

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BAYER MATERIALSCIENCE LLC and
BAYER CROPSCIENCE LP,**

Petitioners Below, Appellants

v.

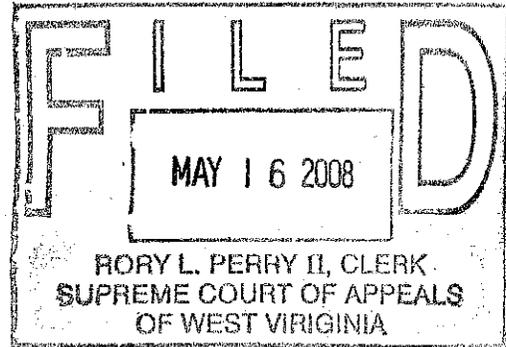
Case Nos: 33378, 33880, 33881

STATE TAX COMMISSIONER, and

**THE HONORABLE PHYLLIS GATSON,
Assessor of Kanawha County, and**

**THE COUNTY COMMISSION OF
KANAWHA COUNTY, and**

**THE PROSECUTING ATTORNEY OF
KANAWHA COUNTY**



Respondents Below, Appellees.

**BRIEF OF APPELLANTS BAYER MATERIALSCIENCE LLC AND
BAYER CROPSCIENCE LP**

Dated: May 16, 2008

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**BRIEF OF APPELLANTS BAYER MATERIALSCIENCE LLC AND
BAYER CROPSCIENCE LP**

In these consolidated appeals, Bayer MaterialScience LLC and Bayer CropScience LP (collectively, "Bayer"), interpose both procedural and substantive challenges to the imposition of property taxes for the years 2006 and 2007. As shown below, the judgments of the Circuit Courts should be set aside because they affirm rulings by the Kanawha County Commission (the "Commission") that (i) are tainted by unconstitutional and unfair procedures, including an improperly high burden of proof imposed on Bayer, and (ii) let stand an arbitrary and unlawful substantive analysis by the Tax Commissioner.

First, the judgments below should be set aside because the Commission, sitting as the Board of Equalization and Review, labors under an improper conflict of interest that led to the violation of Bayer's due process rights. The Commission is a politically elected body whose responsibilities include the control and oversight of the County's budgets and finances, an

essentially executive role. Yet, when the Commission hears challenges to the Tax Commissioner's erroneous valuations of industrial personal property and real property, it has the obligation to make quasi-judicial decisions about whether or not the County's tax base should be reduced. That inherent conflict grows more stark where, as here, the decision involves the tax liability of an out-of-state corporation operating in West Virginia. In that circumstance, a decision reducing Bayer's tax burden is inherently and directly contrary to the County Commission's primary interest in maximizing the funds to operate the County for the benefit of its citizens. Under controlling precedent of the United States Supreme Court and this Court, those competing roles create a conflict of interest and appearance of bias that violate Bayer's due process rights.

Second, the Commission repeatedly, and improperly, required Bayer to prove by "clear and convincing" evidence that the Tax Commissioner's underlying valuations were in error. In doing so, the Commission violated a longstanding syllabus point from this Court which requires application of a "preponderance of the evidence" standard in such proceedings. The heightened burden of proof applied by the Commission not only violates West Virginia law, but it exacerbates the inherent conflict of interest by creating a standard where the Commission's primary interest in overseeing the County's budget is much more likely to be served. Moreover, by imposing an improperly heightened standard of proof at the first adjudicative level, the Commission independently violated Bayer's due process rights and rights under West Virginia law because Bayer never received the "impartial adjudication to which it was entitled in the first instance."

Finally, by affirming the valuations, the Commission sanctioned the Tax Commissioner's repeated breach of his own regulations and generally accepted appraisal principles. The

Commission affirmed valuations that the Tax Commissioner's witness admitted were "fairly arbitrary" and that left him with "no idea" whether they accurately reflected the value of Bayer's property. In sanctioning these improper methods, the Commission violated West Virginia law by failing to ensure that the Tax Commissioner used the "the most reliable techniques" in valuing the property as this Court has required. As such, Bayer was deprived of its right to receive a "true and actual" valuation of its taxable property.

Together and individually, these errors require reversal of the decisions below.

I. The Kind of Proceeding and Nature of the Ruling in the Lower Tribunal

This consolidated appeal involves three erroneous Circuit Court judgments reviewing real and personal property valuations entered by the Commission pursuant to W. Va. Code § 11-3-24. Specifically, by Order entered March 13, 2008, this Court granted Bayer's motion to consolidate Case Nos. 33378, 33880, and 33881.

A. Appeals from Valuation Decisions for Tax Year 2006

Bayer MaterialScience LLC (herein "BMS") and Bayer CropScience LP (herein "BCS") appeared before the Commission to contest the value of their industrial personal property as appraised by the State Tax Commissioner for tax year 2006¹. Additionally, BCS contested the appraisal of its real property. By orders dated February 23, 2006, the Commission denied BMS's and BCS's challenges and upheld the property values assessed by the Tax Commissioner. In doing so, the Commission set the value of Bayer's industrial personal property in excess of its true and actual value in contravention of the provisions of W. Va. Code §§ 11-3-24, 11-1C-10(c),

¹ The County Commission heard these appeals together in hearings conducted on February 16, 2006 and February 21, 2006. Citations to the transcript of the former will be in this format: "2/16/2006 Tr. XX"; those to the latter will be in this format: "2/21/2006 Tr. XX"

and of Article X, Section 1 of the Constitution of West Virginia, and set the value of BCS's real property in excess of its true and actual value in contravention of these same provisions.

Pursuant to W. Va. Code § 11-3-25, BMS and BCS filed timely appeals in the Circuit Court of Kanawha County. The Circuit Court designated the BMS appeal as Case No. 06-MISC-93, and the BCS appeal as Case No. 06-MISC-94. In the BMS appeal, the Circuit Court affirmed the Commission in an order entered on June 28, 2006². BMS timely filed a Petition for Appeal, which this Court granted on April 18, 2007. *See* Case No. 33378. In the BCS appeal, the Circuit Court affirmed the Commission on October 2, 2007³. BCS timely filed a Petition for Appeal, which this Court granted on March 13, 2008. *See* Case No. 33880.

B. Appeals from Valuation Decisions for Tax Year 2007

While Bayer's appeals from the 2006 valuation determinations were pending, on February 15, 2007, BMS and BCS appeared before the Commission to contest the Tax Commissioner's appraisal of their industrial personal property for the 2007 tax year. The Commission denied the Bayer's challenges, and again set the value of Bayer's industrial personal property in excess of its true and actual value⁴.

BMS and BCS appealed to the Circuit Court of Kanawha County. The Circuit Court designated the BMS appeal as Case No. 07-MISC-105, and the BCS appeal as Case No. 07-MISC-106, and then consolidated the two appeals. By order dated October 23, 2007, the Circuit

² Citations to the Final Order rendered in this case will be in this format: "2006 BMS Order".

³ Citations to the Final Order rendered in this case will be in this format: "2006 BCS Order".

⁴ The County Commission again heard these appeals together. The transcript of the February 15, 2007 hearing is divided into two parts: one containing only the portion of the hearing devoted to Bayer's appeals; the other containing the remainder of the County Commissions proceedings on that date, both as the County Commission and as the Board of Equalization and Review. Citations to the Bayer portion of the proceedings will be in this format: "2007 Bayer Tr. XX". Citations to the non-Bayer portion will be in this format: "2007 CC Tr. XX".

Court affirmed the Commission's 2007 valuation decisions⁵, and Bayer timely filed a consolidated Petition for Appeal in this Court, which this Court granted on March 13, 2008. *See* Case No. 33881.

II. Statement of the Facts of the Case

The three consolidated appeals stem from valuation proceedings before the Kanawha County Commission. Before discussing the facts of each case, Bayer sets forth the statutory and regulatory background pertinent to the County Commission's decisions and the Tax Commissioner's obligations in valuing property.

A. Statutory Background

1. Responsibilities of the County Commission

Under West Virginia law, the three-member Kanawha County Commission is granted significant authority over a variety of governmental functions. Under the West Virginia Constitution, "county commissions . . . shall . . . have the superintendence and administration of the . . . fiscal affairs of their counties . . . with authority to lay and disburse the county levies . . . Such commissions may exercise such other powers, and perform such other duties, not of a judicial nature, as may be prescribed by law." W. Va. Const. art. IX § 11. In turn, county commissions are charged with broad authority under West Virginia statutory law. *See* W. Va. Code § 7-1-3 (setting forth jurisdiction and duties of the commissions); *id.* § 7-1-5; *see also* W. Va. Const. art. IX § 10 (providing for the popular election of commissioners by eligible voters in the county). Foremost among a commission's responsibilities is its authority over a county's

⁵ Citations to the Final Order in Bayer's 2007 consolidated appeals will be in this format: "2007 Order".

finances.⁶ This responsibility over a County's fiscal well being is subject to real-world limitations. Most significantly, a county commission's budgeting and management of county assets is constrained by the amount of funds coming into the county through its tax base. See *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 144, 386 S.E.2d 640, 642 (1989). In *Lambert*, this Court explained that a "dwindling tax base in the county" decreased the funds available to the county commission by several million dollars per year which, in turn, caused the county commission to reduce various budgets by substantial percentages. *Id.* at 144 & n.2, 386 S.E.2d at 642 & n.2; see also *id.* at 146-47, 386 S.E. at 644-45 (discussing salary reductions of county employees ordered by the commission). Further, this Court has observed that "[t]he *ad valorem* tax is the most fundamental tax imposed upon the citizens of this State to fund local government." *State ex rel. County Comm'n v. Cooke*, 197 W. Va. 391, 399, 475 S.E.2d 483, 491 (1996) (citation omitted).⁷

⁶ The Kanawha County Commission itself has explained: "The primary function of the County Commission is budget development and management, overseeing purchasing for the county, management of county assets, and management of technology resources -- overseeing the governing, management and protection of Kanawha County and its citizens." Kanawha County Commission, *Mission Statement*, at <http://www.kanawha.us/commission/default.aspx>.

⁷ The Kanawha County budget illustrates the importance of property tax revenues here. See Kanawha County Commission, *Fiscal 2007-2008 Adopted Budget* (Mar. 26, 2007), at http://www.kanawha.us/shared/content/Page_objects/pdfs/2007-2008%20Budget.pdf. For instance, the Commission adopted a \$42.1 million budget for 2007-2008, and approximately \$27.5 million (*i.e.*, 65%) of the funding for that budget stems from property taxes for the current year and roughly an additional \$1.8 million comes from prior years' property taxes. *Id.* at 2-3; compare West Virginia State Auditor, *Local Government Services 2007-2008* at 229, 231 (stating that of its \$42.1 million in general fund revenue for 2007-2008, Kanawha County derives \$31.5 million from current year property taxes and \$1.8 million from prior year taxes), at http://www.wvsao.gov/lg/levyestimates/forms/county_07-08/CountyBudgMonit.pdf. See also West Virginia State Auditor, *Local Government Services 2006-2007* at 229, 231 (stating that for 2006-2007, Kanawha County had original general fund revenue of \$39.3 million, comprised of \$28.9 million in current year property tax and \$1.8 million in prior year taxes), at http://www.wvsao.gov/lg/levyestimates/forms/county_06-07/CountyBudgMonit.pdf; West Virginia State Auditor, *Local Government Services 2005-2006* (stating that \$27.13 million in revenue came from current year property taxes, \$1.86 million in prior years taxes out of \$35.71 million in total revenue), available at http://www.wvsao.gov/lg/levyestimates/forms/county_05-06/CountyBudgMonit.xls.

County commissions also directly play a role in collecting local property taxes. Although the Tax Commissioner is primarily responsible to see that property is accurately valued for the purposes of taxation, *see generally* W. Va. Code § 11-1C-1 *et seq.* Section 11-1A-29a provides that “[i]t is likewise the duty of the several county assessors, sheriffs and *county commissions* to assist the tax commissioner in his efforts to ascertain the true value of all such property and it is likewise their individual and collective duties to see to the proper and fair valuation of property within their respective counties.” W. Va. Code § 11-1A-29a (emphasis added). As a result, a county commission must meet annually in its capacity as the Board of Equalization and Review to review the property valuations made by the Tax Commissioner and assessors. W. Va. Code § 11-3-24; *see id.* § 11-3-19 (requiring the assessor to deliver property books containing assessment values to the county commission on an annual basis). Specifically, if a taxpayer disagrees with the Tax Commissioner’s valuation of its property, its “initial avenue for relief from an allegedly erroneous property valuation lies with the county commission, sitting as a board of equalization and review.” *In re Tax Assessment Against Am. Bituminous Power Partners*, 208 W. Va. 250, 254, 539 S.E.2d 757, 761 (2000).

2. Responsibilities of the Tax Commissioner and Assessors

The Tax Commissioner has the duty to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. W. Va. Code § 11-1-2. The Tax Commissioner must value all industrial property in the state. *Id.* § 11-1C-10(c); *accord Am. Bituminous*, 208 W. Va. at 255, 539 S.E.2d at 762. In doing so, the Tax Commissioner and assessors “are fundamentally bound by statute to ascertain the ‘true and actual value’ of all property.” *Id.* at 255, 539 S.E.2d at 762 (quoting W. Va. Code § 11-3-1). To ensure that the Tax Commissioner and his assessors meet this statutory duty, the Tax Commissioner has

promulgated regulations to “govern[] the methodologies to be utilized in valuing commercial and industrial properties for the purposes of taxation.” Title 100, Series 1P W. Va. Code of State Rules; *see Am. Bituminous*, 208 W. Va. at 255-56, 539 S.E.2d at 762-63 (discussing same).

In valuing real property, the regulations provide that the Tax Commissioner “will consider and use, where applicable, three (3) generally accepted approaches to value: (A) cost, (B) income, and (C) market.” 110 C.S.R. § 1P-2.2.1. The regulations dictate that “[w]hen possible, the most accurate form of appraisal should be used.” *Id.* § 1P-2.2.2. The regulations further acknowledge that the Tax Commissioner may be limited in what methodology can be employed in a particular case “because of the difficulty in obtaining necessary data from the taxpayer, or due to the lack of comparable and/or industrial properties.” *Id.*

Similarly, for valuing industrial personal property, the Tax Commissioner’s regulations provide that the same three approaches set forth above “will be considered and used where applicable.” *Id.* § 1P-2.5.3.1; *see id.* § 1P-2.2.1 (defining approaches); *accord Am. Bituminous*, 208 W. Va. at 257, 539 S.E.2d at 764 (requiring that the Commissioner choose “the most reliable technique for appraising a particular property”). The regulations recognize that of the three approaches, “the cost approach may be most consistently applied to machinery, equipment, furniture, fixtures, and leasehold improvements because of the availability of data.” 110 C.S.R. § 1P-2.5.3.2. The same regulation observes that for such property “[t]he market approach is used less frequently, principally due to a lack of meaningful sales,” and instructs that “[t]he income approach is not normally used because of the difficulty in estimating future net benefits to be derived.” *Id.*

B. Factual and Procedural Background

Each of the three judgments pending before this Court involves the question whether the County Commission labors under an impermissible conflict of interest that violates due process when it sits as the Board of Equalization and Review. Further, these cases present the question regarding the appropriate standard of review to be applied by the County Commission when it reviews challenges to assessments by the Tax Commissioner. Finally, these cases involve violations of West Virginia statutes and regulations by the Tax Commissioner, who misapplied the governing valuation methodology and thereby improperly inflated the value of Bayer's property and with it Bayer's tax burden. Bayer briefly sets forth the nature of the issues.

1. Bayer's Due Process Claims.

In all three cases, Bayer showed that the County Commission's rulings violated Bayer's constitutional rights to due process under federal and West Virginia law because the Commission's role as the Board of Equalization of Review is in inherent and irreconcilable conflict with its competing role of administering the County's finances. *See, e.g.*, 2007 Order, Finding of Fact No. 33; 2006 BMS Order, Finding of Fact No. 24; 2006 BCS Order, Finding of Fact No. 25. In addressing this due process challenge, the Circuit Courts stated simply that there was "no merit" to Bayer's claims regarding the Commission's conflict of interest. *See* 2007 Order, Conclusion of Law No. 3; 2006 BMS Order, Conclusion of Law No. 4; 2006 BCS Order, Conclusion of Law No. 3.

Second, the Commission ruled that under W. Va. Code § 11-3-24, Bayer had the burden to prove "by clear and convincing evidence" that the Tax Commissioner's appraisals were erroneous. Bayer submitted that such a heightened standard of proof before the first adjudicatory tribunal violated the due process requirements of the Fourteenth Amendment to the Constitution

of the United States and West Virginia law. *See, e.g.*, 2007 Order, Finding of Fact No. 6; 2006 BCS Order, Finding of Fact No. 7; 2006 BMS Order, Finding of Fact No. 5. In addressing this challenge, the Circuit Courts believed that the precedent of this Court required the taxpayer to present “clear and convincing” evidence for the Commission to overturn a Tax Commissioner’s assessment under W. Va. Code § 11-3-24. *See* 2007 Order, Finding of Fact No. 34; 2006 BMS Order, Finding of Fact No. 25; 2006 BCS Order, Finding of Fact No. 26.

Third, in addition to challenging the Tax Commissioner’s analysis on the merits, Bayer argued that its due process rights were violated when the Circuit Courts reviewed the rulings of the Commission under a deferential standard of review. 2007 Order at 10-11; 2006 BMS Order at 7; 2006 BCS Order at 6. The Circuit Courts below concluded that Bayer’s rights had not been violated.. *See* 2007 Order at 10-11; 2006 BMS Order at 7-8; 2006 BCS Order at 6-7.

2. The Tax Commissioner’s Erroneous Valuation Determinations

a. 2006 Valuation Appeals

For tax year 2006, BMS and BCS each challenged the appraisal of their industrial personal property, and BCS also challenged the appraisal of its real property.

i. Bayer submitted to the Commission that the Tax Commissioner failed to follow his own regulations and committed serious methodological errors that led him to overvalue BCS’s industrial personal property by approximately \$27.38 million and BMS’s industrial personal property by approximately \$10.2 million.

Pursuant to his regulations, the Tax Commissioner attempted to determine the fair market value of each company’s industrial personal property by employing the “cost approach.” *See* 2006 BCS Finding of Fact No. 12; 2006 BMS Finding of Fact No. 12. When the Tax Commissioner employs the “cost approach,” to determine “fair market value,” his regulations

mandate that the Tax Commissioner “will consider” whether to decrease the value of property based upon “three (3) types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence.” 110 C.S.R. § 1P-2.2.1.1; *see id.* § 1P-2.5.3.1 (incorporating in the valuation of personal property context those definitions and methods set forth in § 1P-2.2.1.1 regarding valuation of real property). At issue here is the proper determination of “economic obsolescence,” which is defined as “a loss in value of property arising from ‘Outside Forces’ such as changes in use . . . or *changes in supply and demand relationships.*” *Id.* § 1P-2.3.5 (emphasis added).

Here, the Tax Commissioner calculated deductions for both physical deterioration and functional obsolescence (which are not in dispute), but failed to consider “economic obsolescence.” *See* 2006 BCS Order, Findings of Fact Nos. 15-17; 2006 Order, BMS Findings of Fact 13-15; 2/16/2006 Tr. 50-51, 268, 278-279. Accordingly, the Tax Commissioner’s cost approach treated Bayer’s facilities as if they operated at 100% capacity even though the evidence showed that changes in “supply and demand relationships” caused Bayer’s facilities to operate well under their available capacity. *See* 2/16/2006 Tr. 77 (“At the end of the day, this is a supply and demand issue for the products being produced at the plant. . . . [T]his strictly is a supply/demand issue.”); *see also id.* at 52, 92. The Tax Commissioner’s appraiser who had assessed the BCS and BMS properties at issue admitted that he had no experience in conducting “economic obsolescence” calculations that the regulations require under the cost approach. *Id.* at 313-14.

Bayer presented expert testimony from a professional appraiser who testified that economic obsolescence could be calculated under generally accepted appraisal practices when, as here, a facility operates at less than capacity due to external market forces. 2006 BCS Order,

Findings of Fact No, 18; 2006 BMS Order, Findings of Fact Nos. 16, 22, 23; 2/16/2006 Tr. 55-57, 61-63, 66-71, 77, 89-90, 131-34. Bayer's expert explained that due to a lack of demand in the market, BCS's Institute, West Virginia facility operated at approximately one-third of its capacity, *id.* at 57-58, 60, 83, and BMS's South Charleston facility operated at approximately 87-88% of its capacity, *id.* at 132. Using formulas generally accepted in appraisal practice, Bayer's expert calculated that the BCS facility sustained 52.7% in economic obsolescence, 2/16/2006 Tr. 63-64, 69, equating to a value of \$30.37M,⁸ and the BMS facility sustained 8.7% in economic obsolescence, *id.* at 131 equating to a value of \$3.68M,⁹ plus an additional \$17.4M in economic obsolescence due to excess operating costs,¹⁰ *id.* at 142, 149-50, 151, for a total amount of economic obsolescence of \$21.08M.

The Tax Commissioner did not challenge Bayer's methodology or its application, but instead employed novel "income approach" calculations which he claimed would show whether to permit any deduction for economic obsolescence. 2006 BMS Order, Findings of Fact No. 17; 2006 BCS Order, Findings of Fact No. 19. The Tax Commissioner recognized that his approach is "not normally used" to value industrial property "because of the difficulty in estimating future net benefits to be derived" from such property. 110 C.S.R. § 1P-2.5.3.2; *see also id.* § 1P-2.2.2

⁸ Chapter 8 of the book *Appraising Machinery and Equipment* states that fair market value is calculated by deducting from the current (trended) cost, in order, physical deterioration, functional obsolescence, and economic obsolescence. Bayer's Exhibit 5, p. 82. The parties agree that the value of Bayer's machinery and equipment after trending and deduction of physical deterioration and functional obsolescence is \$57,629,774. 2006 Tr. 22-23, 50-51, 64-66; Bayer's 2006 Exhibit 1, p.2. 52.7% of value of machinery and equipment after trending and deduction for physical depreciation and functional obsolescence is \$30,370,891.

⁹ The parties agree that the value of Bayer's machinery and equipment after trending and deduction of physical deterioration and functional obsolescence is \$42,320,542. 2006 Tr. 22-23, 50-51, 66; Bayer's 2006 Exhibit 11, p.2, State's 2006 Exhibit 11, p. 3. 8.7% of value of machinery and equipment after trending and deduction for physical depreciation and functional obsolescence is \$3,681,887.

¹⁰ The issue of economic obsolescence due to inutility is present in all cases, but the issue of economic obsolescence due to excess operating costs is present only in BMS's 2006 appeal.

(recognizing that it may not be possible to use certain approaches due to “the difficulty in obtaining necessary data from the taxpayer”). In fact, Bayer does not account for its revenue (i.e., “income”) on a location-specific basis thus making it impossible to value the industrial property at a given site using an income basis. *See* 2006 BMS Order, Findings of Fact 17; 2/16/2006 Tr. 104,109, 264, 273, 290, 303, 307. As the Tax Commissioner’s witness conceded, he “could not do an income valuation because the taxpayer . . . does not have the income data for th[e] specific plants.” 2/16/2006 Tr. 263-64.

Despite the lack of income data, the Tax Commissioner claimed to “derive a projected income” for BMS and BCS as a whole. *See, e.g., id.* at 274-76; 2006 BMS Order, Findings of Fact No. 17. He then arbitrarily apportioned a percentage of the total value for BMS and BCS facilities throughout the country to the Bayer facilities in Kanawha County. 2/16/2006 Tr. 277-278; State’s 2006 Ex. 11. The Tax Commissioner conceded that Bayer is the only industrial taxpayer whose property had been valued using this extrapolated income approach. 2/16/2006 Tr. 305-07. He also admitted that the values he apportioned “do[] not” “relate back to the profitability of a particular plant.” *id.* at 321-22. Rather, the Tax Commissioner had “no idea” what percentage of the income he calculated for the companies as a whole actually was attributable to the West Virginia facilities subject to taxation in Kanawha County. *Id.* Accordingly, he acknowledged that his approach was “fairly arbitrary.” *Id.* at 322.¹¹ Using this

¹¹ The only justification that the Tax Commissioner offered in support of this methodology was that it had been employed for public utilities. 2006 BMS Order, Finding of Fact No. 17; 2/16/2006 Tr. 277. The Tax Commissioner’s regulations, however, explain that public utilities operate as unitary enterprises and have a predictable income given that the prices that they may charge are controlled by regulated ratemaking. *See* 110 C.S.R. §§ 1M-1 *et seq.* The regulations for valuing commercial and industrial property, however, do not approve this method for non-utilities, as income streams cannot be generalized, a fact which Mr. Amburgey recognized, *id.* at 304. *Cf.* 110 C.S.R. § 1M-4.2.1 (“public service corporations are predominantly cost regulated”).

novel approach, the Tax Commissioner found approximately \$3 million in economic obsolescence for the BCS facilities, and \$10.86M for the BMS property. State's 2006 Ex. 8, 11.

In light of the methods the Tax Commissioner employed, Bayer asserted that the results of the Tax Commissioner's valuation approach did not accurately reflect the market value of Bayer's facilities. The County Commission rejected Bayer's position and the Circuit Courts affirmed, holding that the Tax Commissioner's methodology was not an abuse of discretion and the Commission did not clearly err or abuse its discretion in finding that Bayer failed to prove a valuation error by clear and convincing evidence. 2006 BMS Order, Conclusion of Law No. 1; 2006 BCS Order, Conclusion of Law No. 1.

ii. Bayer also showed that the Tax Commissioner had erroneously valued BCS's real property at \$42,000/acre. Pursuant to the Tax Commissioner's regulations, Bayer used market data to value the real property, and showed, based on a fee appraisal and comparable sales figures, that the property's value was \$29,000/acre. See 110 C.S.R. § 1P-2.2.1.3 (allowing use of such data). Rather than valuing the BCS property using one of the approved methods, the Tax Commissioner used a mass appraisal technique not recognized or authorized by his regulations. Before the hearing, the Tax Commissioner conducted a *post hoc* analysis of comparable sales figures purporting to show that his original method nonetheless was accurate. As the Tax Commissioner's witness admitted, however, the "comparable" sales were quite different from the property at issue.

Again, the County Commission rejected Bayer's challenge and the Circuit Court affirmed, finding the assessment supported by "substantial evidence" and not in contravention of "any regulation, statute or constitutional provision." 2006 BCS Order, Conclusion of Law No. 2.

b. 2007 Valuation Appeals

In tax year 2007, BCS and BMS again challenged the Tax Commissioner's appraisal methodologies, which imposed an excessive tax burden on Bayer because the Tax Commissioner failed properly to account for economic obsolescence.

As during the previous proceedings, Bayer presented testimony from a professional appraiser that the BCS and BMS facilities again sustained economic obsolescence due to lack of demand. 2007 Bayer Tr. 32-33, 58; 2007 Order, Finding of Fact No. 18. Employing the cost approach and applying generally accepted appraisal practices and models published by the American Society of Appraisers, Bayer's witness showed that the economic obsolescence was 44.7%, or \$30,138,619 for the BCS facility and 5.4%, or \$2,263,782 for BMS's South Charleston facility Tr. 33-35, 45-46; 2007 Order, Findings of Fact No. 19-20.

The Tax Commissioner did not dispute Bayer's figures. *See* 2007 Bayer Tr. 32, 45, 60. Instead, the Tax Commissioner purported to value Bayer's property using the extrapolated income approach discussed above despite the absence of the necessary income data. *See supra*; 2007 Bayer Tr. 67-68, 78, 93; 2007 Order, Finding of Fact No. 24. The Tax Commissioner testified that this method initially showed the BCS property at issue was worth \$265 million, a sum more than double the fair market value he ultimately submitted to the County Commission. 2007 Bayer Tr. 100. He admitted that the income approach he employed "oftentimes" improperly captures goodwill and other intangible assets, which are not subject to taxation. *Id.* at 100-101, 103; *see* W. Va. Code § 11-1C-1b (exempting intangible property from taxation). Specifically, the Tax Commissioner's "Adjusted Total - Income Approach" for BCS resulted in a value of \$265,036,127, *more than twice as much* as the value under his "Adjusted Total - Cost Approach" of \$129,679,363. Petitioner's 2007 Exhibit No. 1. For BMS, the corresponding

result using the income approach was \$243,853,503, more than \$67 million more than the cost approach value of \$176,657,986. Petitioner's 2007 Exhibit No. 2. The Tax Commissioner realized that it was his income approach that was producing arbitrary values because he based his final valuation on only the results of his cost approach analysis,. 2007 Bayer Tr. 57; see also *id.* at 98, 103, 115; Bayer's 2007 Ex. 1, 2; 2007 Order, Findings of Fact Nos. 11-16, 25, 26.

Finally, to support his conclusion that no economic obsolescence was warranted, the Tax Commissioner conducted an analysis that finds no support in his rules or identified in generally accepted appraisal practices. That is, he compared the results of his incomplete cost approach and his extrapolated income analysis. He submitted that because there was a negative comparison between the values, no economic obsolescence was present. 2007 Bayer Tr. at 37, 101; 2007 Order, Findings of Fact Nos. 25, 26.

As in 2006, the County Commission refused to overturn the Tax Commissioner's determinations, and the Circuit Court concluded that the methodology employed was within the Tax Commissioner's discretion. 2007 Order, Conclusion of Law Nos. 1, 2.

III. Assignments of Error

1. In West Virginia, a county commission has the ultimate responsibility for the fiscal affairs of each county. Accordingly, a commission has an inherent interest in maximizing the revenue available to the county, and thus in denying tax appeals that would result in a reduction of revenue available to the county. This partisan interest presents a conflict with the commission's statutory role to adjudicate tax appeals. Such an inherent conflict of interest on the part of the tribunal constitutes a denial of due process to those who must appear before it.

2. By applying a "clear and convincing" burden of proof, the Kanawha County Commission erred by failing to abide by a well-established syllabus point from this Court

holding that assessment errors must be proved “by a preponderance of the evidence.” Syllabus Point 8, *Killen v. Logan County Comm’n*, 170 W. Va. 602, 604, 295 S.E.2d 689, 691 (1982).

3. Hearings before a county commission deprive taxpayers of an impartial adjudication and their due process rights if, as here, they were required to prove by clear and convincing evidence that the Tax Commissioner’s appraisal was erroneous.

4. The Tax Commissioner violated his own regulations and generally accepted appraisal practices which led to an improper valuation of Bayer’s industrial personal property. Specifically, he violated his own legislative rules in performing the cost approach by failing properly to account for “economic obsolescence” based upon undisputed proof that adverse changes in “supply and demand relationships” caused Bayer’s property to perform at well under its available capacity. The Tax Commissioner’s valuation methodology for “economic obsolescence” contravened his own rules, which dictate that the “income approach” should not be used where, as here, appropriate data are not available. Indeed, the Tax Commissioner admitted that he had “no idea” whether he accurately captured the value of Bayer’s West Virginia property but instead acknowledged that his assumptions and calculations were “fairly arbitrary.” Because these errors resulted in appraised values that did not reflect the true and actual value of Bayer’s industrial personal property, Bayer is entitled to relief.

5. Lastly, it was error for the County Commission to credit the Tax Commissioner’s unreliable mass appraisal of BCS’s real property and *post hoc* use of “comparable” values for properties that bore no similarity to the BCS facility at issue.

IV. Argument

A. The County Commission's Inherent Conflict of Interest Violates Due Process

All of the consolidated appeals involve an inherent and irreconcilable conflict between the County Commission's interests and duties which results in a deprivation of federal and constitutional due process of West Virginia taxpayers. The three elected members of the Kanawha County Commission have a significant and inherent interest in maximizing revenue for Kanawha County.

Under West Virginia law, the County Commission is responsible for managing the county's budget and financial affairs. However, the County Commission also has the statutory duty to sit as a fair and impartial body to determine whether taxpayers are entitled to a reduction in their taxes due to errors in the appraisal of their property subject to *ad valorem* taxes. In the event of such errors—as a County Commissioner recognized in the proceedings here—the tax base of the County is reduced and the provision of county services may suffer as a result.

In this light, any taxpayer who appears before the County Commission challenging the assessment of property subject to tax must persuade a decisionmaker who has a clear and unmistakable interest in rejecting an appeal that would diminish the funding necessary for the County Commission to satisfy its obligation to ensure the provision of government services. Consequently, there is an inherent conflict between the Commissioners' roles as politically accountable overseers of the county finances and as a fair and impartial judges for individual tax appeals.

The present appeals involve stark facts that highlight the inherent bias and improper appearance of bias that infects tax rulings by the County Commissioners. For tax year 2006, (i) BCS showed that the appraisal of its personal property was excessive by more than \$27 million

and of its real property by almost \$6 million, and (ii) BMS asserted that the appraisal of its personal property was excessive by more than \$10 million. Together, the reduction of taxes would have been approximately \$588,000. Similarly, for the 2007 tax year, Bayer showed that the appraisal of BCS's personal property was excessive by more than \$30 million and that for BMS's personal property was excessive by more than \$2 million. As a result, the County's tax base would be reduced by approximately \$470,000 in improperly collected taxes.

The relief sought by Bayer would have had a direct impact on the County Commission's ability to perform its executive obligations. As the President of the County Commission candidly acknowledged: "You are talking arguably [about a] \$350,000.00 loss to the Board of Education [if BCS prevailed]." 2/21/2006 Tr. 24. Similarly, Commissioner Carper predicted that if the Tax Commissioner's decision were overturned as erroneous, taxes county wide would increase such that "the average taxpayer won't be able to afford a carport." *Id.* at 21; *see id.* ("These decisions have a real impact on the tax base of this State and County.").

Such concerns reflected on the record underscore the inherent bias and appearance of bias of the Commission acting in a quasi-judicial role. The dual roles and inherently contradictory obligations of the County Commission subject the taxpayer to a procedure that violates due process. Here, although the Tax Commissioner admitted that he applied a "fairly arbitrary" methodology to value Bayer's property, and that he had "no idea" whether it accounted for the companies' true and actual value as the West Virginia Constitution requires, the County Commission deferred to these views to the detriment of Bayer. As such, reversal is warranted.

1. Taxpayers Have a Right to Due Process in a Valuation Appeal, Including a Tribunal That Is Free of Both Bias and the Appearance of Bias.

First, there is no question that Bayer had a right to due process under the West Virginia and federal constitutions in the proceedings before the Commission. *See, e.g., State ex rel. Ellis*

v. *Kelly*, 145 W.Va. 70, 74, 112 S.E.2d 641, 644 (1960) (citations omitted) (holding all government branches and subdivisions “are bound by the prohibition of the due process guaranties, which extend to legislative, judicial, administrative, or executive proceedings”) (citation omitted). This Court has held that a county commission’s failure to accord taxpayers fair procedures during valuation proceedings violates due process. *In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 62, 303 S.E.2d 691, 701-02 (1983) (lack of quorum of commission and the commission’s decision given the absence of evidence contradicting the taxpayer’s “claim that the assessment was made in an arbitrary fashion” violated due process); see *In re Eastern Associated Coal Corp.*, Syl. Pt. 2, 157 W.Va. 749, 204 S.E.2d 71 (1974) (“Refusal by the county court to permit the introduction of such evidence . . . is a violation of the taxpayer’s right to due process of law as required by Article III, Section 10 of the Constitution of West Virginia.”).

Second, due process requires that Bayer’s grievances be heard by a tribunal free from both bias *and* the appearance of bias. As this Court has explained, “It is a fundamental rule in the administration of justice that a person can not be a judge in a cause wherein he is interested, whether he be a party to the suit or not.” Syl. Point 1, *State ex rel. Shrewsbury v. Poteet*, 157 W. Va. 540, 202 S.E.2d 628 (1974) (citation omitted). Likewise, the United States Supreme Court has confirmed the centrality of a neutral arbiter and the appearance of fairness. Indeed, in its seminal decision in *Tumey v. Ohio*, 273 U.S. 510 (1927), the United States Supreme Court reaffirmed that, “of course,” the “general rule” is that “officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided.” *Id.* at 522-23.

In *Tumey*, the impartiality of a village judge was questioned because he also was mayor of the village. As mayor and the “chief executive of the village,” he was “charged with the business of looking after the finances of the village.” *Id.* at 533. Because of those duties, the Supreme Court found that the mayor “cannot escape his representative capacity.” *Id.* Turning to his duties as village judge, the Court found that income from the mayor’s court “offers to the village council and its officers a means of substantially adding to the income of the village to relieve it from further taxation.” *Id.* Accordingly, the Court concluded that it was reasonable for a party to question whether he could receive a fair trial or sentence given the judge’s “interest as mayor in the financial condition of the village and his responsibility therefor” and his accompanying implicit “motive to help his village by conviction and a heavy fine.” *Id.*

In light of the mayor-judge’s dual roles, the Court established a rule that “[a] situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law.” *Id.* at 533-534.¹² The Court emphasized that “[e]very 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.” *Id.*; accord *Williams v. Brannen*, 116 W. Va. 1, 178 S.E. 67, Syl. Pt. 2 (1935) (quoting same). The Court therefore concluded that the village’s statutory scheme was unconstitutional because “the state, by the operation of the statutes we have considered, has . . . vested the judicial power in one who by reason of his interest, both as

¹² The United States Supreme Court has held that these principles apply equally in civil proceedings. See, e.g., *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal *in both civil and criminal cases.*”) (emphasis added and citations omitted); see also *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993) (holding that the requirement of an unbiased tribunal extends to situations where a private party is given statutory authority to adjudicate a dispute).

an individual and as chief executive of the village, is disqualified to exercise it in the trial of the defendant.” *Tumey*, 273 U.S. at 535.

Since *Tumey*, controlling precedent reflects that due process requires courts to ensure that a party receives a ruling from a tribunal that is free of bias and the appearance of bias. As this Court has stressed, satisfying due process by ensuring both impartiality and the appearance of impartiality requires a “stringent rule” that “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.” *Louk v. Haynes*, 159 W. Va. 482, 499, 223 S.E.2d 780, 791 (1976). Likewise, in *Offutt v. United States*, 348 U.S. 11 (1954), the Court confirmed that “justice must satisfy the appearance of justice.” *Id.* at 14. That is, “[f]airness 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.” *In re Murchison*, 349 U.S. 133, 136 (1955) (emphasis added); see *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972) (holding situation where “mayor’s executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor’s court” violated due process)..

2. The County Commission’s Conflicting Obligations Create an Inherent Conflict of Interest When the Commission Sits as the Board of Equalization and Review.

Applying the foregoing due process principles, the County Commission’s primary function in managing Kanawha County’s financial affairs gives rise to an inherent bias or appearance of bias when it sits in a quasi-judicial capacity as the Board of Equalization and Review. The conflict between the Commission’s budgeting and executive capacities, on the one

hand, and its quasi-judicative function in reviewing assessments, on the other, requires that the judgments below be reversed.

On the one hand, the County Commission is constitutionally and statutorily charged with administering the “fiscal affairs of their counties.” W. Va. Const. Art. IX § 11; *see* W. Va. Code § 7-1-5 (requiring Commission to “supervise the general management of the fiscal affairs and business of each county”); *accord State ex rel. Dingess v. Scaggs*, 156 W.Va. 588, 590, 195 S.E.2d 724, 725 (1973) (quoting the West Virginia Code and observing that county commissions “are the central governing body of the county”). As detailed above, the Kanawha County Commission admits that its “primary function” is to oversee the county’s “budget development and management,” including the “management of county assets.” *Supra* at 5 n.1 (discussing Mission Statement). Further, a substantial portion of the budget which the County Commission oversees and manages is generated from property taxes. *Id.*; *see, e.g., State ex rel. County Comm’n v. Cooke*, 197 W. Va. 391, 399, 475 S.E.2d 483, 491 (1996). When revenues from property taxes fall, the County Commission must make budget cuts and other sacrifices that directly affect its constituents. *See State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 144 & n.2, 386 S.E.2d 640, 642 & n.2 (1989).¹³

On the other hand, however, when sitting as the Board of Equalization and Review, the County Commissioners are charged with the power to determine whether property taxes imposed on a taxpayer are excessive, a determination that would undermine their ability to perform their

¹³ Indeed, adequate funding for the counties of West Virginia and the effective use of such funding are frequent campaign issues. *See, e.g., Meet the Candidates: Primary Election; Putnam County Commission*, Charleston Gazette & Daily Mail, Apr. 20, 2008 at 13J (reporting agreement among county commission candidates that Putnam County’s greatest issue was to find and provide “adequate funding” in the county); Dawn Miller, *It’s tough to be Kanawha County*, Charleston Gazette, Sept. 7, 2007, at 4A (discussing residents’ competing interests, expressed “through their elected representatives,” in funding various initiatives in the county); Janet Metzner, *Mon Commission Candidates Square Off*, Dominion Post, Oct. 5, 2006 (noting one candidate for county commissioner explained that one of his core accomplishments was the funding the county was able to provide its fire departments).

executive responsibilities. Similar to the officials at issue in *Tumey* and *Ward*, the County Commissioners therefore “occup[y] two practically and seriously inconsistent positions, one partisan and the other judicial.” *Tumey, supra*. Moreover, the Commissioners’ executive interests offer precisely the sort of “possible temptation to the average man as a judge” that would cause him to view the taxpayer’s case with partiality and bias. *See Tumey, supra; Brannen, supra; see also Killen v. Logan County Comm’n*, 170 W. Va. 602, 625, 295 S.E.2d 689, 712 (1982) (Neely, J., dissenting) (“The pressures on the county commissions are probably such that they will quickly use all money available to them.”). Requiring individuals who are accountable to county residents to deliver government services also to adjudicate whether the funds available to perform those services should be returned to entities challenging their tax assessments taxpayers creates both an inherent conflict of interest as well as the appearance of such a conflict in violation of the requirements of due process.

These competing roles—through which (1) the Commissioner in his executive role is vested with “an interest in the outcome,” and (2) is empowered to control that outcome while acting his quasi-judicial capacity—present “the probability of unfairness” and preclude the “appearance of justice” mandated by due process. *See Murchison, supra; Offut, supra; Louk, supra.*¹⁴

Indeed, the proceedings before the County Commission in the present appeals illustrate the potential impact of these conflicting obligations on the adjudicatory process. For example, during hearings addressing Bayer’s claims, President Carper repeatedly expressed his concern

¹⁴ *Cf. Pocahontas Land*, 172 W. Va. at 63 n. 13, 303 S.E.2d at 701 n.13 (noting that appellant claimed the Board’s dual role led to its inherent bias, but declining to reach the issue as it had not been raised before the circuit court). In these cases, the issue of whether County Commissioners, by virtue of their executive responsibilities for county finances, should be disqualified from hearing valuation appeals was fully briefed and addressed in the Circuit Court.

for Kanawha County's finances and the possible affect of diminished revenue on county schools to enter his deliberations as a purportedly neutral jurist. *See supra* at 18 (remarking that "[y]ou are talking arguably [about a] \$350,000.00 loss to the Board of Education [if BCS prevailed]," and that "[t]hese decisions have a real impact on the tax base of this State and County") (quoting 2006 hearing transcript).¹⁵

The Commissioners' duty to oversee the fiscal affairs of the county and accompanying executive interest in maximizing the county's revenue cannot be squared with the requirement that they impartially assess the taxpayer's valuation challenges which would deprive the County Commission of revenue. As such, the Commission's proceedings violated Bayer's right to due process, and those decisions should be reversed.

B. The County Commission's Application of a "Clear and Convincing" Standard of Proof Was Erroneous under West Virginia Law and Violates Due Process.

In all three cases, the Commission presumed the Tax Commissioner's assessment to be correct unless Bayer could present the County Commission with "clear and convincing evidence" to the contrary. *See* 2006 BMS Order, Finding of Fact 24; 2006 BCS Order, Finding of Fact 25; 2007 Order, Finding of Fact 33. That is wrong for two reasons. First, this Court has held that a preponderance of the evidence burden of proof applies when challenging an assessment before the Board. Syllabus Point 8, *Killen v. Logan County Comm'n*, 170 W. Va. 602, 604, 295 S.E.2d 689, 691 (1982). Second, imposition of clear and convincing standard of proof exacerbates the due process concerns inherent in having the Commission determine tax appeals. Imposing a standard of proof higher than the traditional preponderance of the evidence

¹⁵ In Commission proceedings immediately before the Board heard Bayer's 2007 valuation challenge was heard, the Commission similarly consistently asked each taxpayer for the exact amount of the reduction in tax revenue that would occur were the Tax Commissioner's appraisal reversed. *See* 2007 CC Tr. 27, 43-44, 52, 55-56, 60, 76.

standard at the first *adjudicative* level independently violates Bayer's due process rights. These errors are discussed in turn.

1. A "Preponderance of the Evidence" Burden of Proof Applies to Challenges Before the Commission.

More than 50 years ago, this Court recognized that a taxpayer who receives an adverse ruling from a County Commission must carry a heavy burden in convincing *a circuit court* to overturn that determination. *See, e.g., In re Nat'l Bank of W. Va. at Wheeling*, 137 W. Va. 673, 73 S.E.2d 655, 687 (1952) (holding assessments by the county commissions "should stand, unless there appears in the record some fact or facts which *clearly establish* the assessments to be erroneous") (emphasis added), *overruled on other grounds by In re Kanawha Val. Bank*, 144 W. Va. 346, 109 S.E.2d 649 (1959); *Norfolk W. Ry. Co. v. Bd. of Public Works*, 124 W. Va. 562, 21 S.E.2d 143, 147 (1942) ("In order *for courts* . . . to reverse or to interfere with the exercise of the taxing power, there must be a *clear showing* of the arbitrary abuse of that power that amounts to a *mala fides* purpose to disregard the principle of uniformity, or of practical confiscation.") (emphasis added). In contrast, this Court did not until more recently articulate the applicable standard of proof in proceedings before the County Commission challenging a tax assessment, *i.e.*, the standard applicable before the first adjudicatory and fact-finding tribunal.

In *Killen v. Logan County Commission*, 170 W. Va. 602, 295 S.E.2d 689 (1982), this Court gave careful consideration to the burden of proof before a County Commission. There, following an appeal from a decision of a board of equalization and review, the circuit court certified a question to this Court regarding the constitutionality of a valuation procedure struck down by the circuit court. In resolving the constitutional question, this Court detailed the interaction of the initial determinations made by the assessor, the burdens placed on a party challenging an assessment before the Commission, and a court's review of a Commission's

determinations. *See id.* at 605-19, 295 S.E.2d at 692-706. Pertinent here, this Court established a syllabus point holding: “An objection to any assessment may be sustained only upon the presentation of competent evidence . . . The objecting party . . . must show *by a preponderance of the evidence* that the assessment is incorrect.” *Id.* at 604, 295 S.E.2d at 691, Syllabus Point 8 (emphasis added); *accord id.* at 619, 295 S.E.2d at 706 (quoting same); *see id.* at 622, 295 S.E.2d at 709 (requiring “preponderance of competent evidence” show that appraisal values are erroneous for Board to reduce or increase the value).

This Court explained that although the statutory scheme demands that the tax commissioner’s appraisal is “presumed to be correct,” due process requires procedures through which parties “may challenge use of the appraisal values” before the Commission and in the courts “if [they] are either too high or too low.” *Id.* at 618-19, 295 S.E.2d at 706. Moreover, the Court recognized:

It is important to realize the difference in the burden of proof required in a *de novo* [*i.e.*, fact-finding] proceeding and the standard of judicial review utilized by courts when considering appeals of assessments. W. Va. Code § 11-3-25 allows taxpayers to contest the proposed assessment value before the Board of Equalization and Review. The preponderance of the evidence standard would apply to that proceeding. . . . However, when the taxpayer has appeared before the Board of Equalization and Review, judicial review by the circuit court and by this Court will be limited.

Id. at 619 n.27, 295 S.E.2d at 706 n.27.

Subsequent to *Killen*, however, decisions have not focused carefully on the distinction between the “burden of proof” before the County Commission versus the heightened standard of review that has applied to appellate review of Commission findings. The decision in *In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 303 S.E.2d 691 (1983) is illustrative. There, this Court affirmed a circuit court’s decision vacating the Commission’s tax appraisal decision on due process grounds because the taxpayers “were denied a meaningful hearing

before a proper quorum.” *Id.* at 60, 303 S.E.2d at 698-99. After doing so, the Court noted the “general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct,’ *Bankers Pocahontas Coal Co. v. County Ct. of McDowell County*, 135 W. Va. 174, 179, 62 S.E.2d 801, 804 (1950), and ‘the burden of showing an assessment to be erroneous is, of course, upon the taxpayer and proof of such fact must be clear,’ *In re Tax Assessments Against the Nat’l Bank of W. Va. at Wheeling*, 137 W. Va. 673, 687, 73 S.E.2d 655, 664 (1952).” *In re Tax Assessment Against Pocahontas Land Co.*, 172 W. Va. at 61, 303 S.E.2d at 699. Even though *Bankers Pocahontas* and *Wheeling* address the standard of review applicable at the circuit court level,¹⁶ in the next sentence, the Court stated in dicta: “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.” *Id.*, 303 S.E.2d at 699. That dicta did not purport to distinguish or overrule, let alone acknowledge, this Court’s contrary holding and syllabus point in *Killen*.

The dicta contained in *Pocahontas Land Co.* has led to unnecessary confusion. As Chief Judge Haden recognized, this Court “has relied upon two different standards for proving erroneous assessments” before a County Commission. *CSX Transp., Inc. v. Bd. of Public Works of W. Va.*, 871 F. Supp. 897, 899 (S.D. W. Va. 1995) (recognizing that this Court inconsistently has applied the “preponderance evidence standard” from *Killen* and the “clear and convincing standard” from *Pocahontas Land Co.*, and choosing to apply the latter), *reversed*, 95 F.3d 318, 322-23 (4th Cir. 1996) (holding district court erred by failing to recognize that “preponderance

¹⁶ See *Bankers Pocahontas*, 135 W. Va. at 179, 62 S.E.2d at 804 (“courts will not interfere with the exercise of the taxing power in the absence of ‘a clear showing’ . . . an order of the circuit court entered on an appeal in a proceeding of this nature will not be reversed ‘when supported by substantial evidence, unless plainly wrong’”) (emphasis added and citations omitted); *Wheeling*, 137 W. Va. at 687, 73 S.E.2d at 664 (“[A]ssessments fixed by the county court should stand, unless there appears in the record some fact or facts which clearly establish the assessments to be erroneous.”) (emphasis added).

of the evidence” standard of proof applied before the Board). A series of cases resting on the *Pocahontas Land* court’s stray remark have confused the “clear and convincing” standard of review applicable when a circuit court reviews the decision of a county commission with the “preponderance of evidence” standard applicable in the original proceeding before the County Commission. See, e.g., *In re Tax Assessment Against Am. Bituminous Power Co.*, 208 W.Va. 250, 254, 539 S.E.2d 757, 761 (2000) (relying on *Pocahontas Land* and *In re Maple Meadow Min. Co.*, 191 W. Va. 519, 523, 446 S.E.2d 912, 916 (1994), which also rests on *Pocahontas Land*, and finding the “clear and convincing” standard of proof applies before the Board); *W. Pocahontas Props., Ltd. v. County Comm’n of Wetzel County*, 189 W. Va. 322, 324-24, 431 S.E.2d 661, 663-64 (1993) (relying on *Pocahontas Land*).

By contrast, in *Eastern American Energy Corp. v. Thorn*, 189 W. Va. 75, 428 S.E.2d 56 (1993) (per curiam), this Court reiterated the *Killen* rule: “[W]e have generally presumed the official assessment to be correct and have placed on the taxpayer the burden of showing by a preponderance of evidence any error in the official assessment.” *Id.* at 79, 428 S.E.2d at 59; accord Syllabus Pt. 3, 189 W. Va. 75, 428 S.E.2d 56 (“The objecting party . . . must show by a preponderance of the evidence that the assessment is incorrect.”) (quoting Syllabus Point 8, *Killen, supra*). Because this Court concluded that the taxpayer did not satisfy its burden, it affirmed the fact-finding below. *Id.* at 79, 428 S.E.2d at 60.

Likewise, in applying a federal act which provides that state law governs the burden of proof in determining assessed value, the Fourth Circuit reversed a district court for requiring the taxpayer to prove by “clear and convincing evidence” at the first adjudicative level that an *ad valorem* assessment was in error. *CSX Transp.*, 95 F.3d at 321-22. Applying *Killen* and *Eastern American Energy*, the Fourth Circuit recognized the “important . . . difference in the burden of

proof required” in an initial challenge to a tax assessment and the “standard of review utilized by courts when considering appeals of assessments,” holding that the preponderance of the evidence standard was controlling. *Id.* at 322-23 (quoting *Killen, supra*, n.27).

The conflict among these cases should be resolved by this Court through adoption of the preponderance of the evidence standard in proceedings before the County Commission. Specifically, *Killen*, the first case squarely to address this issue, carefully considered this question and clearly held that a “preponderance of the evidence” burden of proof applies. *See generally Nelson v. Warden*, 552 S.E.2d 73, 77 (Va. 2001) (“Under the doctrine of *stare decisis*, we are not obliged to uphold a decision that is itself at odds with precedent previously established by this Court “after full deliberation upon the issue,” . . . and that “has produced confusion.”) (citations and additional internal quotation marks omitted); *see also Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 276, 406 S.E.2d 700, 707 (1991) (holding decision of the Virginia Supreme Court to be persuasive and adopting a similar rule).¹⁷

Nor is there any reason for imposing a heightened burden of proof in cases involving tax assessments. Indeed, neither the Commission nor the Circuit Court identified any reason why taxpayers must meet a clear and convincing standard of proof at the first adjudicatory stage of a valuation case. As the United States Supreme Court repeatedly has indicated, heightened standards of proof are appropriate only in special circumstances, such as “in civil proceedings in which the ‘individual interests at stake are both “particularly important” and “*more substantial*

¹⁷ Indeed, where an intra-court conflict of authority exists and the earliest precedent has not been overruled, subsequent cases are obliged to follow the earliest precedent on point—here, *Killen*. *See, e.g., McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) (“When two holdings or lines of precedent conflict, the earlier holding or line of precedent controls.”) (quoting *S.W. Bell Tel. Co. v. City of El Paso*, 243 F.3d 936, 940 (5th Cir. 2001); *see also Nelson v. Warden*, 552 S.E. 2d 73, 21 C.J.S. Courts § 200 (“If a question has been decided expressly in an earlier case, which has never been modified or questioned, the mere fact that the reasoning of a few later cases involving somewhat different questions seems to indicate a change of view does not justify a departure from the rule stated in the earlier decision.”)).

than mere loss of money.’” *Cooper v. Oklahoma*, 517 U.S. 348, 362-63 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982)) (additional citations and alteration omitted); *see, e.g., Cruzon v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 280-81 (1990) (allowing Missouri to require a third party who seeks to terminate life-sustaining treatment to demonstrate by clear and convincing evidence that the incompetent person receiving such treatment would wish that step to be taken); *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) (heightened standard is appropriate in case involving the question of parental rights because proposed state action is “severe” and “irreversible”). In light of this precedent, the imposition of a heightened standard of review would be inappropriate. Indeed, where, as here, the text of the statute in question and its legislative history are silent as to the standard of proof, such “silence is inconsistent with the view that [the legislature] intended to require a special, heightened standard of proof.” *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

In all events, as shown below, the preponderance of the evidence standard should apply so as to avoid the serious constitutional question that would arise if a clear and convincing standard were instead adopted. Where, as here, “a statute is susceptible of two constructions, one of which is, and the other of which is not, violative of a constitutional provision, the statute will be given that construction which sustains its constitutionality unless it is plain that the other construction is required.” *Farley v. Graney*, 146 W. Va. 22, 33, 119 S.E.2d 833, 840 (1960) (internal quotation marks and citation omitted); *accord State ex rel. Cosner v. See*, 129 W. Va. 722, 744, 42 S.E.2d 31, 43 (1947) (“effect must be given to the elementary rule that every reasonable construction must be resorted to in order to save a statute from unconstitutionality”); *Gilbert Imported Hardwoods, Inc. v. Holland*, 176 F. Supp. 2d 569, 584 (S.D. W. Va. 2001) (“if an otherwise acceptable construction of a statute would raise serious constitutional problems, and

where an alternative interpretation of the statute is “fairly possible,” we are obligated to construe the statute to avoid such problems”) (quoting *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)). Because, as shown below, a serious constitutional concern is presented and it is not “plain” that section 11-3-24 must be construed to require proof by clear and convincing evidence before the County Commission, this Court should reaffirm that the appropriate burden of proof before the Commission is a preponderance of the evidence.

2. Imposition of a “Clear and Convincing” Burden of Proof before the Commission Would Violate Due Process.

The heightened standard of proof applied by the Commission is erroneous because it violated Bayer’s right to due process.¹⁸ Imposition of a heightened standard of proof implicates the same due process concerns that the United States Supreme Court identified in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993). There, the federal statute at issue 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.” *Id.* at 611. The Court ruled that the statute was constitutional only because it required a preponderance of the evidence standard of proof. *See id.* at 629. The Supreme Court explained that there is “a substantial question of procedural fairness under the Due Process Clause” where, as here, a challenging party is required to show the “findings to be either ‘unreasonable or clearly erroneous’” at the first level of adjudication. *Id.* at 625 (emphasis added, citation

¹⁸ Given the “clear and convincing” standard of proof violates established state law as expressed in the non-constitutional syllabus point established in *Killen*, it is not necessary for this Court to reach the constitutional error asserted here. *See generally Harshbarger v. Gainer*, 184 W. Va. 656, 660, 403 S.E.2d 399, 403 & n.26 (1991) (“It is a fundamental rule of constitutional adjudication that constitutional questions are avoided unless absolutely necessary.”). Of course, if this Court believes the *Pocahontas Land dicta* provides sound support for the “clear and convincing” burden of proof applied by the Board, the due process issue will require resolution.

omitted). The Court made clear that, as here, where “possible bias” exists, applying a heightened standard of review “*deprive[s] [the challenging party] of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause.*” *Id.* (emphasis added, citation omitted).

Here, in contrast, the bias of the Commission was not remedied by application of a preponderance of the evidence standard. Rather, that inherent bias was exacerbated by the Commission’s adoption of a “clear and convincing evidence” standard. *See, e.g.,* 2007 Bayer Tr. 22, 124, 128. The hearing transcripts show that the Commission relied on the “clear and convincing” standard not as an indication of “to what degree of probability the [taxpayer] must persuade the [Board] that the [Tax Commissioner] was wrong,” *Concrete Pipe*, 508 U.S. at 621, but as a nearly insurmountable hurdle that allows the Commission to disregard the taxpayer’s evidence even where the Tax Commissioner acknowledges errors and unreliable methodology in valuation. Thus, the heightened standard of proof employed by the Commission virtually guarantees that it will rule in favor of the taxing authority regardless of the lack of competent evidence supporting the Tax Commissioner’s initial valuations. In doing so, it denies the taxpayer its right to constitutionally meaningful review.

Because this standard of proof deprived Bayer of due process, the decisions below should be reversed.

C. The Tax Commissioner’s Errors Mandate Reversal Irrespective of the Standard of Proof.

The Tax Commissioner’s substantive basis for determining the fair market value of Bayer’s property violated his own regulations, contravened generally accepted appraisal practices, and relied instead on unsupported guesswork. As the Tax Commissioner testified, his valuation practices were “fairly arbitrary” and left him with “no idea” as to whether they

accurately established the value of Bayer's property. Accordingly, the valuations were without foundation and patently unreliable, and the judgments should be set aside and Bayer should be granted relief.

1. The Tax Commissioner Violated His Own Rules and this Court's Precedents in Valuing BCS's and BMS's Industrial Property Through Procedures that Admittedly Led to Arbitrary Results.

The Tax Commissioner committed a series of fundamental errors in valuing BCS's and BMS's personal industrial property, *i.e.*, machinery and equipment, for the 2006 and 2007 tax years. These errors led the Tax Commissioner to assess inflated and clearly erroneous values to Bayer's industrial personal property.

First, the Tax Commissioner violated his statutory mandate and regulations by failing to apply the most reliable methodology to value Bayer's property. The Tax Commissioner improperly adopted an "income approach" even though he lacked the necessary income data for BCS's and BMS's facilities in Kanawha County. As such, the Tax Commissioner erred by adopting a valuation method that was not the "most reliable" under the circumstances.

The Tax Commissioner is "fundamentally bound by statute to ascertain the 'true and actual value' of all property." *Am. Bituminous*, 208 W. Va. at 255, 539 S.E.2d at 763 (emphasis added). As noted previously, to calculate the true and actual value of personal property, the Tax Commissioner may use one of three valuation approaches—(1) cost, (2) income, or (3) market—"where applicable." 110 C.S.R. § 1P-2.5.3.1. In doing so, the Tax Commissioner must employ "the most reliable technique for appraising a particular property." *Am. Bituminous*, 208 W. Va. at 257, 539 S.E.2d at 764; *see also* 110 C.S.R. § 1P-2.2.2 (specifying that the Tax Commissioner will use "the most accurate form of appraisal").

For the property at issue in this case, the Tax Commissioner's regulations express a clear preference, stating that "of the three (3) approaches to value, the cost approach may be most consistently applied to machinery, equipment, furniture, fixtures, and leasehold improvements because of the availability of data." 110 C.S.R. §1P-2.5.3.2; *accord Am. Bituminous*, 208 W. Va. at 257, 539 S.E.2d at 764 (the "regulation makes clear that the cost approach is most appropriate where . . . the valuation involves machinery and equipment"). The regulations also expressly contemplate that certain valuation approaches will not be available to an appraiser in every case because necessary data may not be available. *See* 110 C.S.R. § 1P-2.5.3.1 (specifying that Tax Commissioner can only select the approaches "where applicable"). Moreover, they recognize that in valuing industrial personal property, as here, "[t]he income approach is not normally used because of the difficulty in estimating future net benefits to be derived." *Id.* §1P-2.5.3.2. In other words, the data essential to employing an income approach often do not exist for industrial personal property. Here, there is no dispute that the "market approach" was unavailable to value Bayer's personal property in these cases because necessary data were unavailable.

Under the "cost" approach, the applicable regulations require that the Tax Commissioner will consider reductions in property value for three types of depreciation: "physical deterioration, functional obsolescence, and economic obsolescence." *Id.* §1P-2.2.1.1. In this case, the parties agree that the Tax Commissioner properly applied the cost approach to the first two categories of depreciation. 2007 Bayer Tr. 28, 30, 32 (BCS), 45 (BMS); 2007 Order, Findings of Fact Nos. 9-11; 2/16/2006 Tr. 50-51, 268, 278-279; 2006 BCS Order, Findings of Fact Nos. 15-17; 2006 Order, BMS Findings of Fact 13-15. Indeed, the Tax Commissioner and Bayer reached the same results in doing so. *E.g.*, 2/16/2006 Tr. 22-23, 30, 50-51; Bayer's 2007 Ex. 1, 2. With respect to economic obsolescence—which is defined as "loss in value of property

arising from 'Outside Forces' such as . . . changes in supply and demand relationships," 110 C.S.R. § 1P-2.3.5—the record was undisputed that Bayer's facilities operated well below their capacity because demand in the market was lacking. Nevertheless, the Tax Commissioner simply refused to make an appropriate reduction for economic obsolescence. *See, e.g.*, 2007 Bayer Tr. 30, 32, 45; 2006 BMS Order, Finding of Fact Nos. 11-13; 2006 BCS Order, Finding of Fact Nos. 13-16; 2007 Order, Finding of Fact No. 13-15, 25, 26.

Specifically, the Tax Commissioner failed to account properly for economic obsolescence even though (1) he was required by the regulations to do so, and (2) the undisputed record evidence demonstrated that the amount of economic obsolescence can be determined through the cost approach using formulas generally accepted in appraisal practice. 2007 Bayer Tr. 32-35, 46, 51-52, 59, 2007 Order, Finding of Fact No. 18, 21; 2006 BCS Order, Findings of Fact No. 18; 2006 BMS Order, Findings of Fact Nos. 16, 22, 23; 2/16/2006 Tr. 55-57, 61-63, 66-71, 77, 89-90, 131-34. When independent appraisers retained by Bayer conducted these calculations, they found that Bayer's facilities were operating at well under capacity based upon decreased demand for Bayer's products. As such, the amount of economic obsolescence for BCS and BMS, respectively, was approximately \$30.37 million and \$21.08 million for tax year 2006, and \$30,138,619 and \$2,263,782 for tax year 2007. *See* footnotes 8 and 9, *supra*; 2007 Order, Finding of Fact No. 20. Because the Tax Commissioner failed to account for economic obsolescence, his valuation of Bayer property was grossly inflated and should be reversed. *See* Syllabus Point 8, *Killen v. Logan County Comm'n*, 170 W. Va. 602, 604, 295 S.E.2d 689, 691 (1982) (recognizing that a taxpayer must present "competent evidence, such as that equivalent to testimony of qualified appraisers" to have its objection to valuation sustained); *Pocahontas*

Land, supra (following a taxpayer's showing, it is "incumbent upon the taxing authority to place some evidence in the record to show why its assessment is correct").

Second, the Commission erred in accepting the Tax Commissioner's claim that his failure to account for economic obsolescence under the cost approach was immaterial because he had conducted an income analysis that he argued showed there was no economic obsolescence. As detailed below, that "income" analysis was wholly inappropriate and unreliable in these circumstances because the Tax Commissioner lacked the necessary income data for the Bayer's facilities in Kanawha County. Without the necessary "income" data, it comes as no surprise that the Tax Commissioner admitted that the results of his income analysis were "arbitrary."

The Tax Commissioner's regulations provide that the accepted valuation methods may be applied only where the necessary data are available. *See supra*. This Court has concluded that the language of the regulations "specifically contemplates situations such as exist here, where the data are insufficient to employ one or more of the designated valuation methods." *Am. Bituminous*, 208 W. Va. at 257, 539 S.E.2d at 764 (emphasis added). The regulations further recognize that the income approach generally cannot be used to value industrial personal property in the absence of necessary income data. *See supra* (discussing 110 C.S.R. §1P-2.5.3.2).

Here, the undisputed record showed that Bayer does not account for its revenue (i.e., *income*) on a plant-by-plant basis, and thus there were no plant-specific income data which could be utilized to conduct an "income approach" valuation of Bayer's industrial personal property. *See, e.g.*, 2007 Order, Finding of Fact 23; 2007 Bayer Tr. at 67-68; 2006 BMS Order, Findings of Fact 17; 2/16/2006 Tr. 104,109, 264, 273, 290, 303, 307. The Tax Commissioner admitted "we could not do an income valuation because the taxpayer . . . does not have the income data

for th[e] specific plants.” 2/16/2006 Tr. 263-64. Accordingly, this was precisely the type of situation recognized in the regulations and by this Court in which an income approach cannot be used because the necessary data are not available. 110 C.S.R. §1P-2.5.3.2; *Am. Bituminous*, 208 W.Va. at 257, 539 S.E.2d at 764.

The Tax Commissioner violated his regulations by applying an income valuation approach even though he lacked the necessary income data. *See generally Vance v. W. Va. Bureau of Employment Programs/Elkins Job Service*, 217 W. Va. 620, 623, 619 S.E.2d 133, 136 (2005) (“This Court has long held that “[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.”). Lacking the necessary plant-specific data, the Tax Commissioner “reviewed [Bayer’s] State corporate income tax returns” and simply picked numbers that he stated were “attributable to the West Virginia facilities.” 2007 Order, Finding of Fact No. 24; 2006 BMS Order, Findings of Fact No. 17. The Tax Commissioner testified that he “derive[d] a projected” income for the company as a whole, then arbitrarily apportioned the total income figure among the facilities in Kanawha County. *E.g.*, 2/16/2006 Tr. at 274-77. The Tax Commissioner admitted that Bayer is the only taxpayer in the entire state whose property has been valued in this fashion. 2/16/2006 Tr. 306-07; 2007 Bayer Tr. 106. Moreover, this “method” of determining plant-specific income data is not supported anywhere in the Tax Commissioner’s regulations that apply to industrial or commercial property, nor could the Tax Commissioner point to any support for it in generally accepted appraisal practices applicable to such property. *See generally* 2/16/2006 Tr. at 303-09; *accord id.* at 309 (“Q. Cite me a statute or cite me a rule that mentions the use of the corporate net income tax data for purposes of determining the value of a taxpayer's industrial personal property. A. I cannot cite one for you.”).

The Tax Commissioner could not support his valuation protocol for good reason. Before the Commission, the Tax Commissioner admitted that his apportionment of Bayer's total income to the particular plants in Kanawha County was entirely speculative and unreliable:

Q. How do you take --- how does your apportionment relate back to the profitability and income of a particular plant?

A. It does not.

Q. All right. And yet you used the apportioned revenue back to West Virginia as a starting point on your income valuation? You have no idea? You have no idea whether the net income that is reported by the company as a whole is generated to the extent of 10 percent at Institute [the Kanawha facility], 20 percent at Institute, 50 percent or 100 percent at Institute?

A. That is correct.

Id. at 321. The Tax Commissioner agreed that the approach he used was "fairly arbitrary" because it treated the Kanawha County plant as if it were just as profitable as every other Bayer plant nationwide. *Id.* at 322. Indeed, his erroneous methodology proved so flawed for tax year 2007 that the Tax Commissioner originally calculated that the BCS property in Kanawha County was worth \$265 million, an amount more than *double* what he ultimately concluded to be the actual value of BCS's property. *See* 2007 Bayer Tr. at 100-03; *id.* at 40, 91.¹⁹

In light of the foregoing, the Tax Commissioner's income approach was an inappropriate methodology for determining the value of Bayer's property. The Tax Commissioner's decision to employ arbitrary speculation as a substitute for hard data violates West Virginia law and plainly was not the "the most reliable technique for appraising a particular property." *Am. Bituminous, supra*. Therefore, the Board's reliance on his valuation with its asserted absence of economic obsolescence was clearly erroneous.

¹⁹ The Tax Commissioner explained that his novel income approach erroneously captured nontaxable intangible property interests that had to be "backed out" before he could reach a purportedly reliable figure. 2007 Bayer Tr. at 100-01. However, he made no effort to do so.

Finally, even if it were possible to value Bayer's industrial property using the income approach despite the missing essential data—and it was not—the Tax Commissioner erred in concluding that his income approach valuation supported the conclusion that there was no economic obsolescence. The basis for his rejection of economic obsolescence was an arbitrary comparison of the results of his incomplete cost approach calculation (*i.e.*, an estimate of property value that did not account for economic obsolescence) and the results of his fundamentally arbitrary and unreliable income approach. *See* 2/16/ 2006 Tr. 255; 2007 Bayer Tr. 37. The Tax Commissioner then averaged the results of his cost approach and income approach calculations to arrive at a “correlated value,” taking that correlated value and comparing it back to the result of the cost approach to get an estimate of economic obsolescence. State's 2006 Exhibits 8 and 11. The Court has previously recognized that when different methods are available to quantify a particular result, they should all yield similar results; when they do not, averaging the differing results does not remedy the error. *Cf. In re Tax Assessments Against the Nat'l Bank of West Virginia at Wheeling and the Morris Plan Savings and Loan Company et al.*, 137 W. Va. 673, 688, 73 S.E.2d 655, 664 (1952) (“If either method is approximately correct, the other methods clearly are erroneous. Yet the sum total of the errors is reflected in the average of the three methods.”).

However, this “method”—again nowhere provided for by his regulations or recognized in generally accepted appraisal practice, *see* 2006 Tr. 303-09, as required by 110 C.S.R. § 1P-2.2—violates core appraisal practices. Although, as the Tax Court of Indiana has held, the *difference in value between* the cost approach and the income approach is a direct measure of economic obsolescence, the Tax Commissioner's approach turns this principle on its head. *See Hometowne Associates, L.P. v. Maley*, 839 N.E.2d 269, 275 (Ind. Tax 2005) (recognizing the

party “compared its property’s fair market value as determined under the income capitalization approach with its fair market value as determined under the cost approach—the difference being attributable to the obsolescence present in the property”) (emphasis added). For example, under principles recognized in *Hometowne Associates*, if the result of the properly performed cost approach calculation were \$3M, and if the result of the properly performed income approach calculation were \$2M, the *entire difference* of \$1M would be treated as economic obsolescence. As such, the appraised value of the property would be \$2M whether the cost approach (\$3M minus \$1M) or income approach were applied.

In contrast, using the same hypothetical values just noted, the Tax Commissioner’s method would take the \$3M result under the cost approach and average it with the \$2M result under the income approach, yielding a “correlated value” of \$2.5M. The Tax Commissioner thus would recognize only the difference between the \$3M result under the cost approach and the correlated value of \$2.5M as economic obsolescence. Thus, the Tax Commissioner’s method recognizes only *half* of the economic obsolescence. In other words, the Tax Commissioner’s method will *always* understate economic obsolescence. Accordingly, the Board’s reliance on this perpetually unreliable method was clearly erroneous.

* * *

For tax year 2006, the Tax Commissioner ultimately concluded that economic obsolescence of \$2,988,204 existed for BCS rather than the \$30,370,891 shown by Bayer, and that there was \$10,861,561 for BMS, compared to the \$21,081,887 shown by Bayer. *See State’s 2006 Exhibits 8 and 11; Bayer’s 2007 Exhibits 1 and 2.* These striking differences are attributable to the fundamental errors in the Tax Commissioner’s approach, including his use of wholly speculative income data. Similarly, for tax year 2007, the result of the Tax

Commissioner's improper income approach was more than twice as high for BCS as the result of his cost approach, *see supra*, thus resulting in *no* deduction for economic obsolescence.²⁰ For these reasons, the evidence before the Commission demonstrated that the Tax Commissioner's valuations were unsupportable and thus the decisions below should be reversed.

2. The Tax Commissioner's "Mass Appraisal" Technique to Value BCS's Real Property Violated State Regulations, and Was Speculative and Unreliable as Applied.

For tax year 2006, the Tax Commissioner overvalued BCS's real property by approximately \$5.9 million. The Commission affirmed that determination even though the Commissioner used a valuation methodology not recognized in his own regulations. That decision should be reversed.

As with the valuation of personal property, the Tax Commissioner's regulations require that the valuation of real property is subject to the same three generally accepted appraisal approaches discussed earlier: cost, income, and market data. 110 C.S.R. § 1P-2.2. The Tax Commissioner, however, failed to apply any of these three approaches.

Instead, the Tax Commissioner claimed that he determined the value of BCS's real property through a mass appraisal technique, under which each of the 34 parcels of land that

²⁰ *See* 2007 Bayer Tr. 101 (concluding that because his initial income approach "came out significantly higher" than the cost approach valuation, he purportedly knew "[t]here was no economic obsolescence"); *id.* at 103 (testifying that because "[t]he [income approach] value came up higher than the cost approach; no economic obsolescence"). Had the Tax Commissioner really believed his value of the income approach accurately reflected the market value of Bayer's property, 110 W. Va. C.S.R. § 1P-2.5.3.2 (titled "Correlation") arguably would have permitted him to correlate his results of the income and cost approaches (perhaps by averaging them) and to use the correlated value as the value of Bayer's property. *See generally Am. Bituminous*, 208 W. Va. at 257, 539 S.E.2d at 764 ("[t]he Tax Commissioner is required to 'consider' the various approaches to valuation by contemplating the feasibility of utilizing each of the ascribed methods. On the other hand, these methods are to be 'used' or actually employed only where 'applicable.'"). But he didn't correlate the results; rather, he based his appraised values only upon the results of his cost approach without bothering to analyze economic obsolescence. His own conduct, then, demonstrates that the Tax Commissioner knew from the huge disparity in the results that his income approach was unreliable and "inapplicable" for the purpose of valuing Bayer's industrial personal property.

make up the BCS site were classified into three categories: primary, waterfront and secondary. Then, the “per-acre price” for each of the three classifications was obtained from a table and was multiplied by the size of the parcel. *See* 2/16/2006 Tr. 338. The Tax Commissioner attributed a different value to each parcel, although the entire property operates as a single site. *Id.* at 339, 349. Nowhere do the Tax Commissioner’s legislative rules authorize the use of mass appraisal techniques for valuing industrial property.²¹ Accordingly, the Commission should not have accepted the Tax Commissioner’s conclusions.

Moreover, as Bayer showed here, application of the market data approach recognized by the Tax Commissioner’s regulations results in a significantly lower value for Bayer’s real property. *See generally* Syllabus Point 8, *Killen*, 170 W. Va. at 604, 295 S.E.2d at 691 (a taxpayer must present “competent evidence, such as that equivalent to testimony of qualified appraisers” to have its objection to valuation sustained). Specifically, Bayer introduced fee appraisals based on sales of comparison properties that showed the value of BCS’s real property was approximately \$29,000 per acre, rather than the \$42,000 per acre assessed by the Tax Commissioner. *See* 2/16/2006 Tr. 38-39, 167-72; *see generally* 110 C.S.R. § 1P-2.2.1.3 (“[t]he market data approach will be applied by considering the selling prices of comparable properties”).

In response to this showing, the Tax Commissioner did not contradict BCS’s appraisal methodology or the conclusions flowing from comparable sales data. The Tax Commissioner also failed to put reliable “evidence in the record to show why its assessment is correct,”

²¹ Furthermore, in applying this method, the Tax Commissioner never viewed the property in question but strictly relied upon values in a table that had not been updated in the last four years. 2/16/2006 Tr. at 338, 354; *see generally* *King Indus. Corp. v. State Bd. of Tax Comm’rs*, 699 N.E.2d 338 (1998) (recognizing mass appraisals inherently lack the accuracy provided by fee appraisals); *cf.* 2/16/2006 Tr. at 164-65, 338.

although it was “incumbent” upon it to do so. *Pocahontas Land, supra*. Rather, the Tax Commissioner’s witness merely attempted to introduce purported “comparable sales” evidence regarding three recently sold local properties. As an initial matter, these supposedly comparable sales were not available to the Tax Commissioner at the time he performed his appraisal; instead, they were collected solely as a *post hoc* attempt to justify the erroneous value placed on Bayer’s property. 2/16/2006 Tr. 348-349. This *post hoc* justification was unsound because the evidence showed there was no comparison between the properties and the BCS property at issue. Indeed, two of the three “comparables” were commercial, not industrial, property, *id.* at 351, and “commercial property tends to be more expensive than industrial,” *id.* at 354. Additionally, all three “comparables” were for much smaller parcels of land (4–10 acre parcels versus BCS’s 450 acres), and smaller properties are recognized to have a higher per acre value. *Id.* at 192-93. Also, each of the “comparables” was improved (existing buildings and site improvements), *id.* at 182-83, but the Tax Commissioner failed accurately to estimate the replacement cost of the improvements (both buildings and site improvements) or to deduct the proper amount of accrued depreciation for the respective improvements as buildings and site improvements have differing useful lives.

Because the Tax Commissioner (i) failed to value BCS’s real property using a method recognized by his own regulations, and (ii) failed to justify his initial valuation using a market approach, the Tax Commissioner’s initial appraisal was unsustainable and reversal is warranted.

V. Conclusion

As detailed above, the proceedings before the Commission violated Bayer’s rights to due process provided by the West Virginia and United States Constitutions because the Commission labors under an inherent conflict of interest that denies Bayer its right to an adjudication by a

decisionmaker who is free from bias as well as the appearance of bias. Likewise, the Commission applied the wrong standard of review in requiring Bayer to establish, by clear and convincing evidence that the valuation of Bayer's property was erroneous. Finally, regardless of the burden of proof, Tax Commissioner's valuation of Bayer's property is unreliable and unsupportable as a matter of West Virginia law. As such, the decisions of the Circuit Courts should be reversed.

VI. Prayer for Relief

WHEREFORE, the Appellants ask this Honorable Court to:

REVERSE the rulings of the Circuit Court of Kanawha County, and

ORDER that Court to reduce the value of BMS's industrial personal property in Kanawha County for tax year 2006 by \$10,220,326, and

ORDER that Court to reduce the value of BCS's industrial personal property in Kanawha County for tax year 2006 by \$27,382,687, and

ORDER that Court to reduce the value of BCS's industrial real property in Kanawha County for tax year 2006 by \$5,919,100, and

ORDER that Court to reduce the value of BMS's industrial personal property in Kanawha County for tax year 2007 by \$2,263,782, or from \$67,176,340 to \$64,912,558, and

ORDER that Court to reduce the value of BCS's industrial personal property in Kanawha County for tax year 2007 by \$30,138,619, or from \$124,795,787 to \$94,657,168, and

for such other relief as this Honorable Court deems appropriate.

Respectfully Submitted,

**BAYER MATERIALSCIENCE LLC
BAYER CROPSCIENCE LP,
By Counsel**



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Dated: May 16, 2008

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BAYER MATERIALSCIENCE LLC and
BAYER CROPSCIENCE LP,**

Petitioners Below, Appellants

v.

Case Nos: 33378, 33880, 33881

STATE TAX COMMISSIONER, and

**THE HONORABLE PHYLLIS GATSON,
Assessor of Kanawha County, and**

**THE COUNTY COMMISSION OF
KANAWHA COUNTY, and**

**THE PROSECUTING ATTORNEY OF
KANAWHA COUNTY**

Respondents Below, Appellees.

CERTIFICATE OF SERVICE

I, Steven R. Broadwater, counsel for Bayer MaterialScience LLC and Bayer CropScience LP, the Appellants herein, certify that service of the "Brief of Appellants Bayer MaterialScience LLC and Bayer CropScience LP" was made upon the parties listed below by mailing a true and exact copy thereof to:

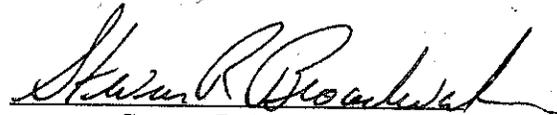
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in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this 16th day of May, 2008.



Steven R. Broadwater
(WVSB No. 462)