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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 20-1099

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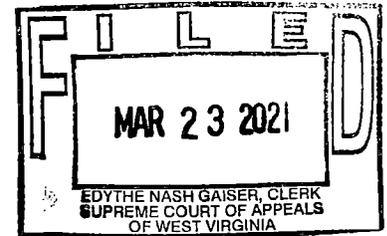
BERKELEY COUNTY COUNCIL,
Defendant Below, Petitioner,

vs.)

No.: 20-1099
(From the Circuit Court of Berkeley County,
19-AA-7)

GOVERNMENT PROPERTIES
INCOME TRUST LLC,

Plaintiff Below, Respondent



***AMICUS CURIAE* BRIEF ON BEHALF OF THE BOARD OF
EDUCATION OF THE COUNTY OF BERKELEY IN
SUPPORT OF THE BERKELEY COUNTY COUNCIL AND
REVERSAL OF THE CIRCUIT COURT DECISION**

Joshua A. Cottle, (WVSB No. 12529)
Kimberly S. Croyle (WVSB No. 6021)
Howard E. Seufer, Jr. (WVSB No. 3342)
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25301
Telephone: (304) 347-2116
Facsimile: (304) 343-2867
Email: jcottle@bowlesrice.com
Counsel for Amicus Curiae

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF *AMICUS CURIAE* BERKELEY COUNTY BOARD OF EDUCATION IN SUPPORT OF PETITIONER1

II. INTRODUCTION AND SUMMARY OF THE ARGUMENT2

III. STATEMENT OF THE CASE.....3

IV. ARGUMENT5

 A. The Circuit Court Failed to Apply the Correct Standard of Review and Erroneously Reversed the Decision of the Board of Assessment Appeals.5

 B. The Circuit Court’s Erroneous Decision Will Impact the Revenue Available for the Board of Education to Fund Supportive Services that are Implicit in a Thorough and Efficient Education.8

V. CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

<i>Century Aluminum of W. Virginia, Inc. v. Jackson Cty. Comm’n</i> , 229 W. Va. 215, 728 S.E.2d 99 (2012).....	7
<i>In re Queen</i> , 196 W.Va. 442, 473 S.E.2d 483 (1996).....	7
<i>In re Tax Assessment Against Am. Bituminous Power Partners, L.P.</i> , 208 W. Va. 250, 539 S.E.2d 757 (2000).....	5, 7
<i>Pauley v. Kelly</i> , 162 W. Va. 672, 255 S.E.2d 859 (1979).....	1, 9, 12
<i>Pope Properties/Charleston Liab. Co. v. Robinson</i> , 230 W. Va. 382, 738 S.E.2d 546 (2013).....	7
<i>Univ. Park at Evansdale, LLC v. Musick</i> , 238 W. Va. 106, 792 S.E.2d 605 (2016).....	5
<i>Webb v. W. Virginia Bd. of Med.</i> , 212 W. Va. 149, 569 S.E.2d 225 (2002).....	7

Statutes

W. Va. Code § 18-9A-1	9
W. Va. Code § 18-9A-11	12
W. Va. Code § 29A-5-4	6
W. Va. Code §§ 11-8-6c(1)-(3).....	9

Other Authorities

John E. Taylor, <i>Pauley-and “The Recht Decision”-at Forty</i> , 121 W. Va. L. Rev. 757 (2019).....	9
W. VA. DEPT. OF EDUC., <i>Current Excess Levies</i> , https://wvde.us/finance-and-administration/school-finance/resources/	3, 9, 11
WVSAO, https://www.wvsao.gov/localgovernment/reports	4, 10

Rules

Title 110, Series 1P of the West Virginia Code of State Rules	2, 6
---	------

W. Va. CSR § 110-1P-3.4.3.1..... 6
West Virginia Rule of Appellate Procedure Rule 30(e)(5) 1
Constitutional Provisions
W. Va. Const. art. X, § 10..... 9

I. IDENTITY AND INTEREST OF *AMICUS CURIAE* BERKELEY COUNTY BOARD OF EDUCATION IN SUPPORT OF PETITIONER

The Board of Education of the County of Berkeley (the “County Board”)¹ is a public corporation charged with the authority to oversee schools and other property within its geographical district and has a duty to provide a thorough and efficient education to students within its school district. *See Pauley v. Kelly*, 162 W. Va. 672, 705, 255 S.E.2d 859, 877 (1979); W. Va. Code 18-5-13. Implicit in such duty and guarantee is what this Court has deemed supportive services: “(1) good physical facilities, instruction materials and personnel; [and] (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.” *Id.*

The County Board and the State Board of Education, in discharging the duty to provide a thorough and efficient education, rely on equal and adequate assessments and appraisements of real property, which, in turn, form the basis of the County Board’s local share of its public school support system. *See* W. Va. Code 18-9A-11. Accordingly, the County Board has an interest in the disposition of the case at bar because it bears on the adequate and equal assessment and appraisal of real property in Berkeley County, which, in turn, affects the County Board’s duty to provide a thorough and efficient education.²

¹ In accordance with Rule 30(e)(5) of the *West Virginia Rule of Appellate Procedure* Rule 30(e)(5), counsel for the County Board hereby discloses that no other party or counsel for a party to this matter has authored this brief, in whole or in part, nor has any other person or entity, other than the amicus curiae, made any monetary contribution to such brief.

² Rule 30(a) of the *West Virginia Rules of Appellate Procedure* provides that the “State of West Virginia or an officer or agency thereof, or a County or Municipality of the State, may file an amicus curiae brief without the consent of the parties or leave of the Court.” It is possible that the County Board, under Rule 30(a), may thus file this brief as a matter of right. However, out of caution, the County Board filed, contemporaneously herewith, a Motion for Leave to File an amicus brief in support of the Petitioner and therein asks that this Court to grant leave and order that this brief is filed, which, if granted, provides the County Board authority to file this brief pursuant to Rule 30(e)(4) of the *West Virginia Rules of Appellate Procedure*.

II. INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Circuit Court applied the incorrect standard of review in reversing the Board of Assessment Appeal's decision regarding the market value and assessment of the subject property. Rather than determine whether the Board of Assessment Appeals and the Berkeley County Assessor's office abused their discretion in appraising the property, the Circuit Court substituted its judgment for the Board of Assessment Appeals and adopted the Respondent's appraisal of the subject property. The Circuit Court's decision was erroneous. Rather than substitute its judgment for the Board of Assessment Appeals and choose which of the two appraisements it preferred, the Circuit Court should have reviewed the appraisal and the Board of Assessment Appeals' decision to determine whether the county assessor exercised proper discretion in following the Tax Commissioner's rules and regulations set forth in Title 110, Series 1P of the West Virginia Code of State Rules.

Permitting the Circuit Court's ruling to stand will negatively impact the Berkeley County Board of Education and county boards of education across the State, all of which depend on uniform, fair, equitable, and adequate real estate assessments. First, in this case, the Respondent's appraisal results in an assessed value that is \$1,987,320 less than the County Assessor's appraisal. Although the West Virginia Public School Support Plan (the "School Funding Formula") requires the State to supply the difference between the local share and the basic foundation program set forth in the School Funding Formula, the Berkeley County Board of Education will still maintain a loss under its excess levy.

Moreover, permitting the Circuit Court's decision to stand impacts other school districts and the State's duty to equalize education throughout the State. Because the State is required to supply the difference between the basic foundation program and the County Board's local share, this will take money away from state funds under the School Funding Formula, which

could and should be used to account for differences in other school districts throughout the State and to equalize educational funding in the various school districts.

Accordingly, it is vitally important that circuit court's throughout West Virginia properly, consistently and evenly review decisions of assessment appeal boards, such as in this case, to ensure (i) that all appraisements and assessments are reviewed by circuit courts under the correct standard of review, and (ii) the proper and equitable funding of county boards, which is required in order to provide a constitutionally mandated, thorough and efficient education to all students.

III. STATEMENT OF THE CASE

The relevant facts and procedural history underlying this appeal are adequately set forth in Petitioner's Brief. However, to supplement the Petitioner's Statement of the Case and to adequately detail the impact of the Circuit Court's decision on the County Board, the County Board notes two supplemental facts for this Court's consideration, both of which are available in the public domain and are published by entities and agencies of the State of West Virginia.

First, voters of Berkeley County approved an excess levy to authorize the continuation of an additional school levy for the year beginning July 1, 2015 through fiscal year beginning July 1, 2019. *See* W. VA. DEPT. OF EDUC., *Current Excess Levies*, <https://wvde.us/finance-and-administration/school-finance/resources/> (last visited on Mar. 22, 2021).³ The excess levy for the relevant fiscal years calls for an amount of \$29,410,000 annually, for the purpose of paying the general expenses of the Board of Education, and sets forth the specific purposes for which the additional funds are needed:

³ The West Virginia Department of Education publishes in the public domain excess levies for all counties in the state. The Berkeley County Excess Levy and all others may be found at the Department of Education's website/link noted above.

A. To continue the present local salary supplements and benefits, including related fixed costs, of all school personnel (excluding the Superintendent) at an approximate total annual cost of \$17,000,000. Such funding will allow the Berkeley County Board of Education to continue to employ and retain highly qualified personnel who have contributed to the county's instructional progress.

B. To continue to provide instructional materials, textbooks, and instructional equipment at an approximate total annual cost of \$3,300,000.

C. To continue to provide financial support of the following community organizations and agencies: Berkeley County Health Department at \$28,500; Martinsburg-Berkeley County Parks and Recreation Board at \$112,500; West Virginia University Berkeley County 4-H Extension Office at \$68,000; and the Martinsburg-Berkeley County Public Library at \$112,500 for an approximate total annual cost of all programs at \$321,500.

D. To continue to address increased enrollment in Berkeley County Schools by providing additional staff where necessary and by providing additional equipment and property at an approximate annual cost of \$5,700,920.

E. To continue to provide for the upkeep and maintenance of existing facilities by providing the necessary supplies, services or equipment at an approximate annual cost of \$53,087,580.

Id.

The West Virginia State Auditor's Office publishes the rates of levy for all counties in the state for each fiscal year. *See* WVSAO, <https://www.wvsao.gov/localgovernment/reports> (last visited on Mar. 18, 2021).⁴ For example, the State Auditor's website provides that the levy rate in Berkeley County for the excess levy is \$90 per \$100 for the year ending June 30, 2020. As set forth in more detail hereafter, the Circuit Court's erroneous decision will decrease the tax revenue the County Board receives through the excess levy by approximately \$145,477.08 used to

⁴ The West Virginia State Auditor's Office publishes in the public domain the levy rates for all counties in the state. The Berkeley County levy rate and the rates for all counties may be found at the State Auditor's website/link posted above.

fund the purposes set forth above, which, in turn, impacts the County Board's delivery of a thorough and efficient education for its students.

IV. ARGUMENT

A. **The Circuit Court Failed to Apply the Correct Standard of Review and Erroneously Substituted its Judgment for the Board of Assessment Appeals.**

The Circuit Court substituted its judgment for the Berkeley County appraiser and the Board of Assessment Appeals by adopting the Respondent's appraisal as preferable, and, in doing so, failed to apply the correct standard of review. The proper issue before the Circuit Court was not which of the two appraisals was preferable. In so doing, the Circuit Court failed to review the Board of Assessment Appeals' decision under the same standard and scope set forth in the West Virginia Administrative Procedures Act and should be reversed.

This Court's precedent makes clear that a circuit court's scope of review in a case such as this is limited:

[J]udicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act . . . In such circumstances, a circuit court is primarily discharging an appellate function little different from that undertaken by this Court

In re Tax Assessment Against Am. Bituminous Power Partners, L.P., 208 W. Va. 250, 255, 539 S.E.2d 757, 762 (2000); *Univ. Park at Evansdale, LLC v. Musick*, 238 W. Va. 106, 114, 792 S.E.2d 605, 613 (2016). The scope of review under the Administrative Procedures Act is limited 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 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.

The Circuit Court adopted, verbatim, and incorporated into its erroneous Final Order the Respondent's "Proposed Undisputed Facts, Conclusions of Law, and Order of the Court" (the "Proposed Order"), which does little more than compare and contrast the Berkeley County Assessor's appraisal and the appraisal provided on behalf of the Respondent. The comparison set forth in the Final Order, however, does not show or explain, as required by this Court's precedent, that the Board of Assessment Appeals abused its discretion in affirming the "Cost Approach" utilized by the County Assessor in appraising the subject property.

The State Tax Commission's regulations dictate that an assessor may consider and use one of three approaches to determine fair market value: cost, income, and market. W. Va. CSR § 110-1P-3.4.3.1. In determining which approach to use, this Court has consistently held that an assessor is entitled to discretion:

Title 110, Series 1P of the West Virginia Code of State Rules confers upon the State Tax Commissioner [and assessor] 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.

Syl. Pt. 5, *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000) (emphasis added); *Century Aluminum of W. Virginia, Inc. v. Jackson Cty. Comm'n*, 229 W. Va. 215, 224, 728 S.E.2d 99, 108 (2012); Syl. Pt. 5, *Pope Properties/Charleston Liab. Co. v. Robinson*, 230 W. Va. 382, 738 S.E.2d 546, 547 (2013). There was simply no finding by the Circuit Court that the County Assessor abused his discretion or that the Assessor's decision to use the cost approach was arbitrary and capricious or clearly wrong.

This Court has explained the clearly wrong and arbitrary and capricious standards as follows:

The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). Thus, "[t]he scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the hearing examiner."

Webb v. W. Virginia Bd. of Med., 212 W. Va. 149, 155, 569 S.E.2d 225, 231 (2002) (emphasis added). Here, the County Assessor's appraisal and the Board of Assessment Appeals' decision were clearly supported by a rational basis.

As the Board of Assessment Appeals held, the principal difference between the Respondent's appraisal and the County Assessor's appraisal was that the County Assessor used the cost approach to value the Respondent's property, while the Respondent's appraiser used the income approach, blended with the sales comparison approach as a check for reconciliation purposes. *See Joint Appendix*, 15. The County Assessor, however, testified that the information and data necessary to use the income approach was not provided to him at the time the appraisal was performed. *Id.* at 16. Likewise, the County Assessor reasonably determined that there were not comparable sales within a reasonable location of the Respondent's property to use the sales approach. *Id.* On the other hand, the Respondent's appraiser used sales of what he deemed

comparable property from other states, which the County Appraiser, in his discretion, deemed inappropriate.

The County Appraiser was required, under this Court's precedent, to follow the rules and regulations of the State Tax Commissioner and to provide a rational basis for his decisions. Because the County Assessor defended his decisions and explained his use of the cost approach in valuing the property, the Circuit Court should have affirmed the Board of Assessment Appeals' decision. Instead, the Circuit Court adopted the Respondent's appraisal because it deemed that appraisal preferable. The issue, however, before the Circuit Court was not whether one of the two appraisals was better. The issue before the Circuit Court was whether the County Assessor's appraisal and the Board of Assessment Appeals' decision upholding that appraisal were arbitrary, capricious or clearly wrong.

Because the Circuit Court substituted its judgment for the Board of Assessment Appeals, this Court should (i) reverse the Circuit Court's erroneous decision and uphold and affirm the County Assessor's appraisal of the property, or, at a minimum, (ii) remand this case to the Circuit Court with instructions to apply the appropriate standard of review.

B. The Circuit Court's Erroneous Decision Will Impact the Revenue Available for the Board of Education to Fund Supportive Services that are Implicit in a Thorough and Efficient Education.

The Circuit Court's decision will have a dramatic impact on the revenue the County Board receives to fund the supportive services, such as supplemental salaries and benefits for school personnel, and instructional materials, textbooks, and equipment, among other things. Local property taxes are central to school funding. The School Funding Formula works by calculating each county's needed resources in various categories in order to arrive at what the School Funding

Formula deems the “basic foundation program.” *See* W. Va. Code § 18-9A-1, *et seq.*⁵ Counties, school districts, and the State share in supplying the funding for the basic foundation program. The county’s “local share” is determined by its “regular levy,” which is the property taxes collected on county real estate taxes across the State’s school districts at the uniform rate determined by the Legislature. The State then supplies the difference between the local share and the basic foundation program. *See* W. Va. Code §§ 11-8-6c(1)-(3). Because regular levy rates are the same for all districts, the amount of the local share contributed by a county is a function of the property wealth or values. The School Funding Formula seeks to equalize educational funding in the State across the various counties.

However, in addition to the regular levy on real estate taxes, counties are permitted to approve an “excess levy” and bonds that may increase the tax rates for the classes of property in the district for a period not to exceed five years for the support of public schools. *See* W. Va. Const. art. X, § 10. The revenue received from excess levies is not included within the State Funding Formula. Thus, while a decrease in tax assessment and receipts for the general tax levy may be alleviated by the State Funding Formula, decreases in receipts pursuant to an excess levy are lost by a county board of education.

That is the precise situation presented in this case. Berkeley County voters approved an excess levy for the purpose of paying the general expenses of the County Board for fiscal year beginning July 1, 2015 through fiscal year beginning July 1, 2019. *See* W. VA. DEPT. OF EDUC., *Current Excess Levies*, <https://wvde.us/finance-and-administration/school-finance/resources/> (last

⁵ For a deep analysis of this Court’s holding in *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979), and funding in West Virginia schools see John E. Taylor, *Pauley-and “The Recht Decision”-at Forty*, 121 W. Va. L. Rev. 757 (2019).

visited on Mar. 22, 2021). Thus, while the lost revenue from the general levy may be balanced via the School Funding Formula, the County Board will sustain a very large loss from the Circuit Court's decision to substitute its judgment for that of the Board of Assessment Appeals and adopt the Respondent's assessment, \$540,000, which is approximately 75% less than the County Assessor's Office assessment, \$2,527,320.

The West Virginia State Auditor's Office publishes the rates of levy for all counties in the state for each fiscal year. *See* WVSAO, <https://www.wvsao.gov/localgovernment/reports> (last visited on Mar. 18, 2021). For example, using the rates published by the State Auditor for fiscal year ending June 30, 2020, the levy rate for the excess levy is \$90 per \$100. The County Assessor's appraisal resulted in an assessment of \$2,527,320. Applying the levy rate published on the State Auditor's website results in a tax revenue amount of \$22,745.88, solely for the excess levy revenues (not including the revenues from the general levy and the bond levy). On the other hand, Respondent's appraisal resulted in an assessment of \$540,000. Again, using the levy rate of \$90 per \$100 results in a tax revenue amount of \$4,860, which is \$17,885.88 less annually (again, solely for the excess levy revenue) that could be used to fund the purposes outlined in Berkeley County's excess levy ballot, such as teacher salaries, school textbooks, school equipment, and the like. The excess levy for the relevant fiscal years sets forth those specific purposes for which the additional funds are needed:

A. To continue the present local salary supplements and benefits, including related fixed costs, of all school personnel (excluding the Superintendent) at an approximate total annual cost of \$17,000,000. Such funding will allow the Berkeley County Board of Education to continue to employ and retain highly qualified personnel who have contributed to the county's instructional progress.

B. To continue to provide instructional materials, textbooks, and instructional equipment at an approximate total annual cost of \$3,300,000.

C. To continue to provide financial support of the following community organizations and agencies: Berkeley County Health Department at \$28,500; Martinsburg-Berkeley County Parks and Recreation Board at \$112,500; West Virginia University Berkeley County 4-H Extension Office at \$68,000; and the Martinsburg—Berkeley County Public Library at \$112,500 for an approximate total annual cost of all programs at \$321,500.

D. To continue to address increased enrollment in Berkeley County Schools by providing additional staff where necessary and by providing additional equipment and property at an approximate annual cost of \$5,700,920.

E. To continue to provide for the upkeep and maintenance of existing facilities by providing the necessary supplies, services or equipment at an approximate annual cost of 53,087,580.

W. VA. DEPT. OF EDUC., *Current Excess Levies*, <https://wvde.us/finance-and-administration/school-finance/resources/> (last visited on Mar. 22, 2021).

While the County Board does not advocate for appraisements and corresponding assessments to be inflated, it works closely with the county to base its budget on the tax revenues it anticipates it will receive from the excess levy. In this case, where the Circuit Court substituted its judgment for that of the County's Assessor and adopted a substantially lower assessment amount merely because the judge thought the Respondent's appraisal was better, the County Board is directly impacted. Again, that is not the standard to be applied by circuit courts in this State.

Further, permitting the Circuit Court's decision to stand poses a domino and reverse windfall threat. Different appraisers may come to different appraisal amounts for a tract of property in Berkeley County (and other counties). Any of those appraisements may be reasonable and valid in its own right. In turn, such an appraisal may differ from the appraisements made by the County Assessor (and assessors from other counties). However, permitting a circuit court to adopt an appraisal other than the County Assessor's—merely because the judge believes the

other is preferable—could result in further losses for Berkeley County due to assessments of other properties.

This Court has addressed the importance of adequate assessments and the concomitant impact on boards of education. In *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979), this Court analyzed school funding in West Virginia, including the sources of funding for county boards of education and, importantly, addressed the critical role of equal and adequate appraisals throughout the state:

The trial court acknowledges that one source of disparity between the amounts raised through property taxes in the various counties is that some are poor in property wealth. There is no evidentiary development of this issue, and it should be examined to develop whether the “poor” counties are assessing their properties adequately, and whether, per W.Va. Code, 18-9A-11, the State Tax Commissioner reappraises all real property in the counties and to make certain that local assessors are using the Tax Commissioner’s values. This same statute places certain mandatory duties on county courts to allocate out of its levies sufficient funds to produce for county boards of education amounts they would have received had the Tax Commissioner’s appraisals been followed.

Upon remand, evidence must be developed to prove whether Lincoln County’s low property tax revenue results from faulty appraisements below those set by the Tax Commissioner. It will also be necessary to calculate the amount of deficiency, if any, to determine the true impact of the State financing formula in Lincoln County. Moreover, inquiry must be directed in other low property revenue counties to determine if the appraisal provisions are being followed.

It is obvious that W.Va. Code, 18-9A-11, reflects legislative perception that equality in property taxes could not occur until uniform property appraisements were set in the various counties. The Legislature’s intent to have this section complied with is demonstrated by these broad enforcement and penalty provisions:

Pauley v. Kelly, 162 W. Va. 672, 712–14, 255 S.E.2d 859, 880–81 (1979). As this Court held in *Pauley*, pursuant to West Virginia Code § 18-9A-11, uniform property appraisements are critical to the equal funding of school districts throughout the State. In fact, as a result of the *Pauley*

holding, the entire State underwent a re-assessment of its property values, an exercise which statute mandates be taken every three years in every county in the State. This exercise is meaningless if circuit courts are permitted to apply their own standards of review and not those prescribed by law. This Court should therefore reaffirm that circuit courts must apply a uniform standard of review for appeals regarding tax assessments and reverse the Circuit Court's decision for failure to apply the appropriate standard of review and impermissibly substituting its judgment for the Board of Review and the County Appraiser.

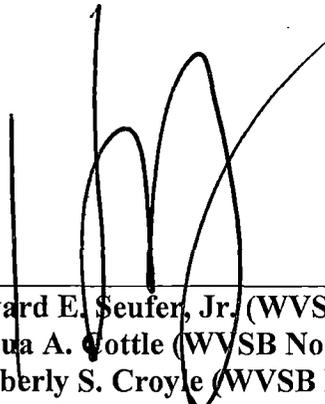
V. CONCLUSION

For the reasons set forth herein, and for all those apparent from the record, the County Board respectfully asks that this Court reverse the Circuit Court's erroneous decision and affirm the County Assessor's appraisal and the decision of the Board of Assessment Appeals.

Respectfully submitted,

THE BOARD OF EDUCATION OF THE
COUNTY OF BERKELEY,
Amicus Curiae,

By Counsel.



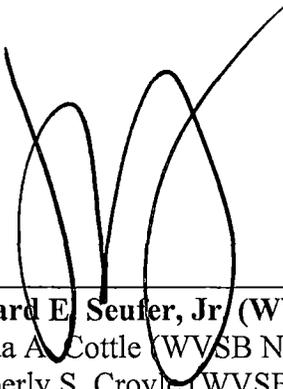
Howard E. Seuffer, Jr. (WVSB No. 3342)
Joshua A. Cottle (WVSB No. 12529)
Kimberly S. Croyle (WVSB No. 6021)
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25301
Telephone: (304) 347-2116
Facsimile: (304) 343-2867
Email: jcottle@bowlesrice.com
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

The undersigned hereby certify that, on the 23rd day of March 2021, we served the foregoing **AMICUS CURIAE BRIEF ON BEHALF OF THE BOARD OF EDUCATION OF THE COUNTY OF BERKELEY IN SUPPORT OF THE BERKELEY COUNTY COUNCIL AND REVERSAL OF THE CIRCUIT COURT DECISION** on counsel by depositing a true copy thereof in the United States Mail, addressed as follows:

Anthony J. Delligatti, Esquire
Berkeley County Legal Director
400 W. Stephen Street, Suite 201
Martinsburg, West Virginia 25401
Counsel for Petitioners

William P. Bresnahan, Esquire
Bresnahan, Nixon & Finnegan, P.C.
300 Oxford Drive, Suite 75
Monroeville, Pennsylvania 15146-2343
Counsel for Respondents



Howard E. Seuffer, Jr. (WVSB: 3342)
Joshua A. Cottle (WVSB No. 12529)
Kimberly S. Croyle (WVSB No. 6021)
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25301
Telephone: (304) 347-2116
Facsimile: (304) 343-2867
Email: jcottle@bowlesrice.com
Counsel for Amicus Curiae