

Nos. 33378, 33880 and 33881

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BAYER MATERIALSCIENCE LLC and
BAYER CROPSCIENCE LP,

Appellants

v.

STATE TAX COMMISSIONER, and

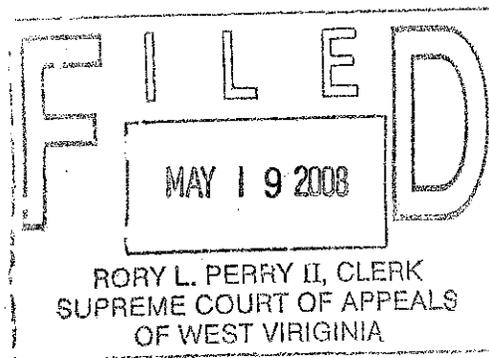
THE HONORABLE PHYLLIS GATSON,
Assessor of Kanawha County, West Virginia, and

THE COUNTY COMMISSION OF
KANAWHA COUNTY, WEST VIRGINIA, and

THE PROSECUTING ATTORNEY OF
KANAWHA COUNTY, WEST VIRGINIA

Appellees.

From the Circuit Court of Kanawha County, West Virginia



BRIEF AMICUS CURIAE OF BEHALF OF
THE WEST VIRGINIA MANUFACTURERS ASSOCIATION

Michael E. Caryl, Esq. (WV Bar No. 662)
Heather G. Harlan, Esq. (WV Bar No. 8986)
BOWLES RICE MCDAVID GRAFF & LOVE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386

Counsel for the West Virginia Manufacturers Association

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Michael E. Caryl, *The Illusion of Due Process in West Virginia Property Tax Appeals
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I. PRELIMINARY STATEMENT

The West Virginia Manufacturers Association (WVMA) is a non-profit, statewide organization that has continuously represented the interests of the manufacturing industries in West Virginia since 1915. Currently, its membership consists of one hundred fifty (150) member companies employing twenty-five thousand (25,000) men and women in West Virginia. The average wages of the employees of WVMA's members in West Virginia is forty-four thousand two hundred dollars (\$ 44,200.00).

WVMA members and their suppliers annually pay tens of millions of dollars to the State of West Virginia and its political subdivisions in direct taxes. Due to the capital-intensive nature of manufacturing, the *ad valorem* property tax is typically the single largest element of the state and local tax burden that most WVMA members bear. As a result, the fair, orderly and objective resolution of disputes involving *ad valorem* property taxes is of paramount importance to WVMA members and their employees.

The constitutionality of West Virginia's frequently-criticized method for resolving *ad valorem* property tax disputes is squarely presented by these consolidated cases. Specifically, the issue to be addressed is whether the arrangements provided in article three of chapter eleven of the West Virginia Code satisfy the standards of due process mandated in the Constitution of the United States and the Constitution of West Virginia.

It is the position of the WVMA that the laws and procedures provided in West Virginia law for resolution of *ad valorem* property tax matters, both on their face and in practical operation, do not satisfy the minimum standards of due process of law. As a result, the WVMA has respectfully requested leave of this Honorable Court to file, and hereby conditionally does file, this brief amicus curiae to address these matters in these consolidated cases.

II. PROCEEDINGS BELOW AND STATEMENT OF FACTS

The "Kind of Proceeding and Nature of the Ruling of the Lower Tribunal" and "Statement of the Facts of the Case," as set forth in the Appellants' Brief are fully developed, and the WVMA, party amicus, will not repeat the same here.

III. ISSUE

THE ISSUE IN THIS CASE, TO WHICH THIS BRIEF AMICUS CURIAE IS ADDRESSED, IS WHETHER THE STATUTORY ARRANGEMENTS IN WEST VIRGINIA STATUTORY LAW, PROVIDED FOR APPEAL OF CONTESTED *AD VALOREM* PROPERTY TAX ASSESSMENTS, VIOLATE, ON THEIR FACE, OR AS APPLIED, THE REQUIREMENTS OF DUE PROCESS OF LAW UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF WEST VIRGINIA?

IV. POINTS AND AUTHORITIES¹

Introduction

Perhaps few features of the federal constitution are more familiar (or, at least, more litigated) than the guarantee that no person "shall be deprived of life, liberty or property, without due process of law." (quoting U.S. CONST. amends. V (applicable to Congress and XIV, §5 (applicable to the states)). Although its exact formulation varies with the circumstances, the legal process which is due to every person generally requires that before a citizen is permanently deprived of property, she or he is entitled to: (1) meaningful notice of the government's intent to effect such deprivation; (2) a reasonable opportunity to prepare and present proof and arguments to challenge the government's proposed action; and (3) a hearing before an impartial tribunal to present such proof and arguments.

¹ Many of the points made throughout this brief can be found in a 1995 law review article authored by the undersigned counsel. Michael E. Caryl, *The Illusion of Due Process in West Virginia's Property Tax Appeals System: Making the Constitution's Promise a Reality*, 98 W. Va. L. Rev. 301 (1995). The original inspiration for that article was the author's work as official reporter for the West Virginia Law Institute's 1992 Property Tax Appeals Reform Project. *Id.* p. 343, n. 169.

The West Virginia Constitution similarly provides that: “No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” W. Va. CONST. art. III, §10. It has been frequently said that, in certain circumstances, the standard of due process under the state constitution may be interpreted by state courts to be a higher level of protection than under the federal constitution. *See e.g., State v. Neuman*, 371 S.E.2d 77, 80, Syl. Pt. 3 (W. Va. 1988). Although, to date, application of that higher standard appears to be largely confined to criminal cases, it is clear that, in matters of taxation, the state standard of due process is at least as exacting as the federal standard.

This Court has long recognized that “[t]he government and every one of its branches, departments, agencies, and subdivisions are bound by the due process guaranties, which extend to legislative, judicial, administrative, or executive proceedings.” *State ex rel. Ellis v. Kelly*, 145 W. Va. 70, 112 S.E.2d 641 (1960) (internal citations omitted). Importantly, this Court noted that:

Though no satisfactory comprehensive definition or description of due process of law has been formulated, and probably can not be, certain principles relating to its application have been determined by careful consideration and adjudication. Thus, it is well settled that, to deprive a person of life, liberty or property . . . due process requires that a trial or hearing must be fair, unbiased and by an impartial tribunal, whether the tribunal be administrative or judicial, and that the power exercised by the tribunal must not be exercised in an arbitrary or capricious manner. . . .

Ellis, 145 W. Va. at 74, 112 S.E.2d at 644.

The requirements of due process are unquestionably applicable to the proceedings at which taxpayers contest the valuation of their property for property tax purposes before a county commission acting as a board of equalization and review (the “board”). *See In Re Eastern Associated Coal Corporation*, 157 W. Va. 749, 204 S.E.2d 71 (1974); *In Re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 303 S.E.2d 691 (1983).

In the case of Eastern Associated Coal Corp., the board refused to hear certain evidence from the taxpayer on the basis that the taxpayer had refused or failed to provide the statutorily required information to the assessor. Holding that the board's refusal to hear such evidence constituted a denial of due process, this Court found that:

We have also said: "The underlying purpose of the due process of law clauses (of Article III, Section 10) * * * is to guarantee that the rights of persons may be dealt with in judicial proceedings only after due notice and a fair and reasonable opportunity for hearing in accordance with procedure which has been ordained for the preservation of personal and property rights." Walter Butler Building Company v. Soto, *supra*, 142 W. Va. 636, 97 S.E. 2d at 287.

Id. at 755-56, 204 S.E.2d at 75. Further, this Court confirmed that due process of law extends to hearings before the county commission sitting as a board of equalization and review in Syllabus Point 2:

[T]he taxpayer has a right to introduce evidence before the county court sitting as a board of equalization and review to show that it furnished the required information. Refusal by the county court to permit the introduction of such evidence invalidates the county court's holding that the assessor sustained the burden of proof on this issue and, in addition, is a violation of the taxpayer's right to due process of law as required by Article II, Section 10 of the Constitution of West Virginia.

Id., Syl. Pt. 1, 157 W. Va. 749, 204 S.E.2d 71.

Similarly, in the case of In re Tax Assessments Against Pocahontas Land Co., 172 W. Va. 53, 303 S.E.2d 691 (1983), this Court, upholding the circuit court's finding that the taxpayer's hearing was inadequate, found two defects in the hearing before the board:

First, there was an absence of a quorum at least in regard to the Pocahontas Land case. In Polk County v. State Board of Equalization, *supra* at 57, a lower court's finding that there had not been a quorum of the board present at a taxpayer's protest was sustained and it was stated: "The interested parties are entitled to have the entire quorum of the State Board present and participating in any hearing or deliberation which purports to be the action of

the Board itself.' Of some analogy is Abernathy v. Chester County Tax Board of Appeals, 254 S.C. 225, 174 S.E.2d 771 (1970), a case where after the taxpayer presented his evidence the board adjourned to a private room where it heard, on an *ex parte* basis, evidence from the tax assessor concerning how he had set the values. The court condemned this procedure and held that the evidence given by the tax assessor could not be considered and consequently there was no evidence to sustain the increase in valuation.

The circuit court also found that there was no evidence presented before the Board that would refute Pocahontas Land's claim that the assessment was made in an arbitrary fashion. Pocahontas Land had the assessor testify that the values that he utilized on the land books were those obtained from the State Tax Commissioner's appraisements. The assessor was not aware of the basis on which the Board had determined to make the general increase to \$300 an acre. The taxpayer also produced other witnesses to show that the \$300 an acre valuation for Class III surface real property was without any economic foundation. We concur in this finding of the circuit court.

Pocahontas Land Co., 172 W. Va. at 63, 303 S.E.2d at 701-02 (1983).

“When due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by government action.” State ex re. White v. Todt, 197 W. Va. 334, 475 S.E.2s 426, Syl. pt. 1 (quoting) (Syl. pt. 2, Bone v. W. Va. Dept. of Corrections, 163 W. Va. 253, 255 S.E.2d 919 (1979)).

In Todt, the Court recognized the distinction between due process in a criminal case versus a non-criminal proceeding:

Applicable standards for procedural due process, outside the criminal area, may depend upon the particular circumstances of a given case. However, there are certain fundamental principles in regard to procedural due process embodied in Article III, Section 10 of the West Virginia Constitution, which are[:] First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.

Id. at Syl. pt. 1 (quoting North v. W. Va. Bd. of Regents, 160 W. Va. 248, 233 S.E. 2d 411 (1977), Syl. pt. 2).

In Todt, this Court recognized that “[t]he due process clause found in article III, § 10 of the Constitution of West Virginia requires that laws provide explicit standards for those who apply them so as to prevent arbitrary and discriminatory enforcement of the laws.” Id. at Syl. pt. 4.

Both expressly and through their practical operation, the West Virginia statutes fail to provide taxpayers with meaningful notice of the government’s intent to take their money in the form of taxes, fail to adequately provide taxpayers with a meaningful opportunity to prepare and present a challenge to such taking and deprive taxpayers of the right to appear before an impartial tribunal to present that challenge.

The following lettered sections of this brief describe in detail the many features of West Virginia’s statutory system for review of proposed property tax assessments which violate taxpayers’ due process rights. Clearly at work against the Appellants here were those features involving the absence of an impartial tribunal, the unusually harsh and excessive burden of proof, the oppressive standard of judicial review and the unreasonably compressed times allowed to prepare for, and present evidence of, their challenges to the assessments at issue.

That others of those prejudicial features may not have played a role in violating the Appellants' rights of due process here does nothing to exonerate the statutory system which allows those other features to be regularly employed in violation of the rights of other taxpayers in every county of West Virginia. Due process is not a benefit to be conferred at the discretion of public officials. It is the right of every taxpayer notwithstanding the whims (or even manifest good faith) of individual county commissioners, etc. because our constitutions give us a system of laws – not of men. See Schenk v. Commissioner of Internal Revenue, 686 F.2d 315 (1982).

Schenk involved an appeal by a farmer from a decision of the United States Tax Court that the farmer's year-end expenditure in alleged prepayment for fertilizer to be delivered in the following year was not a deductible prepayment. The Court of Appeals held that where farmer retained power to substitute nonfertilizer, nondeductible items in years following purported "prepayment," expenditure could not be characterized as bona fide fertilizer prepayment deductible from taxable income in year of expenditure. See id. Explaining its holding, the Court concluded that:

In the proceedings below, the Tax Court refused to allow the Schenks to deduct certain prepaid farm expenses from their 1975 taxable income. We affirm, but not without a measure of reservation. We recognize that there is nothing in this record to suggest that the taxpayers in any way intended to defraud the government or that their prepayment of farm expenses materially distorted their income in 1975. However, in a case such as this, our ruling cannot turn upon the moral quality of the individual taxpayer's conduct. The Code, with all of its permutations and cross-references, cannot be applied on an ad hominem or ad hoc basis. Principles of tax accounting cannot be tailor-made or customized to suit the needs of individual taxpayers. For better or for worse, ours is a system of laws and not men. We therefore must endeavor to fashion rules of general application which provide practical guidelines for taxpayers and collectors and which will prevent the unscrupulous from abusing the system. *Id.* at 320.

- A. By their express terms, and practical operation, the West Virginia statutes, governing appeals of proposed property tax assessments, fail to provide a taxpayer with meaningful pre-deprivation notice of the government's intent to take his, her or its money in the form of *ad valorem* property taxes.

Property taxes in West Virginia are assessed on an annual basis. The assessor in each county is charged with the duty and responsibility to determine value, for *ad valorem* property tax purposes in a given tax year, of all property situated in their respective counties as of July 1st of the preceding calendar year. (See West Virginia Code §11-3-1.)

The assessor is required to complete his or her valuation work by the first day of February each year. At that time, assessors are required to deliver to the county commission of their respective counties the property books reflecting proposed valuations determined by the assessor for purposes of that year's *ad valorem* property taxes. (See West Virginia Code §11-3-1.)

Upon receiving those property books from the assessor, the county commission sits briefly as a board of equalization and review to hear and review appeals from property owners regarding the proposed valuations presented by the assessor. (See W.Va. Code §11-3-19 and 11-3-24).

West Virginia Code § 11-3-2a also requires assessors, on an annual basis, to provide written notification to any property owner whose real property value is determined by the assessor for the coming tax year to be ten percent (10%) greater than the valuation of that property on which taxes were assessed for the prior tax year. Such notices must be given at least fifteen (15) days prior to the first meeting in February of the county commission sitting as a board of equalization and review. When such increases are proposed on an across-the-board basis, published notice in lieu of individual notice is allowed. W.Va. Code § 11-3-24.

If, while the board is sitting, it proposes an increase in a property's taxable value beyond that proposed by the assessor at the beginning of the term of the board, such increase may also be implemented after giving the affected property owner as little as five (5) days prior written notice. Id. Again, to reduce the cost of administration of the system, an exception to individual written notice is also made in the case of a general increase of the entire valuation in any one district when publication of the notice is permitted. The contents of such notice are not specified, and, as a practical matter, even when given on an individual basis, it rarely contains both the property's appraised and assessed values or similar information with respect to the prior year's assessment of the same property.

Importantly, no notice at all is required either before approving real estate tax assessments which are either the same as the prior year or, if the increase in them over the prior year is less than ten percent (10%). Further, no notice is required at all before the board approves increases in assessments of personal property such as industrial machinery and equipment.

The constitutional guaranty of due process assures to every person his or her day in court which necessarily cannot be accomplished without proper notice and an opportunity to be heard. See generally, Truax v. Corrigan, 257 U.S. 312 (1921); Freshwater v. Booth, 160 W. Va. 156, 233 S.E.2d 312 (1977). In order to determine whether a due process violation has occurred, a court must consider the entire spectrum of process provided by the state, including pre- and post-deprivation process. Thus, when claims of due process violations at the pre-deprivation stage are met with allegations that a state acted in accordance with an established post-deprivation procedure (a point not conceded here), due process is not satisfied even if that post-deprivation process is meaningful. See Collyer v. Darling, 98 F.3d 211 (6th Cir. 1996).

It is well-settled that a state legislature is without authority to dispense with the constitutional requirements of adequate notice and opportunity to be heard. Carol v. Johnson, 263 Ark. 280, 565 S.W.2d 10 (1978). Also well-settled is the requirement that any notice must be reasonable and calculated under all the circumstances to apprise interested parties of the pendency of the action and to afford them the opportunity to present their objections. See Ford v. Ford, 270 Ga. 314, 509 S.E.2d 612 (1998); Morrison v. Warren, 375 F.3d 468 (6th Cir. 2004).

Thus, West Virginia's compressed, or often non-existent, pre-deprivation arrangements for notice unquestionably fail to present taxpayers with an adequate opportunity to prepare and present their cases in a manner that passes constitutional muster. Even if the Appellants here had actual pre-deprivation notice of the Appellees' proposed tax assessments of their property, and even if that was as much the result of the Appellees' actions as of the Appellants' extraordinary efforts, that does not alter what can and often does occur under the express terms of the governing statute, to-wit: taxpayers receive little and often no notice of the assessed value of their property before it is too late to challenge the same.²

B. By virtue of their practical operation, the West Virginia statutes, governing appeals of proposed property tax assessments, fail to provide taxpayers with a reasonable opportunity to prepare for and present challenges to such assessments.

The West Virginia Constitution requires that, except for the effect of tax rate classifications based on usage, and certain exemptions, the taxation of property shall be equal and uniform throughout the State, and that property shall be taxed in proportion to its value to be ascertained by law. W.Va. Const. Art. X, § 1. To implement that constitutional mandate, the Legislature enacted laws requiring that property shall be taxed annually based on its true and actual value. W.Va. Code § 11-3-1. "True and actual value" is defined to be "...the price for

² *The Illusion of Due Process in West Virginia's Property Tax Appeals System*, supra, note 1, at p. 308, n. 21.

which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale, ..." Id.

Thus, under West Virginia law, the two primary grounds on which a taxpayer can challenge the proposed taxable value³ of his or her property are: (a) that the proposed taxable value is excessive because it exceeds the true and actual value of the property, and/or (b) that the proposed taxable value is not equalized in relation to the proposed taxable values of other, similar property in the county because the proposed taxable value of the taxpayer's property represents a higher percentage of its true and actual value than the proposed taxable values of other properties in the county are as a percentage of their respective true and actual values.

Integral to raising a challenge to a proposed taxable value on either ground is timely access to information about the true and actual values and proposed taxable values of other taxpayers' properties. As a practical matter, the former can only be ascertained by engaging the services of a professional appraiser to survey recent sales of comparable properties and the latter typically requires the filing of a request under the Freedom of Information Act (FOIA) to actually obtain access to the assessor's proposed property books containing such data.

None of these costly actions are within the means of most individuals and small businesses. Moreover, given the few weeks (or even days) between the time a taxpayer receives the earliest notice of the proposed taxable values of his own property and the time when he must present a challenge to that value, the practical opportunity to effectively use such data is virtually nil even if a taxpayer can afford to obtain it by such costly and inconvenient means. Thus, even

³ For purposes of this brief, the true and actual value of property that is determined for taxation purposes shall be referred to as "taxable value." This is to be distinguished from the term "assessed value" which is, by law, set at sixty percent (60%) of true and actual value and is the measure to which the applicable tax rate is applied to determine the amount of tax imposed on a particular property. W.Va. Const., Art. X, § 1b(A).

in the case of larger, better-funded business entities – including the largest multi-national manufacturing firms, it is not so much the cost of such actions, but the brief time allowed to take them that make the opportunity to do so largely unavailing.

Even if such essential information were readily available, the time a taxpayer has to use it to prepare a challenge to the proposed taxable value of his, her or its property is unreasonably limited. Under current law, the county commission, sitting as a board of equalization and review, is the forum before which a taxpayer must appear to obtain any relief from an excessive or unequal taxable value for his property. W.Va. Code § 11-3-24. Of course, a taxpayer will only be able to know the taxable value proposed for his property if he either: (a) receives a notice of an increased taxable value from the assessor as little as fifteen (15) days before the board of equalization and review first meets; or (b) inquires of the assessor [often aided by a FOIA request] once the property books are completed which may be as late as the first day of February in any given year.

The Legislature has provided that county commissions are required to sit as boards of equalization and review only during the month of February, thus leaving taxpayers with scarce time to prepare challenges to a taxable value once it is known to them. Id. As if that were not enough of an abbreviated opportunity for equalization and review of proposed taxable values, the same law further provides that the county commission may adjourn as a board of equalization and review as early as February 15 in any given year. Id.

The practical effect of such constricted time frames, for a taxpayer's preparation of a challenge to a proposed taxable value, is to inherently limit the effectiveness of any such challenge – particularly one based on a claim of unequalized or discriminatory treatment involving proof of the proposed taxable values of numerous other comparable properties. Given

the unusually high burden of proof imposed on such a taxpayer, the actual prejudice of such time constraints is only compounded. See infra. at p. 21-23.

The immediate and predictable result, of compressing the period during which the board of equalization and review will hear taxpayers' challenges, is to limit the actual time it allocates to hear and rule on each taxpayer's challenge. Although practices vary radically across the fifty-five counties of West Virginia, it is common for the owners of residences or lower value properties to be given as little as fifteen minutes to present their cases to the boards of equalization and review. Likewise, even though the owners of larger and more complex properties (e.g. a chemical manufacturing plant) are usually allowed more than fifteen minutes to present their evidence, an example of a board of equalization and review's final adjournment, in the middle of a taxpayer's evidentiary presentation on the earliest day it could adjourn, involved a member of West Virginia's manufacturing industry just this year.⁴

Just as "justice delayed is justice denied," justice for a litigant prematurely rushed to and through a hearing is also justice denied. The right to a hearing is one of the rudiments of fair play assured by due process and there can be no compromise on the footing of convenience or expediency when that minimal requirement has been neglected or otherwise rendered meaningless. Endler v. Schutzbank, 68 Cal. 2d 162 (1968). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Matthews v. Eldridge, 424 U.S. 319 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545 (1965)).

No justice can be had where a taxpayer has inadequate time to prepare for the hearing and has inadequate time to present his case before the board of equalization and review. While the Appellants in the immediate case were able to present extensive and persuasive evidence of

⁴ Arcelormittal Weirton, Inc. v. Assessor of Hancock County, Circuit Court of Hancock County, Civil Action No. 08-P-16G.

the many errors in the Appellees' proposed taxable values of their property, that does nothing to alter the grim reality that, by the intentional design of the statutory system, for most West Virginia taxpayers there is entirely inadequate time to prepare their cases. Moreover, notwithstanding the extraordinary cost, effort and inconvenience these Appellants obviously endured to marshal their challenge, there can be little doubt from a review of the record made before the Kanawha County Commission that their opportunity to present that challenge was unduly constrained by the time allowed for the same.

- C. The single, most egregious violation of due process standards in the West Virginia statutes providing for appeals of proposed property tax assessments is the complete absence of the right to appear before an independent and neutral forum to present such appeal.

As Justice Neely observed in his dissent in Rawl Sales & Processing Co. v. County Commission of Mingo County, 191 W. Va. 127, 133, 443 S.E. 595, 601 (1994), a county commission that is responsible for the operating budget of a county is inherently biased against taxpayers appealing their assessments. Specifically, Justice Neely observed that:

The county commission lacks expertise in property evaluation but is extraordinarily knowledgeable about the government's need for money, an ingrained bias that is particularly harmful to non-voting entities. Although someone should review the assessor's property evaluation, assigning this important review to the county commission is perhaps not a scheme whose design would prompt nomination for the Nobel Prize in jurisprudence. Indeed, a hearing before a county commission on a tax appeal is probably best described by the old Jewish expression ['[f]rom your mouth to God's ear.']

Id. at 600 (Neely, J., dissenting).

In this case, given the Kanawha County Commission's primary responsibility for the superintendence of the fiscal affairs of Kanawha County, it suffers from an inherent and institutional bias against taxpayers challenging their assessments and its purported adjudication

of those challenges is fatally flawed as a direct violation of the due process provisions of the United States Constitution. Clarence Ward v. Village of Monroeville, 409 U.S. 57 (1972):

In Ward, the issue was whether, absent a personal, pecuniary interest, executive responsibilities for governmental finances alone were enough to disqualify a mayor from acting in a judicial capacity. Answering affirmatively, the Court held that:

[p]lainly that “possible temptation” may also exist when the mayor’s executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor’s court. This, too, is a “situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.” Ward, 409 U.S. at 59 (citing Tumey v. State of Ohio, 273 U.S. 510 (1927)).

There is no doubt but that the requirement for an unbiased tribunal applies in civil as well as in criminal matters. See Marshall v. Jerrico, Inc., 446 U.S. 238 (1980). To satisfy the right to be have one’s case judged by a neutral tribunal, even the appearance of improper bias in the tribunal must be avoided. See Offutt v. U.S., 348 U.S. 11, 14 (1954). Nor is there any doubt but that the tribunal in a valuation appeal must be unbiased. The Supreme Court of the United States has recognized that “officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule.” Tumey v. State of Ohio, 273 U.S. 510, 522 (1927).

The inherent institutional bias, against taxpayers seeking review of their property tax assessments under West Virginia’s statutes governing such matters, does not end with the role of the county commission. The statutory scheme itself demonstrates that the county commission’s interests are aligned with the assessment being challenged by the taxpayer. At issue in any valuation dispute brought by a taxpayer is the taxable value of the taxpayer’s property proposed

by the Tax Commissioner, or by the assessor supervised by the Tax Commissioner. Yet, during the adversarial stage of hearing before the county commission sitting as the board of equalization and review, the statute directs the county assessor to “attend and render every assistance possible [to the board] in connection with such [proposed taxable values].” W.Va. Code § 11-3-24. In effect, the county commission, sitting as the board, is statutorily assigned an advocate for its interests in maximizing its revenue, while at the same time the commission is operating under the legal fiction that it is a neutral judge of the very matter that directly affects its interests.

Likewise, the elected county prosecuting attorney is, by law, the general legal counsel to the county commission. W.Va. Code § 7-4-1. In the context of a hearing before the board of equalization and review, of a taxpayer’s challenge to the taxable value proposed by the county assessor for his property, both the county commission and the county assessor (a party litigant before the board of equalization and review) are entitled to call on the prosecuting attorney to assist them at hearings before the board. See In re Tax Assessments Against Pocahontas Land Co., 172 W. Va. 53, 303 S.E.2d 691 (1983), *supra*. Moreover, except in cases involving natural resource or industrial property, on appeals of decisions of the county commission, the prosecuting attorney is required to appear to represent the interests of the county, and of the State and the school district. W.Va. Code §§ 11-1C-10(h), 11-3-25.

The duplicity and conflicts, inherent in the structured interplay of such multiple roles of both the county assessor and the county prosecuting attorney with the county commission, fly in the face of the standard of an independent and neutral hearing demanded by the due process clause.

As the United States Supreme Court has held, “[t]he fundamental requisite of due process of law is the opportunity to be heard . . . [with such hearing] at a meaningful time and in a meaningful manner.” Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) (holding that procedural due process requires that a pre-termination evidentiary hearing be held when public assistance payments to welfare recipient are discontinued and that procedures followed by city of New York in terminating public assistance payments to welfare recipients were constitutionally inadequate in: (a) failing to permit recipients to appear personally with or without counsel before an impartial official who finally determined continued eligibility and (b) failing to permit recipient to present evidence to that official orally or to confront or cross-examine adverse witnesses).

In the present context, these principles of due process require that a taxpayer have timely and adequate notice detailing the reasons for the assessments, and a reasonable opportunity to prepare and present a challenge of the same with his own arguments and evidence to an impartial official. Clearly, that does not describe West Virginia’s system of review of *ad valorem* property tax assessments.

Just as clearly, the absence of an impartial tribunal to hear the Appellants’ challenge of their property tax assessments could not be more vivid than from the record of the immediate case. On that basis, alone, this Court should be compelled to find that such an arrangement facially violates the Appellants’ rights to due process of law. Unfortunately, there are numerous other aspects of West Virginia’s system for review of property tax assessments which, separately, and collectively, also operate to deny taxpayers the due process to which they are entitled.

D. From the draconian penalty of altogether barring remedies for the most minor administrative defaults, to the excessively high burden of proof and to the severe limitations on opportunities for judicial review, West Virginia's statutory scheme for review of proposed property tax assessments contains a plethora of arrangements that both separately and cumulatively operate to deny taxpayers due process of law.

The bar of all remedies to a taxpayer (starting with relief before the board of equalization and review and extending to judicial review) for failing to file a timely or complete property tax report is an oppressive result – particularly in light of the fact that in many cases, assessors do not consider or even refer to the information on the report to establish assessed values.

In addition to an array of penalties, ranging from forfeiture of certain *de minimis* dollar amounts up to five percent (5%) of the value of the subject property, which are imposed on a property owner for failing to timely “deliver any statement required by law” in connection with the annual report of his property for taxation, the governing statute further provides that such taxpayer “shall be denied all remedy provided by law for the correction of any [proposed taxable value].” W.Va. Code § 11-3-10. Not only are the parameters of such an actionable default ambiguous, but as to the bar of all remedies for correction of erroneous taxable values, there appear to be no grounds for, or discretion in, the assessor to abate such a harshly disproportionate penalty – notwithstanding the existence of mitigating circumstances or good cause shown.

The oppressive effect and arbitrariness of such draconian outcomes is further exacerbated by the fact that, with respect to most real estate, the county assessor is expected to essentially disregard, in favor of the State's computer-assisted mass appraisal data base and formula-driven real estate appraisal system (CAMA), the information about a particular property that the owner is required to enter on his annual report. Thus, for failing to timely provide information on a form that is intentionally ignored by assessment officials, a property owner can lose any right to challenge an erroneous taxable value established by those officials on the basis of entirely separate information.

Under such circumstances, the unfortunate taxpayer is afforded no process for review – let alone the due process contemplated in our constitutional safeguards. Such an outcome is directly at odds with judicially announced prescriptions that loss of one’s right to due process should not easily flow from essentially innocuous oversights or mere technicalities – let alone the failure to perform an essentially meaningless act. See Hernandez v. State, 663 S.W.2d 5, 8 (Tex. 1983) (“It is a settled principle of law that one is not penalized for the failure to perform a useless act.”).

Further, the burden of proof to overcome the presumption of correctness of the assessment before the board of equalization and review is particularly excessive in the context of what is the only record-making, evidentiary hearing afforded a taxpayer. The inherent unfairness of the process by which appeals of property tax valuations are heard before the institutionally-biased county commission, sitting as board of equalization and review, is vastly compounded by the imposition of the high burden of proof (“clear and convincing evidence as opposed to a simple “preponderance of the evidence”) imposed there on the taxpayer. This higher burden of proof itself constitutes a denial of due process. See Concrete Pipe & Prods. v. Const. Laborers Pension Trust, 508 U.S. 602 (1992).

The most recent West Virginia case on the standard of proof is In Re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W.Va. at 254, 539 S.E.2d at 761 the Court stated:

A taxpayer’s initial avenue for relief from an allegedly erroneous property valuation lies with the county commission, sitting as a board of equalization and review. ... In challenging a tax valuation, “[t]he burden [of proof] clearly falls upon ... [the taxpayer] to demonstrate through clear and convincing evidence that the tax assessments were erroneous.” In Re Maple Meadow Min. Co., 191 W.Va. 519, 523, 446 S.E.2d 912, 916 (1994); See also Pocahontas Land, 172 W.Va. at 61, 303 S.E.2d at 699 (“It is obvious that

where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous.”); syl. pt. 2, in part, Western Pocahontas Properties, Ltd., *supra* (“The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous.”)

The imposition of a standard of proof, higher than a simple preponderance of the evidence upon a taxpayer at the first *adjudicative* level, in its own right constitutes a denial of due process to the taxpayer.

In Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 at 617-618 (1992), the United States Supreme Court considered a federal statute that purported to establish standards of proof at a first-level adjudicatory hearing. The statute provided that “any determination made by a plan sponsor ... is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.” The Court identified a potential due process issue with this language:

On the other hand, if the employer were required to show the trustees’ findings to be either “unreasonable or clearly erroneous,” *there would be a substantial question of procedural fairness under the Due Process Clause*. In essence, the arbitrator provided for by the statute would be required to accept the plan sponsor’s findings, *even if they were probably incorrect, absent a showing at least sufficient to instill a definite or firm conviction that a mistake had been made*. Cf. Withrow v. Larkin, 421 U.S.[35], at 58, 95 S.Ct., at 1470. In light of our assumption of possible bias, the employer would seem to be *deprived thereby of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause*. (emphasis added)

Concrete Pipe and Products, *supra*, 508 U.S. at 625.

This Court's decision in In Re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W.Va. 250, 539 S.E.2d 757 (2000), also specifically sets forth the statutory standard by which a circuit court reviews the decision of a board of equalization and review and quoted this language:

Upon receiving an adverse determination before the county commission, a taxpayer has a statutory right to judicial review before the circuit court. W. Va. Code § 11-3-25 (1967). The statute provides little in the way of guidance as to the scope of judicial review, although it does expressly limit review to the record made before the county commission. Given this limitation, we have previously indicated that review before the circuit court is confined to determining *whether the challenged property valuation is supported by substantial evidence*. See Killen v. Logan County Comm'n, 170 W.Va. 602, 295 S.E.2d 689 (1982), or otherwise in contravention of any regulation, statute, or constitutional provision. See In Re Tax Assessments Against the Southern Land Co., 143 W.Va. 152, 100 S.E.2d 555 (1957), overruled on other grounds, In Re Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649 (1959). As this Court's previous cases suggest, and as we have recognized in other contexts involving taxation, e.g., Frymier-Halloran v. Paige, 193 W.Va. 687, 695, 458 S.E.2d 780, 788 (1995), judicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A.

American Bituminous, *supra*, 208 W.Va. at 254-55, 539 S.E.2d at 761-62 (footnotes omitted) (emphasis added).

The sweeping statements in that case, as to the standard of proof and standard of review, were not required for a decision in that matter and therefore are *obiter dicta*. Nevertheless, the court below in this case applied that standard of review.

The constitutional problem with having appeals heard at the first adjudicatory level by an inherently biased tribunal is exacerbated when the taxpayer is confronted with a high standard of review upon an appeal of a decision of that tribunal to a circuit court. Clarence Ward v. Village of Monroeville, 409 U.S. 57 (1972) (citing Tumey v. State of Ohio, 273 U.S. 510 (1927)).

Nevertheless, even a reduced and more reasonable standard of proof would not obviate the prejudice when the adjudicating tribunal is also inherently biased. Even if taxpayers in West Virginia had a right of appeal to circuit court with a trial *de novo* at which the burden of proof would be a simple preponderance of the evidence, the constitutional infirmities of the current hearings before a county commission sitting as a board of equalization and review would not be cured. That option was available in Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972), but the Court there held:

This 'procedural safeguard' does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge *in the first instance*. *Id.*, 409 U.S. at 61-62 (*emphasis added*).

In Williams v. Brannen, 116 W.Va., 178 S.E. 67 (1935), this Court also held that the fact that the accused had the option of being tried by jury and had an unrestricted right of appeal did not remove the constitutional infirmity, stating that '[t]rial by jury,' in the constitutional sense, requires such a trial to be under the superintendence of a disinterested judge" and that "[i]t is ordinarily cheaper to pay a moderate fine than to pay the expenses attendant upon an appeal; for which reason many an innocent man has submitted to an unjust decision in an inferior court." Id. 116 W.Va. at 6, 178 S.E. at 69. Thus, having a right to seek judicial review does not meet the situation. The Constitution requires that a person, facing deprivation of rights at the hands of the government, shall be tried before a fair and impartial tribunal *in the first instance* where he will not face the alternative of paying an unjust fine or of resorting to the delay, annoyance, and expense of an appeal. Id.

To matters even more prejudicial, the right of taxpayers to obtain judicial review in West Virginia is practically unavailing for numerous reasons. First, the board of equalization and review is not required to even issue a written decision – much less to provide any reasons for its decision. Secondly, the unreasonably brief time to perfect the appeal – thirty (30) days from the adjournment of the board of equalization and review – undoubtedly prevents many taxpayers from availing themselves of their appeal rights. W.Va. Code § 11-3-25.

Further, for a taxpayer seeking judicial review of a board of equalization and review decision, there is much confusion and debate about whether, along with the assessor, the county commission (the tribunal from whose decision an appeal is being taken) should also be named as a party/respondent to that same appeal, or, as the statute reads, whether the prosecuting attorney also represents the county commission. Moreover, despite authority indicating that such appellate proceedings are not governed by the Rules of Civil Procedure, circuit courts throughout the state have ruled otherwise. See Haines v. Kimble, 654 S.E.2d 588; 2007 W.Va. LEXIS 60, Docket No. 32844 at page 20, footnote 7.

Finally, the scope of judicial review appears to be roughly equivalent to that under the Administrative Procedures Act (abuse of discretion), a particularly oppressive standard given the unusually harsh “clear and convincing” standard that a taxpayer is required to meet before a board of equalization and review.

Taken together, all of these factors weigh heavily against the appearance of justice. See Louk v. Haynes, 259 W. Va. 482, 223 S.E.2d 780 (1976) (finding failure of due process because the judge was impartial and failed to recuse himself). In Louk, 259 U.S. at 500, 223 S.E.2d at 791, this Court quoted the United States Supreme Court:

'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a Possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have No actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (99 L.Ed. 11).' In Re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). (emphasis added)

Moreover, even if the process for judicial review were reasonably availing, that does not cure the flaws in the initial process of the board since the initial hearing must be before a competent, fair and impartial tribunal. Even an adequate appeal will not cure the failure to provide a neutral and detached adjudicator in the first instance. Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993).

Even if taken in isolation any one of the above described prejudicial arrangements or practices are not, alone, enough to support a conclusion that the system violates due process requirements, cumulatively, they do. Some jurisdictions, including West Virginia, have recognized that prejudice may result from the cumulative effect of errors and that the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. See State v. Walker, 188 W. Va. 661, 425 S.E.2d 616 (1992), Syl. pt. 5 ("Where the record of a criminal trial shows that the cumulative effect of

numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.”) (internal citations omitted).

Clearly, the cumulative effect of the potential bar of remedies for the slightest default in performing an essentially meaningless act, the compression of time for a taxpayer to assert and protect its rights, the excessive and unusually high burden of proof, the lack of an orderly process of appeal and the absence of any requirement for the board of equalization and review to issue any written decision explaining its decision, at the least, constitute a cumulative denial of due process

It is well recognized that the familiar constitutional guarantees of due process of law do not involve a single set of rigid or static rules of procedure imposed on every circumstance where proposed government action puts an individual citizen's legal interests in jeopardy. *See Cafeteria Workers v. McElroy*, 367 U.S. 886, 894 (1961). Rather, they embody a flexible concept whereby the requirements for particular circumstances are determined by reference to the context in which they are applied. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

While the judicial discussion of factors considered in testing due process adequacy has been wide-ranging, there appears to be regular gravitation by the courts toward a three-dimensional, sliding scale standard in such matters. *See Matthews v. Eldridge*, 424 U.S. 319 (1976). Specifically, the courts have regularly looked to a triumvirate of factors which are to be concurrently weighed and balanced in each case where concerns about due process are raised. *See Id.* These factors are: (1) the nature of the individual interest to be affected by official action; (2) the risk of erroneous deprivation of such interest under current procedures and the efficacy of greater safeguards to reduce such risk; and (3) the government's competing interest in

the particular function involved and in avoiding any fiscal or administrative burdens that greater safeguards would likely entail. *See Id.* at 335.

It is well settled that before a citizen is permanently deprived of tax dollars, the taxpayer be given notice and an opportunity for an impartial administrative tribunal to hear any objections to such taxation. *See McGregor v. Hogan*, 263 U.S. 234, 237 (1923); *Turner v. Wade*, 254 U.S. 64, 67-68 (1920) (emphasis added). However, the subsequent right to claim a refund of overpaid taxes, previously remitted under legal compulsion, has been held to satisfy due process requirements. *See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Business Regulation*, 496 U.S. 18, 31 (1990).

Nevertheless, the government's interest in avoiding disruption or interference with its revenue sources (the third Matthews factor) must be balanced against the risk of depriving a taxpayer of the right not to overpay his or her taxes (the second Matthews factor). When weighing these two competing factors, two points become particularly relevant.

Indeed, the second Matthews factor must be balanced in light of the inherent institutional bias, discussed in Section C, *supra*, by the board against protesting taxpayers.

The compressed time to act to exercise their rights, allowed to taxpayers by the statutory scheme, requires that they receive any notices of increased assessments, obtain information regarding those assessments and the process by which it can be appealed, seek and obtain counsel and prepare and present evidence in support of their appeals, all within an unrealistically brief period of time. As such, it is a process which by its design and nature cannot work adequately to preserve and protect the due process rights of any taxpayer in the State of West Virginia.

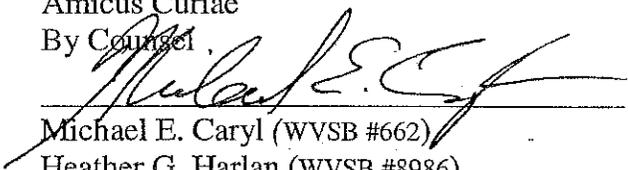
For these reasons, in this and every other case under West Virginia's system, a taxpayer's rights to due process provided by the United States and West Virginia Constitutions are violated by the inadequate notice and hearing requirements provided by statute in West Virginia, the inherently biased tribunal that first heard the taxpayer's challenge to the assessor's and tax commissioner's valuation, the standard of proof applied by the board and the standard of review applied by the circuit court.

V. CONCLUSION

In light of the foregoing legal points and authorities, it is respectfully submitted that West Virginia's statutory scheme for review of proposed property tax assessments --both by their express terms and practical operation -- deny due process of law to taxpayers seeking such reviews.

RESPECTFULLY SUBMITTED this 16th day of May, 2008.

WEST VIRGINIA MANUFACTURERS ASSOCIATION,
Amicus Curiae
By Counsel



Michael E. Caryl (WVSB #662)
Heather G. Harlan (WVSB #8986)
BOWLES RICE MCDAVID GRAFF & LOVE LLP
600 Quarrier Street
Post Office Drawer 1386
Charleston, West Virginia 25325-1386
Telephone Number (304) 264-4225

CERTIFICATE OF SERVICE

I, Michael E. Caryl, Esquire, do hereby certify that a true and exact copy of the foregoing Brief of Amicus Curiae has been served, by United States Postal Service, postage prepaid, upon the following:

Herschel H. Rose, III, Esquire
Steven R. Broadwater, Esquire
Rose Law Office
300 Summers Street, Suite 1440
Post Office Box 3502
Charleston, West Virginia 25335
Counsel for Appellants

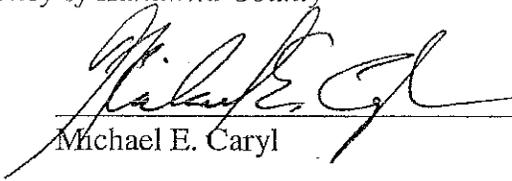
L. Wayne Williams, Esquire
Assistant Attorney General
State Capitol, Room W-435
1900 Kanawha Blvd., East
Charleston, West Virginia 25305
Counsel for the State Tax Commissioner

Stephen C. Sluss, Esquire
Kanawha County Assessor's Office
409 Virginia Street, East
Charleston, West Virginia 25301
Counsel for the Assessor of Kanawha County

Scott E. Johnson, Esquire
Ancil G. Ramey, Esquire
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, West Virginia 25326-1588
Counsel for the County Commission of Kanawha County

Robert William Schulenberg, III, Esquire
Assistant Prosecuting Attorney of Kanawha County
Geary Plaza, Fourth Floor
700 Washington Street, East
Charleston, West Virginia 25301
Counsel for the Prosecuting Attorney of Kanawha County

this 16th day of May, 2008.


Michael E. Caryl