

Nos. 33378, 33880, 33881

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**BAYER MATERIAL SCIENCE LLC and  
BAYER CROPSCIENCE LP,**

**Petitioners Below, Appellants,**

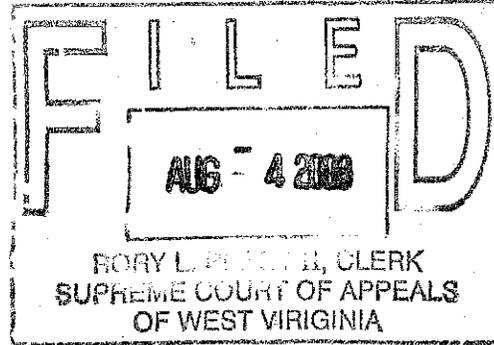
**v.**

**STATE TAX COMMISSIONER, and**

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

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

**THE PROSECUTING ATTORNEY OF  
KANAWHA COUNTY**



**Respondents Below, Appellees.**

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

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**Respondents Below, Appellees.**

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

**I. INTRODUCTION AND SUMMARY**

In their opening brief, Bayer MaterialScience LLC (“BMS”) and Bayer CropScience LLC (“BCS”) (collectively, “Bayer”) demonstrated that they have been injured because they have not been taxed based on the “true and actual” values of their personal and real property, and that injury is the result of a series of fundamental statutory and constitutional errors. Appellees’ briefs fail to call these conclusions into question.

A. Bayer showed that the County Commission’s primary executive obligations – responsibility for the county’s financial resources and budgeting – impose an unconstitutional conflict of interest when the same Commission considers Bayer’s tax appeals. Bayer Br. 18-24. That conclusion is compelled by the United States Supreme Court’s rulings which confirm that

the Due Process Clause of the Fourteenth Amendment requires that before a party can be deprived of its property, it is entitled to an adjudication before an impartial decisionmaker. *See Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 534 (1927).

The County Commission's obligations are inherently inconsistent because it is responsible both for protecting the county's finances *and* for serving as a neutral arbiter with the exclusive power to issue tax rulings that significantly affect the finances of the County. The Due Process Clause requires "a neutral and detached judge in the first instance." *Ward*, 409 U.S. at 62. Here, the proceedings before the County Commission were peppered with improper and prejudicial comments regarding the adverse impact of a ruling in favor of Bayer on the County's budget and the County's ability to operate effectively. Now, before this Court, the County Commission – which was the arbiter below – has taken the extraordinary step of filing a brief opposing the relief sought in Bayer's appeal. Under these circumstances, there can be no doubt that the Commission's divided loyalties "offer a possible temptation to the average man as a judge to forget the burden of proof required" and "might lead [the Commission] not to hold the balance nice, clear, and true." *Id.* at 60 (quoting *Tumey*, 273 U.S. at 532). These conflicts of interest deprived Bayer of the fair and impartial adjudication that due process required under federal and state law.

In response, the Tax Commissioner spends significant effort arguing that the Due Process Clause has limited impact in a tax proceeding, *see* Tax Dep't Br. 7-13, but that argument utterly fails to address that, as a constitutional minimum, due process requires a fair and impartial tribunal. Nor do appellees undermine Bayer's showing that the Commission labors under

fundamentally incompatible obligations. The judgments below should be reversed because due process does not allow the Commission to serve two masters. *See Ward*, 409 U.S. at 60-61.

B. Bayer also showed that the clear and convincing burden of proof that was applied by the Commission here, and that has been referenced in *dicta* in some of this Court's cases, reflects an erroneous break from a clear and well-reasoned holding by this Court in *Killen v. Logan County Commission*, 170 W. Va. 602, 295 S.E.2d 689 (1982) at syllabus pt. 8 (ruling that the "objecting party must show by *preponderance of competent evidence* that assessment is incorrect") (emphasis added). Appellees do not respond to the substance of *Killen*, but instead rely on the same *dicta* that Bayer has shown is inconsistent with the ruling in *Killen*. *See Tax Dep't Br. 27; Commission Br. 33-34*. Any suggestion that *Killen* has been overruled, implicitly or explicitly, cannot be squared with this Court's well-established principles of *stare decisis*. Likewise, appellees have no response to Bayer's showing that a heightened clear and convincing burden of proof would be inappropriate because it would create serious constitutional questions. In response, appellees misapply the case law of West Virginia and pluck out-of-context snippets from cases decided by other states. The decision below violates the standard set forth in *Killen*, and that preponderance of the evidence standard reflects the proper standard under West Virginia law.

C. On the merits, the appellees have no answer to Bayer's core showing: The Tax Commissioner employed an "income" approach for assessing the economic obsolescence of Bayer's facilities even though the Commissioner did not have income data from those facilities necessary for an accurate income approach calculation. Put simply, the Tax Commissioner denied Bayer's request for a reduction in property tax based upon unreliable data that constitute nothing but a guess as to the income generated by the Bayer facilities at issue.

Bayer agrees that “every appraisal is unique” and “the Tax Commissioner must adapt to the specific circumstances of each industrial property.” Tax Dep’t Br. 32. Indeed, the controlling regulations recognize that “because of the difficulty in obtaining necessary data,” the Tax Commissioner “may be limited” in his choice among the three acceptable valuation methods. *Id.* (internal quotation marks and citations omitted).

Here, the “necessary data” to conduct an assessment of economic obsolescence based upon an “income” approach were not available. The Tax Commissioner candidly admitted that he had “no idea” whether the results of his “income” approach were accurate, and he testified that his valuations were “fairly arbitrary” given that the “income” data generated by the Tax Commissioner did not “relate back to the profitability of the particular plants.” 2/16/2006 Tr. 321-22. West Virginia’s regulations require that the Tax Commissioner employ the most accurate method for assessing the value of property in every instance. Although the regulations grant discretion to choose among available methods, it is a violation of that discretion to apply an “income” approach when the necessary “income” data are unavailable.

Contrary to the Commission’s suggestion, Bayer was not required to keep “income” data to obtain a deduction for economic obsolescence; rather, the tax regulations provide for different methods of calculating this deduction depending on which data are available, thereby recognizing that different taxpayers employ different accounting methods. This Court has never suggested that a taxpayer may be denied a deduction because it employs one of a number of appropriate accounting methods. *See In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 253-54, 257, 539 S.E.2d 757, 760-61, 764 (2000) (recognizing differences in valuation approaches selected by the parties, and requiring only that the Commissioner select the “most accurate” method). The Tax Commissioner’s calculation of

economic obsolescence, and thus his ultimate value, was based upon inaccurate data and should be reversed.

## II. ARGUMENT

### A. The County Commission Suffers From An Inherent Conflict Of Interest That Deprived Bayer Of Due Process.

In our opening brief, Bayer established that due process requires that the tribunal hearing a challenge to the Tax Commissioner's valuation of property be fair and impartial. *See* Bayer Br. 19-21. Bayer showed that these principles were reflected in a string of decisions by the United States Supreme Court, which make clear that that the union of executive and judicial power in the same body violates due process where the executive body's responsibility for the finances of an entity makes it "partisan" with respect to its adjudicative responsibilities. *Ward*, 409 U.S. at 60. Here, Bayer was denied its due process rights because it was required to present its challenge to its tax assessment to a tribunal charged with two conflicting functions: (1) in its executive capacity, the Commission is charged with ensuring the proper funding for the county for which it is responsible, but (2) in its quasi-judicial capacity, the Commission is charged with the obligation to address legal controversies that have a significant impact on the funding of the County. Bayer Br. 22-25. Bayer therefore was deprived of the core due process guarantee that no person can "be a judge in a cause wherein he is interested, whether he be a party to the suit or not," *id.* at 20 (citation omitted), and therefore proceedings before arbiters who simultaneously occupy "partisan and judicial roles, necessarily involve[] a lack of due process of law," *id.* at 21. In response, appellees grasp at straws, legal and factual.

1. The County Commission suggests that for this Court to find a due process violation here "would preclude any governmental entity from administering statutes over which they have been legislatively granted authority." County Commission Br. at 1 (citing zoning

boards, human rights commissions and state tax departments as examples of administrative procedures that purportedly would be rendered unconstitutional). That is simply not so. None of administrative bodies highlighted in the Commission's brief has the constitutionally compromising conflict of interest held by the Commission. None of those bodies has the responsibility for overseeing revenue for the county, while also having quasi-judicial power to adjudicate claims over its own most significant revenue stream. As the Tax Department admits here, "Kanawha County [] has a critical interest in the *ad valorem* property tax process. . . . [I]f Kanawha County cannot collect adequate tax revenues from all sources, then law enforcement efforts may be reduced, public schools may be impaired, and the public welfare may suffer." Tax Dep't Br. 10.

But that obligation runs headlong against the Commission's responsibility to act as an impartial arbiter of disputes involving the County's core source of revenue. As in *Ward*, these circumstances "would offer a possible temptation to the average man as a judge to forget the burden of proof required . . . or which might lead him not to hold the balance nice, clear and true." 409 U.S. at 61 (quoting *Tumey*, 273 U.S. at 532). As a result, adjudication of Bayer's challenge to the Tax Commissioner's assessment before the Commission violates due process.

Moreover, as Bayer previously demonstrated, these conflicting interests of the County Commission were apparent at the valuation hearing. *See* Bayer Br. 19. There, Commissioners expressed their concerns that ruling for Bayer would lead to "loss[es] to the Board of Education" and other adverse effects on the County's finances. *Id.* (citations omitted). The consequences of such shortfalls in services is that the County Commissioners – who are charged with administering the "fiscal affairs of their counties" and whose "primary function . . . is

budget development and management” – would be required to answer to the public that has elected them to their current positions. *Id.* at 5-6 & n.6 (citations omitted).

Indeed, that conclusion is underscored in a profound way now that the County Commission—the very tribunal before which Bayer had to prove its valuation claims—has made itself a *party* to this appeal. This is not a mandamus proceeding in which Bayer has sought to compel a lower court judge to act. Rather, the County Commission, the arbiter of Bayer’s challenge to the tax assessment, is now acting in its executive capacity to protect its financial interest in the County’s revenue stream. Here, the Commission’s conflicting interests are the same as those in *Ward*, where the “mayor’s executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor’s court.” 409 U.S. at 60.<sup>1</sup>

2. Without addressing directly the conflicting obligations of the Commission, appellees attempt to downplay the impact of this conflict by arguing that only minimal due process protections apply in a taxation dispute. Tax Dep’t Br. 7-14; Commission Br. 2. These arguments should be rejected.

Appellees arguments ignore that due process applies to valuation proceedings before the Commission and that the minimum requirement of due process is a fair and impartial tribunal. In outlining what it contends to be the “essential elements of due process,” Tax Dep’t Br. 13, the Tax Department utterly ignores that the central guarantee of due process is an opportunity to present a legal challenge to an arbiter whose conflicting responsibilities prevent him or her from acting as an impartial judge. As the United Supreme Court has made clear, the essence of due process is “a neutral and detached judge in the first instance.” *Ward*, 409 U.S. at 62; *see also*

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<sup>1</sup> The Commission’s argument that there was no *equal protection* violation in this case is beside the point as Bayer has not asserted any equal protection violation. *See* Commission Br. 17-19.

*Simard v. Bd. of Educ.*, 473 F.2d 988, 993 (2d Cir. 1973) (“An impartial decisionmaker is a basic constituent of minimum due process”); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980) (due process requires “neutrality” and reflects “the powerful and independent constitutional interest in fair adjudicative procedure”); *Billington v. Underwood*, 613 F.2d 91, 95 & n.4 (5th Cir. 1980) (per curiam) (holding that, at a minimum, due process requires an impartial decisionmaker even in an informal hearing).

As another state tax court has recognized, “constitutional due process requires that the taxpayer be given an opportunity for a hearing before an *impartial tribunal*.” *Berge Ford, Inc. v. Maricopa County*, 838 P.2d 822, 824 (Ariz. Tax. 1992) (emphasis added). Appellees suggest that due process concerns should be ignored because there is no alternative to having the County Commission resolve tax valuation appeals. The County Commission, however, is not the only tribunal capable of hearing property tax challenges. Recent legislation proposed assigning the responsibility for hearing such challenges to the existing independent Office of Tax Appeals if the amount in question exceeded some threshold amount. And, other states such as Washington and California, utilize appointed Boards of Equalization and Review, either at the state or county level, or both. The members of these appointed boards are required to possess appropriate training, experience, and/or professional accreditations. In the end, however, there is no substitute for an impartial decisionmaker, and there is no basis for appellees’ suggestion that an adjudication of a dispute over a tax assessment may be decided by an entity operating under a direct and irreconcilable conflict of interest.

3. Turning to the merits of Bayer’s position that the proceeding before the Commission failed to satisfy the due process standards set forth in *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward*, see Bayer Br. 19-25, appellees argue that these controlling cases are factually

distinguishable. See Tax Dep't Br. 13-20; Commission Br. 19-30; *accord*, e.g., Tax Dep't Br. 16 (“[*Ward v. Village of Monroeville* is factually different than the situation before this court.”).<sup>2</sup>

The distinctions drawn by appellees, however, are immaterial and do not address the conflict of interest held by County Commission.

Specifically, appellees argue that *Tumey* and *Ward* are distinguishable because the mayor's courts at issue “concentrated power in a single individual,” but here the County Commissions are comprised of multiple officials. Tax Dep't Br. 16; see Commission Br. 19-26 (arguing that the Commission shares power within a plural form of government); see also *id.* at 24-25 (arguing that the Commission is not charged with enforcement of criminal law). These purported distinctions are unavailing. Neither *Tumey* nor *Ward* turned on the degree of concentration of executive power;<sup>3</sup> rather, due process was violated because the officials, as here, undeniably had core executive authority yet also had inherently conflicting judicial roles. See *Ward*, 409 U.S. at 60-61; *Tumey*, 273 U.S. at 531-35. Indeed, appellees' argument fails on its own terms because each of the County Commissioners labors under the same conflict of interest that rendered the adjudication by the mayor in *Ward* unconstitutional. That violation would not have been remedied by packing the mayor's court with additional members, each of which had the same conflicting interests of increasing the town's revenues through the mayor's court and fairly and impartially deciding cases presented to the mayor's court. In this regard, contrary to appellees' argument, the Supreme Court in *Ward* distinguished *Dugan v. Ohio*, 277 U.S. 61

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<sup>2</sup> Appellees do not and cannot dispute Bayer's showing that the due process guarantees set forth in *Ward* and *Tumey* apply equally to civil proceedings and those before quasi-judicial bodies. See Bayer Br. 21 n.12 (discussing *Marshall*, 446 U.S. at 242, and *Concrete Pipe*, 508 U.S. at 617); *accord State ex rel. Shrewsbury v. Poteet*, 157 W. Va. 540, 547, 202 S.E.2d 628, 632 (1974) (“Although this case is civil rather than criminal, the principle expressed in *Tumey* applies.”).

<sup>3</sup> Moreover, contrary to appellees' suggestion, *Ward* did not involve a “unitary” government. Commission Br. 23. Although the mayor in that case had “wide executive functions,” he was part of a governing “village council” over which he only had tie-breaking authority. *Ward*, 409 U.S. at 58.

(1928), from *Tumey*, not because the executive power was dispersed in multiple individuals laboring under a conflict, Commission Br. 20-21, 23-24; Tax Dep't Br. 19-20, but because the mayor in *Dugan* had “no executive, but only judicial duties.” *Dugan*, 277 U.S. at 65 (emphasis added).

Here, however, the Commission plainly has core executive duties including responsibility for the county's fiscal affairs. As this Court has explained, a County Commission is the “the central governing body of the county” and the West Virginia Constitution and statutes commit to the County Commission “executive . . . powers directly connected with the local affairs of the county.” *State ex rel. Dingess v. Scaggs*, 156 W. Va. 588, 590, 195 S.E.2d 724, 725 (1973); accord Tax Dep't Br. 16 (“The county commission does have the constitutional responsibility for . . . fiscal affairs of the county.”); Commission Br. 24 (“the Commission is the central governing body of the county”); *id.* at 25 (“county commissioners exercise some supervision over financial practices”).<sup>4</sup> Indeed, it is this management of the county's fiscal affairs that creates the inherent conflict in this case. *See generally* Tax Dep't Br. at 10 (acknowledging that “Kanawha County,” which the Commission governs, “has a critical interest” in collecting taxes, “the life's blood of government”). Thus, even if the standards set forth in *Tumey* and *Ward* depended on the degree of decentralization of executive power, Commission Br. 25, the reality is that the Commission is primarily responsible for overseeing the County's budget and is politically accountable for any shortfalls. Given that responsibility, even if there were “compet[ition] [among various county officials] for funding,” Commission Br. 23 (citation omitted), the Commission itself has an

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<sup>4</sup> The Tax Department's claim that “the county commission is not, primarily responsible for creating the county budget” is belied by the Kanawha County Commission's statements. Compare Tax Dep't Br. 17 with Kanawha County Commission, *Mission Statement* (“The primary function of the County Commission is budget development and management . . .”) (emphasis added) and Matthew Thompson, *County Rolls Ahead With \$1.5 Million Budget Carryover*, Charleston Daily Mail, May 30, 2008 (quoting President Carper as stating “We have done a better job in budgeting the costs of county government.”) (emphasis added).

undisputed interest in securing necessary funding for the County and the various County services which it oversees. W. Va. Const. art. IX § 11 (“county commissions . . . shall . . . have the superintendence and administration of the . . . fiscal affairs of their counties . . . with authority to lay and disburse the county levies”); W. Va. Code § 7-1-3 (same). That core interest, as in *Tumey* and *Ward*, is irreconcilable with its constitutional obligation to prove a fair and impartial tribunal to taxpayers in valuation cases.

Because the very nature of the Commission’s core responsibilities conflict, there is no need for “Bayer [to] argue that one commissioner is inherently biased or all three.” Tax Dep’t Br. 16. Any commissioner will be subjected to these dual and conflicting responsibilities, and, as a result, adjudication before each Commissioner will violate the standards of impartiality and the appearance of lack of bias. Although the comments of a single Commissioner may illustrate the due process violation in a particular case, *see* 2/21/2006 Tr. 21, 24 (Commissioner’s concerns about losses to the tax base and decrease in services) (*quoted in* Bayer Br. 19), it is not necessary for Bayer to prove that the underlying conflict was made manifest in a particular case to prevail on this claim. To the contrary, in *Ward*, the Supreme Court rejected the notion that a party such as Bayer “must show special prejudice in [its] particular case” in addition to showing an inherent conflict of interest. 409 U.S. at 61.<sup>5</sup> Indeed, due process “may sometimes bar trial by judges *who have no actual bias.*” *In re Murchison*, 349 U.S. 133, 136 (1955) (emphasis added).

Similarly misplaced is the Tax Department’s claim that because Bayer prevailed before the Commission in one exoneration case currently on this Court’s docket (although a dissenting

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<sup>5</sup> Compare Commission Br. 30 (suggesting that Bayer is required to produce evidence of the amount of property tax income generated from denied equalizations to show that a conflict of interest exists) *with, e.g., Ward*, 409 U.S. at 60 (requiring only a showing that the circumstances “would offer a possible temptation to the average man as a judge” to place his or her executive responsibility before judicial impartiality).

Commissioner in that case appealed from that ruling), that isolated and unrelated ruling demonstrates that the County Commission is free from any inherent conflict. See Tax Dep't Br. 18-20. In neither *Tumey* nor *Ward* was there any obligation to show that the mayor *always* ruled against the defendant regardless of the facts. Rather, the showing required was only that the inherent conflict "would offer a possible temptation to the average man as a judge to forget the burden of proof . . . which might lead him to hold the balance nice, clear and true." *Ward* 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532).<sup>6</sup>

The Tax Department's argument that Bayer's due process claim is foreclosed because "under West Virginia law judges as well as public officials are presumed to perform their duties in a fair manner," Tax Dep't Br. 25, likewise has been rejected in principle by the United States Supreme Court. See *Ward*, 409 U.S. at 61. In finding due process violated by the inherent conflicts, the Court dismissed the state's contention that an Ohio statute requiring the "disqualification of interested, biased, or prejudiced judges [wa]s a sufficient safeguard to protect petitioner's rights." *Id.*

4. Finally, appellees cobble together a smattering of additional cases, none of which undermines the holdings in *Tumey* and *Ward*.<sup>7</sup>

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<sup>6</sup> Although not directly relevant here, Bayer believes that it prevailed in the exoneration notwithstanding the inherent conflict based upon the strength of the record it assembled before the County Commission. The merits of Bayer's exoneration dispute are before this Court in a separate proceeding. See *Prosecuting Attorney of Kanawha County v. Bayer Corp.*, No. 33871 (W. Va.); see also *id.*, 11/6/2003 Tr. of County Commission at 202 ("This will cost the Kanawha County Board of Education about \$280,000.00 and that's why I voted no.").

<sup>7</sup> See Commission Br. 26-29 (discussing *Concerned Citizens of Southern Ohio v. Pine Creek Conservancy District*, 429 U.S. 651 (1977), *Bath Club v. Dade County*, 394 So. 2d 110 (Fla. 1981), and *Lee Hospital v. Cambria County Board of Assessment Appeals*, 638 A.2d 344 (Pa. Cmwlth. 1994)); Tax Dep't Br. 21-26 (relying upon *Lee* and *Bath Club*, as well as *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813 (1986), *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363 (7th Cir. 1994), and *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482 (1976)).

For instance, the Commission spends significant effort arguing that the process involving conservancy judges in *Pine Creek*, 429 U.S. 651, resembles the Commission hearings here and thus Bayer's claim should be rejected. See Commission Br. 26-28. That entire argument rests on a *dissenting opinion* in *Pine Creek*, a case in which the majority did not even accept jurisdiction, let alone address or endorse the due process analysis of the dissenting justices. Even if weight should be accorded to dissenting opinions – and it is not – the Commission relies on a single footnote in which that dissent suggests that it would have rejected a *Tumey*-based due process attack to the conservancy court. See *Pine Creek*, 429 U.S. at 655 n.4 (Rehnquist, J., dissenting). Yet, even that footnote makes clear that the dissent rejected the argument at issue on the basis of *Dugan*, a case in which the adjudicative body—unlike that here—had no executive function. See *id.*; *Dugan*, 277 U.S. at 64-65. Nor did the *Pine Creek* dissent otherwise suggest that the conservancy court acted in an executive capacity which inherently conflicted with the adjudicatory role; to the contrary, it acknowledged that the challenged determinations “are essentially legislative in nature.” 429 U.S. at 657 (Rehnquist, J., dissenting).

Equally meritless is the Tax Department's reliance on *Aetna*, 475 U.S. 813. That case too involved no allegations of an inherent conflict of interest arising from competing executive and judicial obligations. Rather, the issue there was whether a state supreme court justice violated defendant's due process when he failed to recuse himself from one action given that he was a *plaintiff* in a related action. See *id.* at 822-24 (holding that the judge's direct, pecuniary interest in the litigation violated due process because “[a]t the time [he] cast the deciding vote and authored the court's opinion, he had pending at least one very similar . . . lawsuit against [another insurance company] in another Alabama court” on which his decision became binding). The Tax Department mistakenly suggests that because *Aetna* turned on the judge's “direct,

personal, substantial or pecuniary interest,” Bayer’s allegations concerning the Commission’s conflicting interest in this case does not violate due process. The United States Supreme Court has rejected that argument in *Ward*, explaining that an arbiter’s pecuniary interest “in the fees and costs [collected by the court] *d[oes] not define the limits of the [conflict of interest] principle.*” *Ward*, 409 U.S. at 60. Indeed, the ability of the Commission to meet its executive obligations may create a greater incentive than a nominal, direct interest in a single proceeding. As such, *Aetna* does not undermine Bayer’s claims here.<sup>8</sup>

Equally inapposite is appellees’ citation of *Hortonville*, 426 U.S. 482, which rejected a due process challenge to a school board’s adjudication of teachers’ dismissals, finding that the board members did not have a “personal or financial stake in the decision that might create a conflict of interest.” *Id.* at 491-92. Unlike here, there was no allegation in *Hortonville* that the board was obligated to exercise inherently conflicting executive and judicial functions.<sup>9</sup>

**B. The “Clear and Convincing” Burden Of Proof Applied By The Commission Is Contrary To West Virginia Law, And, In All Events, Would Violate Due Process.**

Bayer’s opening brief demonstrated that the Commission erred as a matter of West Virginia law in ruling that Bayer was required to satisfy a “clear and convincing” burden of proof in the first instance. *See* Bayer Br. 26-32. Bayer showed that the Commission’s determination was contrary to *Killen v. Logan County Commission*, 170 W. Va. 602, 295 S.E.2d

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<sup>8</sup> Even more far a field is the Commission’s reliance on *Del Vecchio*, 31 F.3d 1363, which did not implicate inherently conflicting roles. Rather, that case involved a claim that a judge who presided over a death penalty case had violated defendant’s due process rights because he had been tangentially involved in an earlier prosecution of the same defendant 14 years before the capital crime at issue. *Id.* at 1370-71.

<sup>9</sup> Additionally, appellees cite *Bath Club* and *Lee*, two cases involving alleged infirmities unique to state-law provisions not applicable here. *Bath Club* involved an allegation that the multiple obligations of county commissioners and school board members violated a provision of the Florida constitution prohibiting dual office holding. *See* 394 So. 2d at 112. And in *Lee*, a Pennsylvania trial court held that commissioners’ obligations flowing from Pennsylvania law did not raise due process problems where those commissioners “authorized an examination of the tax exempt status” of various hospitals, but did not—as here—pass on property valuations while also having a competing interest in maximizing the county’s funds. *See* 638 A.2d at 49.

689 (1982), which, in syllabus point 8, held that a valuation challenger “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. In doing so, this Court directed that “[i]t is important to recognize the difference in the burden of proof,”—*i.e.*, the preponderance of the evidence standard applicable to proceedings before the Commission—and the “limited” “standard of judicial review utilized by courts when considering appeals of assessments.” *Id.* at 619, 295 S.E.2d 706 n.27.<sup>10</sup>

Bayer acknowledged that a competing line of precedent from this Court had developed notwithstanding the ruling in *Killen*. Bayer Br. 27. Bayer explained that these later cases all followed a case that failed to distinguish between the burden of proof before the Commission and standard for judicial review. *Id.* at 27-28. Moreover, Bayer demonstrated that the *dicta* that gave rise to this conflicting set of cases was unsupported by prior West Virginia case law, *see id.* at 28, and that none of the cases applying a higher burden of proof expressly overruled *Killen*, let alone offered a well-reasoned analysis for abandoning *Killen*. *Id.* at 30. Bayer further showed that *Killen*’s preponderance of the evidence standard comported with West Virginia law, *id.* at 29-32, and should be followed here because doing so would avoid any constitutional questions implicated by a higher standard of review, *id.* at 31-32.

In response, appellees do not address Bayer’s showings. *See* Tax Dep’t Br. 27; Commission Br. 33-35. Instead, the Tax Commissioner simply notes that one of the post-*Killen* cases previously addressed by Bayer provides that “the taxpayer can only rebut the presumption that the assessment is correct by clear and convincing evidence.” Tax Dep’t Br. 27 (citing *In re*

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<sup>10</sup> Bayer showed that the United States Court of Appeals for the Fourth Circuit, applying West Virginia law including *Killen*, has recognized the importance of this distinction in West Virginia law, *see* Bayer Br. 28-29 (discussing *CSX Transp., Inc. v. Bd. of Public Works of W. Va.*, 95 F.3d 318, 321-22 (4th Cir. 1996), as has this Court, (*E. Am. Energy Corp. v. Thorn*, 189 W. Va. 75, 79, 428 S.E.2d 56, 59 (1993)).

*Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 254, 539 S.E.2d 757, 761 (2000)); see Bayer Br. 29 (addressing *Am. Bituminous*). Likewise, the Commission's brief identifies another case discussed by Bayer, *Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County*, 189 W. Va. 322, 324-25, 431 S.E.2d 661, 663-64, and argues that it, and not *Killen*, sets forth the appropriate burden of proof. See Commission Br. 33-34; Bayer Br. 29 (discussing same). There is a conflict among this Court's cases, but appellees fail to explain why *Killen* should not be followed or why a heightened standard is appropriate in these circumstances.

1. This Court has never ruled that the burden of proof set forth in *Killen* should be overruled.<sup>11</sup> Nor do appellees offer any persuasive reason for abandoning the *Killen* court's well-reasoned conclusion that a preponderance of the evidence standard should apply in proceedings before the Commission. Indeed, the Commission's suggestion that *Killen*'s syllabus point has been impliedly overruled, see Commission Br. 33-34 n.168, is flatly inconsistent with this Court's well-established guidance on its treatment of prior decisions:

"An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law."

*State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 189, 190 (2007) (quoting Syllabus Point 2, *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974)). Here, post-*Killen* decisions have made no effort to justify such a departure and have cited no evidence of changing conditions or judicial error that would warrant rejection of *Killen*'s thoughtful analysis and syllabus point on this issue.

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<sup>11</sup> This Court's practice is to identify clearly when a syllabus point has been overruled, and when inconsistency in an earlier decision has led to its rejection. See, e.g., *State ex rel. Packard v. Perry*, 221 W. Va. 526, 655 S.E.2d 548, 551, syllabus point 5 (2007) ("To the extent that [cases cited], and other cases are inconsistent with this holding, they are overruled.")

See generally *Haney v. County Commission, Preston County*, 212 W. Va. 824, 828, 575 S.E.2d 434, 438 (2002) (“Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated”) (citation omitted).

As a result, failure to adhere to *Killen* would violate this Court’s application of *stare decisis*. As this Court has explained: “Remaining true to an ‘intrinsically sounder’ doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation ‘special justification’ exists to depart from the recently decided case.” *State v. Guthrie*, 194 W. Va. 657, 676, 461 S.E.2d 163, 182 (1995) (emphasis added, additional internal quotation marks and citation omitted).

Finally, it would be especially inappropriate to depart from *Killen* under the constitutional avoidance canon of statutory construction. Under that canon, legislation, which, on its face, imposes no heightened burden of proof should not be interpreted to impose such a standard because doing so would create a potential violation of the constitutional requirements of due process. See Bayer Br. 30-31 (explaining that “silence is inconsistent with the view that [the legislature] intended to require a special, heightened standard of proof,” and that given *Concrete Pipe* the constitutional avoidance doctrine requires that the preponderance standard, rather than clear and convincing standard, should apply) (citations omitted).

2. Having failed to offer a basis to depart from these well-established principles, the Commission changes tack, arguing that the “clear and convincing” standard is “commonplace” in this state and nationwide, including in taxpayer appeals cases. Commission Br. 35. That

argument ignores the relevant statute in West Virginia, and is not supported by the facts or the cases cited by appellees.

First and foremost, the Commission is wrong in suggesting that a heightened burden of proof is “not unusual” but “commonplace” in West Virginia jurisprudence. Commission Br. 35. To the contrary, under West Virginia law, “the preponderance standard applies across the board in civil cases,” *Brown v. Gobble*, 196 W. Va. 559, 564, 474 S.E.2d 489, 494 (1996), whereas “in certain classes of cases, such as those involving either charges of fraud or undue influence, or of mistake sufficient to justify reformation of a contract or written instrument, the stricter standard of clear and convincing evidence is necessary,” *Lutz v. Orinick*, 184 W. Va. 531, 534-36, 401 S.E.2d 464, 467-69 (1990) (“As a general rule, issues in a civil case are to be determined in accordance with the preponderance of the evidence.”); *see, e.g., McClure v. McClure*, 184 W. Va. 649, 653, 403 S.E.2d 197, 201 (1991) (“A preponderance, of course, is our traditional burden of proof in a civil case.”). As this Court has explained, the standard of proof is only heightened in cases “where fairness and equity require more persuasive proof.” *Brown*, 196 W. Va. at 564 (citing 2 McCormick On Evid. § 340 (Strong ed. 1992)).

The authorities cited by the Commission, *see* Br. 35-37 n.36, bear out these principles and illustrate that this is not an exceptional case. They either (1) fall into that “certain class[] of cases,” *Lutz*, 184 W. Va. at 534, warranting a higher standard, such as cases involving fraud, *e.g., Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 474 S.E.2d 887 (1996), or contract mistake, *e.g., Smith v. Smith*, 219 W. Va. 619, 639 S.E.2d 711 (2006); or (2) involve unique fairness and equity concerns that this Court finds “require more persuasive proof,” *Brown*, 196 W. Va. at 564, such as an adoption proceeding that would separate siblings, *e.g., In re Carol B.*, 209 W. Va. 658, 550 S.E.2d 636 (2001), an action to rescind a paternity acknowledgement, *e.g., State ex rel.*

*W. Va. Dep't of Health & Human Res. v. Michael George K.*, 207 W. Va. 290, 531 S.E.2d 669 (2000), a libel action, *e.g.*, *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 480 S.E.2d 548 (1996), the removal of a public official from office, *e.g.*, *Evans v. Hutchinson*, 158 W. Va. 359, 214 S.E.2d 453 (1975), and a suit for an easement over the land of another, *e.g.*, *Berkeley Dev. Corp. v. Hutzler*, 159 W. Va. 844, 229 S.E.2d 732 (1976).

Notably, in the civil cases in which West Virginia applies a clear and convincing standard, “[t]he interest at stake . . . is not the mere loss of money as is the case in the normal civil proceedings.” *Brown*, 196 W. Va. at 564 (applying clear and convincing standard to adverse possession claim, as such claims “often involves the loss of a homestead, a family farm or other property associated with traditional family and societal values”); *accord Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (holding that the “clear and convincing” standard of proof is applicable only in special circumstances, such as “in civil proceedings in which the ‘individual interests at stake are both “particularly important” and “more substantial than mere loss of money””)” (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (additional citations and alteration omitted). Where, as here, where the interest at stake is money, the application of a heightened clear and convincing evidence standard would be both “unusual” and inappropriate.

Further, the Commission’s suggestion that clear and convincing evidence is the “national standard” is not properly supported and is, in all events, irrelevant to an assessment of the applicable West Virginia’s standard. Commission Br. 35. In support of this claim, the Commission quotes (at 35) a provision from 84 C.J.S. *Taxation* § 632, which identifies a single case, *Ozette Ry. Co. v. Grays Harbor County*, 133 P.2d 983, 986 (Wash. 1943). The *Ozette* court, however, states only that as a matter of Washington law, “[t]he mere fact that the assessing officers have proceeded on a fundamentally wrong basis . . . is not of itself alone sufficient to

justify the intervention of the courts at the instance of the taxpayer,” but “it must clearly appear that the assessment is *so palpably exorbitant and excessive as to amount to constructive fraud or to violate some constitutional principle.*” 133 P.2d at 987 (emphasis added). *Ozette* does not purport to create a national standard, and *Ozette* is not remotely the standard applicable under West Virginia law.<sup>12</sup> Indeed, the Washington statutory law upon which appellees rely stands in stark contrast to the statutory scheme in West Virginia, which imposes no heightened standard, and which this Court interpreted in *Killen* to require only a showing by preponderance of the evidence.<sup>13</sup>

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<sup>12</sup> Nor does *Ozette* reflect the current standard in Washington. Indeed, the Washington Supreme Court has recognized that *Ozette*'s standard was superseded by statute. See *Weyerhaeuser Co. v. Easter*, 894 P.2d 1290, 1295 (Wash. 1995). Unlike West Virginia, by statute, Washington now expressly mandates that a party challenging a tax valuation must make a showing “by clear, cogent and convincing evidence.” Rev. Code Wash. Ann. § 84.40.0301; see *Weyerhaeuser*, 894 P.2d at 1295 (recognizing that the statute “eliminated the requirement that an overvaluation be grossly inequitable, palpably excessive, or fundamentally wrong”). Further, under Washington law, “[o]nce the taxpayer overcomes the presumption that an assessor’s overall valuation technique is correct, the standard of proof shifts to a preponderance of the evidence for all issues. *Id.* at 1290; *Wash. Beef, Inc. v. County of Yakima*, 177 P.3d 162, 167 (Wash. App. 2008).

<sup>13</sup> The Commission also mischaracterizes two recent, unpublished cases from Indiana and two pre-war cases from the Board of Tax Appeals, and argues from them that “other courts, in similar cases, have held that a taxpayer’s claim of economic obsolescence unsupported by clear and convincing evidence, does not warrant setting aside a tax assessment.” Commission Br. 43 & n.184. In fact, none of the cited cases applies a “clear and convincing” burden. The Indiana cases instead required the taxpayer to present “*probative evidence . . . regarding the alleged assessment error.*” *BetaSteel Corp. v. Scott*, 863 N.E.2d 21 (table), 2007 WL 778863, at \*1 (Ind. Tax. Mar. 16, 2007) (unpublished) (emphasis added); accord *Pedcor Inv.-1990-XII, L.P. v. Franklin Township Assessor*, 866 N.E.2d 881 (table), 2007 WL 1364424, at \*3 (Ind. Tax. May 9, 2007) (unpublished). The Board of Tax Appeals cases are equally inapposite. The passages quoted by the Commissioner reflect that no clear and convincing standard was applied, and demonstrate precisely why the claims there failed. See *Stoddard v. Commissioner*, 1939 WL 12387 (Bd. Tax. Appeals 1939) (“[T]he Board has often held that the petitioner must present evidence on the basis of which the correct rate of depreciation may be determined. *This petitioner has failed to do.*”) (emphasis added); *Cataract Theatre Corp. v. Commission*, 1934 WL 5390 (Bd. of Tax Appeals 1934) (holding “petitioner has failed to produce evidence”); *id.* (“the taxpayer must introduce evidence to show that the action of the respondent is erroneous. This the petitioner has failed to do in the instant proceeding.”) (citation omitted). Here, there is no question that Bayer presented substantial and compelling evidence upon which economic obsolescence could have been and should have been determined.

Finally, despite the United States Supreme Court's admonition in *Cooper, supra*, that the "clear and convincing" standard of proof is the exception to the general rule and that it should apply only in exceptional circumstances, the Commission (i) argues that "the United States Supreme Court has applied a heightened 'clear and cogent' standard in taxpayer cases," Commission Br. 39 n.174, and (ii) suggests that the cases it cites for this proposition present "similar circumstances" to those here. *Id.* That is not accurate. The cases relied upon by the Commission are not merely "taxpayer cases"; rather, each involves a constitutional challenge, under the Commerce Clause and Due Process Clause, to a State's apportionment of sales or income tax (specifically, the "external consistency," or second component of fairness, of an apportionment formula). Each case holds that the challenger challenging the constitutionality of a duly enacted statutory apportionment tax must meet a higher burden, *i.e.*, that the income attributed to the State is out of proportion to the business transacted in that State, or has led to a grossly distorted result. See *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 195-196 (1995); *Trinova Corp. v. Mich. Dep't. of Treasury*, 498 U.S. 358, 379-380 (1991); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169-170 (1983); *Exxon Corp. v. Wisc. Dept. of Revenue*, 447 U.S. 207, 221-222 (1980); *Mobil Oil Corp. v. Comm'r of Taxes of Vt.*, 445 U.S. 425, 453-454 (1980).<sup>14</sup> The notion that the threshold standard of proof in a straightforward

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<sup>14</sup> A constitutional challenge to a State's tax apportionment statute understandably faces a higher burden of proof, as every State has "wide latitude in the selection of apportionment formulas," *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978), and "[t]he difficulty of making an exact apportionment is apparent . . . hence, when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases," *Hans Rees' Sons v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 133 (1931).

valuation case presents “similar circumstances” to these constitutional attacks on the constitutionality of apportionment statutes is baseless.<sup>15</sup>

For these reasons, this Court should reverse the Commission’s decision below requiring Bayer to prove valuation error by “clear and convincing” evidence.

**C. The Decisions Below Must Be Reversed Due To The Tax Commissioner’s Manifest Valuation Errors.**

On the merits, Bayer showed that the valuations performed by the Tax Commissioner should be set aside because they rested, as the Commissioner admitted, on “arbitrary” data and he had “no idea” whether these data reflected reality, let alone the “true and actual” value of Bayer’s property. Bayer Br. 13-14, 37-39 (discussing, *inter alia*, 2/16/2006 Tr. 321-22).

Simply put, the Tax Commissioner applied an “income” approach to determine economic obsolescence for Bayer’s facilities even though the Commission did not have “income” data necessary to conduct such an analysis. The Tax Commissioner abused his discretion by arbitrarily creating “income” data, rather than applying an alternative valuation method that would have been supported by relevant, real-world data. As a result, Bayer was entitled to relief

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<sup>15</sup> Bayer also showed in its opening brief that applying the heightened standard of proof would invite a constitutional conflict, and indeed would violate the due process principles set forth by the United States Supreme Court. See Bayer Br. 32-33 (discussing *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Labors Pension Trust for S. Cal.*, 508 U.S. 602 (1993)). The Commission responds only by citing *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 515-16 (1990); see Commission Br. 38, an abortion case rejecting a due process challenge to the clear and convincing standard. As discussed in *Cooper*, the individual interests at issue were “particularly important” and far “more substantial than mere loss of money.” The Tax Commissioner, by comparison, responds by resting upon the same “taxes are different from other government functions” argument that he earlier advanced in attempt to suggest that the due process protections granted Bayer in this context are minimal. Tax Dep’t Br. 28-29; compare *supra* at 6-7. He then argues that in *Concrete Pipe* “the Supreme Court may have settled on the preponderance of the evidence standard due to the conflicting terms utilized by Congress in the underlying statute.” Tax Dep’t Br. 28. That argument, however, merely confirms Bayer’s point that, as here, where the statutory language is silent—and there are conflicting lines of case law—the usual “preponderance” standard should apply.

because the Tax Commissioner's valuation was not supported by substantial evidence.

Appellees' briefs undermine none of these showings.

1. At the outset, Bayer agrees with appellees that the Tax Commissioner's regulations require the Commissioner to obtain, if possible, the "market value" of the property in question, 110 C.S.R. §§ 1P-2.1, 1P-2.1.1, *i.e.*, "the price at or for which the property would sell if it was sold to a willing buyer by a willing seller in an arms-length transaction." *Id.* § 1P-2.1.1. However, West Virginia law makes clear that the choice of an appropriate valuation method depends on the facts and circumstances of a case. As such, the regulations acknowledge that the appropriate method depends on the availability of the requisite data.

For instance, the regulations state that the "market data approach" is one means to obtain a fair market value. *Id.* § 1P-2.2.1.3. Although the "market data approach" may "be the most accurate form of appraisal" in a given case—*e.g.*, when there has been a recent sale in an arms-length transaction between willing buyer and seller—that valuation method is not appropriate in another case where such information is not available. Thus, the Commissioner recognizes, for instance, that the market approach is preferable as a general matter, but that resort to the income or cost approach is necessary where there is no relevant market data. *Id.* § 1P-2.2.2. Quoting *American Bituminous* and his regulations, the Tax Commissioner admits that "[w]hen possible, the most accurate form of appraisal should be used, but because of the difficulty in obtaining the necessary data from the taxpayer, or due to the lack of comparable commercial and/or industrial properties, choice between the alternative appraisal methods may be limited." Tax Commissioner Br. 32 (internal quotation marks and citations omitted). The Tax Commissioner's ruling should be set aside because he violated these core principles in this case. *See generally* Syllabus Point 2, *In re Tax Assessments Against Pocahontas Land Corp.*, 158 W. Va. 229, 210

S.E.2d 641 (1974) (stating “[w]here it appears that there was no proper assessment there can be no presumption in favor of the correctness of the assessment”).

Bayer agrees that “every appraisal is unique. One size does not fit all. The Tax Commissioner must adapt to the specific circumstances of each industrial property.” *Id.* Indeed, as this Court has expressly held, the Tax Commissioner must use “the most reliable technique for appraising a particular property,” *Am. Bituminous*, 208 W. Va. at 257, 539 S.E.2d at 764. And, as the regulations discussed above reflect, the Tax Commissioner must use “the most accurate form of appraisal” under the circumstances. 110 C.S.R. § 1P-2.2.2; *accord* Tax Dep’t Br. 31 (“In order to determine the true and actual value of property, the Tax Commissioner *must employ* the best methodology possible and the *most accurate information available.*”) (emphasis added). As shown below, it was improper for the Tax Commission to apply an income approach because he lacked the necessary income data to do so.

2. The Tax Commissioner violated these bedrock principles in valuing the Bayer properties at issue. Instead of adapting to the “specific circumstances” of the industrial property at issue, the Tax Commissioner persisted in using a “one size fits all” method despite his acknowledgement that he did not have the “necessary data from the taxpayer” to support use of the “income” method applied in this case. As this Court explained in *American Bituminous*, although the regulations give the Tax Commissioner discretion to, and indeed, “require[] [him] to ‘consider’ the various approaches to valuation by contemplating the feasibility of utilizing each of the ascribed methods,” the regulations require that “these methods are to be ‘used’ or actually employed only where ‘applicable.’” 208 W. Va. at 257, 539 S.E.2d at 764. Here, as Bayer showed—and as appellees fail to refute—the income approach adopted by the Tax Commissioner was not “applicable” because the “necessary” income data does not exist for tax

years 2006 and 2007. *See* Bayer Br. 36-41, 10-16; *accord* Tax Dep't Br. 31 ("Bayer was unable to provide plant specific income"); Commission Br. 41-42. Indeed, this point is undisputed because, at the hearing, the Tax Commissioner admitted that Bayer "does not have the income data for th[e] specific plants." 2/16/2006 Tr. 263-64.

Despite the absence of "income data," the Tax Commissioner insisted upon applying an "income approach" to calculate economic obsolescence. In doing so, he simply made up numbers for the facilities at issue by "deriv[ing] projecting income" for the companies as a whole and then extrapolating incomes for the particular plants based upon the derived incomes. 2/16/2006 Tr. 274-76. As the Tax Commissioner admitted during the hearings, his extrapolated values (i) "do[] not" "relate back to the profitability of the particular plants," (ii) gave him "no idea" whether the plant-specific income figures he used were accurately attributable to the facilities at issue, and (iii) resulted in a "fairly arbitrary" approach to valuation. *Id.* at 321-22; *see* 2007 Bayer Tr. 37.

Appellees attempt to justify their reliance on an "income" approach by quoting an exchange between President Carper and Bayer's valuation expert. There, Bayer's expert stated that he *generally* finds economic obsolescence can best be measured through the income approach. *See* Tax Dep't Br. 29-31; Commission Br. 40-41 n.175. Appellees omit, however, that Bayer's expert testified that, consistent with West Virginia's regulations, the income approach may be employed only where the necessary data are available. *See* 2/16/2006 Tr. 108-09 ("If I had income and data *available to me*, I would look at and consider and perform an evaluation based on income.") (emphasis added); *id.* at 109 (testifying, consistent with the Tax Commissioner's testimony, that such income data was unavailable). Absent the necessary data, the income approach cannot be employed with any accuracy.

Because “income” data were not available, the Tax Commissioner’s insistence on applying an “income” approach to calculate economic obsolescence is not the “most accurate” method of valuation. That is particularly so because Bayer kept “cost” data for each facility and therefore the economic obsolescence of Bayer’s property would have been valued more accurately through a cost approach. As such, this was exactly the type of case “specifically contemplate[d]” by the regulations “where the data are insufficient to employ one . . . of the designated valuation methods.” *Am Bituminous*, 208 W. Va. at 257, 539 S.E.2d at 764.

The Commission responds with a rhetorical question: “How could any rational decision-maker rely upon testimony that the value of a facility should be discounted for economic obsolescence without knowing how much income is generated by the facility?” Commission Br. 42. The concrete answer is that the Tax Commissioner’s regulations provide that cost data can and should be used to make that determination when such an approach is the most accurate under the circumstances. The Commission’s contrary answer appears to be that it was justified to affirm the Tax Commissioner’s calculation of economic obsolescence based upon an income approach even though the Tax Commissioner admitted that he did not have the data necessary to conduct an income approach. That answer, however, is the wrong answer under this Court’s decisions. *See generally Am. Bituminous*, 208 W. Va. at 254, 539 S.E.2d at 761 (ruling that “challenged property valuation [be] supported by substantial evidence”) (citing *Killen*, 170 W. Va. 602, 295 S.E.2d 689).

The Commission also asks: “How can one fairly criticize the Tax Commissioner and the Commission when the taxpayer refuses to provide the raw data allegedly relied upon by the taxpayer’s expert?” Commission Br. 43 (arguing that Bayer “refused to produce [certain] data on the grounds that ‘it contains substantial trade secrets’”). Prior to the 2007 hearing, Bayer

provided every bit of data that the Tax Commissioner requested. Because the Tax Commissioner applied a different method than Bayer's experts, the Tax Commissioner did not ask for that underlying data. At the hearing, for the first time, the Tax Commissioner's attorney requested that data, and Bayer responded that it had no objection so long as the proprietary nature of the data could be protected. *See* 2007 Tr. 65, 119. The hearing was recessed for 10 minutes to allow the Tax Commissioner's attorney and witness to review the unredacted data. *See id.* at 122. After the recess, the Tax Commissioner's attorney withdrew the request to enter the proprietary data into the record. *Id.* at 123. Because the Commission presided over the hearing and literally was in the room as all of these events transpired, its argument that Bayer withheld data is baseless and improper.

As the Tax Commissioner admitted below, the necessary income data were not available. Rather, the "income" data generated by the Tax Commissioner did not "relate back" to the properties the Tax Commissioner sought to value, left the Tax Commissioner with "no idea" as to the accuracy of his valuations, and led to a "fairly arbitrary" result. This is the epitome of a valuation not supported by "substantial evidence." *Am. Bituminous, supra*.<sup>16</sup>

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<sup>16</sup> The Commission attempts to preempt these arguments and excuse the Tax Commissioner's error by suggesting that "appraising property is more of an art than a science," while stressing that "functional obsolescence is a vague and imprecise concept, and when related to the idea of economic obsolescence it becomes even more so." Br. 44 (quoting *Wash. Beef, Inc. v. County of Yakima*, 177 P.3d 162, 180-81 (Wash. App. 2008) (emphasis added by the Commission)). These suggestions, however, are belied by the fact that in *Washington Beef*, the very case upon which the Commission relies, the appeals court affirmed a trial judge's finding "that the County had failed to factor in 'economic obsolescence' that resulted from increased competition and other business pressures external to the plant," and thus rejected the county's methodology. 177 P.3d at 165; *see id.* at 168 (stating that the trial court found the County's cost approach to be "credible," but that the trial court had to make adjustments to the results reached "due to [the County's] failure to make adjustments for economic obsolescence"). In the process, the appeals court recognized that "[g]enerally the cost method accounts for economic obsolescence." *Id.* at 168. Additionally, *Washington Beef's* characterization that 'appraising property is more of an art than a science' is not the uniform view. *See, e.g. Newport Hous. Auth., Inc. v. Hartsell*, 533 S.W.2d 317, 321-22 (Tenn. Ct. App. 1975) ("The American Institute of Real Estate Appraisers has developed real estate appraising to almost *an exact science*." (emphasis added)).

3. Finally, the County Commission suggests that where, as here, the taxpayer does not have one form of data (here, "income data") necessary to apply one valuation method, the Tax Commissioner can ignore the data submitted by the taxpayer and employ whatever method he sees fit. *See* Commission Br. 40-42 (arguing that "Bayer's tax assessment issues are self-inflicted") (citation omitted). That is not the law.

As set forth above, and as this Court has recognized, the Tax Commissioner's regulations "specifically contemplate[] 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. Nothing in the statute, regulations, or in this Court's cases, suggests that when one form of data is absent, the Tax Commissioner is free to ignore other relevant and reliable data. Instead, the regulations make it incumbent on the Tax Commissioner is obligated to select the valuation method that can be applied most accurately in light of the data available. Indeed, even the Tax Commissioner admits that he is bound by law to use "the best methodology possible and the most accurate information available." Tax Dep't Br. 31.

The County Commission's contrary position cannot be reconciled with this Court's decision in *American Bituminous*. There, this Court recognized that the income approach was "rejected [by the Tax Commissioner] on the basis of the limited income history of [defendant's] facility," but neither the Tax Commissioner nor this Court suggested the defendant should be penalized for not having the income data which would have allowed the application of that method. *Id.* at 253, 539 S.E.2d at 764. Rather, the Court's held that the Tax Commissioner was obligated to apply the most accurate method under the circumstances. *See id.* at 252, 539 S.E.2d at 759, syllabus point 5.

Under the Commission's reasoning, *American Bituminous* was wrongly decided.

Because the taxpayer in that case lacked sufficient data for the Tax Commissioner to apply the income approach, under the Commission's argument, the Tax Commissioner nonetheless should have been able to use whatever approach he wanted notwithstanding the lack of necessary data. That, however, is not what this Court held or what West Virginia law requires. As shown above, the Tax Commissioner's regulations recognize that different taxpayers will keep their books in different fashions. Whereas some, like Bayer, will account for individual operations on a cost basis, others will account for their operations on an income basis.

The only authority the Commission can muster for the proposition that Bayer should be penalized for failing to keep plant-specific income data are soundbites from inapposite cases that are plucked out of context. See Commission Br. 42 & nn.177-81. Thus, the Commission quotes *dicta* from *C.I.R. v. National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134 (1974), which states that "while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not . . . and may not enjoy the benefit of some other route he might have chosen to follow but did not." *Id.* at 148-49 (citation corrected). In *C.I.R.*, the Court held that a taxpayer did not incur a discount on an issuance of debentures where, in the absence of any actual or even attempted sale of the debentures, the necessary evaluation of the property to be exchanged for them could not be made and the debt discount could not be determined. *Id.* at 134. In stating that the taxpayer had to "accept the tax consequences of his choice," the Court reasoned that the taxpayer could not receive a discount on a hypothetical transaction without supporting data. *Id.* at 148. Here, however, the economic obsolescence sought by Bayer is fully supported by data presented by Bayer that the Tax Commissioner arbitrarily and improperly ignored.

Second, the Commission quotes *Higgins v. Smith*, 308 U.S. 473 (1940), for the proposition that “the Government may not be required to acquiesce in the taxpayer’s election of that form for doing business which is most advantageous to him.” *Id.* at 477. The *Higgins* court referred to the *corporate* form—not a form of data—and restated the self-evident principle that in assessing taxes, the Government “may look at actualities” to determine how a business is organized for tax purposes. *Id.* Bayer agrees that the Tax Commissioner was obligated to consider the actual facts in this case, and that principle warrants reversal because the Tax Commissioner rejected ignored real-world data in favor of arbitrary “income” estimates that did not reflect “actualities.”

Third, the Commission asserts that “[t]he use of bookkeeping terms and accounting forms and devices cannot be permitted to devitalize valid tax laws.” Commission Br. 42 & n.179 (quoting *Foster v. United States*, 303 U.S. 118, 121 (1938)). That principle does not support the Tax Commissioner. *Foster* stands for the proposition that a taxpayer should not be able to escape, through accounting artifice, taxation on corporate profits in contravention of the Revenue Act of 1928, *See* 303 U.S. at 119-22. The Commission points to no law that Bayer threatens to “devitalize” or contravene in not submitting nonexistent data to the Tax Commissioner.

Fourth—and most deceptively—the Commission argues that “[w]hile a taxpayer need not produce data, ‘[if] in maintaining and asserting those rights a tax detriment results . . . it is a detriment of the taxpayer’s own making.’” Br. 42 & n.180 (quoting *Wyman v. James*, 400 U.S. 309, 324 (1971)). *Wyman* was a civil rights action where plaintiff sought declaratory and injunctive relief preventing termination of her welfare benefits after she failed to consent to a welfare official’s entry into her home. 400 U.S. at 309. In *dicta*, the *Wyman* Court analogized the welfare official’s home visit to a situation where an I.R.S. agent, “in making a routine civil

audit of a taxpayer's income tax return, asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax. If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax." *Id.* at 324. In that context, the Court noted, as quoted in part by the Commission, that "[t]he taxpayer is fully within his 'rights' in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detriment of the taxpayer's own making." *Id.* Here, Bayer *has* "produce[d] the proof" required in this case—namely, the cost data.

Finally, the Commission argues that "[i]n applying the arbitrary or unlawful standard, the tax court should bear in mind that the taxpayer retains the burden of proof, and any inadequacies with the Commissioner's method that are due to the taxpayer's failure to keep or provide records, to the extent that it affected the Commissioner's choice of method, may be taken into account." Br. 42 (quoting *JPMorgan Chase & Co. v. Comm'r of Internal Revenue*, 458 F.3d 564, 571 (7th Cir. 2006)). *JPMorgan* again has no application here. In *JPMorgan*, the dispute involved how to calculate highly complex transactions known as "income swaps" for the purposes of determining taxable *income*. See 458 F.3d at 566-68. The statute at issue provided that "taxable income shall be computed under the method of accounting on the basis of which *the taxpayer regularly computes his income in keeping his books.*" 458 F.3d at 568 (quoting 26 U.S.C. § 446(a)) (emphasis added). That statute thus made the taxpayer's accounting method central to the dispute, and the taxpayer failed to meet its burden in producing the materials underlying that method. Here, the Commission's attempt to rely on *JPMorgan* is especially perverse given that the Commission's complaint is not that Bayer failed to provide the data to support its normal bookkeeping method as the Seventh Circuit discussed, but instead the

Commission's charge is that Bayer did not produce *additional* data that, as all parties acknowledge, Bayer does not keep for its bookkeeping or in the ordinary course of business.

### III. CONCLUSION

For these reasons, and those stated in Bayer's opening brief and petitions, this Court should reverse the rulings of the Circuit Courts and the County Commission.

Respectfully submitted,



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Dated: August 4, 2008

Nos. 33378, 33880, 33881

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BAYER MATERIAL SCIENCE LLC and  
BAYER CROPSCIENCE LP,**

**Petitioners Below, Appellants,**

v.

**STATE TAX COMMISSIONER, and**

**THE HONOURABLE 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 "Reply 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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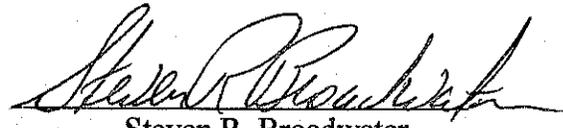
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