

REDACTED DECISION – DK# 23-1306

**BY: CRYSTAL S. FLANIGAN, DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON MAY 14, 2024
ISSUED ON NOVEMBER 13, 2024**

**NOTE: THIS ADMINISTRATIVE DECISION WAS APPEALED BEYOND THE
OFFICE OF TAX APPEALS**

FINAL DECISION

The Petitioner in this matter is XXX, a XXX limited liability company that owns commercial property located at XXX in XXX County (hereinafter “Petitioner” or “XXX”). Upon learning of the proposed property tax values determined by the XXX County Assessor (hereinafter “Assessor” or “Respondent”), the Petitioner sought relief from the West Virginia Office of Tax Appeals.

Thereafter, on February 20, 2023, the Petitioner timely filed a property tax appeal with this Tribunal. The evidentiary hearing was held on January 4, 2024. After the filing of post hearing briefs, the record was closed on May 14, 2024, and the matter became ripe for decision at that time.

FINDINGS OF FACT

1. The Petitioner filed a Petition for Property Tax Appeal with the Office of Tax Appeals dated February 20, 2023, challenging the appraised value for the 2023 tax year.
2. The property at issue in this appeal is commercial real estate located at XXX, XXX, West Virginia in XXX County, owned by the Petitioner, XXX . Tr. 3-4, Pet'r's Ex. 1 at 6.
3. XXX XXX is XXX limited liability company wholly owned by XXX. Tr. 3.
4. The Petitioner purchased the subject property on June 12, 2020, at a public trustee auction for the high bid of \$1,400,000. Tr. 25, Pet'r's Ex. 1 at 7.
5. The Petitioner's expert, XXX, is a licensed West Virginia certified general real estate appraiser.¹ Tr. 8.
6. Mr. XXX prepared an appraisal report dated July 18, 2023, on the subject property. Tr. 8, Pet'r's Ex. 1.
7. Mr. XXX prepared the appraisal report based on the Uniform Standards of Professional Appraisal Practices (hereinafter "USPAP"). Tr. 11, 21.
8. Mr. XXX visited and took photographs of the subject property. Tr 11.
9. Mr. XXX testified that he considered but did not provide a cost approach analysis in his appraisal report. Tr. 10-11, 33.
10. Mr. XXX compared properties in XXX and XXX counties to the subject property. Tr. 12-13, 32, 36.
11. Mr. XXX opines that the appraised value of the subject property at \$1,045,000 by using the sales comparison approach which is his lowest valuation. Tr. 17, Pet'r's Ex. 1 at 87.
12. Mr. XXX also valued the subject property using the income approach and that value was \$1,065,000. Tr. 23, *Id.* at 88.

¹ Although Mr. XXX was not moved to be qualified as an expert, the parties and this Tribunal treated him as such.

13. Mr. XXX reconciled his valuation of the market and income approaches and determined the market value under reconciliation was \$1,055,000. Tr. 23.

14. After considering the income approach value of \$1,065,000 and his reconciliation value of \$1,055,000, Mr. XXX sets forth that \$1,045,000 is the most appropriate valuation. Tr. 17, 55, Pet'r's Ex. 1 at 87, Pet'r's Brief at 6, 19.

15. The Petitioner did not provide the Respondent with its income information so that she could develop an income valuation. Tr. 47-48.

16. The Respondent used the Integrated Assessment System (hereinafter "IAS") to assess the Petitioner's property. Tr. 52, 57.

17. The Respondent appraised the subject property for \$1,729,000 for land and improvements based on cost and two comparable properties in XXX, West Virginia. Tr. 46-47.

18. The Respondent subsequently reduced the value to \$1,200,000 by using the expert's lowest appraisal valuation of \$1,045,000 and the usable basement space. Tr.49.

DISCUSSION

The issue in this matter is whether the Respondent has properly valued the Petitioner's property in the 2023 tax year. The Petitioner is a limited liability company that owns commercial property in XXX, West Virginia. The Petitioner filed a petition for property tax appeal with this Tribunal on February 20, 2023, challenging the 2023 assessments for the subject property's *ad valorem* property taxes. The Petitioner seeks a reduction from the Assessor's valuation of \$1,200,000 to a value of \$1,045,000 based on its expert's evaluation.

The Petitioner has the general arguments as follows: 1) the rules of law, specifically, governing the valuation of income-producing commercial property for tax purposes, require a county assessor's meaningful and good faith consideration of each of the income, market and cost methods

as an essential part of the process to determine the taxable value of such property 2) when applying the income and market methods, as a part of the process of determining the value of income-producing commercial property, a county assessor's search for comparable properties may not be arbitrarily limited to the territorial boundaries of his or her county or state, and the assessor must, in good faith, give meaningful consideration to any evidence of such comparable in the applicable, often broader economic market, including evidence of which that is timely presented by the owner of the property; 3) administrative convenience, a county assessor would invoke as a justification for his or her exclusive reliance on the cost method to determine the taxable value of income-producing commercial property, to the exclusion of meaningful and good faith consideration of the income and market methods, does not override the laws mandate to the contrary; and 4) because each income-producing commercial property owner's right to have the taxable value of that property determined according to the governing rules of law, a county assessor's failure to meaningfully consider, in good faith, and, where relevant data is available, obtain it to apply and reconcile each of the income, market, and cost methods to determine the taxable values of income-producing commercial property.

The Respondent counters these arguments with the following: 1) the Petitioner failed to present any evidence against the cost approach used by the Assessor and therefore cannot overcome the presumption of the Assessor's accuracy; 2) the Petitioner improperly used comparable sales which invalidates the market approach; 3) the Petitioner improperly failed to include improved basement space in its faulty appraisal; and 4) the Petitioner failed to provide income data to the Assessor.

The Tax Commissioner shall have the power to "determine the methods of valuation for both real and personal property" which provides the authority to prescribe the methods for the valuation

of real property under West Virginia Code Section 11-1C-5(a). W.Va. § 11-1C-5(a). The Tax Commissioner is authorized to promulgate rules for the valuation of real and personal property.

The Tax Commissioner shall have the power to “determine the methods of valuation for both real and personal property” which provides the authority to prescribe the methods for the valuation of real property under West Virginia Code Section 11-1C-5(a)². The Tax Commissioner is authorized to promulgate rules for the valuation of real and personal property. Regulations which clarify and implement law relating to appraisal at market value of commercial and industrial real property confer 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. W.Va. Code St. R., §§ 110–1P–1, 110–1P–2. *Stone Brooke Ltd. P'ship v. Sisinni*, 224 W. Va. 691, 688 S.E.2d 300 (2009).

“[T]axation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law.” W. Va. Const. art. X, § 1. Article 1C of Chapter 11 of the West Virginia Code follows this constitutional mandate, and is titled “Fair and Equitable Property Valuation”. Subsection (a) of Section 7, Article 1C, Chapter 11 follows the same through line, and directs assessors to “appraise all real and personal property in their jurisdiction at fair market value” W. Va. Code Ann. § 11-1C-7(a)

² The commercial property in this matter was appraised and assessed by the county assessor’s office. However, all of the work done by the county assessors is overseen by the Tax Commissioner. There are numerous statutory provisions contained in Chapter 11 of the West Virginia Code which outline the working relationship between the two entities. See e.g., W. Va. Code Ann. § 11-1C-7(a) (West) (county assessors shall appraise all real and personal property utilizing the procedures and methodologies established by the Property Valuation Training and Procedures Commission and the valuation system established by the Tax Commissioner.) As such, any references to the Tax Commissioner’s mandatory duty to follow the directives of Series 1P flows to the county assessors as well. Additionally, assessors statewide utilize a computer program to value commercial property that is established and maintained by the West Virginia State Tax Department.

(West). When it comes to valuing commercial property, such as the mall at issue in this matter, the Legislature has given the Tax Commissioner the authority to draft legislative rules. *See* W. Va. Code Ann. § 11-1C-5(b) (West). In West Virginia, properly promulgated legislative rules, that have gone through legislative rule making, have the force and effect of law. *See e.g., Appalachian Power Company v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

The Legislative Rules that control this matter are found in Section 3 of Series 1P, Title 110 of the West Virginia Code of State Rules. Section 3 provides specific direction as to how assessors are to value commercial property.

Under 110-1P-3.2.1, “In determining an estimate of fair market value, the Tax Commissioner shall consider and use where applicable, three (3) generally accepted approaches to value: (A) cost, (B) income, and (C) market.” W.Va. CSR § 110-1P-3.2.1.

Pursuant to 3.2.1.1. “Cost approach. - To determine fair market value under this approach, replacement cost of the improvements is reduced by the amount of accrued depreciation and added to an estimated land value. In applying the cost approach, the Tax Commissioner shall consider three (3) types of depreciation: physical depreciation, functional obsolescence, and economic obsolescence.”

3.2.1.2. “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 shall 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.”

3.2.1.3. “Market approach. - The Tax Commissioner shall apply the market approach by considering the selling prices of comparable properties.” W. Va. Code R. 110-1P-3

3.3.1.13.1.1. The market value of commercial and industrial real property is the price at or for which the property would sell if it was sold to a willing buyer by a willing seller in an arms-length transaction without either the buyer or the seller being under any compulsion to buy or sell. In determining appraised value, primary consideration shall be given to the trends of price paid for like or similar property in the area or locality in which the property is situated. Additionally, for purposes of appraisal of any tract or parcel of real property used for commercial or industrial purposes, including chattels real, the appraisal shall consider the following factors:

3.1.1.1. The location of the property;

3.1.1.2. Its site characteristics;

3.1.1.3. The ease of alienation, considering the state of its title, the number of owners, and the extent to which the property may be the subject of either dominant or servient easements;

3.1.1.4. The quantity of size of the property and the impact which its sale may have upon surrounding properties;

3.1.1.5. If purchased within the previous eight years, its purchase price and the date of each purchase;

3.1.1.6. The recent sale of, or other transactions involving, comparable property;

3.1.1.7. The value of the property to its owner;

3.1.1.8. The condition of the property;

3.1.1.9. The income, if any, which the property actually produces and has produced within the preceding three (3) years; and

3.1.1.10. Any commonly accepted method of ascertaining the market value of the property, including techniques and methods peculiar to any particular species of property if the technique or method is used uniformly and applied to all property of like species. W. Va. Code R. 110-1P-3.

3.2.2. Correlation. - Once generated, the Tax Commissioner may consider the various estimates of value in determining a final value estimate. However, the income approach is ordinarily inappropriate for properties such as franchised restaurants, governmental properties, hospitals, etc. In these cases, the cost or market approaches may be more suitable in estimating fair market value.

3.2.2.a. When possible, the Tax Commissioner should use the most accurate form of appraisal, but because of the difficulty in obtaining necessary data from the taxpayer, or due to the lack of comparable commercial or industrial properties, the choice between the alternative appraisal methods may be limited.³

It is well settled in West Virginia that an Assessor's property valuations are presumed correct. See, e.g., Syllabus pt. 1, *XXX County Council v. Government Properties Income Trust LLC*, 247 W. Va. 395, 880 S.E.2d 487 (2022); *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2008); *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000); *Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993); *In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 303 S.E.2d 691 (1983); *Bankers Pocahontas Coal Co. v. County Court of McDowell County*, 135 W. Va. 174, 62 S.E.2d 801 (1950). Finally, H.B. 2581, passed in 2021, gave this Tribunal jurisdiction

³ This Tribunal has consistently considered the law in West Virginia to be that legislative rules that have gone through legislative rule making, are an act of the Legislature, no matter to what extent they were drafted by the executive branch. See *Appalachian Power Company v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995)(being an act of the West Virginia Legislature, legislatively approved rules are entitled to more than deference, they are entitled to controlling weight.)

over property tax appeals, and additionally, changed the burden of proof in such appeals. Prior to its passage, the burden of proof for property owners to prevail in a property tax appeal was by clear and convincing evidence. Now the burden of proof in such appeals is a preponderance of the evidence. See W. Va. Code Ann. § 11-10A-10(h) (West) (For all appeals regarding property tax assessments, taxability, and classifications the standard of proof which a taxpayer must meet at all levels of review and appeal shall be a preponderance of the evidence standard.)

Cost Approach

The total square footage of the subject property is 18,913, Pet'r's Ex. 1 at 30. The first and second floors have a total square footage of 12,888. The total basement square footage is 6,025 and of that amount, the rentable space is 3,645 square feet. *Id.* at 26. The expert's report also detailed the basement's use and finish as being like that of the above-grade areas except for fenestration (i.e., no windows). The floor plan includes a reception area with an elevator, a waiting room and a mix of open and partitioned office space, a sprinkler system, and is ADA compliant. From this Tribunal's review of Mr. XXX' photographs, this basement appears to be a well-remodeled space that is indeed like the quality of the first and second floor space of this building as his report states.

The subject property was purchased at a trustee sale for \$1,400,000 on June 12, 2020. Pet'r's Ex. 1 at 7. The Respondent used the IAS to appraise the subject property for \$1,729,000 for land and improvements based on two comparable properties in XXX, West Virginia. Tr. 46-47. Under the Code of State Rules 110-1P-3.1.1.5, an appraisal of commercial property must consider "if purchased within the previous eight years, its purchase price and date of purchase." 110-1P-3.1.1.5. The Respondent later reduced the value of the property to \$1,200,000 by accepting Mr. XXX' lowest appraisal number, adding the usable basement space, and considering the purchase price. Tr. 49. This was a reduction of approximately \$529,000 in valuation.

Mr. XXX did not develop a cost approach appraisal because he found that it was not relevant to appraising the subject property. Tr. 10-11. Despite not developing an appraisal using the cost approach, Mr. XXX testified that he “considered it” because he is required to do so under USPAP. Tr. 11. This Tribunal finds that this argument to be without merit for two reasons. First, 110-1P-3.4.3.1, requires the cost approach to be “**considered and used**” in estimating fair market value. While Mr. XXX attempted to follow USPAP, he failed to follow West Virginia law. Second, the Respondent used the cost approach to reach her valuation, but the Petitioner did not prepare a cost approach to rebut the accuracy of her cost valuation. The Petitioner contends that the Respondent cannot rely on the cost approach alone and that she should use all three valuation methods.

Although having the burden of proof, the Petitioner did not provide an appraisal with all three methods. Mr. XXX testified that the cost approach methodology is not relevant to the subject property due to its age. While that may be his strongly held opinion, the regulatory scheme in West Virginia requires that the cost approach be utilized. Therefore, this Tribunal finds the Petitioner cannot fail to consider and use the cost approach while at the same time arguing that the Respondent failed to consider and use market and income methodologies.

Income Approach

Mr. XXX found the value of the subject property under the income approach as \$1,061,873 and he rounded that to \$1,065,000. Tr. 22, Pet’r’s Ex. 1 at 138. However, he is not seeking this amount to be the appropriate value of the subject property and instead seeks the \$1,045,000 amount. Tr. 24. In support of this position, Mr. XXX testified that it would “foolish for him to include the basement area and consider it to be identical to the above grade area and make that square footage, 18,000 square feet.” This Tribunal finds Mr. XXX’ rationale unclear for favoring the \$1,045,000 amount as to the \$1,065,000 amount. Furthermore, he treats the basement space more as an attribute

of the property instead of including its square footage in his appraisal. Pet'r's Ex. 1 at 80. Mr. XXX' testimony appears inconsistent because he avers that the basement was considered in his report but also states that it should not be in the square footage calculation. The GBA (gross building area) that he uses is 12,888 square feet instead of the total usable square footage. As the basement space was leased as office space, has an elevator, is ADA compliant, and the quality is like the rest of property, this Tribunal finds that this square footage area cannot be ignored. While this Tribunal appreciates the experience and education of Mr. XXX, we find his arguments about the basement unpersuasive.

The Petitioner failed to provide three years of income data as required under 110-1P-3.1.1.9. Due to this lack of income information, the Respondent was unable to prepare an income valuation. The Assessor testified that the Petitioner did not approach her to request an income approach nor was any income information ever provided to her. The Respondent only received an appraisal (dated July 18, 2023) regarding the income approach after the appeal was filed. Tr. 47-48. The Petitioner cannot argue that the Assessor failed to provide an income valuation when the Petitioner neither requested nor provided any income data to her. Furthermore, the Petitioner does not argue that the income approach valuation is the appropriate number but instead seeks to have the market approach valuation as the appropriate number. Therefore, this Tribunal finds the Petitioner's argument about the Assessor's failure to prepare an income approach is without merit.

Market Approach

The Respondent argues that some of the Petitioner's comparable sales fail to meet the locality requirement of the regulation. Under 110-1P-3.1.1, "primary consideration shall be given to the trends of price paid for like or similar property in the area or locality in which the property is situated." The regulation states that "primary consideration" shall be given to property in the area or locality in which the property is situated. The regulatory language clearly states a

preference for property in the area or locality to be utilized, however, this is not an absolute consideration. The key in utilizing out of county properties is that they **must be** “like or similar” to the subject property.

There were eight properties compared to the subject property, but the Respondent argues that there were several issues with these comparables. Namely, that only two of them were within the appropriate time frame in XXX County and where an actual sale of property occurred. The Respondent also points to the properties being outside of XXX County as not being comparable under the locality requirement. However, some of the comparables were from an adjacent county with the farthest being approximately 14 miles away from the subject property. As locality is not defined under 110-1P-3.1.1, it appears the adjacent county would be an appropriate county to utilize as a comparison, especially if there are limited comparable properties within the county. This Tribunal further finds that a comparable property must be a property that has actually sold, not just a real estate listing. Pursuant to 110-1P-3.2.1.3, the Tax Commissioner shall apply the market approach by considering the **selling prices** of comparable properties.” (Emphasis added.) W. Va. Code R. 110-1P-3.1.1.3.

Despite the Respondent’s arguments about inappropriate comparable properties, she agreed to the market appraisal number of \$1,045,000 and then added the basement area to reach her final value of \$1,200,000. The Assessor testified that she accounted for the purchase price, the property’s age, the condition of the property, and the square footage that included the usable basement space in reducing her valuation amount. The Respondent takes the position that the Petitioner did not include the improved basement space in the appraisal and disregarded its rental value. This space was approximately 3,645 finished square feet with HVAC, an elevator, sprinklers and appropriate finishes like the above grade.

The Petitioner's valuation of the square footage is based on \$81 a square foot and if that amount is calculated at 12,888 square feet x \$81 equals \$1,043,928 which is the very number the expert puts forth and then rounds up to \$1,045,000. This valuation is the amount he testified to as set out below:

ATTORNEY XXX: Okay. You see the chart at the bottom, value ranges, as is. You'd agree with me that the subject size, the 12,888, is all that just merely above ground square footage, right?

MR. XXX: Yes.

ATTORNEY XXX: And so you multiply the \$81 versus that and you get one point --- \$1,043,000 and change, so 1.45, \$1,045,000?

MR. XXX: Yes.

Tr. 27.

During the hearing, Mr. XXX testified that the basement space was not as valuable as the first and second floors and that the last tenant rented it for only \$12,000 a year. This space was leased on March 1, 2022, approximately three months prior to the valuation date.⁴ He then testified that he only typically attributes 50% of any basement space to the price per square foot of the above grade space. Tr. 22. Mr. XXX testified that he did not include the basement in his calculation of the gross building area because it had no windows and was not as marketable as the above-grade space. Tr. 14-15. Conversely, Mr. XXX states that the basement was included in his valuation while at the same time stating the basement space as very little marketability and he did not include it in the gross building area.

Upon reviewing this matter in its entirety, the Tribunal finds that the crux of this matter is the value of the basement space. The Respondent conceded to Mr. XXX's market value appraisal number and then added the usable basement square footage. She arrived at the price per square foot

⁴ During this time, many commercial spaces were not being as widely used due to covid and may not have been leased at typical rates.

amount by applying Mr. XXX' own generally used 50% discount number from above-ground square footage. The Respondent included the 3,645 square feet of usable basement space and applied the 50% discount rate against the \$81.00 cost per square foot for above-grade space.⁵ Mr. XXX does not want to include the basement square footage because he feels that it's not as marketable as above grade space as he testified below:

And again, the basement area is excluded from the above grade area because a portion of the basement area isn't even suited to lease, it's storage space. It's just irrelevant to use this space that cannot be leased and include it in with the space that's decent quality, leasable office area.

Tr. 55.

While the finished basement area may not be as marketable as above grade rental space, this square footage cannot be ignored for valuation under West Virginia law. Accordingly, this Tribunal finds that the Petitioner has failed to prove by a preponderance of the evidence that Respondent's valuation is incorrect, erroneous, void, invalid, or otherwise unlawful.

CONCLUSIONS OF LAW

Based upon all the above, it **FINDS** and **CONCLUDES** that:

1. Taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. W. Va. Const. art. X, § 1.
2. The Tax Commissioner shall have the power to determine the methods of valuation for both real and personal property pursuant to West Virginia Code Annotated Section 11-1C-5.
3. The Integrated Assessment System provides the method by which local county assessors appraise commercial real estate statewide. *See* Admin Notice 2018-15.

⁵ The total basement space is approximately 6,000 square feet and of that amount 3,645 is rentable space.

4. The Assessor’s valuation of property for taxation purposes is presumed correct. *E.g.*, Syllabus pt. 1, *XXX County Council v. Government Properties Income Trust LLC*, 247 W. Va. 395, 880 S.E.2d 487 (2022), *In re Tax Assessment of Foster Foundation’s Woodlands Retirement Community*, 223 W. Va. 14, 25, 672 S.E.2d 150, 161 (2008).

5. Each tax year is independent of prior tax years and independent of subsequent tax years. Syllabus Pt. 2, *Mountain America, LLC. v. Huffam*, 229 W.Va. 708, 735 S.E.2d 711 (2012) (“[T]he demand for the tax in the subsequent year being a different demand from that for the former”).

6. All hearings before the Office of Tax Appeals are held *de novo*. W.Va. Code § 11-3-25b (West 2021).

7. For all appeals regarding property tax assessments, taxability, and classifications pursuant to § 11-3-1 *et. seq.*, the standard of proof which a taxpayer must meet at all levels of review and appeal shall be a preponderance of the evidence standard. W.Va. Code § 11-10A-10(h) (West 2021), W.Va. Code Ann. § 11-3-24(k) (West 2021).

8. In a hearing before the Office of Tax Appeals on a Petition for Property Tax Appeal, the burden of proof is on the Petitioners to show the XXX County Assessor’s actions are erroneous, unlawful, void or otherwise invalid. W.Va. Code Ann. § 11-10A-10(e) (West 2002), and W.Va. Code R. § 121-1-63.1 (West 2003).

9. The Petitioner has not met its burden of proof to show that the XXX County Assessor’s actions were erroneous, unlawful, void or otherwise invalid.

DISPOSITION

Based upon the arguments of the parties, the exhibits and the testimony, and the post hearing briefs, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the valuation by the XXX County Assessor is hereby deemed correct and **AFFIRMED**.

WEST VIRGINIA OFFICE OF TAX APPEALS

Crystal S. Flanigan
Deputy Chief Administrative Law Judge

Date