

q BEFORE THE JEFFERSON COUNTY, WEST VIRGINIA

COUNTY COMMISSIONERS

IN RE: THE 2007 PROPERTY TAX ASSESSMENTS

of SHEPHERDS GLEN LTD PARTNERSHIP

PATRICK HENRY WAY LTD PARTNERSHIP

BOLIVAR COURT II LTD PARTNERSHIP

PHA ASSOCIATES LTD PARTNERSHIP

The continuation of this matter came
on for hearing on Friday, the 23rd day of
February, 2007, commencing at 9:10 a.m., at
the Jefferson County Courthouse, located at
124 East Washington Street, Charles Town, West
Virginia, before Brian M. McDonald, a Notary
Public.

FOR THE BOARD OF COUNTY COMMISSIONERS:

FRANCES MORGAN, Commissioner (President)

DALE MANUEL, Commissioner

GREG CORLISS, Commissioner

RUSTY MORGAN, Commissioner

JAMES SURKAMP, Commissioner

FOR THE BOARD OF COUNTY COMMISSIONERS:

MICHAEL THOMPSON, ESQUIRE

County Prosecutor

110 North George Street

P.O. Box 729

Charles Town, West Virginia 25414

FOR THE PETITIONER:

MICHAEL E. CARYL, ESQUIRE

Bowles Rice McDavid Graff & Love

6009 Quarter Street

P.O. Box 1306

Charleston, West Virginia 25325-1386

ALSO PRESENT: MR. RANDY MARCHMAN

WITNESS: MR. ROBERT BARUCH MARGOLIS Page No.

Direct Examination by Mr. Caryl.....019

Cross-Examination by Mr. Thompson.....164

Re-Direct Examination by by Mr. Caryl..265

Recross-Examination by Mr. Thompson....266

3

- - -

4

PROCEEDINGS

5 Whereupon,

6

MR. CARYL: Madam President, I

7 have a very quick preliminary matter.

8 Mr. Thompson distributed an excerpt from the

9 treatment of the subject easements and all the

10 legal treatises from the corpus juris

11 secundum. I haven't looked at a corpus juris

12 secundum in fifteen or twenty years.

13

MS. MORGAN: Well, it's widely

14 used in the legal encyclopedia.

15

MR. CARYL: But what I do have,

16 what I thought would be more useful, is to

17 supplement what Mr. Thompson submitted, was an

18 excerpt of the Black's Law Dictionary full

19 treatment of the issue but very succinctly but

20 dealing not with the sub-category aspects that

21 Mr. Thompson was alluding to.

4

1

And I would like to -- I've handed

2

Mr. Thompson that excerpt, and I would like to

3 share a copy with each of the Commissioners.

4 MS. MORGAN: Certainly,

5 absolutely.

6 MR. CARYL: And then I've

7 highlighted -- I mean, Mr. Thompson underlined

8 some kind of arcane aspects of the subject.

9 MS. MORGAN: You're suggesting

10 that's it really much simpler.

11 MR. CARYL: And I have simply

12 highlighted the first sentence, and the point

13 being that while most of the specific

14 manifestations of the concept have to do with

15 a path across someone's property or utility

16 lines, the concept is broader than that, and

17 it is essentially the right in someone other

18 than a property owner to have some use or

19 benefit from the property and therefore the

20 owner has to at least share the use and

21 there's a restriction, a limit on the

5

1 exclusive benefit and use in the underlying

2 owner, would be sort of a layman's explanation

3 of the broad concept of easement. And that's

4 why what we refer to as conservation easements
5 are called easements.

6 MR. MORGAN: Is there always an
7 element of sharing though?

8 MR. CARYL: Pardon?

9 MR. MORGAN: Is there always an
10 element of sharing or can that...

11 MR. CARYL: No, the fact of it is
12 there's a loss. It's not always shared.

13 MR. MANUEL: Well, conservation
14 easement is not always shared. That doesn't
15 give you a right to trespass on my property.

16 MR. CARYL: You're right. You're
17 absolutely right. But it's for the benefit of
18 the people, the public...

19 MR. MANUEL: Oh, yeah.

20 MR. CARYL: ...to maintain open
21 space, all these things, so that for the

6

1 benefit of the public the owner's right to --
2 unfettered right to use it in any way is
3 restricted.

4 MR. MANUEL: But you can still
5 use the property.

6 MR. CARYL: Right, and the owner
7 has the benefit of the open space and so forth
8 and so on. I didn't want to leave a
9 misimpression that limited people to have
10 rights-of-way, a path across someone's
11 property, although that is probably the most
12 common...

13 MS. MORGAN: I think conceptually
14 we understand the idea, and the issue perhaps
15 here is what you do in a case where you have
16 an easement or where the restriction enures to
17 the benefit of society at large rather than to
18 a particular individual, and I think that's
19 why you're using a conservation easement as an
20 analogy.

21 MR. CARYL: That we're more

7

1 familiar with.

2 MS. MORGAN: Mr. Corliss has a
3 question.

4 MR. CORLISS: Yeah, it says

5 further on down under your highlight, the land
6 having the right of use as an appurtenance, I
7 don't understand as an appurtenance.

8 MR. CARYL: That means an added
9 aspect of benefit. It's connected.

10 Typically, these rights-of-way are for
11 adjacent land and such, so the right to go
12 over your neighbor's property is an
13 appurtenance to your property rights.

14 MS. MORGAN: Meaning it's nearby.

15 MR. CARYL: Because it's been
16 granted or someone...

17 MR. SURKAMP: It's an
18 appurtenance.

19 MR. THOMPSON: Let me jump in,
20 having done real estate law for many years and
21 having litigated many cases involving

8

1 easements over the year. I've handed out, by
2 the way, the code section dealing with
3 conservation and preservation of easements
4 since the issue has been raised. I might

5 point you to 20-12-16, which says that they
6 are valid easements, and it goes on to say
7 that it is not appurtenant to an interest in
8 real property.

9 MS. MORGAN: We're still looking
10 for...

11 MR. THOMPSON: 20-12-6.

12 MS. MORGAN: Now we've got it.

13 MS. THOMPSON: It starts out by
14 saying conservation and for preservation,
15 easement is valid even though and say it's not
16 appurtenant to an interest real estate so I'm
17 like the situation the traditional common law
18 easements that we're talking about where a
19 party subdivides a property and retains a rear
20 portion of a parcel and to give himself or
21 herself access, reserves a right-of-way

9

1 through the front parcel which he or she has
2 deeded to another person.

3 That's the common law easement. That
4 type of situation where the person reserved a
5 right-of-way, that right-of-way is pertinent

6 to that rear parcel, and that rear parcel is
7 what is referred to as the dominant estate.

8 We learned this in the first semester
9 of law school in real property. The dominant
10 estate has the benefit. The servient estate
11 has the burden.

12 So the property in the front, if you
13 will, through which the right-of-way passes,
14 is the servient estate that bears the burden,
15 gets all the burden, maybe none of the
16 benefit.

17 From time to time you see them
18 drafted by scribes to give even the
19 servient parcel use of the right-of-way, but
20 more typically the servient parcel doesn't
21 even enjoy the right-of-way, and typically

10

1 what they do is they usually fashion them, the
2 attorneys, and Mr. Caryl's firm will fashion
3 them and other firms will fashion them along
4 the side so it's less onerous.

5 You had a case last week or the week

6 before where you had the meandering road.
7 That was a way of necessity because there was
8 no grant made when that property was
9 subdivided, and there was no access.

10 The courts will sometimes fashion a
11 way of necessity and they try to be as careful
12 as possible in doing that, but again, the
13 property that had been landlocked had that
14 meandering ribbon-like or snake-like right-of-
15 way.

16 The property that had been landlocked
17 had that way of necessity run to it by the
18 courts, is the dominant estate enjoys the
19 benefit.

20 The property in the front for which
21 it passed is the servient estate, and 20-12-6,

11

1 it says that these are valid, they're not
2 appurtenant.

3 By the way, there's another concept
4 of easement, en gross, which is a person right
5 that usually is extinguished at the end of a
6 lifetime of an individual. That's not what

7 we're dealing with here.

8 It goes on to say in No. 3 on the
9 next page, sub-section three, is not a
10 character that has been recognized
11 traditionally in common law.

12 What I was talking about and what I
13 believe the rule was talking about, because
14 the rule, I think, is talking about
15 traditional...

16 MS. MORGAN: Which rule?

17 MR. THOMPSON: The rule which was
18 Title 110. I think it was the first exhibit,
19 series 1(P). It's 2.1.1.3.

20 It's talking about -- and it says,
21 for ease of alienation thereof considering the

12

1 state of the title of the number....and the
2 extent to which the same may be subject of
3 either dominant or servient easements...

4 In other words, the dominant
5 easement, that's a traditional common law
6 easement that they're talking about in that

7 rule, not prescriptive easement. I mean,
8 they're easements nonetheless.
9 Obviously, they're created by
10 statute. I grant you that and certainly it is
11 what it is, but my contention is that when
12 this rule was drafted and God knows when it
13 was drafted, I don't know if the rule even
14 says...

15 MR. CARYL: In the 90's. Early
16 90's.

17 MR. THOMPSON: Yeah, what they
18 were talking about in this particular rule...

19 MS. MORGAN: Mr. Thompson, just a
20 moment. We have this.

21 MR. THOMPSON: And the point I'm

13

1 making, Madam President, is that even the
2 statute dealing with conservation and
3 preservation of easements recognizes, I
4 believe, implicitly, although not explicitly
5 -- or maybe even explicitly -- that these
6 preservation easements are unusual.

7 They're not the common law easements

8 that we're talking about where there's a
9 dominant and servient estate as I believe was
10 intended by the rule.

11 It doesn't say that specifically and
12 there obviously will be a dispute as to that,
13 but my contention is when they add the words
14 dominant or servient, they're talking about
15 the common law easement that you normally have
16 with roads and rights of ways...

17 MS. MORGAN: And the relation,
18 the burden of the property to the property as
19 a whole.

20 MR. THOMPSON: There is a burden.

21 And I think, even though I didn't

14

1 photocopy that, I'm sure the Farmland
2 Preservation Act probably has something like
3 this as well. That's a form of easement
4 apparently. Self-imposed, if you will.

5 And money is received for those as
6 perhaps here or tax credits or some other
7 remuneration, but the easement that I'm

8 talking about, and I believe the rule is
9 talking about in the old-fashioned common law
10 easement of road right-of-way, and that -- and
11 like you all dealt with in that particular
12 case that Mr. Caryl wasn't here for, that
13 property that was -- the taxpayer was
14 appealing bore the burden as the servient
15 estate of that particular way of necessity
16 right-of-way. So that's...

17 MR. CORLISS: Conservation
18 easement would be...

19 MR. THOMPSON: This is a
20 statutory easement, not a common law easement.
21 The law of easements is an ancient, you know,

15

1 it developed slowly over eons. We inherit all
2 of that from England.

3 We have received -- we have a
4 reception statute that allows us to receive
5 the common law as it existed in England at
6 the, I guess, the formation of the State and
7 of course the common law of Virginia.

8 So my argument is, different than his

9 argument, is the rule is limited to the common
10 law traditional easement of dominant estate,
11 servient estate, not the statutory easements
12 created by this particular act dealing with
13 the preservation and conversation easements.

14 MR. CORLISS: Are those
15 prescriptive or...

16 MR. THOMPSON: Prescriptive
17 easements, you can acquire an easement by
18 user. You can lose it over time. There is a
19 statute of limitations in West Virginia. Ten
20 years. It's used for ten years a road path
21 for ten years you can acquire by prescriptive

16

1 easement. You acquire...

2 MS. MORGAN: But the gentleman
3 would agree, would not you, that we're not
4 dealing with prescriptive easements. That's
5 not the issue here.

6 MR. CARYL: Just one response to
7 Mr. Thompson.

8 Mr. Thompson is trying to, first of

9 all, glean an intent and put a very fine point
10 on a litany of items in a list of
11 considerations to determine value. Value
12 needs to be -- it's a judgment; it's a broad
13 expansive open concept of how you determine
14 value.

15 It's not a precise formula and it
16 cannot -- the terms of a rule establishing
17 ways to come to value cannot be interpreted in
18 such a narrow way.

19 Easement -- the point is that if the
20 property is subject to restrictions on its
21 use, that's a legitimate consideration in

17

1 determining the value of the property.

2 It's as simple as that. All this old
3 common law stuff, nuance, and it's such a
4 narrow reading I don't think it's clearly what
5 the Tax Commissioner intended.

6 MR. THOMPSON: Who was that?

7 MR. CARYL: I might have been
8 around. I'll say on the record, that isn't
9 what I intended. But these rules after I was

10 there were adopted as legislative rules which
11 means the legislature blessed it.

12 This wasn't what the legislature
13 intended. The value just doesn't lend itself
14 to that narrow approach that the definition
15 says.

16 MS. MORGAN: I think your
17 argument is a good one.

18 MR. CARYL: Thank you. We're
19 ready to present to our witness.

20 MS. MORGAN: Is the Board
21 prepared? Okay. Thank you.

18

1 MR. CARYL: I think Mr. Margolis
2 has been sworn his very first day.

3 ROBERT BARUCH MARGOLIS,
4 the appellant herein, having been first duly
5 sworn, was examined and testified upon his
6 oath as follows:

7 DIRECT EXAMINATION

8 BY MR. CARYL:

9 Q. For the record, would you state

10 your full name, please.

11 A. Robert Baruch Margolis.

12 Q. And what is your business

13 address?

14 A. I have a couple, but my street

15 business address is TM Associates Management,

16 15825 Shady Grove Road, Rockville, Maryland --

17 I'm sorry, Suite 55, 20850.

18 Q. Mr. Margolis, what, if any,

19 relationship do you with the entity that own

20 the properties that are the subject of this

21 hearing?

19

1 A. I am either the general partner

2 of the limited partnerships that own the

3 property, or I am a member of the LLC that's

4 the general partner for the limited

5 partnership that own these properties, so I am

6 the controlling person either way.

7 Q. Are you involved in the

8 management of these entities?

9 A. I am.

10 Q. In what capacity?

11 A. I own the management company.

12 Q. I'm talking about activities

13 rather than ownership.

14 A. I oversee everything that goes

15 on, whether it be rent increases or expenses.

16 That's why I'm here today, it's an aspect of

17 my job.

18 Q. Okay. Describe, if you would,

19 the general nature of these four properties

20 and how they're used.

21 A. Okay. That's a good question,

20

1 and I would love to educate everybody a little

2 bit because there's a lot of things I don't

3 know but I really know this business.

4 There are two Federal programs that

5 come into play in this type of housing.

6 Primarily, they are U.S. Department

7 of Agriculture, Section 515 properties, and

8 it's rural rental housing, and it comes with

9 interest credit.

10 I get a one percent loan from -- the

11 limited partnerships get a one percent loan
12 from the Federal government for fifty years,
13 but it's not like I get any advantages out of
14 that one percent loan. I get an interest
15 credit.

16 What that means is the difference is
17 the difference between the market interest
18 rate, and the one percent I lower the rent by
19 that difference. It's an interest credit.
20 It's an indirect subsidy to the tenants.

21 For the most part the tenants do not

21

1 get a direct subsidy.

2 MS. MORGAN: In other words, to
3 the extent that that's an avoided cost, the
4 difference between what would be on the market
5 your interest cost.

6 THE WITNESS: Right, the
7 difference bet...

8 (Whereupon, overlapping
9 speakers precluded
10 reporter from transcribing
11 testimony)

12 MR. SURKAMP: You don't just
13 subtract the one percent from the market
14 interest?

15 THE WITNESS: No, not at all.

16 MR. CORLISS: Would you explain
17 the difference?

18 THE WITNESS: Sure. Let me just
19 try. It's a little complicated.

20 What I believe the market rate
21 interest rate is somewhere near seven percent

22

1 today, okay, but it's whatever the loan was at
2 the time the loan was made. So let's just,
3 for example, use seven percent...

4 MS. MORGAN: Excuse me, I'm
5 sorry. It's figured whenever the loan
6 originated, you fix...

7 THE WITNESS: (Interposing) You
8 have a fixed market rate at that time,
9 correct.

10 The difference in debt service, the
11 difference on my mortgage payments from a one

12 percent mortgage, you know, it's going to be a
13 lot lower than a seven percent mortgage.

14 That difference I don't keep. I pass
15 it along to the tenants in the form of a lower
16 rent. It's from interest credit.

17 MR. SURKAMP: The difference in
18 debt service.

19 MR. MARGOLIS: That's correct.
20 The difference in debt service. The market
21 interest rate when the loan was made and the

23

1 one percent that I actually paid. It's an
2 indirect subsidy to the tenants. I pass along
3 that savings in the form of a lower rent.

4 MS. MORGAN: Mr. Manuel.

5 MR. MANUEL: If I was an
6 investor, do I get any tax break, whatever,
7 for investing in the original cost of that
8 building?

9 THE WITNESS: I'm going to get
10 into that in just a minute. I do want to
11 answer your question, but I've just got it to
12 take it in a logical format.

13 MR. MANUEL: Okay.

14 THE WITNESS: I promise I will

15 try and answer your question.

16 MS. MORGAN: Okay. But in order

17 to clarify this point for the Board, I guess

18 what I would need to know is how you

19 calculate⁴ what would be a market rent for

20 your tenants from which you will then subtract

21 the subsidy. You would -- in other words, the

24

1 interest credit comes into play as a reduction

2 so you have to establish what your market rent

3 would be on your apartments.

4 THE WITNESS: Right, the market

5 interest rate is an interest rate set at the

6 time that you get the loan.

7 Now, I can't answer your question

8 because I haven't done a whole spreadsheet for

9 you, but what I can show you is sort of an

10 example, if I may, from one of the budgets for

11 one of these properties.

12 MR. MANUEL: You said this is for

13 fifty years.

14 THE WITNESS: That's right, it's

15 a fifty-year loan.

16 MR. MANUEL: Does that mean that

17 you're guaranteed that those apartment will

18 stay in a subsidized...

19 THE WITNESS: Well, once again,

20 that's another aspect of it. I swear I'm

21 going to answer your question. I want to get

25

1 to that. I really want to get to that, but

2 right now we're talking about the Department

3 of Agriculture.

4 MS. MORGAN: Explain it in your

5 own words.

6 THE WITNESS: I want to do this

7 in a logical order, that's all I'm saying. I

8 promise I'm not trying to avoid this.

9 Okay. So USDA Section 515 loan is

10 what I've described.

11 Okay, now they have income limits of

12 their own. Their incomes limits are that

13 tenants residing in these properties have to

14 be below eighty percent of the area median
15 income. Okay.

16 And the area median income, I have it
17 here. It's somewhere around 40 grand. I have
18 the exact right here if you want me to pick it
19 up. Let's just say it's forty grand, okay?

20 And so eighty percent of that would
21 be thirty-two grand, okay. So if I do not

26

1 have tax credits and I only have this USDA
2 loan, then I would only have to house people
3 of eighty percent or less of the median
4 income.

5 Now, several of the RD properties in
6 the County don't have tax credits so their
7 income limits are eighty percent. Okay. So
8 that's the USDA.

9 MS. MORGAN: But housing...

10 THE WITNESS: (Interposing)
11 Other similar housing but not mine. I have
12 acquired and rehabbed all of these properties.
13 I have not built any of these properties. I

14 acquired and rehabbed these properties between
15 1996 and 2001.

16 And the way I was able to acquire and
17 rehab them, is I got low income housing tax
18 credit which initially comes from the
19 Department of Treasury, by the way, and it's
20 doled out to every State, and it's for the
21 purpose of rehabilitating and preserving low

27

1 income housing.

2 That's building, preserving and
3 rehabilitating low income housing. That's the
4 purpose of low income housing tax credits.
5 And so I got low income housing tax credits to
6 do just that.

7 And so not only was I specialized in
8 fixing slums, basically, I had recovered
9 properties both physically and financially.
10 That's my specialty.

11 You know, I'm in a crazy business and
12 other people really wouldn't take on what I
13 take on.

14 For example, I'm about to do a nine

15 million deal at Berkeley Gardens. It's in
16 Martinsburg. I'm about to spend thirty-six
17 thousand dollars per apartment fixing up the
18 worst slum you guys have in the Eastern
19 Panhandle. That's what I do.

20 So anyways, in other States I'm able
21 to get low interest loans and combine them

28

1 with tax credit, but in these cases I assume
2 the loans and I got the tax credits.

3 The tax credits are sold to
4 corporations.

5 MS. MORGAN: Don't go too fast.
6 You assume the loans that are outstanding on
7 the properties.

8 THE WITNESS: Correct. At the
9 time so -- and I didn't build them originally
10 so maybe ten, maybe fifteen years into the
11 deal I'm assuming a mortgage that has thirty-
12 five years left, right. But actually at that
13 time the term changes because it's a thirty-
14 year loan but it still has a fifty-year. I

15 know it's a lot.

16 And when I take on these tax credits

17 I'm going to lower the rents and incomes much

18 further than the U.S. Department of

19 Agriculture restrictions, and I have

20 specifically -- when we get to it -- and I

21 have specifically, when we get to it, I have

29

1 specifically but I've promised, either for

2 thirty to forty-five years, I am promising to

3 maintain a very low income housing. I think

4 in three out of the four cases, forty-five

5 years and one of them for thirty years.

6 MS. MORGAN: And you're taking on

7 this set of obligations but if you were to get

8 out of you have to find somebody to assume all

9 the obligations that you're assuming?

10 THE WITNESS: Exactly, so they

11 can't raise the rent either. So I'm taking it

12 for eighty percent of median. Now, the

13 maximum I'm allowed to charge is sixty percent

14 of the median. So on that forty thousand

15 dollars example, that's for a family of four,

16 by the way, so it would be like -- let's say
17 it's thirty-five thousand for a family of two,
18 okay. It's going to be less than for a family
19 of four. So you go sixty percent times
20 thirty-five thousand instead of forty
21 thousand. You follow me?

30

1 MR. SURKAMP: Is the sixty
2 percent for a family of two?

3 THE WITNESS: The maximum I'm
4 allowed to put these people in for is sixty
5 percent of the median. But I've even taken on
6 further restrictions so half of my units are
7 either at fifty percent of median or forty
8 percent of median.

9 MR. THOMPSON: I'm going to
10 objection. You were talking at Berkeley
11 Gardens. I want to make sure -- are you
12 talking at Berkeley Gardens?

13 THE WITNESS: No, no, no.

14 MR. CARYL: He's talking about
15 these properties.

16 THE WITNESS: I was making an
17 example of what I do. This is all Jefferson
18 County, all the subject properties.

19 MS. MORGAN: These are the four
20 subject properties.

21 THE WITNESS: May I give you real

31

1 numbers? It will just take me a moment. I'm
2 not as organized as I should be.

3 MR. MORGAN: Well, the final step
4 down to forty or sixty percent, why did you go
5 that far? You didn't explain that.

6 THE WITNESS: You're right. Let
7 me tell you about the tax credits.

8 MS. MORGAN: Forgive me. Just
9 one more clarification. I mistook what you
10 said. It's not the charge, it's the tenant
11 you're allowed to have there. In other
12 words...

13 THE WITNESS: Correct.

14 MS. MORGAN: ...the tenant has to
15 qualify...

16 THE WITNESS: Correct.

17 MS. MORGAN: And this is lowering
18 that threshold...

19 THE WITNESS: Yeah, it's rent and
20 income. So they have to be below a certain
21 income, and I'm not allowed to charge above a

32

1 certain rent so it's rent, then income. It's
2 published by HUD.

3 This is what the tables look like.
4 I'm happy to pass them out. I'm just going to
5 read you a sample and then I can pass them up
6 for you guys to look at.

7 In Jefferson County the 2005 median
8 income was \$62,500, okay. Now, for one
9 person, a one-person family, at a forty
10 percent income, they can't make more than
11 17,520. And a 50 percent income 21,900, and a
12 sixty percent income 26,280.

13 But let's take a family of four
14 because a two bedroom can hold up to four
15 people, okay. I think that's your better
16 example.

17 MR. SURKAMP: Just so we don't
18 lose you, one person at forty percent, they
19 can't be earning more than 17,520; 50
20 percent, 21,900...

21 THE WITNESS: Yeah, 50 percent

33

1 right, correct.

2 MR. SURKAMP: And then is it one
3 person at 60 percent, 26,280?

4 THE WITNESS: Exactly.

5 MS. MORGAN: I don't think we
6 need to absorb the details. That would be
7 impossible.

8 MR. MORGAN: What was the
9 question?

10 MR. SURKAMP: The question was
11 why you went as far as...

12 THE WITNESS: Yeah, thank you,
13 thank you. We compete -- every State has
14 what's called a qualified allocation plan.
15 Okay. So there's fifty different ways to
16 administer these tax credits. Every State
17 develops its own plan, so your

18 administrator...

19 MS. MORGAN: Qualify what plan?

20 THE WITNESS: Qualified

21 allocation plan, QAP. And it's signed by the

34

1 governor every year. Whenever they change the

2 plan it's signed by your governor, just like

3 in every other state.

4 And you have to score points because

5 there's a limited number of tax credits.

6 There's a lot of competition for these tax

7 credits and score points, there's targeting,

8 and so the lower you go the more points you

9 get in general.

10 And the more efficiently you rehab

11 the units, there's a lot of criteria. The

12 targeting is one of the criteria. So I

13 targeted low so I win the tax credits so I

14 could acquire, rehab and preserve this low

15 income housing.

16 MR. MANUEL: Are you going to

17 tell us about the advantage to the investors

18 as well?

19 THE WITNESS: Absolutely. Well,
20 you can't buy one. It's only for
21 C-corporations. I mean, individuals can buy

35

1 them but there's a very minimum amount that
2 they can buy.

3 So in practice these things are
4 generally sold to banks and insurance
5 companies, that type of thing. And it allows
6 them to pay less in taxes. So let's say --
7 let's say I have a project that has a hundred
8 thousand dollars in tax credits.

9 It's a hundred thousand a year for
10 ten years. So that's a million dollars, and
11 let's say they pay eighty cents on the dollar
12 for it. They're paying me eight hundred
13 thousand dollars for it, okay? And they're
14 getting a million dollars in taxes they don't
15 have to pay. Absolutely correct. So...

16 MS. MORGAN: They would use their
17 corporate tax liability dollar for dollar each
18 year...

19 THE WITNESS: No, actually, it's
20 better than dollar for dollar. They're going
21 to pay me eighty cents and they're going to

36

1 get a dollar off.

2 But that money is used not to put in
3 my pocket. That money is used to acquire, to
4 rehabilitate this housing. And I am allowed a
5 developer fee, which in this State is ten
6 percent acquisition and fifteen percent of
7 rehab.

8 And that's how I make my money, a
9 developer fee. But the great majority of the
10 tax credit money goes to acquiring and
11 rehabilitating.

12 And then another -- besides targeting
13 with the low incomes, extended use. I'm going
14 out thirty to forty-five years promising to
15 keep these very poor people in this house.

16 MR. THOMPSON: What was the rehab
17 percentage again?

18 THE WITNESS: The developer fee

19 is fifteen percent.

20 Okay. So anyways, I have all kinds

21 of tables that I can show you what we've

37

1 promised as far as the targeting and what

2 we've promised as far as the extended use.

3 Okay. I would love to -- did I

4 answer your question?

5 MR. SURKAMP: Sure.

6 THE WITNESS: Okay.

7 MR. SURKAMP: Just didn't quite

8 get it as quickly. Ten years, ten thousand,

9 the eight percent tax credit...

10 THE WITNESS: Yeah, the

11 Department of Agriculture is eighty percent of

12 median, okay, but I combined it with low

13 income housing tax credits which has a lower

14 -- I promise to house even poorer people than

15 what the USDA maximums are.

16 MR. SURKAMP: And you're doing

17 that because it improves your competing score

18 for...

19 THE WITNESS: It helped my score;

20 it allowed me to win the tax credits because
21 they're competition.

38

1 MR. MANUEL: Winning the
2 competition is where you're going to go in
3 that. It doesn't have anything to do with the
4 percentage of the developer fee?

5 MR. SURKAMP: Are they unrelated?

6 MR. THOMPSON: Is it still ten
7 percent? You said the development fee was ten
8 percent.

9 THE WITNESS: No, the developer
10 fee is not competitive, but it's ten percent
11 of the acquisition for the majority of the
12 development and then fifteen percent...

13 MR. MANUEL: But the
14 competition...

15 THE WITNESS: The competition for
16 the gross tax credit.

17 MR. SURKAMP: Then you qualify
18 for the ten, fifteen percent developer's fee
19 for acquisition.

20 THE WITNESS: Yeah, at that time
21 which -- that money is long gone for me, of

39

1 course. I'm filing my next affordable housing
2 deal and my overhead.

3 Okay. May I take ten minutes because
4 this is my chance to speak to....

5 BY MR. CARYL:

6 Q. Let me, my question will
7 introduce the issue of the appeal.

8 A. Oh, I'm sorry.

9 Q. Okay. Mr. Margolis, in the
10 prior hearing where you were attending in this
11 very case it was noted that in 2003 appeals to
12 the assessment for these same properties were
13 denied by the Commission and the denial was
14 affirmed in the Circuit Court. And my
15 question is why are you again challenging the
16 assessment of these properties?

17 A. Because I feel they're -- I
18 don't feel that I got the correct decision in
19 2003, and these assessments are even much
20 higher and way more out of whack with what I

21 believe is the true intent of the law and the

40

1 value of these properties. I believe the
2 value of these properties is much lower than
3 these assessments which are ranging from
4 twenty-five to forty percent above the current
5 assessments, by the way. Very large
6 increases. Twenty-five to forty percent, I
7 would be able to show you guys.

8 MR. MANUEL: Well, the current
9 assessment where? Here?

10 THE WITNESS: Here. Talking
11 about your properties.

12 The new assessment that you're
13 telling me I have to pay more taxes on which
14 is why I'm here today are twenty-five to forty
15 percent higher than the old assessment.

16 MR. SURKAMP: Of your properties?

17 THE WITNESS: Of these
18 properties. I have tables to show you guys.

19 MR. THOMPSON: Now, are you
20 talking assessments or appraisals?

21 THE WITNESS: I'm talking about

41

1 -- it's both, I guess. But what I'm trying to

2 -- it's really both, but my tax liability is

3 going to be twenty-five to forty percent

4 higher.

5 MR. CORLISS: Higher...

6 THE WITNESS: Higher than what it

7 is currently if this appeal is unsuccessful.

8 MR. CORLISS: When you say

9 current, what tax year are you talking about?

10 THE WITNESS: The twenty-five to

11 forty percent increase from last year.

12 MS. MORGAN: He's facing

13 continual property tax increases as is

14 everybody and just because he lost his appeal

15 in 2003 and was affirmed in the Circuit Court,

16 he's back here again on the same issue asking

17 the Court to take a fresh look at the

18 valuation issue.

19 MR. CORLISS: I understand that

20 aspect. It was just the question of what the

21 current...

1 THE WITNESS: I have a schedule,
2 actually.

3 MR. CARYL: We have an exhibit...

4 THE WITNESS: Well, I have an
5 exhibit which will spell that out, ma'am.
6 Promise. So anyways, let me give you all my
7 ten minutes since this is my one chance to
8 speak.

9 MR. SURKAMP: You started off by
10 saying that you question that this assessment
11 is not consistent with the intent of the law
12 and just much higher and you don't think they
13 can be argued and justified?

14 THE WITNESS: Correct, I believe
15 that the law indicates that it should be
16 assessed otherwise, and I believe the value is
17 way over value of what the properties are
18 worth. So both the law and the value.

19 MR. CORLISS: But is the value
20 based on who is using it as opposed to the
21 value of replacement costs or current

1 replacement cost?

2 THE WITNESS: I don't believe
3 replacement cost is an applicable method, and
4 for several reasons.

5 First of all, it's been -- the first
6 one I did which is Patrick Henry, I did in
7 '96, so it's been ten years on that one,
8 right, and it's been like eight years on
9 Spring Run, and then like seven years in
10 Shepherd's and Boliver since I did
11 redevelopments of these properties. And so
12 the longer you go, the less effective the cost
13 approach is.

14 But anyways, these are the West
15 Virginia regulations concerning valuation of
16 commercial and industrial real property, and
17 I'm very much a big picture person, so I'm
18 just going to highlight the main points, which
19 I've circled in these regulations.

20 I'm not going to -- I think we've
21 talked enough about dominant and servient

1 easements so I'm not going to talk any more
2 about that.

3 BY MR. CARYL:

4 Q. Just to be clear about the
5 testimony, Assessor's Exhibit No. 1 and the
6 number that you could refer to, if you're
7 going to refer to section, refer to paragraph
8 number...

9 A. Okay, sure.

10 Q. And let me say this. In fact,
11 I apologize because I provided Mr. Margolis
12 the general valuation rules. They are
13 identical in text to the Series 1P dealing
14 with commercial and industrial property; that
15 he is looking at a sub-set within the general
16 rules that is identical.

17 If I could just take a minute to -- I
18 will annotate the exhibit....

19 MR. THOMPSON: Does he refer to
20 No. 7.

21 THE WITNESS: Well, there is a

1 little difference. The first digit is
2 different. If I could just take sixty seconds
3 to annotate the exhibit, our copy of the
4 exhibits so that he can testify...

5 MS. MORGAN: I think that would
6 be great. We'll take a short break.

7 (Whereupon, a recess
8 was taken)

9 MS. MORGAN: I'm sorry, and I'm
10 sorry to interrupt you again. This is
11 complicated. Mr. Corliss has a question about
12 Judge Steptoe's order.

13 MR. THOMPSON: Why don't we
14 finish his testimony, and I'm sure we'll talk
15 about it at some point in time.

16 MS. MORGAN: Is that all right,
17 Mr. Corliss? I think the preference of the
18 attorney is to let Mr. Margolis finish his
19 direct testimony.

20 THE WITNESS: Okay, I was just
21 getting into your all's regulations.

1 BY MR. CARYL:

2 Q. And just for the record, now
3 you're referring to Assessor's Exhibit No. 1.

4 A. Exactly, now I'll refer to the
5 actual exhibit so we can all follow along.

6 MS. MORGAN: Exhibit NO. 1 which
7 is the legislative rule, Title 110. Is that
8 what we're referring to? The legislative Rule
9 110.

10 THE WITNESS: Anyways, as I said,
11 I'm not going to -- I think we've beat this
12 easement thing. 1.1.3., dominant and servient
13 easements, I'm not going to even address that
14 because I think we've covered that one
15 already.

16 MR. THOMPSON: So where are you
17 again?

18 THE WITNESS: I'm moving onto
19 2.1.1.9, which is the income, if any, the
20 property actually produces and has produced
21 within the next preceding three years, even

1 though -- it should be the proceeding three

2 years, not the next preceding.

3 Then 2.1.1.10., "Any commonly
4 accepted method of ascertaining the market
5 value of any such properties including
6 techniques and methods peculiar at any
7 particular species of property if such
8 technique or method is used uniformly and
9 applied to all property of like species."

10 Okay?

11 Then 2.1.3.8., it talks about
12 easements. And then 2.1.3.11, it's income
13 imputed to land. And then 2.2.1.2. income
14 approach. A property's present worth is
15 directly related to its ability to produce an
16 income over the life of the property,
17 selection of an overall capitalization rate
18 will be derived from the current available
19 market data by dividing annual net income by
20 the current selling price of comparable
21 properties. The present fair market value of

1 the property shall then be determined by

2 dividing the annual economic rent by the
3 capitalization rate.

4 MR. CORLISS: What paragraph is
5 that again? 2.2.1.2 income approach.

6 MR. MANUEL: I thought there was
7 a ten in there.

8 THE WITNESS: That was the page
9 before. That was 2.1.1.10. That's on the
10 first page at the end.

11 MR. MANUEL: Now, you're at what?

12 THE WITNESS: Now I'm at 2.2.1.2,
13 which is on the right side of the second page.
14 Income approach.

15 MR. CARYL: Slow it down just a
16 little bit.

17 MR. SURKAMP: I don't want to
18 interrupt you but when you say the life of the
19 property, are you saying -- I mean, just so I
20 understand you, is that where you're doing,
21 the life of the property and you said...

49

1 THE WITNESS: Well, I'm not
2 really going that way because on page one it

3 talks about the preceding three years worth of
4 income, okay. And the second page is just
5 saying the general concept of the income
6 approach, but it really, according to your
7 regs, it presides from the preceding three
8 years of income.

9 Okay, then it goes to page three, and
10 the very first thing it says is one possible
11 -- which is 2.2.2., it says "One possible and
12 most accurate form of appraisal should be
13 used." Okay.

14 MR. MANUEL: Where is that again?

15 THE WITNESS: That's on top of
16 page three. And then there's 2.3.5. which
17 talks about economic obsolescence, which means
18 a loss in value of the property arising from
19 outside forces such as change of use
20 legislation that restricts or impairs the
21 property rights or changes in supply and

1 demand relationships. And in my eyes these
2 restrictions offer economic obsolescence, and

3 in 2003's testimony the appraiser said there's
4 external obsolescence due to the legally
5 enforceable restrictions because the income is
6 restricted and the property is not able to
7 generate this loss of income and value.
8 That's what the appraiser said in the 2003
9 testimony.

10 MR. CARYL: Perhaps we have
11 exhibits that is the condensed transcript of
12 the 2003 hearing, and Mr. Margolis can
13 identify the page which he's quoting the
14 testimony.

15 THE WITNESS: I'm paraphrasing
16 here. This is a summary of the transcript.
17 We have the actual transcript which I'm happy
18 to read to you guys.

19 MR. SURKAMP: That's an important
20 quote. Can you read it?

21 THE WITNESS: This is a

51

1 paraphrase...

2 MS. MORGAN: The problem is we
3 need to make sure that the Board is --

4 Mr. Manuel has a question.

5 MR. MANUEL: Mr. Thompson, that
6 says changes.

7 MR. THOMPSON: I'm sorry.

8 MR. MANUEL: This 2.3.5 says
9 changes, but this was beginning at the
10 existence of the purchase of the property. I
11 thought the change would be something that
12 happened outside of economic...

13 Unless something happened that I
14 wasn't aware of.

15 MR. THOMPSON: You can interpret
16 it that way.

17 MR. MANUEL: That's the way I
18 interpreted it. Something that happened that
19 I wasn't aware of...

20 MR. THOMPSON: You're making a
21 distinction between self-imposed restrictions

52

1 and changes that happened on your control.

2 For instance, eminent domain, a
3 condemnation proceeding like one of our

4 taxpayers suffered taking a part of his
5 property.

6 MS. MORGAN: It's part of the
7 argument.

8 MR. MORGAN: It's only part of
9 it.

10 MR. CARYL: Madam President, if I
11 could ask the witness to identify the
12 transcript and then we will put it into the
13 record.

14 MR. THOMPSON: Is it the complete
15 transcript?

16 MR. CARYL: Yes.

17 MR. THOMPSON: Well, you know,
18 the rules of evidence are relaxed in these
19 hearings. I mean, the whole transcript of the
20 whole prior...

21 MR. CARYL: It's not the whole

53

1 record. It's a transcript.

2 MR. THOMPSON: Of all the
3 testimony that occurred at the prior hearing
4 including our testimony?

5 MR. CARYL: Yes.

6 MR. THOMPSON: Yes.

7 MR. CARYL: I understand, four to
8 a page.

9 MR. MARGOLIS: It's 253 pages.

10 It's very tough to read. I have a summary of
11 it.

12 MR. THOMPSON: Do you have other
13 copies.

14 MS. MORGAN: Do you have a copy?

15 MR. CARYL: Yes, I have a copy
16 for everybody. Just give me a second.

17 BY MR. CARYL:

18 Q. Mr. Margolis, I'm handing you a
19 document. Can you identify it?

20 A. Yes.

21 Q. What is it?

54

1 A. This is a condensed transcript
2 from the 2003 hearing that's identical to our
3 hearing.

4 MR. THOMPSON: This is the

5 unabridged...

6 THE WITNESS: This is the

7 unabridged.

8 MR. CARYL: It's the same words.

9 THE WITNESS: This is the

10 abridged.

11 MR. CARYL: There are four pages,

12 printed on both sides. I move the admission

13 of the transcript as Petitioner's Exhibit No.

14 1.

15 MS. MORGAN: Any objection,

16 Mr. Thompson?

17 MR. THOMPSON: Well, we object

18 because we heard so much from Mr. Caryl about

19 the order that resulted from the prior hearing

20 being another tax year and not applicable

21 here. What is good for the goose is good for

55

1 the gander, but I understand the rules of

2 evidence are relaxed and...

3 MS. MORGAN: So a formal

4 objection...

5 MR. THOMPSON: It's a formal

6 objection for the record if this matter goes

7 on

8 MS. MORGAN: There appears to be

9 an extra.

10 THE WITNESS: And anyways, my

11 mention of external obsolescence has to do

12 with pages 66 through 69, would be the area...

13 MR. THOMPSON: Mr. Margolis, that

14 was your testimony and Mr. Pierce's.

15 MS. MORGAN: The appraiser,

16 Mr. Pierce.

17 MR. THOMPSON: We'll be here

18 forever if you...

19 MR. CARYL: The witness has a few

20 references. Let's keep in mind, the witness

21 is responding to the questions about why he's

56

1 appealing in light of the prior case. He's

2 explaining based on the law, the regulations

3 that were currently in place and he's also now

4 referring to portions of the transcript about

5 the same points and he's able to -- although

6 he's paraphrasing both cases, he's able to
7 identify the page of the transcript so that
8 the Commissioner can, you know, look at the
9 actual testimony themselves.

10 MR. SURKAMP: 66 through 69.

11 MR. THOMPSON: We'll be here
12 forever if we pause...

13 THE WITNESS: Anyway, 2.3.6.
14 talks about economic rent means rental amount
15 within a space or property whether obtained on
16 the open market at the time of appraisal,
17 whether it's lower, higher or the same as the
18 actual contract.

19 Then 2.3.12., page four, income
20 approach, means the appraisal process of
21 discounting an estimate of future income into

57

1 an expression of present worth.

2 So anyways, those are my highlighted
3 part of the regulations.

4 BY MR. CARYL:

5 Q. And again, what was your reason
6 for pointing those out to the Commission?

7 A. Because it clearly says that
8 the income approach should be considered.

9 There's just no doubt it clearly says that.

10 And it also says that for a
11 particular type of property -- and it mentions
12 both the cost and whatnot, sales and income
13 approach, that the commonly accepted technique
14 should be used for any type of property, and
15 then you're supposed to pick the approach
16 that's the most applicable to your type of
17 property.

18 MR. MORGAN: Are we, though, as a
19 body to find using the for instance the income
20 approach for all income-producing properties
21 then or all apartment buildings?

58

1 MR. SURKAMP: No, all like
2 species.

3 MR. MORGAN: What are we boxing
4 ourselves into?

5 THE WITNESS: Currently, your
6 land on your sales approach and then also

7 because of the residual of the cost approach
8 and the buildings are on the cost approach and
9 no consideration is given to the income
10 approach in your all's County. And all I'm
11 trying to say is that your regulations clearly
12 spell out you're supposed to consider all
13 three and choose the one that's the most
14 applicable.

15 MR. MORGAN: The question is are
16 we going to have a problem with other
17 apartments building in the County if we treat
18 yours one way...

19 THE WITNESS: I believe my type
20 of apartments are different because I have
21 restricted rents and incomes. I believe that

59

1 my apartments are being assessed like a normal
2 apartment project with no consideration for
3 these restrictions. I think we can agree upon
4 that.

5 MR. THOMPSON: I tender to the
6 County Commission and for the Board of Review
7 at this particular time the case of in re Tax

8 Assessment against American Bituminous Power
9 Partners Limited Partnership. It's a 2000
10 case cited at 539 Southeastern Seventh, which
11 basically discusses this particular
12 regulation. Page 759 of the case, the head
13 note indicates, head note No. 5 says,
14 "Speaking to this specific rule, this specific
15 rule that we're dealing with here today, it
16 says Title 110 Series, 11P, West Virginia
17 Code, State rules, State Tax Commissioner,
18 we've already heard testimony, and Mr. Caryl
19 brought it up, by the way, that he feels that
20 the Assessor's Office is bound -- stands in
21 the shoes of the Tax Commissioner so it's the

60

1 same discretion -- it confers upon the State
2 Tax Commissioner's discretion in choosing and
3 applying the most accurate method of
4 appraising commercial and industrial
5 properties. The exercise of said discretion
6 will not be disturbed on judicial review
7 absent insuring the abuse of discretion. The

8 case discussed that.

9 In this particular case the
10 replacement cost, I believe, in comparable
11 sales, chose not to do the income approach or
12 sustain that. 2000 case, the purpose of the
13 rule.

14 In addition thereto, we've already
15 had testimony, I do believe, on cross-
16 examination as to the State requires buildings
17 to be valued separately from land and that
18 they appear separately in the land book, value
19 building, value land. Mr. Caryl cross-
20 examined the witness and suggested that you
21 would use one of the other methods to arrive

61

1 by a hybrid approach by subtracting, arriving
2 at a separate value or building and/or land
3 because you have to under our code section.

4 So the income approach cannot in and
5 of itself be the primary approach anyway
6 because it comes to a total or an aggregate
7 conclusion as to value. This case would
8 suggest that we're not obligated absent an

9 abuse of discretion to use the income

10 approach.

11 MR. SURKAMP: I had one question.

12 Would industrial or commercial properties ever

13 qualify as affordable housing and would ever

14 qualify to even apply for the scoring system

15 under the qualified allocation plan?

16 THE WITNESS: No. It's only low

17 income housing. It's a low income housing tax

18 credit. It's only for low income housing.

19 MR. CARYL: Madam President...

20 MS. MORGAN: Yes, Mr. Caryl.

21 MR. CARYL: Request a rule, three

62

1 way here, Mr. Thompson is continuing to -- in

2 the middle of my witness's testimony, raising

3 legal arguments and...

4 MS. MORGAN: Yes, we do need to

5 move on.

6 MR. CARYL: The witness is

7 testifying as a taxpayer about how he believes

8 the applicable law applies to his situation,

9 and so it is mixed, but it is testimony.

10 A couple of points about this
11 argument though. It is the Tax Commissioner's
12 discretion, the Tax Commissioner is well-known
13 to the law in West Virginia that ultimately
14 requires tremendous administrative purpose,
15 the division of the total property assessment
16 between building -- or improvements and land.
17 Yet, it is the same tax commissioner whose
18 regulations that are the subject of what he's
19 testified about that contemplate that the
20 income method could be used. There's no
21 contradiction.

63

1 And it is in the Tax Commissioner's
2 discretion, the Tax Commission wrote these
3 regulations, promulgated them and the case
4 does not change the fact that the income
5 method is the legitimate method that ought to
6 be considered and where the other methods are
7 inappropriately used, and there is easily a
8 way. Obviously the Tax Commissioner
9 understood that the breakdown of the assessed

10 value between improvements and land.

11 MR. MARGOLIS: Anyway, yeah, I
12 would like to finish my schpeil because this
13 is my only chance.

14 MS. MORGAN: If I can ask the
15 Board to let the witness finish his direct.

16 THE WITNESS: Thank you.

17 So anyway, I just point this
18 information out that it's in your current West
19 Virginia regulations, and I just -- I'm really
20 a big picture person so I want to highlight
21 the big points.

64

1 One big point obviously is income
2 approach should be considered. I'll just
3 leave it at that.

4 Second point is for a particular
5 group of properties, you're supposed to
6 evaluate all three of the methods, and it
7 mentions all three of the methods, the sales,
8 the cost and the income approaches and choose
9 the approach that is most applicable to that

10 species of property, and it's given a higher
11 weight so I'm just highlighting that.

12 And whether it's dominant or servient
13 easements or economic obsolescence, whatever
14 you want to call it, these things have
15 restrictions, and they should be considered.
16 Income and rent restrictions.

17 Economic rent, which is something
18 we'll argue about today, it's the rent in the
19 market area.

20 And I want to let you know that the
21 majority -- even though we've had a lot of new

65

1 wealth here in Jefferson County and you're
2 surrounded by three wealthy areas, Leesburg,
3 Frederick, and Washington, there are a lot of
4 very poor people in your County, a whole lot
5 of them, and the demand for my housing we get
6 traffic every day.

7 My apartments are full but poor
8 people are applying every day because they
9 don't have anywhere decent to live.

10 And I would argue that the majority

11 -- I would consider the market area of
12 Jefferson County. I'm a simplistic guy. The
13 whole County is your market area, okay?
14 The majority of your market area, the
15 apartments, are low income housing. And I can
16 say that with certainty. I can't tell you
17 that is seventy-five percent. I can tell you
18 it's over fifty percent.
19 It's either going to be a HUD
20 development, a rural development or a
21 conventional tax credit development, over

66

1 fifty percent of your housing in your market
2 area is low income housing and has lower rent.

3 MR. MORGAN: You say subsidized
4 in some way?

5 THE WITNESS: Yes, they have
6 income and rent restrictions. The majority of
7 the housing in your County. Okay.

8 The other point I want to make was
9 that tax credits, low income housing tax
10 credits, are intangibles. They are exempt

11 under the West Virginia Constitution from

12 being considered for real estate tax

13 valuation.

14 Everyone knows Mr. Caryl is smart.

15 He used to be the State Tax Commissioner. He

16 can tell you more about that. They are

17 exempt. You can't talk about them as far as

18 valuation of real estate. They're

19 intangibles.

20 There'shat it took to get the deal

21 done originally to preserve the housing and

67

1 they are not an indication of value and they

2 cannot be considered. It's exempt under the

3 West Virginia Constitution.

4 So any time you rate for tax credits,

5 just know you're doing what your West Virginia

6 Constitution says you shouldn't do.

7 Okay. Now, I know -- I've just been

8 talking about West Virginia, right, all along.

9 With your economic rent, your market

10 area, the majority is low income housing. And

11 I told you -- oh yeah. And all along up to

12 this point I talked about West Virginia and

13 nothing about West Virginia, okay.

14 Now, I know that he's talked about a
15 2003 case. I know that he's talking about the
16 year 2000 law or what happened in Ohio the
17 other day he talked about the year 2000. This
18 is a while ago, 2000.

19 So he's talking about another case so
20 I'm going to talk. Seventeen states in the
21 last four years have passed laws to value low

68

1 income housing by the income approach.

2 And I have -- I have the law with me
3 today for Pennsylvania, Maryland, and
4 Virginia, they're three very close States,
5 they all touch your State.

6 MS. MORGAN: Well, that can be a
7 double-edged sword.

8 THE WITNESS: Well, you'll read
9 the law and see what it says. I have it. And
10 they're saying you have to use the income
11 approach to value low income housing, plain

12 and simple, but you'll interpret...

13 MS. MORGAN: For real estate and
14 taxation purposes.

15 THE WITNESS: I'm an overly
16 simplistic person, and you'll have to read
17 these laws and make your own judgment. It
18 says a lot more than what I just said. But I
19 have them here for you to review, and it's
20 only in the context -- I know it's not your
21 law, okay, and I'm not trying to argue that it

69

1 is your law, but all I'm saying is these three
2 surrounding states and seventeen states in
3 total in the country, including New York, feel
4 that the income approach is the most
5 applicable method to valuing low income
6 housing.

7 MS. MORGAN: But not in West
8 Virginia.

9 THE WITNESS: No, I brought up
10 that point because he brought up Ohio, I'm
11 telling you, and these are all recent laws, by
12 the way, so when he talks about 2000, he's way

13 behind the curve on what's happening in the
14 country. Very recently we're having these
15 laws passed in the surrounding states which
16 I'm going to give to you. This isn't hearsay,
17 okay.

18 But anyways I also -- I don't believe
19 that I was given a fair shake but the decision
20 was the decision in 2003. I can't argue it.
21 I tried to argue it and the State said I can't

70

1 argue it any further.

2 But I just want to -- the end --
3 there's a bunch of interesting things, but the
4 most interesting part of this whole transcript
5 from 2003 were the closing remarks.

6 We had our courtroom stenographer in
7 a closed door session when the Commissioners
8 were deliberating what to do. And I just want
9 to read some excerpts from that.

10 MR. THOMPSON: Well, I'm going to
11 object to that. These are excerpts from the
12 Commissioners here?

13 THE WITNESS: Yes. Two of them
14 are sitting here, yes.

15 MR. THOMPSON: Well, I'm going to
16 object to that. That was deliberations.

17 MS. MORGAN: It doesn't strike me
18 as proper.

19 MR. CARYL: Well, this is all in
20 response to my question as to why are we here
21 today after 2003.

71

1 THE WITNESS: I don't think we
2 got a fair shake and I'm trying to show you
3 why we didn't get a fair shake.

4 MR. MORGAN: I don't think it's
5 going to make a bit of difference to me.

6 THE WITNESS: Whatever you guys
7 want. I'm not pushing...

8 MS. MORGAN: I mean, the rules
9 are relaxed but to have the deliberative
10 process...

11 THE WITNESS: All I'm going to
12 say...

13 MR. MORGAN: I'll look at what...

14 THE WITNESS: It's from page 232
15 on in the transcript. 232 to the last page.

16 MR. SURKAMP: They simply were
17 responding to certain snippets of evidence
18 from that time.

19 THE WITNESS: Right, but the case
20 is identical...

21 MR. CARYL: But the question was

72

1 raised by Madam President, I think. It was in
2 open court. Wasn't this all resolved in
3 2003? That's why we were trying to respond to
4 that...

5 MS. MORGAN: I asked you if I
6 recall correctly I asked you, Mr. Caryl, what
7 were your arguments that bring you out from
8 under that Court opinion. In other words, if
9 part of it is precedent or part of it is legal
10 precedent and part of it is not, I wanted you
11 to separate for the Board the part of that,
12 that where in your argument and judgment we
13 are not bound by precedent, and your answer to

14 me was a good one, which is that this is
15 taxation.
16 You have a shot at it every year
17 because it's asking for a determination of as
18 true and accurate a fair market value every
19 year, every year you have a fresh shot at it,
20 so to speak. Now, that was how I understood
21 it.

73

1 MR. CARYL: Well, Madam
2 President, and you're right, and the fact --
3 the thought I think I heard from one of the
4 Commissioners, Commissioner Morgan and
5 Commissioner Surkamp, was that the reason that
6 you didn't necessarily want to hear quotes
7 from the deliberations from 2003 was that,
8 that was addressing what was in front of the
9 Commission in 2003.

10 And that is why it's legitimate for
11 us to come back with whatever we're presenting
12 today and to have a fresh reconsideration so
13 I'm not -- and we're fine with -- he's
14 identified...

15 MS. MORGAN: Ultimately the Board
16 must reach a determination as to whether there
17 is an error in the assessor's determination of
18 value...

19 MR. CARYL: Exactly, for this
20 year.

21 MS. MORGAN: ...for this year.

74

1 But at the same time this Board will also have
2 to decide what aspects of Judge Steptoe's
3 opinion, if any, are binding on us so we'll
4 have to do both.

5 MR. CARYL: I think we can move
6 on.

7 THE WITNESS: I'm not going to be
8 reading these, but I point you to 232, 243,
9 245, and 248.

10 MR. THOMPSON: What were the
11 numbers again?

12 THE WITNESS: 232, 243, 245, 248,
13 249, 251 and 252. I really prefer you guys to
14 read those pages. Just the last couple of

15 pages.

16 MR. MORGAN: And you want us to
17 make a decision today?

18 THE WITNESS: No, no, no. No,
19 all I'm saying is -- I'm not going to even
20 tell you what they said -- but what I'm going
21 to say is you guys deliberated, and the reason

75

1 the Commissioners thought the income approach
2 was valid, and at the end of the day there
3 wasn't even a motion made but a second was
4 made even without a motion to go -- it
5 wouldn't look right if we cut their taxes in
6 half because what are we going to do about
7 everybody else, and because no one thought it
8 would look right at the end of the day, you
9 guys made a motion -- even though three of the
10 Commissioners felt a certain way, you didn't
11 even make a motion, you made a second saying
12 we're going to keep it the way it is because
13 we don't know how to handle this.

14 MR. CORLISS: I don't remember
15 that.

16 THE WITNESS: Read those pages is
17 all I'm saying. Okay. Anyways, so we have
18 also come up with our own valuation on the
19 income approach that the tax assessor never
20 asked for any income information.

21 I've got twenty-one properties of

76

1 this nature in the great State of West
2 Virginia and other counties I'm allowed to
3 submit income information, income and expense
4 information.

5 MS. MORGAN: Okay. It's the
6 taxpayer's burden to provide the assessments.
7 Mr. Caryl, you would not argue this point.

8 The taxpayer needsto provide this
9 assessment -- are you suggesting that you
10 offered information to the Assessor's office
11 and it's been rejected?

12 THE WITNESS: Here's what I'm
13 suggesting. In 2003 we offered -- we have
14 full appraisals which I have in my possession
15 here on the income approach, and we have this

16 appraiser speak for a couple of hours talking
17 all about the income approach, and ultimately
18 the values were not considered and the
19 approach was thrown out. And we have quotes
20 from the Assessors back in this transcript
21 saying that you give it to me but I might not

77

1 consider it, and also quotes about the canvass
2 system being the only system and the fact that
3 we can't handle the income approach because
4 then we have to get it from everybody and so
5 basically saying they don't want information
6 on the income approach, and that's why I
7 haven't provided an income on the income
8 approach; I wasn't asked for it this time.
9 And even if I gave it, they wouldn't consider
10 the valuation. They would consider the
11 approach to be better. So...

12 MR. CORLISS: I have a question.
13 What do the other counties do that you
14 mentioned?

15 THE WITNESS: Yeah, I'm all over
16 the State.

17 MR. CORLISS: Generally, what do
18 they do, the hybrid method with your data?

19 THE WITNESS: I give them my
20 income and expense information and it's
21 considered in the tax appeal.

78

1 MR. CORLISS: So it's a hybrid in
2 that sense?

3 THE WITNESS: If I have to go to
4 appeal. If I have to go to appeal.

5 We also -- and we did not
6 introduce...

7 MR. MANUEL: Wait a minute.

8 THE WITNESS: Sure.

9 MR. MANUEL: Do the other
10 Counties use the income approach in West
11 Virginia?

12 THE WITNESS: I don't believe as
13 a general rule they use it. I think everyone
14 uses a CAMA approach.

15 MR. MANUEL: Including Berkeley?

16 THE WITNESS: Yeah, I think it's

17 a State-wide system.

18 MR. MANUEL: It's a State-wide

19 system we use?

20 THE WITNESS: But on appeal, if

21 we're unhappy with it, we feel like we have to

79

1 take it to appeal, we submit income and

2 expense information and it is considered. And

3 we have that State level.

4 MR. SURKAMP: One thing I noticed

5 is there's a bit of a deviance from the CAMA

6 system, and it's spelled out in the Title 110.

7 It's Title 110.

8 It's always talking about fixing or

9 even the law fixing actual costs and

10 (inaudible due to sirens) money at arms

11 length, and CAMA is talking about equalizing

12 by formula so I suspect a difference.

13 THE WITNESS: There's no doubt in

14 my mind that the CAMA approach is overly

15 simplistic.

16 If we went to my buildings ten to

17 fifteen years ago and measured the outside

18 walls, they didn't know what's inside of them,
19 it's overly simplistic. It's based on square
20 footage.

21 I don't think you can argue that it's

80

1 an overly simplistic approach and it's not
2 that accurate on a few levels but I also
3 believe...

4 MR. CORLISS: But CAMA uses the
5 same approach?

6 THE WITNESS: Everyone uses the
7 CAMA system, right?

8 MR. MANUEL: You're in the midst
9 of another acquisition of another property
10 then in Berkeley County?

11 THE WITNESS: I'm constantly --
12 you know, I'm in that business.

13 MR. MANUEL: So it must still be
14 economical?

15 THE WITNESS: I'm very, very
16 blessed, actually. My middle name is Baruch.
17 In Hebrew it means blessed. I'm very blessed.

18 I can make a good living and I also do -- I
19 recover slums for a living, physically and
20 financially.

21 That's what I do. I'm very fortunate

81

1 to be able to do that. And it's not so
2 simple. You don't see a lot of people --
3 other people running around to do this.

4 The Government plays a game with me
5 to make sure I get the least money possible.
6 It's a constant battle on all levels.

7 MS. MORGAN: It's a constant
8 battle but you're...

9 THE WITNESS: I'm good at what I
10 do, but there's not many people like me and
11 you don't see any new affordable housing in
12 this County, particularly because of this tax
13 issue because we can barely even break even on
14 these properties and that's part of why I'm
15 here today.

16 Anyways, so in other Counties I can
17 submit this income and expense information,
18 and I can have a tax applier that I hire

19 speak. I brought a tax applier with me here
20 today. His name is Randy Marshman.

21 We are not having him speak. He's

82

1 not a licensed appraiser in West Virginia and
2 we don't want to be sidetracked into all that,
3 okay, because there is some arcane rule about
4 that, but all I can tell you is that in other
5 Counties, in other Counties we have tax
6 appliers speak and they don't argue about
7 their authenticity because the numbers are
8 real, and I bought his numbers today, which
9 we're going to talk about and dissect
10 financially my property.

11 And his numbers use a very
12 conservative cap rate which was much more
13 conservative than he used back in 2003 when we
14 used an 11 cap, and now we're using an eight
15 cap. I'm only allowed to make an eight
16 percent return on my investment.

17 This is -- I have right here a
18 National apartment market schedule of cap

19 rates telling how cap rates vary in the
20 country and they vary from 4.25 percent to
21 eight percent, with the average being six

83

1 percent, okay, but I put an eight percent cap
2 rate because my properties are riskier because
3 there's less ability to make money.

4 But it's still within the normal
5 range. A more conservative cap rate than the
6 eleven percent that was used to develop that
7 the appraiser came up with, we've reduced that
8 to an eight percent cap.

9 BY MR. CARYL:

10 Q. Mr. Margolis, if I can
11 interject a question.

12 Do you consider part of the risk on
13 which you base the eight percent cap rate to
14 be the risk of abruptly and sharply increased
15 property tax burden?

16 A. Absolutely. That's one of
17 several reasons. Believe it or not you guys
18 are not my primary problem.

19 My primary problem is the Federal

20 Government which is like a game to them to
21 make sure I don't get any cash flow.

84

1 They severely restrict my rents on an
2 annual basis. On October 1st of every year I
3 put forth a budget for the following year,
4 which goes into effect in January, and they
5 only let me increase like twenty-five dollars
6 a month. They want to keep the rent as low as
7 possible for these people.

8 And you guys notified me on January
9 10th there was going to be a tax appeal, okay.
10 And so now we're having our hearing.

11 Let's say the County wins and the
12 assessment states that that you valued it at,
13 so it goes into effect in September.

14 But I don't have another chance to
15 raise my rents until the following January, so
16 right there one-third of my year, one-third of
17 my cash flow is gone, you know, if this
18 assessment takes place because I don't have --
19 my debt service coverage is very low.

20 In the normal world, debt service
21 coverage, just so you know what it is, the

85

1 norm is 115 to 125. What that means is
2 twenty-five percent cash flow over your
3 mortgage payment or fifteen percent cash flow
4 over your mortgage payment. That's what 115
5 or 125 means.

6 My debt service coverage is 1.05, so
7 I get five percent of the cash flow, five
8 percent of the mortgage payment is my cash
9 flow. Very low. It differs for every
10 property, but I have all the figures here and
11 we can analyze what it is.

12 MS. MORGAN: That was for
13 Jefferson County or is that overall?

14 THE WITNESS: Jefferson County.

15 MS. MORGAN: Well, I would say
16 overall, overall I'm getting 1.05. But if
17 this tax increase takes effect, I'm going to
18 lose a third of that. You know.

19 These are very approximate numbers,
20 but I'm going to barely break even. I'm going

21 to make a little bit of money, but very little

86

1 bit of money compared to the size of the

2 operation.

3 MR. SURKAMP: I wanted to

4 understand the 115, 125. I'm a person like

5 Greg. Can you just hit that again?

6 THE WITNESS: In the average real

7 estate market in the whole country no one is

8 going to do anything for under a 1.15 debt

9 service coverage.

10 That's the absolute minimum for any

11 standard real estate deal. If they can't get

12 fifteen percent of their mortgage payment as

13 cash flow, they don't consider the real estate

14 deal to be viable.

15 But I'm in this crazy business where

16 it's all about break-even. I have properties

17 that are in a 1-0, which means I don't get any

18 cash flow, zero.

19 That's the zero part of the 1-0 or a

20 1.05, and it's all in an effort for the

21 Federal Government to keep the rents at a

87

1 minimum for these tenants.

2 And so I have a problem with the
3 timing of this tax appeal because I can't
4 budget for this increase, and it's going to
5 cut into my already small cash flow.

6 I should be wealthy. I own a lot of
7 apartments, but I don't get any cash flow.
8 It's just absolutely nutty what I do. And
9 you're right.

10 The benefits are up front, but
11 they're in the tax credits which you're not
12 allowed to consider, by the way, for real
13 estate tax valuations. You can talk about tax
14 credits all you want, but it's an intangible.

15 MR. SURKAMP: Did we talk about
16 it in your assessment? Did we include it in
17 your assessment?

18 THE WITNESS: Oh, big time. I'm
19 going to get into the actual numbers in a
20 minute.

21 Putting aside everything, I really

1 would like you guys to just do what's fair and
2 just and think about this besides all these
3 regulations on what it is we're accomplishing
4 here. I serve the bottom thirty percent of
5 the population in your County in incomes.

6 And in some of these projects I serve
7 the bottom twenty percent of the population.
8 Very, very poor people. One out of four of
9 the properties is elderly and is fully
10 subsidized.

11 Okay, I've already told you about
12 interest credit. But now there's something
13 else and it's a direct subsidy from the
14 Federal government.

15 It's called rental assistance.
16 People that have rental assistance only have
17 to pay thirty percent of their adjusted gross
18 income in rent. So no matter what the rent
19 is, they're only going to pay the same amount.
20 Thirty percent of their adjusted gross income.

21 Patrick Henry is an elderly

1 development behind your Wal-Mart. It's fifty
2 apartments. It's fully subsidized. It's all
3 elderly. Well, there's some handicapped
4 folks, but for the great majority it's
5 elderly. And a rent increase will not be a
6 rent increase to them individually, but the
7 Feds will have to put in more money to
8 subsidize the rents to cover the expenses.

9 Okay, well, that's not the case for
10 the other three properties. Spring Run,
11 Bolivar and Shepherds -- and the way, I have a
12 schedule of the rents and the amount of
13 subsidy in each property. They don't have --
14 they have very little direct subsidy, which
15 I'll show you...

16 MR. MORGAN: Federal?

17 THE WITNESS: Federal, yeah,
18 Federal direct subsidy, right. I told you
19 about rental assistance, and that's project
20 based. It's assigned to my project.

21 There's something else that you may

1 be more familiar with called Section 8.

2 Section 8 is a tenant-based subsidy
3 that the Section 8 office gives the tenant,
4 and so if the tenant leaves the subsidy leaves
5 with the tenant.

6 That's the major distinction. Some
7 of these tenants have Section 8 and they're
8 only paying thirty percent of their adjusted
9 gross income. But only three developments
10 besides Patrick Henry, very little direct
11 subsidy.

12 I answered in 2003 that I didn't know
13 whether or not the tax increases would have to
14 be paid by these individuals, but I didn't
15 consider it, and I considered it since then,
16 and I actually have the rent increases for
17 these poor individuals that don't get any
18 subsid -- direct subsidy. They get my
19 interest credit; they don't get direct
20 subsidy.

21 But these very poor people, many of

1 them who are making under ten thousand dollars
2 a year, are going to be paying fifteen to
3 twenty-five dollars more to cover your tax
4 increase directly.

5 MR. MORGAN: Monthly?

6 THE WITNESS: Monthly.

7 MR. MANUEL: Is there a waiting
8 list for these?

9 THE WITNESS: Huge. You have no
10 idea of the demand.

11 MR. MANUEL: So if the Section 8
12 person left you would have someone replace
13 them?

14 THE WITNESS: If your County was
15 a lot more conducive to affordable housing I'd
16 be going crazy trying to fill up affordable
17 housing because you have so many poor people.

18 We have huge traffic every day of
19 desperate people, and the real tragic thing is
20 these people are so desperate that a twenty
21 dollar increase can make or break them, and we

1 actually have to evict them and force them to
2 leave if they can't afford the rent.

3 Here we are doing a good job
4 providing very low income housing for these
5 poor people, but we have to kick them out if
6 they can't afford the extra twenty dollars.

7 And it really makes a huge
8 difference, and that's what I'm talking about
9 on the bigger concept or doing what is just
10 and right. I know you want to get as much tax
11 revenue as possible. I want to remind you
12 that your rental market, your rental, is tax
13 -- you guys -- I don't know of the exact
14 figure, but you guys call it double taxation
15 because your rate on your rental housing is
16 much higher...

17 MR. MORGAN: That's a State
18 function.

19 THE WITNESS: ...is much higher
20 than your single family home ownership
21 housing. So at the beginning these renters

1 are actually paying a lot more in taxes per

2 person than your wealthier people with these
3 half million dollar homes. Right at the
4 beginning, this is before you can consider
5 this tax increase.

6 MS. MORGAN: I'm sorry. You're
7 saying because of the aggressive nature...

8 MR. THOMPSON: It's the
9 classification. It's Class 3.

10 THE WITNESS: And so the argument
11 that Mr. Thompson made yesterday and that he
12 made several years ago as well that says
13 because low income family projects are made up
14 of single mothers their children are
15 uneducated and means that everybody else has
16 to subsidize them, that's really not correct.

17 They're paying more than their fair
18 share of tax burden because the tax rate is
19 starting out much higher, and they are the
20 least able to pay.

21 So up until this point you guys have

1 approved these tax increases and these people

2 have been paying whatever you say they should
3 be -- and they've been overpaying. They've
4 been double paying, the poorest people in your
5 County, double paying for this tax, and that's
6 the truth.

7 You guys are not subsidizing them.
8 The poorest people are subsidizing your all's
9 children that are making more money in this
10 County. And so I feel very strongly.

11 Unfortunately, I really wanted to
12 have Jo Duke here. Unfortunately, she's ill.
13 She manages many of my properties here.

14 She manages three of the four
15 properties in question, and I wanted to
16 highlight her.

17 She's a very modest woman but she's a
18 true hero, a true unsung hero in your County.
19 You know, sixteen year olds have a baby and
20 they come to her, they need housing, but they
21 don't have enough money to pay the rent. So

1 she goes to the local churches.

2 She goes to some rich individuals in

3 town that she knows will help these poor
4 people, and she gets direct aid for these
5 people.

6 That's not even part of her job
7 description. Her only job is to manage this
8 housing but she's a total hero in my eyes.

9 She goes and helps your most extreme
10 situations and she can tell you the situation
11 is only getting worse lately with the increase
12 in costs.

13 MS. MORGAN: Well, the argument
14 is equity as far as the tenants are concerned.
15 I think the Board understands your arguments.
16 It's an interesting question.

17 To what extent the Board in its
18 decision should bring those to bear in the
19 area of taxation.

20 THE WITNESS: Right. In my
21 opinion you should separate low income

96

1 housing. It's very special.

2 It's like nothing else. It's not

3 like any other income-producing property
4 because we have restrictive rents, and the
5 public purpose is big. We're trying to house
6 your poorest people and give them a decent
7 place to live.

8 MS. MORGAN: I would just simply
9 repeat that there is a legal question as to
10 whether we could consider those arguments but
11 we appreciate having them.

12 MR. SURKAMP: Let me add that the
13 reason the law brings this in front of the
14 County Commission is the County Commission is
15 filtering through its obligations to be the
16 police power of the public health, safety, and
17 welfare.

18 Obviously, someone decided that this
19 was brought to us to appeal and it makes no
20 sense that they completely scraped our
21 constitutional obligations in this review

97

1 process.

2 MS. MORGAN: But the only legal
3 question the Board can consider is the

4 question of fair market valuation of these
5 properties. Now, if the Board decides that
6 the equities of the renters should bear on
7 that, fine, but that's a question.

8 THE WITNESS: That's why I
9 started out with your West Virginia
10 regulations and your West Virginia
11 constitution. You can't consider intangibles.
12 That's part of your law.

13 And then in my point that I believe
14 the income approach is the most (inaudible)
15 besides what your own regulations say, your
16 neighboring States feel the same way, and I
17 have exhibits to give to you as to their laws
18 which are all within a few years old.

19 It's very much a forefront across the
20 nation. More states are joining and Virginia
21 just started this year in how to treat low

98

1 income housing.

2 MS. MORGAN: I believe that this
3 Board would be unanimous in wishing that the

4 West Virginia legislature would take the lead
5 and be the most enlightened state in every
6 area of developing law but I don't think we're
7 in that situation.

8 MR. SURKAMP: I think one thing
9 that's important, you pointed out what could
10 be a clear error in terms of intangibles tax
11 credits being used to assess. That could be a
12 clear error and that's the basis for us to
13 decide. And it's in conflict with the
14 Constitution of the State.

15 MS. MORGAN: Mr. Morgan.

16 MR. MORGAN: I would like go back
17 to something that Greg started with a little
18 while ago.

19 To your knowledge, is a hybrid system
20 used in other counties, what he called a
21 hybrid system?

99

1 THE WITNESS: I'm not
2 knowledgeable about that.

3 MR. MORGAN: You don't know,
4 right?

5 THE WITNESS: I know it's a...

6 (Whereupon, overlapping

7 speakers caused a portion

8 of this hearing unable to

9 be transcribed)

10 THE WITNESS: ...and I would

11 probably agree with the (inaudible) although I

12 do not know that it's similar in other parts

13 of the State.

14 MR. MORGAN: Again, my question

15 is, is it possible? Maybe I should ask is it

16 possible for us to use a cost approach and

17 also look at income information and make some

18 judgment in between the two?

19 MR. CARYL: If I could respond to

20 it on a legal basis, which I think is the

21 context of your question. I was on the

100

1 Committee then, the property tax case out in

2 Morgan County, although the Circuit Judge

3 agreed my client's property was clearly

4 eligible and absolutely was entitled to be

5 certified and approved for timberland
6 methodology, significant discount like
7 farming.
8 The Supreme Court ruled this is the
9 case (inaudible) Morgan County. Supreme Court
10 ruled that the County Commission whose
11 decision I was appealing in the first place,
12 had the absolute discretion in the exercise of
13 its role as the Board of Equalization and
14 Review to not review, did not even recognize
15 that statutory scheme that had been followed
16 and there was no dispute that they were
17 entitled under the law to manage timberland,
18 and the County Commission's ruling was that by
19 the Supreme Court the County Commission had
20 the discretion to set the appraisal based on
21 far broader general principles.

101

1 MR. THOMPSON: Can I address
2 that? Richard Gay was involved in that, was
3 he not?

4 MR. CARYL: Mr. Gay was counsel
5 for the County Commission.

6 MR. THOMPSON: That's right. And
7 that involved a claim of managed timberland in
8 a subdivision or what was at least platted as
9 a subdivision, was it not?

10 MR. CARYL: Well, there was a
11 plat but the ruling of the Supreme Court was
12 taken by every County including some of them
13 really just said we can disregard it
14 altogether, that they could -- that the
15 discretion of the County Commission sitting as
16 a board trumped the statutory scheme of
17 managed timberland. That was the...

18 MS. MORGAN: That's the way the
19 rule was taken. Or, you're saying this is a
20 case -- what year was this -- what year was
21 the Supreme Court case?

102

1 MR. CARYL: It was subsequent
2 certainly -- oh, I take that back. It may
3 have been -- it actually may have been -- it
4 may have -- no, it was even cited or
5 considered in the...

6 MS. MORGAN: The Board ruled
7 against you and then the Circuit Court
8 reversed the Board...

9 MR. CARYL: Exactly.

10 MS. MORGAN: And then the Supreme
11 Court reinstated...

12 MR. CARYL: Reversed the Circuit
13 Court, reinstated the County Commission
14 ruling.

15 MR. THOMPSON: But there was
16 consideration there that this was platted land
17 for -- being sold for subdivision for houses.
18 And they were asserting a claim of managed
19 timberland.

20 MR. CARYL: Mr. Thompson's right,
21 but as we all know, following the Supreme

103

1 Court, they often speak in far broader terms
2 than the case may call, and they stated
3 clearly -- I mean, the association and
4 counties and all of them believed it, that
5 they could trump managed timberland.

6 Now, I don't think that's correct. I

7 think if you revisit it, it may not be the
8 case, but it illustrates the breadth of the
9 discretion of the Commission sitting as the
10 Board of Equalization and Review.

11 MR. MORGAN: Do you have an
12 argument against that, that we do not have
13 that...

14 MR. THOMPSON: Yeah, I think --
15 this is my argument. The case law that I have
16 provided to you clearly limits your role here
17 as a board of review, and I have provided the
18 case to you, I guess, (inaudible), maybe at
19 the very beginning, which was a case that says
20 that your discretion is limited strictly to
21 finding error and there has to be, then, a

104

1 showing of clear and convincing evidence on
2 the part of the taxpayer. I forget that case.

3 MS. MORGAN: Presumption
4 (inaudible) assessment determination
5 (inaudible) and it's the taxpayers burden to
6 prove by clear and convincing evidence that

7 there was an error in the determination...

8 MR. THOMPSON: And that's a very

9 -- that's a very strict standard. It limits

10 your discretion completely.

11 Now, in terms of your authority under

12 the police powers, this -- yes, the police

13 powers are delegated by statute to -- police

14 powers are delegated to County Commissions, to

15 municipalities and other subdivisions the

16 State has chosen because you are here locally

17 that you can sometimes deal with things more

18 effectively than the State government can.

19 They have in certain instances

20 delegated those powers to you and sometimes

21 where its a delegation that's not overly clear

105

1 where it's reasonable and necessary to imply

2 your exercise of authority and we've talked

3 about this before in other cases they will

4 allow you to exercise those police powers

5 delegated but those police powers are

6 delegated to you in two areas.

7 Acting in a legislative capacity and

8 acting in the executive capacity. You're not
9 wearing those hats here today. You're sitting
10 here today as judges applying the law, and I
11 think the law limits the scope of your review.

12 MR. CORLISS: I want to clarify
13 something.

14 MS. MORGAN: Mr. Corliss.

15 MR. CORLISS: You say that you
16 need to show error, and when I look at the
17 Huntfield, the Steptoe decision three years
18 ago, it seems to me where the petitioner comes
19 in and essentially his appraised values are
20 fifty percent of what the County's appraised
21 values are for the same -- for the four

106

1 properties, roughly that much.

2 And he also says that he's barely
3 breaking even. So I mean, I accept that
4 assumption he's just barely breaking even and
5 so forth, but there seems to be some error,
6 you know, in how we approach this, and you
7 said the tax assessor's office should be fair,

8 but you don't offer how, you know, between
9 fifty percent, which there's a big discrepancy
10 there between what they say the property is
11 worth and what you say it's worth, and you say
12 it's worth not much in terms of just barely
13 breaking even, but it seems to me somewhere.

14 I would like to know a suggested
15 method that you would pay the tax assessor to
16 be complaint with West Virginia law.

17 THE WITNESS: Exactly.

18 MS. MORGAN: Mr. Corliss, and if
19 I might add, if the case in 2003 was where the
20 taxpayer and the assessor were -- the
21 taxpayer's values were at half of the

107

1 assessor's value, this case now, we're closer
2 to a third. The taxpayer's proportion is
3 closer to a third than half of the assessor's
4 value.

5 THE WITNESS: I would love to
6 give you my two cents on that.

7 MR. THOMPSON: Well, that's what
8 I'd like to know, what the taxpayer...

9 THE WITNESS: What I'm saying is
10 your regulations call for consideration of the
11 income approach, plain and simple, period,
12 end of story.

13 It also says that for each pieces of
14 property you're supposed to consider all three
15 approaches, and then weigh the one that's the
16 most applicable.

17 MR. THOMPSON: Yeah, but how to
18 do it.

19 THE WITNESS: Well, right now
20 you're having no consideration for the income
21 approach and every other county I can submit

108

1 income and expense information and it's
2 considered.

3 MR. THOMPSON: Not in West
4 Virginia, you said...

5 THE WITNESS: Oh, yeah, every
6 other County in West Virginia. I said every
7 other County in West Virginia.

8 MR. THOMPSON: But as I

9 understand your testimony you said you submit
10 them at the time of appeal.

11 You don't give this information to
12 the assessor -- you didn't in our case, at
13 least. None of this information was provided
14 to our assessor in advance...

15 THE WITNESS: Right, I'd like to
16 address that. They don't want it here because
17 they said that if they get it they have to get
18 it from everybody or it wouldn't be fair to
19 everybody.

20 MR. THOMPSON: Who said that?

21 THE WITNESS: I have bits of a

109

1 transcript from 2003, they say, well, you can
2 give it to us but we may not utilize it, you
3 know.

4 MR. THOMPSON: Well, may not but
5 they may. You said they wouldn't.

6 THE WITNESS: She basically said
7 in a previous time that there's no way that
8 she could consider because she had to do it
9 before everybody, otherwise it wouldn't be

10 fair.

11 MR. CARYL: But it's a clear
12 principle of law that a citizen is not
13 required to engage in a fruitless or vain,
14 fruitless act.

15 Clearly, it is the absolute, official
16 policy of the Assessor's Office in Jefferson
17 County that they will not use the income
18 method for discounted properties. And it says
19 our failure to offer it up...

20 MS. MORGAN: Is that in dispute?

21 MR. THOMPSON: Did you file a tax

110

1 return with the Jefferson County Assessor's
2 Office?

3 THE WITNESS: Sure.

4 MR. THOMPSON: You file, before
5 October 1, you file a return?

6 THE WITNESS: Correct?

7 MR. THOMPSON: Do you not?

8 THE WITNESS: I do.

9 MR. THOMPSON: Did you not

10 provide that information?

11 MR. CARYL: Again, you know, it's
12 still my side of the case. The point is that
13 that's it a totally bogus position to say that
14 we failed to provide it.

15 We're coming to the one body that has
16 the discretion to apply who in the past
17 hearing on this case, on these people, on this
18 taxpayer, you know, there was a glimmer of
19 recognition of the legitimacy of the income
20 approach. You know, those are some of those
21 portions of the transcript of deliberation.

111

1 So what we're saying is we're
2 offering the income information; we're about
3 ready to move into that part of the evidence.
4 It won't have to be long. It's here now.

5 So the Commission will have what it
6 needs to use the income method.

7 MR. THOMPSON: Give it to us.

8 MS. MORGAN: You've given very
9 strong arguments, and that's fine, and I
10 actually -- I myself am pretty much persuaded

11 that there wasn't -- put it this way -- it
12 appears that the assessor's office was not
13 welcoming that information as the Assessor's
14 office would have used it to value the
15 property differently. And that's pretty much
16 what I'm...

17 THE WITNESS: The Assessor says
18 it's unavailable, and it's unavailable because
19 they don't ask for it and we're only too happy
20 to give it to you.

21 MR. CARYL: The absolute truth of

112

1 the matter is, is the property tax returns
2 that are filed in terms of the real estate are
3 absolutely, utterly ignored by the Assessor's
4 office because they feel bound to follow the
5 CAMA. I mean, you could take any position you
6 want about real estate...

7 MS. MORGAN: And one can
8 certainly understand the necessity for a mass
9 appraisal system given the burden on the
10 Assessor valuing every property in Jefferson

11 County.

12 MR. CARYL: There's all kinds of
13 structures in West Virginia, public,
14 government process that have been found to be
15 unconstitutional. The management of our
16 prisons was just one example.

17 That's why we have the regional jail
18 system and all the costs that that costs. I'm
19 not saying there isn't a dollar value, but
20 Justice, former Justice Neely called the
21 property tax appeal system the worst structure

113

1 in the whole State code.

2 And he's absolutely right, it's a bad
3 one. And he says that just because this is
4 the way it's done and there's good objective
5 reasons why the assessor's office does what it
6 does, doesn't make it legal or constitutional.

7 MS. MORGAN: Your point is well
8 taken. Mr. Manuel.

9 MR. MANUEL: Well, your point may
10 be well taken that this is the wrong venue.
11 They're trying to talk out the merits of the

12 system and so forth.

13 That's not where we are. I don't

14 think that's the function of the

15 commissioners. Our function is to see if

16 there is error in the current replacement

17 method, is this an error here.

18 THE WITNESS: I'm just going to

19 give a very highlighted summary of why I

20 believe it's in error. Your regulations

21 clearly state the income approach must be

114

1 used.

2 Your regulations clearly say for each

3 species of property you're supposed to

4 consider all three approaches and pick the

5 best approach. That's in your regulations.

6 The West Virginia Constitution

7 clearly says intangibles cannot be considered.

8 Now, that leaves whether it's dominant or

9 servient easements or whether it's external

10 obsolescence, economic obsolescence, whatever

11 you want to call it, there's clearly

12 restrictions on this property that needs to be
13 considered.

14 And the last thing is -- what's the
15 last thing? So all I'm saying is you have to
16 follow these guidelines and they haven't been
17 followed and that you are in error because
18 they haven't been followed.

19 MS. MORGAN: Mr. Corliss.

20 MR. CORLISS: You still haven't
21 answered my question.

115

1 THE WITNESS: Now I'm ready; now
2 I'm ready.

3 MR. CORLISS: Now you're ready to
4 give...

5 THE WITNESS: I'm ready to give
6 your answer.

7 MR. CORLISS: You're saying that
8 if you did give the data to the tax assessor's
9 office, how could they reasonably apply your
10 data so that I could be convinced that here it
11 is, it's easing up the due and how would they
12 do it? You haven't suggested...

13 THE WITNESS: I'm going to answer
14 that directly.

15 MR. CORLISS: You just
16 listened...

17 THE WITNESS: No, I'm going to
18 answer that directly. That's one approach.
19 You have different values for each approach.

20 MR. CORLISS: What approach?

21 THE WITNESS: There's three

116

1 approaches: The income approach, the cost
2 approach and the sales approach. She's using
3 the sales and the cost approach. Okay,
4 period.

5 The income approach has to be
6 considered for a particular species of
7 property. I believe low income housing is
8 very special because it's income and rent
9 restricted so there should be a heavier
10 weight, there should be a heavier weight to
11 the income approach.

12 So let's say you give it a seventy-

13 percent weight and let's say you give you the
14 other two approaches a twenty-five percent
15 weight, you have the three different
16 assessments, and you give it a higher -- you
17 know, you don't go all the way as low as the
18 income approach but you go most of the way as
19 low as the income approach because it's the
20 most applicable method. The appraiser weighs
21 it and gives it a higher authority but not

117

1 full authority.

2 MS. MORGAN: Here, I think...

3 MR. CORLISS: Simple question of
4 the Assessor's office. Is the income approach
5 ever used in this County?

6 MS. BOWERS: No.

7 MS. MORGAN: Okay, now, just a
8 minute. I want to point out, there are two
9 decision points. One decision point is for at
10 least three members of the board to be
11 convinced that there's been an error.

12 Once we get past that point, then
13 it's our duty within a wide range of

14 discretion -- and I don't think Mr. Thompson
15 would disagree with that -- once we determined
16 that the assessor's office is in error if
17 three of us so conclude, then we would be
18 beyond that point, so Mr. Manuel, when I talk
19 about abuse of discretion and clear and
20 convincing evidence, I mean, it's that point
21 beyond which if this Board gets beyond that

118

1 point by majority rule, then it would be
2 entirely up to us to redo the evaluation in
3 any manner that we think is reasonable.
4 Do you see what I mean? In other
5 words, they're not a remand to the Assessor's
6 office. We're not sitting here to say, oh,
7 you made a mistake, go fix it. If they made a
8 mistake, we fix it, for this year.

9 MR. CARYL: I agree.

10 MR. MANUEL: And we might do it
11 on the information we're about to hear so
12 let's...

13 MR. THOMPSON: Mr. Margolis was

14 going to testify for a half an hour...

15 THE WITNESS: That's okay, go

16 ahead. Please ask me a question.

17 MR. THOMPSON: I haven't done my

18 cross-examination yet.

19 MS. MORGAN: I understand that.

20 THE WITNESS: You only asked me

21 one question so far.

119

1 MR. SURKAMP: This is what I'm

2 hearing. I think a person can say there's an

3 error in that the income approach, as we just

4 heard, is never used in this County.

5 And the contrast with 1110 says that

6 you have three types and you use them

7 individually or mixture as the most relevant,

8 and I just find it impossible to believe that

9 the income approach is never considered

10 relevant by our tax department in this County.

11 I think it's in error.

12 The idea of the intangibles, if it's

13 true as you said, should not be any tax

14 credits or intangibles and therefore should be

15 not considered in the assessment, that could
16 be an error if the Constitution says what you
17 state it says. Those are two clear errors in
18 my mind. I might as well tell you.

19 My only question is this: Is you
20 really don't think you're a commercial or
21 industrial property as the phrase has been

120

1 used here?

2 THE WITNESS: Well, I'm a
3 particular species of commercial property. I
4 do apartments. And so it's always a fine
5 line, am I residential or am I commercial?

6 So I don't even know the answer of
7 whether I'm residential or commercial. But
8 I'll treat it commercially generally.

9 MS. MORGAN: All right. I think
10 the Board is satisfied for the moment so
11 please go ahead.

12 THE WITNESS: I mean, everywhere
13 I am I'm treated like a commercial property.
14 Go ahead.

15 MR. CORLISS: I had one...

16 MS. MORGAN: I'm sorry, we really
17 need to move on. Mr. Corliss, is it something
18 that is affecting your judgment of the case...

19 MR. CORLISS: Well, we've got the
20 income; we've got the fair market value and
21 we've got cost replacement. We're using cost

121

1 replacement, CAMA system.

2 MR. SURKAMP: Using a
3 combination...

4 MS. MORGAN: Sales.

5 MR. CORLISS: But anyway, and the
6 suggestion that they all three be weighted so
7 we have an income which is provided us and we
8 have the cost replacement which the assessor
9 has provided us, and a fair market value
10 somehow is -- neither one -- or you don't say
11 replacement is the fair market value, but fair
12 market value, would that come out of the core
13 paths, the book which lists all of the -- what
14 apartments would rent for?

15 THE WITNESS: The sales comps,

16 there really are no sales comps because...

17 MR. CORLISS: These are rental
18 comps?

19 THE WITNESS: You see, my
20 investors can't sell their property without
21 risk of recap...

122

1 MR. CORLISS: (Interposing) I'm
2 asking about rental comps.

3 THE WITNESS: Oh, yeah, yeah, if
4 you did the sales approach, we get new sales
5 of comparable properties. It's your
6 determination of whether or not conventional
7 apartments are comparable properties.

8 MR. CORLISS: Well, no, I mean,
9 it's just one evaluation of what a property
10 might rent for that were commercial and not
11 providing apartments for low income.

12 MR. THOMPSON: Mr. Corliss, you
13 have to understand that they're not doing fee
14 appraisal here. They're doing -- they look
15 for comparable sales of commercial land.

16 MR. CORLISS: I know.

17 MR. THOMPSON: And it doesn't
18 have to be a subsidized housing. It could be
19 anything. They look at commercial land,
20 period, and value it as commercial land, and
21 if it's improved they back the structure off.

123

1 So they're not out there looking for
2 comparable sales. And that's the way CAMA
3 works all over.

4 MS. MORGAN: And indeed it would
5 be impossible.

6 MR. THOMPSON: Because there are
7 rural counties that wouldn't have anything. I
8 mean, we have a little bit, but not much.

9 MS. MORGAN: You can't turn a
10 mass appraisal system into an individual fee
11 appraisal.

12 THE WITNESS: There are four
13 county principles, the income approach, you
14 can't use the intangibles...

15 MR. THOMPSON: Take a break.
16 This is going to probably go...

17 THE WITNESS: ...economic
18 obsolescence or servient easements, the
19 restrictions have to be considered. I did it
20 again. And that we have a special class of
21 properties that deserve special attention.

124

1 MS. MORGAN: There's been a
2 request for a break. I would like to ask the
3 Board -- and this is a fascinating discussion.
4 We could go on and on, I'm sure, but when we
5 come back let's let the direct testimony
6 finish.

7 (Whereupon, a recess
8 was taken)

9 MS. MORGAN: Mr. Caryl.

10 MR. CARYL: I have asked
11 Mr. Marshman to deliver a copy of the exhibit
12 I'm going to examine the -- it's actually four
13 separate exhibits I'm going to examine the
14 witness about.

15 And, Mr. Marshman, you need to give
16 Mr. Thompson a copy as well.

17 DIRECT EXAMINATION

18 BY MR. CARYL:

19 Q. Mr. Margolis, I'm going to hand
20 you four sets of documents and ask if you
21 could identify these.

125

1 A. Well, the first page is the
2 complaint and all the subsequent pages are
3 income and expense information on the subject
4 properties. The second page being the summary
5 page and then more detail behind the second
6 page.

7 Q. Okay. And then is the first
8 one in front of you so you can link the
9 exhibit with the number with reference to
10 which property?

11 A. Shepherds Glen.

12 MR. CARYL: Shepherds Glen. I'm
13 going to ask that this be marked and admitted
14 into evidence as Petitioner's Exhibit 2.

15 MS. MORGAN: Is there any
16 objection, Mr. Thompson?

17 MR. THOMPSON: We don't, Judge.

18 We object to the material, the results, but we
19 don't object to it being admitted for the
20 purpose it's being offered.

21 BY MR. CARYL:

126

1 Q. The second, now I can get the
2 questions of this witness...

3 MR. THOMPSON: Shepherds Glen is
4 first?

5 MR. CARYL: Yes, Exhibit 2. I
6 have intentionally -- they're in the same
7 order as the Assessor's exhibits, 2 through
8 5...

9 MR. THOMPSON: Shepherds Glen is
10 2?

11 MR. CARYL: Yes. I'm trying to
12 order them so that they match up in the same
13 number as the counterpart of the assessor's
14 exhibits.

15 MS. MORGAN: All right. You want
16 to proceed in the same order among four
17 properties, the same order that would start

18 with Shepherds Glen?

19 MR CARYL: Right. And that's

20 Exhibit No. 2.

21 MR. SURKAMP: So Shepherds Glen

127

1 is the first.

2 MR. THOMPSON: Sure.

3 BY MR. CARYL:

4 Q. The second one is the one I'm

5 now handing you, Mr. Margolis, what property

6 is that called?

7 A. The apartments are actually

8 Spring Run Apartments, but it's Patrick Henry

9 Way Limited Partnership.

10 MR. THOMPSON: Which number?

11 MR. CARYL: I would ask that be

12 marked and admitted into evidence as

13 Petitioner's Exhibit No. 3.

14 BY MR. CARYL:

15 Q. And the third package...

16 A. Is Patrick Henry Apartments,

17 the elderly development, and the partnership

18 name is PHA Associates Limited Partnership.

19 MR. CARYL: I ask that they be
20 identified as Petitioner's Exhibit No. 4,
21 Again, to match the Assessor's...

128

1 MS. MORGAN: The same order as
2 the Assessor's.

3 MR. THOMPSON: And Bolivar
4 Court's is what number?

5 BY MR. CARYL:

6 Q. The fourth document that I'm
7 showing you, Mr. Margolis...

8 A. Bolivar Court Apartments.

9 MR. CARYL: Okay. And I ask that
10 be marked and admitted into evidence as
11 Petitioner's Exhibit No. 5.

12 MS. MORGAN: So Shepherds Glen
13 is 2; Patrick Henry 3; PHA Associates 4 and
14 last is Bolivar Court?

15 MR. CARYL: Yes, ma'am.

16 BY MR. CARYL:

17 Q. Now, before I ask you, I wanted
18 to get those in the right order, but before I

19 ask you any further questions about the
20 Exhibits 2 through 5, Mr. Margolis, can you
21 describe in general terms the nature of any of

129

1 the restrictions and limitations on the use of
2 these four properties because of their
3 participation in the subsidized housing
4 program?

5 A. Certainly. Shepherds Glen,
6 fifty percent of the apartments have to be at
7 fifty percent rents, and fifty percent of the
8 apartments have to be at sixty percent rents.
9 Okay.

10 Spring Run, which is the next in
11 line, fifty percent of the apartments have to
12 be at forty percent rent, and fifty percent of
13 the apartments have to be at sixty percent
14 rents.

15 The next one is Patrick Henry. Forty
16 percent of the apartments have to be at forty
17 percent rents and sixty percent of the
18 apartments have to be at sixty percent rents.

19 And the last one is Bolivar. Fifty

20 percent of the apartments have to be at fifty
21 percent rents, and fifty percent of the

130

1 apartments have to be at sixty percent rents.

2 So the people that live in these
3 apartments have to be under a fifty percent
4 income limit if it's at fifty rule, and a
5 forty percent income limit if it's a forty
6 percent rule, or sixty percent income limit if
7 it's a sixty percent rule.

8 I have a table which shows you all
9 those numbers. So that's the rented income
10 section, and then the second section of
11 restrictions, Shepherds Glen is going to be
12 low income housing for forty-five years from
13 the date that I did this apartment
14 development, rehab, which was around 2000.

15 So until 2045 approximately it has to
16 stay for these very low incomes. Okay.

17 Spring Run, same thing. Forty-five
18 years. And that was done in like '98 or
19 so, '99.

20 And then the next one was Patrick
21 Henry. I only have to keep it low income for

131

1 thirty years so that's going to be thirty
2 years from 1996 so until 2026 it has to be at
3 the income limits I've already given you.

4 And then Boliver is the last one,
5 forty-five years from 2000 roughly, 2045, it
6 has to be at these very low incomes and rents.

7 Q. Mr. Margolis, I'm going to hand
8 you four other sets of documents and ask if
9 you could identify them, and I've put them in
10 the same order of the exhibits, of the
11 Exhibits 2 through 5. If I can just confer
12 with Mr. Marshman.

13 A. By the way, the fourth
14 principle I couldn't come up with is economic
15 rent. It's subject to negotiation, but it's
16 truly the market area.

17 You know, is it just the low income
18 properties or is it the whole County? And
19 economic rent was the fourth principle of that
20 regulation.

21 Q. Okay. Mr. Marshman will be

132

1 distributing copies of these same four
2 documents to the Commission and Mr. Thompson.
3 But I'm going to ask the witness to identify
4 generally what these four different documents
5 are.

6 A. Well, they're called regulatory
7 and restricted covenants for land use
8 agreement, but to put it in layman's terms
9 because I'm a layman, it's a deed restriction.
10 These are extended use covenants.

11 When I bought the property, I had to
12 record a deed. Right behind the deed I had to
13 record this document, to go to the courthouse
14 whenever the deed was recorded, right behind
15 that document I had to record these covenants
16 that run with the deed for low income
17 restrictions that I've already mentioned, the
18 rent incomes and the extended use.

19 So this is everything outlined
20 before, you know, the fifty percent of fifty,

21 all the income and rent restrictions and the

133

1 length of time are in these documents and

2 they run with the land and...

3 MR. CORLISS: (Interposing) Can

4 there be changes -- can be changed?

5 THE WITNESS: They cannot be

6 changed. It's forty-five years in three of

7 the four cases and thirty years in one of the

8 forty.

9 MR. SURKAMP: One second. We're

10 going to get confused if we don't get our

11 documents straight. I've got one whole set of

12 covenants.

13 Well, there was one that was sort of

14 -- the ones that were distributed should have

15 been -- Commissioner Morgan's -- the first

16 stack was distributed and it should be just

17 to one person.

18 MS. MORGAN: It only went to

19 Rusty.

20 I'm not anticipating that the Board

21 will need to delve into those documents in any

1 detail. The purpose certainly in placing them
2 into the record is acknowledged.

3 These documents appear, indeed, to be
4 in order and to reflect the covenants and
5 restrictions on the property for those times
6 certain as you stated.

7 MR. CARYL: Madam President, I'll
8 proceed to have the witness identify each of
9 the four of them so that they can be marked
10 with exhibit numbers. And again, they're in
11 the same order as the other exhibits.

12 BY MR. CARYL:

13 Q. Mr. Margolis, I'm handing you
14 the first of these four sets of restricted
15 covenants that you identified. Which property
16 does that relate to?

17 A. Shepherds Glen.

18 MR. CARYL: Okay, I ask that that
19 document be marked as Petitioner's Exhibit No.
20 6 and admitted into evidence.

21 BY MR. CARYL:

1 Q. Mr. Margolis, I'm handing you
2 the second of the four. What property do
3 these restrictions relate to?

4 A. Spring Run.

5 Q. And what's the ending one?

6 A. Patrick Henry Way Limited
7 Partnership.

8 MR. CARYL: I move that this
9 marked and admitted into evidence as
10 Petitioner's Exhibit No. 7.

11 BY MR. CARYL:

12 Q. Handing you the third of the
13 four and ask you what property do those
14 restrictions relate to?

15 A. Patrick Henry Apartments, PHA
16 Associated Limited Partnership.

17 MR. CARYL: I move that this
18 exhibit that's been identified be marked as
19 Petitioner's Exhibit No. 8 and admitted into
20 evidence.

21 BY MR. CARYL:

1 Q. Finally, I'm handing you fourth
2 of the four, Mr. Margolis. What property do
3 these restrictions relate to?

4 A. Bolivar Court Limited
5 Partnership, Bolivar Court II Limited
6 Partnership.

7 MR. CARYL: I ask that this
8 document be marked and admitted into evidence
9 as Petitioner's Exhibit No. 9.

10 BY MR. CARYL:

11 Q. Now, back to Petitioner's
12 Exhibits 2, 3, 4 and 5, would you explain the
13 data that is in each of these exhibits, and
14 particularly with reference to the second
15 page, second sheet that's in each one of them.
16 Handing you Petitioner's Exhibit No. 2.

17 A. Okay. In my opinion the key
18 page is page No. 2. It's a summary of the
19 income and expense information by year in
20 total, not individually, but in total for the
21 whole apartment development. That's what it

1 is.

2 Q. And based on -- what's the
3 source of the -- first of all, who prepared
4 this schedule?

5 A. Well, Randy Marshman back here
6 prepared this but it's based upon the budgets,
7 the actual operating budgets for my
8 properties, which I also have.

9 Q. Okay. Now, so the financial
10 records of that partnership were the source of
11 the daily -- the page two of this exhibit?

12 A. Yes, it ultimately also comes
13 from the operating budget of my apartments.
14 But this is a summary by year of the income
15 and expenses.

16 Q. Would you then explain the
17 conclusions that you would draw based on the
18 data. Explain how the data is presented.

19 A. Well, we're using a cap rate of
20 eight percent. I showed you how we came up
21 with that value, and this is a lot more

1 conservative than the cap rate we used four
2 years ago. In the first half -- the top part
3 of the page all the income possibilities of
4 the apartments. You know, the rent revenue is
5 higher.

6 You subtract from the rent revenues
7 the vacancies, obviously, because you normally
8 don't have a full hundred percent complex,
9 people are dying or moving out or there's
10 always transition.

11 Even if the demand's a hundred
12 percent, people move in and out and die in
13 this world. So occupancy doesn't stay at a
14 hundred percent.

15 And then we have extra revenue which
16 could come from the laundry machines or come
17 from charging late fees to the residents. And
18 that's what the other -- you know, the other
19 income is. And then you've got the expenses
20 which have categories. And so they're
21 subtracted from the income, the net operating

2 And then on the cap rate, using this
3 income approach, because this is income minus
4 expenses, the indicated value is what we feel
5 it's worth and the proposed assessments is
6 what you all are saying it's worth basically.

7 Q. And with reference to the
8 expense section, Mr. Margolis, are all charges
9 included in those expenses or is there
10 anything omitted to determine -- to subtract
11 the paying net operating -- are there any
12 other charges that the property bears that
13 aren't necessary?

14 A. Yes, this does show all the
15 income and expenses, but then you see there's
16 net operating income. It's not like I get to
17 keep that money. Where that money goes is I
18 have escrows.

19 I have tax and insurance escrow that
20 I have to set up. So every month I'm putting
21 away one-twelfth of all my real estate taxes

1 and insurance for the year.

2 I have a replacement for reserve
3 escrow, which is fifteen dollars a year per
4 property, which is an escrow to keep the
5 property up so if the roof needs fixing or if
6 the siding needs fixing or to turn the
7 apartments and provide new carpet and tiles,
8 et cetera, and then there's an operating
9 account as well.

10 And the operating accounts normally
11 handle refrigerators or smaller cash items
12 that need to be done, and the replacement for
13 reserves handle the bigger capital items that
14 need to be done over time.

15 So these are reserves and escrows to
16 keep the property up in the future.

17 Q. So is it fair to say that in
18 the calculation on the second page of the
19 exhibit, that the appropriation of those --
20 the funds of those escrows is not taken into
21 account in the calculations?

141

1 A. That's absolutely correct. In
2 fact...

3 MR. THOMPSON: What percentage
4 was escrow?

5 THE WITNESS: The replacement for
6 reserves is approximately fifteen grand a year
7 per property. And I have to fund it until the
8 property has a hundred and fifty grand in
9 reserves.

10 MR. THOMPSON: You mean, a group
11 of...

12 THE WITNESS: I have to fund it
13 every year out of the net operating income.

14 MR. THOMPSON: You mean the group
15 of apartments...

16 THE WITNESS: Each complex,
17 fifteen thousand a year, and then there's a
18 certain amount that goes into your operating
19 account, which basically the Government has
20 designed so you're supposed to have your
21 return -- my cash flow will come out of the

142

1 operating account, but it only comes out of
2 the operating account if I have a hundred and

3 ten percent in excess of the operating
4 account.

5 Do you follow me? They have a rule,
6 otherwise I can't take my cash flow.

7 And in the last item is the tax and
8 insurance escrow where every month I have to
9 set aside one-twelfth of the year's taxes and
10 insurance.

11 BY MR. CARYL:

12 Q. And didn't you testify earlier
13 that those budgets and those requirements are
14 established prior to the time that you know
15 what your property taxes are going to be?

16 A. Actually, all that stuff is in
17 my budget, my operating budget.

18 Q. Now, so based on the way the
19 data is presented, what is your conclusion as
20 the owner of these properties to the value of
21 the property based on income method?

143

1 A. In this particular case it
2 says 154,400.

3 Q. Is that your conclusion?

4 A. Yes.

5 Q. Now, Mr. Margolis, with respect

6 to the other three exhibits, take each one at

7 a time, I'll ask you that same final question.

8 First, would you confirm that they are all set

9 up and arranged in the same fashion?

10 A. Yeah, they're all exactly the

11 same program with exactly the same sort of

12 restrictions. Some have additional forty

13 percent versus fifty percent or thirty versus

14 forty-five years, but they're very, very

15 similar.

16 Q. But the table on page two...

17 A. It's all the same.

18 Q. Same approach.

19 MR. THOMPSON: Which exhibit?

20 MR. CARYL:

21 Q. Now, I'm asking you about

144

1 Petitioner's Exhibit 3, and ask you that final

2 question. Based on the data on page two, what

3 is your conclusion as to the value of that

4 property?

5 A. Okay, Spring Run, Patrick Henry

6 Way, 669,200.

7 Q. With reference to Petitioner's

8 Exhibit 4, the THA Associates, which is which

9 property?

10 A. Patrick Henry Apartments.

11 Q. Patrick Henry Apartments. With

12 reference to page two of the exhibit...

13 A. Four hundred and seven, eight

14 hundred.

15 Q. That's your conclusion of the

16 value of that property?

17 A. Yes.

18 Q. And finally with reference to

19 Petitioner's Exhibit 5, the Bolivar Court

20 property, what is your conclusion as to the

21 value of that based on the income method?

145

1 A. Five hundred and twenty-seven

2 thousand, four hundred.

3 Q. Okay, thank you.

4 Now, Mr. Margolis, I'm going to hand

5 you another single sheet of paper, and I've
6 got a copy for Mr. Thompson, and I have got
7 copies for the commissioners as well.

8 MR. THOMPSON: This is what he's
9 already testified to pretty much.

10 THE WITNESS: Only the bottom
11 half.

12 MR. CARYL: He's made reference
13 to this...

14 THE WITNESS: The bottom half.

15 BY MR. CARYL:

16 Q. Mr. Margolis, what is the
17 document I just handed you?

18 A. It was prepared by the
19 president of my management company who was
20 here on Wednesday, by the way. And it's just
21 facts about these particular properties, many

146

1 facts.

2 Q. Well, why don't we go through
3 the facts and explain the columns and the
4 amounts and what each column means.

5 A. Sure. The first column is the
6 increase in -- the dollar amount of the
7 increase in the assessment. And then
8 percentage increase over what the old
9 assessment was, the second column. The third
10 column is...

11 Q. So we're not getting ourselves
12 confused, is the dollar amount of the
13 assessment...

14 A. Increased.

15 Q. ...increased?

16 A. Correct, increase in assessed
17 value.

18 The second column is the percentage
19 increase over the former assessment.

20 The third column is what I was paying
21 last year.

147

1 The fourth column is what -- if you
2 guys gets your tax increase, what I will have
3 to pay this year for July to July.

4 And it shows the change in dollars
5 between the two numbers. Okay. Then it says

6 RTO. That's the cash flow that I'm allowed to
7 make on these properties annually.

8 If everything goes perfectly, if not
9 too many HVAC units fail, if I don't have an
10 increase in the real estate tax assessment,
11 this is the maximum amount that I'm allowed to
12 make every year, the RTO, return to owner it's
13 called.

14 Okay. The next one is the
15 replacement for reserve balance. And that
16 shows in my big escrow what I have to keep
17 these properties up. And by the way, four
18 years ago I spent a lot more money fighting
19 the real estate tax increase, I spent forty-
20 three grand in total out of these four
21 accounts.

148

1 I'm going to spend a lot less money
2 this time but still a lot of money, and it's
3 not -- so anyway, for the escrow replacement
4 for reserve account to fix capital items that
5 go wrong over time with any real estate.

6 Okay.

7 Then the rent increase -- and as I
8 had told you, with the exception of Patrick
9 Henry because Patrick Henry is full subsidized
10 for the great majority, the other three
11 properties, this is the rent increase that
12 these tenants will have to pay.

13 Q. As a result...

14 A. There's a couple...

15 Q. As a result of what?

16 A. As a result of this real estate
17 tax increase. There are some exceptions which
18 I could show you.

19 I'll give you an example. Shepherds
20 Glen has one unit of rental assistance, so
21 that one unit doesn't have to pay any more.

149

1 And Shepherds Glen has one Section 8 unit, so
2 that one unit doesn't have to pay any more.
3 But Shepherds Glen has forty-four units, and
4 forty-two of the apartments will have to pay
5 fifteen dollars more a month.

6 Q. Okay. So the next column, it

7 shows the basic and the market rent for the
8 most part. Unfortunately, I left it out at
9 Patrick Henry but I have it right here if you
10 would like it. And it actually, I have to
11 give you a description of what this is.

12 The lower number, which, the 475,
13 the 413, the 476 and the 495 is called the
14 basic rent, and the vast majority of my
15 residents pay the basic rent, and the reason
16 they pay the basic rent and not any more is
17 because they're very poor and they're way
18 below these income restrictions and rent
19 restrictions.

20 But under the USDA program where they
21 can pay up to eighty percent of median, your

150

1 rent goes up based upon your income. And so
2 the maximum income in Shepherds Glen would be
3 five hundred and twenty, and I don't believe
4 anybody pays that.

5 I do actually have the individual
6 incomes and rents. I have whited out the

7 apartment numbers and their names for privacy,
8 but I bought all the information specifically
9 on what incomes they make and what rent they
10 pay.

11 And then the farthest right column is
12 the maximum rent that I'm able to charge, and
13 I believe that's at the sixty percent level.
14 But I have this sheet which will describe
15 exactly. So that's the maximum rent that I'm
16 able to charge if they made more money, and
17 that's at the sixty percent level.

18 So at the fifty percent level it
19 would be less and the forty percent level
20 would be lower than that.

21 Q. But you actually charge less

151

1 because of their income level?

2 A. Right, and it's not just rent,
3 by the way, we're talking about. For example,
4 the 475 in Shepherds Glen includes a utility
5 allowance that I give these tenants to pay
6 their utilities.

7 They only have to pay electric. The

8 project pays water, sewer and trash. But
9 they're given, for example, eighty dollars to
10 pay their electric bill out of this
11 calculation, so their rent would actually be
12 eighty dollars -- 475 minus eighty dollars.
13 Do you follow me?

14 So they're actually only paying 395
15 because it includes the utility allowance.
16 And then the bottom part is the deed
17 restrictions that I've already gone over with
18 you all.

19 MR. CARYL: I would move that
20 this document be marked as Petitioner's
21 Exhibit 10 and be admitted into evidence.

152

1 THE WITNESS: My taxes read a
2 hundred thousand a year for ten years, that's
3 a million dollars, and I called for eighty
4 percent, right, well, there's a tax credit
5 compliance period of fifteen years which means
6 the government is going to be watching over my
7 head for fifteen years and doing inspections

8 to make sure I have the right incomes and
9 rents, and then I get out of this tax credit
10 compliancy period, but I have signed what's
11 called extended use, which means not only am I
12 doing it for the fifteen years, but I'm doing
13 it for thirty more years.

14 The tax credits themselves really
15 lasted -- there are ten years worth of tax
16 credits, but there's a fifteen-year compliance
17 period, and then I'm promising an extra thirty
18 years.

19 BY MR. CARYL:

20 Q. Mr. Margolis, and I ask you, I
21 guess, first and the Commission. You've made

153

1 references in other exhibits over -- the ones
2 that have been marked are the ones that I have
3 prepared for introduction, but are there other
4 exhibits that you would want to put in the
5 record?

6 A. I have plenty of stuff to give
7 you all if want it.

8 Q. Maybe the Commission...

9 A. Let me just tell you what my
10 sources are, and if you guys are interested in
11 seeing it you ask me for it.

12 I've got something called a project
13 worksheet right here. And I've whited out the
14 names and the names and the units numbers as a
15 matter of -- under law I have to. I can't
16 divulge people's names or where they live.

17 MS. MORGAN: What would be the
18 purpose of the Board having that?

19 THE WITNESS: You could see the
20 rents that these people actually pay and the
21 incomes that they actually make. You know,

154

1 you're going to see a ton of people that make
2 less than ten thousand a year.

3 And it shows the number in the
4 household as well. So I will give you an
5 example. Two people only make six thousand,
6 two hundred and forty dollars in total.

7 MS. MORGAN: The Board
8 understands the point about subsidized

9 housing.

10 THE WITNESS: No, I'm saying what
11 I have. If you want to see it, I'm going to
12 give you the option of seeing it. I don't
13 care.

14 MR. THOMPSON: It's reflected
15 already. I don't know...

16 THE WITNESS: By the way, these
17 apartments, by the way, even compared to the
18 comparables, I am serving even poorer people
19 than other R&D projects in the area because of
20 this targeting, and I have lower rent as a
21 result as well.

155

1 MS. MORGAN: Mr. Morgan has
2 expressed an interest in looking at these
3 documents.

4 MR. MORGAN: Yes.

5 MR. CARYL: At the request of the
6 Commission we'll ask that this be marked as
7 Petitioner's Exhibit 11.

8 MS. MORGAN: And how many more...

9 THE WITNESS: It's your choice.

10 MR. CARYL: He's testified about
11 a number of things from these other exhibits,
12 and it's just a matter of...

13 MS. MORGAN: Are you looking at
14 another five documents or ten?

15 THE WITNESS: No, no, I would say
16 three or four more.

17 MS. MORGAN: Very well.
18 I think under the circumstances it
19 would be wise to have a complete record.

20 THE WITNESS: Okay. I have a
21 sample, and I didn't call every single other

156

1 place, but I have a sample in Jefferson County
2 of rents for comparable properties.
3 Obviously, I've got the rents for my
4 properties. I also have the amount of direct
5 subsidy in each of my properties.

6 So this is rents on my properties and
7 a few other properties in the County and the
8 number -- and the amount of units and how much
9 direct subsidy they have.

10 MR. CARYL: Okay, I would ask
11 that the exhibit that Mr. Margolis just
12 identified be marked as Petitioner's Exhibit
13 -- would that be 11?

14 MS. MORGAN: 12.

15 MR. CARYL: 12, sorry. And we
16 have four copies.

17 THE WITNESS: Okay, the next one
18 I have is I have a listing of all the
19 affordable housing developments in Jefferson
20 County. So I have a listing of how many
21 apartments there are, what type of government

157

1 housing they are. Most of them are Rural
2 Development, USDA.

3 MS. MORGAN: I'm sorry. I'm
4 confused on the paperwork. We received
5 Petitioner's Exhibit 10. And then we talked
6 about Petitioner's Exhibit 11 but weren't
7 given it, and now you're on Petitioner's
8 Exhibit 12.

9 THE WITNESS: Well, I think you
10 can pass around one at a time.

11 MR. CARYL: That was the one with
12 all the individual rents.

13 THE WITNESS: Why don't you guys
14 look at them one at a time because it just
15 gives you an idea of the number...

16 MR. THOMPSON: Do you have a
17 stapler up here?

18 MS. MORGAN: No, sir. We have
19 paper clips.

20 THE WITNESS: Okay. I have a
21 list of all the affordables because somebody

158

1 asked me the other day. So I made a list of
2 all the affordable housing apartment
3 developments in your County. And for the most
4 part they're rural development, USDA; you have
5 two HUD developments, and then you have two
6 conventional tax credit properties.

7 MS. MORGAN: That sounds like
8 that will be Petitioner's Exhibit 13.

9 THE WITNESS: My point was over
10 fifty percent of your apartments are low

11 income housing. I'm not going to say with
12 certainty.

13 The ones that Butch Walker built, in
14 my opinion, is like the majority. I know he
15 sold them, but that's the majority of the
16 conventional apartments you have in your
17 County, in my opinion. You guys might know
18 better. But that's what I believe.

19 And the point being, you have poor
20 folks in your County obviously because the
21 majority is low income housing.

159

1 I've got the income limits, as I
2 pointed out previously, at 40, 50 and 60
3 percent depending on if you have one, two,
4 three or four people in your household.

5 MS. MORGAN: That would be
6 Petitioner's Exhibit 14.

7 MR. CARYL: Unfortunately, we
8 only have copy of that Exhibit No. 14.

9 THE WITNESS: If you guys want to
10 see this, and I understand we're in West
11 Virginia, it's West Virginia law, but you have

12 three surrounding states that have passed laws
13 on affordable housing, and you can read those
14 laws. The point being that the income
15 approach is applicable to these types of
16 properties.

17 MS. MORGAN: That was
18 Petitioner's Exhibit 14.

19 MR. THOMPSON: Was it 14 or 15?
20 There was the one that we only had one copy
21 of, 14, is the income standards.

160

1 MS. MORGAN: No. 11 is the one we
2 only had one copy of.

3 As far as the copies, I don't
4 anticipate a problem since we'll be
5 deliberating together.

6 Mr. Caryl, we have all the documents.
7 What is next?

8 THE WITNESS: The last thing was
9 I've got specific operating budgets for each
10 apartment involved if you want to see in
11 detail. The one you have already is like a

12 summary of revenues and expenses. This breaks
13 them out per project, per line item.

14 MR. CARYL: But the Exhibits 2
15 through 5 have behind the second page detailed
16 annual data.

17 THE WITNESS: These are annual
18 data but this is even more specific.

19 MR. SURKAMP: My question is, is
20 what you're doing is very thoroughly
21 addressing the income approach. You're

161

1 showing us why this should be the criteria
2 that we should use instead. Is that what
3 you're...

4 THE WITNESS: Well, it's one of
5 the four principles that, you know, these
6 properties should be treated differently
7 because of the restrictions on them. And I'm
8 really pointing out these restrictions.

9 MS. MORGAN: And providing proof
10 in the record for the Board to consider.

11 THE WITNESS: And the other
12 States analysis emphasis on why I believe the

13 income approach is the appropriate method.

14 MS. MORGAN: I personally cannot

15 anticipate needing that additional document.

16 If other Commissioners insist then we'll take

17 it.

18 THE WITNESS: And they're very

19 recent. They're not 2000 or 2002.

20 They're 2005, '6 and '7. They're very recent.

21 MR. CARYL: On that point, and

162

1 the reason for the Commissioners,

2 Mr. Thompson, talking to Judge Steptoe,

3 embraced the law of the -- the high is in the

4 minority. We cited in our petitioner in our

5 brief for Judge Steptoe as well as our

6 petition to appeal to the Commissioner of the

7 Supreme Court, the majority view is that you

8 should use the income method for these kind of

9 properties.

10 MS. MORGAN: All right. Are you

11 resting now?

12 MR. CARYL: I have no other

13 questions of Mr. Margolis subject to, of
14 course, re-direct.

15 THE WITNESS: The only other
16 thing is this cap rate thing, how we came up
17 with eight percent. That's up to you. It
18 doesn't matter, the averages across the
19 country are forty-eight percent.

20 MR. THOMPSON: Okay, it's
21 virtually lunch time. I don't want to start

163

1 my cross-examination before lunch. I would
2 like to come back after lunch.

3 MS. MORGAN: What's the pleasure
4 of the Board?

5 MR. CORLISS: It's a strong
6 argument.

7 MS. MORGAN: One o'clock, shall
8 we resume then, gentlemen?

9 (Whereupon, a recess
10 was taken)

11 MS. MORGAN: The Board is ready.

12 CROSS-EXAMINATION

13 BY MR. THOMPSON:

14 Q. Mr. Margolis, you say that you
15 are associated with TM Associates Management?

16 A. Yes.

17 Q. Okay. Is that a limited
18 liability company? What is that?

19 A. That particular company is an
20 S-corp. I have lots of entities in my
21 business.

164

1 Q. That is an S-corporation?

2 A. Right.

3 Q. And typically with
4 S-corporations the income and the liability
5 and the tax responsibility is passed through
6 to an individual?

7 A. Uh-huh.

8 Q. Now, how many partnerships are
9 we dealing with here?

10 A. Four.

11 Q. Four. Is TM Associates
12 Management, S-corporation, is that entity a
13 general partner here in each of these?

14 A. That's strictly the management
15 company.

16 Q. And you've been hired by the
17 general partner?

18 A. But I am also the general
19 partner.

20 Q. Okay, so you are the general
21 partner?

165

1 A. Right, I'm individually the
2 general partner in one or two of them, and
3 then the general partner in the others --
4 here's what it is exactly.

5 Q. Okay.

6 A. Shepherds and Bolivar...

7 Q. Shepherds Glen Limited
8 Partnership...

9 A. And Bolivar Court II...

10 Q. ...Bolivar Court III...

11 A. ...Limited Partnership.

12 Q. ...Limited Partnership.

13 A. The general partner is called
14 Bovarn, LLC. And I am the sole member of that

15 LLC.

16 Q. Okay, and that's the general

17 partner?

18 A. Correct.

19 Q. Of those two. Shepherds

20 Glen...

21 A. And Bolivar Court II Limited

166

1 Partnership.

2 With the case of PHA Associates, I am

3 individually the sole general partner.

4 Q. In your name?

5 A. In my individual name.

6 MS. MORGAN: Say that again, I'm

7 sorry.

8 THE WITNESS: PHA Associates

9 Limited Partnership, Patrick Henry Apartments,

10 I am individually the sole general partner.

11 BY MR. THOMPSON:

12 Q. Just be patient. I'm writing

13 it down.

14 So you're the sole shareholder in

15 Bovarn, LLC, which is a GP, which is the
16 general partner and those limited partnership.
17 Insofar as PHA Limited Partnership, you are an
18 individual general partner.

19 A. Correct, and in the fourth
20 case, Spring Run Patrick Henry Way Limited
21 Partnership...

167

1 Q. Patrick Henry...

2 A. ..Way Limited Partnership, the
3 general partner is MARG RURAL LLC. I'm the
4 sole member of that general partner. It's a
5 funny business, limited partnerships, because
6 I may only own one percent but I have the
7 controlling interest.

8 Q. Okay. Now, are all of these
9 limited partnerships, the four that we're
10 talking about, are they authorized to do
11 business in the State of West Virginia?

12 A. Absolutely. They're West
13 Virginia limited partnerships.

14 Q. They are West Virginia limited
15 partnerships?

16 A. Yes.

17 Q. Registered with the Secretary

18 of State's Office?

19 A. Yes.

20 Q. And service might be had then

21 on the Secretary of State's office?

168

1 A. Yes. I am not absolutely
2 positive about Patrick Henry Apartments. That
3 would be the only exception. But I believe it
4 is a West Virginia partnership; however, I am
5 not absolutely certain at the moment. I
6 believe it is.

7 Q. In what way do you believe it
8 is?

9 A. Well, at a certain point in
10 time in my development career, I started
11 registering every partnership in the State
12 that they were in.

13 But there was a time going way back
14 in my development career where I would form a
15 Maryland limited partnership and have to

16 register it in both States. Do you follow me?

17 Q. Well, what you're saying is
18 that you register in another State you're
19 licensed to do business in.

20 A. Right, absolutely.

21 Q. So there is a registration or a

169

1 licensure in the Secretary of State's office?

2 A. Yes, I believe I'm actually a
3 West Virginia partnership with the Secretary
4 of State but I might be inaccurate on the one
5 property, but I'm still licensed to do
6 business in West Virginia.

7 Q. Okay, now, the Shepherds Glen
8 Limited Partnership, how many limited partners
9 are there?

10 A. That's a funny question. Let
11 me just tell you about the nature of it. We
12 have a real estate syndication house, and they
13 are the head of the limited partners. The
14 limited partners, there are public funds and
15 private funds. I don't know any of my
16 investors in any of my partnerships.

17 Q. How many limited partnerships
18 did you sell when you syndicated that limited
19 partnership?

20 A. Just one.

21 Q. Just one.

170

1 A. Yes.

2 Q. So there's one limited
3 partnership.

4 A. The whole thing is a limited
5 partnership with the owner. But as to how
6 many limited partners individually there are,
7 I can't even tell you because I have no
8 contact with limited partners. In general,
9 they're usually one corporation, in general.

10 Q. In that case you believe it to
11 be one corporation.

12 A. No, or it could be a fund,
13 which is a blind pool, which a whole bunch of
14 people invest in the whole portfolio of these.
15 But the limited, I don't know what they are.
16 It's like an investment for them.

17 Q. So each of these limited
18 partnerships, there's a limited partner or one
19 limited partnership entity and a general
20 partner.

21 A. I'm the general partner of that

171

1 limited partnership.

2 Q. And then the limited
3 partnership is made up of various limited
4 partners.

5 A. Right, there are several.

6 Q. One of several. And you don't
7 know...

8 A. Public or private.

9 Q. And you don't know.

10 A. I could do some research and
11 let you know.

12 Q. But you don't know here today?

13 A. No.

14 Q. Okay. Now...

15 A. It's a tax credit fund. You
16 know, there's usually a limited partnership --
17 there's an upper tier limited partnership, and

18 that upper tier is made up of the investors
19 and the general partner would be the
20 syndicator.

21 Q. Now...

172

1 A. So there's two tiers, if that
2 makes sense.

3 Q. Now, but you handled either
4 individually in the case of PHA or through the
5 other limited partnership individually or
6 through a corporation, you handled all of the
7 financial matters for these limited
8 partnerships?

9 A. I'm also the only one
10 responsible for every one of those problems.

11 Q. Okay. And you would be
12 familiar with their financial dealings, would
13 you not?

14 A. Yes.

15 Q. You are familiar with the kinds
16 and the amounts that were paid for each of
17 these properties?

18 A. Not off the top of my head.

19 Q. Well, I think you listed the
20 purchase price, did you not? Do you recall --
21 the Patrick Henry Way, I think, which is

173

1 Spring Run, is it not?

2 Do you recall what you paid for that
3 property back in 1999?

4 A. I really don't. I can tell you
5 though, what I paid for something, I'm
6 assuming a loan, and the loan could be a
7 million, two, a million, four, and that's
8 actually part of the purchase price, and then
9 I'm paying in general a hundred to two hundred
10 grand more than that. The cash price over the
11 assumed mortgage.

12 Q. I understand what you're
13 saying, you assumed some obligations as well.

14 A. Assuming the long-term
15 mortgage.

16 Q. Right. You would dispute that
17 you purchased -- the limited partnership
18 purchased that property in 1999 for a million,

19 four hundred and seventy-seven thousand?

20 A. That sounds correct.

21 Q. That was Patrick Henry Way

174

1 Limited. Which one is Spring Run?

2 A. That same one. PHA, that was

3 '96.

4 Q. PHA is Spring Run?

5 A. No.

6 Q. Okay, PHA is Patrick Henry.

7 Patrick Henry Way is Spring Run. So PHA is

8 Patrick Henry. I was just speaking a moment

9 ago to the property that sold in 1999 to PHA

10 at a purchase price in 1999...

11 A. Not PHA, Patrick Henry Way.

12 Q. Patrick Henry Way.

13 A. Yes.

14 Q. Was one million, four hundred

15 and seventy-seven thousand, four hundred and

16 eighty-four?

17 A. Sounds correct.

18 Q. Of which approximately -- you

19 know, I'm completely guessing but I have at
20 least an approximation of which probably a
21 million, three and change was the assumed

175

1 mortgage and the rest was in cash.

2 Q. PHA is Spring Run, right?

3 A. Yeah.

4 MR. CARYL: This one is Patrick
5 Henry Way. This is PHA.

6 BY MR. THOMPSON:

7 Q. PHA was purchased in 1996 for
8 nine hundred and fifty-one thousand?

9 A. That's correct.

10 Q. You don't dispute that, do you?

11 A. Not at all.

12 MS. MORGAN: These are numbers,
13 are they not, Mr. Thompson, that are on the
14 appeals sheet?

15 MR. THOMPSON: I don't think they
16 are.

17 THE WITNESS: It sounds
18 approximately right is what I'm saying.

19 BY MR. THOMPSON:

20 Q. Well, you have an appeal sheet,
21 appeal sheet shows a million, three hundred

176

1 and seventy-seven.

2 A. For PHA Limited.

3 Q. Okay. The appeals sheet shows
4 PHA is one million, three hundred and seventy-
5 two thousand. You don't dispute that.

6 A. No.

7 Q. Okay, that's what you put down?

8 A. That was the oldest one -- I'm
9 the least clear on that one.

10 Q. Let me ask you about Patrick
11 Henry Way Limited Partnership, you show the
12 purchase price there was what?

13 A. 907,813.

14 Q. Okay. And how about Bolivar.
15 That was in 1996, was it not?

16 A. No, this one is '99.

17 Q. '99, okay.

18 MS. MORGAN: It looks like it
19 says 951.

20 THE WITNESS: Okay, could be,
21 could be. That sounds right anyway.

177

1 BY MR. THOMPSON:

2 Q. 951,813. Now, Bolivar, do we
3 have Bolivar?

4 A. We do.

5 Q. What was the purchase price on
6 the Bolivar?

7 A. 1,108,031.

8 Q. That's Bolivar Court...

9 A. Yes.

10 Q. ...II Limited Partnership, one
11 million one hundred and eight thousand thirty-
12 one.

13 A. Yes.

14 Q. And Shepherds Glen Limited
15 Partnership was one million, three hundred and
16 eighty-one thousand five hundred and eighteen.

17 A. Yes.

18 Q. And that was in what year?

19 A. Should be '99.

20 Q. Okay. Have you made any

21 improvements to those properties?

178

1 A. Yes.

2 Q. Okay. Let's go through each

3 one again. Let's start with Patrick Henry.

4 Excuse me, Shepherds Glen Limited Partnership.

5 What improvements did you make to that

6 particular property?

7 A. I have a scope of work but I

8 probably -- back at that time period I spent

9 between five and ten thousand per apartment,

10 you know, probably the carpet and the vinyl

11 and the cabinets and the appliances and siding

12 and the decking and the parking lot and that

13 kind of thing, the roofing.

14 Q. Okay. Do you have a number for

15 how much you spent on the real estate?

16 A. You mean the total development

17 cost?

18 Q. No, just the improvements that

19 you made to the real estate when you purchased

20 the property?

21 A. Not off the top of my head but

179

1 I can get it easy enough.

2 Q. You don't have that, okay. But

3 you added substantial value to that particular

4 property by these improvements?

5 A. I didn't add anything in

6 additional. I replaced old carpets for new

7 carpets, old appliances for new appliances,

8 old roof for new roof, that kind of thing.

9 Q. Well, the purchase price would

10 reflect what you paid for the property and

11 then you made some improvements, did you not?

12 A. Yes, absolutely.

13 Q. Okay. Let's look at the next

14 one, 3, the Patrick Henry Way Limited

15 Partnership you purchased for 951,813 back in

16 '96. Did you make any improvements to that

17 particular...

18 A. Patrick Henry Way was later.

19 Q. Okay, what year was it?

20 A. Late 90's.

21 Q. Okay. And how much did you

1 spend on any improvements to the real estate
2 on that particular property?

3 A. I would say at least five
4 thousand dollars per apartment.

5 Q. Per apartment. And let's take
6 a look at the next one, which is PHA Limited
7 Partnership. You purchased that in the late
8 90's.

9 A. That was '96.

10 Q. '96. We reversed it. You've
11 got the date of purchase as '99. You have got
12 a million three hundred and seventy-two
13 thousand...

14 A. Yeah, that's the only one I
15 doubt a little bit. The other three I feel
16 much more certain about but the number you're
17 asking me just doesn't seem...

18 Q. Okay. Now, I notice here on
19 the complaint form you also listed costs of
20 improvements on PHA as \$220,039.

21 A. (portion inaudible) ...cost on

1 Patrick Henry Way.

2 Q. You list that as five hundred
3 forty-nine thousand, five hundred and twenty-
4 nine dollars.

5 A. Could very well be reversed.

6 Q. Could very well be reversed.

7 A. They could, I'm sorry, that's
8 true.

9 Q. Getting back to Shepherds
10 Glen...

11 A. They sound very similar.

12 Q. Getting back to Shepherds Glen,
13 you show the purchase price for that as a
14 million, three hundred and eighty-one
15 thousand, five hundred and eighteen back on
16 August 31st of '99, showing improvements added
17 at \$232,118.

18 Now, is there a set amount that you
19 put on each apartment that you repaired or
20 does it vary from complex to complex?

21 A. A lot of it has to do with my

1 experience and the resources I have at the
2 time, and over time I've gotten much better at
3 what I do, and so now I'm spending over thirty
4 thousand to rehab these places, so a lot of it
5 has to do with the timing.

6 Myself and the Government, we weren't
7 as educated on how to do these things, and
8 with time I've spent more money per apartment.

9 Q. Now, looking at Bolivar Court,
10 you spent a million, one hundred and eight
11 thousand, thirty-one back on October 29 of
12 1998, then a hundred and ninety-nine thousand
13 three hundred and thirty-three dollars in
14 improvements; is that correct?

15 A. Yes, sir.

16 Q. Now, let's run through the fire
17 insurance coverage on each of those starting
18 again at the end. Bolivar Court II Limited
19 Partnership...

20 MR. CARYL: Object on the fire
21 insurance.

1 MR. THOMPSON: I understand you
2 object to fire insurance.

3 BY MR. THOMPSON:

4 Q. What amount of fire insurance
5 coverage do you have on the structure, the
6 building at Bolivar Court II Limited
7 Partnership?

8 A. Where does it say -- one
9 million, nine fifty-five thousand

10 Q. And looking at Shepherds Glen
11 Limited Partnership, what amount of fire
12 insurance do you have on the building on that
13 particular?

14 A. Two million, five hundred and
15 thirty thousand.

16 Q. Okay. And on Patrick Henry Way
17 Limited Partnership, what face amount of fire
18 insurance do you have on that property?

19 A. Two million, eight hundred and
20 fifteen thousand.

21 Q. I think it's a different

1 number.

2 A. That could be a million, eight

3 hundred and seventy-five thousand.

4 Q. Okay. And on PHA Associates

5 Limited Partnership, how much fire insurance

6 do you have on that particular building, those

7 buildings?

8 A. Two million, one hundred and

9 eighty-five thousand.

10 Q. These are substantial

11 properties, are they not? And they're covered

12 by substantial indebtedness still?

13 A. Yes. Can I speak about the

14 mortgage for a moment?

15 Q. Sure.

16 A. These are unusual mortgages.

17 Most mortgages are thirty-year mortgages and

18 over time there's more interest paid at the

19 beginning and more principal at the end. It's

20 called straight line depreciation. These are

21 unusual mortgages because they don't allow the

1 principal to amortize until the back end of

2 the loan. So even after twenty years a
3 million, five mortgage might only be a
4 million, four-eighty.

5 Q. Okay.

6 A. So the interest is heavily
7 weighted at the front, more than twice as much
8 as a normal property.

9 Q. Do each of these limited
10 partnership have a financial statement?

11 A. Yes.

12 Q. Okay. And on those financial
13 statements, does -- let's take the financial
14 statement for PHA Associates Limited
15 Partnership.

16 What value do you place on that
17 financial statement for the purposes of
18 valuing the buildings and the land?

19 A. Of course, that has nothing to
20 do with being a CPA who does an audit of every
21 property every year on this financial

1 statement so, you know, they're going to do

2 building value less depreciation or...

3 Q. Do you know offhand how much
4 you carry this for on your financial -- on PHA
5 Associates Limited Partnership financial
6 statement in terms of its value?

7 A. Offhand I don't know. I could
8 find out very easily.

9 Q. And when you say very easily,
10 what do you mean?

11 A. I mean I could make a phone
12 call and get it faxed here immediately.

13 Q. Would you do that, please?

14 A. Of course. Now or...

15 MS. MORGAN: Can we take a
16 break...

17 THE WITNESS: My only point, by
18 the way, my only point on that is that the
19 2006 audit won't be ready until next month.

20 BY MR. THOMPSON:

21 Q. I'll take what you have...

187

1 A. I can have a 2005 audit today.

2 Q. I want your most recent

3 financial statement showing the value of the
4 assets on each of these properties.

5 A. That's very easy.

6 Q. Could you get that for me? I
7 need financial statements.

8 A. I mean, there's a lot of pages
9 and the balance sheet will show you the basis
10 of assets or liabilities. That's what I would
11 recommend giving you. I could get you
12 everything but I really you ought to start...

13 Q. The balance sheet is fine.

14 MR. CARYL: Unless I've been left
15 in the dust about the rules of accounting, the
16 balance sheet would show the historic costs
17 allocated between the land and the building
18 depreciated...

19 THE WITNESS: Absolutely.

20 MR. CARYL: But it would not show
21 a written-up value...

188

1 BY MR. THOMPSON:

2 Q. That doesn't help me then.

3 What I'm looking for is the financial
4 statement, what you provided to any lending
5 institution that shows what you believe the
6 current value of the property is.

7 A. It doesn't show the value of
8 the property. It shows the value of the
9 property based on the cost approach.

10 Q. Replacement cost approach?

11 A. Yes.

12 Q. Okay. And...

13 MR. CARYL: No, no, no, no. I
14 think the original cost, the historic cost. I
15 do have an appreciation. It may be obsolete.

16 The financial statements provide for
17 the entry of assets on an historic cost basis
18 and the current value is a completely verboten
19 process for financial statement purposes.

20 Now, to apply for a loan, current
21 values are relevant.

189

1 BY MR. THOMPSON:

2 Q. Have you applied for any loans
3 insofar as your property is concerned?

4 A. I just assume loans.

5 Q. You don't apply, okay.

6 A. I'm happy to get those but...

7 Q. No, that doesn't sound like

8 it's going to help us.

9 It's this value that you're

10 disclosing here for each of these properties

11 less depreciation is what you're telling me.

12 Okay.

13 MS. MORGAN: I'm sorry, in other

14 words, the figure that you were going to

15 provide were going to be historic costs less

16 depreciation.

17 THE WITNESS: Less depreciation.

18 MR. THOMPSON: Less depreciation.

19 THE WITNESS: And they're heavily

20 weighted so the principal doesn't amortize

21 either so the value -- the original debt

190

1 number stays higher for many, many years.

2 BY MR. THOMPSON:

3 Q. Now, the depreciation of the

4 use, is it an accelerated depreciation?

5 A. Yes.

6 Q. Okay. So it's not straight

7 light, some accelerated form of

8 depreciation...

9 A. Correct.

10 Q. ...and permitted by Federal

11 statute, is it not?

12 A. Right, it doesn't work to my

13 advance actually, yes. It makes it harder to

14 pay these things off and refinance them. The

15 Government encourages us to keep them low

16 income housing. I can't refinance it because

17 it has so much debt on it.

18 Do you follow me? And after you pay

19 off a loan, then if you have a lot more value

20 to it, well, these loans you can't pay them

21 off so -- you can't prepay them.

191

1 Q. Now, talking about the tax

2 credits, the tax credits are transferrable tax

3 credits, are they not, and they have been

4 transferred?

5 A. They are given to a
6 partnership. They're awarded to a
7 partnership, but once they're awarded to a
8 partnership they're not transferrable.

9 Q. Okay. So they've been
10 transferred to a limited partnership; they're
11 not further transferable?

12 A. Correct.

13 Q. Okay.

14 MS. MORGAN: I'm sorry, what is
15 not further transferable?

16 THE WITNESS: The tax credits.
17 They're not transferred. They're given to a
18 partnership who is awarded it during the
19 competition from the State, but the
20 partnership has to keep the tax credits for
21 the duration.

192

1 BY MR. THOMPSON:

2 Q. Okay, now, I recall testimony
3 at our last hearing by perhaps one of the
4 other witnesses that the tax credits could be

5 recaptured by the Federal Government as they
6 are spent.

7 A. They could be recaptured if I
8 don't have people at the right income and
9 right rents, and if the Government does an
10 inspection and looks through my paperwork and
11 notices flaws, they can -- the form 8609 is
12 like the gold of my business, that's the
13 taxpayer.

14 The form 8823 is the opposite of the
15 gold. So if they issue an 8823, they could
16 recapture tax credits given to me, and I would
17 be responsible for paying everybody back as a
18 general partner because I made the guarantees.

19 Q. So when you say they've been
20 transferred to the limited partnership, the
21 limited partners then apply them to offset

193

1 income tax, do they not?

2 A. Yeah, tax credit.

3 Q. Tax credits. And there is some
4 risk and possibility for whatever reason that
5 the Federal Government and the IRS in

6 particular come back and say we're going to
7 recapture those credits.

8 A. That's correct. But the risk
9 is to me; it's not the limited partners
10 because I'm guaranteeing the limited partners.

11 Q. But when you say you're
12 guaranteeing them, what do you mean?

13 A. I'm guaranteeing that for
14 fifteen years that I'm going to keep it in
15 compliance with the tax credit policy which is
16 West Virginia Housing Development Fund, and
17 after that, even though I'm not going to have
18 the tax credit policy, I'm going to still have
19 extended use and I'm still going to keep
20 people at the same income for rents.

21 Q. Okay. And what percentage --

194

1 how does the tax credit system work? Is it
2 based upon the purchase price? Is that
3 what...

4 A. It's based on what's called
5 BASIS, and it excludes land value, by the way,

6 so there's acquisition basis with the large
7 component being the acquisition price minus
8 your land and anything to do with acquisition
9 which could be your survey, your appraiser,
10 anything you can think of associated with
11 acquisition. And then there's rehab tax
12 credits that's also BASIS, which is the
13 biggest component being the actual amount of
14 rehab you do, but it's also -- you know, it's
15 also a portion of your architect and any sort
16 costs associated with your rehab.

17 And then there's developer fee and
18 then there's the tax credit fee on top of the
19 acquisition and the rehab.

20 Q. How much is your development
21 fee?

195

1 A. It's ten percent of the
2 acquisition BASIS and fifteen percent of the
3 rehab BASIS.

4 Q. So each of these costs that
5 we've seen disclosed by you, your fee as the
6 general partner is ten percent?

7 A. Of the acquisition BASIS.

8 Q. Of the acquisition BASIS. Is
9 it one and the same as the purchase price or
10 is it different?

11 A. Yeah, the purchase price is
12 probably eighty-five percent of the
13 acquisition BASIS. So ten percent of that
14 amount.

15 Q. So it's even larger than the
16 purchase price then, the syndication fee is
17 what you're saying, the ten percent, would
18 work out to even more.

19 A. Well, let's take an example.

20 Q. Yeah.

21 A. I think it's the right number

196

1 but I think we're reversed. Shepherd's a
2 million, three eighty-one...

3 Q. Yeah.

4 A. ...so I would have a hundred
5 and thirty-eight dollar (inaudible.)

6 Q. Okay.

7 A. And probably a hundred and
8 fifty thousand because there's a few other
9 acquisition costs.

10 Q. That are added on?

11 A. Yeah, and then the rehab here
12 was 252 grand, so you take fifteen percent of
13 that.

14 Q. Now, were these projects built
15 new by you?

16 A. No.

17 Q. None of them were. You assumed
18 loans on all of them?

19 A. Right, they were eligible by
20 the way to get out of their low income
21 restrictions. So not only was I buying them

197

1 and fixing them up to make them more decent,
2 but I was agreeing to preserve them well into
3 the future, and it is true, the money is made
4 up front in my business, and it becomes like a
5 break-even business for years and years and
6 years after.

7 Q. Now, one of the problems that I

8 sense in all of this with the income approach
9 is that you get a total value, you could see
10 that. The number that you get is a total
11 value for land and buildings. Is that not so?

12 A. Which number?

13 Q. The total value that you
14 derived from the computation of an income
15 approach is the value of both buildings and
16 land together; is that not so?

17 A. Well, no, it's really a matter
18 of the rent and the income it produces on an
19 annual basis.

20 Q. I understand that's what you
21 plug in.

198

1 A. Well, that's what the income
2 approach is.

3 Q. But I understand that. But
4 your argument here today is that that
5 represents the value of the land and the
6 buildings, does it not?

7 A. Right, because of the

8 restrictions, that's correct.

9 Q. Now, let's run through these

10 again...

11 MS. MORGAN: Well, I'm sorry, I

12 don't think it's because of the restrictions.

13 I think it's because it's a computation that

14 acknowledges what you can earn from the piece

15 of property.

16 THE WITNESS: Right.

17 MS. MORGAN: So it doesn't break

18 into the components, as Mr. Thompson said, but

19 it gives you an overall figure based on what

20 you're capable of earning from the property.

21 THE WITNESS: That's right.

199

1 BY MR. THOMPSON:

2 Q. Now, looking at the value that

3 you placed on Shepherds Glen Limited

4 Partnership, could you tell me number you

5 placed on the value of the land or can you?

6 A. I can't.

7 Q. Can you tell me then what value

8 you placed on the buildings in this particular

9 project which is Shepherd Glen Limited

10 Partnership.

11 MR. CARYL: Madam President,

12 we'll stipulate that the exhibit does not

13 break down the total value of the properties

14 that he's determined between improvements and

15 land. We'll also argue...

16 MS. MORGAN: Stipulated that

17 there's no breakdown.

18 MR. CARYL: That there's no

19 breakdown, but we'll argue that the Commission

20 has in front of it ample data there's many

21 ways to make that breakdown for administrative

200

1 purposes.

2 BY MR. THOMPSON:

3 Q. Do you know of a way,

4 Mr. Margolis, to make that breakdown for

5 administrative purposes between building and

6 land?

7 A. Not as far as the income

8 approach.

9 Q. Now, I recall the testimony of
10 Mr. McPherson along those lines where he made
11 a breakdown, did he not? Do you recall his
12 testimony?

13 A. I can certainly look at my
14 summary.

15 Q. Do you have a summary of his
16 there?

17 A. I have a summary of whole
18 transcript.

19 MR. CARYL: Here it is. I'm
20 inviting the witness's attention to the
21 transcript, which is Exhibit 1, Petitioner's

201

1 Exhibit 1, and I believe the testimony of
2 Mr. McPherson starts on page 59.

3 That was the transcript page 59.
4 It's actually page 15 of the summary, right-
5 hand quadrant. I'll just tender that portion
6 of the transcript so you can read it better.

7 THE WITNESS: "Okay. Question."
8 I believe it was Mr. Thompson at the time.

9 MR. THOMPSON: It was Mr. Caryl.

10 MR. CARYL: It was from me.

11 THE WITNESS: Oh, I'm sorry.

12 Sorry. Mr. Caryl. "In conducting this

13 appraisal, did you take into account the fact

14 that West Virginia law requires the

15 assessments of improved property be broken

16 down between assessed value of the land and

17 the assessed value of the improvements? MR.

18 THOMPSON:"

19 MR. THOMPSON: What page are we

20 on?

21 THE WITNESS: 59. "MR. THOMPSON:

202

1 Are we talking about assessed value or

2 appraised value?

3 "MR. CARYL: Well, the assessments

4 are only manifested in these categories,

5 therefore the appraisals.

6 "MR. THOMPSON: We're talking

7 appraisals. You said assessment but we're

8 talking appraisal, right, because assessment

9 is sixty percent of the appraisal.

10 "MR. CARYL: Yes, but added those two
11 components together to come up with an
12 indication of value. Now, is the check for a
13 test of my value, I also considered the basic
14 rents that the property owner can charge."

15 MR. CARYL: I'm sorry.

16 THE WITNESS: All right, I'm
17 sorry.

18 MR. CARYL: You skipped.

19 THE WITNESS: I'm sorry. "MR.
20 CARYL: Yes, but the breakdown is the point.
21 The West Virginia law requires assessments to

203

1 be broken down between land and improvements.

2 "MR. THOMPSON: Okay.

3 "MR. CARYL: Therefore, the appraiser
4 should...

5 "MR. THOMPSON: Gotcha.

6 "MR. CARYL: ...get to these
7 assessments that need to be broken down.

8 "QUESTION: Did you take any of that
9 into account?

10 "APPRAISER: Yes, I allocated the

11 value of the properties for the land and
12 improvements and I used an allocation method
13 by getting the ratio of the land value as
14 established by the West Virginia Assessments
15 Department for the total property value,
16 market value, not the sixty percent, but the
17 market value established, and I developed the
18 ratio.

19 I took that ratio, multiplied it
20 times the estimated market value. Now, even
21 though I didn't have a field of properties

204

1 that were encumbered, any land sales of
2 properties that were encumbered by similar
3 restricted covenants or loan agreements, I did
4 find older sales of properties that were
5 purchased for multi-family development and I
6 reviewed those and the indicated allocated
7 value fell within that range and so it
8 supported the allocation."

9 BY MR. THOMPSON:

10 Q. So you used a percentage that

11 was...

12 MR. CARYL: The same percentage
13 that these proposed assessments were or
14 proposed appraised values for property tax
15 purposes.

16 BY MR. THOMPSON:

17 Q. So in effect they used the CAMA
18 percentages?

19 MR. CARYL: Yeah, well, and
20 percent of the relations between the total
21 value and the value of the improvement on the

205

1 one hand and the value of the land on the
2 other.

3 MS. MORGAN: No, what is this?
4 This is a State-wide average or...

5 MR. CARYL: No, no. Well, he
6 referred, Mr. McPherson referred to the West
7 Virginia Department. It was a Jefferson
8 County assessment. The proposed assessed
9 value or total appraised values of these
10 properties for property tax purposes for that
11 year...

12 MS. MORGAN: In other words, they
13 used the same split.

14 MR. CARYL: Exactly, the same
15 ratio between the two components that the
16 assessor used.

17 BY MR. THOMPSON:

18 Q. Okay. So it's clear to you now
19 Mr. McPherson arrived at, he just used a ratio
20 then of land to buildings as found by the
21 local assessor's office?

206

1 A. Right, as I pointed out, you're
2 supposed to use all three approaches and give
3 measured weight to the most appropriate
4 approach. I'm not saying a hundred percent
5 weight to the income approach, but the
6 majority of the weight should be the income
7 approach, but you have to take measured into
8 account precisely because of what you were
9 saying that you have to make an allocation
10 between land and building.

11 Q. But that does presuppose a

12 certain correctness and accuracy to the work
13 that was done by the local assessor's office,
14 does it not, otherwise you wouldn't be able to
15 rely on it, would you?

16 A. I suppose you're right
17 (inaudible).

18 Q. Okay.

19 A. I'm certainly not an expert in
20 these matters, believe me.

21 Q. Now, you did a sampling of

207

1 commercial but subsidized rental units in
2 Jefferson County and came to the conclusion
3 that better than fifty percent, you believe,
4 were subsidized units in some way, shape or
5 form?

6 A. Yeah.

7 Q. Are you or whoever did the work
8 for you, did they look at Tuscawilla Hills,
9 the rental units at Tuscawilla Hills that are
10 commercial use but are not subsidized?

11 A. No, the list was only for...

12 Q. But you came to the conclusion

13 as to the percent, and you seem to be somewhat
14 certain as to that percentage.

15 A. Number-wise.

16 Q. Number-wise. But if you don't
17 know all of the units that are commercially
18 available to be rented in the County, how can
19 you be so sure about that percentage?

20 A. Just by the number of the
21 apartments. I mean, I knew about Tuscowilla

208

1 Hills. It wasn't on the list because it
2 wasn't -- I only point out the low income
3 housing developments. There's less than the
4 number of units.

5 Q. Where did you get your total
6 number from?

7 A. Well, I didn't add up all the
8 conventional apartments. I just know where
9 they are.

10 Q. Okay. Mr. Secrest was in here
11 on several. Did you look at his apartments in
12 Shepherdstown? Do you consider those as well?

13 A. I didn't.

14 Q. Okay. How about Mr. --
15 formally Mr. Walker's apartments. You
16 mentioned his name. Did you consider those?

17 A. Yes.

18 Q. Okay. How about Mr. Marks'
19 apartments here in Charles Town? Did you
20 consider those?

21 A. How many does he have?

209

1 Q. I don't know. I'm asking you.

2 A. My point was besides
3 Mr. Walker's apartments, everybody else has a
4 small amount and Tuscowilla Hills being the
5 only exception, but all the other ones are
6 very small amounts of apartments compared to
7 the amount of these large amounts of
8 apartments.

9 Q. You're suggesting Mr. Secest
10 has a small number of apartments?

11 A. Yeah, I would guess it wouldn't
12 be much.

13 Q. You would guess. How about the

14 assessor herself?

15 A. I don't know about her.

16 Q. You don't know about her

17 apartments?

18 A. No.

19 Q. How about -- you say there are

20 apartments in Bakerton as well?

21 A. Yes.

210

1 Q. Are you familiar with any

2 apartments in Bakerton?

3 A. No.

4 Q. So your number is somewhat

5 speculative, isn't it?

6 A. It is.

7 Q. Maddox Farm, are you familiar

8 with the Maddox Farm apartments in

9 Shepherdstown?

10 A. Yeah, I know where they are, of

11 course.

12 Q. Did you take those into

13 consideration?

14 A. I'm not a hundred percent
15 positive but the majority of the apartments in
16 the County are low income.

17 In fact, you guys have a better idea
18 than me.

19 Q. Now, there's some discussion
20 that the assessor didn't ask for this income
21 information. Have you ever provided that

211

1 income information to the Jefferson County
2 Assessor on these projects or for any others
3 in Jefferson County at any time prior?

4 A. The last time around.

5 Q. Okay. Prior to the appeal or
6 after the appeal? In other words, did you
7 provide them here at...

8 A. I provided them prior to the
9 last appeal, not this appeal.

10 Q. You don't attach them to your
11 property tax return that you filed sometime
12 before first of October of each year?

13 A. Right.

14 Q. Okay.

15 A. But the comments I have from
16 the assessor is that even if he had them he
17 wouldn't look at them because he doesn't look
18 at them from everybody.

19 Q. We'll deal with it.

20 A. And so it's kind of in vain. I
21 knew it wouldn't amount to anything.

212

1 Q. I understand.

2 A. And we commonly do it in other
3 counties because they do look at them. Well,
4 he said that the data was unavailable but if
5 they ever asked me for it I would be happy to
6 supply it.

7 Q. I want you to break out your
8 administrative expenses on Patrick Henry Way
9 and pretty much the same from facility to
10 facility, is it not?

11 A. Generally.

12 Q. Yeah. Why did you break out
13 your expenses? What do you consider
14 administrative expense?

15 A. I actually have the budgets
16 right here and I could tell you exactly.

17 Q. Would you do that?

18 A. Here, categorized.

19 Q. Would you do that?

20 A. Absolutely. Which one?

21 Q. Patrick Henry.

213

1 A. Patrick Henry or Patrick Henry

2 Way?

3 Q. Patrick Henry Way. Okay. Why

4 don't you tell us what you considered

5 administrative expenses.

6 A. Site management and payroll,

7 management fee, project auditing expense,

8 legal expenses, advertising, telephone

9 answering service, office supplies, training

10 expense, health insurance and other employee

11 benefits, payroll taxes, Workers' Comp, other

12 administrative expenses.

13 Q. What is that?

14 A. Well, it says -- it says UA

15 survey, whatever that means and then other

16 subtotals.

17 Q. Okay. And utilities? Typical

18 utilities?

19 A. Electricity, water, sewer,

20 garbage, and trash removal.

21 Q. Operating maintenance.

214

1 A. Maintenance and repairs

2 payroll, maintenance and repairs supply,

3 maintenance and repair contract, painting,

4 snow removal, grounds services, annual capital

5 budget.

6 Q. Real estate taxes.

7 A. Real estate taxes. No, it says

8 other taxes, licenses and permits, franchise

9 tax here. Property and liability insurance,

10 Fidelity coverage insurance.

11 Q. Okay. And finally, you include

12 taxes and insurance. I'm particularly

13 interested in what other taxes you would

14 include in that category of taxes when you say

15 taxes and insurance.

16 A. I'd be guessing. I could find
17 out very easily.

18 Q. Is it listed on there?

19 A. No.

20 Q. Just says taxes and insurance
21 again?

215

1 A. It says other taxes. If I can
2 find out specifically what it was. I would
3 have to research it.

4 Q. Okay, that's all right. We'll
5 pass that on. We're trying to get through
6 this quickly. Okay.

7 A. The only thing broken down is
8 the capital improvements budget.

9 Q. You want to give us that?

10 A. Just there's a budget for
11 ranges and refrigerators and carpet and vinyl
12 and heating and air conditioning and
13 landscaping and grounds. It comes out of the
14 operating escrows.

15 Q. So that's out of escrow and
16 it's not -- but you're expensing it. It's

17 listed as an expense on here, isn't it?

18 MR. CARYL: Well, okay, if it's

19 not expensed out...

20 THE WITNESS: Well, you've got

21 two forms. You've got money that comes out of

216

1 the operating account which is expense, and

2 then you have the replacement for reserve

3 escrow for capital items.

4 MS. MORGAN: Pardon me for

5 asking, Mr. Thompson, where are you...

6 MR. THOMPSON: We're almost

7 finished. I know you're tired of this.

8 MS. MORGAN: No, I'm wondering

9 where this is getting?

10 MR. THOMPSON: He's reading it

11 off of a -- apparently a budget.

12 THE WITNESS: The new, '07

13 approved budget.

14 BY MR. THOMPSON:

15 Q. Now, I'm interested in the cap

16 rate that you used. Where did you derive the

17 cap rate that you used?

18 A. It was the high end of the

19 norm.

20 Q. And what publication, what

21 service, where did you get it?

217

1 A. From the National...

2 Q. Do we have an exhibit that...

3 A. From Corpaz.

4 Q. From Corpaz again. Now, Corpaz

5 is the same publication that Mr. McPherson

6 relied upon, is it not?

7 A. Yes.

8 MS. MORGAN: Do we know what that

9 is.

10 THE WITNESS: By the way, on

11 these matters, he's not a licensed appraiser

12 but he knows a lot more about this stuff than

13 I do. So you can forget the fact that he's

14 not a licensed appraiser in West virginia or

15 we could let him talk about these things.

16 MR. CARYL: It's not listed as an

17 exhibit. He testified about it and the

18 Commission has it.

19 MR. THOMPSON: Well, we'll have
20 it marked. Can I have that marked
21 successively, whatever number it is,

218

1 Respondent's exhibit.

2 THE WITNESS: My consultant tells
3 me that it's a cap rate for conventional
4 apartments, and we took the higher end of the
5 range because of the risk associated with this
6 type of housing.

7 BY MR. THOMPSON:

8 Q. Okay, I'm going to show you
9 what has been marked as Assessor's Exhibit No.
10 8 and ask if you can identify that.

11 A. It shows the range of the
12 overall cap rate. We wanted to be a lot more
13 conservative in 2003 where we have an eleven
14 cap but we picked an eight cap.

15 Q. Okay. This is a document that
16 you produced here today that's been circulated
17 to the Commission and they've already

18 considered that, I take it.

19 A. Yeah.

20 MR. THOMPSON: I would move its
21 admission without objection.

219

1 MR. CARYL: No objection.

2 BY MR. THOMPSON:

3 Q. Can you look at that and tell
4 me where on the face on that page it discussed
5 a use of a cap rate for a subsidized 515 type
6 project.

7 A. It does not. They're
8 conventional apartments. That's why we took
9 the upper end of the range because subsidized
10 would have more risk and less return. But
11 they are so much more conservative than the
12 one we used four years ago. And my return is
13 based on eight percent of my equity.

14 Q. What do you do with the cap
15 rate? Why is the cap rate important?

16 A. To value real estate based on
17 the income approach.

18 Q. Okay. What do you divide it

19 into?

20 A. The amount of the investment

21 from your...

220

1 Q. I understand what it is. But

2 what do you do with it? How do you use it to

3 come up with a value? What do you divide it

4 into?

5 A. That's what it says in your

6 regs.

7 Q. Answer my question.

8 A. Well, I'm not an expert in

9 these matters. I would love for my consultant

10 to but he's not a licensed appraiser in the

11 State of West Virginia.

12 MR. CARYL: Let me add that there

13 are many nuances. The transcript,

14 Mr. McPherson explained in great detail...

15 THE WITNESS: I have an answer.

16 BY MR. THOMPSON:

17 Q. Isn't it true -- you have an

18 answer.

19 A. I'm not a specialist.
20 ...operating income divided by cap rate gives
21 you your value.

221

1 Q. Thank you, thank you.

2 A. Sorry. Net operating income
3 divided by a cap rate gives you your value.

4 Q. So using the various exhibits
5 that you offered where you derived at
6 operating income, you divided your cap rate
7 that you secured from Corpaz and came up with
8 that value, that value that you termed. I
9 understand that you testified.

10 A. Yes.

11 Q. Okay. But nowhere on the face
12 of this document such as Assessor's Exhibit
13 No. 8, which suggests various cap rates and
14 also discount rates and residual cap rates and
15 market change rates and expense change rates
16 and other kinds of rates, was there any
17 discussion of this...

18 A. He's my consultant. He can't
19 even testify.

20 MR. THOMPSON: Let the record

21 reflect my witness is under oath, he's

222

1 testifying on cross-examination and somebody

2 whispering in his ear, your attorney.

3 THE WITNESS: Consultant.

4 MS. MORGAN: It does seem

5 inappropriate for the witness to be coached.

6 THE WITNESS: Okay, no problem.

7 I told you I'm not an expert on these matters.

8 BY MR. THOMPSON:

9 Q. But looking at that document,

10 is there anywhere on the face of that document

11 that would suggest that the cap rate that you

12 used is a particularized cap rate for these

13 kinds of subsidized properties?

14 A. No, I don't believe there's any

15 data available that would show the right cap

16 rate in this type of development for this

17 particular area. There is no data. All we

18 can do is give our best guess.

19 Q. Okay.

20 MS. MORGAN: That seems
21 incredible to me that there would be no data

223

1 on subsidized...

2 THE WITNESS: On cap rates for
3 subsidized housing in Jefferson County, it's
4 very particular.

5 MS. MORGAN: No, this is national
6 apartment projects and this is dealing with
7 conventional apartments, right?

8 THE WITNESS: Correct.

9 MS. MORGAN: So there isn't any
10 publication nationwide that would be the same
11 as those for subsidized housing?

12 THE WITNESS: No, because it
13 differs so much in every area. It would
14 another range of -- probably it would be like
15 six to twelve, okay.

16 BY MR. THOMPSON:

17 Q. Could it be possible -- I
18 realize you've admitted now that you're not an
19 expert in this area, could it be possible that
20 we could create by a (inaudible) investment

21 method of creating other kinds of rates or

224

1 discount rates, a rate that might be

2 considerably lower than this?

3 A. In a hotter economic market.

4 Q. You think so?

5 A. Yes.

6 Q. Are you...

7 A. So if I had subsidized housing

8 in Frederick, it would be a lower cap rate.

9 MR. THOMPSON: I'll move the
10 admission if it hasn't already been admitted.

11 THE WITNESS: I only know the
12 basics. It would take an appraiser to really
13 make these values.

14 BY MR. THOMPSON:

15 Q. You would concede at this point
16 the lower the cap rate the more the property
17 is worth?

18 A. Yes.

19 Q. So there's probably nothing
20 more crucial in income approach than the

21 number that you used as the cap rate?

225

1 A. I said a cap rate is very
2 important, and the appraiser four years ago
3 used a cap rate of eleven, which I believe the
4 judge argued about, and we're saying even as
5 an eight cap rate the income value is very
6 low.

7 Q. Even if it were a five,
8 dividing five percent or dividing four percent
9 or even three percent into the number that you
10 provided will make a substantial difference in
11 the value of your properties?

12 A. Of course.

13 Q. Yeah. Almost double in some
14 instances.

15 A. Well, you will remember, the
16 low end -- I mean, the hottest area on these
17 averages was four percent according to this
18 National apartment survey.

19 So I wouldn't go below four in any
20 case even if it was in the middle of
21 Washington, D.C. Do you follow me?

1 While Frederick would be like a six
2 because it's not in the middle of a huge city,
3 but it's not in the middle of the country
4 either.

5 MS. MORGAN: We wondered if we're
6 still in the middle of the country.

7 BY MR. THOMPSON:

8 Q. What you're telling us is that
9 you selected a commercial apartment rate for
10 unsubsidized apartments, a cap rate for
11 unsubsidized apartments, a cap rate for
12 unsubsidized commercial apartments. You're
13 using that rate or one of the rates that it
14 suggests to prompt you to compute your
15 valuation.

16 A. We're using the upper range of
17 that selected range for averages of
18 conventional apartments across the country.

19 Q. Conventional apartments but not
20 subsidized...

21 MS. MORGAN: Mr. Thompson, I

1 think the Board can easily see the point in

2 that many changes in the cap rate...

3 MR. CORLISS: I have a question.

4 MS. MORGAN: All right. Finished

5 with your cross-examination?

6 MR. THOMPSON: I am indeed.

7 MS. MORGAN: Well, then, let's

8 have questions from the Board. Mr. Corliss.

9 MR. CORLISS: When you say the

10 cap rates, the cap rates were at five percent,

11 I think you said...

12 MR. THOMPSON: Well, I suggested

13 several possible cap rates.

14 MR. CORLISS: Well, you said five

15 and the property would be worth more. I don't

16 quite understand.

17 MR. THOMPSON: Do you want to do

18 the math?

19 MR. CARYL: Well, I could

20 respond...

21 MS. MORGAN: Mr. Caryl. Thank

1 you.

2 MR. CARYL: The smaller the
3 number. In other words, you're dividing the
4 cap rate into the annual income, the annual
5 net income. Because the smaller the number
6 that you divide into that annual income, the
7 higher the results is going to be.

8 THE WITNESS: Right, because a
9 million dollars, a three cap would be three
10 hundred an (overlapping colloquy) five cap is
11 all you (inaudible).

12 MR. CARYL: To illustrate the
13 point is that if we use the four percent cap
14 rate, the resulting value will be double the
15 values that we've shown.

16 MR. THOMPSON: The cap rate, as I
17 understand, the cap rate is made up of a lot
18 of different things. It's not just -- it's
19 not just the debt service rate or the interest
20 rate. Do you want to explain that?

21 MR. SAM OGDEN: Just to explain,

1 there are a number of different ways of
2 deriving cap rates and different ways of
3 calculating cap rates.

4 MR. THOMPSON: Are you under oath
5 by the way? Were you ever sworn?

6 MR. SAM OGDEN: I've been sworn
7 for the whole...

8 MR. THOMPSON: Okay, let the
9 record reflect that Mr. Ogden was previously
10 sworn to testify before the Board of Review
11 and still under oath.

12 Go ahead and explain what your
13 understanding of the cap rate is.

14 MR. OGDEN: Only to say that
15 there is a cap rate, or discount rate which
16 has the same effect, that are dividers to
17 achieve value that can be put together in many
18 different ways. The most basic was to take
19 the net operating income of property that sold
20 -- there were several of them, divided that
21 income by the sales price and that yields

1 what's called a direct cap rate. That's the
2 simple, quick, and dirty way to do it.
3 But we're complicated properties.
4 There are other more complicated ways that are
5 more suited to a particular type of property
6 for generating cap rates.

7 And one more thing in here. The
8 equation, yes, the cap rate is the most
9 important component, but the cap rate has to
10 be divided into net operating income.

11 It has to be not necessarily a
12 specific income to a specific property, but a
13 representative income for average -- in other
14 words, you have to -- when you're looking at a
15 net operating income, if we were to do cap
16 rates, which we have the skill to do, simply
17 not the manpower and the time to do, but if we
18 were to do cap rates, we would look at
19 Mr. Margolis's income and expense statement.

20 We would compare it to other income
21 expense statements of similar properties to

1 see if it falls, that things are expensed out

2 correctly, expensed out in the proper range.
3 When they last appealed we had time to do that
4 whereas this time we didn't see it until
5 today.

6 This is no criticism. I simply
7 didn't see one until today. But you wouldn't
8 specifically use without question the income
9 and expense statement that somebody's
10 appealing submits.

11 You would have to compare it to other
12 incomes and expenses for typical apartments of
13 the size -- projects the same size.

14 MS. MORGAN: (Interposing)
15 (Inaudible).

16 THE WITNESS: If anything we
17 erred on the said of conservative because four
18 years ago the 11 cap rate was questioned as
19 being too high. It's certainly not lower and
20 it may be higher.

21 MR. CORLISS: But the cap rate

1 will affect your ability to shop the loan with

2 various banks. You could perhaps get a more
3 favorable loan with a higher...

4 MR. THOMPSON: And you're
5 thinking of an interest rate, I think. Cap
6 rate is not that (interposing colloquy made
7 transcription impossible).

8 MS. MORGAN: I'm sorry, one at a
9 time, please.

10 MR. SURKAMP: (Inaudible)

11 MR. CARYL: And it indulges the
12 assumption that the time value of money is
13 offset by inflation. Just for sake of
14 simplicity.

15 MR. THOMPSON: The rule on income
16 approach talks about the property's present
17 worth that's directly related to its ability
18 to produce an income over the life of the
19 property. So we're looking -- it's looking
20 way out but reducing its present value.

21 MR. CARYL: And that's my point.

233

1 MR. THOMPSON: Yeah.

2 MR. CARYL: The present value of

3 the property, that this low earning is
4 investor demand rate of return on his
5 investments. This slow of earnings divided by
6 that rate of return yields the present value
7 of the property and that's the wash you
8 assume, the wash between inflation and the
9 time value.

10 MR. THOMPSON: Correct. And it
11 reminds so me so much of pi, remember pi, and
12 computing circumference and diameter and all
13 of that, so this is pi that's flexible.

14 MS. MORGAN: More questions of
15 the Board. I'm sorry, Mr. Surkamp.

16 MR. SURKAMP: Simple thing. What
17 Mr. Ogden was going back to, a .0. Your cap
18 rate has to be representative of a large pool
19 as opposed to (inaudible). But I want to say
20 that I saw your list of controlled properties
21 in the County, and I've been personally, well,

234

1 some of this has campaigned.

2 Well, I personally think that you

3 probably have about thirty to forty percent of
4 the controlled rentals, house structures in
5 the County.

6 In other words, you are getting a
7 representative area, but if you had some cap
8 rate, it's almost becoming like a
9 representative figure.

10 MR. THOMPSON: Is that something
11 that you try, the right size for your
12 operation in the community?

13 THE WITNESS: Well, of course,
14 this has nothing to do with me. This is a
15 figure that an appraiser or a tax applier
16 comes up with. Cap rates have to do...

17 MR. THOMPSON: So you don't do
18 it.

19 THE WITNESS: Cap rates have to
20 do with the conventional market world. And
21 I'm in the subsidized world where cap rates

235

1 have very little meaning. They used to derive
2 an income approach for a real estate
3 valuation, but they're not used in my business

4 otherwise.

5 MR. SURKAMP: But in theory you
6 could have gone the (inaudible).

7 THE WITNESS: I believed that we
8 erred on the side of conservative, and if
9 anything it's higher than an eight.

10 MR. THOMPSON: Well, but the
11 overall cap rate...

12 (Overlapping colloquy)

13 THE WITNESS: Just to tell you an
14 idea of the risk, just the real estate taxes
15 going up will severely affect my income. And
16 that's a real risk.

17 MR. THOMPSON: If you look at the
18 cap rate range here, it's 4.25 to eight.

19 MR. SURKAMP: That's
20 unrestricted.

21 MR. THOMPSON: Again, it's

236

1 conventional property but I'm saying that
2 they're at the far end. They're taking the
3 highest number of the two.

4 MS. MORGAN: Well, from my point
5 of view the section of the cap rate in
6 addition to the items that feed into the
7 definition of net operating income are at best
8 on the taxpayer's part a judgment call and
9 would spring from there all the way towards
10 advocacy. You know.

11 That is proper because you're a
12 taxpayer and you're making your case before
13 the Board. I'm not saying there's anything
14 improper about that.

15 THE WITNESS: Right. To take
16 that element out of the subjectivity of it, we
17 have lowered it from an 11 to an 8. We really
18 believe it's higher.

19 Mr. Ogden, what do you honestly
20 believe the cap rate is for this type of
21 property? He would know maybe. Better than

237

1 me.

2 MR. THOMPSON: He can't say
3 because we don't -- we haven't looked at your
4 expenses and gone through those.

5 MR. OGDEN: I calculated one
6 based on the date of investment with some
7 guidance from people at the State Tax
8 Department who have done both appraisal and
9 appeals of Section 515 properties, and I was
10 told that the most -- that the most applicable
11 method is what called the band of investment.
12 It's the term for a particular type of cap
13 rate or discount rate, if you will.

14 And it's a simple calculation based
15 on the finance costs, the percent of equity to
16 get and what the income percent would be
17 expected to be from the equity and the
18 amortization period.

19 And again, because I don't do this
20 regularly although I am trained in it, with
21 guidance, I came up with a cap rate of excuse

238

1 me I have to find it...well, I know what it
2 is. Point-o-four or 4.6.

3 MR. CARYL: Mr. Ogden, would you
4 agree, first of all, your 4.6 percent is based

5 on what, Statewide data or what was the source
6 of this?

7 MR. OGDEN: With a band of
8 investment you simply consider the details of
9 finance basically, of amortization period, the
10 interest -- actual interest rate, and in the
11 case of subsidized apartments -- and again, I
12 can only testify by what I've just learned
13 from people who do this because I have not
14 done it, but with subsidized apartments,
15 accepted practice is to use as this cap rate
16 generated value using the eight percent cap
17 rate that's used actual rents.

18 And this gets into the apples to
19 apples, apples to oranges, oranges to oranges.
20 If you're going to use actual rents, then you
21 have to use actual financing details.

239

1 MR. CARYL: Well, and my question
2 though is from what basis, data, what
3 experience is from where was this number
4 derived? And roughly the process. But what
5 market does is this?

6 MR. OGDEN: It is a market driven
7 -- let me find the sheet and I think I can
8 clarify it. I've got it right here.

9 MR. CARYL: Well, it wasn't
10 Jefferson County, we could do it in the
11 negative.

12 MR. OGDEN: Well, it's based on
13 investment expectations and it's calculated --
14 should I show it or...

15 MR. THOMPSON: Yes.

16 THE WITNESS: This is a breakdown
17 of it. And these are the standard required --
18 these are the financing requirements of the
19 type 515 project.

20 MR. CARYL: Okay. Now, would you
21 agree that -- so you're claiming that the 4.6

240

1 is based on the actual financial structure of
2 one of these facilities?

3 MR. OGDEN: Plus the effective
4 tax rate.

5 MR. CARYL: Okay. The effective

6 tax rate being the levy rate?

7 MR. OGDEN: The levy rate

8 multiplied by the assessment, point six.

9 MR. CARYL: Okay, now, is there

10 any room in establishing a cap rate for

11 consideration of the risk that a particular

12 property faces?

13 MR. OGDEN: Again, I'll be

14 honest. I haven't worked with this particular

15 type. I consulted some. And my understanding

16 is that the risk component of it is

17 encompassed by the financial arrangements.

18 MR. CARYL: So it's your

19 understanding that you believe that the

20 financial arrangement took into account the --

21 which were put in place -- these were assumed

241

1 loans, so these were put in place ten, fifteen

2 years ago, twenty years ago. Fifteen.

3 That those financial arrangements

4 contemplated the superheated real estate

5 market of Jefferson County and the risk of the

6 tax assessment going through the roof for

7 everybody. Is that how -- that those
8 financial arrangements reflect all that?

9 MR. OGDEN: My understanding --
10 and again, I hate to say I'm not an expert in
11 this -- my understanding is that when you
12 include the effective tax rate, which is a
13 percentage, not -- it's a percentage of the
14 assessment to the levy, that that would
15 encompass -- in fact, I think that's why it's
16 done that way because basically when you're
17 doing an appraisal of a property that's being
18 appealed, you're looking at a new higher tax
19 amount, so what you want is a percentage tax
20 rate rather than expensing out for last year's
21 tax amount for what's going to be a different

242

1 tax in the year that you're going to appeal.
2 That's my understanding of it. And my
3 understanding is that then encompasses
4 whatever tax increase.

5 MR. CARYL: So you believe that
6 an investment that is subject to the radical

7 increases in property taxes. It's still
8 properly capitalized as something as low as
9 4.6 percent.

10 MR. OGDEN: Yes.

11 MR. CARYL: All right.

12 THE WITNESS: My consultant knows
13 the most about these matters because this is
14 what he does for a living, but he's not a
15 licensed real estate appraiser in West
16 Virginia, but he's the one who derived these
17 numbers. If he could testify about cap rates,
18 he would be better to testify than anybody
19 else.

20 UNIDENTIFIED BOARD MEMBERS: Why
21 can't he testify?

243

1 MS. MORGAN: The objection is
2 that he would be speaking on matters that have
3 to do with appraisals in West Virginia and
4 he's not licensed in West Virginia so he's not
5 capable of being offered as an expert in the
6 field because of the lack of State
7 accreditation. Is that not right,

8 Mr. Thompson?

9 MR. THOMPSON: That would be my
10 concern.

11 MR. CARYL: Unfortunately, I got
12 involved with this case late in the game, and
13 Mr. Margolis has done a great deal of work,
14 but it would be problematic for him to
15 testify.

16 MS. MORGAN: I honestly think
17 that the Board has probably heard enough about
18 capitalization rates. I think the Board has
19 heard enough about capitalization rates, at
20 least as I can say twenty percent of the Board
21 I control, so that I can see it's a judgment

244

1 call and it is done by experts, but it is not
2 a hard and fast figure, and this Board would
3 not be limited in its consideration if it were
4 to look at this case and determine that the
5 income method needs to be used.

6 The Board is not limited to what the
7 taxpayers have offered, eight percent. The

8 Board is not limited as to what Mr. Ogden has
9 offered. The Board can look at it and decide
10 for itself.

11 MR. SURKAMP: I think we're all
12 up here trying to put it back together a
13 little bit. I agree about the cap rates. But
14 I think I hear at this point in a simplified
15 version is that if we were to look at this
16 from an income approach, I have the impression
17 a person could argue that we have to find
18 actual, I don't want to say the word cap rate,
19 but actual numbers of value whether it's rents
20 or cap rates that compare you to other you
21 would say compare you to other controlled

245

1 rentals in the County specifically those that
2 aren't also not yours.

3 MS. MORGAN: Well, we don't have
4 that data.

5 MR. SURKAMP: I know, but I'm
6 saying that seems to be the structure of the
7 issue, and for all different logistical
8 reasons there isn't that much data to make

9 that decision.

10 MS. MORGAN: We have plenty of
11 other data.

12 THE WITNESS: I believe it is.
13 And the one exhibit that I gave you which
14 shows my RTO number, return to owner, that is
15 the cash flow that I'm allowed.

16 And so as far as the income that I
17 make it should come from that ROT figure, not
18 from this larger net operating figure which
19 includes the tax and insurance escrow, the
20 operating account and the replacement reserve
21 account.

246

1 MR. THOMPSON: I'm finished. Are
2 you finished?

3 MS. MORGAN: We need to take a
4 break. What further do you have for the
5 Board?

6 MR. CARYL: I just have a couple
7 very few re-direct questions.

8 MS. MORGAN: And the Board has

9 some questions. Did you want to...

10 MR. CORLISS: Well, I wanted -- I
11 had some questions on the capitalization rate
12 again because Judge Steptoe makes that a major
13 issue in his decision 2003 where he says
14 having failed to properly apply or calculate
15 his capitalization rate the Court must
16 disregard the appraised value on each of the
17 properties.

18 And so to me I don't think it's wrong
19 to ask for more information on the
20 capitalization and how it may or may not have
21 been correctly calculated.

247

1 MS. MORGAN: It's true,
2 Mr. Corliss, but our obligations, we have one
3 set of obligations, the taxpayer has an
4 obligation, tax assessor has an obligation,
5 Mr. Thompson, everyone has obligations here.
6 The taxpayer needs to meet this obligation to
7 tender whatever you want to tender for this
8 Board's consideration.

9 We received a wealth of evidence. If

10 the Board were to see all this evidence and
11 decide that, gosh, there's just nothing firm
12 enough in the taxpayer's cap rate, we can't
13 abide by it, we don't like eight percent, then
14 we would have to either pick another one or
15 determine the value in some other way.

16 I mean, we can't make this record
17 perfect, and the taxpayer has provided what
18 he's provided. His assertion which he's made
19 with great strength and vigor is that eight
20 percent is appropriate. The Board can accept
21 or reject that or modify it.

248

1 MR. CARYL: I would agree with
2 the President's characterization of the
3 process and status of this petition.

4 MR. SURKAMP: I'd like to request
5 an information thing during the break. If you
6 can show where in the Constitution tax credits
7 are intangibles that shall not be included in
8 the assessment. I'm asking if you can include
9 that for the record.

10 MR. CARYL: Well, I mean,
11 Mr. Thompson may disagree about the
12 characterization, but clearly intangible
13 assets are exempt from property taxes under
14 the West Virginia Constitution.

15 MS. MORGAN: That has not always
16 been the case.

17 MR. CARYL: That has not always
18 been the case. But as of 2003 they were fully
19 exempt.

20 And certainly as we sit here today
21 they're exempt. I would contend that an

249

1 intangible asset is a claim, is a right to
2 some you know claim for money claim.

3 It is not tangible personal property
4 like this table, it's not real estate. It's a
5 distinct type of property and it is only a
6 claim. It doesn't have a physical
7 manifestation.

8 Sometimes there's physical evidence
9 of it in terms of the stock certificate, you
10 know, a CD or something.

11 MR. SURKAMP: Make it -- push it
12 into the zone of clear error is what I need as
13 a Commissioner.

14 MR. CARYL: Well, Commissioner,
15 I'm telling you that I believe, first of all,
16 the law is that -- and I don't think
17 Mr. Thompson will question this -- the law is
18 the Constitution of West Virginia has exempted
19 from property taxation intangible personal
20 property.

21 I contend that these tax credits are

250

1 claimed and therefore meet the definition of
2 intangible personal property, and putting
3 those two thoughts together is how I reach the
4 conclusions that it's improper to include and
5 refer to or rely on in any way in terms of
6 determining the value of tangible property and
7 real estate intangible assets like tax
8 credits.

9 MS. MORGAN: If I can put it into
10 plain language, if the argument is, well, this

11 property shouldn't be valued at a lower rate
12 because the investors have gotten their money
13 out anyway, or the investors have been
14 remunerated, that's the argument.

15 MR. THOMPSON: We're having
16 closing arguments here, aren't we? I mean,
17 isn't that what we're doing? Why don't we
18 finish this hearing up and then you decide
19 whether we're going to have closing arguments,
20 and I'll address the issue. I mean, Mike's
21 getting all the time.

251

1 MR. CARYL: Makes up for when
2 you...(laughter)

3 MS. MORGAN: All right. Let's
4 taken a ten-minute break then.

5 (Whereupon, a recess
6 was taken)

7 MS. MORGAN: What is the pleasure
8 of Counsel?

9 MR. CARYL: I have really only
10 one or two questions about this fire insurance
11 coverage, re-direct of the witness. And

12 that's the end of my our presentation.

13 MS. MORGAN: Then...

14 MR. CARYL: I'd like an

15 opportunity to make oral arguments either

16 right now or some other time as the Commission

17 designates.

18 MS. MORGAN: Well, I think we

19 should wrap up the argument.

20 MR. CORLISS: Will we have an

21 opportunity to ask questions afterwards or is

252

1 that the end of the question period?

2 MR. THOMPSON: Typically don't

3 ask questions at oral argument stage but...

4 MS. MORGAN: Well, typically in a

5 normal court hearing, full-fledged court

6 proceeding, it would be certainly, as

7 Mr. Thompson just pointed, out, we're not in

8 the question...

9 MR. THOMPSON: If the question is

10 for the witness I supposed they should be

11 asked now before we argue.

12 MR. CORLISS: They gave us a lot
13 of stuff to read and...

14 MR. THOMPSON: I've got more.

15 MR. MORGAN: I'd like to
16 understand what the procedure actually is.
17 Now, will we be going into executive session
18 to discuss this or...

19 What if we have questions? If we
20 enter into deliberations and then we boil this
21 down to some critical question, what do we do

253

1 then?

2 MR. CORLISS: Are our
3 deliberations videotaped? Is it open or
4 closed?

5 MS. MORGAN: I don't see any
6 reason for it to be closed. And I think it
7 ought to be in open session. And the other
8 thing is that whether it's problematic for the
9 Board or not, I don't think that we should
10 consider the case open. We have to close the
11 evidence and argument and deliberate and reach
12 a decision.

13 We can't leave it open-ended. This
14 is complex. We're not going to be able to
15 leave it open-ended where if the Commissioners
16 have a particular question that they feel is
17 crucial, we're just going to have to get
18 through making a decision without reaching
19 additional information. Otherwise we may
20 never see an end to this.

21 MR. MANUEL: So do I understand

254

1 what that means is that when we go into
2 deliberations, that's it. Not asking any more
3 questions of the witness, not ask any more
4 questions of the attorneys.

5 MS. MORGAN: That would be my
6 strong preference in addition to which
7 (interposing colloquy).

8 MR. SURKAMP: Yeah, so get your
9 questions answered.

10 MR. MANUEL: Okay, so that when
11 we come in Tuesday we can't ask questions...

12 MS. MORGAN: I would prefer that

13 we not take further questioning and taking of
14 evidence and arguments.

15 MR. MORGAN: I can almost
16 guarantee that we're going to hung up on some
17 issue that needs -- just need a simple answer,
18 and I think the quality of results are more
19 important than some rigid rules.

20 MS. SURKAMP: I mean, if we're
21 going to read this stuff, there's going to be

255

1 something that's going to come out of that.

2 MR. MANUEL: Why don't we wait
3 and do summations on Tuesday because we're not
4 going to be able to come to a conclusion here
5 that we are not going to ask...

6 MS. MORGAN: Is it your intention
7 -- Mr. Thompson is here. It's more of a
8 burden obviously for the taxpayer and his
9 attorney to come down here. Is it your
10 intention to reassemble when we're in
11 deliberative session?

12 MR. CARYL: Well, if it was just
13 for deliberations, not just as an observer.

14 If that was the only role that I was going to
15 play I would just as soon pass. In the past
16 I've done it a few times including the '03
17 case.

18 As long as the deliberations are on
19 the record and I have some idea of his basis
20 of appeal if there's an adverse ruling, but if
21 there's not (inaudible) then I absolutely

256

1 should be here and would welcome the
2 opportunity to be here.

3 MS. MORGAN: But what I'm
4 suggesting to the Board is that I just don't
5 see an end to that process. I think that
6 could bog us down and make it into a multi-day
7 event.

8 We have to be out of here by February
9 28th and actually I would want to reach a
10 decision by the end of our session on Tuesday
11 the 27th.

12 MR. THOMPSON: I agree.

13 MR. CARYL: Madam President, I

14 would think that the process whereby the
15 attorneys appeared, made their points,
16 responded to the questions of the Commission
17 and you're absolutely in charge of the time
18 just like in the Supreme Court or any other
19 court, that you could contain that process.

20 MS. MORGAN: Well, the chair is
21 subject to being overruled.

257

1 MR. CARYL: Well, still have a --
2 but the statute, you're absolutely right. The
3 statute requires that you adjourn by the 28th,
4 so it wouldn't be my thought that there be any
5 ongoing open-ended multi-day process, but an
6 hour or so, at most, in front of you one more
7 time just with the lawyers.

8 MR. THOMPSON: Yes, that's fine.
9 It concerns me too if Ginger has a RT, it was
10 changed, she's over there now doing changes
11 that have already taken place, and she is
12 running out of time.

13 She has to get these figures out, I
14 think, at the end of February, first of March.

15 So there has to be some finality to this and I
16 would hope that you would reach that finality
17 not later than Tuesday.

18 MS. MORGAN: Oh, absolutely. We
19 will not adjourn Tuesday until we've reached a
20 decision on this case.

21 MR. CORLISS: But the only

258

1 question I have is that if we review all this,
2 are we prohibited from asking any more
3 questions?

4 MS. MORGAN: Well, that's what...
5 Mr. Thompson, you don't object to the notion
6 of doing your summations on Tuesdays?

7 MR. THOMPSON: I do not. Tuesday
8 is a busy day in our office, and I'll make
9 myself available at whatever time you...

10 MS. MORGAN: Well, we're meeting
11 at 2:30 so if we took summations at 2:30
12 giving allotting you twenty minutes each.

13 MR. CARYL: That's fine.

14 MS. MORGAN: Twenty minutes to

15 each side. I think the questions better come
16 at the end. I think we ought to hear the
17 summations and then have a twenty-minute
18 question period and we'll divide the time
19 among the Commissioners but we shouldn't leave
20 it really open.

21 The taxpayer has the burden of proof,

259

1 twenty minutes for the taxpayer's counsel.
2 Twenty minutes for Mr. Thompson. Twenty
3 minutes question and answer period if it's
4 needed. And then we'll deliberate in open
5 session.

6 MR. CARYL: The only caveat to
7 what you just described is I would request
8 since we do have the burden of proof and we're
9 the moving party that I could possibly divide
10 my time, five minutes...

11 MS. MORGAN: Reserve five
12 minutes...

13 MR. CARYL: ...out of the twenty.

14 MS. MORGAN: Mr. Thompson, is
15 there an objection to that?

16 MR. THOMPSON: No.

17 MR. CORLISS: What was the
18 proposal again?

19 MR. CARYL: That I would open and
20 close, I'd be able to respond since we have
21 the burden. But not having greater total

260

1 time.

2 MS. MORGAN: Would you want the
3 election of reserving your rebuttal time to
4 the end of the question and answer period, do
5 you do want to do it at the end...

6 MR. CARYL: This is getting
7 complicated. No.

8 MR. MORGAN: (Inaudible)

9 MR. CARYL: ...I find what you
10 suggested more orderly, but we would still be
11 here and I would want to be able to respond to
12 your questions, but it wouldn't be part of our
13 allotted twenty minutes.

14 MR. THOMPSON: Yeah, the problem
15 with the court is that they -- you say two

16 words and they're already interrupting you and
17 you never get back to your argument.

18 MS. MORGAN: That is a serious
19 problem. It is.

20 MR. THOMPSON: And then your left
21 with a very incomplete argument or none at all

261

1 in some cases because they're right on you and
2 so it's -- I would prefer not to be
3 interrupted.

4 MR. CARYL: That's what I'm
5 suggesting...

6 MS. MORGAN: All right, then the
7 only remaining question is what the opinion of
8 counsel is about what the vice-chair has
9 suggested about if there are questions and the
10 Board comes to you during deliberations would
11 Counsel object to appearing and dealing with
12 those questions hearing from both sides?

13 MR. THOMPSON: Well, I envision
14 that, that will make the process lengthy.

15 MR. MORGAN: Give us one shot.

16 MR. THOMPSON: One question.

17 MR. MORGAN: I think it benefits

18 both sides.

19 MR. THOMPSON: You've got to have

20 a limit because you'll never reach a decision.

21 MR. SURKAMP: I think you're

262

1 right that we have the responsibility to

2 keeping it to one question.

3 MS. MORGAN: All right, then in

4 that case on question each. You have three

5 minutes of argument on both sides so we can

6 dispose of it.

7 But it has to be the type of question

8 that appears to be blocking the reaching of a

9 decision.

10 MR. THOMPSON: So what you're

11 going to be doing, as I understand it, we'll

12 make our closing and then you'll deliberate

13 and then if you have a question that needs to

14 be clarified, then that will be...

15 MS. MORGAN: Now, that's cutting

16 out the question and answer period that I had

17 previously...

18 Well, I guess philosophically I
19 disagree how perfect you can get with this
20 process, but I'm respectful of the other
21 commissioners.

263

1 This has been cumbersome and lengthy
2 and a complicated case so I don't think
3 there's a particular problem with going ahead
4 and giving ourselves the time, twenty minutes
5 for argument for both sides, twenty minute
6 question and answer period, and then the Board
7 will deliberate and if by majority vote the
8 Board comes up with a question, that will be
9 submitted to three minutes of argument from
10 both sides.

11 MR. CARYL: You may have created
12 the perfect process, it could be a model
13 for...

14 MS. MORGAN: I'm sure not.

15 MR. CORLISS: I still object to
16 the decision because after, again, taking a
17 look at all this information, I might have

18 questions regarding it and I don't...

19 MR. SURKAMP: You'll have an
20 opportunity. You can bring the question up.

21 MR. THOMPSON: We're not going to

264

1 have any witnesses on Tuesday.

2 MR. CORLISS: I just want to be
3 able to ask the attorneys.

4 RE-DIRECT EXAMINATION

5 BY MR. CARYL:

6 Q. Mr. Margolis, isn't it true
7 although I'll speed it up, isn't it true that
8 the amount of fire insurance coverage that has
9 been indicated on these various properties is
10 based on the cost to replace those buildings
11 today?

12 A. Absolutely.

13 Q. And isn't it true that that is
14 a much greater amount than the value of those
15 properties with their age and depreciation
16 today?

17 A. Absolutely.

18 MR. CARYL: Thank you.

19 RE-CROSS-EXAMINATION

20 BY MR. THOMPSON:

21 Q. Does that include the personal

265

1 effects?

2 A. That's everything. It covers

3 everything in case I have a super catastrophe,

4 replacing the whole darn thing including lost

5 rents.

6 MR. MANUEL: But not the renters'

7 personal possessions?

8 THE WITNESS: No, no, no, there's

9 renters' insurance for that.

10 MR. CARYL: I have no other

11 questions of this witness.

12 THE WITNESS: And lost rent

13 during the time it's replaced.

14 MS. MORGAN: Thank you. Is there

15 anything further from Counsel?

16 All right. Tuesday at 2:30.

17 Thank you. We'll see you then.

18 (Whereupon, the hearing

19 concluded at 2:45 p.m.)

20 - - -

21

266

1 CERTIFICATION OF REPORTER

2 I, Brian M. McDonald, the officer before whom
3 the foregoing hearing was taken, do hereby
4 certify that the proceedings that appear in
5 the foregoing hearing were taken by me
6 stenographically and thereafter reduced to
7 typewriting by me; that said hearing is a true
8 record of the proceedings held; that I am
9 neither counsel for, related to, or employed
10 by any of the parties to the action in which
11 this hearing is taken and further, that I am
12 not a relative or employee of any attorney or
13 counsel employed by the parties thereto, nor
14 financially or otherwise interested in the
15 outcome of the action.

16

17 _____

18 Brian M. McDonald

19 Shorthand Reporter

20

21