In The

Supreme Court of Virginia

RECORD NO. 091621

TB VENTURE, LLC,

Appellant,

v.

ARLINGTON COUNTY,

Appellee.

BRIEF OF APPELLEE

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TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE VIRGINIA SUPREME COURT:

The Appellee, Arlington County ("County"), respectfully states that the Final Order of the Circuit Court entered on May 8, 2009, granting the County's Motion to Strike the Appellant's ("TB Venture") evidence, entering judgment in favor of the County, and dismissing TB Venture's Complaint, is plainly correct and that the Circuit Court should be affirmed.

TB Venture advances an argument that this Court has repeatedly and flatly rejected since at least 1962 in Richmond, Fredericksburg and Potomac Railroad Company v. Commonwealth of Virginia, 203 Va. 294, 301, 124 S.E.2d 206, 211 (1962), and subsequently restated in Richmond, Fredericksburg and Potomac Railroad Company v. State Corporation Commission, 219 Va. 301, 247 S.E.2d 408 (1978), Fairfax County v. Nassif, 223 Va. 400, 290 S.E.2d 822 (1982) and most recently in Board of Supervisors v. Donatelli & Klein, Inc., 228 Va. 620, 325 S.E.2d 342 (1985); namely, TB Venture's claim that the allegedly restricted rents for the twenty-one condominium units at issue ("Subject Properties") must be used

as the absolute measure of income using the capitalization of income method of appraisal.[1]

Additionally, even though it never asked the Circuit Court to do so, TB Venture seeks to have this Court mandate the use of the capitalization of income approach in assessing condominiums (which this Court has never done and should not do), and, in plain contradiction to the authorities cited above, to mandate the use of allegedly restricted income as the absolute measure of income available to the property. TB Venture provides no justification for making these sweeping changes to the law, and that issue is not properly before this Court.

This appeal is complicated by several issues:

First, as will be demonstrated below, TB Venture has failed properly to assign error in its Assignments of Error 1-3, and this Court should decline to reach such Assignments of Error.

Second, TB Venture argues or implies on appeal, for the first time in this case, that the restrictions it claims encumber the Subject Properties were not voluntarily entered into by the developer but were imposed by the

[1] Generally, real estate can be appraised using three approaches to value: the income capitalization approach, the cost approach (reproduction cost less depreciation), and the sales comparison approach (also called the market approach). County Board of Arlington v. Commonwealth, 240 Va. 108, 112, 393 S.E.2d 194, 196-97 (1990).

County as part of the County's land use approval. However, TB Venture represented to the Circuit Court that the restrictions were voluntarily assumed, having been agreed to by the developer. TB Venture cannot raise a contrary argument for the first time on appeal.

Third, considering that the Subject Properties are contained within a 274-unit condominium development, TB Venture's description of the Subject Properties throughout the proceedings below and now in its Brief is confusing at best. While TB Venture asserted below that each of the twenty-one (21) condominium units at issue was encumbered by a recorded Declaration of Covenants that prohibits any individual sale of the units and requires that the use of these units be limited to low and moderate income rental for a period of forty (40) years, Joint Appendix ("JA") 1, TB Venture concedes on appeal, but only towards the end of its Brief, that this is in fact not the case. Even on page 1 of its Brief, TB Venture claims that "these units" (emphasis added) were designated as Community Benefit Units ("CBUs") under an agreement between the County and the original developer, and "may only be leased to qualified low income families, at restricted rents, for the next 40 years." However, in flat contradiction of these statements, TB Venture, on page 44 of its Brief, admits that the same agreement "does not identify specific units" in the

overall development project of 274 units and on page 45 admits (for the first time during this litigation) that there are no provisions in any document in the record which prohibit the sale or transfer of any or all of these condominium units or which require that these specific units be used for low and moderate income rental housing.[2] TB Venture is apparently now claiming that the CBU Agreement, which it claims TB Venture is bound by (but of which it has provided no documentary proof), merely requires that whatever entity has the obligations under the Agreement maintain 21 affordable units somewhere in the 274-unit building which meet the general requirements stated in the Agreement.[3] TB Venture has thus chosen to treat the Subject Properties as the units subject to the CBU agreement.

Finally, as will be demonstrated below, TB Venture makes numerous "straw man" arguments that it attributes to the Circuit Court or the County, and proceeds to critique these pretended rulings and arguments that were never made by the Court or the County. For example, at p. 40 of TB Venture's Brief, it claims that "the Trial Court disapproved of the direct

[2] Yet TB Venture goes so far as to claim that a unit cannot be sold regardless of the price. Appellant's Brief, p. 38. Mr. Sloter's testimony on the applicability of these restrictions was not certain; he referred to what was "represented" to him and what his "understanding" was. JA 44-45.

[3] The restrictive covenant recorded by the developer, JA 312-317, does not encumber any specific units in the high-rise building; rather, it specifies that 15 two-bedroom flats and six townhouses be encumbered at various rent levels. JA 317.

capitalization methodology to value the 'leased fee' because it did not value the fee simple." The Circuit Court made no such nonsensical ruling, and TB Venture's citation to the record, JA 277, does not support its claim. The Circuit Court merely (and correctly) ruled that TB Venture's expert testified as to the value of the leased fee estate of the Subject Properties (a partial interest), not the fee simple value, that is the value required by law. The Circuit Court never "disapproved" of the income capitalization method of valuation. TB Venture's numerous other fictitious rulings and arguments are detailed below.

INVALIDILITY OF TB VENTURE'S ASSIGNMENTS OF ERROR 1-3 AND COUNTERSTATEMENT OF QUESTIONS 4-5

1. Assignments of Error.

TB Venture has not properly assigned error regarding the Circuit Court's consideration of the bulk sale of the Subject Properties in that it assigned error to a ruling that was not made, rather than to no ruling at all by the Circuit Court on the issue. Assignment of Error #1 reads:

> In granting a motion to strike, the Trial Court erred in finding that the County need not consider the contemporaneous sale of the 21 CBU Units when the County assessed their value at more than double the price paid in that contemporaneous, arms-length transaction.

(emphasis added). However, TB Venture does not cite to any such ruling in the record, and cannot, as the trial court made no such finding. The Circuit

Court's ruling on the motion to strike is found at JA 276-278, and the Circuit Court made no findings at all regarding the sale of the Subject Properties. However, TB Venture did not assign error to the trial court's silence regarding the bulk sale of the properties, and any alleged error was not properly preserved for this appeal. Bolling v. D'Amato, 259 Va. 299, 303, 526 S.E.2d 257, 258 (2000). In Bolling, the appellant filed a motion to substitute a party plaintiff; but the trial court did not rule on the motion. The Bolling appellant assigned error to the trial court's "refusal" to substitute the party plaintiff, rather than the trial court's inaction on the motion. This Court held:

> We do not reach the second contention because the trial court did not rule on that issue, and the plaintiff has not assigned error to the court's alleged inaction.

See also Gibson v. Commonwealth, 276 Va. 176, 181, 662 S.E.2d 54, 58 (2008) (assignment of error not proper because record reflects no ruling of the trial court to that effect); Nelson v. Davis, 262 Va. 230, 235, 546 S.E.2d 712, 715 (2001) (trial court made no such ruling on issue stated in the assignment of error; issue therefore not properly before the Court).

Similarly here, TB Venture assigned error to a ruling that was not made, rather than to the trial court's failure to address the issue. Accordingly, this Court should decline to consider TB Venture's Assignment of Error #1.

Assignments of Error 2 and 3 are also insufficient. TB Venture's Assignments of Error 2 and 3 state:

> 2. In granting a motion to strike, the Trial Court erred in finding that the County need not consider the nature of the 21 CBU Units, including their contract rents and the restrictions imposed by the Community Benefit Housing Program Agreement ("CBU Agreement").
>
> 3. In granting a motion to strike, the Trial Court erred in finding that the County need not consider the actual and economic expenses associated with the management and maintenance of the 21 CBU Units.

While TB Venture's counsel made that statement "as if not encumbered by the restrictions" and the Court responded "[a]s if not encumbered by the low income," JA 278, the Circuit Court made no "finding that the County need not consider the nature of the 21 CBU units" and made no "finding that the County need not consider the actual and economic expenses associated with the management and maintenance" of the Subject Properties. Based on the holding in Bolling, *supra*, the Court should not consider Assignments of Error 2 or 3, either.

2. Counterstatement of Questions Presented 4 and 5.

Regarding the remaining assignments of error and respective questions presented 4 and 5, the County states that the proper question as to both is:

"Particularly given that there is no basis in the record to state that the Circuit Court "disregarded" any evidence, and that the only evidence of economic income presented by TB Venture was restricted, non-market income, should the County have to assess the leased fee interest of the properties instead of the fee simple interest, and to assess these 21 separate parcels of real estate "in bulk," instead of individually, all in violation of well-established Virginia law?"

COUNTER-STATEMENT OF FACTS

A. Background: This case[4] involves the 2007 and 2008 real estate tax assessments of 21 separate luxury condominium units scattered throughout the 274 unit Odyssey condominium complex in Arlington, Virginia, within walking distance of the Courthouse metro rail station. The development includes a rooftop pool, health spa, community room with billiards and a lounge, a business center, and underground parking. Fifteen of the units at issue in this case are two-bedroom flats and six of the units are three-bedroom townhouses. JA 280.

[4] TB Venture incorrectly asserts, at p. 5 of its Brief, that this is an action "pursuant to Virginia Code § 58.1-3295." That statute does not authorize an action for the correction of an alleged erroneous assessment. The correct citation would be to Virginia Code § 15.2-717.

As stated above, TB Venture has inconsistently described these units as being both specifically restricted by operation of the Community Benefit Housing Program Agreement (JA 289-310) and as not being specifically restricted (Appellant's Brief, pp. 44-5). It is clear, however, that the Agreement does not encumber any specific unit in the complex. JA 291, 310. There is no dispute that TB Venture has itself chosen thus far to treat these particular units as community benefit units, although it is not legally required to do so.

The rents that are charged for these units have no relation whatsoever to market rents. TB Venture rents the units to households with incomes that do not exceed either 50% or 60% of Washington, D.C. area median income, depending on the unit, and rents are limited to no more than 30% of the gross income of households that qualify. JA 290-91.[5]

Paradigm's President, Stanley Sloter, testified that, because of the substantially reduced rents for these units, they constitute "tremendous bargains" to tenants who meet the income restrictions. He testified that if "you had enough income to own [a unit], you probably won't qualify to live there." JA 55-56.

[5] The Community Benefit Housing Program Agreement sets out a process that allows the owner to rent the units at full market rent in the event tenants meeting the income restrictions do not apply. JA 293-95.

TB Venture was not the developer of the project; rather, TB Venture ultimately acquired the 21 units through a bulk sale in 2006 and 2007.[6] Twenty of the units conveyed in 2006; one unit conveyed in 2007.

The 2007 assessments at issue before the Circuit Court were those set by the Board of Equalization ("BOE"), which lowered the original assessments by the County's Department of Real Estate Assessments ("DREA").[7] The 2007 assessments by the BOE were either $187,300 or $187,400 for each of the townhouses and $141,600 for each of the flats.[8]

The BOE set the 2007 assessments by its October 31, 2007, Order. JA 371. The BOE used the income capitalization method of valuation. As the Subject Properties had not even been in operation for a year at that point, there was of course no annualized actual income and expense data available yet, and TB Venture merely presented incomplete data or its bulk projections. JA 369. Some of the data presented by TB Venture was obviously inaccurate, given the short operating experience of the Subject

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[6] The twenty-one units were transferred from the developer, MR Odyssey, LLC, to Paradigm Development Company. Paradigm then transferred the units to TB Venture, which is an affiliated entity. JA 329-358.

[7] Throughout its Brief, TB Venture makes much of the original 2007 assessment by the DREA, which actually was never at issue at trial.

[8] At page 4 of Appellant's Brief, it asserted that the original assessment "assumed a rate of return…" There is no record support for this assertion and it is factually incorrect.

Properties, i.e., TB Venture's projected expenses included the projected taxes on an amount never assessed by the County and before the assessments were reduced by the BOE.[9] TB Venture did not present the individualized expenses for each unit but presented them in gross. The BOE reduced the 2007 assessments on the Subject Properties and the parking spaces to a total of $3,698,100.

The 2008 assessments, by the DREA, were $210,900 for the townhouse units and $186,200 for the flats. The DREA used a sales comparison approach to value the condominium units. JA 224. TB Venture produced no expert testimony that either the 2007 or 2008 assessments were performed in an erroneous manner.

B. Trial proceedings generally: Trial was held on April 14-15, 2009. TB Venture's first witness was Mr. Sloter. TB Venture makes much of Mr. Sloter's testimony, which detailed his analysis of the restricted income stream for the Subject Properties. Appellant's Brief, pp. 12-13. While Mr. Sloter testified that he was not familiar with the term "leased fee," JA 98, TB Venture's valuation expert, Thomas Shields, who similarly capitalized the

[9] The 2007 tax rate was $.818 per $100 of assessed value. The projected taxes set out at JA 367 assume an assessed value of $9,500,000 for the twenty-one condominium units and the parking. The original 2007 assessment for all of these parcels was $8,820,400, JA 3, but was reduced by the BOE by more than half-thus TB Venture's projections of real estate taxes presented to the BOE was greater than double the actual taxes.

restricted rent, conceded that such an approach merely valued the leased fee estate, not the fee simple value of the property.[10] JA 175. However, it is the fee simple value of real property, not the leased fee estate (which is merely a partial interest in the fee simple estate), which is required to be valued for real estate tax assessment purposes.[11]

Mr. Sloter conceded that the sale of the Subject Properties, a sale on which TB Venture places great weight, was a bulk sale, and he further testified that he represented to the Virginia Housing Development Authority

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[10] A leased fee estate is defined as "an ownership interest held by the landlord with the right of use and occupancy conveyed by lease to others. The rights of the lessor (the leased fee owner) and the leased fee are specified by contract terms contained within the lease." Appraisal Institute, The Dictionary of Real Estate Appraisal (3rd ed. 1993). Mr. Shields similarly defined the leased fee as "essentially the owner's interest in the property." JA 174-5. The fee simple estate, on the other hand, is "absolute ownership unencumbered by any other interest or estate, subject only to limitations imposed by the governmental powers of taxation, eminent domain, police powers and escheat." Id. Mr. Shields testified that this definition of the fee simple estate is accurate. JA 175.

[11] The leased fee estate is a partial interest in real estate. Ownership of the fee simple interest is equivalent to ownership of the complete "bundle of sticks" that can be privately owned, while one or more of the sticks can represent a partial interest. When the fee simple is divided by a lease, the divided interests represent two distinct but related interests, the leased fee interest and the leasehold interest. Appraisal Institute, The Appraisal of Real Estate 112-4 (13th ed. 2008). This Court has cited to The Appraisal of Real Estate as authoritative. See, e.g., County Bd. of Arlington County v. Commonwealth Dep't of Tax'n, 240 Va. 108, 112, 393 S.E.2d 194, 196-7 (1990).

("VHDA") that the 2007 County assessments on the Subject Properties were correct, as detailed below.

TB Venture next called Michael Butler, project manager at Paradigm. As described below, Mr. Butler not only conceded that the sale of the Subject Properties was a bulk sale, but was instrumental in touting the assessments of the Subject Properties as being correct to the VHDA and to other potential lenders.

TB Venture's third witness was Thomas Shields, a retained expert appraiser. His testimony either did not advance TB Venture's claims or contradicted them, as discussed in greater detail below.

TB Venture's fourth witness was the County's Director of Real Estate Assessments, Mr. Thomas Rice, who testified as to his methodology for the 2008 assessments of the Subject Property.

C. Evidence that the 2007/2008 sale of the Subject Properties to Paradigm was a "Bulk Sale":

First, TB Venture's expert appraiser, Thomas Shields, testified that the 2007 and 2008 sale of the 21 real estate parcels was a bulk sale. He testified as follows on cross-examination:

> Q: You know, the purchase of these 21 units, that was a bulk sale, was it not?
>
> A: Yes.

Q: No individual prices were negotiated in the sale price. It was a bulk purchase for the aggregate of the 21 units, right?

A: That's my understanding.

JA 177.[12]

Next, Michael Butler, project manager at Paradigm Development Company, also testified on cross-examination that the sale was a bulk sale:

Q. You ever heard the term "bulk sale"?

A. Yes.

Q. Can you tell me what you understand a bulk sale to be?

A. When you have multiple assets sold within a single transaction.

Q. And the purchase of these 21 community benefit units by Paradigm was a bulk sale?

A. Yes.

Q. The units themselves were not individually valued in the sale, right, the bulk sale? "

A. Correct.

Q. Do you remember giving that testimony?

A. That's all correct.

JA 124.[13] Butler conceded the price paid was "just a general aggregate price for a collection of units." JA 125.

[12] Mr. Shields confirmed that Monument, the developer that sold the units, "did not want to be involved" in the units and "unloaded them." JA 180-81.

[13] Butler confirmed his deposition testimony, which was submitted when he attempted to contradict his prior testimony.

Finally, Stanley Sloter, the President of Paradigm, also conceded that the sale was a bulk sale, as did Thomas Rice, the County's Director of Real Estate Assessments. JA 87-88 and 219.[14] Every single witness called by TB Venture testified that the sale on which TB Venture relies so heavily before this Court was a bulk sale.

Additionally, Sloter testified that the Subject Properties were to be offered only to a limited number of potential buyers, i.e., to someone who had the experience to comply with the CBU agreement, JA 42, and that he only knew of one other offer to buy the property, from a nonprofit entity not motivated by profit in buying and running the properties. JA 88. Thus, TB Venture's own witness testified that the Subject Properties were not made available on the open market.

While TB Venture attempts to avoid the issue by asserting that the sale was an "arms-length" transaction, TB Venture introduced no evidence that the sale of the Subject Properties was anything other than a "bulk sale." "Arms-length" merely refers to the relationship between the parties, not whether it is a "bulk" sale. See West Creek Associates v. Goochland, 276 Va. 393, 415, 665 S.E.2d 834, 846 (2008) (Circuit Court found that although the sale was an arms-length transaction, it also found that it was a

[14] Mr. Rice testified that he considered the sale in making the assessments but discounted its effect because it was a bulk sale. JA 219.

bulk sale); Appraisal Institute, The Dictionary of Real Estate Appraisal (3rd ed. 1993) ("arms-length transaction" is a transaction between unrelated parties under no duress).

D. TB Venture's Representations that the County's Assessments were Correct:

TB Venture submitted a loan application to the VHDA. JA 348-364. On page 4 of the application (JA 351), TB Venture listed the "Estimated Value" of the 21 condominium units as $3,698,100, which is the combined total of the 2007 County real estate tax assessment on units, not the sale price touted here by TB Venture in order to obtain a tax refund. TB Venture noted on its application that this results in a 43% estimated "loan-to-value ratio." Mr. Sloter signed the application on behalf of TB Venture, and by signing the application certified that "the information set forth in this application is true, correct and complete." JA 356. TB Venture noted that the "Total Estimated Value" of $3,698,100 results in a per unit value of $176,100. JA 362.

The loan-to-value ratio is a way a lender looks at the value of an asset to determine if it is a risky loan; the lower the ratio, the safer the loan. A 43% loan-to-value ratio is a low ratio; greater than 60% is a high ratio. If the ratio is high, a lender may charge the borrower a higher interest rate,

make the loan term shorter, or require additional collateral. Conversely, a low ratio gains more favorable terms. JA 129-131.

TB Venture submitted the loan application to the VHDA after it had decided to challenge the very tax assessments it asserted in its loan application were the correct. JA 81. Mr. Sloter admitted that he never advised anyone at VHDA that TB Venture actually disputed the value they were asking VHDA to rely upon. JA 86.[15]

TB Venture gave conflicting explanations for making these representations. When asked during his deposition whether TB Venture asked VHDA to rely on the County's assessed value in lieu of a third-party appraisal, Mr. Sloter claimed that such a notion was "preposterous." JA 84. However, at trial, Mr. Sloter testified that that was exactly TB Venture's purpose, as did Mr. Butler. JA 83-4, 118. But TB Venture's motivation may have had yet another explanation.

[15] Mr. Butler claimed at trial that he did not recall whether he told Charles Wilson, a mortgage broker who acted as TB Venture's agent, that TB Venture was going to challenge the assessment, JA 125-126, 138-9, contradicting his deposition testimony that he did so advise Mr. Wilson. JA 126. Mr. Butler may have changed his testimony as he had read Mr. Wilson's deposition testimony in which Wilson denied that Butler had told him that TB Venture intended to challenge the assessment. JA 126-27. Mr. Butler also testified at that he did not recall whether he advised Scott Charnock, an employee of VHDA, that TB Venture disputed the assessment, again contradicting his deposition testimony in which he claimed that he did tell Mr. Charnock. JA 127-28. Mr. Charnock has denied that Mr. Butler ever made such a statement. JA 128.

TB Venture also circulated a memorandum to numerous potential lenders highlighting the County's assessment of $3,698,100, the value of $176,100 per unit, and the loan-to-value ratio of 43%. Mr. Butler, who circulated the memorandum, conceded that he did not alert the lenders that TB Venture actually disputed the $3,698,100 total even though he knew that TB Venture did not agree with the value and intended to file this lawsuit challenging the assessment. JA 134-137. Mr. Butler conceded that had he used the amount TB Venture is claiming in this lawsuit, that amount would have indicated a loan-to value ratio of approximately 75%, which is high and which might result in more unfavorable loan terms. JA 134-136. In short, TB Venture touted the County's assessment valuation in order to obtain loans at the same time it was asserting that such valuations were too high in order to obtain a tax refund.

E. Testimony of Thomas Shields: TB Venture retained Thomas Shields as an expert in real estate appraisal, despite the fact that he: 1) had never qualified as an expert witness in the Arlington Circuit Court; 2) had never qualified as an expert in any court in the appraisal of condominiums; 3) had never, prior to this case, done an appraisal of condominiums by the income approach to valuation; 4) had never appraised a property like the Subject Properties; and 5) had to retract a

statement in his report that "[w]e are competent to perform this appraisal based on past experience appraising similar properties in the DC area." JA 176. Shields testified that he was not familiar with the laws relating to the assessment of properties that are "burdened" by low-income housing restrictions. JA 154.

Shields stated that he was retained to appraise the value of the leased fee, not the fee simple value, of the Subject Properties. JA 174.[16] Significantly, he testified that he did not perform a valuation of the fee simple value of the property and that if he had, he would have reached a substantially higher conclusion of value. JA 175.[17]

Shields further testified that he did not perform individual valuations for each unit; rather, he performed a "bulk" valuation. JA 177. He appraised the leased fee value of the 21 units as a whole, and then allocated values to each individual condominium. He testified that he did

[16] Shields merely capitalized the restricted rental income for the Subject Properties. JA 175. He readily conceded that this merely valued, in bulk, the leased fee estate of the Subject Properties. JA 175.

[17] TB Venture claims, at p. 16 of its Brief, that Shields "used a valuation technique which he referred to as a 'Leased Fee' appraisal." Of course, this is nonsensical, as a leased fee is an interest in real estate, not a valuation technique.

not know that Appraisal Institute, The Appraisal of Real Estate 77 (12th ed. 2001), a treatise he recognized as authoritative, provided:

> Appraisers do not value individual units and then sum the values to produce a value indication for the entire project. Likewise, individual units are not to be valued by appraising the entirety and allocating total value to individual units. Each assignment has a separate and distinct consideration.

JA 178-79 (emphasis added). Mr. Shields conceded that his conclusions of value were not valuations of the market values of the Subject Properties, but were merely an allocation based on the restricted income, only for "informational purposes." JA 179, 195 (emphasis added). Shields merely allocated value rather than appraising the fair market value of each unit as required. Further, his allocation was based on gross income (rent) and not on net income. Notably, he does what is claimed to be an error on the County's part regarding the supposed failure to consider the expenses of the Subject Properties.

Mr. Shields testified that, in appraising condominiums, he would typically use the sales comparison approach to value. JA 179. However, he conceded on cross-examination that he did not look for sales of apartments that commanded rents similar to those charged for the Subject

Properties. JA 179-80.[18] The only sale he used was the bulk sale of several apartments at a complex known as the Grove, which, unlike the Subject Properties, included no townhouse units. JA 184-85. Not only did Shields not know whether the units at the Grove were ever put on the open market (JA 185), but he conceded that the Grove was inferior to the Subject Properties in construction, quality and location. JA 185-87.[19]

F. The County's Motion to Strike: At the conclusion of TB Venture's evidence, the County moved to strike on the grounds that TB Venture had: 1) failed to prove the value of the Subject Properties; and 2) failed to show manifest error or total disregard of controlling evidence in the making of the assessments and therefore failed to overcome the presumption of correctness which applies to the assessments. The Court granted the County's motion to strike on both of these grounds and entered a Final Order to that effect on May 8, 2009. This appeal followed.

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[18] TB Venture erroneously claims, on p. 37 of its Brief, that a comparable sales approach would only consider other, unrestricted units in the Odyssey building.

[19] TB Venture's claim, at p. 17 of its Brief, that the bulk sale price of the Grove, an inferior property in construction, quality and location, was "consistent" with the sale price of the Subject Properties, supports the view that it was not a market value sale.

The Circuit Court did not make any of these rulings or findings fictitiously claimed by TB Venture in its Brief at the following pages:

p. 2: "…the Trial Court ruled that the fee simple value of low income housing is the same as what its market value would be if it were unencumbered by the affordable housing restrictions."[20]

p. 5: "The Trial Court found, as a matter of law, with respect to each of the 21 units, that its status as a condominium, rather than a rental apartment, requires that it be assessed based upon a fair market value analysis that disregards the low income housing limitations on use and income."

p. 40: "Here the Trial Court disapproved of the direct capitalization methodology to value the "leased fee" because it did not value the fee simple."

p. 41: "The Trial Court in this case found that direct capitalization of economic rent for income producing property is an improper method of valuation…"

[20] The County assesses similar units in the Odyssey complex that are not used for affordable housing at approximately three times the value of the Subject Properties.

ARGUMENT

As described below, TB Venture failed to prove the fair market value of the Subject Properties. That failure is fatal to TB Venture's claims here, and this Court need not reach the issue of whether TB Venture rebutted the presumption of correctness which applies to the assessments. However, TB Venture failed to do that as well, as described below. First, the County addresses TB Venture's assertion, made for the first time here on appeal, that the restrictions that are alleged to encumber the Subject Properties were imposed or otherwise involuntary.

I. TB VENTURE CANNOT BE PERMITTED TO CLAIM, FOR THE FIRST TIME ON APPEAL, THAT THE PURPORTED RESTRICTIONS ON THE SUBJECT PROPERTIES WERE COMPELLED BY THE COUNTY.

TB Venture argues or implies, for the first time in this case in this appeal, that the restrictions it claims encumbers the Subject Properties were not voluntarily entered into by the developer but were imposed by the County. See Appellant's Brief, pp. 3 (was a "condition" to site plan approval), 8 (same), 41 (restrictions are "imposed"), 43 (County wrong in claiming are "voluntary"), 46 (same), 47 (same). Additionally, the premise of the entirety of section III.B. (pp. 41-43) of Appellant's Brief is that the use limitations were imposed by the County, not agreed to by the parties.

However, TB Venture explicitly represented to the Circuit Court that the restrictions were voluntarily assumed, having been agreed to by the developer. It never argued to the Circuit Court that the restrictions were anything but voluntary and the case proceeded on that basis.

In TB Venture's opening statement to the Circuit Court, TB Venture's counsel made the following representation to the Court:

> In obtaining the approval to build the Odyssey, the then-developer, 16th and Scott Street, LLC, entered into negotiations with the County of Arlington, and as part of those negotiations, agreed to provide 21 condominium and townhouse units to be set aside as community benefit units.

Trial Transcript, April 14, 2009, pp. 7-8 (emphasis added.)[21]

Further, in argument in opposition to the County's motion to strike, TB Venture's counsel referred to the "restrictions to which the County and the developer agreed," JA 265, and as a "trade-off" in which the developer received more site density. JA 266. At no time during the trial did TB Venture claim that the restrictions were anything other voluntary.

TB Venture cannot be permitted to take inconsistent positions at different stages of this litigation. In Commonwealth Transportation

[21] Appellant's counsel would not agree to designate this part of the record for inclusion in the Joint Appendix. It was not anticipated then that TB Venture would attempt to contradict its earlier representations to the Circuit Court regarding the voluntariness of the restrictions and attempt to raise a new claim for the first time on appeal.

Commissioner of Virginia v. Target Corporation, 274 Va. 341, 350, 650 S.E.2d 92, 97 (2007), this Court stated that "[w]e have consistently held that litigants may not take inconsistent positions at different stages of litigation," citing Cohn v. Knowledge Connections, Inc., 266 Va. 362, 367, 585 S.E.2d 578, 581 (2003); Commonwealth v. Lotz Realty Co., 237 Va. 1, 7, 376 S.E.2d 54, 57 (1989); Sullivan v. Commonwealth, 157 Va. 867, 878, 161 S.E. 297, 300 (1931); Kelley v. Commonwealth, 140 Va. 522, 536, 125 S.E. 437, 441 (1924). This Court further noted that "[t]his is an appellate court, and [this Court] hears cases on the theory upon which they were tried in the [circuit] court, reviewing those points properly raised, decided, and preserved." Pearsall v. Richmond Redevelopment & Housing Authority, 218 Va. 892, 908, 242 S.E.2d 228, 237 (1978) (quoting Strauss v. Princess Anne Marine and Bulkheading Co., 209 Va. 217, 221-22, 163 S.E.2d 198, 202 (1968)). TB Venture should not be permitted to argue on appeal that the restrictions were compelled when it represented to the Trial Court that they were entered into voluntarily and the Circuit Court proceeded to decide the case on that basis.

II. TB VENTURE FAILED TO PROVE THE FEE SIMPLE VALUE OF THE SUBJECT PROPERTIES.

A. TB Venture's Expert Witness, Mr. Shields, Did Not Appraise the Fair Market Value of the Fee Simple Estate, as Required by Virginia law.

In order to prevail in a challenge to a tax assessment, a taxpayer must establish the property's fair market value. West Creek Associates, LLC v. County of Goochland, 276 Va. 393, 417, 665 S.E.2d 834, 847 (2008). Assessments are to be of the fair market value of the fee simple estate, and fair market value is to be ascertained as prescribed by law. Va. Const., art. X, § 2; Richmond, Fredericksburg and Potomac Railroad Company v. Commonwealth of Virginia, 203 Va. 294, 301, 124 S.E.2d 206, 211 (1962); Arlington County Board v. Ginsburg, 228 Va. 633, 640, 325 S.E.2d 348, 352 (1985).

As described above in Counterstatement of Facts, section E, Mr. Shields, TB Venture's expert witness, conceded that he did not appraise the value of the fee simple estate, and that had he done so he would have reached a substantially higher conclusion of value. Rather, he testified that he performed a "bulk" appraisal of the value of the leased fee estate, which is not sufficient under Virginia law, as succinctly summarized in a Circuit Court decision:

> Furthermore, he pointedly testified that his appraisal of the property was a leased fee appraisal, i.e., the value of the property was the function of the existing income stream generated by actual leases. While that appraisal may have been wholly appropriate for the

> purposes of Fincham's appraisal for his bank client, the Supreme Court has emphasized that real estate assessments must take the full fee simple value of real property into account, not merely the value of the real estate as determined by existing leases which might or might not reflect the fee simple value of the property. Richmond, F. & P. RR. v. Commonwealth, 203 Va. 294, 301, 124 S.E.2d 206 (1962). Accordingly, Fincham's opinion testimony as to value does not constitute a basis for correcting the County's assessments either alone or in combination with other evidence introduced.

Seaone v. Fairfax County Bd. of Supervisors, 35 Va. Cir. 351, 365 (Fx. Cir. Ct. 1995) (emphasis added.) TB Venture, which claims that this Court should require the capitalization of the income generated by the existing non-economic leases, is attempting exactly what the Seaone court rejected.

B. TB Venture's Claim that the Subject Properties Must Be Valued by Capitalizing the Non-Market Income is Contrary to Long-Standing Precedent.

Despite Shields' concession that he valued, in bulk, only the leased fee estate, not the fee simple interest in the Subject Properties, TB Venture persists in claiming that his valuation of the leased fee estate, a partial interest in the real estate, should be the controlling valuation for assessment purposes, despite established law to the contrary.

TB Venture claims that the rent charged for the condominium units operates to restrict the value of the Subject Properties for real estate tax

assessment purposes such that the Circuit Court was required to merely capitalize the restricted income to obtain its value:

> Because the CBU Agreement requires these units to remain rental apartments for 40 years, their fair market value is determined by the income they generate.

Appellant's Brief, p. 17. This is the crux of TB Venture's case, and it is flatly contrary to Virginia law. In order to obtain the fair market value, the property is to be assessed in fee simple. Throughout its brief, TB Venture repeatedly cites language in Arlington County Board v. Ginsburg, 228 Va. 633, 641, 325 S.E.2d 348, 353 (1985) that "everything which affects value must be considered." This language must be read in context with the interest in real estate that is required to be valued (the fee simple, not the leased fee) and as delineated in the following line of cases (rejecting the use of below-market rents as the absolute measure of income).

In Richmond, Fredericksburg and Potomac Railroad Company v. Commonwealth of Virginia, 203 Va. 294, 300-301, 124 S.E.2d 206, 211 (1962), this Court rejected the plaintiff's claim that long-term contracts which it entered into with other railroads which limited the use of the property and the return plaintiff received on the property should reduce the taxable value of the property. Id., 203 Va. at 300-01, 124 S.E.2d at 211. This Court explicitly noted that the value to be assessed was not the value

of the property to its owner, but the entire fee. Id., 203 Va. at 300, 124 S.E.2d at 210. Mr. Shields testified that the leased fee estate is merely the value of the property to its owner. JA 174-75.

This Court reiterated this principle in Richmond, Fredericksburg and Potomac Railroad Company v. State Corporation Commission, 219 Va. 301, 247 S.E.2d 408 (1978). There, the railroad argued that the assessment of its property was erroneous in that no reduction was made for indentures on the property that substantially restricted its use to railroad uses and provided that the property would revert to the United States if railroad uses were discontinued. Id., 219 Va. at 310, 247 S.E.2d at 413. This Court rejected this claim, holding that:

> Finally, we address the RF & P's contention that the Commission erred in failing to reduce the assessment because of certain limitations on alternate use of the property imposed by restrictions inherent in the property and by title impediments. A similar issue was addressed in the first Potomac Yard case *supra*. There, RF & P contended that the value used in assessing the real estate should have been reduced because the parcels were railroad property devoted to a special use. [citation omitted]. Essentially the same contention is made here, but in different terminology. Here the RF & P says the valuation should be reduced because many of the railroad parcels in Arlington are not available for "alternate use" due to zoning, soil conditions, aviation easements, availability of competing sites for development, prohibitive development costs and the 1938 Indenture. We reject the contention now as did the court in the prior case in 1962 …
>
> …In that case, RF & P contended that certain long-term contracts prohibited use of the real estate for any but railroad purposes and on that basis sought reduction of the valuation because of the limited

> return which the railroad received. In rejecting that contention, this court noted that an estate to be taxed may be made up of various legal interests, the value of which in many cases would be impracticable to determine. The magnitude of such interests could seriously impair the taxable valuation of the property as a whole and, conceivably, the entire estate could escape taxation. We said, quoting from Donovan v. Haverhill, 247 Mass. 69, 72, 141 N.E. 564, 566 (1923), that "'a determination of the fair cash valuation of real estate [does not require] the assessors to make such a deduction.'" [citation omitted]. The same reasoning applies here.

Id., 219 Va. at 318-20, 247 S.E.2d at 418-419 (emphasis added). Notably, TB Venture never even mentions the RF&P cases in its Brief, for the obvious reason that they are fatal to its claim. TB Venture's claim that the voluntary restrictions that were placed on the rental income that could be charged for the property by its predecessor in title operate to limit its taxable value are contrary to the holdings set forth above and should be rejected.[22]

This Court directly addressed and rejected the same argument made by TB Venture here in Board of Supervisors of Fairfax County v. Nassif, 223 Va. 400, 290 S.E.2d 822 (1982), another case not cited by TB Venture in its Brief. In Nassif, the Circuit Court ruled that, in determining the value of an office building by use of the capitalization of income approach to

[22] The General Assembly has, in certain circumstances not applicable here, authorized a reduced assessment due to an agreement which limits the use of the land. See Virginia Code § 10.1-1011.B (assessments of land subject to perpetual conservation easement shall reflect the reduction in fair market value of the land which results from the inability of the owner to use property for uses terminated by the easement).

valuation, only the contract rent as fixed in a 20 year lease to the federal government should be used. The Nassif Court held that the decisions in the two RF&P cases cited above were on point and indistinguishable:

> Consistent with the two RF&P decisions, we hold that the rent fixed by the lease between Nassif and the federal government does not control the amount of gross income to be used in evaluating the property according to the capitalization of income method.

223 Va. at 404, 290 S.E.2d at 824 (emphasis added.) This Court reversed the Circuit Court, as it erred "in ruling that only contract rent could be used in appraising property by the capitalization of income method." Id.[23]

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[23] This Court characterized Nassif as follows:

> The holding in Fairfax County v. Nassif [citations omitted] is that, as a "general rule, economic rent is the measure to be used in capitalizing income for fair-market-value determination; however, contract rent is relevant as evidence of economic rent. [citations omitted] We did not say in that case, or in any subsequent case, that once the assessor has "considered" contract rent, a county is required to adopt it as part of the assessment, if such rent does not fairly reflect economic rent. Indeed, we have held to the contrary.

Tysons International Limited Partnership v. Board of Supervisors of Fairfax County, 241 Va. 5, 13, 400 S.E.2d 151, 155 (1981) (Compton, J., dissenting) (emphasis added). In Tysons, the evidence before the Court was that, unlike here, the property was attracting the highest rent the market would support. 241 Va. at 12, 400 S.E.2d at 155. Similarly misplaced is TB Venture's reliance on Smith v. Board of Supervisors of Fairfax County, 234 Va. 250, 256, 361 S.E.2d 351, 354 (1987) (similarly, evidence was that the owners were attracting the highest rent the market would support). In this case, the units do not attract the highest rent the market would support, as market rents are not be charged; rather, "bargain" rents, which are not and cannot be tied to market rents, are not evidence of economic rent.

This Court once again rejected the type of claim advanced by TB Venture here in Board of Supervisors v. Donatelli & Klein, Inc., 228 Va. 620, 325 S.E.2d 342 (1985). It is undisputed that TB Venture's expert, Mr. Shields, merely capitalized the "restricted" income coming into the Subject Properties, JA 175, as did Mr. Sloter. JA 98. TB Venture's only theory in this case, and the only evidence of value it adduced, used the below-market rents as the sole and absolute measure of income. This Court in Donatelli & Klein noted that it had repeatedly rejected this approach:

> In RF&P, we considered the impact on fair market value of an indenture between the railroad and the United States government; in Railroad Company, the effect of long-term contracts with other railroad companies was in issue. The indenture and long-term contracts restricted the use of the properties and thus produced limited returns. The taxpayer in each case contended the assessor should have deducted from the assessed values an amount equal to the loss in use value caused by these restrictions. In each case, we ruled that no such deduction was required in arriving at the value of the fee simple interest. [citations omitted] In Nassif, the taxpayer made the similar argument that outstanding long-term government leases at below-market rents should be the measure for gross income in evaluating the property by the capitalization-of-income method. Just as we allowed no deduction for the value of outstanding interests in the railroad cases, we refused in Nassif to allow existing below-market leases to be an absolute measure of income.

Donatelli & Klein, supra, 228 Va. at 631, 325 S.E.2d at 347-8 (emphasis added). The only valuation evidence presented by TB Venture was exactly what this Court has refused to allow: the use of below-market leases as an

absolute measure of income.[24] While TB Venture cites the Donatelli & Klein case at length, it omits any mention of this critical part of the opinion.

As described above, TB Venture's expert, Mr. Shields, testified that determining the value of the Subject Properties by use of the restricted rental income would value the leased fee estate, rather than the fee simple estate, of the Subject Properties. Additionally, he valued the Subject Properties based on use of the restricted, non-market rents as an absolute measure of income, contrary to the RF&P, Railroad Company, Nassif and Donatelli & Klein decisions cited above.

C. TB Venture's Expert Witness, Mr. Shields, Did Not Individually Appraise the Twenty-One Separate Real Estate Parcels.

Even if Shields had appraised the value of the fee simple estate of all of the condominium units combined, rather than merely the value of the leased fee estate, TB Venture would still have failed to prove the fair market values of the individual condominium units, as required by Virginia law. Virginia Code § 55-79.42 provides that "each condominium unit constitutes for all purposes a separate parcel of real estate" and "shall be separately assessed and taxed." (emphasis added). A condominium

[24] Unlike Messrs. Shields and Sloter, the taxpayer's expert witness in Donatelli & Klein, Mr. Downs, testified that while he had considered the contract leases on the properties, he valued each property free and clear of those leases. 228 Va. at 626, 325 S.E.2d at 344. TB Venture does the opposite-it merely capitalizes the restricted rent.

complex must be assessed as separate parcels of real estate rather than as a single apartment block. Lexington Tower Assoc. v. Director of Finance of the City of Richmond, 45 Va. Cir. 230 (Richmond Cir. Ct. 1988). Even if the condominium complex is entirely owned by the developer and leased as apartments, they are to be valued as separate units and not as a unitary apartment building. Orchard Glen East, Inc. v. Board of Supervisors of Prince William County, 254 Va. 307, 312, 492 S.E.2d 150, 153 (1997). See also Virginia Code § 58.1-3290 (mandating that each real estate parcel must be assessed individually); West Creek Associates, supra, 276 Va. at 414, 665 S.E.2d at 846, n.8 (listing numerous statutes requiring individualized assessments of parcels). Mr. Shields testified that his valuation of the leased fee estate was done in bulk and that he did not perform individual fair market value appraisals of each individual condominium unit, as required. Rather, he did an allocation for "informational purposes" which can hardly be the basis for setting the assessments of the fair market value of the separate, individual parcels. See Counterstatement of Facts, § E, above.

D. The Bulk Sale of the Property is Not Evidence of the Fair Market Value of the Individual Units.

The County reiterates that TB Venture's Assignment of Error 1 did not preserve the issue of the sale of the Subject Properties for appeal. Without waiver of its objection, the County states that even had TB Venture properly preserved this issue, its claim is meritless.

A bulk sale is one where the sale price of each individual property was not negotiated separately to its ultimate purchase price. See Donatelli & Klein, Inc., 228 Va. at 625, 325 S.E.2d at 343 (1985) ("not a sale in bulk, because the sale of each individual property was negotiated separately to its ultimate purchase price.") Where property was sold in a bulk sale, the mere difference between the sales price and the assessed value is not sufficient to show manifest error or disregard of controlling evidence in making the assessment. West Creek Associates, LLC v. County of Goochland, 276 Va. 393, 665 S.E.2d 834, 837 (2008) (rejecting use of the bulk sales price of $34,100,000 for 144 individual parcels as proof of the fair market value of the individual parcels).[25] All of the witnesses called by

[25] Additionally, as Virginia Code § 58.1-3290 mandates that each real estate parcel must be assessed individually, a bulk sale of different legal parcels does little to establish the value of each individual parcel. See West Creek Associates, infra. In this case, the units sold varied from relatively small two-bedroom "flats" to three story townhouses on varying floors of the development, so the individual parcels obviously were not all worth the same amount.

TB Venture to testify-Mr. Sloter, Mr. Butler, Mr. Shields and Mr. Rice-testified that the purchase of the Subject Properties was a bulk sale, as detailed at the Counterstatement of Facts, § C, above.[26]

At p. 35 of Appellant's Brief, it claims that the uniform and compelling testimony of all of these witnesses that the sale was a bulk sale was insufficient because the County only asked if the Subject Properties were "sold together;" in fact, the County's cross-examination elicited testimony regarding whether the units were individually valued in the sale, mirroring the test laid out in Donatelli & Klein, supra. TB Venture, on the other hand, which as the plaintiff had the burden of proof and the ability to question these witnesses (which were in fact all witnesses called by TB Venture to testify), asked none of the questions it now claims are pertinent, i.e., whether there was a "bulk discount." That is not the test and, in any event, TB Venture elected to put on no evidence regarding whether there was a "bulk discount."[27]

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[26] Once again, TB Venture mischaracterizes the County's argument and then claims to rebut it. At p. 36, n.11, of its Brief, TB Venture claims, without citation, that the "County claims that the arms length sale of these units should be disregarded because there was a unified price for all 21 units…" The County made no such argument; rather, it argued that the twenty-one units were not individually valued in the sale.

[27] TB Venture claims, at p. 15 of its Brief, that Mr. Sloter "neither sought nor received a discount for purchasing the 21 units in bulk." The pages of the Joint Appendix cited in support of this statement, pp. 318-328, do not support this bald assertion; TB Venture never even asked Mr. Sloter (or any other witness) about any discount in the sale price.

III. TB VENTURE FAILED TO PROVE MANIFEST ERROR IN THE ASSESSMENTS.

TB Venture's failure to prove the fair market value of the fee simple estate of the 21 separate parcels is fatal to its claim and the Court need not reach the issue of manifest error in the making of the assessments. However, TB Venture failed to prove manifest error, as well.

TB Venture's ultimate claim in this case is that is that the County is compelled to assess these condominium units by falsely treating the purportedly restricted rents as economic rent, and assessing the leased fee interest of the Subject Properties instead of the fee simple interest, contrary to the well-established precedent of this Court. TB Venture pointedly ignores the County's obligation to assess the fee simple value of the Subject Properties.

A. General Principles Applicable to Challenges to the Assessment of Real Estate.

As stated above, the Court need not reach the County's methodology in making the disputed assessments, as TB Venture failed to prove the value of the Subject Properties (except to the extent its certification to VHDA confirmed the correctness of the County's valuation). Notably, TB Venture claimed that the Subject Properties had a unique hybrid nature and presented "difficult" valuation issues. Trial Transcript of April 14, 2009, pp.

7, 18. Mr. Shields testified that he had never dealt with properties like the Subject Properties, that they were uncommon, that the brokers he had consulted had never dealt with a "situation" like the Subject Properties. JA 155, 169 and 176. Despite these claims, TB Venture asserts that the BOE (in 2007) and the DREA (in 2008) committed "manifest error" in the making of the assessments. Notably, TB Venture offered no expert testimony that either the 2007 or 2008 assessments were done in error.

Virginia Code §§ 15.2-717 and 58.1-3984(A) provide that "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 illegal or invalid." The burden of proving an erroneous assessment lies with the taxpayer. The County has no obligation to demonstrate the correctness of an assessment. Shaia v. City of Richmond, 207 Va. 885, 893 n. 7, 153 S.E.2d 257, 263 n.7 (1967) ("the inability of the [taxing authority] to come forward with evidence to prove the correctness of the assessments does not impeach the assessments, because the [plaintiffs] had the burden of proving they were erroneous.").

The law places a strenuous burden of persuasion upon one seeking a refund of real estate taxes. As shown below, such a litigant must introduce

evidence sufficient to overcome the presumption that a challenged assessment is correct (by proving that the assessor committed manifest error or totally disregarded controlling evidence in making the assessment), and also sufficient to enable the Court to conclude that the assessment is in excess of fair market value by some particular amount.

The plaintiff's burden is so great that even where the court finds manifest error in the assessments, if the plaintiff has not met its burden of proof to show a valuation that would enable the court to properly determine the assessed values, the assessments will nevertheless be confirmed. Hechinger Company v. Board of Supervisors of Fairfax County, Final Order (Dec. 15, 1995 Fairfax Cir. Ct.), petition refused Aug. 9, 1996 (Va. Supreme Court). As stated above, TB Venture failed to prove that the Subject Properties had a value different from the assessed values.

Real property tax assessments are clothed in a presumption of correctness. City of Richmond v. Gordon, 224 Va. 103, 110, 294 S.E.2d 846, 850 (1982). To overcome this presumption for each of the challenged assessments, the taxpayer must prove that the assessors committed manifest error in the manner in which the estimate of value was made, or that the assessors totally disregarded evidence which should have been

controlling. Arlington County Board v. Ginsberg, 228 Va. 633, 640, 325 S.E.2d 348, 352 (1985); Gordon, supra, 224 Va. at 110, 294 S.E.2d at 850.

The word "manifest" means "obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident." Hoover v. Smith, 248 Va. 6, 10, 444 S.E.2d 546, 548 (1994) (quoting Black's Law Dictionary). Moreover, an assessor does not "disregard" evidence if he relies on the information made available at the time of the assessment, even if the taxpayer later makes other information available to the assessor. Gordon, 224 Va. at 111, 294 S.E.2d at 851. Thus, the Plaintiff's evidence must establish an unmistakable, indisputable error of commission or a complete error of omission clearly evident at the time of the assessment and materially affecting the underlying valuation.

Evidence that merely presents a difference of opinion as to the value of property is insufficient to meet the taxpayer's burden of proof. City of Norfolk v. Snyder, 161 Va. 288, 293, 170 S.E.2d 721, 723 (1933) (cited in Gordon, 224 Va. at 112, 294 S.E.2d at 851). In Snyder, this Court explained why this is so:

> The value of property is a matter of opinion, and there must necessarily be left a wide room for the exercise of opinion, otherwise courts will be converted into assessing boards and, in assuming to act as such would assume the powers lodged elsewhere by the

> lawmaking branch of government. Judge Cooley says in Cooley on Taxation, § 1612: "Courts cannot substitute their judgment as to the valuation of property for the judgment of the duly constituted tax authorities."

161 Va. at 292, 170 S.E.2d at 723. Ruling that the evidence was insufficient to satisfy the taxpayer's burden of proof, this Court observed:

> In the present case, the most that can be said is that there is a difference of opinion among the witnesses as to the value of the applicant's property, which ranges from estimates below to estimates above the value fixed by the assessors …
>
> ...necessarily the evidence must be based upon opinion, which with reasonable and qualified men does differ, yet so long as the assessment comes within the range of a reasonable difference of opinion, as it does here, when considered in the light of the presumption in [the assessor's] favor, it cannot be said that the assessment is erroneous.

161 Va. at 293, 170 S.E.2d at 723.

In Gordon, this Court again emphasized that because fixing property values is a matter of opinion, a court must be hesitant to set aside tax assessments in order to avoid arrogating to itself the function of the duly constituted tax authorities. 224 Va. at 110, 294 S.E.2d at 850.

B. The County's Assessments.

The Court in Donatelli & Klein, supra, 228 Va. at 631, 325 S.E.2d at 347-8, noted that the interest to be valued is the fee simple (not the leased fee as Messrs. Sloter and Shields did, JA 51, 93, 97-8),[28] and stated that

[28] The methodology submitted by TB Venture in its loan application to the VHDA is also a leased fee analysis. JA 121-2.

consideration should be given to the contract rents. There is no question that the County gave consideration to what are claimed to be restricted rents-the BOE in 2007 used the actual rents as the basis for its assessment and the DREA in 2008 took it into account. JA 106, 206 and 222.

As regards the 2007 assessments as set by the BOE, TB Venture's sole complaint is that the BOE applied a County-wide expense ratio in determining the net operating income for the Subject Properties as a whole, rather than the specific expenses for the Subject Properties. Appellant's Brief, p. 49. At the outset, this claim must fail, as TB Venture never provided expenses segregated for each individual unit, in order to permit parcel-specific assessments. JA 223.

More importantly, TB Venture <u>never presented evidence of actual expenses to the Board of Equalization</u>, either per unit or in bulk. TB Venture did not acquire all of the Subject Properties until February 2007. The hearing before the BOE occurred in October 2007, so an annual expense history did not yet exist. What TB Venture describes to this Court as "actual expenses" were instead merely budgeted or projected expenses for the whole year, were not unit-specific but were in bulk, and were not

stabilized.[29] JA 106, 367. Since TB Venture did not present evidence of actual expenses to the Board of Equalization, it cannot properly claim that the Board of Equalization failed to consider that evidence.

Further, TB Venture did not provide a valuation applying actual expenses at trial either; instead, Mr. Shields merely took one year of expense data (which existed by the time Mr. Shields was retained) and changed the numbers in several categories.[30] For example, Mr. Shields decided that, while the management fee for the Subject Properties as a whole was 1%, he used 2½% because it was not a "market-derived" management fee. JA 189. Shields also used an insurance expense for his calculation that was not an actual expense. JA 190. He used a vacancy rate of 3% even though he testified that he understood there was no record

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[29] TB Venture concedes this point at p. 24, n.9 of its Brief. These "expenses" were clearly not stabilized, given the start-up nature of the property. Compare with Mullen v. Brantley, 213 Va. 765, 195 S.E.2d 696 (1973) (discussing unavailability of damages for loss of profit for a new business given uncertainty of business performance).

This stands in sharp contrast to Smith v. Board of Supervisors of Fairfax County, 234 Va. 250, 256, 361 S.E.2d 351, 354 (1987) upon which TB Venture relies. The evidence in Smith was that the office buildings had been up and running for several years and actually had an expense history.

[30] It is unlikely that the expenses for the first year of the operation of the Subject Properties would give an accurate picture of the stabilized operating expenses for the Subject Properties anyway.

of any vacancies.[31] JA 190-1. Thus, TB Venture's claim that Mr. Shields' calculation of a 39% expense ratio constituted the "actual expenses" is absolutely false-they were actual <u>except</u> where he chose to increase them to support a lower valuation. TB Venture did exactly what it claims was error for the Board of Equalization to do; namely, fail to use the actual expenses for the Subject Properties.

As TB Venture did not present evidence of actual expenses to the BOE, it cannot identify any specific expenses applied by the BOE that were different from the actual expenses, either in bulk or specific to any of the twenty-one parcels and Mr. Shield's conclusions as to an appropriate expense rate were not based on actual expenses. As such, TB Venture cannot carry its burden of proving manifest error in the 2007 assessments on the Subject Properties.

As to the 2008 assessments, which were made by the DREA, TB Venture's sole complaint appears to be that the County "totally disregarded the expenses incurred in managing and maintaining the units," Appellee's Brief, p. 25, which the record shows is not true. The Director of Real Estate Assessments testified that the assessments were done by the comparable

[31] Such is not surprising, given the "bargain" rents that are charged.

sales approach to value.[32] JA 224. He further testified that, for each of the comparable sales he used, he:

> looked at the operating characteristics of the property, the ratio of expenses to operating income and the expenses, and the absolute amount per unit basis per income to see if I was developing it from properties that were similar in characteristic.

JA 213.

TB Venture only provided some of the expense information to the County, and none of it was specific to the individual units, as would be necessary to do parcel-specific assessments as required by law.[33] Mr. Rice testified that the expenses attributable to one of the townhouses would not necessarily be the same expenses attributable to one of the flats. JA 222-3. This was important to Mr. Rice as he had to value each condominium separately for tax assessment purposes. JA 223. As such, TB Venture's claim that Mr. Rice "totally disregarded" the expenses incurred is wrong and TB Venture has failed to show manifest error sufficient to overcome the presumption of correctness of the assessments.

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[32] In the two reported decisions on the tax assessment of condominiums, the Lexington Towers and Orchard Glen East cases cited above, it appears that only the sales comparison approach to value was used.

[33] Virginia Code § 58.1-3294 does not authorize the assessor to ask for this information. In any event, it was never produced in discovery or at trial and presumably does not exist.

Given the above, the following assertions by TB Venture, by the page numbers in its Brief, which attribute arguments to the County, are without merit:

p. 18: the County's "fee simple" analysis assumes the absence of encumbrances and limitations: to the contrary, the County's assessments considered the restricted income.

p. 43: the County would have the Court "ignore" the purported restrictions on the Subject Properties: the evidence was that County took them into account through the reduced income and the ratio of income to expense.

p. 46: the County asserts that the "intervening change" from apartment units to condominium units results in the assessor no longer having to consider these factors as they affect the fair market value of these units: as stated above, the County took those factors into account.

p. 47: "the County dismisses the impact of the income restrictions and the duration of the agreement by asserting that they reflect artificial rents and voluntary constraints": to the contrary, both assessments took into account the purported restrictions.

Thus TB Venture's claims, at pp. 18 and 46 of its Brief, that the County's "fee simple" analysis assumes the absence of the purported

restrictions on the Subject Properties, and that the County claims it does not have to consider the actual, below-market income achieved by the Subject Properties, is without merit.

IV. THE APPLICABILITY OF VIRGINIA CODE § 58.1-3295.

TB Venture makes a confusing argument regarding recent amendments to Virginia Code § 58.1-3295.

In its Complaint, the Plaintiff relied heavily on Virginia Code § 58.1-3295, which, prior to the recent amendment, provided for certain considerations to be made in "…determining the fair market value of real property containing more than four residential units…" This statute was clearly written to apply to apartment buildings. Since the 21 condominium units at issue in this case are each separate and distinct parcels of real estate, the statute did not apply to then Virginia Code § 55-79.42, which provides that "each condominium unit constitutes <u>for all purposes</u> a separate parcel of real estate." (emphasis added).

However, the General Assembly in its most recent session amended § 58.1-3295 and removed the "more than four residential units" restriction, effective January 1, 2011. TB Venture seems to claim that somehow this means that the statute should be applied retroactively to the 2007 and 2008 assessments in this case and has a bearing on this case. <u>See</u> Appellant's

Brief, p. 47-8. However, the statute is not effective until January 1, 2011, and does not apply retroactively.

With regard to the substance of the statute, there is no question, as detailed above, that the County took into account all available information regarding the alleged restrictions on the Subject Properties.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the reasons stated above, the County respectfully requests that the Circuit Court be affirmed.[34]

Respectfully Submitted,

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[34] TB Venture seeks to have this Court "require the use of the net income capitalization method for assessing property encumbered by low income rental housing restrictions. Brief of Appellant, p.1. TB Venture did not make this request of the Circuit Court, JA 7-8, no supporting record was made, and it is improper to claim it for the first time on appeal.

CERTIFICATE

Pursuant to Rule 5:26(d), I, Ara L. Tramblian, do hereby certify that fifteen (15) paper copies and one (1) electronic copy on CD-ROM of this Brief of Appellee were hand-filed with the Clerk of this Court and three (3) paper copies of the same were sent, via U.S. Mail, postage prepaid, to:

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