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37 - 70 MAP 2023 (Consolidated cases)

IN THE SUPREME COURT OF PENNSYLVANIA

NO. 37-70 MAP 2023
(CONSOLIDATED)

In re: Appeal of Prospect Crozer, LLC FROM THE DECISION OF THE BOARD OF ASSESSMENT APPEALS OF DELAWARE COUNTY, PA

Appeal of: Chester Upland School District

BRIEF OF APPELLANT CHESTER UPLAND SCHOOL DISTRICT

Appeal from the Order of the Commonwealth Court
entered at Nos. 1596-1629 CD 2019 (Consolidated), on September 28, 2022,
vacating the order of the Delaware County Court of Common Pleas entered
at Docket No. CV-2016-010884 (Consolidated) on October 15, 2019

Pamela A. Van Blunk, Esquire
Attorney I.D. #205992
BEGLEY, CARLIN & MANDIO, LLP
680 Middletown Boulevard
Langhorne, PA 19047
215-750-0110

Attorney for Petitioner Chester Upland School District

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INTRODUCTION

In a case of first impression, at the behest of appellant Prospect Crozer, LLC ("Prospect"), the Commonwealth Court found that Honorable John L. Braxton, the trial judge in this matter, violated the Pennsylvania Constitution, Art. V, §17. In so doing, the Commonwealth Court ignored the procedure established in Pa. Const. Art. V, §18 for investigation, prosecution, and adjudication of claims alleging that a judicial officer has violated Pa. Const. Art. V, §17.

Based upon its investigation and adjudication of Prospect's claim that Judge Braxton violated Pa. Const. Art. V, § 17, the Commonwealth Court concluded—without citation to any controlling legal authority—that this violation resulted in the automatic forfeiture of Judge Braxton's judicial office. This, too, ignored the plain language in Art. V, §18 establishing the forfeiture of, or the procedures for removal from, judicial office.

Finding—again without citation to controlling legal authority and in another matter of first impression—that Judge Braxton's forfeiture of his judicial office constituted a structural error, the Commonwealth Court voided *ab initio* the final orders without any

harmless-error analysis. The vacating of Judge Braxton's Orders jettisons the determination of the jurist who presided over multiple bench trials, held over numerous weeks, and who had deep familiarity with the complex facts and legal issues in these tax assessment matters. The turmoil created by the Commonwealth Court's voiding of a jurist's orders without any harmless-error analysis creates substantial disruption to the legal system.

The Commonwealth Court's decision created a novel process for the investigation, prosecution and adjudication of alleged judicial misconduct by trial and intermediate appellate courts that (a) fails to provide due process to the accused judge; (b) exposes litigants to uncertainty of final orders by duly authorized judges; and (c) blatantly usurps this Court and the constitutionally-mandated Judicial Conduct Board and the Court of Judicial Discipline of their exclusive authority to administer, supervise, investigate, or adjudicate the discipline of judges, or hear appeals from these adjudications, as applicable.

STATEMENT OF JURISDICTION

The Court of Common Pleas had jurisdiction pursuant to 42 Pa.C.S. § 931(a). The Commonwealth Court had jurisdiction pursuant to 42 Pa.C.S. §762(a)(4)(i). On September 28, 2022, the Commonwealth Court entered the Order that is challenged by this appeal. (R. 895a.) This Court allowed the appeal of the Commonwealth Court's Order on May 31, 2023, and has jurisdiction under 42 Pa.C.S. § 724. (R. 896a.)

ORDER IN QUESTION

The text of the Commonwealth Court's Order entered on September 28, 2022, states:

> AND NOW this 28th day of September 2022, Prospect Crozer LLC's Application to Vacate Orders on Appeal Because of Structural Error is GRANTED, and the orders of the Court of Common Pleas of Delaware County, dated October 11, 2019, are VACATED. This case is REMANDED for a new decision in accordance with the foregoing opinion.
>
> Jurisdiction relinquished.

(R. 895a.)

SCOPE AND STANDARD OF REVIEW

This appeal presents a question of constitutional interpretation, which is a pure question of law. *Pennsylvania State Educational Assoc., v. Commonwealth Department of Community and Economic Development,* 148 A.3d 142, 162 at n. 5 (Pa. 2016). The standard of review is *de novo* and the scope review is plenary. *Valley Forge Towers Apartments N LP v. Upper Merion Area School District,* 163 A.3d 962, 969 (Pa. 2017).

STATEMENT OF THE QUESTION INVOLVED

Whether the Commonwealth Court erred by finding that a judicial officer has violated Pa. Const., art. V, §17, concluding that such violation resulted in the automatic forfeiture of judicial office, and determining that such violation constitutes a structural error which renders the trial court's orders void *ab initio*??

The Commonwealth Court agreed that a trial or intermediary appellate court can investigate and find that a judicial officer violated Pa. Const., Art. V, § 17 and that such finding results in an automatic forfeiture of judicial office that constitutes a structural error rendering all of the judicial officer's orders after the alleged violation void *ab initio*.

STATEMENT OF THE CASE

A. Background – The Pennsylvania Constitution Vests Exclusive Power and Procedures in Matters of Judicial Misconduct to Entities Which Do Not Include the Commonwealth Court

In establishing our Judicial Branch, the Pennsylvania Constitution vests this Court with the exclusive right to supervise the conduct of all courts and judicial officers. Pa Const. Art. V, § 10(c).

The Pennsylvania Constitution also delineates certain prohibited activities for justices and judges. Pa. Const. Art. V, § 17. For example, judges are prohibited from engaging in any activity that violates any canon of legal or judicial ethics prescribed by this Court. Pa. Const. Pa. Const. Art. V, § 17(b). A judge is also prohibited from being paid a fee or emolument for the performance of his/her judicial duty or any service connected with his/her office other than his salary and expenses. Pa. Const. Art. V, § 17(c). A judge also is prohibited from holding an office or position of profit in the government outside of his/her judicial office. Pa. Const. Art. V, § 17(a).

The Pennsylvania Constitution provides a mechanism for the enforcement of Section 17's prohibited activities. Pa. Const. Article V,

§ 18; *Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority*, 489 A.2d 1291, 1299 (Pa. 1985). A claim that a judicial officer has violated Art. V, § 17 must be investigated, prosecuted, and adjudicated in accordance with the procedure set forth in Art. V, §18. Pa. Const. Art. V, §18 (d)(1).

Specifically, the Judicial Conduct Board is responsible for investigating claims that a jurist has engaged in conduct which violates Art. V, § 17, and, upon a finding of probable cause, is empowered to file formal charges and present the case in support of the charges before the Court of Judicial Discipline. Pa. Const. Art. V, § 18 (a)(7). Importantly, notice and opportunity to respond to the allegations are provided to the judicial officer accused of judicial misconduct. Pa. Const. Art. V, § 18 (a)(8). The Court of Judicial Discipline then determines whether clear and convincing evidence supports a finding that a judicial officer has violated Art. V, §17 and, if so, decides the appropriate remedy for that violation. Pa. Const. Art. V, §18(b)(5).

The Pennsylvania Constitution sets forth the only circumstances when a member of the judiciary forfeits his or her judicial office under the Pennsylvania Constitution: (1) upon conviction of misbehavior in

office by a court, disbarment as a member of the bar of this Court, or removal under Art. V, §18; and (2) upon the filing for nomination for or election to any public office other than a judicial office. Pa. Const. Art. V, §18(d)(3) and (4). Thus, a judge who allegedly violates Art. V, §17—whether it is engaging in an activity that violates any canon of legal or judicial ethics; paid a fee or emolument for the performance of his duties; or holding a position of profit outside of his/her judicial office—does not automatically forfeit their judicial office under the Pennsylvania Constitution. Rather, it is only after an adjudication pursuant to Art. V, § 18 results in a finding of judicial misconduct that the judicial officer *may* be removed from office as a sanction. Pa. Const. Art. V, § 18(d)(1); *In re Bruno*, 101 A.3d 635 (Pa. 2014). That power to sanction, however, does not rest with a trial or intermediary appellate court.

This Court provided significant guidance in *Reilly, supra,* where it considered the issue of whether an intermediate appellate court usurps the administrative power reserved exclusively to this Court by the Pennsylvania Constitution when an intermediate appellate court seeks

compliance with or enforcement of the Code of Judicial Conduct ("Code").

SEPTA, the losing party following a three-week jury trial for personal injuries, asserted—for the first time on appeal—in its appeal to the Superior Court that the trial judge should have recused himself because the trial judge had family members (a son-in-law and nephew) affiliated with the plaintiff's counsel's law firm. The Superior Court's decision established a rule of judicial administration requiring a different judge to rule in any recusal motion because the judge being asked to recuse himself could not objectively address the issue of impartiality. *Reilly*, 489 A.2d at 1298. The Superior Court also determined that a showing that a judge's ruling actually prejudiced a party was no longer required. *Id.*

After establishing this Court's exclusive right to supervise the conduct of all judges, this Court held that the enforcement of judicial conduct is beyond the jurisdiction of intermediate appellate courts. *Reilly*, 489 A.2d at 1298. To the extent new standards of review or procedures were created, this Court criticized the Superior Court's

holding as an unwarranted intrusion upon this Court's exclusive right to supervise the conduct of all judges. *Reilly,* 489 A.2d at 1298.

Finding that perceived violations of the Code do not permit lower courts to alter the rules of law, evidentiary rules, or presumptions of proof, this Court held that any tribunal—other than those authorized by this Court—reviewing alleged violations of the Code is seen as an "impermissible meddling into the administrative and supervisory functions of this Court over the entire judiciary." *Id.* at 1299.

Reilly was decided prior to the 1993 Amendment to Pa. Const. Art. V, §18, which established the current procedure for claims alleging violations of Art. V, §17, vesting exclusive authority to the Judicial Conduct Board to investigate and prosecute such claims, exclusive authority to the Court of Judicial Discipline to adjudicate such claims, and exclusive authority to this Court (or a special tribunal) to hear appeals of such adjudications. The 1993 Amendment to Pa. Const. Art. V, §18 amplifies this Court's holding in *Reilly*—that adjudication of claims of judicial misconduct under Art. V, §17 are not the province of an intermediate appellate court.

B. Facts

These matters involve Prospect's tax assessment appeals of multiple parcels consisting of the Crozer Chester Medical Center Campus wherein the Trial Court docketed its Adjudication (final order) on October 15, 2019. (R. 31a.)

Visiting Senior Judge Braxton—specially assigned as conflict judge by this Court following a recusal of the Delaware County Court of Common Pleas' Board of Judges—presided over multiple bench trials[1] consisting of 28 days of trial involving Prospect and either Chester Upland School District (hereinafter "CUSD"), CUSD and the City of Chester or Springfield School District and Springfield Township (collectively "Taxing Authorities"). (R. 329a, 333a-334a.)

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[1] Three of the matters that were tried are currently reserved pending a decision in this matter, which are: (1) Springfield Hospital/Parking Garage valuation appeals at Docket Nos. 503-504 MAL 2022; (2) CUSD's Community Hospital/Convent exemption appeals at Docket Nos. 505-506 MAL 2022; and (3) CUSD's Petition for Relief (case settled) and City's Petition for Relief at Docket Nos. 499-502. The remaining two matters that were tried—North Campus appeals and Crozer Chester Medical Campus exemption appeals—are pending in Delaware County Court of Common Pleas following the Trial Court's orders vacating Judge Braxton's adjudications because they were docketed after his retirement on January 24, 2020. (R. 288a-289a.)

Judge Braxton entered final orders in favor of the Taxing Authorities, and Prospect appealed these final orders to the Commonwealth Court appealing the instant matter on November 8, 2019. (R. 5a.)

Despite having numerous opportunities to do so over an eight-month period, Prospect argued for the first time on appeal that Judge Braxton had allegedly violated the Pennsylvania Constitution and the Code of Judicial Conduct by accepting an appointment to the BRT—an appointment about which Judge Braxton had transparently notified the parties during trial many months before entering his final orders. (R. 499a, 417a–424a, 426a-433a, 40a-47a.)

In an Application to Vacate, Prospect sought to vacate Judge Braxton's orders without a harmless error analysis by arguing that Judge Braxton's acceptance of the BRT position resulted in automatic forfeiture of his judicial office as senior judge causing a structural error. (R. 49a.)

Procedurally, the Commonwealth Court remanded the matters ("Remand Order") to the Trial Court to hold an evidentiary hearing relating to Prospect's assertion that Judge Braxton engaged in judicial

misconduct, including facts relating to the timing of Judge Braxton's commencement of his appointment to the BRT[2]. (R. 84a-86a.)

The Commonwealth Court, while retaining jurisdiction, entered its Remand Order seeking findings of fact regarding the following questions:

1. The date on which Senior Judge Braxton assumed his position on the Philadelphia Board of Revision of Taxes and began receiving compensation therefore;
2. Whether Senior Judge Braxton's continued work on the above-captioned assessment appeals of Prospect Crozer, LLC while simultaneously serving on the Philadelphia Board of Revision of Taxes was approved in writing or in some other way by the Pennsylvania Supreme Court; and

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[2] Following the Remand Order, the Taxing Authorities filed an Application for Extraordinary Relief asking this Court to decide whether a lower court is empowered to question the authority granted by this Court to a judge to complete a judicial assignment and whether that lower court usurps the power reserved exclusively to this Court by investigating, prosecuting and ultimately adjudicating a judge's violation of Article V, § 17 of the Pennsylvania Constitution and the Code of Judicial Conduct. (R. 88a–187a.) This Court denied the Applications. (R. 893a-894a.)

3. The date on which Prospect Crozer, LLC learned that when Senior Judge Braxton issued the orders in the above-captioned appeals, he had already assumed his position with the Philadelphia Board of Revision of Taxes.

(R. 85a-86a.)

The Trial Court, per the Honorable Barry C. Dozor, held an evidentiary hearing and rendered its findings to the Commonwealth Court. (R. 496a-502a.)

On remand, the Trial Court acquired evidence and made credibility findings. Prospect chose not to call any witnesses. Instead, Prospect chose to rely solely on documentary evidence, including certifications, emails, and affidavits despite the Trial Court's cautionary language that it could not make any finding of credibility of a witness that is not present and not on the witness stand. (R. 312a–313a.) Prospect nonetheless continued to choose not to produce any witnesses. The only witness to testify at the hearing was Judge Braxton. (R. 276a.) The Trial Court found Judge Braxton's testimony candid and credible. (R. 497a, 499a-502a.)

Judge Braxton was appointed to the BRT on or about May 16, 2019 and immediately notified the Administrative Office of Pennsylvania Courts ("AOPC") of his appointment. He immediately ceased sitting as a judge in Bucks County where he had been assigned due to a shortage of judges in the county. Regarding his conflict cases, Judge Braxton timely notified the AOPC—via verbal conversations with both Joseph Mittleman and Diane Bowser—of his appointment to the BRT and that he was willing to walk away or wrap them up. The Trial Court found that Judge Braxton credibly testified that Judge Braxton understood that the AOPC authorized him to complete his conflict cases. (R. 337a, 339a-345a, 361a, 365a-366a, 371a-372a, 499a-500a.)

After his appointment to the BRT, Judge Braxton only worked as a judge—less than twelve days over a six-month period—completing his cases where he sat as conflict judge: these tax appeal cases and a criminal case in Carbon County. (R. 345a-348a, 405a.)

Although Judge Braxton's first paycheck in connection with his position on the BRT was June 16, 2019, he did not start hearing cases until the fall of 2019. (R 388a, 337a, 370a.)

Judge Braxton retired from the judiciary on January 24, 2020 and was a duly authorized judge when he entered his decisions in these cases. (R. 402a, 407a, 409a.)

C. The Commonwealth Court's Opinion

The Commonwealth Court granted Prospect's Application to Vacate Orders on Appeal Because of Structural Error holding Judge Braxton forfeited his position as senior judge by operation of law on June 16, 2019 when he began receiving compensation for his service on the BRT. (Opinion, 33.)

The Taxing Authorities argued that Prospect failed to demonstrate that there is a structural error that vitiates Judge Braxton's decisions. Prospect has not alleged that it was deprived of any constitutional right identified by the United States Supreme Court or of this Court. Absent the existence of a structural error, Prospect would need to satisfy its burden under a harmless-error analysis, which it was not able to do, as Prospect could not establish—let alone could it even assert—any partiality, prejudice, bias, or ill-will by Judge Braxton. (R. 301a.)

In response to Prospect's appellate argument, the Commonwealth Court found that Judge Braxton violated Pa. Const. Art. V, §17—despite the fact that the Commonwealth Court is not authorized to make such a finding under Pa. Const. Art. V, §18. The Commonwealth Court further held that Judge Braxton's violation of Article V, Section 17(a) of the Pennsylvania Constitution, resulted in the forfeiture of his judicial office as a matter of law as of the date Judge Braxton began serving on the BRT. (Opinion, 21.) Not only was the Commonwealth Court without authority to render this decision, but its holding conflicts with the Pennsylvania Constitution's explicit language establishing only two circumstances when a judge forfeits his judicial office. Pa. Const. Art. V, § 18(d)(3)-(4).

The Commonwealth Court also held that the forfeiture of judicial office constitutes a structural error which cannot be waived. (Opinion, 21-22.) The Commonwealth Court acknowledged that Justice Saylor, in his concurring opinion in *Commonwealth v. Martin*, 5 A.3d 177, 218-19 (Pa. 2010), favors a fact-based assessment of any alleged structural error to decide whether that particular error is waivable; nonetheless, the Commonwealth Court—without citing to any legal

authority—simply equated this type of structural error with that of subject matter jurisdiction and held that it could not be waived. (Opinion, 21.) The Taxing Authorities argued that Prospect's attack on Judge Braxton—raised for the first time on appeal—is a waived allegation of judicial misconduct.

Biased by its improper finding that Judge Braxton violated Art. V, § 17 of the Pennsylvania Constitution, resulting in the forfeiture of his judicial office, the Commonwealth Court then needlessly engaged in a biased review of the record and essentially directed the Trial Court on remand to make certain findings contradicting Judge Braxton's findings and conclusions. (Opinion, 32-33; R. 31a-35a.)

SUMMARY OF THE ARGUMENT

This Court and the constitutionally mandated Judicial Conduct Board and the Court of Judicial Discipline have exclusive authority to administer, supervise, investigate, or adjudicate the discipline of judges, or hear appeals from these adjudications, as applicable. Pa. Const. Art. V, § 18; *Reilly,* 489 A.2d at 1299.

The Pennsylvania Constitution sets forth the only circumstances when a judicial officer automatically forfeits his judicial office and an Art. V, §17 violation is not one of the defined circumstances. Pa. Const. Art. V, § 18(d)(3) and (4). It is only after an adjudication pursuant to Art. V, § 18 results in a finding judicial misconduct that the judicial officer *may* be removed from office by this Court or the Court of Judicial Discipline. Pa. Const. Art. V, § 18(d)(1); *In re Bruno*, 101 A.3d 635 (Pa. 2014).

Ignoring the plain language in Art. V, § 18, the Commonwealth Court created a new procedure for the investigation and adjudication of a claim of judicial misconduct by a disappointed litigant. Although Prospect did not allege any partiality, prejudice, bias or ill-will against it by Judge Braxton, the Commonwealth Court investigated Prospect's

claim that Judge Braxton violated Art. V, §17 through a remand to the Trial Court. The Commonwealth Court ultimately found that Judge Braxton violated Art. V, §17 after substituting its own view of the evidence and evidentiary rulings for that of its appointed "investigator", the Trial Court.

After finding that Judge Braxton violated Art. V, §17, the Commonwealth Court then fashioned a new sanction (forfeiture of judicial office) against a duly authorized judge and a new remedy (voided final orders *ab initio*) for the disappointed party, once again ignoring the plain language in Art. V, §18 that establishes the forfeiture of, or the procedures for removal from, judicial office.

Finally, the Commonwealth Court's reasoning that its (self-created) automatic forfeiture of Judge Braxton's judicial office constitutes structural error is erroneous because the Commonwealth Court was not empowered to conclude that Judge Braxton was no longer vested with judicial authority at the time he entered his final orders.

ARGUMENT

A. The Commonwealth Court is Not Authorized to Determine Whether a Judicial Officer has Violated Pa. Const. Art. V, § 17

In the context of the Commonwealth Court appeal, Prospect raised—for the first time—its contention that when Judge Braxton assumed his position on the BRT while simultaneously completing his judicial assignments, he violated the provisions of Pa. Const. Art. V, § 17. The Commonwealth Court proceeded to investigate this allegation—through a remand to the Trial Court for fact finding—and made a determination that Judge Braxton had violated Pa. Const. Art. V, § 17. The Pennsylvania Constitution, however, provides a specific procedure to be used where any judge of this Commonwealth is accused of violating Pa. Const. Art. V. § 17—a procedure which does not allow for an intermediate appellate court, at the behest of a disappointed litigant, to make a finding of a violation, let alone to craft a remedy for such violation[3].

[3] A trial court or appellate court may investigate a party's claim of partiality, prejudice, bias, or ill-will by a judicial officer. *Reilly*, 489 A.2d at 1299. However, Prospect has never asserted any partiality, prejudice, bias or ill-will by Judge Braxton. (R. 301a.)

1. The Pennsylvania Constitution does not permit the Commonwealth Court to usurp the roles of the Judicial Conduct Board or the Court of Judicial Discipline

As set forth above, a claim that a judicial officer has violated Art. V, § 17 must be investigated by the Judicial Conduct Board, and, upon a finding of probable cause, prosecuted by the Judicial Conduct Board and adjudicated by the Court of Judicial Discipline. Pa. Const. Art. V, §18. The Court of Judicial Discipline then determines whether clear and convincing evidence supports a finding that a judicial officer has violated Art. V, §17 and, if so, the appropriate remedy for that violation, which may or may not include removal from office. Pa. Const. Art. V, §18(b)(5).

Here, the Commonwealth Court deprived Judge Braxton of the presumption of innocence and due process afforded accused jurists under the Pennsylvania Constitution. Pa. Const. Art. V, §18(b)(5). In stark contrast to the carefully selected composition of both the Judicial Conduct Board and the Court of Judicial Discipline—each body having its own distinct duties regarding judicial officers accused of violating Pa. Const. Art. V, §17—the Commonwealth Court panel improperly

acted as both ultimate arbiter and metaphorical executioner regarding Prospect's accusations against Judge Braxton.[4]

The Commonwealth Court investigated Prospect's claims—via a remand to the Trial Court for a hearing and fact finding before Judge Dozor—and then substituted its own view of the evidence and evidentiary rulings for that of its appointed "investigator", the Trial Court.[5] The Commonwealth Court then determined, without applying the "clear and convincing evidence" standard required under Pa. Const.

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[4] As discussed below, Prospect did not raise the question of whether Judge Braxton violated Pa. Const. Art. V, § 17(a) until after Prospect filed its appeal. Prospect's delay not only constitutes a waiver of its objection to Judge Braxton's ability to complete his limited work in these tax assessment appeals, but Prospect's decision to present this issue on appeal prompted the Commonwealth Court to usurp the process which Pa. Const. Art. 5, §18 establishes for suspected violations of Art. V, §17.

[5] For example, as discussed more in detail below, the Commonwealth Court heavily relied upon an affidavit of Joseph Mittleman ("Affidavit") which conflicted with live testimony provided by Judge Braxton at the hearing held before Judge Dozor. As set forth in detail below, the Affidavit was a hearsay document, submitted by Prospect after the hearing before Judge Dozor had closed, and the Taxing Authorities never had the opportunity to cross-examine Mr. Mittleman's out-of-court statements. Despite Judge Dozor's proper rejection of that hearsay Affidavit, the Affidavit constituted a cornerstone of the Commonwealth Court's decision.

Art. V, § 18 (b)(5), that Judge Braxton violated Pa. Const. Art. V, §17 and was automatically divested of his judicial office. The Pennsylvania Constitution simply does not permit the Commonwealth Court to usurp the roles of the Judicial Conduct Board and Court of Judicial Discipline—or this Court—in this fashion.

2. The Commonwealth Court's novel procedure for the investigation and adjudication of judicial misconduct creates a substantial disruption to the legal system

The Commonwealth Court's novel procedure for the investigation and adjudication of alleged judicial misconduct fails to provide due process to the accused judge and exposes litigants to uncertainty of final orders.

First, the Remand Order did not provide any direction to the Trial Court about fundamental due process for this highly unusual proceeding over which the Trial Court explicitly had no jurisdiction because the Commonwealth Court retained it. (R. 86a.) These fundamental due process issues include but are not limited to the following:

(a) Given that Prospect is accusing Judge Braxton of gross impropriety, what is the process due to Judge

Braxton by which he will be afforded adequate notice of this proceeding and an opportunity to be heard?

(b) Do the parties have the legal authority to issue subpoenas for witness testimony and subpoenas *duces tecum,* given that the Trial Court will explicitly have no jurisdiction? If so, what is the enforcement mechanism, given that the Trial Court will explicitly have no jurisdiction?

Notably, the Commonwealth Court, the Trial Court and Prospect never provided notice to Judge Braxton of the evidentiary hearing concerning Prospect's allegations of his purported judicial misconduct. (R. 293a-294a, 300a-302a, 332a-333a.)

Second, the procedures for the evidentiary hearing were unclear. The Taxing Authorities believed that the burden of proof was Prospect's because it made the allegations. (R. 293a.) The Trial Court believed that the burden of proof was left to the parties themselves and that the burdens were the same as the parties' burdens on appeal. (R. 292a.) The Commonwealth Court's ultimate decision remained silent

regarding the burden of proof and whether "clear and convincing evidence" was the legal standard.

Furthermore, the Trial Court did not understand that its role on remand was as the finder of facts. The Trial Court understood its role to be to merely receive evidence and that the Commonwealth Court would be the ultimate fact finder. (R. 312a-313a, 379a-380a.)

Finally, the Commonwealth Court's novel procedure exposes litigants to uncertainty of final orders by duly authorized judges. Here, the Commonwealth Court's decision obligates the parties—and the Trial Court—to spend significant time and expenses retrying four trials. Moreover, and unbeknownst to Carbon County, the Commonwealth Court's decision voided *ab initio* Judge Braxton's sentencing order in criminal matter. (R. 185a, 339a.)

These substantial disruptions on the legal system caused by the Commonwealth Court's novel procedure demonstrates why the Judicial Conduct Board—and not a trial court—is the appropriate body to investigate allegations of judicial misconduct, and why the Court of Judicial Discipline—and not an intermediary appellate court—is the

appropriate tribunal to determine whether Judge Braxton was no longer vested with judicial authority at the time he entered his orders.

B. The Commonwealth Court Erred in Concluding that Judge Braxton Forfeited His Judicial Office

Even assuming, *arguendo,* that the Commonwealth Court was empowered to find that Judge Braxton violated Pa. Const. Art. V, § 17(a)—which it was not—the Commonwealth Court fashioned a remedy which it was not authorized to create. Specifically, without citation to any legal authority, the Commonwealth Court declared, "A judge that violates Article V, Section 17(a) of the Pennsylvania Constitution forfeits his judicial office." (Opinion, 21.) In so doing, the Commonwealth Court effectively removed Judge Braxton from the bench.

The Pennsylvania Constitution does not state that a violation of Art. V, § 17(a) results in an automatic forfeiture of judicial office. If, following proceedings conducted pursuant to Art. V, §18 the Court of Judicial Discipline finds clear and convincing evidence that a judge has committed a violation of Art. V, § 17, it may sanction the judicial officer in a number of ways, including but not limited to removing them

from office. Pa. Const. Art. V, §18 (d)(1). The Commonwealth Court does not have this same authority.

Moreover, the Commonwealth Court relied upon inapposite cases in concluding that Judge Braxton's appointment to the BRT resulted in an automatic forfeiture of his judicial office. In *Commonwealth v. Conyngham*, 65 Pa. 76 (Pa. 1807), this Court decided the issue of whether the recorder of the Mayor's Court of Scranton was a judicial officer and whether the president judge of the Common Pleas of Luzerne County could simultaneously hold both full-time judicial positions—president judge and recorder. This Court found that the Mayor's Court of Scranton was a court of record and its members were judges, including its recorder. *Id.* 65 Pa. at 83. This Court held that the judges of the Mayor's Court of Scranton must be elected pursuant to the Pennsylvania Constitution, and to the extent the judicial offices were conferred directly by an Act of Assembly, this automatic vesting of judicial power violated the constitutional mandate for judicial elections. *Id.* This Court further found that the president judge could not have been elected to both full-time judicial positions and could not hold both positions. *Id.*

In sharp contrast, Judge Braxton did not simultaneously hold two full-time judicial appointments—he was a senior judge working on a part-time basis to complete a handful of pending matters in anticipation of judicial retirement and had been appointed to a non-judicial post on the BRT. As such, the Commonwealth Court's reliance on *Commonwealth v. Conyngham* is misplaced.

The Commonwealth Court also relied upon *Simmons v. Tucker*, 281 A.2d 902 (Pa. 1971), wherein Judge McCune, a judge of the Washington County Court of Common Pleas, was appointed and confirmed to the office of United States District Judge for the Western District of Pennsylvania. This Court decided the issue of the length of Judge McCune's successor's term in Common Pleas which was dependent upon the date of Judge McCune's vacancy. After recognizing that a state judicial office and a federal judicial office are incompatible offices, this Court did not find that Judge McCune had vacated his state judicial office position by operation of law. *Id.* at 904. Rather, not only did Judge McCune's confirmation to federal court not effectuate an automatic forfeiture of his state court judgeship, but this Court also refused to find any incompatibility where Judge McCune

resigned from his full-time state judicial office before taking the oath of his full-time federal judicial office.

Simmons, like *Conyngham,* is inapposite because Judge Braxton did not simultaneously hold two judicial offices, let alone two full-time judicial offices. Judge Braxton was a Senior Judge who had been assigned by this Court to adjudicate the tax assessment appeals involving various Prospect properties. Although full time judges are required to devote full time to their judicial duties and shall not engage in the practice of law or hold office or position of profit in the Commonwealth, there is no similar *per se* rule for part time, per diem judges. 42 Pa.C.S.A. § 3301.

Simply put, the Commonwealth Court did not—as it could not—point to any legal authority which holds that a violation of Pennsylvania Constitution Art. V, § 17 constitutes an automatic forfeiture of judicial office.[6]

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[6] Perhaps mindful of the dearth of caselaw supporting its determination, the Commonwealth Court concluded that Judge Braxton's two positions—serving as a part time, per diem judge presiding over the completion of Prospect's tax assessment appeals and allegedly serving as a member of the BRT—are incompatible offices. However, neither Prospect's appeals from the Board's decision to the Delaware Court of

1. The Elements Required to Void the Trial Court's Orders *Ab Initio* Are Lacking

Even assuming, *arguendo,* that the Commonwealth Court was empowered to determine that Judge Braxton violated Art. V, §17, as a matter of law, Judge Braxton's orders cannot be deemed void *ab initio* in the absence of structural error. The Commonwealth Court reasoned that (its self-created) automatic forfeiture of Judge Braxton's judicial office resulting from his violation of Art. V, §17 constitutes structural error. This is wrong for two reasons.

First, as discussed above, the Commonwealth Court is not the appropriate tribunal to determine whether Judge Braxton violated Art. V, §17 nor is it empowered to conclude that Judge Braxton was no longer vested with judicial authority at the time he entered his final orders.

Second, a structural error is a class of constitutional error that deprives an individual of a constitutional right where the deprivation of that right strikes at fundamental societal values. *Arizona v. Fulminante*,

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Common Pleas nor Judge Braxton's Orders are appealed to the BRT. Similarly, any decisions by the BRT are not appealed to Delaware County Court of Common Pleas.

499 U.S. 279, 294, 306-312 (1991); *Commonwealth v. Sandusky*, 77 A. 3d 663, 671(Pa. Super. 2013). Structural errors are not subject to a harmless-error analysis because they are constitutional deprivations that amount to a defect "affecting the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 309-10. Very few constitutional errors qualify as structural error. *Sandusky,* 77 A.3d at 671.

The United States Supreme Court identified the following constitutional errors as structural errors: the complete denial of counsel; the denial of the right of self-representation; the denial of the right to public trial; the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction; and the erroneous disqualification of a criminal defendant's choice of retained counsel. *Id.*, *citing United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006).

In contrast, confessions obtained in violation of the Sixth Amendment; confessions obtained in violation of *Massiah v. United States*, 377 U.S. 201 (1964); and admission of an out-of-court statement by a non-testifying codefendant are not structural errors. *Id.* at 311. *See also In re Adoption of L.B.M.*, 161 A.3d 172 (Pa. 2017)(finding the failure to appoint counsel for children in an involuntary termination of

parental rights proceeding was structural error because the children were denied the right to counsel); *Commonwealth v. Martin*, 5 A.3d 177, (Pa. 2010)(holding that the procedure for appointing capital counsel was not so extreme that it reversed the presumption of counsel's effectiveness and thus, was not structural error); *Commonwealth v. Isaac*, 205 A.3d 358, 367 (Pa. Super. 2019)(holding that a technically deficient waiver of right to counsel colloquy is not structural error like the deprivation of the right to counsel itself); *Commonwealth v. Sandusky*, 77 A. 3d 663, (Pa. Super. 2013)(holding that trial court's refusal to grant a continuance did not effectively deprive him of his Sixth Amendment right to effective assistance of trial counsel and thus, was not structural error).

None of the structural errors identified by the United States Supreme Court or this Court are at issue in these matters. *Sandusky,* 77 A.3d at 671. Relying on its own conclusion that Judge Braxton's judicial office had been forfeited, the Commonwealth Court simply adopted Prospect's argument that a structural error exists because Prospect has a right to have these cases heard by a judge validly holding his office. However, because the Commonwealth Court has no

authority to determine that Judge Braxton was not a duly authorized judge when he decided these cases, no structural error exists which supports the Commonwealth Court's voiding of Judge Braxton's orders *ab initio*.

2. Prospect waited too long to claim that Judge Braxton lacked the power to determine these tax assessment appeal matters

The Commonwealth Court held that Judge Braxton's "forfeiture" of judicial office constituted the type of error which cannot be waived. As discussed above, however, the Commonwealth Court is not authorized to conclude that Judge Braxton violated Art. V, § 17 or that he forfeited his judicial office. Therefore, because the Commonwealth Court's basis for determining that Prospect's objection to Judge Braxton's authority was not waivable cannot stand, this Court should consider the impact of Prospect's delay in raising its objection well after it was aware of Judge Braxton's service on the BRT.

Prospect admits that no later than June 24, 2019, Prospect knew that Judge Braxton was appointed to serve on the BRT. According to Prospect, it knew no later than December 18, 2019 that Judge Braxton was already sitting as a member of the BRT which was *before* he issued

his final orders in three companion cases[7]. (R. 288a-289a, 396a, 398a.) Despite having numerous opportunities to do so over an eight-month period, Prospect waited until March 6, 2020 – well after it lost at trial in all companion matters–to raise this issue—for the first time—in an Application to Vacate filed before Commonwealth Court. (R. 18a.)

It is axiomatic that a party may not raise an issue for the first time on appeal; rather, to preserve an issue for appellate review, the issue must first be presented to the trial court. In *In re F.C. III,* 607 Pa. 45, 64, 2 A.3d 1201, 1211–12 (2010), this Court observed as follows:

> Issue preservation is foundational to proper appellate review. Our rules of appellate procedure mandate that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). By requiring that an issue be considered waived if raised for the first time on appeal, our courts ensure that the trial court that initially hears a dispute has had an opportunity to consider the issue. *Lincoln Philadelphia Realty Assoc. v. Bd. or Revision of Taxes of Philadelphia*, 563 Pa. 189, 203, 758 A.2d 1178, 1186 (2000). This jurisprudential mandate is also grounded upon the principle that a trial court, like an administrative agency, must be given the opportunity to correct its errors as early as possible. *Wing v. Com. Unemployment Comp. Bd. of Review*, 496 Pa. 113, 117, 436 A.2d 179, 181 (1981).

[7] The Orders in the Community Hospital exemption appeals were docketed on January 21, 2019 (R. 406a-409a.); Orders were docketed in the North Campus appeals and CCMC tax exemption appeals on February 10, 2019. (R. 288a-289a.)

> Related thereto, we have explained in detail the importance of this preservation requirement as it advances the orderly and efficient use of our judicial resources. See generally *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 258–59, 322 A.2d 114, 116–17 (1974). Finally, concepts of fairness and expense to the parties are implicated as well. *Id.*

Prospect remained silent for more than eight months, never using any of the numerous opportunities after Judge Braxton's June 24, 2019 announcement—which included hearings, several e-mail communications with the trial court, and the filing of six briefs—to present its alleged concern to the trial court or Judicial Board of Conduct. Despite the numerous opportunities available to Prospect to object to Judge Braxton's alleged "forfeiture" of his judicial office because of his appointment to the BRT, Prospect failed to make any objection, either on the record or off the record. (R. 40a-47a, 417a-424a, 426a-433a.)

Prospect's position essentially seeks a post-final order "disqualification" or "recusal" of Judge Braxton by seeking to vacate the Trial Court's final orders, which had been entered months after Prospect became aware of the alleged basis for its disqualification request. The law is clear in Pennsylvania: "a party must seek recusal of

a jurist at the earliest possible moment, *i.e.,* when the party knows of the facts that form the basis for a motion to recuse. If the party fails to present a motion to recuse at that time, then a party's recusal issue is time-barred and waived." *Lomas v. Kravitz*, 170 A.3d 380, 390 (Pa. 2017).

In *Kravitz,* the appellants claimed they were unaware of the fiscal interests in the outcome of the case of one of the members of trial court's bench until it cross-examined the judge during the trial on attorney's fees. Admitting they were unaware of any bias or prejudice against them, the appellants maintained there was an "appearance of impropriety" by the entire bench and filed a motion for recusal of the entire Montgomery County Court of Common Pleas bench 39 days after the last day of trial but before a verdict was rendered.

This Court first noted that the appellants' motion, if granted, would effectively render all the proceedings before the presiding judge void. *Id.* at 385. The *Kravitz* Court held that a party seeking recusal or disqualification must raise the issue at the earliest possible moment. *Id.* at 389 (citing *Reilly by Reilly, v. Southeastern Pennsylvania Transportation Authority*, 489 A.2d 1291 (Pa. 1985), *overruled on*

other grounds as recognized by Gallagher v. Harleysville Mut., 617 A.2 790, 794 (Pa. Super. 1992) as an example of waiver due to untimeliness for the filing of a motion to recuse eight months after actual knowledge of the basis for motion). This Court further noted that by not timely raising its recusal issue, the appellants essentially allowed the trial to continue, causing the parties to expend additional time and money before the recusal issue was finally raised. *Lomas*, 170 at 391.

Like the appellants in *Kravitz*, Prospect requested that all the proceedings—four separate trials—before Judge Braxton be rendered void. Like the appellant in *Reilly*, Prospect waited over eight months after actual knowledge of Judge Braxton's appointment to the BRT before claiming to the Commonwealth Court that Judge Braxton should be "disqualified." Like the appellants in *Kravitz*, Prospect expended additional time and money waiting until *after* Judge Braxton made his final determinations before raising the issue. It was only after Prospect lost that the "structural error" of Judge Braxton's "forfeiture" of office became important to Prospect. Because Prospect had *actual* knowledge of the purported basis for Judge Braxton's alleged "forfeiture" since June 24, 2019, the issue is time-barred and waived under *Kravitz*, *supra*.

3. The Commonwealth Court erroneously relied on inadmissible hearsay

The Commonwealth Court engaged in a biased review of the record substituting its own view of the evidence and evidentiary rulings for that of the Trial Court's.

After the Trial Court closed the record of the evidentiary hearing on remand, Prospect attempted to inject an egregiously improper purported affidavit—the affidavit of Joseph Mittleman ("Affidavit")—into the Trial Court's record. The Trial Court properly precluded the Affidavit, but the Commonwealth Court admitted the Affidavit, which was attached to Prospect's brief, into the certified record. (R. 504a, 554a-555a, 892a.)

Judge Braxton testified that he had a discussion with Mr. Mittleman which confirmed that Judge Braxton could complete his judicial assignments in the Prospect tax appeal matters. (R. 340a-341a.) The Commonwealth Court erroneously relied on the Affidavit stating that it "refuted Senior Judge Braxton's characterization [at the evidentiary hearing] of their conversations." (Opinion, 16). The Commonwealth Court's reliance on this hearsay document is erroneous for several reasons.

First, the Affidavit is classic inadmissible hearsay offered to prove the truth of the alleged facts asserted in the Affidavit that is not subject to any hearsay exception. Hearsay is a statement a declarant made outside of "testifying at the current trial or hearing" and offered "in evidence to prove the truth of the matter asserted in the statement." Pa.R.E. 801. The declarant is the person who made the written statement. *Id.* An affidavit is inadmissible hearsay when offered for its truth, unless it fits within a hearsay exception. *Sprague v. Walter*, 656 A.2d 890, 913 (Pa. Super. 1995). The Affidavit does not meet any hearsay exceptions.

In contrast, Judge Braxton's candid and credible testimony regarding his conversations with representatives of AOPC was properly allowed as non-hearsay. The Trial Court initially sustained Prospect's hearsay objection regarding discussions Judge Braxton had with others but properly allowed Judge Braxton to testify as to his conduct and actions as a result of his conversations with AOPC representatives. (R. 339a-342a, 371a-372a.) This testimony was not hearsay because it demonstrates the basis upon which Judge Braxton relied in proceeding to complete his work on these cases—the truth of the facts asserted in

the AOPC's out-of-court statement is irrelevant to Judge Braxton's reliance on that statement. *Commonwealth v. Johnson*, 838 A. 2d 663 (Pa. 2003)(verbal acts are not offered to establish the truth of the matter asserted but to demonstrate the influence on the listener and is non hearsay).

Second, Pennsylvania does not allow consideration of purported after-discovered evidence for the purpose of impeaching the credibility of a witness. *Hornick v. Bethlehem Mines Corporation, 165 A. 36, 37 (Pa. 1933); Daniel v. Wyeth Pharmaceuticals, Inc., 15 A.3d 909, 916 (Pa. Super. 2011)*. Prospect obtained the hearsay Affidavit for the sole purpose of impeaching Judge Braxton's testimony and credibility after the hearing was over and the record was closed.

The Commonwealth Court erroneously relied on Prospect's false claim that the affiant was not "available at the time of the April 20, 2022, evidentiary hearing." (Opinion, 16.) The record simply does not support this claim. (R. 275a-274a.) Following this evidentiary hearing, the Trial Court closed the evidentiary record and asked the parties whether there was any other evidence to be presented to the Trial Court. Not once did Prospect ever indicate that it would—or even wanted to—

add any evidence—by live testimony or otherwise—regarding any AOPC employees. (R. 380a-384a.)

Third, it is well-established that an appellate court is required to accept a trial court's finding of facts and credibility determinations if they are supported by the record. *Interest of S.K.L.R.*, 256 A.3d 1108, 1127 (Pa. 2021). An appellate court should not review the record and make a finding substituting its judgment for that of the trial court. *Id.* at 1124. Appellate courts cannot reweigh the evidence, make credibility determinations, nor override trial court's credibility determinations. *Troiani Group v. City of Pittsburgh Bd. of Appeal*, 273 A.3d 43, 57 (Pa. Cmwth. 2022)(*citing In re R.J.T.*, 9 A.3d 1179, 1190 (Pa. 2010). Heavily relying on the improper Affidavit, the Commonwealth Court rejected the Trial Court's finding that Judge Braxton was authorized to wrap up his conflict cases, and instead substituted its own judgement for that of the Trial Court. (R. 345a, 354a, 361a, 499a-500a.)

Following its improper finding that Judge Braxton violated the Pennsylvania Constitution—by relying on inadmissible hearsay—the Commonwealth Court continued to needlessly engage in a biased review of the record, essentially directing the Trial Court on remand to

make certain findings which are opposite the findings and conclusions made by Judge Braxton. (Opinion, 29-33.)

Importantly, the Trial Court has been instructed that it is not to supplant the existing record in the remanded proceedings. (Opinion, 34.) The Commonwealth Court then went on to adopt from that existing record Prospect's *preferred* view of the evidence, signaling to the Trial Court that it should do the same on remand. Not only is this an improper role for the Commonwealth Court, but the Commonwealth Court's interpretation of the record is simply wrong.

It is long established that "where disputed facts must be resolved appellate courts should refrain from assuming the role of fact-finder". *Bearoff v. Bearoff Bros., Inc.,* 327 A.2d 72, 76 (Pa. 1974); *In re A.J.R.-H.,* 188 A.3d 1157, 1176 (Pa. 2018). An appellate court does not make findings of fact. *Com. v. Jackson*, 346 A.2d 746, 748 (Pa. 1975).

"As fact-finder, the trial court maintains exclusive province over matters involving the credibility of witnesses and the weight afforded to the evidence." *In re Penn-Delco Sch. Dist.*, 903 A.2d 600, 608 (Pa. Cmwlth. 2006). "The trial court's findings are entitled to great deference, and its decision will not be disturbed absent clear error." *In*

re Appeal of Prop. of Cynwyd Investments, 679 A.2d 304, 307 n.1 (Pa. Cmwlth. 1996).

Here, the Commonwealth Court rejected this established line of jurisprudence and either outright substituted—or signaled to the Trial Court on remand that it should substitute—its own judgment for the Trial Court's credibility determinations.

VII. CONCLUSION

This Court should reverse the Commonwealth Court's September 28, 2022 Order in its entirety and affirm the Trial Court's October 15, 2019 Adjudication.

Most respectfully,

/s/ Pamela A. Van Blunk
Pamela A. Van Blunk, Esquire
Attorney I.D. # 205992
Begley, Carlin & Mandio, LLP
680 Middletown Boulevard
Langhorne, PA 19047

DATED: August 11, 2023

Attorney for Appellant

CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complied with the word count limits in Pa.R.A.P. 2135 because it contains less than 14,000 words.

/s/ Pamela A. Van Blunk
Pamela A. Van Blunk, Esquire
Attorney I.D. # 205992
Begley, Carlin & Mandio, LLP
680 Middletown Boulevard
Langhorne, PA 19047
Attorney for Appellant

DATED: August 11, 2023

TAB “A”

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Appeal of Prospect Crozer LLC from the Decision of the Board of Assessment Appeals of Delaware County, PA	:	Nos. 1596 – 1599 C.D. 2019
	:	Nos. 1600 – 1629 C.D. 2019
Appeal of: Prospect Crozer LLC	:	Argued: March 10, 2022

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE STACY WALLACE, Judge
HONORABLE MARY HANNAH LEAVITT, Senior Judge

OPINION
BY SENIOR JUDGE LEAVITT FILED: September 28, 2022

Prospect Crozer LLC (Taxpayer) appeals 34 orders of the Court of Common Pleas of Delaware County (trial court) that, collectively, assessed Taxpayer's real property at $74 million for tax years 2017, 2018, and 2019.[1] On appeal, Taxpayer argues that the 34 orders are null and void because the judge issued them after he had forfeited his judicial office by assuming a position with the Philadelphia Board of Revision of Taxes (Philadelphia Tax Board). Taxpayer also challenges the orders on their merits because, *inter alia*, the trial court did not state a reason for accepting the valuation of the taxing authority's expert over that of Taxpayer's expert, which was necessary because the trial court accepted the testimony of both experts. For the reasons that follow, we vacate the trial court's orders and remand the matter.

Background

Taxpayer owns 57.7 acres of land located in Upland Borough, Delaware County, Pennsylvania. Part of this property has been developed with a 6-

[1] On May 12, 2020, the Court granted Taxpayer's application to consolidate all 34 appeals.

story hospital known as Crozer Chester Medical Center (Medical Center). The other part of the property has been developed with several buildings and is known as Crozer Theological Seminary (Seminary). For real estate tax purposes, the Medical Center and Seminary properties are assessed as 34 separate parcels. Taxpayer purchased this real property as part of its acquisition of the Crozer-Keystone Health System on July 1, 2016.

For tax years 2017 through 2019, the Delaware County Assessment Office assessed the Medical Center and Seminary properties at a combined value of $80,166,493. Taxpayer appealed the assessment as excessive, and the Delaware County Board of Assessment Appeals denied the appeal. Taxpayer then appealed to the trial court, and the Chester Upland School District (School District) intervened.

At the *de novo* hearing before the trial court, Taxpayer and the School District stipulated that with the admission of the assessments of the Delaware County Assessment Office, the School District established a *prima facie* case.[2] Reproduced Record at 1149a-83a (R.R. __). Taxpayer then submitted expert testimony and documentary evidence to challenge the Delaware County assessments, and the School District responded with its own expert and documentary evidence.

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[2] In tax assessment appeal proceedings, the taxing authority presents its assessment records into evidence to establish the assessment's presumed validity. *Songer v. Cameron County Board of Assessment Appeal*, 173 A.3d 1253, 1256 (Pa. Cmwlth. 2017). The burden then shifts to the taxpayer to present "sufficient competent, credible and relevant evidence" of the property's fair market value to overcome the assessment's presumed validity. *Id.* at 1257. If the taxpayer meets this burden, the tax assessment record loses its presumed validity. *Green v. Schuylkill County Board of Assessment Appeals*, 772 A.2d 419, 425-26 (Pa. 2001) (citing *Deitch Company v. Board of Property Assessment*, 209 A.2d 397, 402 (Pa. 1965)). If the taxing authority presents rebuttal evidence, the trial court determines the weight to be afforded the conflicting evidence. *Green*, 772 A.2d at 426.

Taxpayer's vice president for development, Frank Saidara, testified that in January 2016, Taxpayer entered into an agreement to purchase the Crozer-Keystone Health System, and the transaction closed on July 1, 2016. The transaction involved numerous real properties owned by Crozer-Keystone Health System. Saidara explained that Taxpayer and Integra Realty Resources – DFW, LLC (Integra Realty) did their "best to come up with a qualified guess" to apportion purchase prices among the properties acquired in order to calculate the real estate transfer taxes. Notes of Testimony (N.T.), 1/14/2019, at 51; R.R. 97a. With respect to the 34 properties here, they estimated a total purchase price of $78 million, which Saidara testified was "high." *Id.*

Taxpayer's real estate appraiser, Ryan Hlubb, prepared an expert report of the fair market value of the Medical Center and Seminary properties, which was submitted into evidence. The Seminary property of 36.2 acres is separated from the Medical Center property of 21.5 acres by Medical Center Boulevard. Hlubb separately valued the Medical Center and Seminary properties because they are not used together.[3]

At the hearing, Hlubb first testified about his valuation of the Seminary property. Hlubb used the sales comparison approach to establish its fair market value.[4] This approach assumes that an informed purchaser will pay no more for a

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[3] In fact, Taxpayer listed the Seminary property for sale and recently entered an option purchase agreement for $5.35 million.

[4] Fair market value, "while not easily ascertained, is fixed by the opinions of competent witnesses as to what the property is worth on the market at a fair sale." *Grand Prix Harrisburg, LLC v. Dauphin County Board of Assessment Appeals*, 51 A.3d 275, 277 (Pa. Cmwlth. 2012) (quoting *Buhl Foundation v. Board of Property Assessment, Appeals and Review of Allegheny County*, 180 A.2d 900, 902 (Pa. 1962)).

property than the cost of acquiring an existing property with the same utility.[5] Hlubb studied the Seminary property by collecting property tax records, site plans, and interviewing the property owner. He noted that one of the buildings on the Seminary property, Old Main, had been designated a historic building and cannot be demolished. The other buildings had an economic life of five years, which meant that they should be razed or put to another use.

Hlubb identified four comparable vacant land sales in Southeastern Pennsylvania, where the price per acre ranged from $150,000 to $240,000. After adjusting for topography and location, Hlubb concluded that the Seminary property had a value of $165,000 per acre, or $5,971,515, from which he subtracted the cost of razing, *i.e.*, $867,833.[6] Hlubb opined that the Seminary property had a fair market value of $5.1 million for the 2017 and 2018 tax years. Based on updated market data, Hlubb determined that the Seminary property had a value of $5.35 million for tax year 2019.

Next, Hlubb testified about the fair market value of the Medical Center, which is a 21.5-acre property with a 300-bed acute care hospital and parking facilities to accommodate 1,500 cars. The Medical Center is a "special purpose property," meaning it has "a unique physical design, special construction materials,

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[5] Hlubb did not develop a cost approach because some buildings on the Seminary property dated back to the 1840s. He also did not develop the income capitalization approach because there was no market activity to suggest that the Seminary property could be leased. N.T., 1/14/2019, at 193; R.R. 204a.

[6] To calculate the Seminary property's value, Hlubb multiplied $165,000 by the number of acres of usable land, 36.19 acres, and arrived at $5,971,515. Hlubb Land Valuation Report at 46; R.R. 1507a. From there, he subtracted razing costs, which are the estimated costs for building demolition and site grading. Using $7.50 per square foot as an appropriate unit of cost and multiplying that number by 115,711 square feet for the buildings on the property, Hlubb's estimated razing costs were $867,833. Subtracting $867,833 from $5,971,515 resulted in the value of $5,103,683, which Hlubb rounded to $5.1 million.

or [a] layout that particularly adapts its utility to the use for which it was built." N.T., 2/4/2019, at 174; R.R. 324a. The Medical Center's location in a medical campus zoning district also limits the number of potential buyers.[7]

To calculate the fair market value of the Medical Center property, Hlubb used both a sales comparison and a cost approach. He developed the income capitalization approach but only to test the validity of the other valuation approaches.

For the sales comparison approach, Hlubb identified four sales in the region that were similar to the Medical Center: Memorial Hospital, Suburban Community Hospital, Roxborough Memorial Hospital, and MedStar Southern Maryland Hospital. After making the necessary adjustments to the sales, Hlubb determined that the fair market value of the Medical Center property under the sales comparison approach was $37.5 million for tax years 2017 and 2018 and $39.2 million for tax year 2019.[8]

Hlubb also used the cost approach, which is "based on the concept that an informed investor would not willingly pay more for the subject property than would be necessary to develop an alternative providing economically equivalent benefits." *In re PP&L, Inc.*, 838 A.2d 1, 11 (Pa. Cmwlth. 2003). Hlubb testified that there are two cost methodologies. The reproduction cost method estimates the cost to construct an exact duplicate using the same materials, construction standards, design, layout and quality. The replacement cost method estimates the cost to construct a building of equal utility using modern materials and current design standards. Hlubb used the replacement cost method.

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[7] The zoning district also allows, by special exception, group daycare homes, daycare centers, parking structures and billboards.

[8] Hlubb explained that the property's fair market value had increased between 2018 and 2019 because of the improved market conditions. N.T., 2/5/2019, at 107; R.R. 446a. For 2018, he set the price per square foot at $55, and for 2019, at $57.50. N.T., 2/5/2019, at 106; R.R. 445a.

Hlubb determined a total replacement cost of $328,592,804 for 2017 and 2018 and $345,419,938 for 2019, to which he added a land value of $4.3 million for each tax year. For 2017 and 2018, he estimated depreciation at $296,061,870, and for 2019 at $309,113,292. Hlubb arrived at a cost valuation of $36.8 million for 2017 and 2018 and $39.6 million for 2019.

Reconciling his sales comparison and cost valuations, Hlubb opined that the fair market value of the Medical Center was $37.5 million for tax years 2017 and 2018 and $39.5 million for tax year 2019. Hlubb opined that the combined fair market value of the Medical Center and Seminary properties was $42.6 million for tax years 2017 and 2018 and $44.5 million for tax year 2019.

In response, the School District introduced the report of its expert real estate appraiser, John J. Coyle, III, and offered his testimony. Coyle stated that the highest and best use for the 57.7-acre property was as a hospital. He did not separate the Medical Center from the Seminary in his valuation. Coyle also used the sales comparison and cost approaches in his valuation.[9]

For the sales comparison approach, Coyle selected three hospital facilities with parking garages. The three properties were part of the Community Health System in Reading, Pennsylvania, which had been sold to Tower Health. Each building ranged from 354,887 square feet to 362,703 square feet and had sale prices ranging from $91.54 per square foot of building area, including the land, to $172.39 per square foot of building area, including the land.

After taking into consideration the differences between those sales and the subject property, Coyle opined that the entire 57.7-acre property should sell at

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[9] Coyle did not use the income approach, explaining that the income approach examines the economic benefits of property ownership in comparison to the risks of ownership and arrives at a conclusion. For a hospital business, market data was needed, but it was not available.

$105 per square foot of building area, including the land. Multiplying the 703,081 square feet of gross building area of the 57.7-acre property by $105 produced a market value of $73,823,505, which he rounded to $73.8 million.

For the cost approach, Coyle used a reproduction cost method. Coyle testified that the International Association of Assessing Officers defines "reproduction cost new" as "the cost of constructing new property reasonably identical with the given property except for the absence of physical depreciation using the same materials[,] construction standards, design, and quality of workmanship computed on the basis of prevailing prices and on the assumption of normal competency and normal conditions." N.T., 3/20/2019, at 56-57; R.R. 1012a-13a. Coyle explained that reproduction cost does not have to price an exact duplicate building, only one reasonably identical.

To develop the fair market value of the land, Coyle looked at three sales of vacant land. The first involved land in Richland Township, Bucks County, that was purchased by a hospital. The second involved a sale of land along Interstate 80 in Monroe County. The third involved land in Middletown Township, Bucks County, that was purchased by a hospital. Coyle explained that he made an upward adjustment for market conditions and a small downward adjustment for physical features. With these adjustments, the unit sale price ranged from $172,000 to $180,262 per acre. He estimated the market value of the subject land to be $175,000 per acre, which he multiplied by 57.7 acres. This produced a total land value of $10,109,750, which he rounded to $10.1 million.

To estimate the reproduction cost of the Medical Center, Coyle used Taxpayer's building plans to develop a separate price for the foundation, the substructure, the superstructure, the exterior closure for the roofing, and the interior

construction and systems. He separated the mechanical systems into plumbing, heating, ventilating, fire protection and electrical. He then did a separate breakout for the cancer center, the mechanical services building, the front parking garage, and the rear parking garage. Instead of breaking the Seminary buildings into components for evaluation as he did for the Medical Center buildings, Coyle used the same unit cost for each building. Coyle estimated a reproduction cost of $260,891,800 for all the buildings, for both the Seminary and Medical Center properties.[10]

To estimate depreciation, Coyle used two methods: the observed condition breakdown and the aged-life technique. The first method produced a depreciated reproduction cost of $64,367,600. The age-life technique produced a depreciated reproduction cost of $65,222,900. Adding a land value of $10.1 million produced valuations of $74,467,000 and $75,322,900. Reconciling those two numbers, Coyle opined that the real property had a fair market value of $75 million under the reproduction cost approach.

Reconciling his sales comparison estimate of $73.8 million with his reproduction cost estimate of $75 million, Coyle opined that the fair market value of the 57.7-acre property was $74 million for tax years 2017 and 2018 and $73 million for the tax year beginning January 1, 2019.

On cross-examination, Coyle explained that there is a commonsense approach to estimating reproduction costs and a textbook definition. He disagreed that the reproduction cost approach requires an "exact replica of everything [that is] at that property[.]" N.T., 3/18/2019, at 18; R.R. 957a. Coyle offered, for example, that in doing a reproduction cost, he would not use the cost of a new cucumber

[10] Coyle testified that the Seminary buildings should be razed because of their age.

marigold tree but, rather, the cost of some reasonable vegetation in its place. N.T., 3/18/2019, at 19; R.R. 958a.

Coyle acknowledged that he did not use a standard reproduction cost approach. Rather, he "blend[ed] the reproduction and replacement cost methods with the intent to reflect [the] cost of reproduction[.]" N.T., 3/18/2019, at 26; R.R. 965a. To do an exact duplicate for a hospital complex, he would have needed about 25,000 drawings. Instead, he used the basic information he was given and his own observations of the property. Coyle clarified that he did not do a replacement cost analysis. He explained that "a replacement cost analysis redesigns the facility and eliminates excess construction costs." N.T., 3/18/2019, at 31; R.R. 970a. For example, the size of a building could be changed or different materials used in a replacement cost analysis.

On October 11, 2019, in a five-page adjudication, the trial court concluded that the fair market value of the Medical Center and Seminary property was $74 million for tax years 2017, 2018 and 2019. The trial court found that both experts agreed that a proper appraisal of the fair market value of the properties used a reconciliation of a sales comparison and cost approach. The trial court made the following findings:

> 8. The court heard testimony from Mr. Coyle whose reconciliation of the sale comparison approach and the cost new approach which resulted in his conclusion that the total fair market value of the subject properties was $74 million for tax years 2017, 2018, and 2019.
>
> 9. The court also accepted the testimony of Mr. Hlubb, on behalf of Prospect, who testified that the value under [the] cost approach (which combined total depreciation as a reduction against total replacement cost (new) of the buildings and then added the land value) resulted in a fair market value of $36.8

> million for tax years 2017 and 2018 and a fair market value of $39.6 million for tax year 2019.
>
> 10. There did not appear to be any significant externalities which suggested a change in fair market value during the subject tax years.
>
> 11. The court concluded that the value of $74 million is a valid and accurate assessment of the fair market value of the properties.

Trial Court Adjudication at 3-4, Findings of Fact Nos. 8-11; R.R. 3056a-57a. Taxpayer appealed.

Appeal

Before this Court,[11] Taxpayer raises four issues. First, Taxpayer has filed an Application to Vacate Orders on Appeal Because of Structural Error.[12] This application asserts that the presiding judge, the Honorable John L. Braxton, forfeited his judicial office by taking a position with the Philadelphia Tax Board and, thus, lacked authority to issue the 34 orders on appeal here. Second, Taxpayer argues that the trial court did not make adequate findings of fact or explain how it determined the fair market value of Taxpayer's property after accepting the testimony of both experts. Third, Taxpayer argues that the trial court erred by accepting the methodology of the School District's expert, which used a reproduction cost analysis that is flawed and has no support in the real estate appraisal profession. Fourth,

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[11] Our review in tax assessment matters determines whether the trial court abused its discretion, committed an error of law, or reached a decision not supported by substantial evidence. *Douglass Village Residents Group v. Berks County Board of Assessment Appeals*, 84 A.3d 407, 408 n.3 (Pa. Cmwlth. 2014). Our standard of review for questions of law is *de novo*, and our scope of review is plenary. *Id.*

[12] Taxpayer filed its application to vacate on March 6, 2020, and the Court referred the application to the merits panel.

Taxpayer argues that the trial court erred by allowing the report of Integra Realty to be used to cross-examine Taxpayer's witnesses.

Article V, Section 17(a) of the Pennsylvania Constitution prohibits a judge from holding "an office or position of profit in the government of the United States, the Commonwealth or any municipal corporation or political subdivision thereof[.]" PA. CONST. art. V, §17(a). In its application to vacate, Taxpayer asserted that Senior Judge Braxton held a "position of profit" with the Philadelphia Tax Board at the same time he served as a judge on the instant tax appeals, which rendered his 34 orders null and void. The School District responded that Taxpayer's application to vacate was untimely filed and, further, that the Pennsylvania Supreme Court approved Senior Judge Braxton's completion of this judicial assignment after his appointment to the Philadelphia Tax Board

Taxpayer supported its application to vacate with affidavits and public record searches that it attached thereto. Following argument before the merits panel, the Court concluded that a record was needed on Taxpayer's assertion of incompatible service and the School District's response thereto. Accordingly, the Court entered an order remanding this matter to the trial court with directions to develop an evidentiary record on the following factual questions:

> (1) The date on which Senior Judge Braxton assumed his position on the Philadelphia Board of Revision of Taxes and began receiving compensation therefor;
>
> (2) Whether Senior Judge Braxton's continued work on the above-captioned assessment appeals of Prospect Crozer, LLC while simultaneously serving on the Philadelphia Board of Revision of Taxes was approved in writing or in some other way by the Pennsylvania Supreme Court; and
>
> (3) The date on which Prospect Crozer, LLC learned that when Senior Judge Braxton issued the orders in the above-captioned

> appeals, he had already assumed his position with the Philadelphia Board of Revision of Taxes.

Court Order, 3/17/2022.

Remand Hearing

On April 20, 2022, the trial court conducted a hearing.[13] The record consists of a stipulation of the parties; Taxpayer's public record searches and affidavits; and the testimony of Senior Judge Braxton.

Taxpayer's affidavits related to how it learned of Senior Judge Braxton's dual service. Leslie Gerstein, an attorney at the firm of Klehr, Harrison, Harvey, Branzburg, LLP, attested that she observed Senior Judge Braxton participating in hearings of the Philadelphia Tax Board in late Fall of 2019. Luke McLoughlin, an attorney at the firm Duane Morris, LLP, attested that on or about December 18, 2019, he attended a hearing at the Philadelphia Tax Board where he observed a nameplate for Senior Judge Braxton. In February 2020, McLoughlin learned from the City of Philadelphia Law Department that Senior Judge Braxton was elected to the Philadelphia Tax Board on May 16, 2019. McLoughlin then submitted a Right-to-Know Law[14] request for information on the date of Senior Judge Braxton's first paycheck for his service on the Philadelphia Tax Board;

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[13] The remand hearing related to applications to vacate filed by Taxpayer in the following consolidated appeals: *In re: Appeal of Prospect Crozer LLC from the Decision of the Board of Assessment Appeals of Delaware County, PA* (Pa. Cmwlth., Nos. 1596-1629 C.D. 2019, filed September 28, 2022); *In Re: Appeal of Prospect Crozer LLC Tax Assessment Appeals* (Pa. Cmwlth., Nos. 1630-1633 C.D. 2019, filed September 28, 2022); *In Re: Appeal of Prospect Crozer LLC from the Decision of the Board of Assessment Appeals of Delaware County, PA* (Pa. Cmwlth., Nos. 1727-1728 C.D. 2019, filed September 28, 2022); and *Chester-Upland School District v. Chester City Board of Revision of Taxes and Appeals* (Pa. Cmwlth., Nos. 386-387 C.D. 2020, filed September 28, 2022). Participating in the remand hearing were multiple taxing authorities: Chester Upland School District, Springfield School District, Springfield Township, and the City of Chester. The County of Delaware also appeared at the hearing.

[14] Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

McLoughlin received that information on June 5, 2020. Alan Kessler, also an attorney with Duane Morris, LLP, attested that in January 2020, he tasked the firm's librarian with determining when Senior Judge Braxton began serving on the Philadelphia Tax Board, but the librarian was unsuccessful. Kessler also attested that in January 2020, he learned from Gerstein that she had seen Senior Judge Braxton participating in a hearing before the Philadelphia Tax Board in the Fall of 2019.

Taxpayer also submitted a record certification from Geoff Moulton, the Court Administrator of Pennsylvania, dated March 20, 2020. That certification stated as follows:

> After an examination by the Administrative Office of Pennsylvania Courts ("AOPC") of its records pertaining to the time period from 2017 through 2020, as well as an examination of the records of the Prothonotary of the Supreme Court of Pennsylvania, I hereby certify there is no record of entry of an order, decision, or other determination of the Supreme Court of Pennsylvania, the Chief Justice, or any other justice, or AOPC approving simultaneous service, by the Honorable John L. Braxton on the Philadelphia Board of Revision of Taxes and as a senior judge within Pennsylvania's Unified Judicial System. Any such record or entry would be in my custody as Court Administrator of Pennsylvania.

N.T., 4/20/2022, at 29, Exhibit C-7.

The School District offered the testimony of Senior Judge Braxton. He testified that in or around June 2017, he was assigned the instant tax matter and all related tax appeals. He stated that he was elected to the Philadelphia Tax Board on May 16, 2019.

On June 24, 2019, while he was presiding over another one of Taxpayer's related tax appeals,[15] Senior Judge Braxton informed the parties that he was retiring from judicial service because he "had been elected by the Board of Judges of Philadelphia County" to the Philadelphia Tax Board. N.T., 4/20/2022, at 63. Senior Judge Braxton testified that he did not know "the actual date" that he began sitting on the Philadelphia Tax Board, explaining that he had to go through orientation before hearing cases. *Id.* Senior Judge Braxton agreed that he received his first compensation for his position with the Philadelphia Tax Board on June 16, 2019. Acknowledging that he did not discuss his compensation with the parties on June 24, 2019, Senior Judge Braxton explained that by telling the parties of his appointment, he was telling them that he was "being paid." *Id.* at 84.

Senior Judge Braxton testified that he advised Joe Mittleman, Director of Judicial District Operations for the AOPC, that he had been appointed to the Philadelphia Tax Board and talked about "whether or not [he] should finish things or just walk away." N.T., 4/20/2022, at 65, 68. Senior Judge Braxton retired from judicial service on January 24, 2020.

On May 4, 2022, the trial court issued a report on the factual questions set forth in this Court's March 17, 2022, order.

Regarding the date on which Senior Judge Braxton assumed his position on the Philadelphia Tax Board and began receiving compensation therefor, the trial court summarized the evidence as follows. Both the testimony of Senior Judge Braxton and the Declaration of the Director of Human Resources for the City of Philadelphia established the date of Senior Judge Braxton's appointment to the

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[15] *See Chester-Upland School District v. Chester City Board of Revision of Taxes and Appeals* (Pa. Cmwlth., Nos. 386-387 C.D. 2020, filed September 28, 2022).

Philadelphia Tax Board as May 19, 2019. The parties stipulated that Senior Judge Braxton received his first paycheck from the Philadelphia Tax Board on June 16, 2019. The trial court credited Senior Judge Braxton's testimony that he began hearing cases as a member of the Philadelphia Tax Board sometime in the Fall of 2019 but did not remember the exact date because he had to undergo orientation before hearing cases.

Regarding the question of whether Senior Judge Braxton's work on Taxpayer's assessment appeals, while simultaneously serving on the Philadelphia Tax Board, had been approved by the Pennsylvania Supreme Court, the trial court summarized the evidence as follows. A March 2020 record certification from Geoff Moulton, the Court Administrator of Pennsylvania, stated that "there is no record or entry of an order, decision, or other determination of the Supreme Court of Pennsylvania, the Chief Justice or any other Justice, or AOPC approving simultaneous service, by [Senior Judge Braxton], on the [Philadelphia Tax Board] and as a senior judge within Pennsylvania's Unified Judicial System." Trial Court Op., 5/4/2022, at 4, Finding of Fact No. 7.b. Senior Judge Braxton submitted his resignation as a senior judge in late 2019 and officially ended his judicial service on January 24, 2020. The trial court credited Senior Judge Braxton's testimony that he informed Mittleman of his election to the Philadelphia Tax Board; the complex nature of his judicial assignments; that he could finish up those cases or walk away; and that Mittleman told him to finish his judicial assignments. Senior Judge Braxton's communications with the AOPC were oral not written.

Regarding the date that Taxpayer learned that Senior Judge Braxton adjudicated its assessment appeals after assuming his position on the Philadelphia Tax Board, the trial court summarized the evidence as follows. On June 24, 2019,

Senior Judge Braxton informed counsel for the parties that he was "going to be sitting in Philadelphia as a member of the Board of Revision of Taxes[.]" *Id.* at 6, Finding of Fact No. 8.c. Senior Judge Braxton advised the parties that "as soon as I leave here, I'm going to do that other post. And that's why I can't linger here. I have to get this matter done. And the AOPC, the Supreme Court wants me to just finish this and then I will go on to my next assignment . . . . I'm going to be sitting in Philadelphia as a member of the Board of Revision of Taxes over there." *Id.* at 6, Finding of Fact No. 8.d. The affidavits from Gerstein, McLoughlin, and Kessler, as well as the email exchange between McLoughlin and the Philadelphia City Law Department, demonstrated that Senior Judge Braxton began hearing cases for the Philadelphia Tax Board in the Fall of 2019. *Id.* at 6, Finding of Fact No. 8.b.

The trial court credited Senior Judge Braxton's testimony that he timely notified representatives of the AOPC of his appointment to the Philadelphia Tax Board and received approval to complete his outstanding judicial assignments. Trial Court Op., 5/4/2022, at 7, Finding of Fact No. 10.

On or about May 4, 2022, Taxpayer submitted supplemental findings of fact to the trial court to address new evidence. Specifically, it sought to admit into evidence an email exchange with the AOPC (Exhibit C-19) and a copy of an affidavit from Mittleman (Exhibit C-20), which refuted Senior Judge Braxton's characterization of their conversations.[16] Taxpayer explained that neither was available at the time of the April 20, 2022, evidentiary hearing. In response, the School District moved to strike and preclude Taxpayer's submissions.

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[16] As part of his duties as Director of Judicial District Operations, Mittleman facilitated the assignment of senior judges to local districts. Mittleman Affidavit, ¶¶1-2.

By order dated May 4, 2022, the trial court granted the School District's motion as to Exhibit C-19. It did so for the stated reason the record was closed at the end of the hearing on April 20, 2022, and Taxpayer had not requested to keep the record open for an affidavit from Mittleman. Trial Court Order, 5/4/2022, at 2.

On May 5, 2022, Taxpayer sought reconsideration, explaining that the Mittleman affidavit only became available on May 4, 2022. Further, the trial court's order striking Exhibit C-19 did not refer to Exhibit C-20.

On May 18, 2022, the trial court denied reconsideration. It clarified its order of May 4, 2022, and struck both Exhibits C-19 and C-20, for the stated reason that the record closed on April 20, 2022. Accordingly, the trial court refused to supplement the record with after-discovered evidence.

Following the transmittal of the trial court's order to this Court, the parties filed supplemental briefs.

Analysis

I. Senior Judge Braxton's Incompatible Service on the Philadelphia Tax Board

Taxpayer asserts that Senior Judge Braxton was precluded from serving simultaneously as a senior judge and a member of the Philadelphia Tax Board. Article V, Section 17(a) of the Pennsylvania Constitution prohibits a judge from holding another "position of profit" with any Federal, State or municipal body. Taxpayer contends that as of June 16, 2019, when Senior Judge Braxton began receiving compensation for his position on the Philadelphia Tax Board, he forfeited his authority to serve as a judge in Taxpayer's tax appeals. His issuance of the 34 orders on October 11, 2019, constituted a structural error, which requires those orders to be vacated and the tax appeals remanded for a decision by another judge.

The School District responds that Taxpayer waived this challenge to the 34 orders because it knew of this alleged structural error on June 24, 2019, when Senior Judge Braxton informed the parties of his appointment to the Philadelphia Tax Board. However, Taxpayer waited until March of 2020 to file its application to vacate. Taxpayer's failure to seek Senior Judge Braxton's disqualification at the earliest opportunity precludes it from raising the issue at the appellate stage of the proceeding. Alternatively, the School District argues that Senior Judge Braxton was directed to complete his judicial *per diem* assignment notwithstanding his appointment to the Philadelphia Tax Board.

A structural error is "a constitutional violation affecting the 'framework within which the trial proceeds, rather than simply an error in the trial process itself[.]'" *Commonwealth v. Baroni*, 827 A.2d 419, 420 (Pa. 2003) (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). Structural errors "infect the entire trial process." *Interest of J.M.G.*, 229 A.3d 571, 587 (Pa. 2020) (Todd, J., concurring) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993)). Structural errors are unlike "'trial error,' because trial errors may 'be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.'" *Interest of J.M.G.*, 229 A.3d at 586-87 (Todd, J., concurring) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006)).[17] Courts address structural errors primarily in criminal cases, but structural errors may also taint a civil case. *Interest of J.M.G.*, 229 A.3d at 587 n.2 (Todd, J., concurring) (citing *Bruckshaw v. Frankford Hospital of City of Philadelphia*, 58 A.3d 102, 113-14 and n.6 (Pa. 2012) (court officer's removal of presumptively

[17] For trial errors, a reviewing court "'can make an intelligent judgment' about whether the error might have affected the fact-finder." *Interest of J.M.G.*, 229 A.3d at 587 (Todd, J., concurring) (quoting *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988)).

competent juror without notice to the court or the parties was error for which prejudice was presumed, "suggestive" of structural error)).

The Pennsylvania Constitution prohibits a federal office holder from holding state office, and it authorizes the General Assembly to identify other incompatible offices. Article VI, Section 2 states:

> No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible.

PA. CONST. art. VI, §2. Pursuant to Article VI, Section 2, the General Assembly has declared, for example, that one cannot simultaneously hold the office of magisterial district judge and the office of prothonotary or clerk of court. Section 4 of the Act of May 15, 1874, P.L. 186, 65 P.S. §4. *See also Commonwealth ex rel. Fox v. Swing*, 186 A.2d 24, 25 (Pa. 1962).

Regarding judges, the Pennsylvania Constitution was amended in 1968 to specify positions incompatible with a judicial office. Article V, Section 17 of the Pennsylvania Constitution states, in relevant part, as follows:

> (a) Justices and *judges* shall devote full time to their judicial duties, and *shall not* engage in the practice of law, hold office in a political party or political organization, or *hold an office or position of profit in the government of the United States, the Commonwealth or any municipal corporation or political subdivision thereof*, except in the armed service of the United States or the Commonwealth.
>
> (b) Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court. Justices of the peace shall be governed by rules or canons which shall be prescribed by the Supreme Court.

PA. CONST. art. V, §17(a)-(b) (emphasis added). Article V, Section 17 illustrates "a special constitutional intention to maintain the purity of the bench" by singling "out the judiciary for pointed instructions on judicial comportment." PENNSYLVANIA CONSTITUTIONAL CONVENTION 1967-68, REFERENCE MANUAL NO. 5, Part IV, §3, at 148 (1968). Our Supreme Court has explained that Article V, Section 17(a) prohibits a Pennsylvania judge from simultaneously serving as a federal court judge. *Simmons v. Tucker*, 281 A.2d 902, 904 (Pa. 1971). It is not a matter of discretion for the Pennsylvania judge.

In *Simmons*, the Honorable Barron P. McCune, a judge of the Court of Common Pleas of Washington County, was nominated to the position of United States District Judge for the Western District of Pennsylvania. His appointment was confirmed by the United States Senate on December 16, 1970, and his commission was issued on December 18, 1970. On December 28, 1970, Judge McCune resigned from state judicial service, effective January 4, 1971. A question was raised about the date the vacancy occurred for purposes of electing his replacement. A would-be candidate claimed that the vacancy occurred on December 18, 1970, when Judge McCune received his commission as a federal judge. The Pennsylvania Supreme Court disagreed. Noting that one does not hold office as a federal judge until the oath of office is administered, the Supreme Court concluded that there was no incompatibility because Judge McCune resigned 18 days before his federal office began on January 22, 1971. Nevertheless, the Supreme Court agreed that under Article V, Section 17(a), "the offices of Common Pleas judge and federal district judge are incompatible." *Simmons*, 281 A.2d at 904.

An "office of profit" is one that pays compensation to the office holder. The office of "recorder for the Mayor's Court" was held to be an "office of profit"

that a judge could not hold. *Commonwealth v. Conyngham*, 65 Pa. 76, 83-84 (1870). The Philadelphia Tax Board is a municipal corporation or political subdivision of the Commonwealth, and a member of the Philadelphia Tax Board receives an annual salary of $70,000. THE PHILADELPHIA CODE §20-304(7) (2020). A member of the Philadelphia Tax Board holds a "position of profit." PA. CONST. art. V, §17(a). In sum, the offices of a "common pleas judge" and member of the Philadelphia Tax Board are "incompatible." *Simmons*, 281 A.2d at 904; *Conyngham*, 65 Pa. at 84.

Further, the "applicable rule, which is generally held in all American jurisdictions, holds that where a single person holds two incompatible offices, the acceptance of the second *ipso facto* vacates the first." *Fauci v. Lee*, 38 Misc. 2d 564, 567 (N.Y. Sup. Ct. 1963); *see also Commonwealth ex rel. Crow v. Smith*, 23 A.2d 440, 442 n.3 (Pa. 1942) (stating that an official holding two incompatible offices is required to abandon one of them); *DeTurk v. Commonwealth*, 129 Pa. 151, 160 (1889) (noting common law rule that where incompatible offices are derived from common source, acceptance of the second automatically vacates the first); *Opinion of the Justices*, 647 A.2d 1104, 1105 (Del. 1994); *Stubbs v. Lee*, 64 Me. 195, 198 (1874); *Scott v. Strobach*, 49 Ala. 477, 485 (1873).

It was structural error for Senior Judge Braxton to issue the adjudications on Taxpayer's appeals while he also served on the Philadelphia Tax Board. This structural error cannot be waived implicitly or explicitly, or by agreement of the parties. It is not unlike the well-established principle that parties cannot agree to confer subject matter jurisdiction on a tribunal where it does not exist. *Greenberger v. Pennsylvania Insurance Department*, 39 A.3d 625, 629 n.5 (Pa. Cmwlth. 2012). A judge that violates Article V, Section 17(a) of the Pennsylvania Constitution forfeits his judicial office.

Litigants have a right to have decisions made by a judge validly holding his office. A trial conducted by a judge that lacks capacity is tainted by structural error which cannot be waived. *See generally Commonwealth v. Martin*, 5 A.3d 177, 218-19 (Pa. 2010) (Saylor, J., concurring);[18] *In re Adoption of K.M.G.*, 240 A.3d 1218, 1235 (Pa. 2020) (failure to appoint an attorney to represent child's legal interests constituted a structural error that was non-waivable).

That a judge's incompatible service may also implicate the Code of Judicial Conduct does not mean this Court cannot consider how a judge's incompatible service affects the constitutionality of a trial. As our Supreme Court has explained, courts have a "solemn obligation to protect, safeguard and uphold [constitutional] rights." *Commonwealth v. Koehler*, 229 A.3d 915, 936 (Pa. 2020). This Court is required to examine the limits imposed by any constitutional provision, and if there is a violation, grant appropriate relief.

The School District argues that Article V, Section 17(a) applies only to commissioned judges and justices, not to senior judges. It notes that Article V, Section 17(a) requires judges to work "full time," but senior judges work part-time.

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[18] Justice Saylor observed that there is a split of authority among jurisdictions about whether a structural error can be waived. *Compare Mains v. Commonwealth*, 739 N.E.2d 1125, 1128 n.3 (Mass. 2000) ("Our cases have held that even structural error is subject to the doctrine of waiver."), *with State v. Aragon*, 210 P.3d 1259, 1262 (Ariz. 2009) (declining to apply waiver principles to structural error). Justice Saylor explained that

> [o]n the one hand, structural error, by definition, impacts the basic integrity of the trial, which must be assured to maintain public confidence in the criminal justice system. On the other hand, there is the possibility, if all structural errors are treated as non-waivable, for the defense to omit an objection to assure a reversal on appeal in the absence of an acquittal.

Martin, 5 A.3d at 218 (Saylor, J., concurring) (quoting *Reid v. State*, 690 S.E.2d 177, 181 (Ga. 2010) (reflecting the position that structural error is waivable)). In his concurrence, Justice Saylor favored a fact-based assessment of the particular structural error to decide whether the error was waivable.

Further, magistrate judges are permitted to have a law practice and other employment.[19] To support its assertion that senior judges are exempt from the prohibition on dual service, the School District directs the Court to *In re Cain*, 590 A.2d 291 (Pa. 1991).

In *In re Cain*, a senior judge was convicted of a violation of the Hobbs Act, 18 U.S.C. §1951. The Judicial Inquiry and Review Board filed a petition to remove the senior judge because his conviction rendered him ineligible to serve. The question was whether the mandate that a convicted judge be removed applied to senior judges. *Former* Article V, Section 18(*l*) of the Pennsylvania Constitution stated:

> A justice, judge or justice of the peace convicted of misbehavior in office by a court, disbarred as a member of the bar of the Supreme Court or removed under this section eighteen *shall forfeit automatically his judicial office* and thereafter be ineligible for judicial office.

Former PA. CONST. art. V, §18(*l*) (emphasis added). The Supreme Court explained that "judicial office" referred to the duties of a "justice, judge or justice of the peace," which are performed by senior judges. *In re Cain*, 590 A.2d at 292. Accordingly, the senior judge's conviction automatically rendered him ineligible for judicial office.

The School District contends that had "justice" and "judge" included senior judges within the ambit of *former* Section 18(*l*), then the Supreme Court

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[19] In *In re Murphy*, 10 A.3d 932, 938 (Ct. Jud. Disc. 2010), the Court of Judicial Discipline of Pennsylvania explained that in Article V, Section 17(b) of the Pennsylvania Constitution, "justices and judges" are treated separately from "justices of the peace." PA. CONST. art. V, §17(b) ("Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court. Justices of the peace shall be governed by rules or canons which shall be prescribed by the Supreme Court.").

would not have had to consider whether the term "judicial office" included the work of a senior judge, as it did in *In re Cain*. It notes that Article V, Section 17(a) does not expressly refer to "senior judges," and it does not use the phrase "judicial office."

When construing the Constitution, "[o]ur ultimate touchstone is the actual language of the Constitution itself." *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (citing *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006)). Further, "because the Constitution is an integrated whole, effect must be given to all of its provisions whenever possible." *Jubelirer*, 953 A.2d at 528 (citing *Cavanaugh v. Davis*, 440 A.2d 1380, 1382 (Pa. 1982)). Article V, Section 17(a) applies to "judicial duties," and senior judges assume judicial duties. *In re Cain* established that it is the work performed, not the appellation that is determinative. Following that logic, we conclude that Article V, Section 17(a) applies to senior judges. Further, had the proscription against incompatible service not applied to senior judges, that exemption would have been provided in Section 17(b), as it was for magistrate judges. Because senior judges perform "judicial duties," they are subject to Article V, Section 17(a).

The School District argues that the AOPC authorized Senior Judge Braxton to complete his outstanding judicial assignments while simultaneously serving on the Philadelphia Tax Board. Taxpayer responds that Senior Judge Braxton's testimony about Mittleman's out-of-court statements were hearsay. Indeed, Taxpayer's hearsay objection was sustained by the trial court, which instructed Senior Judge Braxton "not to testify as to what any third party told him." N.T., 4/20/2022, at 67. Contrary to its own ruling, the trial court then used those hearsay statements to find that Mittleman "authorized" Senior Judge Braxton "to complete his conflict cases[and] the present matters[.]" Trial Court Op., 5/4/2022,

at 5, Findings of Fact No. 7.i. The School District responds that Mittleman's statements to Senior Judge Braxton were properly considered because they constituted verbal acts, *i.e.*, the AOPC orally authorized his continued judicial service after assuming his position with the Philadelphia Tax Board by a verbal act.

"[A] 'verbal act' is a statement which creates legal rights, duties or responsibilities offered for their legal significance alone." *Municipality of Bethel Park v. Workmen's Compensation Appeal Board (Hillman)*, 636 A.2d 1254, 1256 n.2 (Pa. Cmwlth. 1994). The statements are not offered to establish the truth of the matter asserted but, rather, for some other relevant purpose.[20]

We reject the School District's argument for several reasons. First, the question was whether the Supreme Court, or one of its justices, had directed Senior Judge Braxton to serve as a senior judge notwithstanding the inception of his service on the Philadelphia Tax Board. Second, the School District did not establish that Mittleman, an employee of the AOPC, had authority to approve service on the Philadelphia Tax Board by a senior judge. Without that foundation, Mittleman's so-

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[20] Treatise authority describes "verbal acts" as follows:

> Oral or written expressions of offer and acceptance, or the exchange of promises that create a contract are examples. The dispositive provisions of a will are verbal acts, although statements of fact in a will may be hearsay. Statements made by the parties to a conspiracy in forming that conspiracy are verbal acts. Statements made in an attempt to corrupt a juror or intimidate a witness are verbal acts. A statement giving notice is a verbal act, and in a case in which it is relevant whether a party had received notice, evidence of the statement containing the notice is not hearsay. Instructions may be verbal acts.
>
> The term "verbal act" also applies to statements that accompany conduct and explain the intent of that conduct.

Leonard Packel & Anne Bowen Poulin, *Nonhearsay – Statements Offered as Verbal Acts*, 1 WEST'S PA. PRAC., EVIDENCE §801-2 (4th ed. 2021) (footnote omitted).

called verbal acts are irrelevant. In any case, the AOPC cannot waive the Pennsylvania Constitution.

The School District next argues that the Supreme Court's Rules of Judicial Administration regulate senior judges, and those rules do not bar a senior judge from extra-judicial employment. Taxpayer responds that the Rules of Judicial Administration cannot trump the Constitution. *See* PA. CONST. art. V, §10(c) (authorizing Supreme Court to prescribe general rules of practice, procedure and administration that are consistent with the Constitution). We agree. The Rules of Judicial Administration must be read in conjunction with the express constitutional prohibition against judges "hold[ing] an office or position of profit in the government of the United States, the Commonwealth or any municipal corporation or political subdivision thereof[.]" PA. CONST. art. V, §17(a).[21]

Finally, the School District argues that Taxpayer has waived its constitutional challenge to the tax proceeding because it did not move to disqualify Senior Judge Braxton until after it received an unfavorable result on its tax appeals. *Reilly v. Southeastern Pennsylvania Transportation Authority*, 489 A.2d 1291, 1300 (Pa. 1985). The School District argues that the recusal of a jurist must be sought "when the party knows of the facts that form the basis for the motion to recuse," *Lomas v. Kravitz*, 170 A.3d 380, 390 (Pa. 2017), and facts that "should have been

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[21] Taxpayer also argues that Senior Judge Braxton's position with the Philadelphia Tax Board was incompatible with his temporary assignment to the trial court to adjudicate tax assessment appeals and cites to Canon 3.1 of the Pennsylvania Code of Judicial Conduct, CODE OF JUDICIAL CONDUCT CANON 3.1 (requiring judges to regulate their extrajudicial activities to minimize risk of conflict with their judicial activities). The Code of Judicial Conduct, however, is not "intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court." CODE OF JUDICIAL CONDUCT, Preamble (7). Should a judge violate the standards of conduct, that is a matter for the Pennsylvania Supreme Court to address pursuant to Article V, Section 10(a) of the Pennsylvania Constitution, PA. CONST. art. V, §10(a) (relating to exercise of general supervisory and administrative authority over all courts).

known" are to be considered in determining timeliness. *Goodheart v. Casey*, 565 A.2d 757, 764 (Pa. 1989). Where the disqualification is requested after judgment is entered, then it must be shown that the facts could not have been presented earlier "in the exercise of due diligence." *Reilly*, 489 A.2d at 1301.

Here, Taxpayer acknowledges that it learned of Senior Judge Braxton's appointment to the Philadelphia Tax Board on June 24, 2019, when Senior Judge Braxton stated:

> The good Judges of the City of Philadelphia have elected me to another post to which I'm going to leave – *as soon as I leave here, I'm going to do that other post.* And that's why I can't linger here. I have to get this matter done. And the AOPC, the Supreme Court wants me to finish this and then I will go on to my next assignment, which will be something that probably Mr. Kessler is well familiar with. *I'm going to be sitting in Philadelphia as a member of the Board of Revision of Taxes over there.*

Taxpayer Application to Vacate Orders, Exhibit H; N.T., 6/24/2019, at 219 (emphasis added). Taxpayer reasons that there is a difference between an appointment to an incompatible position and service thereon, as the Supreme Court explained in *Simmons*, 281 A.2d. 902. We agree. Senior Judge Braxton did not state that his duties for the Philadelphia Tax Board would overlap with his duties as a member of the judiciary. To the contrary, his statement implied that he would complete his judicial duties before he began his service on the Philadelphia Tax Board.

The affidavits showed that Taxpayer learned through counsel that Senior Judge Braxton's nameplate appeared in the Philadelphia Tax Board's hearing room on December 18, 2019. In late January 2020, Taxpayer's counsel learned that Senior Judge Braxton was observed hearing cases on the Philadelphia Tax Board in

the Fall of 2019. In February of 2020, Taxpayer's counsel learned that Senior Judge Braxton had been elected to the Philadelphia Tax Board on or about May 16, 2019, but could not confirm when Senior Judge Braxton began his service or started to receive compensation. On June 5, 2020, in response to a Right-to-Know request, Taxpayer's counsel learned that Senior Judge Braxton began receiving compensation for his service on the Philadelphia Tax Board as of June 16, 2019.

In *Lomas*, 170 A.3d at 390, the developer's recusal motion, filed one month after the relevant facts had been disclosed, was rejected as untimely filed. Here, Taxpayer did not begin to learn of simultaneous service until December 2019, and did not receive firm confirmation of Senior Judge Braxton's compensation for service with the Philadelphia Tax Board until June 5, 2020.

Taxpayer exercised due diligence. It learned in December of 2019 that Senior Judge Braxton may have started his position at the Philadelphia Tax Board before completing his judicial assignments on Taxpayer's tax appeals. Taxpayer then took prompt and reasonable steps to ascertain the facts before filing an application to vacate in March of 2020. Given this history, we reject the School District's contention that Taxpayer's application to vacate was untimely filed. The facts had to be determined before appropriate relief could be sought.

More to the point, *Reilly* and *Lomas* govern motions to disqualify, but Taxpayer did not file a motion to disqualify Senior Judge Braxton. Rather, it filed an application to vacate the 34 orders that are the subject of this appeal on the basis that the entire proceeding was unconstitutional. The presiding judge forfeited his judicial office by June 16, 2019, when he assumed a "position of profit" with the Philadelphia Tax Board. The 34 orders that are the subject of this appeal were issued on October 19, 2019, and, thus, are null and void.

We reject the School District's waiver argument. Taxpayer filed an application to vacate 34 orders on grounds that they were null and void; it did not file a motion to recuse.[22] In any case, Taxpayer acted with due diligence to investigate if and when Senior Judge Braxton began to work for the Philadelphia Tax Board and thereby forfeited his judicial office.

Senior Judge Braxton forfeited his judicial office no later than June 16, 2019, when he began to receive compensation in his "position of profit" on the Philadelphia Tax Board. PA. CONST. art. V, §17(a). The 34 orders he issued in this case are nullities because they were issued after he forfeited his judicial office. Accordingly, we grant Taxpayer's application and vacate the trial court's orders.

II. Assessment Adjudications

Taxpayer argues that the trial court erred by omitting an explanation of the reasons for its decision. In tax assessment appeals, the trial court weighs the testimony and valuations provided by the experts and arrives at a valuation based on the credibility assigned to their opinions. Here, the trial court deemed both experts credible but relied entirely on Coyle's valuation without explanation. Taxpayer contends that the trial court's adjudications are inadequate as a matter of law.

The School District responds that Taxpayer simply challenges the weight assigned to each expert's opinion by the trial court. The School District acknowledges that the trial court was required to give reasons for its decision. *See Westinghouse Electric Corporation v. Board of Property Assessment, Appeals and Review of Allegheny County*, 652 A.2d 1306, 1312 (Pa. 1995) (stating that "[i]n

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[22] In *Lomas*, the developer's recusal motion, filed one month after the relevant facts had been disclosed, was rejected as untimely filed. Here, the facts were not finally confirmed until June 5, 2020, after the application to vacate was filed on the basis of information received from public and private sources.

making a determination in a tax assessment appeal, the trial court must state the basis and reasons for its decision"). However, the School District argues that the trial court's adoption of Coyle's opinion of fair market value constitutes the explanation.

In a tax assessment appeal, the trial court hears the matter *de novo* and is the finder of fact. *Grand Prix Harrisburg*, 51 A.3d at 280. As such, the trial court has exclusive province over all matters of credibility and evidentiary weight. Additionally, the trial court has the discretion to choose which valuation method to use to value a particular property. *Id.* The trial court's findings will not be disturbed if they are supported by substantial evidence in the record. *Herzog v. McKean County Board of Assessment Appeals*, 14 A.3d 193, 200 (Pa. Cmwlth. 2011). Nevertheless, "the trial court must state the basis and reasons for its decision." *Green*, 772 A.2d at 433 (quoting *Westinghouse Electric Corporation*, 652 A.2d at 1312). Additionally, if an appraiser uses an invalid methodology, his opinion is not competent and cannot support a valuation. *Grand Prix Harrisburg*, 51 A.3d at 280.

Here, the trial court found that both experts agreed that the proper way to value the Medical Center and Seminary properties was by a replacement cost method. It stated that "[w]hile [the experts] differed in some details, both experts agreed that a proper appraisal of the fair market value of the properties entailed an evaluation through a cost of replacement analysis." Trial Court Adjudication, 10/11/2019, Finding of Fact No. 7; R.R. 3056a. This is inaccurate. Coyle used reproduction cost, not replacement cost, to value the Medical Center and Seminary properties. Further, Taxpayer challenges Coyle's reproduction cost approach as *sui generis* and without support in the appraisal profession.

The trial court accepted Coyle's testimony that the fair market value of Taxpayer's real property was $74 million for the 2017 and 2018 tax years, and $73

million for the 2019 tax year. The trial court also accepted Hlubb's testimony that this property's "fair market value was $36.8 million for tax years 2017 and 2018 and . . . $39.6 million for tax year 2019." Trial Court Adjudication, 10/11/2019, Finding of Fact No. 9; R.R. 3056a. In actuality, Hlubb opined that the fair market value was $42.6 million for 2017 and 2018 and $44.5 million for tax year 2019. Inaccuracies aside, the trial court did not explain how Hlubb's testimony could be accepted but not used, or why it chose to use $74 million for all three tax years. Likewise, the trial court mis-stated Coyle's opinion for 2019; it was $73 million, not $74 million.

To set his fair market value of the Medical Center and Seminary properties, Coyle blended elements of reproduction cost and replacement cost methodology. Hlubb used replacement cost in his cost evaluation, which is authorized by the Appraisal Institute. By contrast, Coyle cited the International Association of Assessing Officers, but Coyle is not an assessor. The disciplines of assessor and appraiser are different. The trial court did not consider, and resolve, the differences in the cost approaches used by each expert, including the different methods used to depreciate the cost valuations.

The School District contends that because the trial court did not depart from Coyle's opinion of value, no additional explanation is required. In support, it cites *Westinghouse Electric Corporation*, 652 A.2d 1306. In that assessment appeal, the trial court found all the expert testimony competent. In the end, however, the trial court made its own finding of fair market value, essentially "split[ting] the difference" between the two experts' opinions of value. *Id.* at 1311. The Supreme Court affirmed, explaining that where a trial court is presented with conflicting testimony of equally credible experts, it may choose a fair market value between the two values. *Id.* at 1312. *Westinghouse Electric Corporation* is inapposite. Here,

the trial court did not reject both experts' valuations of the property; rather, the trial court accepted both.

Further, the School District overlooks this Court's precedent that, although a trial court may deem one expert more credible than the other, it must explain that decision. *See Grand Prix Harrisburg*, 51 A.3d at 282. In *Grand Prix Harrisburg*, the taxpayer challenged the 2009 real estate assessment of its property, which was a hotel. The taxpayer's expert prepared an appraisal report of the property's fair market value using the sales comparison approach and the income approach. By combining the two approaches, the taxpayer's expert settled on a fair market value of $9 million for the property. The taxing authorities' expert determined that the property had a value of $13,150,000 using the income approach and a value of $12,322,000 using the sales comparison approach. The trial court held that the property's fair market value was $13,150,000, crediting the taxing authorities' expert that a buyer would rely on the income of a property when purchasing a hotel.

On appeal, the taxpayer challenged the trial court's stated reasons for its determination. The critical difference between the two experts was the capitalization rate that each chose to produce an income valuation, which difference the court did not address. Likewise, the trial court did not address the difference in the experts' sales comparison approach valuations or the admission by the taxing authorities' expert that the income approach value was too high. Concluding that the trial court needed to address these issues, we vacated the order and remanded the matter.

Here, the trial court accepted the testimony of both experts, even though each expert used different methods and sources to develop their expert valuations.

The trial court did not address Coyle's blending of the reproduction cost and replacement cost methodologies or Taxpayer's challenge thereto.

The trial court did not explain the basis of its fair market value of $74 million or how it resolved the conflict between the expert opinions and methodologies. This will be required in the adjudication issued upon remand. Effective judicial review of an assessment requires a clear statement of "the basis and reasons for [the court's] decision." *Westinghouse Electric Corporation*, 652 A.2d at 1312. Accordingly, the trial court, by a newly assigned judge, must provide an explanation for whatever valuation it sets for the 57.7-acre property that is the subject of this tax assessment appeal.[23]

Conclusion

Senior Judge Braxton vacated his position as senior judge by operation of law on June 16, 2019, when he began to receive compensation for his incompatible service on the Philadelphia Tax Board, which was a "position of profit in the government of the United States, the Commonwealth or any municipal corporation or political subdivision thereof." PA. CONST. art. V, §17(a). The 34 orders issued on Taxpayer's tax appeals are null and void. We grant Taxpayer's application to vacate the trial court's orders. This requires a remand of these matters for a decision by a newly assigned jurist that will state "the basis and reasons for [the court's] decision." *Westinghouse Electric Corporation*, 652 A.2d at 1312. The trial

[23] We do not address Taxpayer's challenge to the use of the Integra Realty report. It may or may not be relevant to the new valuation on remand.

court, on remand, may supplement the record if deemed appropriate but may not supplant the existing record.

s/Mary Hannah Leavitt
MARY HANNAH LEAVITT, President Judge Emerita

Judge Fizzano Cannon did not participate in the decision in this case.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

IN RE: APPEAL OF PROSPECT CROZER LLC FROM THE DECISION OF THE BOARD OF ASSESSMENT APPEALS OF DELAWARE COUNTY, PA	**NO.: 2016-010884 (lead case)** **CONSOLIDATED**

ADJUDICATION

Braxton, S.J. * **Filed:** 10/11/19

And now, this 11th day of October, 2019, upon consideration of: the evidence and arguments presented by counsel during hearings held on October 11, 2018, January 14, 2019, February 4th through February 8th, 2019, February 26, 2019, February 28, 2019, March 18, 2019, and March 20th through March 22nd, 2019; the court's site visit to inspect the subject premises; and, the submissions of counsel in the form of their proposed findings of fact and conclusions of law, the court enters the following:

I. Findings of Fact

1. Real estate tax appeals for the years 2017, 2018 and 2019 were perfected on the Crozer Chester Medical Center, located in Upland Borough, Delaware County, Pennsylvania, filed on behalf of Prospect Crozer LLC, the owner of the constituent properties.

2. Tax parcels in Delaware County are identified by folio numbers.

* Senior Judge Braxton of Philadelphia County was appointed visiting Judge by the Supreme Court of Pennsylvania.

3. On December 12, 2018, this court consolidated trial on thirty-three separate tax appeals comprising the Crozer Chester Medical Center (hereinafter "CCMC") under Docket No. 2016-010884.

4. The folio numbers of properties reflected in this consolidated appeal (and the associated case number) appear below:

FOLIO NUMBER	DCCP DOCKET NUMBER
47-00-00561-00	2016-10884
47-00-00248-01	2016-10851
47-00-00248-02	2016-10854
47-00-00455-00	2016-10862
47-00-00455-01	2016-10859
47-00-00455-02	2016-10857
47-00-00455-03	2016-10860
47-00-00455-04	2016-10874
47-00-00455-05	2016-10863
47-00-00455-06	2016-10848
47-00-00455-07	2016-10865
47-00-00455-08	2016-10848
47-00-00455-09	2016-10841
47-00-00456-00	2016-10868
47-00-00458-00	2016-10839
47-00-00459-00	2016-10856
47-00-00460-00	2016-10869
47-00-00461-02	2016-10903
47-00-00461-03	2016-10913
47-00-00461-04	2016-10894
47-00-00461-05	2016-10915
47-00-00461-06	2016-10847
47-00-00461-07	2016-10843

47-00-00461-08	2016-10873
47-00-00463-00	2016-10893
47-00-00464-11	2016-10897
47-00-00464-12	2016-10885
47-00-00465-00	2016-10887
47-00-00465-10	2016-10850
47-00-00466-00	2016-10849
47-00-00560-00	2016-10853
47-00-00560-02	2016-10852
47-00-00560-04	2016-10883.

5. Prospect offered Ryan Hlubb, an MAI certified and Pennsylvania licensed real estate appraiser and an expert in the field of commercial real estate appraisal.

6. The taxing authorities offered John Coyle, III, an MAI certified and Pennsylvania licensed real estate appraiser and an expert in the field of commercial real estate appraisal.

7. While they differed in some details, both experts agreed that a proper appraisal of the fair market value of the properties entailed an evaluation through a cost of replacement analysis.

8. The court heard testimony from Mr. Coyle whose reconciliation of the sale comparison approach and cost new approach which resulted in his conclusion that the total fair market value of the subject properties was $74 million for tax years 2017, 2018 and 2019.

9. The court also accepted the testimony of Mr. Hlubb, on behalf of Prospect, who testified that the value under cost approach (which combined total depreciation as a reduction against total replacement cost (new) of the buildings and then added the land value) resulted in a fair market value of $36.8 million for tax years 2017 and 2018 and a fair market value of $39.6 million for tax year 2019.

10. There did not appear to be any significant externalities which suggested a change in fair market value during the subject tax years.

11. The court concluded the value of $74 million is a valid and accurate assessment of the fair market value of the properties.

II. Conclusions of Law

1. This court has jurisdiction over this appeal and the authority to render a decision on the fair market value of the subject properties.

2. A proper determination of a real estate tax appeal case calls upon the trial court to determine the fair market value of the property(ies) and the appropriate common level ratio. 53 Pa. Con.Stat.Ann. §8854(a)(2)(Consolidated County Assessments – Appeals to court).

3. "Actual value is a property's fair market value, and 'is defined as the price a purchaser, willing but not obliged to buy, would pay an owner, willing but not obliged to sell, considering all uses to which a property is adapted and might reasonably be applied.'" ***Clifton v. Allegheny Cty.***, 600 Pa. 662, 672 n.5, 969 A.2d 1197, 1203 n.5 (2009).

4. Both Ryan Hlubb and John Coyle, III, qualified as experts in the field of commercial appraisal of real estate.

5. The record did not adequately support a basis to suggest a difference in fair market value over the period from 2017 through 2019 tax years.

6. Based on the facts as decided the court concludes that the fair market value of the subject properties is Seventy-four million dollars for the tax years 2017, 2018 and 2019.

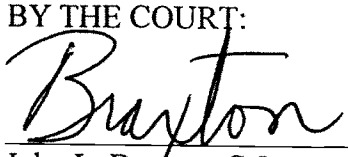
7. The applicable common level ratio for properties located in Delaware County, as set by the State Tax Equalization Board, for the tax years at issue follow:

2017 – 65.0%

2018 – 61.0%

2019 – 58.1%.

BY THE COURT:



John L. Braxton, S.J.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

IN RE: APPEAL OF PROSPECT CROZER LLC FROM THE DECISION OF THE BOARD OF ASSESSMENT APPEALS OF DELAWARE COUNTY, PA	**NO. 2016-010872**

ADJUDICATION

Braxton, S.J. * **Filed:**

And now, this 28th day of October, 2019, upon consideration of: the evidence and arguments presented by counsel during hearings and other proceedings held on September 25-27 and October 11 & 12, 2018, and, the submissions of counsel, the court enters the following:

I. Findings of Fact

1. Real estate tax appeals for the years 2017 and 2018 were perfected on the Springfield Hospital ("Property"), located at 190 West Sproul Road, Springfield Township, Delaware County, Pennsylvania, filed on behalf of Prospect Crozer LLC, the owner of the Property.

2. Tax parcels in Delaware County are identified by folio numbers.

3. The Property, is reflected in the tax records by its assigned folio number:

42-00-06625-01.

* Senior Judge Braxton of Philadelphia County was appointed visiting Judge by the Supreme Court of Pennsylvania.

4. Prospect offered evidence from Ryan Hlubb, an MAI certified and Pennsylvania licensed real estate appraiser and an expert in the field of commercial real estate appraisal.

5. The Springfield School District offered evidence from John Coyle, III, an MAI certified and Pennsylvania licensed real estate appraiser and an expert in the field of commercial real estate appraisal.

6. The experts' approaches in appraising the fair market value of the Property differed in significant ways, especially as to the details of their respective evaluations.

7. Both experts offered complete and detailed explanations of their methods and expressed their determinations to a reasonable degree of certainty as authorities in real estate appraisal.

8. The court found the testimony offered by Mr. Coyle credible and his approach to valuation comprehensive, sensible and believable.

9. Mr. Coyle employed the cost approach and the sales approach in developing his appraisal of the Property.

10. The court concluded the value of $12 million is a valid and accurate assessment of the fair market value of the Property.

II. Conclusions of Law

1. This court has jurisdiction over this appeal and the authority to render a decision on the fair market value of the subject Property.

2. A proper determination of a real estate tax appeal case calls upon the trial court to determine

the fair market value of the property and the appropriate common level ratio. 53 Pa. Con.Stat.Ann. §8854(a)(2)(Consolidated County Assessments – Appeals to court).

3. "Actual value is a property's fair market value, and 'is defined as the price a purchaser, willing but not obliged to buy, would pay an owner, willing but not obliged to sell, considering all uses to which a property is adapted and might reasonably be applied.'" ***Clifton v. Allegheny Cty.***, 600 Pa. 662, 672 n.5, 969 A.2d 1197, 1203 n.5 (2009).

4. Both Ryan Hlubb and John Coyle, III, qualified as experts in the field of commercial appraisal of real estate.

5. The record did not adequately support a basis to suggest a difference in fair market value of the Property for the years 2017 and 2018.

6. Based on the facts as decided the court concludes that the fair market value of the subject Property is Twelve million dollars for the tax years 2017 and 2018.

7. The applicable common level ratio for properties located in Delaware County, as set by the State Tax Equalization Board, for the tax years at issue follow:

2017 – 65.0%

2018 – 61.0%.

BY THE COURT:

Braxton

John L. Braxton, S.J.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

IN RE: APPEAL OF PROSPECT CROZER LLC FROM THE DECISION OF THE BOARD OF ASSESSMENT APPEALS OF DELAWARE COUNTY, PA	**NO. 2016-010872**

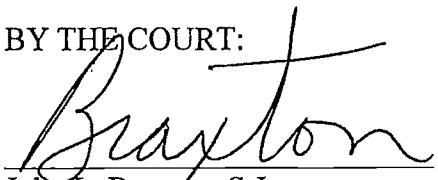
OPINION

Braxton, S.J. * **Filed:** 1/17/20

Prospect Crozer, LLC ("Prospect") filed a tax assessment appeal for the years 2017 and 2018 related to the Springfield Hospital building ("Property") adjacent to Springfield Hospital, in Springfield Township, Delaware County, Pennsylvania. The Findings of Fact and Conclusions of Law contained in the Adjudication docketed November 1, 2019, comprehensively addressed the issues raised. The Adjudication is incorporated by reference as if fully set forth herein.

However, the court is compelled to address an oversight. The Adjudication neglected to reflect the fact that the local municipality, Springfield Township, concurred with the valuation offered by Prospect's expert. As a beneficiary of tax payments on the Property, Springfield Township has an incentive to desire and secure a higher tax assessment. However, that fact, standing alone, does not operate to bind the court. So while the Township's position presents an interesting sidelight to the case, the court did not accept that position and instead focused on the presentations of the experts and rendered its decision on the basis of those presentations. Then, as now, we see no reason or justification to deviate from the decision articulated in the Adjudication.

BY THE COURT:



John L. Braxton, S.J.