

REDACTED DECISION – DK#’S 23-1491

**BY: CRYSTAL S. FLANIGAN, DEPUTY ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON JUNE 18, 2024
ISSUED ON DECEMBER 12, 2024**

FINAL DECISION

XXX and XXX XXX (hereinafter “Petitioners”) in this matter own residential property in XXX County, West Virginia that was reclassified from Class II to Class III. On January 13, 2023, the Petitioners learned of the reclassification determined by the XXX County Assessor (hereinafter “Assessor” or “Respondent”) and sent a letter to the Assessor explaining their objections. Thereafter, the Assessor sought a property tax ruling from the Tax Commissioner. On February 28, 2023, the Tax Commissioner issued Property Tax Ruling 23-39 finding that the subject property was not Class II property.

Upon receipt of the Tax Commissioner’s decision, the Petitioners timely filed their Petition for Property Tax Appeal with this Tribunal on March 16, 2023. An evidentiary hearing was held *de novo* on December 18, 2023. The evidence closed on June 18, 2024, and the matter became ripe for decision at that time.¹

FINDINGS OF FACT

1. The Petitioners live in XXX, XXX and own the subject property with the address of XXX in XXX County, West Virginia. Tr. 12, 33. Pet’r’s’ Ex. 1, Pet’r’s’ Ex. 3.
2. The parcel number for XXX is XXX. Property Tax Ruling 23-39.²
3. The subject property was reclassified from Class II to Class III property. Tr. 12.

¹ The West Virginia Tax Commissioner and the XXX County Assessor filed a Joint Response Brief, and it will be referred to as the Respondents’ brief in this decision.

² This Tribunal takes judicial notice of Property Tax Ruling 23-39 for purposes of the correct parcel numbers for the XXX and XXX properties.

4. The Petitioners purchased the subject property on December 3, 2009. Pet'r's' Ex.
5. The subject property is a house of approximately XXX. Tr. 35.
6. The subject property is directly adjacent to the Petitioners' other property that has the address of XXX and is colloquially referred to by Mr. XXX as the "vacation cottage." Pet'r's' Ex. 4, Tr. 11, 31, 41.
7. The parcel number for XXX is XXX. Property Tax Ruling 23-39.
8. The XXX property was purchased on July 28, 1982. Pet'r's' Ex. 1.
9. XXX remains a Class II property. Tr. 9.
10. The Petitioners do not use the subject property in a rental capacity or in any other commercial manner. Tr. 9, 34, 38.
11. The Petitioners use the subject property for woodworking, a library, a bedroom, a game room, a man cave for Mr. XXX's model trains, a guest house, and a garage. Pet'r's' Ex. 7-12, 14-18, Tr. 10-11, 23.
12. The Petitioners typically stay at the subject property five days out of the month for approximately seven to eight times a year. Tr. 9, 34, 38.
13. The Petitioners spend nights at both the subject property and the vacation cottage. Tr. 30-31.

DISCUSSION

The sole issue in this matter is whether the subject property was properly reclassified as Class III property from Class II. In this matter both parties agree regarding the controlling law, and neither party argues that any of the statutory provisions are ambiguous.

The controlling law in this matter is West Virginia Code § 11-8-5 which states that property shall be classified as follows:

Class I. All tangible personal property employed exclusively in agriculture, including horticulture and grazing;
All products of agriculture (including livestock) while owned by the producer;

All notes, bonds, bills and accounts receivable, stocks and any other intangible personal property;

Class II. All property owned, used and occupied by the owner exclusively for residential purposes;

All farms, including land used for horticulture and grazing, occupied and cultivated by their owners or bona fide tenants;

Class III. All real and personal property situated outside of municipalities, exclusive of Classes I and II;

Class IV. All real and personal property situated inside of municipalities, exclusive of Classes I and II.

W. Va. Code Ann. § 11-8-5 (West 1961). (Emphasis added).

The West Virginia Code defines several terms that apply to West Virginia Code Section 11-8-5 as set out below:

West Virginia Code § 11-4-3(a)(1) defines as “owner” as:

(1) “Owner” means the person, as defined in section ten, article two, chapter two of this code, who is possessed of the freehold, whether in fee or for life. A person seized or entitled in fee subject to a mortgage or deed of trust securing a debt or liability is considered the owner until the mortgagee or trustee takes possession, after which the mortgagee or trustee shall be considered the owner. A person who has an equitable estate of freehold, or is a purchaser of a freehold estate who is in possession before transfer of legal title is also considered the owner. Owner shall also include the corporation or other organization possessed of the freehold of a qualified continuing care retirement community.

W. Va. Code Ann. § 11-4-3(a)(1) (West 2007).

The parties agree that the Petitioners are the owners of the subject property. The larger dispute between the parties involves the application of West Virginia Code 11-4-3(a)(2) which states:

(2) “Used and occupied by the owner thereof exclusively for residential purpose” means actual habitation by the owner or the

owner's spouse, or a qualified resident of all or a portion of a parcel of real property as a place of abode to the exclusion of any commercial use: *Provided*, That if the parcel of real property was unoccupied at the time of assessment and either: (A) Was used and occupied by the owner thereof exclusively for residential purposes on the first day of July of the previous year assessment date; (B) was unimproved on the first day of July of the previous year but a building improvement for residential purposes was subsequently constructed thereon between that date and the time of assessment; or (C) is retained by the property owner for noncommercial purposes and was most recently used and occupied by the owner or the owner's spouse as a residence and the owner, as a result of illness, accident or infirmity, is residing with a family member or is a resident in a nursing home, personal care home, rehabilitation center or similar facility, then the property shall be considered "used and occupied by the owner thereof exclusively for residential purpose": *Provided, however*, That nothing herein contained shall permit an unoccupied or unimproved property to be considered "used and occupied by the owner thereof exclusively for residential purposes" for more than one year unless the owner, as a result of illness, accident or infirmity, is residing with a family member or is a resident of a nursing home, personal care home, rehabilitation center or similar facility. Except in the case of a qualified continuing care retirement community, if a license is required for an activity on the premises or if an activity is conducted thereon which involves the use of equipment of a character not commonly employed solely for domestic as distinguished from commercial purposes, the use may not be considered to be exclusively residential. In the case of a qualified continuing care retirement community, uses attendant to the functioning of the qualified continuing care retirement community, including, without limitation, cafeteria, laundry, personal and health care services, shall not be considered a commercial use even if such activity or equipment requires a separate license or payment.

W. Va. Code Ann. § 11-4-3(a)(2) (West 2007).

The Respondents argue that the property should remain Class III under the following rationale: 1) classification under the West Virginia Code is not solely determined by commercial use versus non-commercial use of the subject property; and 2) the Petitioners are not using the subject property for actual habitation and place of abode.

The Respondents contend that even if a property is being used in a non-commercial way, the other requirements under West Virginia Code Section 11-4-3(a)(2) are not met. If the other requirements are not met, then it's not automatically residential or Class II. The subject property cannot be Class II because the Petitioners are not utilizing it for actual habitation and a place of abode. The parties agree that the Petitioners are the owners and are using the property for their personal and non-commercial use. The Respondents concede that "habitation" and "abode" are not defined in the West Virginia Code and that this Tribunal may rely upon the common, ordinary and accepted meaning of these undefined words. Syl. Pt. 6, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171, 173 (W.Va. 1984) ("Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.")

The Respondents further concede that the Petitioners have shown that their primary and immediate use of the subject property is for their personal and leisure activities in the 2023 tax year. Despite these concessions, their position remains that the subject property is not being used as a place of abode or actual habitation. The Petitioners are required to be living and staying in the subject property as their temporary or permanent home according to the Respondents' definitions. The Respondents essentially believe that the Petitioners are not there enough to meet the common, ordinary definitions of habitation and place of abode.

The Petitioners argue that they meet the statutory definition of "used and occupied by the owner thereof exclusively for residential purposes." W. Va. Code Ann. § 11-8-5. The Petitioners have not used the subject property for any commercial use and have exclusively used it only for residential purposes. They further aver that the statute requires that "actual habitation by the owner or the owner's spouse...as a place of abode to the exclusion of commercial use." The West Virginia Code does not define "habitation", but the Petitioners cite to "habitation being a person's abiding

place, either permanent or temporary.” See *Union Hotel Company v. Hersee*, 79 N.Y. 35 Am. Rep.536. “He who stops even for a long time in a place for the management of his affairs, has only a simple habitation there, but has no domicile.” See *In Re Thompson*, 1 Wendell (N.Y.) 45. (Ballentine’s Law Dictionary, Second Edition).

The Petitioners’ use of the subject property is primary and not secondary as discussed in *Central Realty, et al., v. Martin*, 126 W.Va. 915, 30 S.E.2d 720. In *Central Realty*, the West Virginia Supreme Court held that the hotel’s primary and immediate use of the property was for a commercial purpose even though the income from a hotel is applied and used for charitable purposes and not exempt from taxation. *Id.* at Syl. Pt. 1. The primary and immediate use of the subject property by the Petitioners is residential and there is no secondary and remote use.³ The Respondents conceded in their post hearing brief to the issue of the Petitioners’ primary and immediate use of the subject property. See Resp’t’s’ Brief at 6-7.

The Petitioners also take the position that a person is not prohibited from owning more than one piece of property that is classified as a Class II property under the West Virginia Constitution or under any other West Virginia law. They base this argument on two points: 1) that the Respondent Assessor believes that a person can only have one Class II based on her testimony during the hearing; and 2) that both Article X, Section I of the West Virginia Constitution and West Virginia Code 11-8-5, uses the words “[a]ll property owned, used and occupied by the owner thereof exclusively for residential purposes...” The Respondents did not address the interpretation of “all property” in their post hearing brief and therefore, waived it.

³ An Attorney General opinion was also cited by the Petitioners. This opinion discussed the differences between Class II and Class III and the requirements of each. This Opinion states that a summer home or camp never rented but used solely by owners is class II (owner occupied) property for ad valorem taxation. 51 W.Va. Op.Atty.Gen. 128 (December 3, 1964) 1964 WL 72597. This Tribunal is aware that Attorney General opinions are not binding legal precedent. However, this opinion is squarely on point with the instant case and has persuasive value.

The XXX County Assessor testified that her decision to change the classification of the subject property hinged on Mr. XXX referring to it as a “guest house” upon a conversation they had **after** Mr. XXX had received the January 13, 2023, letter stating the reasons that the property had already been reclassified. Resp’t’s’ Ex. 3. The decision to reclassify the property at issue was made on July 1, 2022, because a door hanger had been left on the property with the question of “what is the house used for? with the reason of: no reply to the door hanger.” Mr. XXX testified that they had never seen the door-hanger to respond to it. The letter included the Petitioners right to appeal the Assessor’s decision to the State Tax Commissioner. The XXX County Assessor testified that a decision was made to reclassify without any information regarding the use of this property as set out below:

ATTORNEY XXX: Okay. But you said he didn't respond to the door hangers. And so, did you have any new information or evidence when you sent that letter as to what uses were being made of either property?

MS. XXX: No. That was the purpose of the letter, to ask him.

ATTORNEY XXX: Okay, and the purpose of the door hanger?

MS. XXX: Yes.

ATTORNEY XXX: Right?

MS. XXX: Yes.

ATTORNEY XXX: But if I understand what you're saying, you made a decision to change classification before you had any new information or evidence. Is that right?

MS. XXX: That was the purpose of the door hanger, to question it.

ATTORNEY XXX: Right, and you got no response. And so, you didn't have any information at the time you sent the letter about what the uses were of those two properties. Is that right?

MS. XXX: We did not know the uses of the property. That was the purpose of the door hanger, to get information.

Tr. 52.

The Petitioners argue that the Respondent Assessor is mistaken in her belief that a property owner may not have the property classified as a Class II unless the owner sleeps there for an unspecified number of nights. Despite conceding that the Petitioners did not use the subject

property in a commercial manner and that they use it only for a residential purpose, the XXX County Assessor imposed a “sleeping” requirement for an unspecified number of nights in each building as a condition of the building qualifying for residential use. The XXX County Assessor testified that she believed that overnights were required for Class II because she had been told this from the West Virginia State Tax Department. Tr. 55-59.

The XXX County Assessor testified that the number of overnights spent at a property has a role in determining whether a property is Class II or Class III. However, upon inquiry by this Tribunal she could not provide the number of overnights required. Furthermore, she could not testify as to what legal authority controlled the overnight requirement as follows:

JUDGE FLANIGAN: Now, you testified that the overnights had some type of outcome or outcome determinative of this reclassification. Is that right?

MS. XXX: Yes.

JUDGE FLANIGAN: Okay. Now, you also testified that you did not know the exact number of overnights that were required in order to do so. Is that right?

MS. XXX: That's correct.

JUDGE FLANIGAN: Okay. You also testified that you referred to some notes and you said you weren't 100% sure about what maybe the regulation is that controls this. Am I right there?

MS. XXX: Correct.

Tr. 68.

This Tribunal cannot locate, nor was any legal authority cited by the Respondents during the hearing or in their post hearing brief, to clarify the number of overnights required for an owner to spend at a property for it to be deemed Class II. Therefore, this Tribunal finds this argument to be without merit.

The Petitioners utilize the subject property as a storage facility and garage, woodworking area, a library, a game room, a bedroom, a guest house, and a man cave for Mr. XXX's model

trains. They have never and do not currently use the subject property as a rental property and have never earned nor do they currently derive any income from it.

Under West Virginia Code Section § 11-8-5, Class II property consists of “[a]ll property owned, used and occupied by the owner exclusively for residential purposes.” W.Va. Code § 11-8-5 (2023).⁴ The parties agree the Petitioners are the true owners and use the subject property in a non-commercial manner exclusively for residential use. The statute is clear that “all property” being used by the owners exclusively for residential purposes is Class II. West Virginia Code Section 11-8-5 is devoid of any limitation of owning Class II property nor did the Respondents cite to any such law providing such limitation. This Tribunal finds that there is clearly no question that the Petitioners are the owners, are using the property exclusively for residential purposes, and are not limited to owning only one Class II property.

West Virginia Code Section 11-4-3(a)(2), defines “[u]sed and occupied by the owner thereof exclusively for residential purpose” as meaning actual habitation by the owner or the owner's spouse, or a qualified resident of all or a portion of a parcel of real property as a place of abode to the exclusion of any commercial use. As previously discussed, habitation and abode are not defined in the West Virginia Code. We are therefore tasked with using the common, ordinary meaning of the words.

Habitation is defined as “the act of inhabiting; occupancy by inhabitants” or a “place of residence; dwelling; abode.” HABITATION Definition & Meaning | Dictionary.com. Abode is defined as “a place in which a person resides; residence; dwelling; habitation; home” or “an extended stay in a place; sojourn.” ABODE Definition & Meaning | Dictionary.com.

⁴ If the West Virginia Legislature intended for a certain number of overnights to be a Class II requirement, then it would have enumerated them as it has in other areas of Chapter 11, such as, West Virginia Code Section 11-21-7. W.Va. Code § 11-21-7 (West 1961).

Habitation is again defined as “the act of inhabitating: occupancy” or “a dwelling place.” Habitation Definition & Meaning - Merriam-Webster. Abode is defined as “a place where one lives: home” or “a temporary stay: sojourn.” Abode Definition & Meaning - Merriam-Webster. Both resources generally define habitation as occupying a property and abode as a dwelling place. These common, ordinary meanings comport with the Petitioners’ use of the property. They are occupying (habitation) a temporary dwelling place (abode) and neither of these resources, Dictionary.com or Merriam-Webster, provide any additional requirements.

The Respondents effectively seek to expand the requirements of 11-4-3(a)(2) to include specific uses due to the undefined terms of habitation and place of abode. The Assessor testified that she had been informed by the Tax Commissioner to consider the number of overnights for determining classification. However, upon inquiry by this Tribunal, she could not cite any legal authority of required overnights to meet their interpretation of 11-4-3(a)(2). It is understandable that she could not confirm these inquiries because no such legal requirement exists. The statute is devoid of any such overnight requirement. This Tribunal cannot expand the statute to include such a requirement which has not been promulgated by West Virginia Legislature. Therefore, the overnight requirement will not be considered, and this Tribunal interprets and applies the statute as plainly written. Upon consideration of the transcript, the exhibits, the post hearing briefs, and the record in its entirety, this Tribunal finds that the Petitioners have proven their case by a preponderance of the evidence and that the subject property should be designated Class II.

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. Class II property is defined as “[a]ll property owned, used and occupied by the owner exclusively for residential purposes.” W. Va. Code Ann. § 11-8-5 (West 1961).

3. “ ‘Owner’ means the person, as defined in section ten, article two, chapter two of this code, who is possessed of the freehold, whether in fee or for life.” W. Va. Code Ann. § 11-4-3(a)(1) (West 2007).

4. “ ‘Used and occupied by the owner thereof exclusively for residential purpose’ means actual habitation by the owner or the owner's spouse, or a qualified resident of all or a portion of a parcel of real property as a place of abode to the exclusion of any commercial use.” W. Va. Code Ann. § 11-4-3(a)(2) (West 2007).

5. Words that are not defined in the West Virginia Code and may be given their common, ordinary and accepted meaning. *See* Syl. Pt. 6, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171, 173 (W.Va. 1984).

6. Each tax year is independent of prior tax years and independent of subsequent tax years. Syl. Pt. 2, *Mountain America, LLC. v. Huffman*, 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”).

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

8. 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).

9. 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).

10. The Petitioners have met their burden of proof under the preponderance of the evidence standard to show that the XXX County Assessor's actions were erroneous, unlawful, void or otherwise invalid.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the reclassification of the subject property for the 2023 property tax year is hereby **REVERSED**. The XXX County Sheriff is hereby ordered to provide a credit for the 2025 tax year from the previously paid property taxes in 2023 for the subject property.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Crystal S. Flanigan
Deputy Chief Administrative Law Judge

Date Entered