In The

Supreme Court of Virginia

RECORD NO. 091590

COUNTY OF ALBEMARLE,

Appellant,

v.

KESWICK CLUB, L.P.,

Appellee.

REPLY 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 Reply Brief in the above-captioned case.

PRINCIPLES OF LAW AND ARGUMENT

In its opening Brief of Appellant, the County responded to many of the arguments already raised by the Appellee Keswick Club, L.P. (the "Appellee" or "Keswick Club") in its earlier Brief in Opposition to Petition for Appeal. Rather than even attempt to respond to the County's opening Brief of Appellant, the Keswick Club's latest Brief merely repeats the same arguments as its prior Brief. Many of these arguments are not just unsupported, they are in fact demonstrably false. The Keswick Club effectively did not respond to the County's opening Brief of Appellant because it could not. This Reply Brief will rebut certain arguments repeated in the Brief of Appellee that lack any support or that in fact are demonstrably false.

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

A. THIS COURT'S PRIOR OPINION DID *NOT* FIND THE ASSESSMENT ITSELF ERRONEOUS.

As noted more fully in the County's opening Brief of Appellant, the trial court erred in concluding that this Court had already found the County's assessment erroneous. 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.

Nevertheless, in its Brief of Appellee, the Keswick Club repeatedly continues to assert that this Court previously found the County's assessment to be not just erroneous, but manifestly erroneous.[1] Notably absent from any of these assertions is any citation to the record or this Court's prior opinion.

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[1] See, e.g., Brief of Appellee at p. 11 ("This Court's earlier opinion did, in fact, hold that the County's assessment was erroneous, because the County Assessor committed manifest error by failing to consider and properly reject the income and sales approaches. A plain reading of the opinion shows this to be true."); at p. 12 ("[T]his Court said very clearly that the County Assessor committed manifest error in failing to consider income and sales approaches to value."); and at p. 21 ("[T]his Court found that not only was there error in the original assessment method, but that there was manifest error due to the County's failure to consider and properly reject the income and sales approaches.").

To set the record straight, here are *all* the references in this Court's prior opinion to the terms "err" or "error":

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. v. County of Albemarle, 273 Va. 128, 135, 639 S.E.2d 243 (2007).

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.

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," either to describe the County's assessment method, the amount of the assessment, or otherwise. The record simply does not support the Keswick Club's continued claim of manifest error. As demonstrated above, this Court made no such finding of error, manifest or otherwise.

B. BY MISREADING THIS COURT'S PRIOR OPINION, THE TRIAL COURT FAILED TO HOLD THE APPLICANT TO ITS BURDEN OF PROOF.

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, 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.

By wrongly 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 PROFFERED AS AN EXPERT.

As noted in the County's opening Brief of Appellant, the trial court erred in admitting the opinion testimony of an unlicensed witness proffered as an expert. Part of that argument deals with the legislative history of *Virginia Code* § 54.1-2010(B). In its Brief of Appellee, the Keswick Club continues to misstate that legislative history to suit its own purposes.[2]

Approved on March 16, 1995 as 1995 Acts of Assembly Chapter 327, *Virginia Code* § 54.1-2010(B) currently[3] provides, "Nothing contained herein shall proscribe the powers of a judge to determine who may qualify as an expert witness to testify in any legal proceeding." Later that year, on November 3, 1995, *after Virginia Code* § 54.1-2010(B) had already been enacted, this Court rendered its decision in Lee Gardens v. Arlington

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2 See Brief of Appellee at pp. 16-17 ("While the Lee Gardens case was in this Court's 'pipeline,' the General Assembly amended *Va. Code* § 54.1-2010(B), and deleted the former last sentence which read 'The [*sic*] provision is declarative of existing law.' The General Assembly, presumably 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.") The Brief does not explain the apparent contradiction between the General Assembly having "full knowledge of the Lee Gardens case" while that case was admittedly only "in this Court's 'pipeline.'"

3 In 1999, by Acts of Assembly Chapter 259, the General Assembly deleted the phrase "This provision is declarative of existing law" present in the 1995 legislation.

County Bd., 250 Va. 534, 463 S.E.2d 646 (1995), holding that a witness not licensed as a real estate appraiser could not testify as an expert on real estate valuation where the statute made it unlawful to engage in real estate appraisal without a license. In enacting *Virginia Code* § 54.1-2010(B), the 1995 General Assembly did not have and could not have had "full knowledge of the Lee Gardens case," as the Keswick Club argues, because that opinion would not be issued until later that year.

By contrast, by the time of the Court of Appeals' 2006 decision in Fitzgerald v. Commonwealth, 48 Va. App. 271, 630 S.E.2d 337 (2006), that Court clearly had full knowledge of both *Virginia Code* § 54.1-2010(B) in its current form, and of the Lee Gardens case, which it cited. With that full knowledge, the Court of Appeals noted: ""[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." Fitzgerald, 48 Va. App. at 275, 630 S.E.2d at 339.

Given the holdings of both this Court and the Court of Appeals *after* the enactment of *Virginia Code* § 54.1-2010(B), the trial court's admission of an unlicensed 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.

A. THE COUNTY'S APPRAISER DID CORRECTLY UNDERSTAND THE PROPERTY'S DEVELOPMENT POTENTIAL.

As noted in the County's opening Brief of Appellant, after this Court's remand of this case, the County engaged expert appraiser Ivo Romenesko to supplement his earlier cost-based and sales-based valuations of the subject property with an income-based valuation. Contrary to the Keswick Club's argument, Mr. Romenesko's appraisal properly considered these alternate valuation methods. Though the Keswick Club attempted to discredit Mr. Romenesko's appraisal, including through the use of an unlicensed witness, both his analysis and conclusions were sound.

In its Brief of Appellee, the Keswick Club repeats its earlier allegation that Mr. Romenesko was somehow unaware of development restrictions on the subject property.[4] In fact, Mr. Romenesko's appraisal clearly reflects his correct understanding of the property's development rights: "The subject property does not have any 'development rights', which means that

[4]See, e.g., Brief of Appellee at p. 4 (Mr. Romenesko's "figure assumed that there are no restrictions other than the general RA zoning on the property and that the property could therefore be developed residentially. . . . Mr. Romenesko was unaware that, as of 2001, the Keswick Club property was subject to a special use permit."). Though the Brief of Appellee cites pp. 776-777 of the Appendix in support of this argument, that excerpt in fact does not address Mr. Romenesko's knowledge of the subject property's development rights.

it cannot be developed with any single family lots less than 21 acres in size." (Appendix, p. 604; see also Appendix, p. 793:16-18) His valuation of the unimproved property at $4,340,000 specifically adjusted for the subject property's actual development rights: "All of the comparable land sales retained their 'development rights' when they were sold and these land sales are superior to the subject property. All of the land sales are adjusted -20% to account for their superior 'development rights'." (Appendix, p. 604). The unimproved property presumably would have been worth even more with development rights.

The Keswick Club is incorrect when it states that its property was "subject to a special use permit, issued by the County, that permits one, and only one, use of the property" and that the existing zoning (because of the special use permit) "simply does not permit any other development in the absence of a legislative act by the County." (Brief of Appellee, pp. 4-5) As explained below, special use permits do not *compel* landowners to engage in the special use. Rather, special use permits *allow* landowners to engage in the special use. In addition, special use permits do not prohibit landowners from engaging in any by-right uses allowed in the zoning district that do not conflict with the exercise of the special use.

When a locality grants a special use permit to allow a particular use, the locality is, in effect, expanding the possible uses of a property by adding the special use to those uses allowed by right in the zoning district. The granting of a special use permit does not, contrary to Keswick Club's argument, strip the property subject to the special use permit of the ability to engage in any by-right use. At any time, a landowner may decide not to engage in the special use or to discontinue the special use and, without any legislative act, may engage in any use permitted in the zoning district by right. In addition, provided that all other requirements of the zoning ordinance are satisfied, a landowner may engage in non-conflicting by-right and special uses simultaneously.

In this case, Keswick Club's special use permit allowed it to engage in the special use authorized by its special use permit. However, if the special use were not utilized, Keswick Club would also be allowed to engage in any of the more than twenty by-right uses allowed in the Rural Areas zoning district, including dividing its property into minimum 21-acre lots to establish single family detached dwellings. *Albemarle County, Va., Code* § 18-10 (1998)

The Keswick Club also claims that Mr. Romenesko's opinion of the highest and best use of the property included the mistaken assumption that

the property could be used as a corporate retreat. (Brief of Appellee, p. 5) The Keswick Club cites no authority, no zoning determination, and no special use permit condition prohibiting Keswick Hall from being used as a corporate retreat. Condition 7 of Special Use Permit SP-2000-33 (Appendix, p. 890) provides: "Except for any restaurant on the property open to the general public, Keswick Hall and its associated facilities shall be used only by the guests of the inn and their invitees, and members of the Keswick Country Club and their invitees."

If the officers and employees of a business entity are guests of the inn and congregate at Keswick Hall to hold a "corporate retreat," there is nothing in Condition 7 or any other condition of Special Use Permit SP-2000-33 to prohibit that activity. Therefore, Mr. Romenesko's assumption was valid.

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

Finally, in its Brief of Appellee, the Keswick Club maintains the argument that the County somehow "fail[ed] to analyze the terms of the 2002 sale of Keswick Club to Orient Express." (Brief of Appellee, p. 20) Of course, it is easier simply to repeat this argument than to address the questions raised by an actual analysis of this three-year-old sale of stock.

In simply repeating its prior argument, the Keswick Club still has no answers for:

1. The difference between a sale of stock and a sale of real estate,

2. The failure of the subject property to be exposed to the open market for years prior to the supposedly comparable sale, and

3. The gap of over three years between when the sales price was fixed (1999) and when the actual transfer took place (2002).

For all of the Keswick Club's claims that the County somehow failed to analyze this sale, it is ironic that the Keswick Club cannot answer these questions raised when the supposedly comparable sale is analyzed.

CONCLUSION

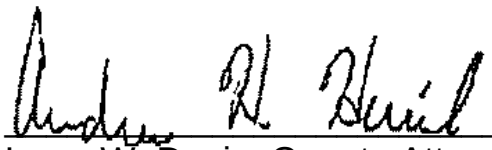
When confronted with the inaccuracies of its earlier Brief in Opposition to Petition for Appeal, the Keswick Club chose simply to repeat them in its Brief of Appellee. The Brief of Appellee effectively does not respond to the County's opening Brief of Appellant because it cannot.

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 renews its request 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 9th day of April, 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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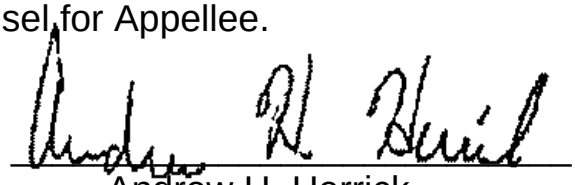
3. Fifteen paper copies and one electronic copy on CD of the foregoing Reply Brief have been hand-filed with the Clerk of the Supreme Court of Virginia, this 9th day of April, 2010, and three paper copies of the same have been served, via U.S. Mail, postage prepaid, upon Counsel for Appellee.



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