Anatomy of a Tax Assessment Defense: West Creek Associates v. County of Goochland

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West Creek Associates v. County of Goochland

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Chicago, Illinois

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Andrew R. McRoberts, Sands Anderson PC
919 E. Main Street, Suite 2300
Richmond, Virginia 23219
Main: (804) 648-1636
Direct: (804) 783-7211
amcroberts@sandsanderson.com
www.sandsanderson.com

Background of the Story

Goochland County is the county west of Henrico County and Richmond, Virginia, largely located between Interstate 64 on the north and the James River on the south, and reaching west to about 25 minutes of the City of Charlottesville.

It is largely rural, with significant suburbanization on the east end within 7 miles of the City of Richmond.

In 2000-2001, the Virginia Department of Transportation was constructing the Route 288 western beltway for City running north-south through eastern Goochland County, Virginia...

… right through West Creek Business Park.

West Creek Business Park (West Creek) was created in the 1980s by a well-known and successful commercial developer in the Richmond area, and was owned by Bank of America, Trustee of the Bank of America Retirement Trust (and their predecessor named entities…Nationsbank, Sovran Bank, etc.)

Approx. 2500 acres, mixed use zoning (industrial and commercial), residential prohibited, Class A Business Park.

Master planned, 30% open space mandate, Route 288 is spine, other four-lane and two-lane highways elsewhere, or planned.

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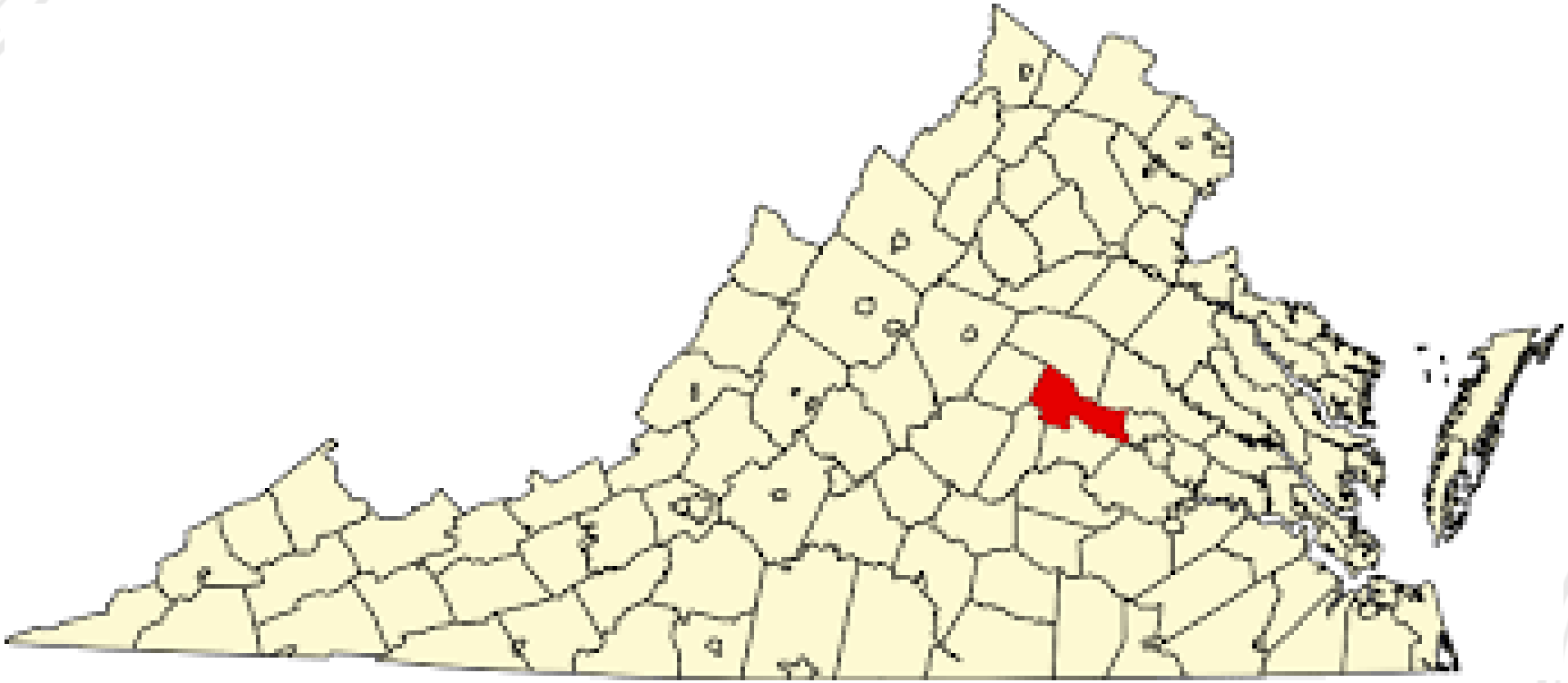

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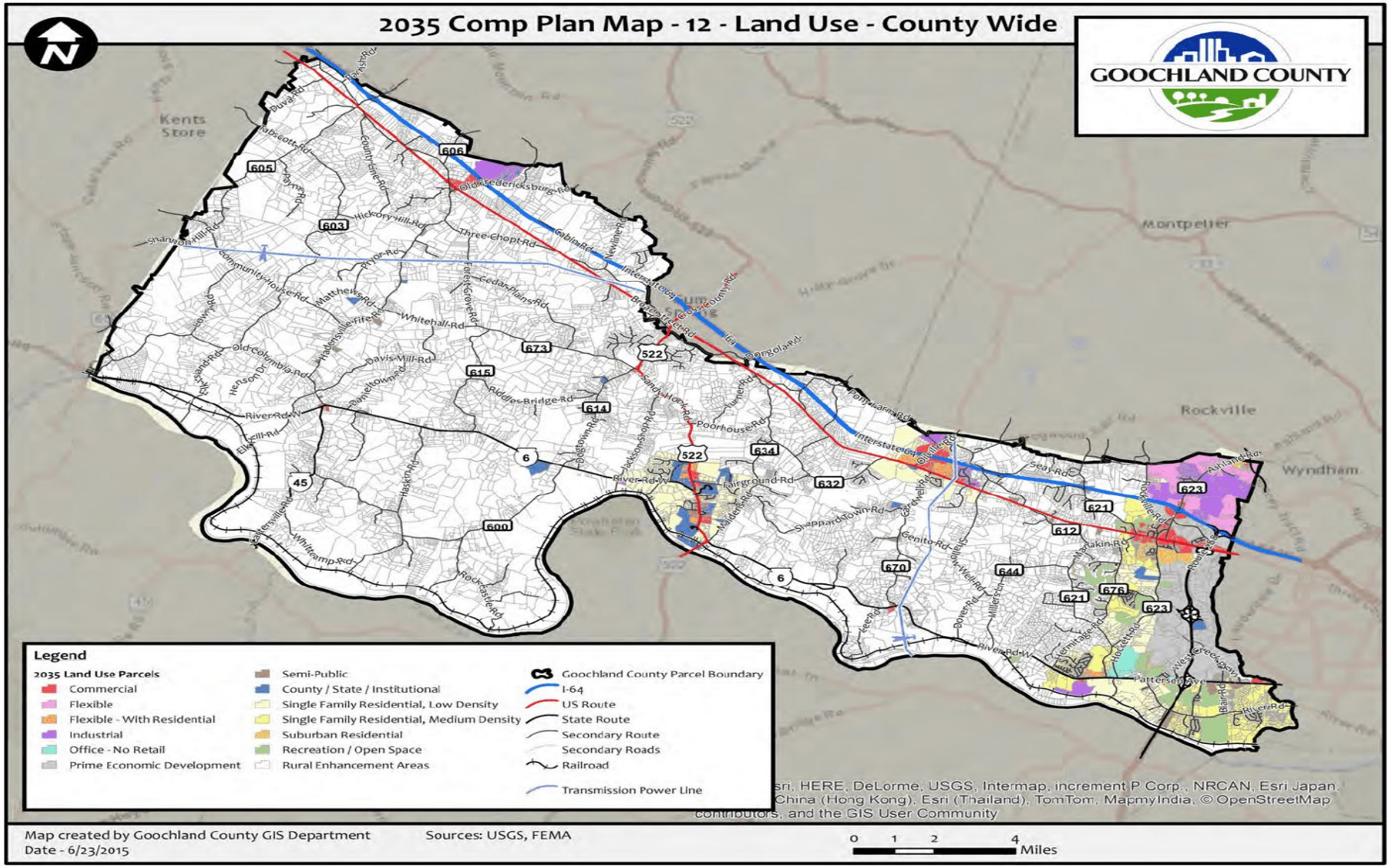

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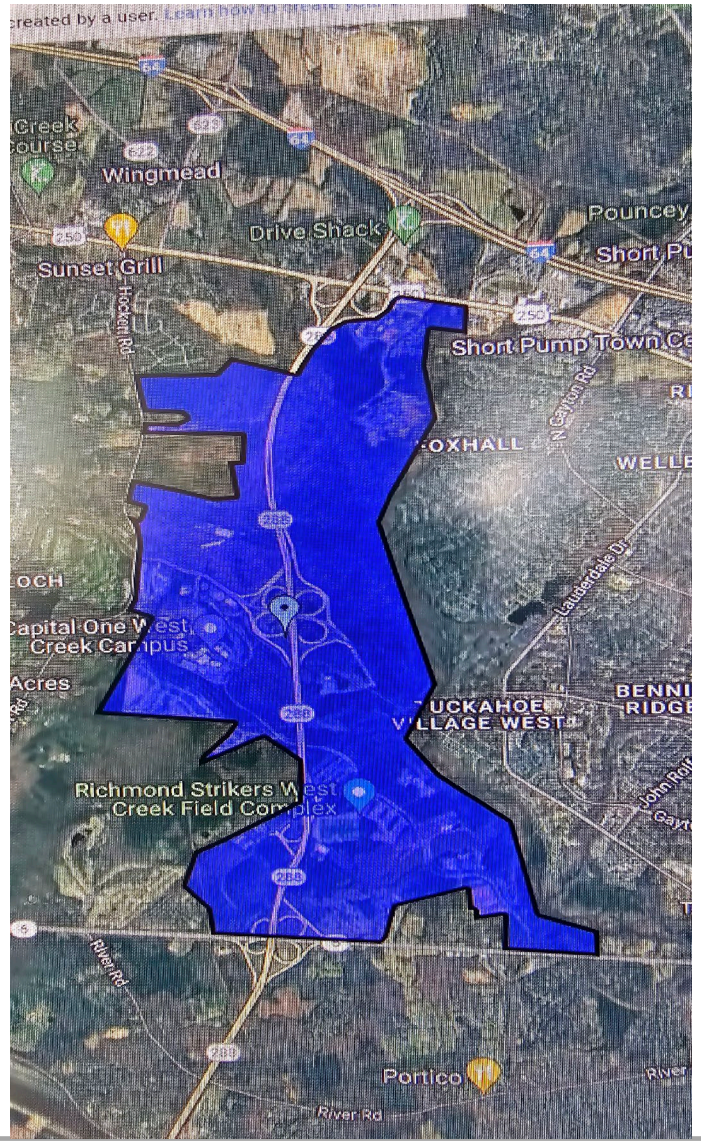

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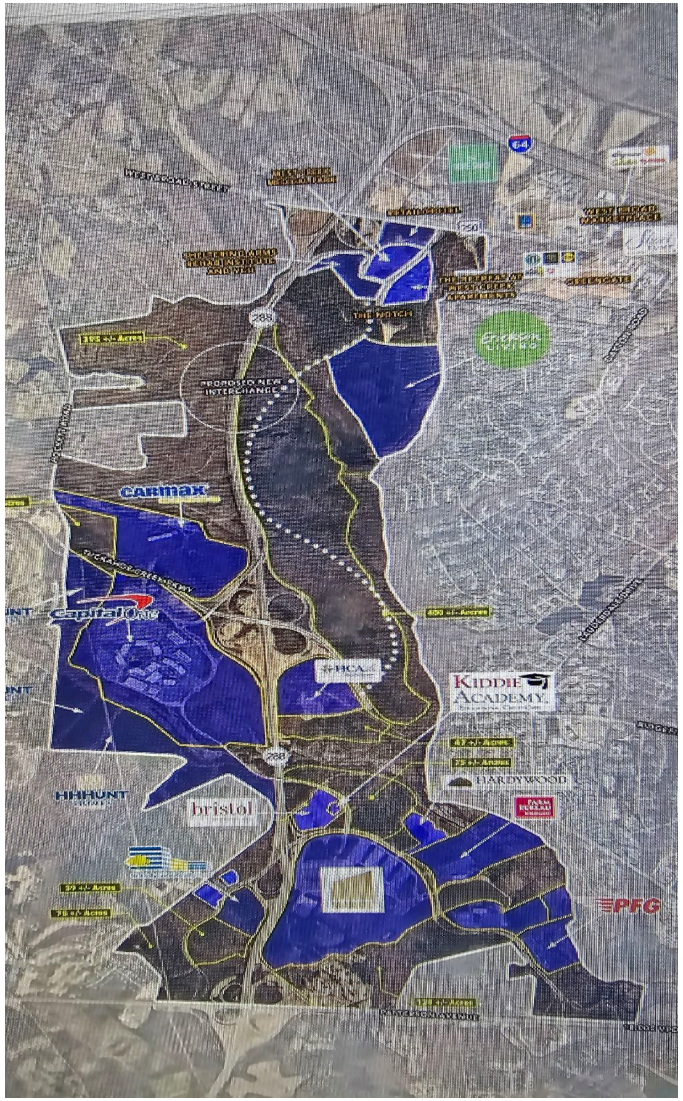

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In late 1980s-2000, under the bank trustee ownership, West Creek had built West Creek Parkway in Phase 1 on southern end (adjacent to Route 6 – Patterson Avenue), ran water/sewer/power, sold a number of major corporate HQ campuses which owners then developed and occupied, and one multi-unit industrial building for smaller tenants.

About 7 parcels in Phase 1 vacant, ranging from 10 – 20 acres each, served by West Creek Parkway and water and sewer. About 10 other parcels in Phases 2 (northern end) and 3 (central portion) still in their pre-business park "Ag" configuration. 20 parcels in all in the business park.

Nothing new had been developed in some years.

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The Bank of America Trustee was under pressure to sell under-performing assets by its retirees and beneficiaries of the retirement fund.

Few buyers able to buy such a large and under-performing asset for the appraised value of approx. $56 million.

Likely buyer was a billionaire financier and his partner, who, because of their wealth, were able to hold for the long term. As a result, long term costs were clearly an issue to them (i.e., taxes).

Entered into an agreement to purchase the entirety of West Creek Business Park, all unsold acreage, for good deal of $34.1 million.

At that same time, in 1999-2000, Goochland County, Virginia government was undergoing its reassessment process for the County, for effective assessment date of Jan. 1, 2001.

At the time, Goochland County reassessed every four years, per the Code of Virginia.

As permitted by the Code, the County Board of Supervisors had appointed a Board of Assessors (BOA) – a citizen board sworn to approve the assessments for all real property in the County.

The BOA was assisted by an outside contract appraiser who largely used mass appraisal to value the real property.

During assessment process, these prospective purchasers for West Creek met with County's Commissioner of the Revenue, County Administrator, contract appraiser and a representative of the State Dept. of Taxation, who sometimes would advise smaller localities on assessment practices.

Purchasers explained plan to divide the business park into 144 parcels at settlement, scheduled for June 30, 2000. Done "for income tax purposes" and reportedly "should not affect value."

Contract purchasers said the purchase price for the business park would be $34.1 million, and insisted that the assessments must be a total of about $34.1 million.

In the meeting, County's contract appraiser said that figure would likely be far below his opinion of value of the collective total of the proposed 144 parcels, which had been set based on prior sales in West Creek.

Commissioner of the Revenue said that when property was divided that often made the total value go up.

County Administrator and Va. Dept. of Tax said nothing. County Attorney not present.

Billionaire financier's partner said the $34 million was the purchase price, and if you do not assess the business park at $34 million "we will sue you." … They later did.

Sale of business park closed on June 30, 2000, for approx. $34.1 million.

Re-divided from the 20 pre-existing parcels into 144 parcels at closing, not by subdivision plat but by deeds, and conveyed to 144 different LLCs, albeit under common ownership.

Each deed's legal description was an estimated acreage and a reference to a "sketch plan" which contained a warning label to the effect that said, effectively, "this is not a subdivision plat."

Sketch plan showed parcels for roads, wetlands, large medians, and "developable parcels" in the 12 – 25 acre range.

Circuit Court Clerk reported the sales and recorded deed information to Commissioner of the Revenue.

The Commissioner of the Revenue revised the "land book" of parcels to be assessed, and the County planning staff updated the "tax map" showing the taxable parcels of real property.

Old parcel map configuration before settlement was gone, legally. New parcel map configuration was in place, before the January 1, 2001 effective date of the new general reassessment.

That was what the County's assessing team assessed.

For reassessment purposes, the contract appraiser came up with a value of $75,000 per acre for all of the subject 144 parcels, largely using the market approach, using a sales comparison to parcels sold in the West Creek Business Park.

Several similarly-sized parcels along West Creek parkway in Phase 1 had sold in the $70,000/ac – $120,000/ac range.. No parcels in Phase 2 (northern end) had sold. In Phase 3 (central portion), one approx. 100 acre parcel with no access or utilities constructed had sold to Carmax at approx. $90,000/acre.

As vacant land, income capitalization and cost approaches deemed not proper and not developed. Final contract appraiser valuation of entire park, totaled: Around $128,700,000.

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West Creek Associates, et al.'s primary arguments at BOA level:

1. All phases should not have same value.
2. Whether certain parcels shown as potential future roads, landscaped medians or open spaces, or in wetlands should have much value.
3. Lack of lawful subdivision harmed value drastically. Division only for federal tax purposes. And always: We paid $34.1 million for the business park and it should not be assessed at a total amount above $34.1 million.
4. Those sales in West Creek of $70,000/ac to $120,000 ac should not be used.

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With little explanation or record, the citizen Board of Assessors (BOA) adopted a $75,000/acre valuation (same as contract appraiser) for most of West Creek, but reduced Phase 2 (northern end) to $35,000/acre.

The Board of Assessors further discounted 19 narrow parcels shown as future roads or rights of way on West Creek's sketch map referred to in the deeds.

The final BOA assessments for all parcels in West Creek Business Park totaled $103,200,000.

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On January 31, 2001, Capital One closed on purchase of 300 acres from West Creek in Phase 3, near CarMax acquisition. The sale was contingent on a substantial amount of infrastructure improvements.

Cap One and owners of West Creek cleverly worked an economic development deal for a combination of state and local incentives to pay for water and sewer to be extended and for VDOT to finish Route 288 and local roads in Phase 2 to serve Cap One/CarMax.

The sale price, reflecting the successful completion of all these infrastructure improvements, amounted to approximately $77,000 per acre—$23,100,000 in total.

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West Creek then appealed to the Board of Equalization, a quasi-judicial appeal body appointed by the state circuit court.

West Creek owners made the same arguments again. Especially the "it cannot be worth more than what we paid for it."

The Board of Equalization increased the assessment to $105,500,000 on the basis that the roads on West Creek's maps were not built and speculative, and their undeveloped land was no different than the other land in their respective Phase.

The BOE recognized that whenever a sale had occurred in the park, a new plat was created and recorded with the sale.

Round 1: The First Trial (2001-2003)

The first 89 lawsuits were filed in August of 2001, challenging the assessments of 89 of the "developable parcels" and "road parcels" pursuant to Virginia Code § 58.1-3984. The lawsuits were consolidated for trial. The trial was held in April 2003, presided over by Circuit Court Judge-designate Charles Russell (former Justice of the Virginia Supreme Court).

In discovery, the parties were obviously focused on different issues. The plaintiffs focused on the sale for $34.1 million in June 2000. Their discovery was aimed at developing evidence that the sale was an arm's length fair market value sale. The County, on the other hand, was focused on assembling evidence that the sales price was determined on the basis of the whole business park, not any of the individual parcels created at settlement.

Both parties got what they were looking for in a deposition of the CFO of the Bank of America Trustee held in Charlotte in 2002. The CFO confirmed that the sale of the business park was at arm's length and at fair market value. But he also confirmed that the negotiated price was for the entire business park in bulk, not for any individual portion thereof. In many ways, the parties would be jousting over the legal relevance of these facts for years.

Just before trial, the various plaintiffs attempted to non-suit (voluntarily dismiss) the 89 cases in order to re-file with all 144 parcels and pursue a previously-unexpressed theory, namely, that all 144 parcels should be valued collectively as one business park, and valued at the "price paid," or $34.1 million. Because the County had a pending counterclaim for increased assessments, Judge Russell denied the motion and presided over a four-day trial. At the end of trial, Judge Russell upheld the assessments in the southern, developed end of the business park, but overturned others, ordering the assessments reduced by a collective total of about $34 million.

After the ruling, neither side was happy with the result.

The West Creek plaintiffs appealed the non-suit ruling.

The County of Goochland appealed the assessment reduction of $34 million, which was only about one-half to one-third what the plaintiffs hoped to receive under their new theory.

Round 2: The First Appeal (2003-2004)

On appeal in 2004, the Virginia Supreme Court reversed the non-suit ruling, essentially giving the plaintiffs a "do-over" to present their "one business park, one property" theory. The Court seemed very interested in reversing on the non-suit issue in oral argument, which would also reverse the sizable $34 million assessment reduction ordered below.

Perhaps understandably, near the end of argument, Chief Justice Hassell asked counsel for the West Creek LLCs, "Are you sure your clients want this?" The clients did.

The Court ordered the plaintiffs' non-suit motion granted, and therefore did not reach any of the multiple assignments of error cited by the County.

With grant of nonsuit, the case was dismissed at the request of the plaintiffs.

In some ways, it was like the parties had entered a time warp and lost the previous three years of litigation.

Round 3: The Second Trial (2004-2006)

After having walked away from $34 million in assessment relief on appeal, the 144 West Creek plaintiff LLCs re-filed 159 lawsuits in December 2004. Some were challenges of parcel assessments, but one was a declaratory judgment.

Some were later dismissed for various reasons. Some because LLCs had been terminated after the sale to Capital One. The declaratory judgment action was dismissed because 58.1-3984 provided an adequate remedy at law.

One hundred thirty (130) of these cases were later consolidated for trial, this time before resident Circuit Court Judge Timothy Sanner.

Against the County's vigorous defense, the plaintiffs steadfastly pursued their "one business park, one property" theory.

At one point, after this theory had been attacked again and again by the County on demurrer, motions and in discovery disputes, Judge Sanner (somewhat wearily) remarked before ruling on a discovery motion that he wished he could just rule on the "one business park, one property" issue and move on.

However, the issue was not squarely presented for ruling until trial of the consolidated cases, which was held in late November of 2006.

At trial, the plaintiffs presented valuation evidence from an appraiser as well as representatives of the owners. All consistently told the same tale – that the parcels should be valued collectively as a portion of the business park – and all agreed on the proper value, *to the penny*, of each parcel's value.

These values, not surprisingly, added up to the $34.1 million purchase price for the business park in June of 2000. And each parcel's proposed value was the same percentage of $34.1 million as the percentage the parcel's acreage bore to the overall West Creek Business Park acreage.

All owners and their witnesses faced vigorous cross-examination on the "one business park, one property" theory, the curious similarity of the appraiser's and the owner's opinions of value, and many other grounds.

The plaintiffs also presented evidence from the Commissioner of the Revenue, who on cross-examination explained clearly how she was required to list each parcel separately on the land book, which then meant that the County had to assess each parcel separately. Collective assessment was simply not possible or lawful.

There were bumps in the road for the County.

The County's contract appraiser, who was not used as an expert by either side, had developed one value ($75,000 per acre) based upon comparable sales, then applied that value to each of the 144 parcels.

The Court was convinced this was an erroneous methodology, given the differences in accessibility, infrastructure and location for different parts of West Creek.

However, the contract appraiser was not the assessor.

There was no evidence presented of how the County's board of assessors or on appeal, the court-appointed board of equalization had assessed the property.

Little in the way of record. Many of the citizens who had served on these boards were elderly, most had no specific memory of what they did, other than they tried their best. Many were unavailable, and one had died. In the end, only one member of the BOE was available and appeared to testify.

Fortunately, during the 2000-2001 general reassessment process, some proposed assessments had been set at values inconsistent with the contract appraiser's recommendations at each stage.

This was most apparent in the northern one-third of the business park, which had been set at $35,000 per acre by the board of assessors.

The contract appraiser testified that he did not know what information the boards considered in making their assessments, and that he knew the boards had information he did not.

On County's motion to strike at end of the Plaintiffs' case, the Court could find no "linkage" between the erroneous contract appraisal and the assessment by the board of assessors or the board of equalization, other than a frequent $75,000 per acre value in the southern two-thirds of the business park.

Thus, the Court dismissed those 40 northern parcels on the County's motion to strike because there was absolutely no proof of "manifest error in the manner of making the assessment" of those parcels. Examining the evidence in the light most favorable to the plaintiffs, the Court overruled the remainder of the motion to strike.

In the County's case-in-chief, only two expert witnesses were presented.

One was an appraiser, William C. Harvey, II, MAI, who thoroughly criticized the plaintiffs' appraisal for methodology errors and the "math" inherent in it.

The other county expert, Jay B. Call, III, MAI, presented his own opinion of value for the 144 parcels, which was largely consistent with the assessments. He clearly called out the June 30, 2000 sale of the business park as totally non-comparable to any of the parcels to be valued.

Given this evidence, and the requirement that the Court give the County assessment a presumption of correctness and that manifest error be proven by a clear preponderance of the evidence, the Court ruled for the County and dismissed the case.

The Court ruled again that there was no evidence of the manner of the making of the assessment, but additionally, that the evidence of value presented by the plaintiffs was simply not credible for many reasons. In its ruling, the Court rejected the "one business park, one property" theory as violating appraisal practice and lacking any common sense.

On the common sense issue, the Court reasoned that if a hypothetical 100-acre parcel were purchased and split into 100 parcels, each parcel would be worth more than one percent of the purchase price, even with problems with access and a lack of infrastructure as argued by the plaintiffs.

He also relied upon the testimony of MAI Jay B. Call, III, who essentially testified that the "one business park, one property" theory violated basic tenets of appraisal practice.

Given this serious setback, the plaintiff LLCs appealed to the Virginia Supreme Court for the second time.

Round 4: The Second Appeal (2006-2008)

The stakes had never been higher.

On appeal to the Virginia Supreme Court for a second time, the West Creek LLCs were asking for complete reversal of Circuit Court Judge Sanner's comprehensive ruling which favored the County, and also for a final judgment setting the assessments (collectively) at $34.1 million. While the years went by, claimed interest at 10% per annum was accruing. A loss could have cost the County millions of dollars in tax refunds and interest.

The County defended, insisting that Judge Sanner had gotten it right, and the County's $105.1 million collective assessment of the 144 parcels must be affirmed.

Oral Argument

The main issue on oral argument appeared to revolve around whether a plaintiff in a tax appeal under Virginia Code § 58.1-3984 could bear their burden of proof by simply proving the assessments differed substantially from the proven evidence of fair market value.

The trial court's granting of the motion to strike regarding the northern one-third of the West Creek Business Park, based solely on lack of any evidence of how the assessment was determined,came under fire.

On appeal of a MTS, the non-moving party gets the benefit of any doubt and evidence is construed in their favor.

Based upon the questions asked, the Supreme Court seemed interested in settling the question of whether evidence of methodology ("manner of making the assessment") is required to prove a "manifest error."

The appellant West Creek LLCs argued no, pointing primarily at *Board of Supervisors v. Telecommunications Industries, Inc.*, 246 Va. 472, 436 S.E.2d 442 (1993) and the statutory language from Virginia Code § 58.1-3984, which seemed to support its argument.

The appellee County argued yes, distinguishing the *Telecommunications* case as involving fungible items of personal property (personal computers) rather than unique real estate, and pointing in support to the many Virginia Supreme Court opinions describing the standard as "manifest error in the making of the assessment."

The Opinion

After oral argument, both sides awaited the results, which came in a detailed opinion issued in September of 2008. In the opinion, the Virginia Supreme Court relied on its precedent, re-affirmed many well-settled points of Virginia tax assessment law, and settled the question raised at oral argument.

The Supreme Court largely upheld the circuit court (and the County's position) on the law, with one exception, and upheld the assessments, but remanded the forty cases decided on the motion to strike. What follows are some legal highlights of the opinion.

The Supreme Court started by reciting very familiar principles of Virginia local government tax assessment law:

- Courts are generally deferential to the judgment of the taxing authority.
- As such, a taxing authority's assessment is presumed to be correct.
- The taxpayer carries the burden of proof when claiming erroneous assessment.
- The taxpayer must prove its case by a clear preponderance of the evidence to meet its burden of proof.

The most significant point of law addressed in the West Creek case settled the question raised at oral argument regarding whether proof of "manifest error in the manner of making the assessment" was mandatory.

Reconciling somewhat conflicting caselaw, the Court concluded that a taxpayer need not "prove what information the taxing authority considered and how it arrived at the assessment in question, i.e., its methodology," to establish the erroneous assessment.

Instead, the evidence of the property's fair market value may be used to establish the erroneous assessment.

As a result, the Supreme Court of Virginia reversed and remanded the circuit court's decision to strike forty claims at the conclusion of the plaintiffs' case, since the decision was based solely on the grounds that West Creek had presented no evidence establishing the County Board of Assessors' or Board of Equalization's methodology (i.e., "the manner of making the assessment").

Since proof of an error in methodology was not the sole way the plaintiffs could have prevailed, the Court held that the circuit court erroneously granted the motion to strike based on lack of proof of methodology alone without considering (at that stage) whether the plaintiffs' had proven a substantial difference between the assessment and the fair market value.

The Supreme Court stated that in accordance with the deference shown to the taxing authority, this difference between assessed value and fair market value must be substantial and be clearly shown to be a "manifest error."

The Code of Virginia requires that the property of different owners be assessed individually. 276 Va. at 414, 665 S.E.2d at 846 ("[P]ursuant to Code § 58.1-3290, the County was required to assess the 144 parcels individually."). Specifically, Va. Code § 58.1-3290 provides that "[w]hen a tract or lot becomes the property of different owners in two or more parcels, subsequent to any general reassessment of real estate in the city or county in which such tract or lot is situated each of the two or more parcels shall be assessed and shown separately upon the land books, as required by law."

A property's recent sale price is not controlling evidence of the property's fair market value. 276 Va. at 415, 665 S.E.2d at 846 ("As we have previously stated, the recent sale price of real property is 'merely one of the factors to be taken into consideration' when determining whether such property has been assessed at more than fair market value." (citing *American Viscose Corp. v. City of Roanoke*, 205 Va. 192, 196, 133 S.E.2d 795, 798 (1964)).

Because the purchase price of $34.1 million reflected a "bulk sale" discount, it could not be used to establish the fair market value of the real property and carry the taxpayer's burden of proof. 276 Va. at 417, 665 S.E.2d at 847 ("[T]here is an inverse relationship between the size of a parcel and the purchase price, i.e., the larger the parcel, the cheaper the price."); id. at 415, 665 S.E.2d at 846 ("Since the 34.1 million dollar figure represented the 'bulk sale' of the 2,500 acres, the County is correct in its assertion that the mere difference between the purchase price and the assessed value was not sufficient to show manifest error or disregard the controlling evidence.").

In so ruling, the Supreme Court distinguished the case of Board of Supervisors v. Donatelli & Klein, Inc., 228 Va. 620, 325 S.E.2d 342 (1985), in which the sale of the subject property "was not a sale in bulk, because the sale of each individual property was negotiated separately to its ultimate purchase price." 228 Va. at 625, 325 S.E.2d at 343. In contrast, the $34.1 million sales price for the West Creek Business Park was negotiated for the entire acreage of the park and the parcels created later at closing for tax planning purposes.

In part because West Creek's expert simply divided the $34.1 million purchase price among the individual parcels, the Supreme Court of Virginia affirmed the circuit court's ruling regarding the remaining ninety parcels that West Creek failed to show that the property in question is assessed at more than its fair market value. The plaintiffs' appraiser adopted not only the owners' theory of valuation ("one business park, one property"), but also their opinion of value ($34.1 million total, then broken down by parcel). The Court upheld Judge Sanner's finding that such a "me too" expert opinion based on math was simply not credible.

The plaintiffs failed to develop a credible opinion of value that could be compared to the assessed value. Therefore, the Court ruled that the plaintiffs failed to carry their burden of proof to show "substantial disparity" between the fair market value and the assessments, even if that alone would legally have carried the day.

Remand

After remand of the forty cases that had been reversed by the Supreme Court, given the lack of any expert testimony held to be credible by the high court, the plaintiffs ultimately agreed to dismiss them all. The state circuit court's final order was entered in Spring of 2009.

After almost eight years of litigation, the County of Goochland had prevailed. The cases were over. The County was left with a major victory, one great opinion and an interesting tale to tell.

Coda

This case was litigated and decided 2001-2009.

A while ago.

Since then, the Virginia General Assembly has since made it more difficult to challenge assessments. See Va. Code section 58.1-3984 (as amended); *see Portsmouth 2175 Elmhurst, LLC v. City of Portsmouth*, 298 Va. 310, 321–22 (2020).

The most major amendment was in 2011, effective for tax years beginning in 2012.

Questions?

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Andrew R. McRoberts, Esquire

Sands Anderson PC

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Richmond, Virginia 23219

Main: (804) 648-1636

Direct: (804) 783-7211

amcroberts@sandsanderson.com

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