

COUNTY OF JEFFERSON: STATE OF WEST VIRGINIA

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IN RE: )  
 The 2007 Property Tax Assessments )  
 of Shepherds Glen, Limited Partnership; )  
 Patrick Henry Way, Limited Partnership; )  
 Bolivar Court II, Limited Partnership; )  
 PHA Associates, Limited Partnership. )

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February 27, 2007

2:27 p.m

100 East Washington Street

Charles Town, West Virginia

JEFFERSON COUNTY COMMISSION:

FRANCES MORGAN, President

RUSTY MORGAN, Vice President

GREG CORLISS, Commissioner

DALE MANUEL, Commissioner

JIM SURKAMP, Commissioner

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A P P E A R A N C E S

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1 CHARLES TOWN, WEST VIRGINIA

2 TUESDAY, FEBRUARY 27, 2007

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4 P R O C E E D I N G S

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7 PRESIDENT MORGAN: Mr. Caryl, I

8 believe the board is ready whenever you're

9 ready.

10 MR. MORGAN: I just have a statement

11 to make before we start.

12 PRESIDENT MORGAN: Oh, certainly.

13 MR. MORGAN: I wanted to put on the

14 record that I did review the meeting that I

15 missed, the original part of the hearing on

16 webcam. I reviewed that entire event, and

17 I've also read the entire transcript of that

18 same proceeding, and I do appreciate that

19 being delivered to me a day early. It was

20 very helpful.

21 MR. THOMPSON: I have not received

4

1 my copy yet.

2           PRESIDENT MORGAN: And, Mr. Caryl,  
3 if you wish to preserve time, I would like to  
4 know.

5           MR. CARYL: Yes, I would like to put  
6 in my five minutes.

7           Madame President, Members of the  
8 Commission, let me thank everyone for the  
9 extraordinary time and effort you've put into  
10 considering the merits of our appeal.  
11 Regardless of the extensive background, I do  
12 appreciate the effort that you all have put  
13 into an extraordinary four-session case that  
14 has been a little bit unusual in my  
15 experience.

16           Let me start with just a couple  
17 guiding principles, as I see them, that I  
18 would ask the Commission to consider as it  
19 looks at this case. First of all, the case,  
20 as cited from the previous session, that's "In  
21 Re: The 1994 Assessments of Property, Ragini,"

1 a case out of Morgan County, I believe stands

2 for the proposition that the Commission has  
3 very broad, if not plenary authority, to set  
4 assessments of true and actual value.

5       In that case, the Commission's  
6 authority was ruled by the Supreme Court to  
7 trump the authority of the Division of  
8 Forestry to classify the property as managed  
9 timber land for property tax purposes. As a  
10 result of that case, the legislature amended  
11 the law to make it clear that the Division of  
12 Forestry classification, if satisfied, would  
13 stand, and the Commission would be bound by  
14 it; but it did put in some other detailed  
15 procedures to prevent abuse of that  
16 methodology. But the general principle  
17 arriving from the Ragini case, I think, is  
18 that the Supreme Court views the Commission's  
19 authority as very broad in these matters of  
20 setting a true and actual value.

21       Secondly, it's been well-

6

1 established, and I believe -- I don't think  
2 Mr. Thompson will disagree with this -- that

3 in matters like this, if a taxpayer has shown  
4 by clear and convincing evidence that the  
5 proposed assessments are erroneous for one  
6 reason or another, then the burden to come  
7 forward with some evidence to rebut that and  
8 to show that they are, in fact, correct is on  
9 the Assessor. It would be our position that  
10 the proposed values, assessed values, in this  
11 case have been shown to be erroneous by clear  
12 and convincing evidence.

13 First of all, the proposed values of  
14 the improvements of these properties were  
15 determined by applying a discredited  
16 methodology, the "cost method," to obsolete  
17 data; and that combination renders, we would  
18 argue, those assessments erroneous and at  
19 least highly suspect.

20 The Assessor's expert, Ms. Meyers,  
21 admitted, begrudgingly, but admitted, that

1 it's well-established that the older the  
2 properties are, the less reliable the cost

3 method is, simply because there's so many  
4 judgments have to be made about the economic  
5 obsolescence, the physical depreciation,  
6 deterioration, and (inaudible). In fact, we  
7 heard that there was -- she really didn't pay  
8 much mind to economic obsolescence as defined  
9 in the regulations.

10       Secondly, the proposed values the  
11 Assessor has come forward with clearly did not  
12 consider the discounting effect of the  
13 restrictions on the use of the property.

14       Now, we had an interesting law  
15 school-type debate about dominant and serving  
16 easements, but in the portions of the  
17 regulations that Mr. Margelis specifically  
18 referred to, the term "easements" was in a  
19 list of proper considerations unadorned by  
20 those nuances. And quite simply, the  
21 restrictions, legal restrictions, on the use

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1 of the property, including zoning quite  
2 frankly, are legitimate considerations,  
3 according to the regulations, in terms of the

4 value of the property.

5       Finally, most importantly, the value  
6 proposed by the Assessor ignored, admittedly  
7 ignored, the income method; and as a result of  
8 ignoring the income method are far in excess  
9 of the amount which a prudent investor would  
10 pay for these subject properties. We believe  
11 that the income approach is the proper  
12 approach. It was ignored by the Assessor.

13       And the income approach set in the  
14 simple down-and-dirty method that Mr. Ogden  
15 referred to, I think, was simply to take the  
16 net income over a span of time, and we showed  
17 three years; and we actually used the current  
18 -- it wasn't the most recent and full year --  
19 but we showed through our exhibit that it was  
20 typical and was in the same range year after  
21 year of each property, and divided that by a

9

1 capitalization rate.

2       And to get the capitalization rate,  
3 Mr. Margelis, the owner of the property, who

4 under any Rule of Evidence is entitled to  
5 opine as to its own, its value, referred to a  
6 professional journal that reported, among  
7 other things, a range of yields or returns  
8 that were found in rental property generally,  
9 not restricted rental property.

10 He picked the upper end of the  
11 range, because we believe legitimately that  
12 there is a greater risk with these kinds of  
13 properties, particularly if you consider the  
14 potential for abrupt spikes in real estate  
15 taxes that can come in the circumstances that  
16 are in front of you today.

17 And keep in mind, and I agree with  
18 the Madame President, that the setting of a  
19 capitalization rate is a lot of judgment; and  
20 I believe there, the Commission has broad  
21 discretion to determine what is a correct

10

1 capitalization rate, based on all the factors  
2 that ought to be applied.

3 But in exercising that judgment, I  
4 would ask you to consider the fact that risk-

5 free investments can be had today at over 5  
6 percent. I mean, I have a copy of today's  
7 Washington Post where there are CDs, 3- and  
8 6-month CDs, at over 5 percent. There is  
9 insured accounts, which are insured accounts,  
10 I should say, a 6-month yield on a -- or the  
11 yield on a 6-month Treasury bill, full faith  
12 and credit of the United States of America,  
13 5.18 percent.

14       So if a risk-free investment can get  
15 you five, more than 5 percent, then 8 percent  
16 is not a big stretch to take into account the  
17 vast and greater risk that these properties  
18 face or the investors in these properties  
19 face.

20       So I believe that we have shown that  
21 the Assessor's proposed values are erroneous.

1 They're based on erroneous methods, and they  
2 ignored the correct method. The Assessor then  
3 has not then carried the burden that was  
4 shifted to her, as a result of our showing, to

5 somehow justify the values nonetheless.

6       What she's done is raised a lot of

7 issues, tax credits. Well, I'm down here to

8 tell you that tax credits are a claim to a

9 benefit. That is federal income tax

10 statements. That is nothing more -- that is

11 an intangible asset, if it's anything, and it

12 is exempt from consideration for property tax

13 purposes under the Constitution of the United

14 States of America -- I'm sorry -- under the

15 Constitution of West Virginia. I apologize.

16 It is Article 10, Section 1A, and then there

17 was a statute that implemented the phaseout of

18 the taxation of intangibles, and then I think

19 it became fully phased out, I believe, in tax

20 year 2002, maybe 2003, but the code is 11-1C,

21 Section 1B.

12

1       So the availability of tax credits

2 is not a legitimate consideration. Those tax

3 credits were available to the original

4 investors when these properties were purchased

5 a number of years ago, and they have nothing

6 to do legally or economically with the value  
7 of these properties as of July 1, 2006.

8       The failure of the Assessor to use  
9 or consider the taxpayer's income information  
10 -- she didn't have it; she didn't ask for it;  
11 we didn't give it to her; could have given it  
12 to her within a day and age; but they didn't  
13 act, clearly by the policy of the Assessor --  
14 does not preclude the Commission's use of it  
15 now. That's the point. Here it is. We put  
16 it in the record, and the Commission has the  
17 authority to use it to set the correct  
18 assessments.

19       At the same time, using the income  
20 method for these kinds of properties, for  
21 grant-restricted, low income, rental housing,

13

1 does not mandate that you abandon the CAMA  
2 system and the cost method that's embodied in  
3 the CAMA system for other kinds of properties.

4       The Commission can comply also with  
5 the administrative requirement to break down

6 the total value of these properties between  
7 land and improvements a couple of ready ways.  
8 One is to take the same ratio that the  
9 Assessor's proposed values have of land to  
10 improvements; or, alternatively, to take the  
11 land values that the Assessor has proposed,  
12 which though flawed, are far less flawed than  
13 the cost method for the improvements, and use  
14 those, use those land values as the Assessor  
15 has proposed them, and then take -- deduct  
16 that from the proposed value by the taxpayer  
17 on the income method and assign that  
18 difference to the improvements. It's no big  
19 deal, and it sounds a lot like the residual  
20 method that Ms. Barrett talked about when  
21 using that sale of improved land to come up

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1 with land values.

2 Finally, properly applying the  
3 income method in this case will also keep  
4 Jefferson County from undermining the  
5 important public policy interest of promoting  
6 the availability of affordable housing for its

7 poorer citizens. The market or economic grant  
8 for subsidized, low income, restricted rental  
9 housing in Jefferson County is represented by  
10 the rent charged by these taxpayers and by the  
11 others listed in the exhibits that  
12 Mr. Margelis provided. That range is the  
13 market -- is the market rent to apply the  
14 income method as the regulations contemplate.  
15       Local economic conditions, including  
16 the lack of availability of affordable housing  
17 for low income citizens is a legitimate  
18 consideration in setting assessed values for  
19 property tax purposes. Now, I cite to you an  
20 old case from 1931, Central Realty Company v.  
21 Board of Inquisition Review, and I have copies

15

1 of each case that I am citing, a copy for each  
2 of the Commissioners, when I finish.

3       PRESIDENT MORGAN: It puts us at a  
4 disadvantage, sir, when this comes up in your  
5 argument, and I don't remember that case being  
6 cited.

7 MR. CARYL: No, no, I haven't. I  
8 just -- you haven't heard that before, and I  
9 have a copy of each of the three cases:  
10 Ragini, the Pocahontas Land case, and this  
11 one, which is the business about the Assessor  
12 having the burden, once the assessments are  
13 shown to be erroneous.

14 To the extent that landlords,  
15 including these taxpayers, pass the cost of  
16 property taxes on to their tenants through the  
17 rent -- and there was some evidence that that  
18 would happen to some extent in some cases --  
19 the rate structure of the West Virginia  
20 Constitution, which imposes a rate twice as  
21 much on that kind of property, essentially

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1 subsidizes the people who can own their own  
2 homes, because a single-family rate is half of  
3 that of the rate on these types of properties.

4 So, in effect, the tenants of these  
5 properties are subsidizing the people that can  
6 own their own homes under our rate structure,  
7 so it's inherent. So here's something you can

8 do to mitigate that incredibly regressive  
9 structure that we have in our rate structure.  
10 If, on the other hand, landlords have to  
11 absorb the cost of the property taxes on these  
12 kinds of properties, obviously, it will  
13 discourage the investment in these kinds of  
14 properties, and the greater inventory that's  
15 needed in Jefferson County will never  
16 materialize.

17       Finally, the vast majority of  
18 jurisdictions in the United States, including  
19 some of our neighboring states, recognize that  
20 the income method is the correct method to use  
21 for rent-restricted, subsidized, rental

17

1 housing, like these properties; and I urge you  
2 to consider it as the weight of the value of  
3 these properties and use it, apply it to the  
4 data we submitted to determine their proper  
5 values.

6       Madame President, how much time do I  
7 have left?

8       PRESIDENT MORGAN: One moment.

9       MR. CARYL: One moment?

10       PRESIDENT MORGAN: If you're going  
11 to reserve five.

12       MR. CARYL: Right, if I still have  
13 my five. So I'll sit down, and I will pass  
14 out the cases. I've got a set for each of you  
15 of three cases.

16       PRESIDENT MORGAN: Thank you, sir.

17       MR. CARYL: Mr. Thompson has his  
18 cases.

19       MR. MORGAN: Do you want us to read  
20 off all his cases?

21       MR. CARYL: No, no, I'm not

18

1 suggesting that at all. He may raise, you  
2 know, preemptively raise questions about them,  
3 and you'll have me (inaudible). (Handing)

4       MR. MORGAN: Okay. Thank you.

5       PRESIDENT MORGAN: Thank you.

6       MR. THOMPSON: Okay. I'm ready to  
7 go. Thank you very much.

8       I too am going to cite the

9 presumption of correctness cases and would  
10 pass the cases out to the members of the Board  
11 of Review and point out to you that the  
12 presumption attached to the Assessor's  
13 assessment as being correct, and the burden is  
14 on the taxpayers to demonstrate by clear and  
15 convincing evidence that the assessment is  
16 erroneous. I'm passing out the Western  
17 Pocahontas case.

18       In terms of the valuations, let me  
19 suggest to you that the methodology employed  
20 by the Assessor is a better methodology  
21 because 11-4-2 provides that the land and the

19

1 buildings be separately assessed, and the cost  
2 approach and replacement approach does that,  
3 in effect; whereas, the income approach does  
4 not.

5       The income approach gives you a  
6 total value for the entire business  
7 enterprise, when operating as an enterprise,  
8 that would include lots of things, including

9 personal property, if you will. I suppose  
10 goodwill, other matters, other than the value  
11 of the buildings and the value of the land,  
12 which is required to be assessed separately,  
13 according to that particular statute.

14       And I find it extraordinarily  
15 interesting that the taxpayer, while  
16 "hookeling" the approach taken by the Assessor  
17 and using the replacement cost approach and  
18 comparable sales-of-land approach, then turns  
19 around and relies on those two approaches that  
20 we utilized and relies upon our values to  
21 establish a ratio of land to buildings,

20

1 because his approach doesn't give you that.  
2 His approach gives you a total value of  
3 business enterprise without separately valuing  
4 the buildings, without separately valuing the  
5 land. Our approach for that reason is a  
6 better approach because it values the land  
7 separately; it values the buildings  
8 separately.

9       And we use the uniform system. We

10 use the CAMA system which looks at the value  
11 of a land as commercial land. We don't look  
12 for comparable buy-one-by-type properties. We  
13 look for comparable land, commercial land. So  
14 we're valuing the commercial land under these  
15 buildings as commercial land, as all other  
16 commercial land is valued in Jefferson County;  
17 and we do a replacement cost on the buildings,  
18 and our approach is better because our  
19 approach is what is mandated by state code.

20 Now, I'm going to pass out --  
21 because I don't have time to go through it

21

1 here -- but I'm going to pass out to you some  
2 notes that I made of the various values.  
3 Mike. (Handing) I doubt if I have time to  
4 get into those individually.

5 But you will notice that I showed  
6 what the Assessor has the property appraised  
7 at, both land and buildings, the total; the  
8 value that the taxpayer claims is derived by  
9 his approach used in finding a total value of

10 the business enterprise; the Assessor's land  
11 to building ratio; the values that use the  
12 Assessor's ratio, which he contends we can use  
13 for that purpose only, but we can't use -- we  
14 cannot rely on our approaches because they're  
15 inaccurate, but all of a sudden, they become  
16 accurate enough to use to establish the ratio.  
17 I would submit to you that that is one of the  
18 greatest inconsistencies in his income  
19 approach argument. And then, finally, the  
20 fire insurance coverage.

21 I give you each of those for each of

22

1 the project, listing the acreage, and I think  
2 you're going to find the acreage and the  
3 values that he attributes to the acreage per  
4 acre very extraordinary. You cannot buy real  
5 estate, commercial real estate or even  
6 residential real estate at the values he  
7 claims his real estate is worth. Regardless  
8 of the depreciation issues on the buildings,  
9 those values are funky, ladies and gentlemen.  
10 Okay.

11 Now, he suggests to you that the  
12 Assessor is somehow obligated to use the  
13 income approach, and I would suggest to you  
14 that this case that I gave to you previously,  
15 which is the In Re: Tax Assessment against  
16 the American Bituminous Power Partners,  
17 Limited Partnership case would suggest to the  
18 contrary, that the Assessor is under no  
19 obligation to use the income approach, as long  
20 as the Assessor does not abuse his or her  
21 discretion.

23

1 And, specifically, let me say that  
2 that case -- and I've underlined the  
3 applicable portions -- would suggest that the  
4 Assessor stands in the shoes of the Tax  
5 Commissioner. It's the same rule, by the way,  
6 that we've been looking at during the entirety  
7 of these proceedings. And the question is:  
8 Did the Assessor abuse his or her discretion  
9 by not employing the method, the income  
10 approach method?

11           And I would suggest several reasons  
12 why the Assessor did not abuse her discretion.  
13 For one thing, the taxpayer failed to provide  
14 the information to the Assessor. How is the  
15 Assessor supposed to require information from  
16 a taxpayer, if the taxpayer doesn't submit it  
17 with his personal property tax return, which  
18 is the only one that is required of him, on or  
19 before October of the previous year? It was  
20 not provided. It was provided for the first  
21 time at this hearing. No state statute or no

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1 state regulation requires taxpayers provide  
2 that information.

3           Now, Mr. Ogden indicated some  
4 expertise here. He was probably in a position  
5 to look at that information and probably give  
6 the taxpayer a read on whether he thought the  
7 approach was a legitimate approach or not, but  
8 it was not provided, period. How can there be  
9 an abuse of discretion when the information is  
10 never provided to the Assessor to consider?  
11 Regardless of whether it is considered a vaent

12 (phonetic) act. At least provide it, and then  
13 you have the argument at least, but in terms  
14 of an abuse of discretion of standard, it was  
15 not provided, so how can it be an abuse of  
16 discretion?

17       And, secondly, it couldn't be an  
18 abuse of discretion anyway, because 11-4-2  
19 requires the buildings and land be valued  
20 separately. The income approach doesn't give  
21 you that. The income approach only works if

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1 the Assessor does her job and does the other  
2 two approaches and gives you a land and  
3 building ratio. Again, they have to rely on  
4 our work to have a land and building ratio.

5       So I would submit to you that we're  
6 in compliance with that case that I gave you,  
7 that she was proper, as was the Tax  
8 Commissioner in that case, in not considering  
9 that approach, because the very particular  
10 information that she needed to do that  
11 approach wasn't provided. So how can you be

12 heard to complain?

13 Now, his income approach -- this is  
14 the apples and oranges that was talked about  
15 in Judge Steptoe's opinion -- he uses a  
16 commercial cap rate. His appraiser,  
17 Mr. McPherson, back at the previous hearing,  
18 used a cap rate. It's discussed in the  
19 publication, CORPAS, the same publication that  
20 Mr. Margelis mentioned. This is at pages 89  
21 and 90. He used the same publication and came

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1 up with a cap rate of 11.2 percent. It was a  
2 commercial cap rate.

3 Now, the taxpayer in this particular  
4 case came up with a cap rate of 8 percent.  
5 Now, why is the cap rate important? Because  
6 the cap rate is what you divide into the net  
7 operating income, annual-wise, to come up with  
8 a value of the business, reduce the present  
9 value.

10 And even the publication, CORPAS,  
11 suggested that it was possible to use a cap  
12 rate as low as 4 percent, but he chose the

13 higher rate, 8 percent, because he said the  
14 project is risky. What risk is there when the  
15 loan is subsidized, the loan is at 1 percent,  
16 way below market? And given, apparently, the  
17 occupancy rates that he's had, there doesn't  
18 appear to be much of a risk involved in his  
19 particular projects.

20 But, again, the point is cap rates,  
21 the selection of cap rates, is a particularly

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1 subjective thing that you do. Now, it was  
2 suggested by Mr. Ogden that a different cap  
3 rate could have been constructed. And I'm  
4 going to give you a case to consider. And,  
5 again, this was not a case that you had in  
6 front of you during the course of the  
7 hearings, but I'll give it to you anyway.  
8 It's a California case. It discusses  
9 specifically Section 515 properties.

10 And in this particular case, the  
11 taxpayer, a Mr. Eureka, disregarded  
12 consideration of the 1 percent -- the 1

13 percent subsidized interest rate on his  
14 federally guaranteed 515 loan and used instead  
15 the face amount of the indebtedness or the  
16 note, exactly what Mr. Caryl is advocating to  
17 you.

18       It's a California case, but the  
19 court says that in constructing their band of  
20 investments cap rate, a specialized cap rate,  
21 not out of CORPAS or any other publication,

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1 you should use the 1 percent actual rate, not  
2 base amount on the note, but what your actual  
3 percentage rate is after the subsidy is  
4 received. So I give you that to consider.

5       The tax credits. I'm going to give  
6 you the federal or the state constitutional  
7 provision which exempts intangible personal  
8 property. I'm going to give you the statute  
9 that phased it out, the taxation of  
10 intangibles. I'm going to give you the  
11 definition of "personal property," which  
12 includes a definition of sorts of "intangible  
13 personal property." (Handing)

14 I'm going to give you Article 10,  
15 which talks about other exemptions, or it's in  
16 Section 1 of the state constitution, which  
17 talks about other exemptions; and I'm going to  
18 give you a case that talks about ad valorem  
19 taxation of an FCC license. This is Ohio  
20 Cellular, RSC, Limited Partnership v. The  
21 Board of Public Works

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1 Now, tax credits against income tax  
2 are not mentioned specifically as exempt  
3 intangible personal property in Article 10,  
4 Section 1.8, of the first document I gave to  
5 you. 11-1C-1D, which is the phaseout  
6 provision, does not specifically mention tax  
7 credits as intangible personal property. It  
8 speaks in terms of just intangible personal  
9 property generally

10 11-5-3 speaks in terms of fixtures,  
11 things moveable and tangible, chattels, real  
12 and personal; and, finally, in the last phrase  
13 -- it's 11-5-3 -- I think I gave you that --

14 MR. MORGAN: Yeah.

15 MR. THOMPSON: -- it speaks in terms  
16 of all notes, bonds, accounts receivable,  
17 stocks and other -- and other intangible  
18 property.

19 So the first three items --  
20 fixtures, moveable property, chattel, real  
21 chattel, personal -- don't apply. Intangible

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1 is dealt with in that last part of 11-5-3. If  
2 you look at the Ohio Cellular case, it  
3 basically is to try and determine whether an  
4 FCC license is intangible personal property  
5 for purposes of fixed -- for purposes of ad  
6 valorem taxation, and basically went through  
7 the various kinds of personal property set  
8 forth in 11-5-3 and concluded that if it's any  
9 of them, it has to be an intangible item of  
10 personal property, and then it reformed a Rule  
11 of Construction.

12 And the Rule of Construction is, he  
13 used those generics, which is a rule which  
14 says that the definition of "intangible

15 personal property" is defined by the group or  
16 class of things mentioned prior: Notes,  
17 bonds, accounts receivable. In other words,  
18 the court in that particular case limited what  
19 intangible personal property is to those kinds  
20 of things: Notes, bonds, accounts  
21 receivables, things that they quote from the

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1 cases, things of the same general nature and  
2 class.

3       So the analysis will carry us to the  
4 next step. Applying the same analysis to  
5 income tax credits, we have to conclude that  
6 they were not intangible personal property  
7 under West Virginia law that was ever prior  
8 previously subject to personal property tax  
9 when we had it. If you look at the statute,  
10 if you look at the statute, the statute says  
11 that -- the phaseout statute says that the  
12 only thing exempt is intangible personal  
13 property with tax license in the state that  
14 would have been taxable prior to the effective

15 date of this act.

16 So income tax credits were never

17 taxable, weren't taxable prior to this act.

18 So the phaseout and the constitutional

19 provision phasing them out don't apply. Now,

20 they would have had to have been taxable

21 before to be exempt now. Technically, they

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1 could be taxable. They never were, never have

2 been. They've never been taxed. Now, he's

3 claiming that this value should somehow be

4 exempt from the value of these buildings and

5 the property altogether.

6 I'm going to give you the Maplewood

7 Community, Inc. case v. Craig. This is a

8 little different kettle of fish. This was a

9 senior citizen community.

10 PRESIDENT MORGAN: Mr. Thompson, I

11 might remind you, I don't think I got a copy

12 of the Maplewood case --

13 MR. THOMPSON: You did not.

14 PRESIDENT MORGAN: -- but I might

15 remind you that your time is running very

16 short.

17 MR. THOMPSON: Okay. I'll give it  
18 to you afterward.

19 PRESIDENT MORGAN: Thank you, sir.

20 MR. THOMPSON: The point I'm making  
21 is in Maplewood, exemptions, when you're

33

1 claiming them, you have to show that the  
2 property that you claim that is exempt -- and  
3 this is the head note -- clearly falls within  
4 the term of the exemption, end note 2, I think  
5 it is. And if there is any doubt that arises  
6 as to the exemption, the doubt has to be  
7 resolved against the one claiming it. And the  
8 rule goes on, the head note goes on, and the  
9 constitutional statute of provisions exempting  
10 property are strictly construed. Enough said.

11 Finally, Judge Steptoe's order is  
12 still the law in this circuit. He was  
13 concerned about the apples-and-oranges nature  
14 of the cap rate that was used then and is used  
15 now. It's a commercial rate. He found it to

16 be particularly invalid because of the  
17 subjective nature of its use. He was  
18 concerned about nonmarket and noneconomic  
19 rent.

20       You know, they make a contention  
21 that it is economic rent. I would suggest to

34

1 you that it isn't. It is not what apartments  
2 rent for in the community. He makes an  
3 argument that somehow it is a niche market  
4 that should be considered a loan. I would  
5 suggest to you that Judge Steptoe's decision  
6 would be available to the contrary.

7       And, finally, the most important  
8 thing, encumbrances. A lot was said about  
9 encumbrances during the course of the  
10 testimony. He says, following the State of  
11 Ohio's approach, that you appraise property at  
12 its true market value, free and clear of  
13 encumbrances; but you have to consider what  
14 type of encumbrance he was talking about in  
15 that case.

16       The facts of the case limited the

17 type of encumbrance that he was talking about  
18 to these self-imposed covenants and  
19 restrictions. That's what he was talking  
20 about. That's what the cases talked about,  
21 self-imposed encumbrances, not the kinds of

35

1 encumbrances that Mr. Caryl has been talking  
2 about. Rights-of-ways and roads is what I've  
3 been talking about. Rights-of-ways and roads  
4 that I contend are what's covered in the rule  
5 because typically they aren't self-imposed.  
6 Somebody else has branded the property with a  
7 right-of-way across it, and you come along and  
8 just bear the burden. It's not you self-  
9 imposing it. I'm going to stop. I think I  
10 ran out of time.

11       PRESIDENT MORGAN: Thank you, sir.  
12 Mr. Caryl, we will have your rebuttal.

13       MR. CARYL: Very quickly. First of  
14 all, the business about the Assessor's method  
15 is better because it values the two separate  
16 components, the land and the improvements

17 separately, well, I was searching frantically  
18 for a provision that I know is there. I can't  
19 cite it now.

20 But any time there is a division of  
21 interest or components of property, the

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1 statute is clear that the total cannot exceed  
2 -- the total of those two, the value of those  
3 two components cannot exceed the value of the  
4 whole, and I think that's what Mr. Thompson is  
5 headed toward if we follow his logic.

6 The section that deals with that is  
7 entitled "Form of Land Books." It's purely an  
8 administrative question. The value of the  
9 whole property is what matters. The breakdown  
10 is an administrative requirement. There's  
11 nothing more. You've got the tail wagging the  
12 dog if you allow the valuation of the separate  
13 components, based on that administrative  
14 provision, to determine the total value,  
15 because it will exceed the total, the whole.

16 The case in California, California  
17 clearly recognizes, as do the vast majority of

18 the states, that the income method is the  
19 method to use for these kinds of properties.  
20 We can quibble about the capitalization rate.  
21 That's been recognized.

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1 Invariably, I accept Mr. Thompson's  
2 point. I can live with his point about that  
3 tax credits are not property to be taxed at  
4 all. I don't need to, you know, to work it in  
5 under as an expressed exemption. I think he  
6 argued that they're not -- that's the Ohio  
7 Cellular case -- that that interest, the FCC  
8 license in that case, was not property that  
9 was subject to anybody, any kind of tax, in  
10 any form. We'll accept that outcome per these  
11 tax credits.

12 I believe they are, in a broad  
13 sense, are intangible claims to a benefit from  
14 the federal government. The FCC license is a  
15 privilege. That's, you know, different than  
16 an actual pecuniary benefit that you're  
17 entitled to that's a claim. I don't know what

18 else you can call them. You can't call them  
19 tangible personal property; you can't call  
20 them real estate. If they aren't intangible,  
21 then they aren't taxable. If they are

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1 intangible, they aren't taxable. Either way,  
2 we're riding on that point. Thank you very  
3 much.

4       PRESIDENT MORGAN: Thank you,  
5 Mr. Caryl. All right. That's accomplished.  
6 I'll just take -- Mr. Manuel asked to use his  
7 time last, and I don't have any questions.  
8 (Inaudible) You gentlemen -- let's start with  
9 you. Jim, you want to go first? Again, it's  
10 four minutes.

11       MR. SURKAMP: I just basically have  
12 two comments or observations about the  
13 presentation. It's something I want to read,  
14 which I will concur with in four minutes in  
15 summary.

16       PRESIDENT MORGAN: Well, now is the  
17 time.

18       MR. SURKAMP: Okay. Well, it first

19 requires that I hand something out to each of  
20 the Commissioners and to everyone. (Handing)  
21 These and these.

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1 (Discussion held off the record)

2 PRESIDENT MORGAN: Do you have a  
3 copy? Do you have one for counsel?

4 MR. SURKAMP: Okay. Here you go.  
5 Here is a record copy. Here is a record copy.  
6 Here is one for counsel and another one for  
7 counsel.

8 I'm going to -- well, here's the  
9 thing. I'm going to just read the statement.  
10 There are two observations I'd like to make.

11 Mr. Thompson pointed out that the  
12 Town's system was used to assess this  
13 commercial property. Commercial was used  
14 several times. We had been given  
15 Administrative Notice 2006-16 describing the  
16 CAMA procedure. It said, "The State Tax  
17 Commissioner's statement concerning methods by  
18 which residential real estate is appraised

19 statewide..." Nowhere in this description of  
20 CAMA does the word "commercial" appear. So  
21 that could argued that's clearly wrong.

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1           This could also be said -- where is  
2 that? Since it had been brought up, the  
3 question needs to be said or put into the  
4 record under Title 110 CSR 8.4 -- we just need  
5 to have this in the record -- Prosecuting  
6 Attorney Responsibilities, 8.4.1, "When so  
7 called upon, the Prosecuting Attorney of the  
8 County shall serve as legal advisor to the  
9 County Commissioner with respect to questions  
10 of law, which consider any (inaudible),  
11 pursuant to West Virginia Code 11-1B-1  
12 (inaudible)."

13           In 8.4.2, "The Prosecuting Attorney  
14 shall not represent the Tax Commissioner in  
15 any capacity with respect to any such  
16 hearing." That's in question.

17           PRESIDENT MORGAN: Jim, pardon me,  
18 but you do have four minutes, and I just --

19           MR. SURKAMP: Okay. I'm going to

20 start right now.

21 PRESIDENT MORGAN: But do you have

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1 any questions of counsel?

2 MR. SURKAMP: No, that's it. I do

3 have a statement to read.

4 PRESIDENT MORGAN: Well, we need to

5 finish this.

6 MR. SURKAMP: Okay. That's my

7 point. This all has to do with substantial

8 evidence. If you look at the handouts, the

9 particular first three syllabi, "The Assessor,

10 as well as the Petitioner, must show

11 substantial evidence to have presumption of

12 correctness and be upheld in its accordance."

13 It says substantial evidence.

14 The substantial evidence given for

15 the petitioner's case, approximately 1992

16 rental payments from 166 apartment rentals in

17 the tax year in question, it's the

18 petitioner's contention that his rents are

19 required to be an economic rent. He also

20 concluded in his substantial evidence

21 comparable rents from 213 units of affordable

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1 housing in the county, like that of the

2 petitioner, are from the year in question.

3 The purpose of (inaudible) contention that his

4 rents are required economic rent.

5 He also included detailed operating

6 expenses needed to calculate income method of

7 valuation of the petitioner's property from

8 the tax year in question. He included legal

9 documents proving that there is restrictions

10 on his property, and current statutes of

11 Maryland, Virginia, and Pennsylvania are

12 mandating only the income method in assessing

13 property, rental properties, identical to that

14 of petitioner, constitute a form of

15 substantial evidence. The Tax Assessor is --

16 PRESIDENT MORGAN: There is not

17 possibly time for you to go through that.

18 MR. SURKAMP: I have one page.

19 Well, I would like to get it into the record.

20 My simple point is this. The Tax

21 Assessor is clearly wrong to explicitly refuse

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1 consideration of the petitioner's easements,  
2 status as provided or federally sanctioned,  
3 affordable housing, comparable income and  
4 actual property value information, as well as  
5 refusing to consider by use of calculation and  
6 income method. Even the Code of State Rules  
7 authorizes the use of said income method.

8       It was clearly wrong in using 300  
9 approved parcels of land as a basis for  
10 comparable sales that are not in any way  
11 comparable to petitioner's pieces of property.  
12 The Assessor testified the comparable parcels,  
13 both residential and commercial, could not  
14 explain how unimproved land could be so  
15 classified either.

16       Failure to consider the zoning  
17 status of petitioner's parcels have affected  
18 their actual value; willfully refused to  
19 consider the effluence of easements on all the  
20 petitioner's properties in the form of four

21 regulatory restrictive covenants with the West

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1 Virginia Housing Development Fund. They did  
2 not assemble sufficient evidence to be called  
3 substantial and, thereby, meet the standard of  
4 presumed correctness.

5       PRESIDENT MORGAN: Is that all you  
6 have?

7       MR. SURKAMP: In summary --

8       PRESIDENT MORGAN: Commissioner  
9 Surkamp, there is no time to summarize. You  
10 were very well --

11       MR. SURKAMP: In summary --

12       PRESIDENT MORGAN: You were very  
13 well apprised by this board, our ruling was --

14       MR. SURKAMP: It hasn't been four  
15 minutes.

16       PRESIDENT MORGAN: -- that each  
17 Commissioner would have four minutes. You  
18 have used up more than that time.

19       MR. SURKAMP: Okay. Then I'm  
20 finished.

21       PRESIDENT MORGAN: Thank you.

1 Commissioner Morgan, would you like to go next  
2 or would --

3 MR. MORGAN: Well, you know, I did  
4 have a few questions, actually with respect to  
5 the testimony of the Assessor's office as  
6 well, so I don't know whether that's going to  
7 be appropriate, frankly.

8 But for Mr. Margelis, to start out  
9 with, can you clarify why you think your  
10 property is now worth less than what you paid  
11 for them? I mean, I think we discussed that  
12 to some extent in your earlier testimony, but  
13 could you briefly give me an answer to that  
14 question?

15 PRESIDENT MORGAN: Mr. Thompson, is  
16 it appropriate at this point to hear from --

17 MR. THOMPSON: That's what I am --

18 PRESIDENT MORGAN: I mean, I --

19 MR. MORGAN: Well, who am I supposed  
20 to ask the questions to?

21 PRESIDENT MORGAN: Counsel.

1 MR. MARGELIS: Whatever you want.

2 MR. THOMPSON: I don't think we're  
3 going to take more testimony.

4 MR. MORGAN: Okay.

5 MR. MARGELIS: But I can answer if  
6 you want me too.

7 MR. MORGAN: I mean, I'm not a  
8 lawyer, so --

9 PRESIDENT MORGAN: Mr. Morgan, you  
10 --

11 MR. MORGAN: -- someone told me I  
12 had a right to ask questions. I'm sorry.

13 PRESIDENT MORGAN: -- you're  
14 perfectly capable. I'm sorry. I'm addressing  
15 your question for Mr. Caryl.

16 MR. MORGAN: That's fine. That's  
17 fine.

18 MR. CARYL: The properties are worth  
19 what they can earn. Payments were made for  
20 those properties, and now further and further,  
21 years prior to now. The case was four years

1 ago. It contemplates the various things,  
2 including the tax credits, but the purchase  
3 price of a particular property is a  
4 particularly inappropriate measure to use for  
5 the value of the property when your obligation  
6 is to equalize assessments in the county.

7 I'm involved in a big case in Monroe  
8 County on that very question. A welcome  
9 stranger was rejected by the United States  
10 Supreme Court, 9-0. I mean, in my lifetime, I  
11 don't think I've ever heard of the U.S.  
12 Supreme Court taking a case on the merits and  
13 then voting 9-0.

14 Webster County tried to assess a  
15 coal property, based upon its current or the  
16 recent sale price, and without adjusting the  
17 values of all the properties in the county to  
18 reflect all prices over in recent years, and  
19 they were -- you know, that was rejected on a  
20 9-0 vote in the U.S. Supreme Court, an  
21 extraordinary situation.

1           So the answer is, there were other  
2 considerations way back when these properties  
3 were purchased, but they are to be valued now  
4 as they stand, and if that turns out to be a  
5 lower figure than what they paid for it, that  
6 reflects all kinds of things, including the  
7 fixed rents that, as far as I know, don't have  
8 much of a cost-of-living factor built into  
9 them.

10          PRESIDENT MORGAN: Did you have  
11 anything else?

12          MR. MORGAN: Yeah. I'd like to  
13 question, I guess, Mr. Thompson, if I can't  
14 question the Assessor's office directly.

15          In choosing cap rates, who  
16 ultimately is responsible? Because a moment  
17 ago in your testimony, you said it was a  
18 subjective process. Is it up to the taxpayer  
19 to choose the appropriate cap rate?

20          Why is -- I guess the second part of  
21 my question is: Would the Tax Commissioner be

1 able to choose an appropriate cap rate? They  
2 must be doing this across the state. Could we  
3 not go to the Tax Commissioner and ask for  
4 help in a case like this?

5 MR. THOMPSON: Well, the rule is  
6 incomplete, insofar as telling us how to  
7 select a cap rate. The rule addresses  
8 commercial cap rates, but what we have here is  
9 a noncommercial -- they're saying that their  
10 situation is noncommercial, it's noneconomic.

11 So we have to -- I contend you have  
12 to use a specialized constructed by band-of-  
13 investments method cap rate. You cannot  
14 select one out of CORPAS. Last time, it was  
15 11.2. This time, it's 8. Even though the  
16 range that he could have selected was 4 to 8,  
17 I'm saying that each party will select a cap  
18 rate or construct a cap rate, a particular cap  
19 rate, that when divided into net operating  
20 income will reduce the value, into the  
21 future's present value. So there is --

1 MR. MORGAN: Well, who ultimately

2 says, gee, this is -- this is the right cap

3 rate?

4 MR. THOMPSON: Well, I would suppose

5 the Board of Review will ultimately decide.

6 The Assessor -- as with all of these cases --

7 and I think Mike will concede the point --

8 with all of these cases --

9 MR. MORGAN: If the Assessor, if the

10 Assessor's office were using the income

11 method, where would they -- how would they

12 develop that? Using the band-of-investments

13 method?

14 MR. THOMPSON: Yes. Look at -- look

15 at the California case that Mike apparently

16 says also substantiates this theory, that the

17 income approach should be used, although it's

18 a different setting under different rules.

19 If you will -- in that particular

20 case, there is discussion as how to construct

21 by a band-of-investment method a cap rate. I

1 would suggest to you that that would be a

2 better approach. And in that particular case,  
3 they said using the face value of the note, as  
4 opposed to the subsidized value of the note,  
5 is the wrong way to go when you construct by  
6 the band-of-investment method a cap rate. Do  
7 you see what I'm saying?

8 MR. MORGAN: Yeah.

9 MR. THOMPSON: So both sides are  
10 going to have cap rates. That, again, shows  
11 how subjective this is.

12 MR. MORGAN: Well --

13 MR. THOMPSON: He is --

14 PRESIDENT MORGAN: Mr. Morgan, if  
15 you have more questions, I can see --

16 MR. MORGAN: I have one more  
17 question.

18 PRESIDENT MORGAN: I can see  
19 (inaudible).

20 MR. MORGAN: In the testimony last  
21 week, the Assessor's office indicated that

1 they had developed a cap rate using the band  
2 of investment technique, and I believe that,

3 according to my notes, it was a 4.6.

4 MR. THOMPSON: Yeah.

5 MR. MORGAN: How reliable is that  
6 number? Was that just shooting from the hip  
7 or was there actually some method behind that?

8 MR. THOMPSON: I think he put some  
9 effort into it, but the problem, the problem  
10 with that is he also indicated to me -- I  
11 don't know if he testified to this fact -- but  
12 he needed those figures well in advance. He  
13 would have -- he would have done a great deal  
14 more research.

15 But, again, that's how you do it.  
16 You don't select it out of a book called  
17 CORPAS, which is a book on commercial cap  
18 rates, and then pick the higher number and  
19 argue that his properties are risky, when in  
20 fact they're less risky than any other  
21 commercial enterprise, because he basically

1 has given his low rents almost a guaranteed  
2 flow of tenants. He should have used the 1

3 percent in constructing his cap rate. That,  
4 by the way, that case talks about the 515  
5 section on apartment complexes.

6       PRESIDENT MORGAN: Thank you. I  
7 think it's only fair for Mr. Caryl to be able  
8 to respond to your question as well.

9       MR. MORGAN: So -- okay, yes, please  
10 do.

11       MR. CARYL: Simply, I mean, I agree  
12 with Mr. Thompson that there is a lot of  
13 judgment that goes into selecting a cap rate,  
14 and a row of formulas can get you started, but  
15 there are judgments that -- and when you come  
16 up with a cap rate bids, which is supposed to  
17 represent the return that a prudent investor  
18 would demand for a property, to invest in the  
19 property, and you divide that into the income  
20 that the property actually yields to come up  
21 with the value of the property, if that rate

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1 is lower than you could invest in a 6-month  
2 Treasury bill, back to full faith and credit  
3 of the United States of America, you've got

4 the wrong cap rate. You've got too low a cap  
5 rate.

6       PRESIDENT MORGAN: Thank you,  
7 Mr. Caryl. Mr. Morgan, did you have --

8       MR. MORGAN: I think I'm okay right  
9 now.

10       PRESIDENT MORGAN: All right. You  
11 have used up two minutes of my time. Let's go  
12 on to Mr. Corliss.

13       MR. CORLISS: I have no questions.

14       PRESIDENT MORGAN: No questions?  
15 Then that brings us to Mr. Manuel.

16       MR. MANUEL: Okay. Well, I don't  
17 really have any questions. I just wanted to  
18 be last because I want a motion on the floor,  
19 a motion for a denial. I move to deny.

20       PRESIDENT MORGAN: I will second it  
21 for purposes of discussion. Do you have any

55

1 reasons you want to put on the record?

2       MR. MANUEL: Well, I've listened to  
3 all the evidence for, I think it was three

4 days or more, and I think we have talked about  
5 a system that was not utilized. Basically, I  
6 think we have a uniform system in effect.  
7 I've listened to and have a preponderance of  
8 court cases and information from both sides,  
9 and after listening to everything, I believe  
10 that there is no error. Error has been shown  
11 by the taxpayer; and, therefore, I move to  
12 deny.

13       PRESIDENT MORGAN: All right.  
14 Gentlemen?

15       MR. MORGAN: On the Assessor?

16       MR. MANUEL: I'm sorry.

17       PRESIDENT MORGAN: Yes, that's  
18 right. You misspoke. I didn't catch that.

19       MR. MORGAN: That's all right.

20       MR. MANUEL: I am glad you caught  
21 that. I appreciate that. Good catch.

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1       MR. SURKAMP: I'd like to pick up on  
2 the phrase "preponderance of evidence."

3       PRESIDENT MORGAN: Well, just a  
4 minute, Mr. Surkamp --

5 MR. SURKAMP: Okay. Go ahead.

6 PRESIDENT MORGAN: -- because

7 Mr. Corliss hasn't weighed in on anything yet.

8 MR. SURKAMP: Sure.

9 PRESIDENT MORGAN: Do you have

10 anything?

11 MR. CORLISS: Well, this is --

12 constitutes our deliberations?

13 PRESIDENT MORGAN: Certainly.

14 MR. MORGAN: Well, my only question

15 is how to deal with the motion and the second.

16 I'm going to be in opposition to the motion.

17 MR. SURKAMP: I will too.

18 MR. CORLISS: And I will too.

19 MR. MORGAN: Let's -- I call the

20 question.

21 PRESIDENT MORGAN: All right. All

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1 those in favor of the motion to deny relief,

2 say aye.

3 MR. MANUEL: Aye.

4 PRESIDENT MORGAN: Aye. Opposed?

5 MR. SURKAMP: Aye.

6 MR. MORGAN: Aye.

7 MR. CORLISS: Aye.

8 PRESIDENT MORGAN: All right. That  
9 takes care of that, Mr. Manuel. Thank you for  
10 your motion, and we'll go ahead. Mr. Corliss.

11 MR. CORLISS: These are  
12 deliberations now?

13 PRESIDENT MORGAN: Yes.

14 MR. CORLISS: Okay. Well, first of  
15 all, I really think Jefferson County has a  
16 serious problem in terms of tax assessments  
17 and tax appraisals that are done at fair  
18 market value and how we do that. And in the  
19 last two weeks, we've been handling all these  
20 E&R cases, which everybody knows about, and to  
21 me, Dale was keeping some sort off track on

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1 them, but it seemed to me we had over 50, or  
2 my impression was we had around 50 cases that  
3 we were considering.

4 MR. MANUEL: No, it was 60 or --

5 MR. CORLISS: And of those 50 cases,

6 25 of those, we provided some sort of relief  
7 towards. And to me, that all has to do with  
8 the consideration of error. And "error" is  
9 kind of a hard word, but when we have the  
10 taxpayer come in with comparables, it was  
11 obvious that, in my mind, that these  
12 properties that we took action on were  
13 overvalued, either through some minor error --  
14 the basement wasn't full or only partially  
15 finished and some other adjustments -- but,  
16 basically, the CAMA does not permit, in my  
17 mind, a fair market evaluation.

18       And so, to me, when I look at CAMA's  
19 use in commercial property, I think there is  
20 some real problems there in terms of the tools  
21 that we're using to evaluate commercial

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1 property. And so the issues on mistakes, I  
2 don't -- you know, mistakes, error, to me, we  
3 have certainly enough authority to go ahead in  
4 terms of what we're doing today; and a  
5 presumption of Tax Assessor correctness and

6 where the burden of proof or dealing with the  
7 case laws, whether it's with the Tax Assessor  
8 or it's somebody else's problem, to me, we do  
9 have a problem, and it's been passed to us.

10       And whether the Tax Assessor maybe  
11 not was afforded the data, or maybe she wasn't  
12 using it anyway, I don't -- I don't know, but  
13 to me, the data has been provided to us to  
14 look at a income tool as part of a tax  
15 appraisal method that would affect the value  
16 of this property.

17       So I spent a good bit of time with  
18 Title 10 and dealing with personal property  
19 taxes for the state, and I've looked at, you  
20 know, all the quotes that -- 2.2.1 and -- but,  
21 anyway, starting with 2.1-1.8, the condition

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1 of such property is a consideration, which  
2 we're all aware of; 2.1-1.9, income over the  
3 three preceding years, to me, carries some  
4 weight in terms of it has to be applied to  
5 income, you know.

6       So 2.1.1 or 2.1-110, the options of

7 applying techniques and methods, to me, are  
8 all property of like species, to me, talks to  
9 income property, such as affordable housing  
10 property in this case. And I am also  
11 concerned about the leasehold income  
12 properties, which, to me, are also affected in  
13 terms of how much income there may be under  
14 the function of the leases and how they  
15 change.

16       And then so 2.2.1, the Tax  
17 Commissioner will consider three generally-  
18 accepted approaches; i.e., cost, income, and  
19 market data approach. So, to me, it's -- the  
20 authority is there to consider all of these  
21 approaches in an appraisal of the value of

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1 this property.

2       And then it mentions in 2.2.2, it  
3 talks about correlation. And so correlation,  
4 to me, means weighing something, I mean; and  
5 to me, we have the authority to weigh the  
6 market data approach, the cost approach, and

7 the income approach. And we may not like what  
8 we see in all of this, but to me, we have that  
9 authority to look at it and use our best  
10 judgment in coming up with what we consider a  
11 fair market value, and that's our business to  
12 determine specifically a fair market value, I  
13 believe why we're in here today.

14 And so, to me, we have the authority  
15 under Title 110 with respect to correlation in  
16 determining final value, and to me, weighted  
17 estimates are important to this, and it goes  
18 on about some of the problems with the CAMA  
19 approach.

20 So I'm prepared -- I won't make my  
21 motion now -- but my motion essentially will

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1 be for a weighted 50/50 approach towards a  
2 correlated income market approach and a CAMA  
3 approach. So it's -- I would take what the  
4 Tax Assessor has recommended as the appraised  
5 value; I would take what the appeal has stated  
6 as a fair value; and I would add those two  
7 together and divide by two and come up with a

8 revised market value.

9       So it's somewhere between what the  
10 appeal says should be the appraised value and  
11 somewhere between what the Tax Assessor says  
12 should be the appraised value, and I think  
13 that's a fair way to end this. That's all.

14       PRESIDENT MORGAN: Thank you.

15       MR. MORGAN: Well, you know, I -- I,  
16 as well, spent a good bit of time this  
17 weekend, I read over virtually all the  
18 materials. They are complex issues, and I've  
19 dealt with this in another state, similar  
20 kinds of problems. I was an Assessor for a  
21 while. I never actually used the income

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1 method, because I was able to get help with  
2 that from the State when I needed to use it.  
3 But I always indicated that it be employed in  
4 situations like this. That's my sense of it.

5       But I think Mr. Thompson makes his  
6 case well that the Assessor does have the  
7 authority to choose which method they employ.

8 We can't change state law. That's what we're  
9 stuck with. But at the same time, we also  
10 have authority to do what we think is proper,  
11 and I'm going to rely on that authority here  
12 today.

13 I also have a motion, which I -- you  
14 know, I guess we spent an awful lot of time  
15 talking about all the details of why we come  
16 to our conclusions. Greg, I think for the  
17 most part, your statement was excellent; but  
18 I, as an appraiser, never liked to combine  
19 methods if I didn't have to. You're talking  
20 about a straight compromise. I think if you  
21 will consider what I'm about to say, you will

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1 find it is going to get you almost exactly the  
2 same dollar figures.

3 But I'm going to suggest that we  
4 accept the cap rate of 4.6, suggested in the  
5 testimony by our own Assessor. I hope that  
6 there is some reasonable grounds to that,  
7 because I am willing to accept it. And if you  
8 work the numbers out -- I have them here to

9 enter into the record, if it's deemed  
10 appropriate -- but it's roughly -- it's  
11 roughly a middle-ground figure. And I applied  
12 the cap rate to each property, of 4.6 to each  
13 one of the four individual properties, and I  
14 have the results here.

15 MR. SURKAMP: I can second that  
16 motion.

17 PRESIDENT MORGAN: Was that in the  
18 form of a motion?

19 MR. MORGAN: I can make that a  
20 motion that we accept the cap rate of 4.6.  
21 I'm making this motion, you know, for a whole

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1 range of reasons, but I can't -- in one way,  
2 primarily, I think it's well-known my concern  
3 about housing in the community, and I don't  
4 want to err -- I don't want to be  
5 overaggressive in passing this kind of an  
6 operation. And I hope we, even with this cap  
7 rate, we provide at least some incentive for  
8 this kind of activity to remain in our

9 community and thrive.

10       So I'm recommending that we apply  
11 the cap rate of 4.6 to each of the net  
12 operating incomes of each one of the four  
13 properties, and I can read off the figures, if  
14 you like. I can also give you the comparisons  
15 between figures I have and what the Assessor  
16 has. For instance, in Shepherds --

17       PRESIDENT MORGAN: Well, it might be  
18 better to go ahead and place those into the  
19 record, since we are doing a full-fledged  
20 transcript of this hearing, if you don't mind.

21       MR. MORGAN: The assessed value at

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1 Shepherds Glenn would be \$1,312,065. The  
2 Assessor has it down as \$2,069,600.

3       MR. MARGELIS: That's very extreme.

4       MR. MORGAN: Now, you might know of  
5 this one -- I'm not going to read every one of  
6 these -- but TM Associates has it down for  
7 \$754,400.

8       MR. CORLISS: What was it for PHA  
9 Associates?

10 MR. MORGAN: For --

11 PRESIDENT MORGAN: This is

12 Shepherds, Shepherds Glenn.

13 MR. CORLISS: Your 4.1 or 4.6?

14 MR. MORGAN: For that -- for

15 Shepherds Glenn?

16 MR. CORLISS: No, PHA.

17 MR. MORGAN: Well -- okay. PHA is

18 --

19 PRESIDENT MORGAN: Well, I think --

20 MR. MORGAN: Well, let me just go

21 down here. Patrick --

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1 PRESIDENT MORGAN: I think this

2 should be placed into the record.

3 MR. MORGAN: Patrick Henry is the

4 next one I have. My figure is \$1,116,380. TM

5 Associates has it down at \$669,200.

6 PRESIDENT MORGAN: And the

7 taxpayer's value is -- I mean, the Assessor's?

8 I'm sorry.

9 MR. MORGAN: The Assessor's is

10 \$1,815,400.

11 PHA Associates, I have at \$818,717.

12 The Assessor's figure is \$1,677,100. TM

13 Associates, \$470,800.

14 PRESIDENT MORGAN: And the last one?

15 MR. MORGAN: Bolivar Court is

16 \$917,239.

17 MR. THOMPSON: What was that figure

18 again?

19 MR. MORGAN: 917,239. The Assessor

20 at \$1,553,200. TM Associates at \$527,400.

21 The total for the county would be

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1 \$4,164,401. And I did all this by hand, so I

2 would prefer that someone checks my

3 calculations in a final figure, but they

4 should be pretty close.

5 MR. THOMPSON: Well, they're

6 separately assessed and appraised, so they

7 really don't -- we don't need a total for all

8 four projects.

9 MR. CARYL: Could I clarify --

10 PRESIDENT MORGAN: Just a moment.

11 There is a motion on the floor.

12 MR. SURKAMP: I seconded it.

13 PRESIDENT MORGAN: All right.

14 Mr. Surkamp has seconded the motion, and we  
15 are in discussion on the motion.

16 Mr. Manuel, Mr. Caryl had asked to  
17 say something. I don't know if you were --

18 MR. MANUEL: No, I think we are in  
19 deliberations here. I think we made that  
20 clear the other day. Maybe I misunderstood.

21 PRESIDENT MORGAN: Well --

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1 MR. CARYL: I'm just asking for a  
2 clarification.

3 MR. MANUEL: If you want to correct  
4 me, that's fine, but my understanding was,  
5 once we started deliberations, we were in  
6 deliberations.

7 MR. MORGAN: I think we agreed to  
8 that. He did get the opportunity to ask one  
9 question.

10 MR. MANUEL: Well, I think that

11 period is gone. My understanding was --

12 MR. MORGAN: No, no. I think we --

13 PRESIDENT MORGAN: Yes, we did

14 reserve the --

15 (All parties speaking at once)

16 MR. CARYL: I just need the answer

17 to one single question.

18 MR. THOMPSON: Could we both ask a

19 question?

20 MR. CARYL: I mean, it's for

21 clarification.

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1 MR. THOMPSON: Why don't we step

2 back, so there is no -- we will step back to

3 the back of the room, so there is no further

4 input.

5 But you are talking appraised?

6 That's the same question? You're talking

7 appraisures?

8 (Mr. Caryl nodded head yes.)

9 MR. THOMPSON: Okay. Let's step

10 back, so we are not intruding on their space.

11 MR. MANUEL: I believe what we are

12 doing right here is trying to figure out  
13 between two systems and trying to find out  
14 which one, and I think that we are also --  
15 even when we talked and talked and talked  
16 about the system that's not in effect, and all  
17 the other properties in Jefferson County have  
18 been under a uniform system, and the  
19 properties that are commercial properties have  
20 been under that system. Now, all of a sudden,  
21 we're dragging in another system here. I

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1 don't think this is the venue for that debate.

2       The other thing I think we're doing  
3 is I think we're underlying the Assessor's  
4 authority, as it's been presented to us, as  
5 the agent of the State Tax Commissioner, to  
6 come up with the appropriate method.

7       So I just -- I can't support any of  
8 the schemes that we come up with or  
9 calculations -- I'm not trying to be negative  
10 about those -- I'm just saying any of those  
11 calculations or ways of doing this, basically,

12 because of the information and data that has  
13 been presented to me. So that's where I am.  
14       PRESIDENT MORGAN: Thank you. As  
15 long as we're hearing the negative arguments,  
16 I'll just place in the record from my own  
17 heart, because I didn't have the opportunity  
18 to do so earlier, that the common -- common  
19 sense refers me back to your question,  
20 Commissioner Morgan, earlier on, which is, how  
21 can you stand here -- you didn't say it so

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1 argumentatively -- but how can you stand here  
2 and say that the property has sunk in value,  
3 when every other property in Jefferson County  
4 is increasing in value at a rapid rate? And  
5 beyond that, it violates common sense to me  
6 that the property has sunk in value since its  
7 purchase.

8       On the income approach, it is not  
9 that I am not persuaded that the income method  
10 might be absolutely useful in such a case as  
11 this, and in fact that the Assessor's office  
12 probably should undertake the responsibility

13 to embrace that and use that method on  
14 properties, such as this, that really call for  
15 it.

16 But the fact that seventeen states  
17 have expressly mandated by their legislature  
18 to use the income method in valuing properties  
19 burdened such as this type of commercial  
20 property, just says to me that West Virginia  
21 hasn't. So I look at that argument from the

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1 other side.

2 And, you know, other than that, my  
3 main problem is that I -- I think it's how you  
4 approach the case. The taxpayer has come in  
5 and made somewhat aggressive arguments, that,  
6 to me, are over the top; and the board is  
7 prepared by majority vote to accept the  
8 taxpayer's appeal and then reach a more  
9 reasonable result, sort of somewhere in the  
10 middle between the Assessor and the taxpayer,  
11 and that's fine.

12 I just happen to disagree as a

13 matter of procedure. I would feel that if the  
14 taxpayer comes in and doesn't persuade us of  
15 the truth of the matter, that we shouldn't --  
16 we shouldn't accept the appeal, and I think  
17 the taxpayer's position was too aggressive.

18 MR. MORGAN: Well, I think -- I  
19 think my motion takes care of that overly  
20 aggressive part of it, and that was my sense  
21 too that they had gone too far, asked for too

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1 much. The properties are -- you know, they  
2 are claiming that they're worth less than what  
3 they paid for them, which is a difficult  
4 hurdle to get over, but I think their  
5 explanation is reasonable and that times  
6 change.

7 These places are something like a  
8 coal mine. I mean, they depreciate in value  
9 over time. Markets change, but in the end,  
10 the coal is running out, and these properties  
11 in their 30-to-45-year life will not be worth  
12 much. They will be worn out, obsolete, and  
13 they will be left with, you know, the land for

14 the most part, depending on the maintenance  
15 levels, but even that won't -- that won't  
16 preserve those properties over the long haul.

17       PRESIDENT MORGAN: Okay. Now, we've  
18 -- Mr. Surkamp has been patiently waiting over  
19 there, and it's his turn to speak.

20       MR. SURKAMP: I agree with picking  
21 just the income method, because one of the

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1 things that's changed since Steptoe's decision  
2 is the preeminence of the income method in all  
3 -- in many of the states surrounding us as the  
4 method to assess, as the only allowed method  
5 for assessing this kind of property. So  
6 Steptoe's decision, unfortunately, referred to  
7 the so-called "hybrid income" method -- with a  
8 certain tone of sarcasm -- but it's very  
9 strong, and those laws are a form of evidence.

10       The second thing is, I really think  
11 that if you read carefully what presumption of  
12 correctness is all about, if you read the  
13 Bituminous Coal case, you will notice that the

14 Assessor was commended, more or less, for not  
15 choosing the income method, which had no data,  
16 which was not supported by data. Presumption  
17 of correctness, if you read the syllabi,  
18 assumes that you go to the method that has  
19 that supporting data.

20       So not using -- I am saying that  
21 that is one of the most important flaws in the

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1 way the Assessor assesses property, the lack  
2 of substantial evidence. And I do think it is  
3 clearly wrong to apply CAMA, which is  
4 explicitly for residential. And if you read  
5 the discussion, it's all about porches and  
6 bathrooms. It's wrong to apply it to  
7 commercial.

8       MR. MORGAN: Listen, I think what  
9 we're doing here is taking responsibility in  
10 our own hands. I think Steptoe was exactly  
11 right in what he said in that case. So it is  
12 the Assessor's law. We can't change the state  
13 law. That's what it is. The Assessor can use  
14 whatever method they want. We can't get past

15 that.

16 PRESIDENT MORGAN: Thank you.

17 MR. MORGAN: But I'm saying we still  
18 have the authority to do what we think is  
19 right, and what I think is right is making an  
20 adjustment, and my adjustment seems to line up  
21 quite closely to your thinking.

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1 MR. CORLISS: Yes, it's very close,  
2 in my opinion.

3 MR. MORGAN: And I do like sticking  
4 with one method when I can, and I think it's  
5 so clearly appropriate to use the income  
6 method that I stand on my motion.

7 PRESIDENT MORGAN: All right. Is  
8 there further discussion on the gentleman's  
9 motion?

10 MR. CORLISS: Well, explain to me  
11 again on the 4.6 as the income approach.  
12 That's what I'm concerned about in terms of --

13 MR. MORGAN: Well, it's a rate that  
14 the Assessor's office may be --

15       PRESIDENT MORGAN: That was the  
16 capitalization rate.

17       MR. MORGAN: -- without ever  
18 anticipating that it would actually be used.  
19 I will admit that.

20       PRESIDENT MORGAN: Pardon me.  
21 That's a capitalization rate.

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1       MR. CORLISS: Yeah, the 4.6 is the  
2 cap rate.

3       MR. MORGAN: And that is one that  
4 was put out by Mr. -- or referenced or at  
5 least defined by Mr. Ogden in his testimony --

6       MR. CORLISS: Right.

7       MR. MORGAN: -- and he said that  
8 they had used this method of band of  
9 investments to calculate it. I hope that he  
10 did put some diligence into that, because I'm  
11 relying on it, but the -- I think it does get  
12 us to where we need to be.

13       MR. CORLISS: But who would apply it  
14 to -- the same argument would apply to 4.6 to  
15 the Tax Assessor's evaluation?

16 MR. MORGAN: Well, the net operating  
17 income.

18 PRESIDENT MORGAN: No, to the -- to  
19 the annualized net operating income from the  
20 rents.

21 MR. MORGAN: Yeah, which --

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1 MR. CORLISS: Okay.

2 MR. MORGAN: -- which, you know, our  
3 -- the applicant has provided all that  
4 information under oath, and I believe their --

5 PRESIDENT MORGAN: Right. Those  
6 were the backup data that were behind the  
7 individual four sets of properties.

8 MR. MORGAN: -- all of their income  
9 data.

10 PRESIDENT MORGAN: That's that  
11 backup data.

12 MR. CORLISS: You know, my approach  
13 would have taken 50 percent of what the  
14 Assessor said the property appraisal should be  
15 and 50 percent of what the Plaintiff would

16 have asked for for this property, and it's --  
17 it was very close. It's just -- I am just  
18 concerned that -- it would seem to me in the  
19 future that our opinion ought to reflect that  
20 the Tax Assessor should consider, you know,  
21 income data when --

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1 MR. MORGAN: Well, by accepting my  
2 motion, you are saying that loud and clear.

3 MR. CORLISS: -- looking at  
4 particularly these unique properties.

5 MR. SURKAMP: You're quite right. I  
6 think it's, you know, "shall consider, shall  
7 consider, shall consider" is really a  
8 significant part of that Title 110 document.

9 PRESIDENT MORGAN: All right. So I  
10 guess what the board needs to sort through is  
11 whether there is any opposition to -- to this  
12 idea.

13 MR. MANUEL: We've got a motion on  
14 the floor. Just pop out the question.

15 PRESIDENT MORGAN: Very well.

16 MR. MORGAN: Everyone ready to vote?

17       PRESIDENT MORGAN: All those in  
18 favor of Mr. Morgan's motion, say aye.

19       MR. CORLISS: Aye.

20       MR. SURKAMP: Aye.

21       PRESIDENT MORGAN: Opposed?

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1       MR. MANUEL: No.

2       PRESIDENT MORGAN: No.

3       MR. SURKAMP: Wait. Did you say

4 "aye" twice? Four to one?

5       PRESIDENT MORGAN: No, I'm sorry. I

6 was against it.

7       MR. SURKAMP: Oh, okay. Three to

8 one.

9       PRESIDENT MORGAN: It's still three

10 to two.

11       MR. SURKAMP: Split the difference.

12       MR. MANUEL: It's three to two.

13       PRESIDENT MORGAN: Three to two.

14       MR. MANUEL: That's all.

15       MR. SURKAMP: Three-and-a-half to

16 one-and-a-half.

17 MR. MORGAN: That's a good point.

18 There is silence in the corridor.

19 MR. THOMPSON: Rob, you still  
20 haven't resolved the issue of contribution of  
21 land and buildings.

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1 MR. MORGAN: I recommend that that  
2 is -- my sense is that is an administrative  
3 activity.

4 PRESIDENT MORGAN: But I believe we  
5 should move and vote on it.

6 MR. MORGAN: We need to -- I would  
7 leave it to the same proportion that exists --

8 MR. MANUEL: It's up to the three of  
9 you.

10 MR. MORGAN: -- in the Assessor's --

11 PRESIDENT MORGAN: Mr. Corliss --

12 MR. SURKAMP: The Assessor used her  
13 best judgment analysis.

14 MR. CORLISS: You want to convert  
15 that over to a percentage, or what do you want  
16 to do?

17 PRESIDENT MORGAN: No. Mr. Surkamp,

18 that won't work. It has to be this board has

19 to be --

20 MR. MORGAN: No, I mean, the

21 Assessor already has it divided between land

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1 and buildings, so we'll just use the same

2 ratio.

3 MR. SURKAMP: Use the Assessor's

4 ratio?

5 PRESIDENT MORGAN: Is that

6 agreeable?

7 MR. CORLISS: (Inaudible) by being

8 specific as to what the appraised value ought

9 to be. That's what, I mean --

10 MR. MORGAN: I want my numbers to be

11 --

12 MR. CORLISS: I just want to be --

13 MR. MORGAN: I would like the

14 numbers that I put into the record to be

15 checked for accuracy.

16 MR. CORLISS: Well, I remember four

17 years ago, you know, we went back into session

18 to -- specifically, we couldn't just do a  
19 percentage approach. The Tax Assessor wanted  
20 specific numbers.

21       PRESIDENT MORGAN: But these are

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1 dollar figures, and so now the only thing left  
2 to do is to retain proportionality the same  
3 way the Assessor's office has it or to figure  
4 some other method of proportions, values on  
5 the land --

6       MR. MORGAN: The only thing  
7 practical is to retain the same numbers.

8       MR. SURKAMP: Yeah. Anything that  
9 we come up with will be considered --

10       MR. MORGAN: The same ratio between  
11 land and buildings as the Assessor has  
12 proposed.

13       MR. CORLISS: Well, my approach  
14 wouldn't have changed any of that, but anyway,  
15 that's fine. I'm just concerned about being  
16 correct, so we don't have to come back.

17       MR. MORGAN: I think we are. You  
18 know, any time -- any time the income method

19 is used, all across the United States, they  
20 run into this issue. There has got to be an  
21 administrative way to --

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1 MR. CORLISS: Oh, I agree.

2 MR. MORGAN: I think the one we've  
3 chose makes sense.

4 PRESIDENT MORGAN: Mr. Morgan, just  
5 so the record is perfectly clear, would you  
6 make a motion about the proportionality issue,  
7 so we can dispose of that, because I think  
8 that is the way to go.

9 MR. MORGAN: I move that in order to  
10 divide the values of the totals for the TM  
11 Associate's properties, that we use the same  
12 ratio that the Assessor's original appraisal  
13 up to this year indicates.

14 MR. SURKAMP: Second it.

15 PRESIDENT MORGAN: All right. Any  
16 further discussion?

17 MR. MANUEL: No questions.

18 PRESIDENT MORGAN: All those in

19 favor?

20 MR. SURKAMP: Aye.

21 MR. MORGAN: Aye.

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1 MR. CORLISS: Aye.

2 PRESIDENT MORGAN: Opposed?

3 MR. MANUEL: No.

4 PRESIDENT MORGAN: No.

5 MR. MORGAN: Three to two.

6 PRESIDENT MORGAN: Does counsel have

7 -- have you determined any other outstanding

8 issues?

9 MR. THOMPSON: The only other issue,

10 Madame President, would be to adjourn, sine

11 dine, now that you have concluded your work as

12 a Board of Review.

13 MR. MORGAN: I have one other issue

14 I'd like to address in the matter of -- I

15 think it was Mr. Durst, Highway 51.

16 (Discussion held off the record)

17 MR. MORGAN: I am having trouble

18 with that one. I'd like to reconsider it. Do

19 we have a copy of his --

20 MR. MANUEL: Is there a second for  
21 the motion, Madame Chairman?

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1 MR. CORLISS: I will second it.

2 MR. MORGAN: Do we vote to  
3 reconsider?

4 MR. THOMPSON: Are we finished  
5 insofar as this case is concerned?

6 MR. MORGAN: Yes.

7 PRESIDENT MORGAN: Yes. Thank you,  
8 Mr. Caryl.

9 MR. CARYL: Thank you all.

10 (This proceeding was concluded at  
11 3:45 p.m.)

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1 CERTIFICATION OF NOTARY  
2 I, SHERYL L. GASPARIK, RPR, Court Reporter  
3 and Notary Public, in and for the State of  
4 Maryland, do hereby certify: That the  
5 foregoing proceeding was duly taken by me  
6 stenographically at the time and place and for  
7 the purpose therein mentioned, and that same  
8 was accurately transcribed by me to the best  
9 of my ability. I certify that I am neither  
10 counsel for, related to, or employed by any of  
11 the parties to this action; I am not a  
12 relative or employee of any attorney or  
13 counsel employed by the parties thereto; and I  
14 further certify that I am in no way  
15 interested, financially or otherwise, in the  
16 outcome of this matter.

17 \_\_\_\_\_

18 SHERYL L. GASPARIK, CCR, RPR  
19 Notary Public - State of West Virginia  
20 Commission Expires: December 31, 2014