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In The  
**Supreme Court of Virginia**

RECORD NO. 071411

**WEST CREEK ASSOCIATES, LLC, *et al.*,**

*Appellants,*

v.

**THE COUNTY OF GOOCHLAND, VIRGINIA,**

*Appellee.*

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**BRIEF OF AMICUS CURIAE IN SUPPORT OF THE APPELLEE BY THE  
LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC.,  
THE VIRGINIA ASSOCIATION OF COUNTIES, AND  
THE VIRGINIA MUNICIPAL LEAGUE**

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**IN THE SUPREME COURT OF VIRGINIA**  
**AT RICHMOND**

<b>WEST CREEK ASSOCIATES, LLC,</b>	:	
<b>et al.,</b>	:	
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<b>Appellants,</b>	:	
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<b>VIRGINIA,</b>	:	
	:	
<b>Appellee.</b>	:	

**BRIEF *AMICUS CURIAE* IN SUPPORT OF THE APPELLEE BY THE  
LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC., THE VIRGINIA  
ASSOCIATION OF COUNTIES, AND THE VIRGINIA MUNICIPAL LEAGUE**

**TO THE HONORABLE CHIEF JUSTICE AND JUSTICES  
OF THE SUPREME COURT OF VIRGINIA:**

The Local Government Attorneys of Virginia, Inc. (the “LGA”), the Virginia Association of Counties (“VACo”), and the Virginia Municipal League (“VML”), by counsel, submit this brief *amicus curiae* in support of the Appellee in this matter, the County of Goochland, Virginia (the “County”).

**I. Interest of the Amici Curiae**

The LGA is a nonprofit professional corporation created to promote the continuing legal education of local government attorneys, furnish information to local government attorneys and their offices that will enable them to better perform their functions, offer a forum through which LGA members may meet and exchange ideas of

import to Virginia local government attorneys, and initiate, support, or oppose legislation and litigation that, in the judgment of the LGA, is significant to Virginia local governments. The LGA was founded in 1975, and its members represent 71 counties, 39 cities, and 55 towns of the Commonwealth. The LGA regularly is asked by the Virginia General Assembly and agencies of the Commonwealth to offer legal advice on matters of state policy and to recommend knowledgeable attorneys to serve on legislative study committees and commissions.

VACo was formed in November 1934 as an independent, non-profit instrumentality of Virginia's governments. VACo exists to support county officials and to effectively represent, promote, and protect the interests of counties to better serve the people of Virginia. All 95 counties in the Commonwealth are members of VACo.

VML is an association of political subdivisions of the Commonwealth, currently consisting of 39 cities, 155 towns, and 12 urban counties, formed and maintained pursuant to § 15.2-1301 of the Code of Virginia for the purpose of promoting the interest and welfare of its members as may be necessary or beneficial. VML is an instrumentality of its member political subdivisions.

As an organization of attorneys who are charged with the responsibility of protecting the legal interests of Virginia's local governments, the LGA is well qualified to recognize matters of general importance impacting local government law that may be presented to this Court. Similarly, VACo and VML are uniquely qualified to express the interests of localities throughout Virginia with respect to matters of common concern that come before this Court. The LGA, VACo, and VML therefore are well situated to

provide assistance to the Court with respect to local government issues that may impact not only the present litigants but all Virginia local governments and their citizens. The LGA, VACo, and VML previously have filed *amicus curiae* briefs or letters of support in cases before this Court that implicate issues of special importance to Virginia's local governments.

## **II. Preliminary Statement**

This appeal raises several important local tax issues. In general, the Appellants (the "Owners") seek to have this Court declare that the trial court committed error by ruling that 130 separate parcels of property (the "130 Parcels") must be assessed as such and not by pretending that they are all one much larger tract of land.<sup>1</sup> In pursuit of this goal, the Owners would have this Court effectively reverse years of precedents of this Court, rule in conflict with widely-accepted economic realities, and ignore well-supported evidentiary conclusions of the trial court.

In particular, the Owners want this Court to eviscerate the manifest error standard for review of a local tax assessment established by and reiterated in a long chain of precedents of this Court stretching back almost a century. The Owners further seek to avoid the general rule that the plaintiff in a civil action has the burden of proof, which has been specifically applied to local tax assessment cases in many precedents of this Court, simply because they failed to take any steps that were available to them to preserve the records of the challenged assessments. The Owners also want this Court to conclude, as

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<sup>1</sup> The bulk purchase of over 2,500 acres described below actually was divided into 144 separate parcels. However, the assessments of only 130 of the 144 total separate parcels are at issue in this case.

a matter of law, that the price paid in a bulk sale of a large area of land controls the later valuation of individual parcels each approximately one one-hundredth the size of the area sold in bulk, even without any proof that the individual parcels would trade in the same market as the bulk area sold. In addition, the Owners want this Court to ignore its own precedents regarding the deference owed to evidentiary findings made by a trial court.

In contrast, the LGA, VACo, and VML believe that the trial court's decision is well supported by Virginia law and that a failure to affirm the trial court's decision could result in dramatic changes in Virginia law governing local taxation of real property, resulting in an erosion of the tax base of Virginia localities and consequential impairment of their ability to provide services to their citizens.

### **III. Statement of the Case**

The LGA, VACo, and VML adopt the Statement of the Case submitted by the County in its Brief.

### **IV. Statement of the Facts**

The LGA, VACo, and VML adopt the Statement of the Facts submitted by the County in its Brief.

### **V. Standard of Review**

The LGA, VACo, and VML adopt the statement setting forth the appropriate Standard of Review submitted by the County in its Brief.

### **VI. Argument**

The LGA, VACo, and VML will limit their argument to address only those issues in this case that we believe have the most potential to disrupt local tax assessment processes generally. The absence of argument regarding other matters raised by the

Owners does not indicate that we acquiesce in the Owners' views concerning those matters, but merely reflects our intention as *amici curiae* to focus on those matters of greatest general significance to our respective memberships.

**A. The Holding in *Telecommunications Industries* Should Not Be Expanded to Effectively Eliminate the Presumption of Correctness.**

The Owners argue that the mere fact that they presented opinions of value different than the assessed values of the 130 Parcels was sufficient to overcome the presumption of correctness. This argument rests on the Owners' characterization of this Court's holding in *Board of Supervisors v. Telecommunications Industries, Inc.*, 246 Va. 472, 436 S.E.2d 442 (1993). But that characterization ignores the critical fact that *Telecommunications Industries* had nothing to do with any difference of opinion regarding fair market value. By ignoring the real nature of the holding in *Telecommunications Industries*, the Owners seek to have this Court expand that holding so broadly that it will effectively eliminate the presumption of correctness in virtually any tax assessment appeal.

In challenging a tax assessment in court, a taxpayer first must overcome a presumption that the assessment is correct. *E.g.*, *City of Richmond v. Gordon*, 224 Va. 103, 110, 294 S.E.2d 846, 850 (1982). To do so, it must prove that the assessing authority committed manifest error in the manner in which the estimate of value was made or that it totally disregarded evidence which should have been controlling. *Arlington County Bd. v. Ginsberg*, 228 Va. 633, 640, 325 S.E.2d 348, 352 (1985);

*Gordon*, 224 Va. at 110, 294 S.E.2d at 850.<sup>2</sup> 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* 962 (6th ed. 1990)). Evidence that merely presents a different opinion of fair market value than that of the assessing authority is insufficient to overcome the presumption of correctness. *City of Norfolk v. Snyder*, 161 Va. 288, 292-93, 107 S.E. 721, 723 (1933) (cited in *Gordon*, 224 Va. at 112, 294 S.E.2d at 851).

As is typical when there is a claim that local tax assessments are in excess of fair market value, the case now before this Court presents a clash of opinions regarding the fair market value of the properties at issue, i.e., that of the assessing officers versus that of the taxpayers. But this was not the scenario presented in *Telecommunications Industries*. In *Telecommunications Industries*, the plaintiff challenged the personal property tax assessments of two computers, claiming that each assessment exceeded the fair market value of the particular computer. But perhaps uniquely among assessment cases to come before this Court, the locality did not claim to have assessed either of the two computers at its fair market value.

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<sup>2</sup> The Owners’ argument regarding the fact that the presumption can be overcome by proof either of manifest error or a total disregard of controlling evidence is a red herring, because the trial court never found otherwise. In fact, the trial court indicated that there was no disagreement among the parties that the presumption can be overcome by proving either one of those two alternatives. The trial court did not ignore the fact that assessments cannot exceed fair market value. The trial court simply concluded, from its evaluation of all the evidence, that the Owners’ mere different opinion of value did not overcome the presumption, but even assuming it did, the Owners’ evidence did not prove that the assessed values were incorrect.

Instead, the locality claimed that its assessor had valued the computers in accordance with a uniform depreciation schedule developed by the assessor and used to value all computer equipment in the same class as the two computers. The locality's evidence was that the assessor believed that he was compelled by Virginia's constitutional uniformity requirement to so value such equipment;<sup>3</sup> and that the uniform depreciation schedule was designed so that the value of all of the thousands of pieces of computer equipment assessed by using the schedule, taken as a whole, did not exceed the cumulative fair market value of all such equipment. 246 Va. at 476, 436 S.E.2d at 444.

In other words, the locality claimed that the combined assessments of the class as a whole did not total more than the collective fair market values of the individual properties comprising the class, but the locality did not claim to have attempted to assess each individual computer at its particular fair market value. In contrast, the taxpayer presented the testimony of an expert in the field of computer valuation who gave an opinion of the fair market value of each of the two particular computers that were the subjects of the case. 246 Va. at 479, 436 S.E.2d at 446.

Thus, unlike in the present case, this Court in *Telecommunications Industries* was not faced with any conflicting opinions of the fair market value of the property at issue. Instead, this Court had before it (1) two assessments, neither based on an opinion of the fair market value of the particular property assessed, and (2) only one opinion of the fair

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<sup>3</sup> Local property taxation in Virginia is subject to two fundamental constitutional requirements. In addition to the requirement to tax at fair market value, property taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax . . ." Va. Const. art. X, § 1. This Court has ruled that the uniformity and fair market value requirements must be construed together, but if it is impossible to attain both, then the requirement for uniformity should prevail. *Telecommunications Industries*, 246 Va. at 477, 436 S.E.2d at 445.

market value of each of the two computers, i.e., that of the taxpayer's expert. Given that the assessments were not based on the fair market values of the two computers, and given the expertise and experience of and methodology used by the taxpayer's expert, this Court concluded that the fact that the assessments were for much more than the only opinion of fair market value in the record proved that manifest error had been committed.

In contrast, in the instant case the Owners urge this Court to apply its *Telecommunications Industries* holding to the much different situation of a conflict between two different opinions of the fair market value of the properties at issue. Here, with respect to each of the 130 Parcels there is a disagreement between an assessing body's opinion of fair market value and that of the property owner. But the proper standard for determining what to do when there are conflicting opinions of fair market value is provided not by *Telecommunications Industries* but by *Snyder* and its progeny, to-wit, a mere difference of opinion regarding value does not prove manifest error or overcome the presumption of correctness.

This Court has never ruled that a mere difference of opinion regarding fair market value overcomes the presumption of correctness. Instead, this Court has emphasized:

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. . . . "Courts cannot substitute their judgment as to the valuation of property for the judgment of the duly constituted tax authorities."

*Snyder*, 161 Va. at 293, 170 S.E. at 723 (quoting in part Cooley on Taxation § 1612); *see also Gordon*, 224 Va. at 110, 294 S.E.2d at 850.

Virtually every tax assessment lawsuit based on fair market value (except for rare exceptions like *Telecommunications Industries*) necessarily involves a difference of opinion regarding value. The assessor has one opinion of fair market value, which is reflected in the challenged assessment and, since there is litigation, naturally enough the property owner has a different opinion. If the Owners' expanded construction of *Telecommunications Industries* is adopted by this Court, then the fact of this common and ordinary difference of opinion suddenly could become the basis for overcoming the presumption of correctness in all such cases.

Not only is this illogical (a difference of opinion does not prove error, but merely that two people disagree), it exposes the tax assessment process in Virginia to exactly the dangers warned against in *Snyder* and later decisions of this Court. Since differences of opinion regarding property values are not only common but are to be expected, virtually any assessment becomes open to question, with the courts becoming a kind of "super assessor," deciding property values even in the total absence of any evidence that an assessor committed any real error in the valuation process.

The LGA, VACo, and VML respectfully submit that this Court was right in *Snyder* and for three-quarters of a century since in consistently ruling that a mere difference of opinion regarding value does not overcome the presumption of correctness of a tax assessment. The Owners' argument that this principle now should be overturned should be rejected by this Court.<sup>4</sup>

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<sup>4</sup> The Appellants misstate the trial court's decision when they assert incorrectly that "the trial court held that it was not sufficient for the Taxpayer to show 'manifest error' by showing that the Park was assessed at greater than fair market value." Opening Brief of Appellants at 15. First, there is no assessment of "the Park" at issue. What the Appellants call "the Park" is the totality of over 2,500 acres transferred in the

**B. The Owners' Failure to Take Steps to Preserve the Assessment Record Should Not Excuse Them from the Obligation to Meet Their Burden of Proof.**

The Owners allege that their complete failure to meet their usual burden of proof should be excused because at the time of trial the Owners were unable to produce evidence they allegedly needed to support their claims from the records of the challenged assessments or the memories of various witnesses who participated in those assessments. However, there is no evidence that any assessing official failed to meet a recordkeeping requirement mandated by statute, nor any indication that the Owners exercised any appropriate degree of due diligence in seeking or preserving such evidence for trial. Accordingly, the Owners' apparent failure to adequately prepare for trial or exercise due diligence should not relieve them of the regular burdens of proof and persuasion that must be borne by any taxpayer challenging an assessment.

There is no inherent right to relief from allegedly erroneous tax assessments. Such relief, being in derogation of sovereign immunity, is available only pursuant to statute. *E.g.*, *Commonwealth v. Cross*, 196 Va. 375, 378, 83 S.E.2d 722, 725 (1954); *Commonwealth v. Conner*, 162 Va. 406, 409, 174 S.E. 862, 863 (1934). Va. Code Ann. § 58.1-3984(A) (2004) authorizes a person aggrieved by a local tax assessment to apply for such relief to the circuit court. In such a case, "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

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bulk sale. Opening Brief of Appellants at 5. This case concerns instead 130 separate parcels among the 144 total carved out of the property acquired in the bulk purchase. Second, the trial court did not find that the Appellants had shown that anything was assessed at greater than fair market value, but rather concluded that, even assuming that the presumption of correctness had been overcome, the Appellants' evidence did not prove that any assessment was in excess of fair market value.

illegal or invalid . . . .” Va. Code Ann. § 58.1-3987 (2004) empowers a trial court to raise or lower a challenged assessment if the evidence proves that the fair market value of the property is higher or lower, respectively, than the assessment.

This Court repeatedly has 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 by substituting its judgment regarding the value of property for that of the tax authorities. *E.g.*, *City of Richmond v. Gordon*, 224 Va. 103, 110, 294 S.E.2d 846, 850 (1982); *City of Norfolk v. Snyder*, 161 Va. 288, 293, 107 S.E. 721, 723 (1933). The taxing authority has no affirmative obligation to demonstrate the correctness of an assessment. *E.g.*, *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 that they were erroneous”).

Proof of manifest error is insufficient in itself to establish that an assessment should be reduced. Even after a court “is satisfied from the evidence that the assessment is erroneous,” it can only base a reduction of the assessment on “evidence [of what] is the fair market value of the property involved.” Va. Code Ann. § 58.1-3987 (2004). An assessment “should not be disturbed by the court unless the applicant has carried the burden of showing clearly that the assessment is *excessive* . . . .” *Snyder*, 161 Va. at 292, 107 S.E. at 723 (emphasis added). “[T]he taxpayer must carry the burden of proving that the property in question is assessed at more than its fair market value . . . .” *Skyline Swannanoa v. Nelson County*, 186 Va. 878, 885, 44 S.E.2d 437, 441 (1947). *See also*

*Compton v. United States*, 334 F.2d 212, 216 (4th Cir. 1964) (concerning analogous matter of a federal tax deficiency assessment, “it is not enough to show that the assessment was invalid or that the Commissioner erred; the plaintiff must go further and produce evidence from which another and proper determination can be made”).

Furthermore, a taxpayer challenging an assessment, as the plaintiff in a civil suit, always retains the ultimate burden of persuasion. *E.g.*, *Redford v. Booker*, 166 Va. 561, 569, 185 S.E.2d 879, 883 (1936) (“the necessity of proving his case always rests upon the plaintiff and never shifts”). Even if the presumption of correctness is overcome, the taxpayer still must satisfy its ultimate burden of persuasion by proving by a clear preponderance of the evidence that it overpaid its taxes in some amount discernable by the court. *See Tidewater Psychiatric Inst., Inc. v. City of Virginia Beach*, 256 Va. 136, 141, 501 S.E.2d 761, 763 (1998) (“taxpayer must show by a clear preponderance of the evidence that his property is assessed at more than fair market value”).

Here, there is no evidence that the Owners asked for an explanation of the assessing officers’ decisions that formed the basis for the challenged assessments after those decisions were rendered, even though the evidence shows that another taxpayer did make such a request with respect to his assessment and was provided information, demonstrating that the Owners could have done so, too. Joint Appendix at 7966-7968. The Owners also complain that witnesses’ memories were unavailing six years after the fact, but there is no indication that the Owners made any effort to investigate what those witnesses might have recalled years earlier soon after this litigation was commenced.

Moreover, the Owners not only failed themselves to introduce a tape recording or transcript of the meeting of the Board of Equalization (the “Board”) that considered the

appeals of their assessments (which counsel and representatives of the Owners attended) but also objected when the County attempted to do so. Joint Appendix at 5158, 5351-5353, and 7958EE. Furthermore, when trial testimony revealed that one member of the Board had performed an investigation regarding the Owners' individual parcels and reported his results to the full Board, the Owners failed to call him as a witness, even though he had been subpoenaed by them and was available to testify. Joint Appendix at 4890, 4932-4933, 5502, 5534-5535, and 6122. Nonetheless, the Owners ask this Court to grant them an exception from the universal rule imposing on civil plaintiffs the responsibility of providing the evidence needed to prove their case, and to just assume that theoretically had the Owners done anything to adequately meet that responsibility, they somehow would have succeeded in finding something sufficiently wrong with the assessment process to overcome the presumption of correctness.

As noted above, this Court has recognized that any claim regarding a tax assessment must be based on and pursued strictly in accordance with statutory law. The Owners do not contend that the assessing officials here failed to meet any statutory recordkeeping requirement, but argue nonetheless that since they allegedly needed more information to prove their case than was available in records that were kept in accordance with all such requirements, their claims should not be limited by statute but should be expanded to allow their recovery. The LGA, VACo, and VML respectfully submit that the precedents of this Court regarding the burden of proof should not be upended in this circumstance, and that to do so could vastly expand the burden of local assessing officers who are performing their duties in strict accordance with all statutory requirements.

**C. In the Absence of Any Proof That the Market for Bulk Sales of 2,500 Acre Assemblages of Land Is the Same As the Market for the Much Smaller 130 Parcels, the Owners' Claim That the Fair Market Value of Such Smaller Parcels Is Determined Conclusively By the Bulk Sale Price for the 2,500 Acres Clearly Is Wrong.**

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The Owners contend that the price paid in a bulk purchase of a large amount of land absolutely controls and determines the subsequent value of each individual, much smaller parcel created from that large area. In other words, the Owners argue that the wholesale price paid for a bulk purchase solely determines the various retail prices of the individual items included in that bulk sale. But the Owners provide absolutely no evidence proving that this is in fact the case, either as a general matter of economics or in particular with respect to any of the 144 separate parcels created from the much larger area sold in bulk by Bank of America.

Real property tax assessments are to be “at fair market value.” Va. Const. art. X, § 2. “[F]air market value is the price property will bring when offered for sale by a seller who desires but is not obligated to see and bought by a buyer under no necessity of purchasing” in a hypothetical transaction occurring on the assessment date. *Board of Supervisors v. Telecommunications Industries, Inc.*, 246 Va. 472, 476, 436 S.E.2d 442, 444 (1993) (quoting *Board of Supervisors v. Donatelli & Klein*, 228 Va. 620, 628, 325 S.E.2d 342, 345 (1985)). The fair market value of property is based on its highest and best use. *County Bd. v. Commonwealth*, 240 Va. 108, 112, 393 S.E.2d 194, 196 (1990). “Highest and best use” is “the most advantageous and valuable use of the [property] . . . having regard to the existing business demands of the community or such as may reasonably be expected in the immediate future.” *Appalachian Power Co. v. Anderson*, 212 Va. 705, 708, 187 S.E.2d 148, 152 (1972).

The Owners did not even try to present evidence at trial regarding the amounts for which properties comparable to the 130 Parcels at issue here, particularly with respect to size, sold for on the open market between willing buyers and sellers, the very definition of a fair market value transaction. Instead, the Owners' case is based on their assumption, unsupported in the evidence, that the bulk sale price of an area of land totaling more than 2,500 acres of real estate *ipso facto* completely determines the values of 144 different and much smaller parcels carved from it, simply by allocating some of the wholesale bulk price paid for the whole to each of the smaller parcels.

This Court has ruled that while a recent sale price of property is one of the factors that must be taken into consideration and given substantive weight in determining fair market value, it is not conclusive evidence of value. *American Viscose Corp. v. City of Roanoke*, 205 Va. 192, 196, 135 S.E.2d 795, 798 (1964); *see also Arlington County Bd. v. Ginsberg*, 228 Va. 633, 640, 325 S.E.2d 348, 352 (1985); *City of Harrisonburg v. Taubman*, 212 Va. 28, 30, 181 S.E.2d 654, 656 (1971).<sup>5</sup> Each of this Court's tax assessment precedents regarding consideration of a recent actual sale price involved a sale of the same discrete, separate tract that was assessed. In contrast, the bulk sale upon which the Owners rely was not a sale of any particular property that is the subject of this appeal, but rather was a sale of a much larger tract that merely included what became the subject assessed properties. Each assessment at issue in this case is of a parcel of

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<sup>5</sup> "Consider" does not mean necessarily to adopt, use, or rely upon. To "consider" something means to fairly and carefully evaluate it. *E.g., Black's Law Dictionary* 306 (6th ed. 1990) ('[t]o fix the mind on, with a view to careful examination'). This Court has not held that to "consider" means to automatically rely upon. *See, e.g., Board of Supervisors v. Nassif*, 223 Va. 400, 290 S.E.2d 822 (1982) (assessor erred in failing to consider contract rent in the selection of economic rent for income capitalization valuation, but trial court erred in holding that contract rent must be selected as economic rent in income capitalization formula).

property far smaller than the property sold in bulk, comprising only a small fraction of the total land included in the bulk sale.

Here, there is no evidence that the trial court (or any assessing official) failed to carefully and substantially consider the 2,500 acre bulk sale, including the price paid, in reaching its (or their) conclusions. What is clear from the trial court's decision is that, after careful consideration of the bulk sale, the trial court correctly concluded that it did not provide a sound basis for directly valuing any of the individual 130 Parcels, i.e., simply allocating the bulk sale price among the individual parcels as urged by the Owners was not justified. Nonetheless, the Owners insist that the trial court erred by not finding that the assessments of the 130 Parcels must be controlled conclusively and absolutely by the price paid in the bulk sale of the whole 2,500 acres from which the 130 Parcels (and 14 others) were created. But there are a number of significant reasons why such a bulk sale should not be considered conclusive evidence of the values of any of the individual 130 Parcels, and why any bulk sale generally should be viewed with skepticism as an indicator of the individual values of multiple items of property included in the bulk sale.

The Owners provided no evidence in this case that the market for a bulk sale of 2,500 acres in the County was the same as the market for much smaller individual parcels, nor is there any reason to believe generally that the markets for two such disparate kinds of property would be the same. Given that the applicable valuation standard is fair *market* value, the choice of the appropriate market is critical in evaluating that value. When determining the fair market value of a house, it typically does not matter what large corporations are paying for high-rise office buildings, because companies that buy or sell large office buildings are not the normal participants in the

market for single-family houses. The behavior of entities which generally do not participate in the market for a particular kind of property simply has little if any relevance in evaluating the behavior of entirely different participants in an entirely different market.

This intuitive fact regarding markets has been recognized by other courts. For example, *Double R Enterprises v. City of East Orange*, 13 N.J. Tax 54 (N.J. Tax Ct. 1993), involved tax assessments of 61 condominium units which recently had been sold in bulk to an investor. The investor appealed the assessments, claiming that the sale price it had paid in the bulk transaction indicated the values of the individual units included in the bulk sale. But in rejecting the claim that the bulk sale price was probative of the value of the individual units, the court made several observations about markets and bulk sales generally that are relevant to the instant case before this Court.

The court first noted that since the sale was in bulk, it “was, for that reason, presumptively discounted.” *Double R Enterprises*, 13 N.J. Tax at 57 n.3. In other words, the court recognized the fact that generally a bulk sale enjoys a volume discount in the price paid. Second, in evaluating who would be the market participants for the units, the court considered whether the highest and best use of the 61 individual units would be for investment or end use by owner-occupiers. Highest and best use analysis is also vital in determining the market for a property in Virginia because tax assessments are to be based on the fair market value of a property for its highest and best use. *Shoosmith Bros., Inc. v. County of Chesterfield*, 268 Va. 241, 246, 601 S.E.2d 641, 644 (2004); *Orchard Glen East, Inc. v. Board of Supervisors*, 254 Va. 307, 314, 492 S.E.2d 150, 154 (1997).

The court in *Double R Enterprises* concluded that the evidence there showed that a number of condominium units in the same development had been purchased by

individual owner-occupants and so, since the prices paid in those individual “retail” sales were substantially higher than the “wholesale” price paid in the bulk sale to the investor, the court correctly ruled that the highest and best use of the subject condominiums was for end use rather than for investment. In other words, the correct market for valuing the individual condominium units was composed of persons participating in the sale of individual units, not persons seeking to purchase multiple units in bulk, and so market value was more appropriately indicated by prices paid in individual sales rather than the bulk sale price. 13 N.J. Tax at 62-63.

In the instant case, the Owners failed to satisfy their burden of proving that the highest and best use of each of the 130 Parcels was for investment and not for end use and failed to prove that the correct market to consider was the market composed of investors seeking to make bulk purchases of large assemblages of thousands of acres of land instead of much smaller parcels like the 130 Parcels at issue here. Given those critical shortcomings in the Owners’ evidence, it would have been error for the trial court to overrule assessments based on sale prices of comparable parcels closer in size to the 130 Parcels in order to impose assessments based on the single bulk sale that took place in the entirely different market of investors seeking to acquire much larger tracts.

Other courts have recognized another serious problem with relying on a bulk sale to value individual properties, to-wit, it can lead to violations of constitutional requirements for tax uniformity like that of article X, § 1 of the Constitution of Virginia. In *Mathias v. Department of Revenue*, 817 P.2d 272 (Or. 1991), a statute requiring a different assessment methodology for four or more lots in a subdivision under common ownership than for three or fewer such lots was held to violate constitutional uniformity

requirements. Taxpayers complained that their vacant subdivision lot was assessed higher than identical adjacent lots. The court found that individual lots were valued by comparison to sales of similar individual lots, but that four or more lots were valued by applying what essentially amounted to a bulk sale discount. In *Board of Equalization v. Utah State Tax Comm'n*, 864 P.2d 882 (Ut. 1993), the court held that assessing 44 subdivision lots owned by a developer as if they were sold all together in a bulk sale violated uniformity because it essentially applied a discount to the assessment of those lots but not to other individual properties.

Similarly here, if the Owners succeed in persuading this Court that their properties should be valued based on the bulk sale price, it will create exactly the same kind of nonuniform disparity between their properties and other properties in the County. This Court simply would be conferring a special tax discount upon the individual owners of each of the 130 Parcels that is not available to any other owners of similar parcels in the County.

The Owners also attempt to trivialize the fact that there are 130 separate parcels owned by 130 different entities. They suggest that all of this was done in a very casual manner, for federal tax reasons, with little real significance for their future plans for the properties. But this argument begs several questions.

First, the intentional act of legally recording 130 different parcels of property in the name of 130 different owners in the official land records of the County should not be considered vitally significant for federal income tax purposes and yet so trivial that it must be ignored for local property tax purposes. Second, local property tax assessment officials in Virginia should be able to rely on the public records of the Commonwealth

and not be obligated to inquire into the individual circumstances behind each recorded transaction to divine whether the sellers or buyers might have had private motives or aspirations at odds with the transaction recorded. Third, applicable law mandates separate assessments of the resulting separate parcels of property when a tract is divided among different legal owners. Va. Code Ann. § 58.1-3290 (2004); *see also* Va. Code Ann. §§ 58.1-3103, -3281, -3302, and -3309 (2004) (also indicating that separately-owned parcels are to be assessed individually).

The LGA, VACo, and VML respectfully submit that the County's assessing officials had the right and even duty to rely upon the fact that 130 individual parcels of property were recorded among the official land records of the County in the names of 130 different owners, and that 130 separate assessments based on those facts should not be deemed to be erroneous just because the Owners now suggest that what was officially recorded in the land records somehow is trivial, particularly in light of the significance recognized by applicable statutory law of dividing a larger tract into separate parcels with different owners.

**D. The Owners Ignore the Applicable Standard of Review in Arguing the Evidentiary Conclusions of the Trial Court.**

The Owners attack various details of the County's evidence at trial, and particularly the testimony of Mr. Call, but they are addressing the wrong forum. Their opportunity to argue that their witnesses were more creditable than Mr. Call was before the trial court. They failed to so persuade the trial court and, according to the applicable standard of review as set forth in the brief of the County, cannot now relitigate the creditability of the various witnesses before this Court.

Rather than apply the appropriate standard of review, the Owners want this Court to ignore it. Instead of viewing the evidence in the light most favorable to the County, the prevailing party at trial, and affording the County the benefit of all reasonable inferences fairly deducible from the evidence, the Owners argue the evidence in the light most favorable to their position. Rather than accepting that all conflicts in the evidence are to be settled in favor of the County on appeal to this Court, the Owners vigorously present their alternative interpretation of the facts that was rejected by the trial court.

In particular, the Owners now argue that in various ways the comparable properties used by Mr. Call in support of his opinions are not identical to some or all of the 130 Parcels at issue. But the Owners present no evidence that Mr. Call failed to make appropriate adjustments to account for any such differences that were material, nor that the process of making such adjustments is not a common and accepted appraisal technique. The court heard Mr. Call's testimony, and that of the Owners' witnesses, and decided that Mr. Call's testimony was more creditable. Having done so, its judgment should not be disturbed based on arguments that in effect simply contend that the trial court should have reached a different conclusion.

In attacking Mr. Call's testimony, the Owners also mischaracterize the holding of this Court in *Fruit Growers Express Co. v. City of Alexandria*, 216 Va. 602, 221 S.E.2d 157 (1976) and ignore other relevant precedents of this Court. *Fruit Growers* does not support the Owners' argument. That case concerned a taxpayer who sought to prove the present fair market value of raw land by deducting the estimated cost of developing it into finished, subdivided industrial sites from the estimated income to be derived from selling or leasing the finished sites. This Court held that present market value cannot be

proved by testimony from a witness that describes “a speculative enterprise for which in his opinion (or that of some expert) the land might be used, and base his estimate of value upon the profits which he would expect to derive from the enterprise. In other words, he cannot capitalize the projected earnings of a non-existent enterprise of projected use.” 216 Va. at 608, 221 S.E.2d at 161 (quoting a treatise on valuation). But there is no evidence here that the County or its witness, Mr. Call, based any assessment or any estimate of value on such a method.

In contrast, *Fruit Growers* said that it is permissible to value such property by “showing a possible scheme for development for the purpose for which it is most available, provided it appears that the likelihood of demand for the property for that purpose is such as to affect fair market value.” *Id.* Here, the evidence showed that individual properties in the business park were available for development and that actual sales for that purpose had occurred. Accordingly, Mr. Call was fully justified in considering that purpose in reaching his conclusions of value. Furthermore, the evidence shows that Mr. Call made such adjustments as were appropriate, in his professional judgment, to account for any material differences between the comparable sales and each parcel being valued. Joint Appendix at 4897, 5893-5933, and 6129. This Court has endorsed the appraisal practice of making such adjustments to account for differences between a subject property and comparables. *See, e.g., Arlington County Bd. v. Ginsburg*, 228 Va. 633, 325 S.E.2d 348 (1985) (in income capitalization valuation of office building based on market rents, adjustment for cost of rehabilitating the building sufficiently so that it could attract rents at market levels was appropriate).

The difference between what *Fruit Growers* prohibits and what it permits was further highlighted in *Lynch v. Commonwealth Transp. Comm'r*, 247 Va. 388, 442 S.E.2d 388 (1994). There this Court ruled that evidence showing “the property’s potential, the adaptability and suitability of the property for its highest and best use” was admissible to prove fair market value. The Owners do not contend that the highest and best use of the 130 parcels at issue here is other than development within a business park setting, and they provided no evidence of any other highest and best use.

The issue fundamentally comes down to an evaluation of the relevant market and potential market participants. In *Fruit Growers* and in *Appalachian Power Co. v. Anderson*, 212 Va. 705, 187 S.E.2d 148 (1972), also cited by the Owners, the subject property was valued by treating it as having been turned into something else and then valuing the something else. That was considered by this Court to be too speculative to accurately reflect how the market for the properties would actually value them. But in *Lynch* and *Appalachian Power Co. v. Gorman*, 191 Va. 344, 61 S.E.2d 33 (1950), this Court recognized that the market would not be blind to the development potential of property in its existing condition. Those cases properly recognized that the potential of a property for development to its highest and best use, in light of existing conditions and circumstances, is exactly the kind of evaluation made by potential sellers and buyers in pricing any property.

Mr. Call did not value any of the subject parcels based on the cost to develop it and the expected profits that might be earned after such development, as prohibited by *Fruit Growers*. He did not value it based on a division into “hypothetical and nonexistent lots” as in *Anderson*, 212 Va. at 711, 187 S.E.2d at 154. Rather, he valued the parcels for

what they actually were at the time of the assessments, i.e., legally recorded separate parcels consisting of land suitable for development at a highest and best use within a business park setting, exactly as permitted by *Lynch* and *Gorman*. Joint Appendix at 5893 and 5900-5901. He based his conclusions on ample evidence that similar parcels had been or could be developed exactly that way. Joint Appendix at 4897, 5897-5899, and 6129. Accordingly, Mr. Call's sales comparison methodology was fully consistent with applicable precedents of this Court.

Having heard all the evidence and evaluated the credibility of the witnesses, the trial court concluded that Mr. Call's testimony was more compelling and persuasive than that of the Owners' witnesses, even assuming *arguendo* that the Owners had overcome the presumption of correctness. But viewing the evidence in the light most favorable to the County and according it the benefit of all reasonable inferences fairly deducible from the evidence, it is apparent that there is ample evidence to support the trial court's judgment, and so the LGA, VACo, and VML respectfully submit that the judgment should be affirmed.

## **VII. Conclusion**

By arguing that a mere difference of opinion overcomes the presumption of correctness, that they should be relieved of their burdens of proof and persuasion despite their own failure to take reasonable steps to preserve and present evidence, that a bulk sale price of a large tract conclusively controls the subsequent valuation of 144 much smaller parcels created from that large tract, and that the deference normally accorded the evidentiary conclusions of a trial court should be ignored, the Owners seek to have this Court rule in a manner inconsistent with many of the precedents that critically control the

tax assessment appeal process in Virginia. The LGA, VACo, and VML believe that such a result is not justified by the record in this case, would impose very undesirable changes in public policy, and is not required to attain justice for any party.

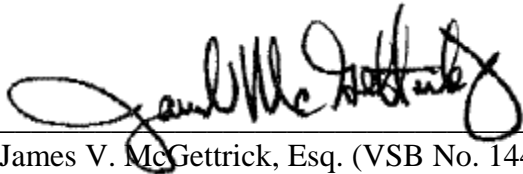
The Owners have not proven that the judgment of the trial court was plainly wrong or without evidence to support it. Accordingly, the LGA, VACo, and VML respectfully urge this Court to affirm the judgment of the trial court.

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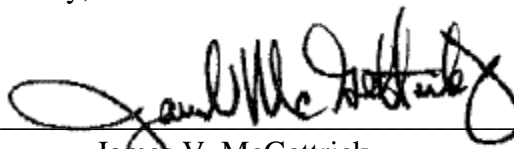
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**CERTIFICATE OF SERVICE**

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I certify that twenty copies of the foregoing Brief *Amicus Curiae* were filed with the Clerk of the Supreme Court of Virginia by hand delivery, and that three copies were mailed by first class mail, postage prepaid, to counsel for the Appellants, Edward J. Fuhr, Esq., and Eric H. Feiler, Esq., Hunton & Williams LLP, 951 East Byrd Street, Riverfront Plaza, East Tower, Richmond, Virginia 23219, and to counsel for the Appellee, Andrew R. McRoberts, Esq., Goochland County Attorney, Post Office Box 10, 1800 Sandy Hook Road, Suite 310, Goochland, Virginia 23063, and Debra L. Mallory, Esq., and Tracy Taliaferro, Esq., Taliaferro & Mallory, LLP, 320-C Charles Dimmock Parkway, Colonial Heights, Virginia 23834, on this 7th day of January, 2008.

  
James V. McGettrick