In The

Supreme Court of Virginia

RECORD NO. 091590

COUNTY OF ALBEMARLE,

***Appellant*,**

v.

KESWICK CLUB, L.P.,

Appellee.

BRIEF OF APPELLANT

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To the Honorable Chief Justice and Justices of the
Supreme Court of Virginia:

The Appellant County of Albemarle (the "County") respectfully submits the following Opening Brief in the above-captioned case.

STATEMENT OF FACTS

The trial of this case involved an application by the Respondent-Appellee Keswick Club, L.P. (the "Keswick Club", "Keswick", or the "Appellee"), pursuant to *Virginia Code* § 58.1-3984, to correct an allegedly erroneous tax assessment of the property known as the Keswick Club. The subject property, which consists of a total of approximately 153.761 acres of land, with 18 holes of golf, the club complex, swim and tennis facilities and numerous other improvements and amenities, is located in the Rivanna Magisterial District in eastern Albemarle County, and is considered to be one of the premier resort properties in the County. The subject property is identified as Tax Map Parcel 80-8Z, and is zoned RA (Rural Areas District).

The tax years in dispute were 2003 and 2004. As part of the 2003 biennial general reassessment, the County reassessed Keswick effective January 1, 2003. (Appendix, p. 5) After the County Assessor reviewed the property's original 2003 reassessment, at Keswick's request, the total assessment for 2003 was reduced to $12,585,700, with the land alone

assessed at $3,708,800 and the improvements alone assessed at $8,876,900. (Appendix, p. 6) Keswick appealed this assessment to the Board of Equalization of Albemarle County, pursuant to *Virginia Code* § 58.1-3380. (Appendix, pp. 284-285) Following its review, by letter dated July 25, 2003, the Board of Equalization reduced the 2003 assessment of the improvements to $7,531,500, for a total assessment of $11,240,300. (Appendix, p. 244)

Keswick's assessment was later adjusted further to reflect a change in acreage from 156.992 to 153.761 acres. As a result, the land value of Keswick decreased to $3,644,200, and the total value decreased to $11,175,700. (Appendix, p. 10) Pursuant to *Virginia Code* §§ 58.1-3981 and 58.1-3351, the County notified Keswick of a change in the assessed value of the property on or about April 15, 2004. (Appendix, p. 306)

Keswick further appealed the decision of the Board of Equalization to the Circuit Court for Albemarle County. In its application for relief (filed on or about May 14, 2004), Keswick challenged the County's 2003 and 2004 assessments. (Appendix, pp. 1-10) In its answer, the County sought to reinstate Keswick's 2003 and 2004 assessments (pursuant to *Virginia Code* § 58.1-3981) to the amounts originally assessed, prior to adjustment by the Board of Equalization. (Appendix, pp.11-13)

The gravamen of Keswick's application was that the County assessed Keswick Club in 2003 and 2004 at more than its fair market value. It was and is the County's position that Keswick Club was assessed at fair market value.

STATEMENT OF THE CASE

Keswick Club filed its Application to Correct Erroneous Assessment, pursuant to *Virginia Code* §§ 58.1-3382 and 58.1-3984 challenging real estate tax assessments for the years 2003 and 2004 made by the County. (Appendix, pp. 1-10) The County traversed the Application, denying all material allegations of fact in its Answer. (Appendix, pp. 11-13) Trial of the matter was held on June 27, 2005, before the Honorable James Luke, Circuit Court Judge Designate, and the parties submitted argument both orally and by brief. By its letter opinion dated December 14, 2005, the trial court found that Keswick Club failed to prove that the County committed manifest error in its valuation of the property, and affirmed an assessment of $11,175,700.00 for the property, for both 2003 and 2004. (Appendix, pp. 747-748) The final order was entered on January 9, 2006, (Appendix, pp. 749-752), and Keswick Club timely noted its appeal. This Court granted Keswick Club's petition for appeal on July 19, 2006.

Following oral argument on October 31, 2006, this Court issued its first opinion in this case on January 12, 2007. Keswick Club, L.P. v. County of Albemarle, 273 Va. 128, 639 S.E.2d 243 (2007). In its first opinion, this Court found that the County had failed "to consider and properly reject the income and sales approaches before solely utilizing the cost approach in assessing the fair market value of Keswick Club." Id. at 140. As a result, this Court found that "since the assessments were not entitled to a presumption of validity, the proper standard of review was the less stringent standard, requiring the taxpayer only to prove that the county's assessments were erroneous." Id. at 141. Accordingly, this Court reversed the initial judgment of the circuit court and remanded this case so that the circuit court could apply the proper and less stringent standard of review. Id.

On remand, the trial court heard additional evidence and argument from both parties. After taking the case under advisement, the trial court found the County's assessment erroneous and adjusted the subject assessment to a value of $7,000,000. The final order was entered on June 6, 2009 (Appendix, pp. 762-768), and the County timely noted its appeal.

ASSIGNMENTS OF ERROR

1) The trial court erred in concluding that this Court had already found the County's assessment erroneous when this Court had faulted only the manner in which the assessment method was chosen.

2) The trial court erred in admitting the testimony of an unlicensed witness proffered as an expert because where a statute requires an individual to be licensed, a witness not licensed may not testify as an expert in that field.

3) The trial court erred in finding the County's assessment erroneous and in setting the assessment at $7 million because the trial court failed to hold the Plaintiff to its burden of proof, failed to properly consider the County's evidence on remand, and over-relied on a lay valuation not supported by the evidence.

QUESTIONS PRESENTED

1) Whether the trial court erred in concluding that this Court had already found the County's assessment erroneous. (Assignment of error 1)

2) Whether the trial court erred in admitting the testimony of an unlicensed witness proffered as an expert. (Assignment of error 2)

3) Whether the trial court erred in finding the County's assessment erroneous and in setting the assessment at $7 million. (Assignment of error 3)

GENERAL STATEMENT OF THE LAW

Title 58.1 of the *Virginia Code* sets forth an elaborate statutory scheme governing local taxation of real property and provides for an administrative and judicial review process. The precise method of how a locality is to calculate and determine a property's fair market value is reserved to the locality, subject to the constitutional mandates that the assessment represent fair market value and be uniform with assessments of similarly situated property within the jurisdiction. *Virginia Code* § 58.1-3984 addresses the correction of allegedly erroneous assessments of real estate. Section 58.1-3984(A) provides a right of any aggrieved person to apply for relief to the circuit court of the locality wherein the assessment was made, and states further:

> "In such proceeding the burden of proof shall be upon the taxpayer to show that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal, but it shall not be necessary for the taxpayer to show that intentional, systematic and willful discrimination has been made."

Challenges to tax assessments of real property have been numerous over the years, and this Court has established clear legal standards to be followed in such cases. Those standards are summarized below.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE SUPREME COURT HAD ALREADY FOUND THE COUNTY'S ASSESSMENT ERRONEOUS.

In arriving at its decision in this case, the trial court looked to the following passage from this Court's prior opinion:

> "[T]he county's categorical application of the cost approach to the valuation of all golf courses resulted in a *failure by the county to consider and properly reject the income and sales approaches before solely utilizing the cost approach* in assessing the fair market value of Keswick Club. Here, the county did not attempt to obtain the data necessary to perform appraisals based on the income and sales approaches."

(Appendix, p. 766 (quoting Keswick Club, L.P., 273 Va. at 140, 639 S.E.2d at 250.) (emphasis added by trial court).

In analyzing the above holding of this Court, the trial court stated, "Therefore, in effect, the Supreme Court stated that based on its review of the record, *the assessment was erroneous*, on the ground that the County used an improper methodology." (emphasis added) (Appendix, p. 766) However, as detailed below, because this Court had faulted only the manner in which the assessment method was chosen, and not the

assessment method or amount itself, the trial court misread this Court's prior opinion to find error in the assessment where none existed.

A. THIS COURT'S PRIOR OPINION DECIDED ONLY THE PROPER STANDARD OF REVIEW AND DID *NOT* SHIFT THE BURDEN OF PROOF IN THIS CASE OR FIND THE ASSESSMENT ITSELF ERRONEOUS.

When considering the present case, it is critical to note what this Court's prior opinion actually said and (more importantly) did *not* say. See Keswick Club, L.P., 273 Va. at 128.

This Court's prior consideration of this case focused solely on the County's manner of selecting an assessment method and the proper standard of review. In this Court's own words, stated at the outset of the opinion, "Specifically, we consider whether the county failed to properly consider the income and sales approaches to valuation before basing its assessment solely on the cost approach." Id. at 131-132. Consistent with its preface, this Court considered this issue and only this issue in rendering its ultimate opinion: "[T]he taxpayer [i]s required only to show that the county's assessment was erroneous, not that the county committed manifest error or disregarded controlling evidence in making its assessment." Id. at 141.

This Court did *not* consider the proper *amount* of the assessment. The Keswick Club, itself, had framed the issue: "The issue in this case, at

its core, is not the amount of the assessment." (2006 Reply Brief of Appellant, p. 8).

Furthermore, contrary to the Keswick Club's repeated claim, nowhere did this Court find the actual assessment erroneous.[1] While this Court

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[1] The Keswick Club's repeated claim to the contrary is demonstrably false. This Court's prior opinion in this case uses some form of the term "err" or "error" exactly 11 times:

1. "In its closing argument and post-trial brief, the taxpayer contended, among other things, that the county **erred** in basing its assessment solely on the cost approach." Keswick Club, L.P., 273 Va. at 135.
2. "In response, the county generally contended that it considered all three valuation approaches in making its assessment and that the assessment should be upheld as not manifestly **erroneous**." Id. at 135-136.
3. "Accordingly, the circuit court concluded that the taxpayer failed to prove that the county committed manifest **error** in assessing Keswick Club's fair market value and approved the county's $ 11,175,700 assessment." Id. at 136.
4. "A taxpayer seeking relief from an allegedly **erroneous** assessment has the burden to show that the assessment exceeds fair market value." Id. at 136.
5. "Generally, a taxing authority's assessment of a property's fair market value is presumed valid and a circuit court will reject and correct a taxing authority's assessment only if the taxpayer demonstrates that the taxing authority committed manifest **error** or disregarded controlling evidence in making the assessment." Id. at 136-137
6. "The evidence in the record is insufficient for us to decide that the county's decision not to look for comparable sales outside of the jurisdiction was **error**." Id. at 139.
7. "Therefore, the taxpayer was required only to show that the county's assessment was **erroneous**, not that the county committed manifest error or disregarded controlling evidence in making its assessment." Id. at 141.

faulted the manner in which the County selected its assessment method, nowhere did this Court hold that the chosen cost *method* was itself erroneous. More importantly, nowhere did this Court hold that the ultimate assessment *amount* was erroneous.

With this Court having decided *only* the proper standard of review, the initial issue reserved for the trial court on remand was whether the assessment was erroneous: "[W]e will . . . remand this case so that the

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8. "Therefore, the taxpayer was required only to show that the county's assessment was erroneous, not that the county committed manifest **error** or disregarded controlling evidence in making its assessment." Id. at 141.
9. "The circuit court's letter opinion reflects that the court reviewed the county's 2003 and 2004 assessments of Keswick Club under the standard of review applicable when the assessments are entitled to a presumption of validity, requiring the taxpayer to prove that the county committed manifest **error** or disregarded controlling evidence." Id. at 141.
10. "However, since the assessments were not entitled to a presumption of validity, the proper standard of review was the less stringent standard, requiring the taxpayer only to prove that the county's assessments were **erroneous**." Id. at 141.
11. "The circuit court **erred** in reviewing the taxpayer's application to correct the county's assessments of Keswick Club under the wrong standard of review." Id. at 141.

Nowhere else does this Court's prior opinion use any form of the term "err" or "error." The record simply does not support the claim that "this Court found that not only was there error in the original assessment method, but that there was manifest error." (Appellee's Brief in Opposition to Petition for Appeal, p. 21.) As demonstrated above, this Court made no such finding of error, manifest or otherwise.

circuit court can apply the proper and less stringent standard of review applicable under the facts of this particular case." Id. at 128.

That this Court did *not* find the County's assessment erroneous is reflected in these remand instructions. If this Court had already found the County's assessment erroneous, it could have proceeded to instruct the trial court to determine only the proper assessment amount. This Court's actual remand instructions directed the trial court to apply a different standard of review to determine whether the assessment was even erroneous at all.

That the trial court failed to conduct this determination reflects its misreading of these remand instructions. The trial court erred in its interpretation of the Court's opinion, believing the Court had found both the method used to make the assessment and the amount of the assessment to be erroneous.

1. THIS COURT'S PRIOR OPINION DID *NOT* ARTICULATE A REQUIRED OR PREFERRED ASSESSMENT METHOD.

Despite the Keswick Club's repeated argument to the contrary, this Court has not ruled that the income approach is the preferred or default method of property assessment, or that the cost approach is only a "method of last resort." Though the Keswick Club argued these positions

repeatedly,[2] this Court has not adopted them. In fact, in its prior opinion, this Court expressly declined to endorse any specific approach. Id. at 138. If this Court had actually agreed with the Keswick Club that the cost approach was only a "method of last resort," its prior opinion in this case would have articulated that standard. By *not* adopting the Keswick Club's argument, when given a perfect opportunity to do so, this Court has "considered and properly rejected" the argument that the cost approach is only a "method of last resort."

2. THIS COURT'S PRIOR OPINION DID *NOT* SHIFT THE BURDEN OF PROOF.

This Court's prior opinion did *not* shift the burden of proof in this case. While the Keswick Club no longer had the burden of proving that the County committed manifest error or disregarded controlling evidence in making its assessment, the taxpayer continued to bear the burden of proving (a) that the property was valued at more than its fair market value or (b) that the assessment was not uniform in its application, or (c) that the assessment was otherwise invalid or illegal, pursuant to *Virginia Code* § 58.1-3984(A). The issue is *not* whether "the County's method of appraisal

[2] *See*, *e.g.*, Brief of Appellant, dated August 22, 2006 (pp. 18-19) and Reply Brief of Appellant, dated September 28, 2006 (pp. 1-2), both of which were filed by the Keswick Club with this Court in advance of the prior appellate argument of this case.

[sic] accurately reflects the fair market value of the property," as the Keswick Club once suggested. (Opening Argument of Applicant, dated July 28, 2005, p. 2) Rather, the issue is whether the county's assessments were erroneous. Keswick Club, L.P., 273 Va. at 141.

The burden of proof remains upon the taxpayer. As this Court reiterated in its first opinion in this case, the "courts must be hesitant within reasonable bounds, to set aside the judgment of assessors; otherwise the courts will become boards of assessment thereby arrogating to themselves the function of the duly constituted tax authorities." Id. at 138. Richmond v. Gordon, 224 Va. 103, 110, 294 S.E.2d 846, 850 (1982) (quoting Richmond, F. & P. R. Co. v. State Corp. Com., 219 Va. 301, 313, 247 S.E.2d 408 (1978)); *see also* Board of Supervisors v. Leasco Realty, Inc., 221 Va. 158, 165, 267 S.E.2d 608, 612 (1980).

Even if the assessor is unable to come forward with evidence to prove the correctness of the assessment, this does not impeach the assessment since the taxpayer, and not the assessor, has the burden of proving the assessment to be erroneous. Norfolk & W. R. Co. v. Commonwealth, 211 Va. 692, 695, 179 S.E.2d 623 (1971) (citing Shaia v. Richmond, 207 Va. 885, 887, 153 S.E.2d 257 (1967)). Moreover, because inequalities of valuation are inevitable, the disparity must be striking before

relief will be granted. Leasco, 221 Va. at 166; Washington County Nat'l Bank v. Washington County, 176 Va. 216, 222, 10 S.E.2d 515 (1940).

In the landmark case Norfolk v. Snyder, 161 Va. 288, 170 S.E. 721 (1933), the Court observed that in Virginia "the burden is upon those who seek relief to show that the value as fixed is excessive or out of proportion to other like surrounding property." Id. at 291. The Court noted that the value of property is a matter of opinion, and there must necessarily be wide discretion for the exercise of opinion as to value. Id. at 293. The Court also noted that in cases of this kind there is no single accurate standard by which the value of property may be determined, and therefore the evidence must be based upon opinion about which reasonable persons may differ. Id. Yet so long as the assessment comes within the "range of reasonable difference of opinion," it cannot be said that the assessment is erroneous. Id.

By erroneously concluding that this Court had already found the County's assessment erroneous, the trial court failed to hold the Keswick Club to its burden of proving that the assessment was erroneous. Because the County's assessment was not proven erroneous, the trial court committed reversible error and should have upheld the County's assessment.

II. THE TRIAL COURT ERRED IN ADMITTING THE OPINION TESTIMONY OF AN UNLICENSED WITNESS PROFERRED AS AN EXPERT.

On remand, the Keswick Club offered the opinion testimony of appraiser David Sangree. (Appendix, pp. 805-837) Mr. Sangree had prepared and testified to the Keswick Club's appraisal report at the initial trial of this case in June 2005. (Appendix, pp. 73-141) At that time, Mr. Sangree, who is based in Ohio, held a temporary property-specific Virginia real estate appraiser's license that expired on June 30, 2005. (Appendix, p. 327) However, at the time of the remand hearing on June 13, 2008, Mr. Sangree was not licensed as a certified general real estate appraiser in Virginia. (Appendix, p. 833) Nevertheless, over the objection of the County that an unlicensed appraiser could not offer opinion testimony, the trial court allowed Mr. Sangree to offer opinion testimony as an expert witness. (Appendix, pp. 805-812) Mr. Sangree then testified at length in rebutting the opinion of the County's (fully-licensed) expert appraiser. (Appendix, pp. 812-837) In allowing an unlicensed professional to offer opinion testimony, the trial court committed reversible error. *See* Fitzgerald v. Commonwealth, 48 Va. App. 271, 630 S.E.2d 337 (2006); Lee Gardens v. Arlington County Bd., 250 Va. 534, 463 S.E.2d 646 (1995).

Virginia Code § 54.1-2011 makes it unlawful, with certain exceptions, to engage in the appraisal of real estate or real property for compensation

or valuable consideration in this Commonwealth without first obtaining a real estate appraiser's license. Although Mr. Sangree did not attempt to introduce his own written report on remand, the definition of the term "appraisal" in *Virginia Code* § 54.1-2009 includes "analysis": "a study of real estate or real property other than estimating value." Even without introducing his own report, by extensively analyzing another appraiser's report, Mr. Sangree was committing exactly the type of appraisal analysis for which *Virginia Code* § 54.1-2011 requires a license.

A 1993 opinion of the Attorney General reached the same conclusion: "Under the plain language of the definition in § 54.1-2009, an 'appraisal' includes any opinion or conclusion about the value of interest in real property. An appraisal report may be either oral or written. A broker's testimony in a partition suit or other court proceeding, therefore, clearly falls within this definition of an 'appraisal.'" 1993 Op. Atty Gen. Va. 210. This Court subsequently stated that it shared the Attorney General's analysis of the applicable statutes. Lee Gardens, 250 Va. at 540.

As noted in Fitzgerald v. Commonwealth:

> "[W]here a statute requires an individual to be licensed before working in a particular field, a witness not licensed in that field may not testify as an expert in that field. See Lee Gardens v. Arlington County Bd., 250 Va. 534, 539-40, 463 S.E.2d 646, 648-49 (1995) (holding witness not licensed as real estate appraiser could not testify

as expert on real estate valuation where statute made it unlawful to engage in real estate appraisal without license)."[3]

Fitzgerald, 48 Va. App. at 275, 630 S.E.2d at 339.

The trial court's admission of this witness's opinion testimony was prejudicial to the County and is reversible error.

III. THE TRIAL COURT ERRED IN FINDING THE COUNTY'S ASSESSMENT ERRONEOUS AND SETTING THE ASSESSMENT AT $7 MILLION.

After this Court addressed questions of methodology in its prior opinion, the trial court was left on remand to consider the issue of whether the County's assessment was erroneous. However, as detailed above, the trial court incorrectly concluded that this Court had already found the actual assessment erroneous. As a result, the trial court did not perform its own analysis to determine whether the County's assessment was erroneous

[3] In its Brief in Opposition to Petition for Appeal, the Keswick Club attempts to mitigate this Court's holding in Lee Gardens by citing the legislative history of *Virginia Code* § 54.1-2010(B). Specifically, the Keswick Club suggests, "In apparent response to the Lee Gardens case, . . . [t]he General Assembly, with full knowledge of the Lee Gardens case, amended the exemptions statute to permit trial courts to qualify or not qualify appraisers as experts in cases such as this." (Appellee's Brief in Opposition to Petition for Appeal, p. 16.) In fact, these two events occurred in just the reverse order. This Court's opinion in the Lee Gardens case (on November 3, 1995) came *after* the Governor had already approved (on March 16, 1995) the addition of *Virginia Code* § 54.1-2010(B) as 1995 Acts of Assembly Chapter 327. The only amendment to *Virginia Code* § 54.1-2010(B) since the Lee Gardens decision was the deletion (in 1999) of the phrase "This provision is declarative of existing law" by 1999 Acts of Assembly Chapter 259.

under "the proper and less stringent standard of review applicable under the facts of this particular case," as required by this Court in its opinion remanding the case. Keswick Club, L.P., 273 Va. at 141.

Having incorrectly determined that this Court had opined that the assessment was erroneous, the trial court then had to fix a fair market value of the property. Over the course of the trial and remand proceedings, the trial court heard from two professional appraisers and the County's assessor. Rather than using any of their opinions as the basis of its valuation, the trial court selected an arbitrary value of $7,000,000, suggested only in a letter from a non-appraiser Keswick employee. (Appendix, p. 284) Without offering any explanation of why this lay valuation was superior to any of the professional valuations it heard, the trial court summarily "split the baby" by selecting an unsupported figure "somewhere in between." (Appendix, p. 768) As detailed below, both the trial court's assumption of error and fixing of value were without evidence to support them.

A. THE TRIAL COURT ERRED IN NOT PROPERLY CONSIDERING THE COUNTY'S ADDITIONAL EVIDENCE OF VALUE PRESENTED ON REMAND.

In its letter opinion, the trial court stated its view of the evidence presented on remand:

> "On June 13, 2008, after the remand and over Keswick's objection, the Court gave the parties an opportunity to produce additional evidence. The only evidence the County presented at this time was the testimony of Ivo Romenesko. *The County failed to show consideration and proper rejection of the income and sales approaches*, instead reasserting its previous value, which was based on the cost approach. Keswick again presented evidence through Mr. Sangree, who reached the same appraisal value as he did at trial. Thus, *the evidence before the Court at present is substantially similar to the evidence before the Court at trial*." [emphasis added]
> (Appendix, p. 766)

This summary of the evidence on remand clearly demonstrates the errors of the trial court in (a) expecting the County to present additional evidence on an issue already decided and (b) overlooking relevant evidence on the most important issue still outstanding.

Based on the summary of the evidence presented on remand, the trial court apparently was looking to the County to present additional evidence that the County had indeed considered and properly rejected the income and sales approaches to valuation. This issue was important in both the initial trial and this Court's earlier review of this case. However, this Court had already ruled against the County on this issue: "For these reasons, we are of opinion that the county's categorical application of the cost approach to the valuation of all golf courses resulted in a failure by the county to consider and properly reject the income and sales approaches." Keswick Club, L.P., 273 Va. at 140. Because this Court had already ruled

on this issue and made it the law of the case as a “thing decided,” the County consciously chose not to present additional evidence on this issue on remand.

Instead, the County’s evidence on remand focused on the issue still pending before the trial court: What was the fair market value of the property? To answer this question, the County presented the testimony of Ivo Romenesko, the only licensed appraiser to testify on remand. Mr. Romenesko went beyond the cost and sales valuations presented at the original trial of this case, and for the first time presented his income-based valuation of the subject property. (Appendix, p. 781) Mr. Romenesko’s testimony on remand demonstrated, among other points, that (a) the income approach is very sensitive to assumptions (Appendix, p. 787) and (b) even using the income method, preferred by the Keswick Club, the subject property is properly valued much closer to the County’s assessment than to the Keswick Club’s request, as explained in detail below. (Appendix, p. 786)

Unfortunately, while expecting testimony on an already-decided issue, the trial court failed to properly consider this significant additional testimony that directly addressed the property’s fair market valuation. Far from being “substantially similar to the evidence before the Court at trial,”

Mr. Romenesko's testimony on remand directly addressed the most important issue still outstanding – the property's value. The trial court erred in failing to properly consider this significant addition to existing evidence.

B. ALL THREE ASSESSMENT METHODS SUPPORT THE COUNTY'S ASSESSMENT.

1. MR. ROMENESKO'S VALUATION WAS RELIABLE AND SUPPORTED THE COUNTY'S ASSESSMENT.

Even if, *arguendo*, error were found in the County's original assessment *method*, the *amount* of the underlying assessment did in fact reflect the actual fair market value of the subject property. Following the remand of this case, the County asked Ivo Romenesko, an experienced, licensed expert appraiser, to take a second look at the appraisal of this property. Mr. Romenesko originally conducted an appraisal of the subject property dated January 5, 2005. (Appendix, pp. 562-661) In that appraisal, he used the cost and sales methods, and considered but properly rejected the income method. (Appendix, p. 623) Using the cost and sales methods alone, Mr. Romenesko arrived at a value of $12,500,000. (Appendix, p. 566)

Though still having strong reservations about the use of the income method (as detailed elsewhere), Mr. Romenesko was asked when the case was remanded to determine a value using the income approach (Appendix,

p. 781:13-15) The resulting report, dated February 22, 2008, was introduced into evidence, and thoroughly explained at the trial court's hearing on remand. (Appendix, pp. 891-914) Mr. Romenesko found that using the income approach alone resulted in a value of $9,900,000 (Appendix, p. 911) When considering and properly weighting all three methods together, Mr. Romenesko arrived at a value of $12,500,000 (Appendix, p. 911)[4] As the Keswick Club's appraiser failed to ever use the cost approach, Mr. Romenesko's report stands as the *only* analysis of the subject property to use all three approaches.

A. USE OF THE INCOME APPROACH REQUIRES CONSIDERABLE SPECULATION.

Though Mr. Romenesko prepared an income-based valuation on remand (at the County's request), he continued to caution against over-reliance on that method. (Appendix, pp. 787:12-789:5) Employing the income approach to value such an unprofitable property requires considerable speculation, a fact acknowledged at trial even by the Keswick Club's appraiser (Appendix, p. 120) While the Keswick Club attempted to

[4] Far from being the value of only the most profitable golf courses in the country, as the Keswick Club has alleged, this amount is on par with the 2003 assessed values of the other golf courses in the County. As the County Assessor noted, in 2003, Farmington was assessed at $21,585,700; Glenmore Country Club was assessed at $13,281,200; and Birdwood was assessed at $9,159,000. (Appendix, p. 6)

lessen the impact of this admission at various stages of trial, the undisputed evidence from both the Keswick Club (Appendix, p. 120) and the County established that, in this case, due to the inherently speculative nature of projecting positive income from a property with no history of income production, coupled with the consistent and long-standing history of lack of profitability, the income method is unreliable in valuing unprofitable properties (Appendix, p. 175) Given the amount of speculation required to project positive net income from a property that has never earned a profit, introduction of such a high level of uncertainty into a property appraisal might be acceptable for internal business decisions or future planning, but it is plainly unacceptable for a tax assessment. *See*, *e.g.*, Fruit Growers Express Co. v. Alexandria, 216 Va. 602, 609, 221 S.E.2d 157, 162 (1976) ("[F]air market value 'is the present actual value of the land with all its adaptations to general and special uses, and not its prospective, speculative or possible value, based on future expenditures and improvements, that is to be considered.'" (quoting Appalachian Power Co. v. Anderson, 212 Va. 705, 708, 187 S.E.2d 148, 152 (1972))

B. A BUSINESS'S ACTUAL HISTORICAL PERFORMANCE CANNOT BE THE BASIS OF A PROPERTY'S INCOME VALUATION.

Though the Keswick Club repeatedly faulted Mr. Romenesko for not relying exclusively on this property's actual historical data, such reliance is misplaced for two reasons. First, in performing an income valuation, the proper consideration is how much income *could* the property produce, not how much *has* its occupant produced. (Appendix, p. 782:24-783:17) A well-situated, highly-valuable property could have great income potential, but little or no actual income due to any number of business decisions. For example, as the County's expert appraiser Ivo Romenesko testified, a rational business manager could decide to use one property as a "loss leader" to draw customers to (and generate even greater income on) other properties under the same ownership or management; but the resulting business decisions would not produce a true value for each individual property. (Appendix, p. 779:12-23) In short, an appraiser is (or should be) looking more for a property's potential than a business's performance.

That point relates to a second reason against over-reliance on actual historical data: they are subject to the owner's own control. (Appendix, p. 783:18-784:7) If so inclined, a property owner could intentionally influence the outcome of an income valuation, if it were based blindly on actual

performance. While the County is in no way suggesting that the Keswick Club is engaging in unethical behavior, it is important to note why actual historical data cannot be the sole basis of an income valuation.

C. THE INCOME APPROACH'S EXTREME SENSITIVITY TO ASSUMPTIONS MAKES IT LESS RELIABLE.

If nothing else, the wide disparity between Mr. Romenesko's income valuation and Mr. Sangree's demonstrated that the income approach is very sensitive to assumptions. (Appendix, p. 787:12-17) Slight changes in the assumptions may result in vastly different valuations. Unfortunately, when valuing an historically unprofitable property, an appraiser *has* to make assumptions about future profitability (Appendix, p. 786:10-21); otherwise, a property with an indefinite negative income stream would have a negative value. The assumptions used in Mr. Romenesko's income valuation were derived from industry standards for profit-maximizing golf courses. (Appendix, pp. 896, 905-906)

D. EVEN THE INCOME METHOD GENERALLY SUPPORTS THE COUNTY'S ASSESSMENT.

These significant shortcomings make the income approach unreliable as the sole means of valuing this property. However, even if, despite all its shortcomings, the income method is used to value the subject property, that approach alone yields a value ($9,900,000) (Appendix, p. 911) much

more in line with the County's assessment ($11,175,000, as adjusted) (Appendix, p. 306) than the Keswick Club's request ($2,900,000) (Appendix, p. 109) Proper application of even the Keswick Club's preferred income method generally supports the County's assessment. Regardless of one's chosen valuation *method*, the *amount* of the County's assessment was ultimately correct.

2. EVEN IF ADMISSIBLE, THE OPINION OF THE KESWICK CLUB'S UNLICENSED EXPERT WITNESS WAS UNRELIABLE.

A. THE LACK OF EXPERIENCE AND SPECULATIVE ASSUMPTIONS OF THE KESWICK CLUB'S EXPERT MADE HIS CONCLUSIONS SUSPECT.

To support its contention that the County's assessment was erroneous, the Keswick Club presented the opinion testimony of David Sangree. As noted in section II *infra*, Mr. Sangree should not have been qualified as an expert on remand because he did not even hold a Virginia real estate appraisal license at the time of his June 13, 2008 testimony. (Appendix, p. 833:4-7) Nevertheless, on remand, Mr. Sangree re-affirmed his earlier valuation of the Keswick Club property and testified extensively. (Appendix, pp. 805-837) Mr. Sangree had earlier estimated a value of $2,900,000 using income and comparable sales approaches. (Appendix, p. 109) This valuation is well below what even unimproved acreage with

limited development rights[5] would command in Albemarle County. That Mr. Sangree would value the luxurious Keswick Club below the value of raw land in Albemarle County dramatically demonstrates his lack of both credibility and familiarity with local conditions. (Appendix, p. 837:3-10)

In his original testimony, Mr. Sangree stated that he did not utilize a cost approach because it was useful only to new courses, but later acknowledged that the cost approach was a viable method of determining value, just not the one he preferred. (Appendix, pp. 110, 113) Instead, Mr. Sangree relied on a "discounted cash flow analysis" for his income approach, a method used for making "projections" of future earnings. (Appendix, p. 95) This Court rejected the use of such an analysis as "conjectural and speculative" in Fruit Growers Express, 216 Va. at 609. By the same token, the projections behind Mr. Sangree's analysis were by no means guaranteed to materialize and were, as he admitted, inherently speculative. (Appendix, p. 120) In fact, Mr. Sangree's projections are a good example of what Mr. Romenesko was describing when he said: "[A]

[5] Despite the Keswick Club's repeated claims, Mr. Romenesko *was* aware of the property's limited development rights. (See Appendix, p. 604 and Appendix, p. 793:16-18) His valuation of the unimproved property at $4,340,000 specifically adjusted for the subject property's limited development rights (See Appendix, pp. 604-605) The unimproved property presumably would have been worth even more if unrestricted.

person could do almost anything if you tried hard enough, if you have enough of an imagination." (Appendix, p. 174)

Mr. Sangree complemented his discounted cash flow analysis with a comparable sales approach, despite his admission that "golf courses do not sell very often, and quite honestly finding sales is always a challenge." (Appendix, p. 103) Nonetheless, he used the data from four "somewhat comparable" sales in Virginia and two in South Carolina to create his estimate. (Appendix, p. 103) Included among the Virginia sales was the sale of KGC, Inc.[6] stock, which Mr. Sangree considered to be a "comparable sale." (Appendix, p. 103) As for the other sales used in Mr. Sangree's comparable sales approach, none of them occurred within Albemarle County or its vicinity. As Mr. Romenesko testified at the original trial, "It's easy to go outside Albemarle County," but "[i]t's probably not a good thing to do, and it makes it difficult for others to check your work and verify it." (Appendix, p. 206)

B. THE SALE OF A KESWICK *BUSINESS* IS NOT A COMPARABLE SALE OF *REAL ESTATE*.

Both the Keswick Club and its expert again relied heavily on the sale of KGC, Inc. stock from Metropolaris, S.A. to Orient-Express Hotels Inc. as

[6] Though not the subject of trial testimony, KGC, Inc. was presumably the then-owner of the subject property.

a suggested indicator of the value of the subject property. (Appendix, pp. 420-421) Following an earlier Stock Purchase Agreement dated March 17, 1999, these two parties agreed that Metropolaris, S.A. would have the option to sell all outstanding shares of KGC, Inc. to Orient-Express Hotels Inc. within an agreed time at an agreed price. (Appendix, pp. 315-326) In April 2002, Metropolaris, S.A. gave notice that it would indeed be selling all outstanding shares of KGC, Inc. to Orient-Express Hotels Inc. at the price the parties had agreed to three years earlier as part of that Put and Call Agreement. (Appendix, pp. 315-326)

The Keswick Club and its expert would have the Court believe that a three-year-old *stock* purchase agreement represents the sale of comparable *real estate*. Their reasoning is faulty at several levels.

For starters, the sale of stock in a corporation is not the same as the sale of real estate. A corporation may have assets, liabilities, and business goodwill that affect its value beyond any real estate that it might own. Blindly assuming that a corporation's net worth equals the value of its real estate holdings may ignore significant external influences. The Put-and-Call Agreement was not a sale of *real estate*, and cannot be used as such.

The County acknowledges this Court's holding that "The fact that the sale was of the beneficial interest of an entity owning Keswick Club, as

opposed to the outright sale of the real estate, is not a sufficient reason, *in and of itself*, to fail to investigate the terms of that sale." Keswick Club, L.P., 273 Va. at 140. [emphasis added] However, an investigation of the terms of this particular sale, set out below, provide at least two additional reasons for not relying on the 1999 Put-and-Call Agreement as an accurate measure of fair market value in 2003.

First, the Keswick Club presented no evidence that either the subject property or even KGC, Inc. was exposed to the open market during the relevant period. In fact, because the parties' Put-and-Call Agreement anticipated that the subject stock would remain available for the other party to buy or sell, the parties presumably were precluded from offering the subject stock to potential third-party buyers or sellers, under the very terms of their agreement. Again, based on the evidence presented to the trial court, no one other than Orient-Express Hotels Inc. was offered the subject real estate (or even KGC, Inc.) at this or any price. Without that exposure to the open market, the parties cannot know the full value that an outside willing purchaser would have paid for the subject property.

Second, the stock price of KGC, Inc. was set over three years in advance of the subject assessment. (Appendix, pp. 315-326) When Metropolaris, S.A. and Orient-Express Hotels Inc. entered their Stock

Purchase and Put-and-Call agreements in 1999, they could not have predicted what the actual fair market value of KGC, Inc. (let alone the subject property) would be on January 1, 2003, the relevant valuation date in this case. Any number of unforeseeable factors in the intervening years may have made a price agreed to in 1999 unrepresentative of the true value as of January 1, 2003. As this Court has noted, "[F]air market value 'is the *present actual value of the land* with all its adaptations to general and special uses, and not its prospective, speculative or possible value, based on future expenditures and improvements, that is to be considered.'" Fruit Growers Express, 216 Va. at 609, 221 S.E.2d at 162 (quoting Appalachian Power, 212 Va. at 708, 187 S.E.2d at 152 (emphasis added by Court in Fruit Growers Express).

Despite the Keswick Club's repeated claims, this analysis demonstrates that the County has in fact duly considered the Put-and-Call Agreement, and provides several good reasons for its proper rejection as an accurate measure of fair market value. On the contrary, it is the Keswick Club and its appraiser who have failed to account for *any* of these shortcomings of the Put-and-Call Agreement. (Appendix, pp. 833:21-835:4) Any failure to *properly* consider the Put-and-Call Agreement belongs to the Keswick Club, not the County. In short, there is simply too much

"interference" in a three-year-old *stock* purchase agreement to use it as an indicator of the value of the subject *real estate* on the subject date.

The trial court's reliance on a letter from the Keswick Club's General Manager (not a professional appraiser) to determine a value for the property is plainly wrong, not supported by the evidence and the value determined by the trial court is erroneous.

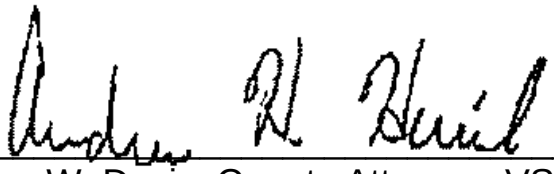
CONCLUSION

In its prior review of this case, this Court remanded the case not because it found the assessment method or amount erroneous, but only because of the County's prior failure to consider and properly reject alternate valuation methods. On remand, the County presented evidence that the County's assessment, even using those alternate valuation methods, was reasonable and supported by each valuation method. Unfortunately, the trial court failed to require the Keswick Club to meet its burden of proving the County's assessment erroneous and failed to properly consider the County's valuations under those alternate methods. In addition, contrary to established case law, the trial court did consider the opinion testimony of the Keswick Club's unlicensed witness and determined a value not supported by the evidence. Together, these reversible errors call for this Court's review and correction. The County

respectfully requests that this Court reverse the judgment of the trial court, direct that the assessment of the subject property be set at no less than $12,500,000, and that any unpaid taxes be paid with interest.

Respectfully submitted,

COUNTY OF ALBEMARLE
By Counsel



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CERTIFICATE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, on this 5th day of March, 2010, I hereby certify that:

1. The name of the Appellant is County of Albemarle, and Counsel for Appellant are:

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2. The name of the Appellee is Keswick Club, L.P., and Counsel for Appellee are:

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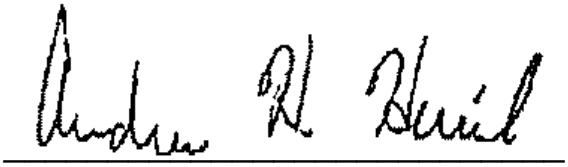
3. Fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellant and Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia, this 5th day of March, 2010, and three paper copies of the same have been served, via U.S. Mail, postage prepaid, upon Counsel for Appellee.



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