by the income produced per unit which would produce a value by the income approach. Therefore, the income approach was considered applicable, and the analysis was performed.

18. Part of Mr. Bunch's reasoning also has to do with the fact that rent controls that these apartments are subject to under the LIHTC program remain in place for 30 or 40 years regardless of whether the properties are sold to new owners. He explained this aspect of his valuation to the Board on February 19, 2008, stating:

And my understanding, it can't be changed for 30 years, or one that's for 40 years. So if I sell it, I own it, I sold it to you, you're buying it under the same conditions that I built it and operated it. It can't be changed. So you are sort of handcuffed on these, and to help out a segment of the population of Cabell County to give them affordable housing. It's not like the Waterfords.¹

It's not like apartments around the market because they are burdened with this agreement. They cannot change it.

So taking the income from these three units, the Parks, Hamlets and Pine Haven, I took the maximum rent to five percent vacancy rate, took off the expenses and came with a net of operation, and divided it by the capitalization rate. Now, that's the way I would buy something.

That's the way any person that would be in a business would buy these, is the income that it produces after the net of operation and what is that worth. You come out with a rate, a capitalization rate we call it, dividing that into the annual income, and that's where the values come out.

Corrected Tr. pp. 8-9 (February 19, 2008).

¹ The Waterfords is a new apartment complex on Rt. 60.

19. The Petitioners have cited multiple cases from other jurisdictions², as well as two circuit court cases in West Virginia³, in which those courts found that the income approach was the best way properly to value LIHTC properties. A representative sampling of those cases from outside our jurisdiction can be found in *Town Square Ltd. Partnership v. Clay County Bd. of Equalization*, 2005 SD 99, 799 N.W.2d 896 (2005), which stated:

The taxing authority's appraiser used the three required statutory approaches to determine value: cost, market and income. But he concluded that the greatest weight and reliability should be given to the income capitalization approach.

20. The Respondents used the cost approach to value these properties and also stated that they used the income approach as a check on their cost approach and that the income approach result was higher than that of the cost approach.

21. The Respondents have not directly addressed the Petitioners' argument that the income approach is the only fair way to get to the actual value of these properties.

22. The transcript of the February 22, 2008 hearing includes a statement by Jerry Hutchinson, Chief Deputy Assessor, which casts some light on why the Board went with the cost approach:

I spoke to our legal department yesterday in Charleston, They said the accepted rate that we should appraise it is exactly as not only the cost factor, but we backed it up with the market rents in the area. And they said that that's the accepted way. That's the way we should do it. How they finance it is not really our concern. It's the value of the buildings and that's what we have to do.

Corrected Tr. p. 63 (February 22, 2008).

² *Deerfield 95 Investor Associates, LLC v. Town of East Lyme*, 1999 WL 391099, 25 Conn. L. Rptr. 51 (1999); *Huron Ridge, L.P. v. Township of Ypsilanti*, 275 Mich.App. 23, 737 N.W.2d 187 (2007); and *Town Square Ltd. Partnership v. Clay County Bd. of Equalization*, 2005 SD 99, 704 N.W.2d 896 (2005).

³ *Providence Green LLC v. Assessor, et al.*, Civil Action Nos. 07-CAP-7 and 08-CAP-14, (Circuit Court of Ohio County) and *In re 1994 Tax Assessment of Twin Oaks Plaza et al.*, Civil Action No. 94-C-78-H (Circuit Court of Fayette County).

23. While the Respondents use the cost approach, they did not make any real argument as to how this approach would produce a better valuation than the income approach.

24. The Respondents' income approach yielded higher numbers than their cost approach. This occurred for two reasons: (1) the Respondents valued the properties at their market rents, rather than their restricted rents; and (2) the Respondents included the tax credits as a factor in determining the fair market value of the property.

25. As to the Assessor's use of market rents rather than restricted rents, the Petitioners have again cited numerous cases from others jurisdictions with similar facts, in which courts have found that using the restricted rents, rather than the market rents, is the best way and the best method for properly evaluating LIHTC property.⁴ An example of this is in *Cascade Court Limited Partnership v. Noble*, 105 Wash.App. 563, 20 P.3d 997, at pages 570-71 and 1001-1002 respectively, 2001 decision, in which the Court of Appeals of Washington held:

Here the property owners do not have the right to charge market rents. Since the covenants run for up to 60 years, any hypothetical subsequent owner would be unable to charge market rents. Washington law directs the Assessor to focus on the price a willing buyer would pay for the property at the time of the assessment. A willing buyer would not buy the property based on the rents that the buyer could not charge. Therefore, the Assessor should have taken the restricted rents into account when assessing the property. For an example, an assessor using the income method should capitalize the maximum rents allowed under the covenants.

26. The Respondents also raise the issue is whether the tax credits should be included in the value of the properties, and if so, how they should be valued.

⁴ *Bayridge Associates Ltd. Partnership v. Department of Revenue*, 321 Or. 21, 892 P.2d 1002 (1995); *Greenfield Village Apartments, L.P. v. Ada County*, 130 Idaho 207, 938 P.2d 1245 (1997); *Cascade Court Limited Partnership v. Noble*, 105 Wash.App. 563, 20 P.3d 997 (2001); *Cottonwood Affordable Housing v. Yavapai County*, 205 Ariz. 427, 72 P.3d 357 (2003); and *In re Ottawa Housing Assoc., L.P.*, 27 Kan.App.2d 1008, 10 P.3d 777 (2000)

27. Parkview Limited Partnership, Hamlets Limited Partnership and Pine Haven Limited Partnership owned the properties in question. In order to raise the funds for the land and improvement, these owners sold tax credits to individual investors in exchange for their investment in the project. The investors now own the tax credits and may use them over a ten year period to offset their federal income tax liabilities; the Petitioners are not entitled to use the tax credits or to reduce or eliminate their own tax liabilities. Corrected Tr. pp. 57-61 (February 22, 2008).

28. The Petitioners argue that the value of the tax credits should not be included in the appraised value of the properties because the tax credits are owned by the investors, not the limited partnerships that own the properties being appraised.

29. The Petitioners also argue that in a sense, Mr. Bunch's appraisal took the tax credits into account. They state that the purpose of the tax credit is to encourage investment in low income housing projects, and this investment has the effect of reducing the amount of money the project must borrow from banks as mortgages. That, in turn, reduces the expenses that the project must pay and therefore increases the net income to be capitalized in the income approach, and increases the resulting value.

30. The Petitioners also raised a number of questions and pointed out potential errors the Respondents made while performing their own income-based analysis of these properties. See in *Petitioners' Memorandum of Law in Support of Their Motion for Summary Judgment*, pages 22-24.

31. The Respondents failed meaningfully to respond to these issues that were raised in regard to the income approach, but rather relied on the fall-back position that they're entitled to the presumption that their values are correct.

Conclusions of Law

1. As the parties agree, the standard of review for this Court is set forth in the recent case of *In Re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 254-55, 539 S.E.2d 757, 761-62 (2000), which stated:

Upon receiving an adverse determination before the county commission, a taxpayer has a statutory right to judicial review before the circuit court. W. Va.Code § 11-3-25 (1967). The statute provides little in the way of guidance as to the scope of judicial review, although it does expressly limit review to the record made before the county commission. Given this limitation, we have previously indicated that review before the circuit court is confined to determining whether the challenged property valuation is supported by substantial evidence, see *Killen v. Logan County Comm'n*, 170 W.Va. 602, 295 S.E.2d 689 (1982), or otherwise in contravention of any regulation, statute, or constitutional provision, see *In re Tax Assessments Against the Southern Land Co.*, 143 W.Va. 152, 100 S.E.2d 555 (1957), overruled on other grounds, *In re Kanawha Valley Bank*, 144 W.Va. 346, 109 S.E.2d 649 (1959). As this Court's previous cases suggest, and as we have recognized in other contexts involving taxation, e.g., *Frymier-Halloran v. Paige*, 193 W.Va. 687, 695, 458 S.E.2d 780, 788 (1995), 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, W. Va.Code ch. 29A (footnotes omitted).

W.Va.Code 29A-5-4(g) provides as follows:

The court may affirm the order or decision of the agency or remanded 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 had been prejudiced because of the administrative findings, inferences, conclusions, decisions or order are:

- (1) In violation of constitutional and 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 extensional evidence all on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

2. The Petitioners argue that the Assessor's valuation of the three properties was in violation of subsections 5 and 6 of the West Virginia Code section cited above; that is, they

argue that the Assessor was clearly wrong in view of the appraisals submitted by the Petitioners' appraiser, David E. Bunch, and that the Board's decision to uphold the Assessor's values was arbitrary, capricious and abuse of discretion.

3. In the area of property valuation, the Tax Commissioner, as well as each county assessor, is fundamentally bound by the statute to ascertain the "true and actual value" of all property. Such value is defined as "the price for which such property would sell if voluntarily offered for sale by the owner." W.Va.Code 11-3-1.

4. The appraised value of commercial and industrial real property is the price at or for which the property would sell if 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. 110 W.Va. C.S.R. § 1P-2.1.1.

5. The Assessor is charged with using, when possible, the most accurate form of appraisal. If there is difficulty in obtaining the necessary data from the taxpayer, or a lack of comparable commercial and/or industrial properties, then the choice between alternative appraisal methods may be limited. 110 W.Va. C.S.R. § 1P-2.5.3.1 and *In Re Tax Assessment Against American Bituminous Power Partners, L.P., supra*.

6. Additionally, 110 W.Va. C.S.R. § 1P-2.13 recognizes other important considerations affecting the value of land including: location, size, shape, topography, accessibility, present use, highest and best use, easements, zoning, availability of utilities, income imputed to land and supply and demand for land of a particular type. Further, that each of these factors should be considered although some may be given more weight than others.

7. There are generally accepted three approaches to value, according to 110 W.Va. C.S.R. § 2.2.1: Those are the cost approach, the income approach and the market approach.

8. Both sides agree, and the Court finds, that the market data approach is not appropriate for these three properties due to the lack of sales data for comparable properties, which, in order to be comparable, would have to be subject to similar contractual and obligatory rent controls that are imposed on the property.

9. The West Virginia Supreme Court of Appeals has not directly resolved the issue of how to properly to value a LIHTC property.

10. Given the testimony of Mr. Bunch, the multiple cases from other jurisdictions, as well as the two circuit court opinions from West Virginia, the Petitioners have clearly demonstrated that the income approach is the proper method for valuing Low Income Housing Tax Credit properties.

11. The fact that the Respondents performed their own income approach appraisal as a check on their cost approach demonstrates that they understand that the income approach is likely the best way to value the property.

12. In West Virginia, the appraised value of commercial and industrial property is the price at or for which the property would sell if sold to a willing buyer by a willing seller in an arms-length transaction without either the buyer or the seller being under compulsion to buy or to sell. Taking this and Mr. Bunch's testimony into account, the Petitioners have conclusively demonstrated that the restricted rents should have been used in the income approach. The Respondents offered no argument in their response brief that would lead one to the opposite conclusion, nor did the transcript from the February 19 and 22, 2008 hearings contain any compelling evidence or arguments which would contradict the Petitioners' position that restricted rents are the best way to value the properties.

13. While the Respondents argue the tax credit should be included in the valuation and offers case law from outside our jurisdiction to support the argument⁵, the Petitioners correctly point out that their argument here cannot succeed, because there is no evidence in the record as to what value the Respondents place on these tax credits.

14. The Respondents continually fall back on the position that “the general rule is that valuation for taxation purposes fixed by an assessing officer are presumed to be correct”⁶, yet they offer no concrete evidence in this record showing how the Assessor accounted for the tax credits and what value was placed on them.

15. The Petitioners have demonstrated that the income approach is the most appropriate method for Low Income Housing Tax Credit properties, and that the use of the actual, restricted rents, that are locked in place for 30 years, are more appropriate to use than market based rent. The Petitioners demonstrated this through the citation of multiple cases from outside our jurisdiction, as well as to the two circuit court cases in West Virginia, and perhaps, mainly through the testimony and appraisal provided by Mr. Bunch.

16. While it is true that “the general rule is that valuation for taxation purposes fixed by an assessing officer are presumed to be correct”, the Assessor has a duty to prove that his appraisals are correct when presented with evidence to the contrary. *In re Tax Assessments Against Pocahontas Land Co.*, 172 W.Va. 53 at 61, 303 S.E.2d 691 at 699 (1983). Given the facts in this case, one cannot say that the Assessor’s valuation is supported by substantial evidence as is the standard under *Killen, supra*.

⁵ *Parkside Townhomes Assoc. v. Bd. of Assessment Appeals of York County*, 711 A2d 607 (1998); *Townsquare Ltd. P’ship v. Clay County Bd. Of Education*, 704 N.W.2d 896 S.D. (2005); *Meadowlanes Ltd. Dividend Housing Ass’n v. City of Holland*, 473 N.W.2d 636 (1991).

⁶ Citing *In Re Tax Assessment Against American Bituminous Power Partners, L.P., supra*.

17. To the contrary, the Petitioners have presented clear and convincing evidence that the appraisal done by Mr. Bunch is supported by evidence and that his approach is one the majority of the states follow.

18. The Cabell County Commission sitting as the Board of Equalization and Review on February 19th and February 22nd, 2008, was clearly wrong in review of the reliable probative and substantial evidence on the record, and that its decision was arbitrary and abuse of discretion which was clearly unwarranted under these circumstances.

For these reasons, the Court finds that there exists no genuine issues of material fact and that the Petitioners are entitled to summary judgment in their favor as a matter of law. Accordingly, the Petitioners' motion for summary judgment is GRANTED to each Petitioner as a matter of law, and that the Court finds that the true appraised value of each property shall be:

- (1) Pine Haven Limited Partnership, \$500,000.00.
- (2) The Hamlets Limited Partnership, \$900,000.00.
- (3) The Parks Limited Partnership, \$750,000.00.

The Assessor of Cabell County is Ordered to make the appropriate corrections in the tax books for tax year 2008, and the Sheriff of Cabell County is Ordered to issue the appropriate refund or credit as specified by the provisions of W. Va. Code § 11-3-25.

The Respondents' objections and exceptions are noted and made part of the record, and to the extent that the Court did not address a couple of the issues that were presented by the Petitioners, the Petitioners' exceptions and objections are noted and made part of the record.

IT IS SO ORDERED.

The Clerk is directed to mail a copy of this Order to Herschel H. Rose, III, Esq. and Steven R Broadwater, Esq., P.O. Box 3502, Charleston, WV 25335-3502, William T. Watson, Esq., P.O. Box 1371, Huntington, WV 25715-1371, the Assessor of Cabell County, the Sheriff of Cabell County, and the Clerk of the County Commission of Cabell County.

ENTERED this the 12th day of November, 2008.



Hon. David M. Pancake
Judge, Sixth Judicial Circuit

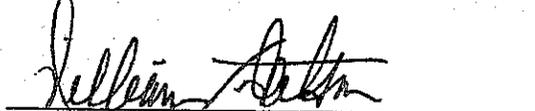
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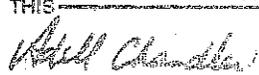
Counsel for Petitioners

ENTERED Circuit Court Civil Order Book
No. 214 Page 655 this
NOV 12 2008

Approved as to form:



Counsel for Respondents

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, ADELL CHANDLER, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON 11-12-08
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS 12 NOV 2008
 CLERK
CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA