

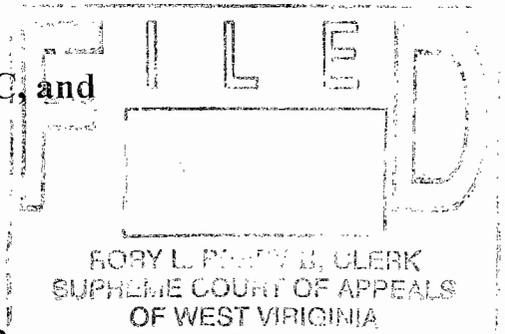
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Nos. 33378, 33880, 33881

**BAYER MATERIALSCIENCE, LLC, and  
BAYER CROPSCIENCE, USA, LP,  
Petitioners Below, Appellants,**

v.

**STATE TAX COMMISSIONER,  
ASSESSOR OF KANAWHA COUNTY,  
COUNTY COMMISSION OF KANAWHA COUNTY, and  
PROSECUTING ATTORNEY OF KANAWHA COUNTY  
Respondents Below, Appellees.**



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Honorable Louis H. Bloom, Judge  
Honorable James C. Stucky, Judge  
Circuit Court of Kanawha County  
Civil Action Nos. 06-MISC-93 (Bloom),  
06-MISC-94 (Stucky), 07-MISC-105 (Bloom),  
and 07-MISC-106 (Bloom)

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**BRIEF OF APPELLEES COUNTY COMMISSION OF  
KANAWHA COUNTY, ASSESSOR OF KANAWHA COUNTY,  
AND PROSECUTING ATTORNEY OF KANAWHA COUNTY**

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. STATEMENT OF FACTS .....4

    A. Facts relating to the 2006 Cases.....4

    B. Facts relating to the 2007 Cases.....10

III. DISCUSSIONS OF LAW.....15

    A. THE APPLICABLE STANDARDS OF REVIEW WERE CORRECTLY APPLIED AND APPLICATION OF THE STANDARD OF REVIEW IN THESE CONSOLIDATED APPELAS WARRANTS AFFIRMING THE ORDERS OF THE CIRCUIT COURT OF KANAWHA COUNTY .....15

    B. THE USE OF A COUNTY COMMISSION AS A BOARD OF EQUALIZATION AND REVIEW DOES NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS .....17

        1. Equal Protection.....17

        2. Due Process.....19

    C. THIS COURT HAS CLEARLY HELD THAT A “CLEAR AND CONVINCING” EVIDENCE STANDARD APPLIES IN THIS CONTEXT AND SUCH STANDARD, WHICH IS ALSO THE NATIONAL STANDARD AND APPLIED BY THE UNITED STATES SUPREME COURT IN TAX CASES, DOES NOT VIOLATE DUE PROCESS .....33

    D. THE TAXPAYER IN THIS CASE FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE THAT THE TAX ASSESSMENTS AT ISSUE WERE ERRONEOUS AND TAX COMMISSIONER’S APPRAISALS WERE NOT AN ABUSE OF DISCRETION.....39

IV. CONCLUSION.....45

## TABLE OF AUTHORITIES

### CASES

<i>Accord Graf v. University of West Virginia Bd. of Trustees</i> , 202 W. Va. 419, 423, 504 S.E.2d 654, 658 (1998).....	17
<i>Accord Ward</i> , 409 U.S. at 60.....	22
<i>Appalachian Power Co. v. State Tax Dep't of West Virginia</i> , 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995).....	18
<i>Arizona Dept. of Revenue v. Questar Southern Trails Pipeline Co.</i> , 215 Ariz. 577, 580, 161 P.3d 620, 623 (Ariz. Ct. App. 2007).....	45
<i>Arkansas v. Farm Credit Serv.</i> , 520 U.S. 821, 826 (1997).....	20
<i>Bath Club v. Dade County</i> , 394 So.2d 110 (Fla. 1981).....	28
<i>Beckman Prod. Serv., Inc. v. Michigan Dep't of Treasury</i> , 1990 WL 96944, 3 (Mich. Ct. Cl.).....	18
<i>Bunch v. Short</i> , 78 W. Va. 764, 768, 90 S.E. 810, 811-12 (1916) .....	25
<i>C.I.R. v. National Alfalfa Dehydrating</i> , 417 U.S. 148-49 (1974) .....	18, 42
<i>Concerned Citizens of Southern Ohio v. Pine Creek Conservancy District</i> , 429 U.S. 651 (1977).....	26
<i>Concrete Pipe and Prod. v. Constr. Laborers Pension Trust</i> , 508 U.S. 602 (1993).....	30, 31, 32
<i>Dugan v. Ohio</i> , 277 U.S. 61 (1928).....	<i>passim</i>
<i>Eastern American Energy Corp. v. Thorn</i> , 189 W. Va. 75, 79, 428 S.E.2d 56, 60 (1993).....	34
<i>Foster v. United States</i> , 303 U.S. 118, 121 (1938).....	19, 42

<i>Gribben v. Kirk</i> , 195 W. Va. 488, 500, 466 S.E.2d 147, 159 (1995).....	15
<i>Harman v. Frye</i> , 188 W. Va. 611, 425 S.E.2d 566 (1992).....	25
<i>Harrison v. Ginsberg</i> , 169 W. Va. 162, 174, 286 S.E.2d 276, 283 (1982).....	17
<i>Hartley Marine Corp. v. Mierke</i> , 196 W. Va. 669, 681, 474 S.E.2d 599, 611 (1996).....	17
<i>Higgins v. Smith</i> , 308 U.S. 473, 477 (1940).....	19, 42
<i>In re Tax Assessment Against American Bituminous Power Partners, L.P.</i> , 208 W. Va. 250, 255, 539 S.E.2d 757, 762 (2000).....	<i>passim</i>
<i>In re 1975 Assessments Against Oneida Coal Co.</i> , 178 W. Va. 485, 360 S.E.2d 560 (1987).....	34
<i>In re Tax Assessments Against Pocahontas Land Co.</i> , 172 W. Va. 53, 303 S.E.2d 691 (1983).....	3, 22, 34
<i>Israel by Israel v. West Virginia Secondary Sch. Activities Comm'n</i> , 182 W. Va. 454, 388 S.E.2d 480 (1989).....	18
<i>Janasiewicz v. Board of Ed. of Kanawha County</i> , 171 W. Va. 423, 426, 299 S.E.2d 34, 37 (1982).....	18
<i>JPMorgan Chase &amp; Co. v. C.I.R.</i> , 458 F.3d 564, 571 (7 <sup>th</sup> Cir. 2006) .....	42
<i>Klas &amp; Pops</i> , <i>supra</i> n. 81 at 2.....	24
<i>Lee Hospital v. Cambria County Board of Assessment Appeals</i> , 638 A.2d 344 (Pa. Cmwlth. 1994).....	29
<i>Martin v. Randolph County Bd. of Educ.</i> 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995).....	17
<i>Mozingo v. Barnhart</i> , 169 W. Va. 31, 33, 285 S.E.2d 497, 498 (1981).....	24

<i>Ohio v. Akron Center for Reproductive Health</i> , 497 U.S. 502, 515-16 (1990) .....	38
<i>Ranger Realty Co. v. Miller</i> , 136 So. 546, 549-50 (Fla.1931) .....	19
<i>Riedel v. Commissioner of Taxation</i> , 1977 WL 943, 3 (Minn. Tax Ct.).....	18
<i>Robertson v. Goldman</i> , 179 W. Va. 453, 369 S.E.2d 888 (1988).....	17
<i>State v. David D. W.</i> , 214 W. Va. 167, 178, 588 S.E.2d 156, 167 (2003).....	17
<i>State ex rel. Dingess v. Scaggs</i> , 156 W. Va. 588, 590, 195 S.E.2d 724, 726 (1973).....	24
<i>Tumey v. Ohio</i> , 272 U.S. 510 (1927).....	<i>passim</i>
<i>United States v. Brown</i> , 381 U.S. 437, 443 (1965).....	26
<i>Ward v. Monroeville</i> , 409 U.S. 57 (1972).....	<i>passim</i>
<i>Weldon v. Bonner County Tax Coalition</i> , 36, 855 P.2d 868, 872-73 (Idaho 1993) .....	26
<i>Western Pocahontas Properties, Ltd. v. County Comm'n of Wetzel County</i> , 189 W.Va. 322, 324-25, 431 S.E.2d 661, 663-64 (1993) .....	3 33, 34
<i>Wyman v. James</i> , 400 U.S. 309, 324 (1971).....	19, 42
 <b>RULES</b>	
16 MICHIE’S JURIS. <i>Sheriffs</i> § 3 at 717 (2002) .....	25
84 C.J.S. <i>Taxation</i> § 621 (2008) .....	32
84 C.J.S. <i>Taxation</i> § 632 (2008) .....	35
W.Va. Code § 11-1C-10(a)(1) .....	4

W. Va. Code § 11-1C-10(c).....	4, 29
W. Va. Code § 11-1C-19(g).....	29
W. Va. Code § 11-1C-2(d).....	29
W. Va. Code § 11-1C-3(a).....	29
W. Va. Code § 11-1C-6(b).....	32
W. Va. C.S.R. § 110-1-2.5.3.1.....	40
W. Va. C.S.R. § 110-1-2.5.3.3.....	41
W. Va. Code R. § 110-1P-2.2.1.1.....	6
W. Va. Code R. § 110-1P-2.3.5.....	6
W. Va. Code R. § 110-1P-2.3.8.....	6
W. Va. Code R. § 110-1P-2.3.20.....	6
W. Va. Code R. § 110-1P-2.5.2.2.....	4
W. Va. Code R. § 110-1P-2.5.3.2.....	5
W. Va. Code § 11-3-25.....	16
W. Va. Code, 7-4-1 [1971].....	25
W. Va. Code § 7-5-1.....	25
W. Va. Code § 7-7-4(e)(5).....	26

**MISCELLANEOUS**

<i>2A McQuillin on the Law of Municipal Corporations</i> § 9:20.....	23
David A. Bingham, <i>Local Government in West Virginia</i> , W. VA. PUB. AFF. RPTR. 2 (1979).....	24
Harold J. Shamberger, COUNTY GOVERNMENT AND ADMINISTRATION IN WEST VIRGINIA 19-20 (1952).....	24
Jon Delano, <i>Court Related County Officials on Ballot this May</i> ,	

LAWYERS J., at 8 (May 7, 1999) .....	23
Kenneth A. Klase, & Gerald M. Pops, <i>County Conflict in West Virginia</i> , W. VA. PUB. AFF. RPTR. 2 (1998).....	23
Robert Jay Dilger, <i>County Government in West Virginia</i> , W. VA. PUB. AFF. RPTR. 9 (1995).....	23

## I. INTRODUCTION

The consolidated appeals by Bayer Material Science and Bayer Crop Science (collectively “Bayer” unless otherwise specified) present three issues: (1) whether a county commission sitting as a board of property tax equalization and review is unconstitutional; (2) whether application of a “clear and convincing” standard of review was erroneous; and (3) whether Tax Commissioner’s appraisals of Bayer’s property constituted an abuse of discretion. The Appellees, the Kanawha County Commission (“Commission”), the Kanawha County Assessor (“Assessor”), and the Kanawha County Prosecuting Attorney (“Prosecuting Attorney”), submit that Bayer is wrong on all three counts.

First, taken to its logical conclusion, Bayer’s argument that the use of a county commission as a board of property tax equalization and review is unconstitutional would preclude any governmental entity from administering statutes over which they have been legislatively granted authority.<sup>1</sup> When a county commission sits as a board of equalization and review, it is primarily performing an executive or administrative function:

It is true that variations in assessments may be made by the assessor without violating the equal and uniform provision of the Constitution, because perfection is not expected of an assessor or the county court acting as a board of equalization and review. . . . The ascertainment of the value of property for the purpose of assessment and taxation is primarily an executive or administrative function and the courts will not interfere with such assessments unless they clearly violate the constitutional provision regarding equal and uniform taxation of property.<sup>2</sup>

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<sup>1</sup> For example, a zoning board would be disqualified from hearing disputes over zoning matters. A human rights commission would be disqualified from hearing disputes over alleged discrimination. A state tax department or other revenue agency would be precluded from hearing disputes over taxes, fees, and other assessments.

<sup>2</sup> *In Re Tax Assessments Against Pocahontas Land Corp.*, 158 W. Va. 229, 238, 210 S.E.2d 641, 648 (1974)(emphasis supplied).

Bayer's argument that the performance of what is primarily an executive or administrative function by an administrative agency<sup>3</sup> is subject to a "conflict of interest" or "appearance of bias" test, Appellants' Brief at 2, is simply incorrect. This Court has already held that the level of "due process" required in proceedings before a board of equalization and review is simply not the same as in a full-blown judicial proceeding

It must be remembered that property assessment proceedings have historically been treated as not being subject to rigorous due process requirements. . . . courts do not demand that a hearing before a board [of equalization and review] be surrounded by extensive due process procedures. The formal rules of evidence are not applicable. The assessor and a board may call upon the services of the county prosecuting attorney to assist them at such hearing as provided for by W. Va. Code, 7-4-1."<sup>4</sup>

West Virginia's system of property tax equalization and review is no different than that found throughout the country. There is no constitutional justification for mandating "courts of equalization and review" rather than "board of equalization and review."

Second, Bayer's argument that the Commission applied the incorrect standard of review is wrong as this Court has held:

Variations in assessments will not be considered unless the presumption of correctness is clearly rebutted by the evidence introduced by the taxpayer. *In re Tax Assessments Against Southern Land Co., Supra; Bankers Pocahontas Coal Co. v.*

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<sup>3</sup> Indeed, this Court has held, "As this Court's previous cases suggest, and as we have recognized in other contexts involving taxation, e.g., *Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995), judicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A." *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 255, 539 S.E.2d 757, 762 (2000).

<sup>4</sup> *In re Tax Assessments Against Pocahontas Land Corp.*, 172 W. Va. 53, 60-62, 303 S.E.2d 691, 698-700 (1983)(emphasis supplied).

*County Court, Supra.*<sup>5</sup>

As this Court has further explained:

A taxpayer's initial avenue for relief from an allegedly erroneous property valuation lies with the county commission, sitting as a board of equalization and review. W. Va. Code § 11-3-24 (1979). The burden upon the taxpayer to demonstrate error with respect to the State's valuation is heavy in these adjudicative proceedings: "It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear." Syl. pt. 7, *In re Tax Assessments Against Pocahontas Land Co.*, 172 W.Va. 53, 303 S.E.2d 691 (1983)." Syl. pt. 1, *Western Pocahontas Properties, Ltd. v. County Comm'n of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993). In challenging a tax valuation, "[t]he burden [of proof] clearly falls upon . . . [the taxpayer] to demonstrate through clear and convincing evidence that the tax assessments were erroneous." *In re Maple Meadow Min. Co.*, 191 W. Va. 519, 523, 446 S.E.2d 912, 916 (1994); *see also Pocahontas Land*, 172 W.Va. at 61, 303 S.E.2d at 699 ("It is obvious that where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous."); syl. pt. 2, in part, *Western Pocahontas Properties, Ltd., supra* ("The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous.")<sup>6</sup>

Moreover, "clear and convincing" is the national standard used in tax assessment cases, is a standard used by the United States Supreme Court in tax cases, and is used in many other contexts. Use of the standard in tax assessment cases simply does not constitute a violation of equal protection or due process principles.

Finally, Bayer's allegations that the Tax Commissioner violated the applicable regulations and generally-accepted appraisal principles is without merit. As previously

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<sup>5</sup> *Pocahontas Land Corp., supra* at 238, 210 S.E.2d at 648.

<sup>6</sup> *Id.* at 254, 539 S.E.2d at 761 (emphasis supplied).

discussed, “perfection is not expected”<sup>7</sup> in the appraisal and assessment process, because perfection is unattainable. Recently, this Court observed, “Based upon our broad reading of the regulation, we hold that Title 110, Series 1P of the West Virginia Code of State Rules confers upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.”<sup>8</sup> Here, the circuit court correctly determined that the Tax Commissioner did not abuse such discretion where the taxpayer failed to produce key data to support its reliance upon a theory of “economic obsolescence” and where its own experts’ testimony was contradictory, not supported by the evidence, and indeed supported the valuations by the Tax Commissioner.

## II. STATEMENT OF FACTS

### A. Facts relating to the 2006 Cases.

The Tax Commissioner is charged with valuing “all industrial property in the state at its fair market value” and then providing the values to county assessors to use in assessing the property.<sup>9</sup> Pursuant to this responsibility, the Tax Commissioner promulgated Title 110, Series 1P of the West Virginia Code of State Rules, which explains the mechanisms to be utilized in valuing industrial property.

To determine the fair market value of industrial property, there are three approaches that

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<sup>7</sup> *Pocahontas Land Corp.*, *supra* at 238, 210 S.E.2d at 648.

<sup>8</sup> *American Bituminous*, *supra* at 254, 539 S.E.2d at 761.

<sup>9</sup> W. Va. Code § 11-1C-10(c). Industrial property is defined as “real and personal property integrated as a functioning unit intended for the assembling, processing and manufacturing of finished or partially finished products.” W.Va. Code § 11-1C-10(a)(1). Additionally, industrial property located in the state of West Virginia is taxed in the same manner that personal property is taxed. W.Va. Code R. § 110-1P-2.5.2.2.

“will be considered and used where applicable” by the Tax Commissioner: (1) the cost approach; (2) the income approach; and (3) the market [data or comparison] approach.<sup>10</sup> 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.”<sup>11</sup> Because of the “lack of meaningful sales[,]” the market approach “is used less frequently . . . .”<sup>12</sup> The income approach “is not normally used because of the difficulty in estimating future net benefits to be derived[,] except in the case of certain kinds of leased equipment.”<sup>13</sup> Moreover, the Title 110, Series 1P regulations “confer[] upon the . . . Commissioner discretion in choosing and applying the most accurate method of appraising . . . industrial properties.”<sup>14</sup>

The Tax Commissioner appraised the industrial and real property of Bayer MaterialScience (“BMS”) and Bayer CropScience (“BCS”) for tax year 2006 using the cost approach.<sup>15</sup> When determining fair market value of industrial property under the cost approach,

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<sup>10</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 7; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact No. 9; W. Va. Code R. § 110-1P-2.5.3.1; *see also id.* § 110-1P-2.2.1 (discussing three approaches).

<sup>11</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact Nos. 8 and 9; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact Nos. 10 and 11; W. Va. Code R. § 110-1P-2.5.3.2.

<sup>12</sup> W. Va. Code R. § 110-1P-2.5.3.2.

<sup>13</sup> *Id.*

<sup>14</sup> Syl. pt. 5, *American Bituminous*, 208 W. Va. 250, 539 S.E.2d 757 (2000).

<sup>15</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact Nos. 2, 10; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact Nos. 2, 3, and 12. The BMS appeal concerns the production facility located in South Charleston, West Virginia. The BCS appeal concerns the production facility located in Institute, West Virginia.

the “replacement cost of the [property] is reduced by the amount of accrued depreciation.”<sup>16</sup> The Tax Commissioner considers “three (3) types of depreciation: physical deterioration,<sup>17</sup> functional obsolescence,<sup>18</sup> and economic obsolescence<sup>19</sup>.”<sup>20</sup>

On February 16, 2006, Bayer appeared before the Kanawha County Commission, sitting as the Board of Equalization and Review (“Board”), and contested the value of the Tax Commissioner’s valuation of its industrial property for tax year 2006.<sup>21</sup> Bayer did not dispute the values calculated or methods used by the Tax Commissioner for replacement value, physical deterioration, and functional obsolescence.<sup>22</sup> Rather, Bayer objected to the manner in which the Tax Commissioner calculated the economic obsolescence of its industrial property.<sup>23</sup>

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<sup>16</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 11; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact No. 13; W. Va. Code R. § 110-1P-2.2.1.1.

<sup>17</sup> Physical deterioration includes “a loss in value due to natural wear and tear of property resulting from age, use, abuse, etc.” W. Va. Code R. § 110-1P-2.3.20.

<sup>18</sup> Functional obsolescence contemplates “[t]he loss of value due to factors such as excess capacity, changes in technology, flow of material, seasonal use, part-time use or other like factors.” W. Va. Code R. § 110-1P-2.3.8.

<sup>19</sup> Economic obsolescence comprises “a loss in value of property arising from ‘Outside Forces’ such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships.” W. Va. Code R. § 110-1P-2.3.5.

<sup>20</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 11; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact No. 13; W. Va. Code R. § 110-1P-2.2.1.1.

<sup>21</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 3; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact No. 4. BCS also contested the Tax Commissioner’s valuation of its real property for tax year 2006.

<sup>22</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 14; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact No. 16.

<sup>23</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 15; Final

At the hearing conducted by the Board on February 16, 2006, the Tax Commissioner called Jeff Amburgey, Assistant Director of the Property Tax Division, who used an income method commonly employed in appraising utility plants to calculate the deduction for economic obsolescence.<sup>24</sup> Because Bayer did not maintain plant level income data and failed to provide the Tax Commissioner with any income information at the plant level, the Tax Commissioner employed an income method to arrive at a true and actual valuation that would be consistent with the information Bayer did provide as well as with the information the Tax Commissioner was able to obtain, *i.e.*, BMS's and BCS's annual reports and State corporate tax returns.<sup>25</sup> Mr. Amburgey testified that Bayer was the only taxpayer for which the Tax Commissioner had to start with corporate income taxes to calculate the deduction for economic obsolescence because of the lack of plant-specific income data.<sup>26</sup> Based on his calculations using the income method, Mr. Amburgey testified that the BMS facility located in South Charleston, West Virginia, should receive a deduction of \$10,861,561 for economic obsolescence and the BCS facility located in Institute, West Virginia, should receive no deduction for economic obsolescence.<sup>27</sup>

Bayer called Robert Stanley Svoboda as its expert who used a cost approach and calculated an inutility factor in determining the deduction for economic obsolescence. Based on

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Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact No. 17.

<sup>24</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 17; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact No. 19.

<sup>25</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 17; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact No. 19.

<sup>26</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 17.

<sup>27</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 17; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact No. 19.

his calculations, Mr. Svoboda testified that the BMS facility located in South Charleston, West Virginia, should receive a deduction of \$23,000,000 for economic obsolescence and the BCS facility located in Institute, West Virginia, should receive a deduction of \$36,300,000 for economic obsolescence.<sup>28</sup> Mr. Svoboda admitted, however, that economic obsolescence is best measured by the income method as stated in his book on page 104.<sup>29</sup> The circuit courts found that the legislative regulations for the evaluation of industrial, real, and personal property are void of any reference to the inutility factor used by Mr. Svoboda.<sup>30</sup> In BMS's appeal, Judge Bloom further found that Mr. Svoboda's inutility factor determined only a portion of the economic obsolescence, while the income approach would determine all the economic obsolescence, and that Mr. Svoboda's cost approach included excess operating expenses for an evergreen contract between BMS's predecessors and Dow Chemical before BMS acquired the South Charleston facility that should not have been included in the calculation of economic obsolescence.<sup>31</sup>

With respect to tax year 2006, the Board orders dated February 23, 2006, concluded that "(1) Petitioner failed to prove by clear and convincing evidence that the assessments are erroneous and that the Tax Commissioner abused his discretion in considering the economic

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<sup>28</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 16; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact No. 18.

<sup>29</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 21.

<sup>30</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact No. 20; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Finding of Fact No. 22.

<sup>31</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Finding of Fact Nos. 22 and 23; *Id.* at Conclusion of Law No. 2; *Id.* at fn. 10 ("An evergreen contract is one that never ends and in this case is only terminable by Dow and obligates [BMS] to pay for services for which it receives no benefit.").

obsolescence of the subject property; and (2) the agreement by Petitioner to pay Dow Chemical a million dollars per year was within the original service agreement as an acquisition cost, when Petitioner agreed to assume acquisition of the facility, and does not represent additional economic obsolescence.”<sup>32</sup> The circuit courts correctly resolved these issues as follows:

The Tax Commissioner’s use of the income method to calculate economic obsolescence was well within its discretion and the Tax Commissioner did not abuse its discretion in applying this approach to economic obsolescence. Therefore, the Board did not clearly err or abuse its discretion in finding that Petitioner failed to prove by clear and convincing evidence that the assessments are erroneous. The Board did not clearly err or abuse its discretion in finding that Petitioner failed to prove by clear and convincing evidence . . . that the Tax Commissioner abused his discretion in considering the economic obsolescence of the subject property.

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The Court concludes that the Tax Commissioner’s assessment of Petitioner’s property is supported by substantial evidence in the record and by the testimony of the Tax Commissioner’s witnesses. The Court concludes that the Tax Commissioner’s assessment of Petitioner’s property is not in contravention of any regulation, statute, or constitutional provision.

The Court concludes that there is no merit to Petitioner’s allegations that it was denied due process. The legislatively mandated system to equalize and review the assessments is set forth in *West Virginia Code*, § 11-3-24, and the Board properly followed the statutes and properly applied the burden of proof to Petitioner’s case.<sup>33</sup>

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<sup>32</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at 1. *See also* Final Order (BCS appeal) (06-MISC-94) (Stucky) at 1-2 (“The February 23, 2006 Board orders concluded that, (1) Petitioner failed to prove by clear and convincing evidence that the assessments are erroneous and that the Tax Commissioner abused his discretion in considering the economic obsolescence of the subject property; and (2) Petitioner failed to prove, by clear and convincing evidence, that the valuation for taxation of the subject real property was erroneous or an abuse of discretion.”)

<sup>33</sup> Final Order (BMS appeal) (06-MISC-93) (Bloom) at Conclusions of Law Nos. 1, 3, and 4; Final Order (BCS appeal) (06-MISC-94) (Stucky) at Conclusions of Law Nos. 1, 2, 3 (substantially the same).

Accordingly, this Court should affirm the decisions of the circuit courts in Civil Action Nos. 06-MISC-93 and 94.

**B. Facts relating to the 2007 Cases**

The Tax Commissioner appraised BMS and BCS industrial property for tax year 2007.<sup>34</sup> Bayer contested the valuation before the Board.<sup>35</sup> At the hearing conducted by the Board on February 15, 2007, Bayer and the Tax Commissioner each produced an expert witness.<sup>36</sup>

Bayer employed Greg O'Dell, who received a Bachelor's Degree in Finance and has worked as property tax evaluation consultant in Texas.<sup>37</sup> The Tax Commissioner called Jeff Amburgey, Assistant Director of Property Taxes for the State Tax Department, who holds a Bachelor's Degree in Business and a Master's Degree in mathematics.<sup>38</sup> Mr. Amburgey has calculated economic obsolescence for industrial taxpayers in West Virginia for the last fourteen years.<sup>39</sup>

Like Mr. Svoboda in Bayer's 2006 tax year appeals, the only calculation Mr. O'Dell disputed was economic obsolescence,<sup>40</sup> the "value loss reducing the property value attributable

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<sup>34</sup>2/15/2007 BER Tr. at 74.

<sup>35</sup>*Id.* at 6.

<sup>36</sup>*Id.* at 4-5.

<sup>37</sup>*Id.* at 24-25.

<sup>38</sup>*Id.* at 94-95.

<sup>39</sup>*Id.* at 95.

<sup>40</sup>*Id.* at 30. Indeed, in the circuit court order in consolidated Civil Action Nos. 07-MISC-105 and 106, it is noted: "[P]etitioners raise primarily two issues: (1) whether the proper method was used to calculate a deduction for economic obsolescence; and (2) whether the assessment process under West Virginia Code § 11-3-24 violates due process." Order at 3.

to factors that are external to the property and out of control of the property or property owners.”<sup>41</sup> Mr. O’Dell and Mr. Amburgey both acknowledged that the cost approach should include a reduction for economic obsolescence where it is present;<sup>42</sup> however, the two experts disagreed over the method used to calculate economic obsolescence for Bayer.<sup>43</sup>

Mr. Amburgey testified that to adjust the appraisal for economic obsolescence, the Tax Commissioner performs an income valuation and then compares that value to the cost valuation.<sup>44</sup> To make an income valuation, the Tax Commissioner typically requests five years of income data at the plant level, along with annual reports to stockholders and other, similar types of data.<sup>45</sup> The Tax Commissioner analyzes the plant level data, projects future income, and capitalizes that number.<sup>46</sup>

Unlike other taxpayers for which industrial property appraisals have been performed, Bayer does not keep plant-specific income data.<sup>47</sup> Mr. Amburgey testified he could not remember any other industrial appraisal performed in West Virginia in the last five years for which the taxpayer did not keep plant-level income data.<sup>48</sup> Mr. Amburgey explained the process he employed resulted from the following situation: five or six years prior to the tax appraisal

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<sup>41</sup>*Id.* at 31.

<sup>42</sup>*Id.* at 31, 77-78.

<sup>43</sup>*Id.* at 39-42, 77-79.

<sup>44</sup>*Id.* at 77.

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>*Id.* at 78.

<sup>48</sup>*Id.*

here, the Tax Commissioner denied Bayer any reduction for economic obsolescence because Bayer did not keep plant level data which the Commissioner consistently used to make the income valuation.<sup>49</sup>

The Commission reversed and directed the Tax Commissioner to develop another method for calculating economic obsolescence when plant-level data was not kept.<sup>50</sup> Thus, the Tax Commissioner developed a technique he used here, evaluating data at the lowest level at which income data was kept by the taxpayer, and then performing the income valuation using that data and extrapolating back to the plant level.<sup>51</sup> This income approach is unique to Bayer since it is the only corporation in West Virginia that has requested an adjustment for economic obsolescence of industrial property for which it does not keep plant-level income data.<sup>52</sup> Nevertheless, Mr. Amburgey testified that this technique is well established and similar to that used in West Virginia and at least thirty states to value utility corporations.<sup>53</sup>

Using the cost approach the Tax Commissioner valued the properties at \$124,795,787 and \$190,314,858 respectively<sup>54</sup> and then calculated the economic obsolescence for them using the modified income approach specifically designed to address Bayer's lack of plant-specific data.<sup>55</sup> Due to a significant increase in net income on income tax returns from 2003 to 2005,

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<sup>49</sup>*Id.*

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at 79.

<sup>53</sup>*Id.* at 112.

<sup>54</sup>*Id.* at 115.

<sup>55</sup>*Id.* at 77-79.

when this income was apportioned among the BMS and BCS properties, the income approach for both yielded valuations greatly exceeding those produced through application of the cost approach.<sup>56</sup> Consequently, the Tax Commissioner found no economic obsolescence for either property, and thus the cost approach values were taken as the actual values of the BMS and BCS properties for 2007.<sup>57</sup>

Mr. O'Dell testified that the Commissioner "didn't account for the economic obsolescence."<sup>58</sup> Mr. O'Dell employed a scale factor model to measure permanent inutility, and an income method model to measure temporary inutility.<sup>59</sup> Both models, though, were modified from models published by the American Society of Appraisers, and were ultimately developed in-house by Ryan & Company, the employer of Mr. O'Dell.<sup>60</sup> The circuit court further found that the legislative regulations for the evaluation of industrial, real, and personal property are void of any reference to the scale factor and inutility model employed by Mr. O'Dell.<sup>61</sup>

In assessing the Tax Commissioner's determination of economic obsolescence, Mr. O'Dell testified that, although he knew of no levying authority that determined economic obsolescence in the precise manner as was done for Bayer,<sup>62</sup> general appraisal practices include

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<sup>56</sup>*Id.* at 79-94.

<sup>57</sup>*Id.* at 96-97.

<sup>58</sup>*Id.* at 30.

<sup>59</sup>*Id.* at 32-33, 45-46.

<sup>60</sup>*Id.* at 51-52.

<sup>61</sup> Final Order (consolidated Civil Action Nos. 07-MISC-105 (BMS appeal) and 07-MISC-106 (BCS appeal)) (Bloom) at Finding of Fact No. 32.

<sup>62</sup> *Id.* at 48.

the measurement of economic obsolescence through the use of income techniques.<sup>63</sup> When questioned about why he did not employ such a method in determining the economic obsolescence for Bayer, he testified he had asked Bayer for plant level data, but that Bayer did not keep such data.<sup>64</sup> He conceded it is Bayer's choice to not keep such data.<sup>65</sup>

With respect to tax year 2007, the Board order dated February 15, 2007, concluded that "Petitioners failed to prove by clear and convincing evidence that the assessments are erroneous and that the Tax Commissioner abused his discretion in considering the economic obsolescence of the subject property."<sup>66</sup> The circuit court correctly resolved these issues as follows:

The Tax Commissioner's use of the income method to calculate economic obsolescence was well within its discretion and the Tax Commissioner did not abuse his discretion in applying this approach to economic obsolescence. Therefore, the Board did not clearly err or abuse its discretion in finding that Petitioners failed to prove by clear and convincing evidence that the assessments are erroneous. The Board did not clearly err or abuse its discretion in finding that Petitioners failed to prove by clear and convincing evidence . . . that the Tax Commissioner abused his discretion in considering the economic obsolescence of the subject property.

The Court concludes that the Tax Commissioner's assessments of Petitioners' property are supported by substantial evidence in the record and by the testimony of the Tax Commissioner's witness. The Court concludes that the Tax Commissioner's assessments of Petitioners' property is not in contravention of any regulation, statute, or constitutional provision.

The Court concludes that there is no merit to Petitioners' allegations that they were denied due process. The legislatively

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<sup>63</sup> *Id.* at 63.

<sup>64</sup> *Id.* at 63-64, 67-70.

<sup>65</sup> *Id.* at 69-70.

<sup>66</sup> Final Order (consolidated Civil Action Nos. 07-MISC-105 (BMS appeal) and 07-MISC-106 (BCS appeal)) (Bloom) at 1-2.

mandated system to equalize and review the assessments is set forth in *West Virginia Code*, § 11-3-24, and the Board properly followed the statutes and properly applied the burden of proof to Petitioners' case.<sup>67</sup>

Accordingly, this Court should affirm the decision of the circuit court in consolidated Civil Action Nos. 07-MISC-105 and 106.

### III. DISCUSSION OF LAW

#### A. THE APPLICABLE STANDARDS OF REVIEW WERE CORRECTLY APPLIED AND APPLICATION OF THE STANDARD OF REVIEW IN THESE CONSOLIDATED APPEALS WARRANTS AFFIRMING THE ORDERS OF THE CIRCUIT COURT OF KANAWHA COUNTY.

“Title 110, Series 1P of the West Virginia Code of State Rules confers upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.”<sup>68</sup>

“It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear.”<sup>69</sup>

“Under the abuse of discretion standard, [this Court] will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances.”<sup>70</sup>

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<sup>67</sup> Final Order (consolidated Civil Action Nos. 07-MISC-105 (BMS appeal) and 07-MISC-106 (BCS appeal)) (Bloom) at Conclusions of Law Nos. 1-3.

<sup>68</sup> Syl. pt. 1, *American Bituminous*, *supra*.

<sup>69</sup> Syl. pt. 7, *Pocahontas Land Co.*, *supra*.

<sup>70</sup> *Gribben v. Kirk*, 195 W. Va. 488, 500, 466 S.E.2d 147, 159 (1995) .

“[J]udicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A. In such circumstances, a circuit court is primarily discharging an appellate function little different from that undertaken by this Court; consequently, our review of a circuit court’s ruling in proceedings under § 11-3-25 is *de novo*.”<sup>71</sup>

The contested case provision of the Administrative Procedures Act, W. Va. Code § 29A-5-4(g) provides:

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because of the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

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<sup>71</sup> *American Bituminous, supra* at 255, 539 S.E.2d at 762 (footnote omitted).

Notably, “[t]he scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the hearing examiner.”<sup>72</sup> Similarly, “an appellate court should strive to uphold discretionary rulings made by trial judges and avoid in almost every case tampering with that discretion.”<sup>73</sup> Faithfully applying these standards to the instant case warrants a decision affirming the subject decisions of the circuit courts.

**B. THE USE OF A COUNTY COMMISSION AS A BOARD OF EQUALIZATION AND REVIEW DOES NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS PRINCIPLES.**

**1. Equal Protection.** Section 1 of the Fourteenth Amendment provides, in pertinent part, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Article III, § 10 of the West Virginia Constitution provides that “No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” “The concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the fourteenth amendment to the United States Constitution.”<sup>74</sup>

“At the center of any equal protection analysis is the precept that similarly situated persons within the same class are to be treated equally.”<sup>75</sup> “Equal protection of the law is

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<sup>72</sup> *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995). *Accord Graf v. University of West Virginia Bd. of Trustees*, 202 W. Va. 419, 423, 504 S.E.2d 654, 658 (1998); *Harrison v. Ginsberg*, 169 W. Va. 162, 174, 286 S.E.2d 276, 283 (1982).

<sup>73</sup> *State v. David D. W.*, 214 W. Va. 167, 178, 588 S.E.2d 156, 167 (2003)(Maynard, J., concurring).

<sup>74</sup> Syl. pt. 3, *Robertson v. Goldman*, 179 W. Va. 453, 369 S.E.2d 888 (1988).

<sup>75</sup> *Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 681, 474 S.E.2d 599, 611 (1996).

implicated when a classification treats similarly situated persons in a disadvantageous manner.”<sup>76</sup>

A “classification[ ] not affecting a fundamental right or some suspect or quasi-suspect criterion. . . will be sustained so long as it ‘is rationally related to a legitimate state interest.’”<sup>77</sup>

“When there is a rational basis to distinguish between groups of individuals, not based on invidious discrimination, then different treatment does not offend equal protection provisions.”<sup>78</sup>

Hence, where there is a rational basis for disparate treatment there is equal protection.

“Disparate treatment of dissimilar taxpayers is patently lawful . . . [and] rational as well.”<sup>79</sup> Here though, “Appellant is asking for equal treatment with taxpayers *not* similarly situated.”<sup>80</sup>

Every other taxpayer who seeks economic obsolescence provides plant level data. “[W]hile 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.”<sup>81</sup> “[T]he Government may not be required to acquiesce in the taxpayer’s election of that form for doing

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<sup>76</sup> Syl. pt. 2, in part, *Israel by Israel v. West Virginia Secondary Sch. Activities Comm’n*, 182 W. Va. 454, 388 S.E.2d 480 (1989).

<sup>77</sup> *Appalachian Power Co. v. State Tax Dep’t of West Virginia*, 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995) (quoting *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (additional citations omitted)).

<sup>78</sup> *Janasiewicz v. Board of Ed. of Kanawha County*, 171 W. Va. 423, 426, 299 S.E.2d 34, 37 (1982) (internal citations omitted)).

<sup>79</sup> *Beckman Prod. Serv., Inc. v. Michigan Dep’t of Treasury*, 1990 WL 96944, 3 (Mich. Ct. Cl.).

<sup>80</sup> *Riedel v. Commissioner of Taxation*, 1977 WL 943, 3 (Minn. Tax Ct.).

<sup>81</sup> *C.I.R. v. National Alfalfa Dehydrating*, 417 U.S. 148-49 (1974).

business which is most advantageous to him.”<sup>82</sup> “The use of bookkeeping terms and accounting forms and devices cannot be permitted to devitalize valid tax laws.”<sup>83</sup> While 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.”<sup>84</sup>

It is certainly no violation of equal protection for taxing authorities to treat taxpayers differently who do not have available the same accounting and financial data provided by other similarly-situated taxpayers. Indeed, it would arguably violate the equal protection rights of those other taxpayers to effectively penalize those taxpayers who make available such accounting and financial data.

**2. Due Process.** Bayer argues that West Virginia’s equalization and review procedure deprives it of due process because the Commission is inherently biased.<sup>85</sup>

Bayer’s argument of inherent bias requires as a starting point review a trilogy of United States Supreme Court cases: *Tumey v. Ohio*,<sup>86</sup> *Dugan v. Ohio*,<sup>87</sup> and *Ward v. Monroeville*,<sup>88</sup> each of which arose in significantly different circumstances than those here – a particularly important

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<sup>82</sup>*Higgins v. Smith*, 308 U.S. 473, 477 (1940).

<sup>83</sup>*Foster v. United States*, 303 U.S. 118, 121 (1938).

<sup>84</sup>*Wyman v. James*, 400 U.S. 309, 324 (1971); see also *Ranger Realty Co. v. Miller*, 136 So. 546, 549-50 (Fla.1931).

<sup>85</sup> Although the amicus brief discusses other issues of adequacy of notice and hearing in the tax equalization and review process in West Virginia, Amicus Brief at 8-14, none of those issues were raised below; were set forth as assignments of error in Bayer’s petitions for appeal; nor are addressed in Bayer’s brief. Thus, none of those issues are properly before this Court.

<sup>86</sup>272 U.S. 510 (1927).

<sup>87</sup>277 U.S. 61 (1928).

<sup>88</sup>409 U.S. 57 (1972).

point since “[t]he States’ interest in the integrity of their own processes is of particular moment respecting questions of state taxation.”<sup>89</sup>

In *Tumey*, a mayor enforced the state prohibition act,<sup>90</sup> and also sat as a judge in determining guilt or innocence under the act -- being paid as a judge only if he convicted.<sup>91</sup> The Supreme Court found this direct pecuniary interest resulted in the mayor/judge lacking impartiality,<sup>92</sup> additionally finding it impermissible for the mayor to sit as judge since the mayor was the village’s chief executive, supervised all other executive officers, and represented the village’s interest.<sup>93</sup>

In *Dugan*, a defendant challenged his mayor’s court conviction claiming the mayor’s alleged “practically and seriously inconsistent positions, one partisan and the other judicial[.]”<sup>94</sup> Unlike *Tumey*, the Supreme Court found no due process violation. The Court noted the mayor was part of a commission form of government, where one of the commissioners served as mayor.<sup>95</sup> The commission exercised all legislative authority and, with a city manager, exercised all executive powers.<sup>96</sup> The city manager was the active executive.<sup>97</sup> All the commission

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<sup>89</sup>*Arkansas v. Farm Credit Serv.*, 520 U.S. 821, 826 (1997).

<sup>90</sup>272 U.S. at 515.

<sup>91</sup>*Id.* at 520.

<sup>92</sup>*Id.* at 531-32.

<sup>93</sup>*Id.* at 533.

<sup>94</sup>*Id.* at 62.

<sup>95</sup>*Id.* at 63.

<sup>96</sup>*Id.*

<sup>97</sup>*Id.*

members, except for the mayor, fixed the mayor's salary.<sup>98</sup> The mayor received no fees.<sup>99</sup> The Court found due process satisfied distinguishing *Tumey* from *Dugan*, since the mayor in *Tumey* (1) exercised primarily executive authority; (2) was chief conservator of the peace; (3) was directed to see all ordinances were enforced; (4) communicated to the council the city's finances; and, (5) supervised the conduct of all city officers.<sup>100</sup>

In *Ward*, the Court examined another case where a mayor also sat as a municipal judge. The town mayor had "wide executive powers and [was] the chief conservator of the peace. [The mayor was] president of the village council, preside[d] at all meetings, vote[d] in case of a tie, account[ed] annually to the council respecting village finances, fill[ed] vacancies in village offices and ha[d] general overall supervision of village affairs."<sup>101</sup> The mayor sat as the village a traffic court judge.<sup>102</sup> A major part of the village's finances came from the mayor's court.<sup>103</sup> The Court held that even though the mayor derived no direct pecuniary benefit from the fines he imposed, his role as a strong executive gave him a possible temptation to insure a high level of income for the village in his role as judge.<sup>104</sup>

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<sup>98</sup>*Id.*

<sup>99</sup>*Id.*

<sup>100</sup>*Id.* at 14.

<sup>101</sup>409 U.S. at 58.

<sup>102</sup>*Id.* at 57.

<sup>103</sup>*Id.* at 58.

<sup>104</sup>*Id.* at 60.

In *Pocahontas Land*,<sup>105</sup> this Court noted that *Ward* was inapplicable to an equalization and review proceeding, applying *Dugan*,<sup>106</sup> since county commissioner salaries are paid regardless of a board of equalization and review's determination. Furthermore, while not addressed in *Pocahontas*, the separation of powers factors in *Tumey* and *Ward* are not present here.

*Tumey* and *Ward's* concern was not simply that the mayors could have wanted to maximize income; it was that they could have wanted to maximize income because increasing fines collected as a judge increased the powers wielded as mayors. "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 in the trial of defendants charged with crimes before him."<sup>107</sup> It was the amount of authority the mayors wielded as *both* judges *and* mayors that resulted in the incompatibility of the two offices—there being no way to diffuse or dilute the power that could accumulate in the mayors hands which gave the mayors an incentive to rule against defendants. The mayors' powers in *Tumey* and *Ward* are not comparable to those of county commissions.

In *Tumey*, the mayor was chief executive, supervised all executive officers, and represented the village's interest in a representative capacity. In *Ward*, the mayor had "wide executive powers and [was] the chief conservator of the peace[,] president of the village council, preside[d] at all meetings, vote[d] in case of a tie, account[ed] annually to the council respecting village finances, fill[ed] vacancies in village offices and ha[d] general overall supervision of

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<sup>105</sup>172 W. Va. 53, 303 S.E.2d 691 (1983).

<sup>106</sup>277 U.S. 61 (1928).

<sup>107</sup>*Tumey*, 273 U.S. at 534. *Accord Ward*, 409 U.S. at 60.

village affairs.”<sup>108</sup> Such an accumulation of executive power being characterized by one leading treatise on municipal law as “making the mayor a genuine autocrat.”<sup>109</sup> Because *Tumey*, *Dugan*, nor *Ward* are exactly on point, the question for this Court is whether this case falls on the *Tumey/Ward* side of the line or falls on the *Dugan* side of the line. Given West Virginia’s distribution of powers to county officers, this case falls within the ambit of *Dugan* rather than *Tumey* or *Ward*.

Unlike the unitary strong mayor governments in *Tumey* and *Ward*, the West Virginia Constitution requires counties to have a plural form of government, thus dividing governmental authority among seven independently elected county offices (so called “row officers”)<sup>110</sup> in addition to the three member county commission.<sup>111</sup> “This fragmentation of authority invites conflict as the independent offices compete for funding and zealously resist any effort to infringe on their autonomy.”<sup>112</sup> “[T]he county commissions lack the power and authority necessary to coordinate the various functions performed by the independent elected officers.”<sup>113</sup> Also, there

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<sup>108</sup>*Ward*, 409 U.S. at 58.

<sup>109</sup> 2A *McQuillin on the Law of Municipal Corporations* § 9:20 (footnote omitted).

<sup>110</sup>Jon Delano, *Court Related County Officials on Ballot this May*, LAWYERS J., at 8 (May 7, 1999).

<sup>111</sup>Kenneth A. Klase, & Gerald M. Pops, *County Conflict in West Virginia*, W. VA. PUB. AFF. RPTR. 2 (1998).

<sup>112</sup>*Id.*

<sup>113</sup>Robert Jay Dilger, *County Government in West Virginia*, W. VA. PUB. AFF. RPTR. 9 (1995).

has been a “proliferation of jurisdictions, special districts and independent boards and authorities within counties[,]”<sup>114</sup> which diminishes the commission’s power.<sup>115</sup>

The case at hand is much more analogous to *Dugan*<sup>116</sup> than *Tumey* or *Ward*. While the Commission is the central governing body of the county,<sup>117</sup> “since all county elective officials are constitutional in nature, and have constitutional and statutory responsibilities, it is difficult for the Commission to exercise integrated administrative control over all county government activities—including budget expenditures and personnel.”<sup>118</sup> “The organizational structure [of county government] resulting from both constitutional and statutory authorizations and mandates provides little in the way of a centralizing or controlling force.”<sup>119</sup> The Commission is not a predominantly executive body and, indeed, there is “no executive head” in the county government.<sup>120</sup>

Further, unlike the mayors in *Tumey* and *Ward*, it is not the Commission, but the “[t]he sheriff and his deputies [who] are, first of all, charged with the enforcement of all criminal laws within their jurisdiction[,]”<sup>121</sup> and who are “conservator[s] of the peace[.]”<sup>122</sup> Additionally, a

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<sup>114</sup>Klas & Pops, *supra* n. 81 at 2.

<sup>115</sup>*Id.* at 3.

<sup>116</sup>277 U.S. 61 (1928).

<sup>117</sup>*State ex rel. Dingess v. Scaggs*, 156 W. Va. 588, 590, 195 S.E.2d 724, 726 (1973).

<sup>118</sup>David A. Bingham, *Local Government in West Virginia*, W. VA. PUB. AFF. RPTR. 2 (1979).

<sup>119</sup>*Id.* at 5.

<sup>120</sup>Harold J. Shamberger, *COUNTY GOVERNMENT AND ADMINISTRATION IN WEST VIRGINIA* 19-20 (1952).

<sup>121</sup>*Mozingo v. Barnhart*, 169 W. Va. 31, 33, 285 S.E.2d 497, 498 (1981).

popularly elected prosecuting attorney “is charged under W. Va. Code, 7-4-1 [1971] [with] instituting and prosecuting all necessary and proper criminal proceedings against offenders[.]”<sup>123</sup> And, unlike the mayors in *Tumey* and *Ward*, it is the popularly elected and autonomous sheriff who is the *ex officio* county treasurer who is charged to “receive, collect and disburse all moneys due such county or any district thereof[.]”<sup>124</sup>

The “statutes express the will of the legislative branch of the state government, wherein is reposed supreme control of the method and manner of the management of public funds of every description [that] [t]he county court is not, nor is any member thereof, strictly speaking, the fiscal agent of the counties they represent.”<sup>125</sup> In other words, “[w]hile the county commissioners exercise some supervision over financial practices, they possess no authority to coordinate the various functions of the several elected officers.”<sup>126</sup> “As a consequence each carries on functions required by law independent of those performed by others[.]” and unlike the centralized control the mayors exercised in *Tumey* and *Ward*, “[c]ooperation among county officers exists mainly on a voluntary basis.”<sup>127</sup>

West Virginia’s county government’s centrifugal structure differs significantly from the centripetal systems in *Tumey* and *Ward*, and is much more analogous to the commission type

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<sup>122</sup>16 MICHIE’S JURIS. *Sheriffs* § 3 at 717 (2002).

<sup>123</sup>Syl. Pt. 3, in part, *Harman v. Frye*, 188 W. Va. 611, 425 S.E.2d 566 (1992).

<sup>124</sup>W. Va. Code § 7-5-1.

<sup>125</sup>*Bunch v. Short*, 78 W. Va. 764, 768, 90 S.E. 810, 811-12 (1916).

<sup>126</sup>Shamberger, COUNTY GOVERNMENT AND ADMINISTRATION IN WEST VIRGINIA at 20.

<sup>127</sup>*Id.*

system in *Dugan*.<sup>128</sup> “[I]f a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.”<sup>129</sup>

Therefore, Bayer’s reliance on *Tumey* and *Ward* is misplaced. In fact, Bayer’s argument cites not a single case dealing with the *Tumey* trilogy and taxes. It is apparently not lack of such authority that results in this absence but, rather, that such authority directly contradicts Bayer’s argument.<sup>130</sup>

Bayer’s claim here is similar to that raised in *Concerned Citizens of Southern Ohio v. Pine Creek Conservancy District*.<sup>131</sup> In *Pine Creek*, the Court was asked to review an Ohio statute that established a procedure for the creation and governance of conservancy districts, political subdivisions of the state charged with flood prevention and control.<sup>132</sup> Each time a petition to create a district was filed, a conservancy court was created to determine if a district was needed and, if so, to administer the district.<sup>133</sup> The conservancy court was comprised of one

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<sup>128</sup>*Weldon v. Bonner County Tax Coalition*, 36, 855 P.2d 868, 872-73 (Idaho 1993) (“The Elected Officials are not under the control or direction of Bonner County, acting through its Board of County Commissioners. Instead, the Elected Officials, acting in their respective official capacities, represent the people of Bonner County.”), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 141 P.3d 1123 (Idaho 2006).

<sup>129</sup>*United States v. Brown*, 381 U.S. 437, 443 (1965).

<sup>130</sup>As indicated in Bayer’s brief, Kanawha County’s 2007-2008 budget was approximately \$42 million, Appellants’ Brief at 6 n.7, but amount of tax disputed by Bayer was \$470,000, *id.* at 19, or about 1 percent of the total. Under W. Va. Code § 7-7-4(e)(5), the maximum annual salary for the office of county commissioner is \$36,960, hardly enough of a financial incentive to create the “bias” alleged by Bayer.

<sup>131</sup>429 U.S. 651 (1977).

<sup>132</sup>*Id.* at 651.

<sup>133</sup>*Id.*

judge of the court of common pleas for every county having territory within the district.<sup>134</sup> While the majority of the Court remanded the case on procedural grounds, Justice Rehnquist, joined by Justices Powell and Stevens, dissented. Of particular note here, Justice Rehnquist addressed the *Tumey* claim raised by the petitioners that they were deprived of a hearing before an impartial decisionmaker,<sup>135</sup> because once a district was formed, its income was generated by assessments based on appraisals which the conservancy court had to approve or which the court could disapprove.<sup>136</sup> The petitioner's claimed that this constituted a due process violation because the court judges would be inclined to vote in favor of the assessments to keep the district's fisc full.<sup>137</sup> Justice Rehnquist rejected this, observing that the assessments were, in the first instance, the responsibility of the district's board of directors, and not the court.<sup>138</sup> Justice Rehnquist concluded that this argument was so pallid that it "surely raise[d] no further challenge not worthy of summary affirmance."<sup>139</sup>

The process at issue in *Pine Creek* resembles that here. Here, industrial property is assessed by the Tax Department – which receives no money as a result of its assessment – and is then certified by the County Assessor. Thus, the Tax Department is like the district board of directors and, in fact, is even more attenuated because the State receives no money from its

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<sup>134</sup>*Id.*

<sup>135</sup>*Id.* at 655 & n.4.

<sup>136</sup>*Id.* at 655 n.4.

<sup>137</sup>*Id.*

<sup>138</sup>*Id.*

<sup>139</sup>*Id.*

assessments. A board of equalization and review resembles the conservancy judges. Consequently, the decision of the circuit court should be affirmed.

Another case on point is *Bath Club v. Dade County*.<sup>140</sup> In *Bath Club*, a taxpayer could go before the county's tax equalization body which consisted of three county commissioners and two school board members.<sup>141</sup> The taxpayer claimed this composition violated the Florida Constitution's dual office holding prohibition.<sup>142</sup> The court held "[t]here is no conflict between the duty of county commissioners and school board members to levy ad valorem taxes on real property and the limited function of Board members to review and correct individual assessments made by the county tax appraiser."<sup>143</sup> It also rejected the argument as having "neither merit nor record support" that the board could not provide a fair and impartial tribunal since tax revenue was distributed in part to the county commission and school board.<sup>144</sup> The court rejected this contention noting that "[c]ourts frequently render decisions involving matters of taxation, yet no one would seriously contend that the courts are incapable of rendering fair decisions in such cases simply because the judicial branch is financially supported by tax revenues."<sup>145</sup>

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<sup>140</sup>394 So.2d 110 (Fla. 1981).

<sup>141</sup>*Id.* at 111-12.

<sup>142</sup>*Id.* at 112 (footnotes omitted).

<sup>143</sup>*Id.*

<sup>144</sup>*Id.* at 113.

<sup>145</sup>*Id.* at 113 n.12.

Also on point is *Lee Hospital v. Cambria County Board of Assessment Appeals*.<sup>146</sup> In *Lee*, the members of the county commission, whose responsibilities included management and administration of the county's fiscal affairs, also sat as a Board of Assessment Appeals. As a result of a decision of the Commonwealth Court in a different case, the Commissioners decided that Lee was not entitled to a charitable exemption from property taxes. Lee argued that it would violate due process "to seek review before an impartial tribunal composed of the same members as the Commissioners which already has evidenced its view of Lee's tax status and which has a strong financial interest in raising additional revenue for the county."<sup>147</sup> The court discussed *Ward*, *Dugan*, and *Tumey*, and recognized that "the *Ward* court" addressed *Dugan* "ma[king] clear that when the government official's relationship to the finances and financial policies of the municipality are too remote to presume a bias, there can be no finding of unconstitutional partiality."<sup>148</sup> The court went on that it is not the Board, but the chief assessor who initially values the property,<sup>149</sup> which is similar to the role the Tax Commissioner plays in appraising industrial property.<sup>150</sup>

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<sup>146</sup>638 A.2d 344 (Pa. Cmwlth. 1994).

<sup>147</sup>*Id.* at 347.

<sup>148</sup>*Id.*

<sup>149</sup>*Id.* at 350.

<sup>150</sup>W. Va. Code § 11-1C-10(c). Although not occurring here, if a county assessor rejects the Tax Commissioner's appraisal, the assessor must show just cause to the state valuation commission for the rejection and provide a different appraisal plan *Id.* § 11-1C-19(g). The commission comprises the Tax Commissioner, or designee, three county assessors, five citizens (one of whom must be a certified appraiser) and two county commissioners; no more than seven members can belong to the same political party. W. Va. Code §§ 11-1C-2(d); 11-1C-3(a).

Further, while Bayer asserts that a board of equalization and review is inherently biased as it derives a majority of revenue from property taxes, this measures the wrong factor. In *Ward*, the *total* amount of the fines constituted the amount at issue because the total of the fines were the amount in controversy. Here, Bayer does not contend that it should pay *no* property taxes -- only that it does not owe a certain *portion* of the taxes imposed as a result of the Tax Commissioner's determination of economic obsolescence. Thus, the total property tax revenue is not proper measurement; rather, it is the amount of tax income generated as a result of the Commission denying equalizations. Bayer has produced no evidence on this amount for the last five years--that period being the length the Supreme Court considered in *Ward*.<sup>151</sup> Assuming *arguendo* Bayer's legal argument is correct, Bayer has failed to produce evidence pertinent to it and has failed to carry its burden to show error.

Since Bayer has failed to show a board of equalization and review holds an institutional bias, its reliance on *Concrete Pipe and Prod. v. Constr. Laborers Pension Trust*,<sup>152</sup> is unavailing. *Concrete Pipe* examined the employer withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act,<sup>153</sup> which assessed a withdrawal penalty against withdrawing business in an amount set by the plan's trustees.<sup>154</sup> If the employer objected, and it and the trustees and could not resolve the conflict, the case went to arbitration where certain presumptions in favor of the plan sponsor attached.<sup>155</sup> On judicial review, the arbitrator's

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<sup>151</sup>409 U.S. at 58.

<sup>152</sup>508 U.S. 602 (1993).

<sup>153</sup>508 U.S. at 605.

<sup>154</sup>*Id.* at 609.

<sup>155</sup>*Id.* at 611.

findings of fact were presumed correct rebuttable only by a “clear preponderance” of the evidence.<sup>156</sup> Concrete Pipe alleged a due process violation because the trustee’s were potentially biased against it.<sup>157</sup> The Court found the per se rule of *Tumey*<sup>158</sup> and *Ward*<sup>159</sup> inapplicable as the trustees were not acting in an adjudicative, but an enforcement, role.<sup>160</sup> The Court held that any bias would be mitigated by a de novo review as long as the employer could rebut any presumption by a preponderance of the evidence—finding that any higher standard, in light of the trustees possible bias, would be constitutionally suspect.<sup>161</sup> *Concrete Pipe* is inapplicable.

The threshold question in *Concrete Pipe* was whether fund trustees were possibly biased. “The resulting tug away from the interest of the employer is fueled by the threat of personal liability for any breach of the trustees fiduciary responsibilities, obligations, or duties, which may be enforced by civil actions brought by the Secretary of Labor or any covered employee or beneficiary of the plan.”<sup>162</sup> The Court also noted the could want to maximize the fund to impose maximum liability on the withdrawing employer to protect union members and the to protect businesses from unfunded liability.<sup>163</sup> These factors are not present here. The Commissioner receives no money personally for his appraisal, and the state receives but a minuscule amount.

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<sup>156</sup>*Id.*

<sup>157</sup>*Id.* at 617-18.

<sup>158</sup>272 U.S. 510 (1927).

<sup>159</sup>409 U.S. 57 (1972).

<sup>160</sup>*Id.* at 617-18.

<sup>161</sup>*Id.* at 626.

<sup>162</sup>*Id.* (citation omitted).

<sup>163</sup>*Id.* at 617.

Neither the Commissioner nor the Assessor face any personal liability if they err. In sum, the presumption in *Concrete Pipe* attached to the decision of a body, the trustees, who had a potentially bias because of personal interest. Here, the presumption attaches to the Tax Commissioner – who has no personal interest in the outcome of his decision. The Tax Commissioner’s and Assessor’s roles are unlike the trustees. Bayer has not been denied due process.

West Virginia is not unique in the manner in which it structures the property tax equalization and review process: “[I]n the different jurisdictions the various provisions of the revenue laws with respect to the review and equalization of assessments for purposes of taxation generally disclose a legislative intent to adopt a scheme or system whereby local boards of review equalize the assessments as between individual taxpayers.”<sup>164</sup> “Under some statutes,” as in West Virginia, “boards act in a dual capacity and have power to equalize assessments between the various taxing districts, and also to review and correct individual assessments.”<sup>165</sup> Likewise, “[u]nder some statutes,” as in West Virginia, “it is the duty of the tax commission or commissioner to supervise the operation of the system of taxation established by the legislature, and to give assistance in an advisory capacity to other officers or agencies.”<sup>166</sup> There is nothing

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<sup>164</sup> 84 C.J.S. *Taxation* § 621 (2008).

<sup>165</sup> *Id.* at § 632 (footnote omitted). And, in West Virginia, our Legislature has provided, “All county commissioners are required to participate in a training program which meets the criteria set by the property valuation training and procedures commission. The tax commissioner shall conduct such programs to educate county commissioners in their duties as a board of equalization and review and to make them generally familiar with appraisal techniques.” W. Va. Code § 11-1C-6(b).

<sup>166</sup> *Id.* at § 624.

unique about West Virginia’s system and, obviously, no other court has seen fit to invalidate similar legislative schemes on constitutional grounds.<sup>167</sup>

**C. THIS COURT HAS CLEARLY HELD THAT A “CLEAR AND CONVINCING” EVIDENCE STANDARD APPLIES IN THIS CONTEXT AND SUCH STANDARD, WHICH IS ALSO THE NATIONAL STANDARD AND APPLIED BY THE UNITED STATES SUPREME COURT IN TAX CASES, DOES NOT VIOLATE DUE PROCESS.**

As previously noted, this Court has repeatedly held that a “clear and convincing” evidence applies in this context.<sup>168</sup> Indeed, for example, in *Western Pocahontas Properties, Ltd.*

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<sup>167</sup> It is worthy of noting that Bayer and the Amicus are long on criticisms, but short on alternatives.

<sup>168</sup> Although *Bayer* relies upon Syllabus Point 8 of this Court’s 1982 opinion in *Killen v. Logan County Comm’n*, 170 W. Va. 602, 295 S.E.2d 689 (1982), which states, “An objection to any assessment may be sustained only upon the presentation of competent evidence, such as that equivalent to testimony of qualified appraisers, that the property has been under- or over-valued by the tax commissioner and wrongly assessed by the assessor. The objecting party, whether it be the taxpayer, the tax commissioner or another third party, must show by a preponderance of the evidence that the assessment is incorrect,” its reliance is misplaced. Since *Killen*, which was addressing standard of review in a different context, this Court clearly held in *American Bituminous* that:

A taxpayer’s initial avenue for relief from an allegedly erroneous property valuation lies with the county commission, sitting as a board of equalization and review. W. Va. Code § 11-3-24 (1979). The burden upon the taxpayer to demonstrate error with respect to the State’s valuation is heavy in these adjudicative proceedings: “It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear.” Syl. pt. 7, *In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 303 S.E.2d 691 (1983).” Syl. pt. 1, *Western Pocahontas Properties, Ltd. v. County Comm’n of Wetzel County*, 189 W.Va. 322, 431 S.E.2d 661 (1993). In challenging a tax valuation, “[t]he burden [of proof] clearly falls upon . . . [the taxpayer] to demonstrate through clear and convincing evidence that the tax assessments were erroneous.” *In re Maple Meadow Min. Co.*, 191 W. Va. 519, 523, 446 S.E.2d 912, 916 (1994); see also *Pocahontas Land*, 172 W. Va. at 61, 303 S.E.2d at 699 (“It is obvious that where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous.”); syl. pt. 2, in

v. *County Comm'n of Wetzel County*,<sup>169</sup> where, as in the instant case, a taxpayer was challenging its property tax assessment, this Court succinctly stated:

As an initial matter, we point out that this case essentially turns on whether the appellants, in challenging the tax assessment of their coal properties, have met their burden of proof. In *In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 303 S.E.2d 691 (1983), we reaffirmed that the burden of showing that a tax assessment is erroneous is upon the taxpayer, and proof that the assessment is erroneous must be clear. We explained:

[i]t 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. Once this is done, it is incumbent upon the taxing authority to place some evidence in the record to show why its assessment is correct. . . .

172 W.Va. at 61, 303 S.E.2d at 699. We summarized this holding in syllabus point 7 of *In re Tax Assessments Against Pocahontas Land Co.*: “It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear.” Therefore, the burden in this case was on the appellants to

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part, *Western Pocahontas Properties, Ltd.*, *supra* (“The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous.”).

*Supra* note 3; *see also* Syl. pt. 4, *In re 1975 Assessments Against Oneida Coal Co.*, 178 W. Va. 485, 360 S.E.2d 560 (1987). Indeed, in no case since *Killen* has this Court ever applied anything other than the “clear and convincing” standard in this context. Rather, even in *Eastern American Energy Corp. v. Thorn*, 189 W. Va. 75, 79, 428 S.E.2d 56, 60 (1993), the only case to cite *Killen* for the burden of proof, this Court stated, “Because the record does not show that Eastern met its burden of showing by clear and preponderating evidence that the county assessment was incorrect, we find that circuit court was correct in affirming the county assessment for the plant.” (emphasis supplied). There is no uncertainty, as Bayer would suggest, in the appropriate standard of review and characterizing as “dicta” every case since *Killen*, including *Pocahontas Land*, where the “clear and convincing standard” is set forth in a syllabus point, speaks for itself.

<sup>169</sup> 189 W.Va. 322, 324-25, 431 S.E.2d 661, 663-64 (1993)(emphasis supplied).

demonstrate by clear and convincing evidence that the tax assessments were erroneous.

Not only is “clear and convincing” the standard in West Virginia, it has also been recognized as the national standard: “It is a presumption, liberally applied, that the equalization officers did their duty and equalized the valuation of all property in the county, and that they exercised their powers fairly and reasonably. The evidence to overthrow such presumption must be clear and convincing.”<sup>170</sup>

The application of a “clear and convincing” standard is our jurisprudence is not unusual; rather, it is commonplace,<sup>171</sup> including in cases involving taxpayer appeals.<sup>172</sup> It is for this

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<sup>170</sup> 84 C.J.S. *Taxation* § 632 (2008)(emphasis supplied and footnotes omitted).

<sup>171</sup> See, e.g., Syl. pt. 5, *Smith v. Smith*, 219 W. Va. 619, 639 S.E.2d 711 (2006)(“To justify the reformation of a clear and unambiguous deed for mistake, the mistake must be one of fact, not of law; the mistake must be mutual and common to both parties to the deed; the unambiguous deed must fail to express the obvious intention of the parties; and the mutual mistake must be proved by strong, clear and convincing evidence.”); Syl. pt. 4, in part, *In re Carol B.*, 209 W. Va. 658, 550 S.E.2d 636 (2001)(“In any proceeding brought by the department to maintain separation of siblings, such separation may be ordered only if the circuit court determines that clear and convincing evidence supports the department’s determination. . . . Upon review by the circuit court of the department’s determination to unite a child with his or her siblings, such determination shall be disregarded only where the circuit court finds, by clear and convincing evidence, that the persons with whom the department seeks to place the child are unfit or that placement of the child with his or her siblings is not in the best interests of one or all of the children.”); Syl. pt. 1, *State ex rel. West Virginia Department of Health and Human Resources, Child Support Enforcement Division v. Michael George K.*, 207 W.Va. 290, 531 S.E.2d 669 (2000)(“After the statutory period of time during which a paternity acknowledgment made pursuant to W. Va. Code, 48A-6-6 [1997] may be rescinded has passed, proof by clear and convincing evidence of fraud, duress, material mistake of fact, or similar circumstance raising serious equitable concerns is a necessary prerequisite for a court to entertain a challenge to the validity and effectiveness of such a paternity acknowledgment.”); Syl. pt. 4, in part, *Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 474 S.E.2d 887 (1996)(“In order for a plaintiff employee to prevail on the narrowly construed cause of action by the employee against an employer for fraudulent misrepresentation concerning the employee's workers' compensation claim, the employee must . . . prove by clear and convincing evidence all essential elements of the claim, including the injury resulting from the fraudulent conduct.”); Syl. pt. 2, in part, *State ex rel. Suriano v. Gaughn*, 198 W. Va. 339, 480 S.E.2d 548 (1996)(“Plaintiffs who are public officials

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or public figures must prove by clear and convincing evidence that the defendants made their defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not.”); Syl. pt. 2, in part, *Overfield v. Collins*, 199 W. Va. 27, 483 S.E.2d 27 (1996)(“When a natural parent transfers temporary custody of their child to a third person and thereafter seeks to regain custody of that child, the burden of proof shall be upon that parent to prove by clear and convincing evidence that he or she is fit; thereafter the burden of proof shall shift to the third party to prove by clear and convincing evidence that the child's environment should not be disturbed because to do so would constitute a significant detriment to the child notwithstanding the natural parent's assertion of a legal right to the child.”); Syl. pt. 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995)(“Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code, 49-1-3(a) (1994).”); Syl. pt. 5, in part, *Smith v. Monongahela Power Co.*, 189 W. Va. 237, 429 S.E.2d 643 (1993)(“A defendant seeking to establish that a settlement made by a plaintiff and a joint tortfeasor lacks good faith has the burden of doing so by clear and convincing evidence.”); Syl. pt. 3, *Adkins v. Inco Alloys Int’l, Inc.*, 187 W. Va. 219, 417 S.E.2d 910 (1992)(“Where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies, or custom and practice, such claim must be established by clear and convincing evidence.”); Syl. pt. 4, in part, *Adkins, supra* (“In order to establish an implied contract right by custom and usage or practice, it must be shown by clear and convincing evidence that the practice occurred a sufficient number of times to indicate a regular course of business and under conditions that were substantially the same as the circumstances in the case at issue. . . .”); Syl. pt. 2, in part, *In re Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991)(“[T]ermination of parental rights of a parent of an abused child is authorized under W. Va. Code, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent’s version as to how a child’s injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.”); Syl. pt. 3, *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990)(“It will be the insurer's burden to prove by clear and convincing evidence that it attempted in good faith to negotiate a settlement, that any failure to enter into a settlement where the opportunity to do so existed was based on reasonable and substantial grounds, and that it accorded the interests and rights of the insured at least as great a respect as its own.”); Syl. pt. 2, in part, *Lutz v. Orinick*, 184 W. Va. 531, 401 S.E.2d 464 (1990)(“A party seeking to prove fraud, mistake or other equally serious fault must do so by clear and convincing evidence . . . .”); Syl. pt. 3, in part, *Everett v. Brown*, 174 W. Va. 35, 321 S.E.2d 685 (1984)(“In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant . . . the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence . . . .”); Syl. pt. 1, *Berkeley Development Corp. v. Hutzler*, 159 W. Va. 844, 229 S.E.2d 732 (1976)(“The burden of proving an easement rests on the party claiming such right and must be established by clear and convincing proof.”); Syl. pt. 9, *Evans v. Hutchinson*, 158 W. Va. 359, 214 S.E.2d 453 (1975)(“To warrant removal of an official pursuant to Code, [1985], § 6-6-7, clear and

reason that Bayer’s brief cites not a single case where any court has ever held that application of a “clear and convincing” evidence standard in a tax appeal violates a taxpayer’s due process rights. Obviously, if this Court were to hold that the “clear and convincing” standard violated the due process rights of taxpayers, then how could it not also violate the due process rights of those alleging fraudulent misrepresentation or fraudulent concealment, the existence of an easement, the propriety of terminating parental rights, the unethical conduct of judges and lawyers, mutual mistake in a contract or deed, the invalidity of an acknowledgment of paternity, good faith in the adjustment of an insurance claim, the existence of an implied contract, the integrity of a jury verdict, or the scores of other circumstances in which such standard applies?

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convincing evidence must be adduced to meet the statutory requirement of satisfactory proof.”); Syl. pt. 7, in part, *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932)(“The question as to whether or not a juror has been subjected to improper influence affecting the verdict, is a fact primarily to be determined by the trial judge from the circumstances, which must be clear and convincing to require a new trial, proof of mere opportunity to influence the jury being insufficient.”).

<sup>172</sup> See, e.g., Syl. pt. 3, in part, *Schmehl v. Helton*, 2008 WL 552704 (W. Va.) (“The burden is on the person seeking to avoid such [sales tax] liability to show with clear and convincing evidence, giving due deference to the statute’s general authorization for the imposition of such liability, that it would be fundamentally unfair and an arbitrary and capricious or unreasonable act to impose such liability.”); *U.S. Steel Min. Co., LLC v. Helton*, 219 W. Va. 1, 10, 631 S.E.2d 559, 568 (2005) (“The standard of review applicable to the coal severance taxes in question in the instant case requires us to affirm the taxes as constitutional unless it appears beyond doubt that they offend the United States Constitution.”); *Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995) (“Our decisions have, in effect, limited judicial review of the Tax Commissioner’s decision to the same scope permitted under the State’s Administrative Procedures Act, W. Va. Code, 29A-1-1, et seq. This Act provides in W. Va. Code, 29A-5-4(g)(5) and -4(g)(6) (1964), that an agency action may be set aside if it is ‘[c]learly wrong in view of the reliable, probative and substantial evidence on the whole record;’ or . . . [a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. . . .’ The ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are deferential ones which presume the agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.”); *Preston Memorial Hosp. v. Palmer*, 213 W. Va. 189, 192, 578 S.E.2d 383 (2003)(same); *CB&T Operations Co., Inc. v. Tax Comm’r*, 211 W. Va. 198, 203, 564 S.E.2d 408, 412 (2002)(same).

As the United States Supreme Court stated in *Ohio v. Akron Center for Reproductive Health*,<sup>173</sup> where a due process challenge to the application of a “clear and convincing” standard was made:

Second, appellees ask us to rule that a bypass procedure cannot require a minor to prove maturity or best interests by a standard of clear and convincing evidence. They maintain that, when a State seeks to deprive an individual of liberty interests, it must take upon itself the risk of error. . . . House Bill 319 violates this standard, in their opinion, not only by placing the burden of proof upon the minor, but also by imposing a heightened standard of proof.

This contention lacks merit. A State does not have to bear the burden of proof on the issues of maturity or best interests. The principal opinion in *Bellotti* indicates that a State may require the minor to prove these facts in a bypass procedure. *See* 443 U.S., at 643, (opinion of Powell, J.). A State, moreover, may require a heightened standard of proof when, as here, the bypass procedure contemplates an ex parte proceeding at which no one opposes the minor's testimony. We find the clear and convincing standard used in H.B. 319 acceptable. The Ohio Supreme Court has stated:

“Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.” *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (1954) (emphasis deleted).

Our precedents do not require the State to set a lower standard. Given that the minor is assisted in the courtroom by an attorney as well as a guardian ad litem, this aspect of H.B. 319 is not infirm under the Constitution.

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<sup>173</sup> 497 U.S. 502, 515-16 (1990).

Likewise, there is no constitutional infirmity in applying the “clear and convincing” standard to taxpayer appeals.<sup>174</sup>

**D. THE TAXPAYER IN THIS CASE FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE THAT THE TAX ASSESSMENTS AT ISSUE WERE ERRONEOUS AND TAX COMMISSIONER’S APPRAISALS WERE NOT AN ABUSE OF DISCRETION.**

Bayer’s relegation of its attack on its tax assessments to the last section of its brief is telling. First, it attacks the process, seeking to have this Court invalidate a system for property tax review and equalization that is used throughout the country. Second, it attacks the burden of proof, again seeking to have this Court reject the national standard for review of property tax assessments and one used by the United States Supreme Court in tax cases. Finally, even though taxing authorities are not required to embrace any particular valuation methodology; are not

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<sup>174</sup> Even the United States Supreme Court has applied a heightened “clear and cogent” standard in taxpayer cases. See *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 195 (1995)(“an objecting taxpayer has the burden to demonstrate by “clear and cogent evidence,” that “the income attributed to the State is in fact out of all appropriate proportions to the business transacted . . . in that State.”)(citation omitted); *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 379 (1991)(“In order to prevail on such a challenge, an income taxpayer must prove ‘by “clear and cogent evidence” that the income attributed to the State is in fact “out of all appropriate proportions to the business transacted . . . in that State . . . .”’)(citation omitted); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983)(“we will strike down the application of an apportionment formula if the taxpayer can prove ‘by “clear and cogent evidence” that the income attributed to the State is in fact “out of all appropriate proportions to the business transacted in that State . . . .”’)(citations omitted); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 221-22 (1980)(“The company had the ‘distinct burden of showing by “clear and cogent evidence” that it results in extraterritorial values being taxed,’ *ibid.*, quoting *Norfolk & Western R. Co. v. North Carolina ex rel. Maxwell*, 297 U.S. 682, (1936), and the taxpayer’s accounting evidence was insufficient to meet that burden.”); *Mobil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 444-45 (1980)(“If a taxpayer proves by clear and cogent evidence that the income attributed to the State by an apportionment formula is “out of all appropriate proportion to the business transacted . . . in that State,” see *Moorman, supra*, at 274, the assessment cannot stand.”). Generally speaking, it is usually unlikely that the United States Supreme Court declares unconstitutional a state court standard of review it applies itself in similar circumstances.

required to accept every expert appraiser's opinion; and are engaged in a process that has been described as much as an art as a science, Bayer seeks to have this Court substitute its judgment for the Tax Commissioner.

Bayer's tax assessment issues are self-inflicted. W. Va. C.S.R. § 110-1-2.5.3.1, provides, "[i]n determining an estimate of fair market value, three (3) approaches to fair value will be considered and used where applicable: (A) cost, (B) income, and (C) market."<sup>175</sup> However,

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<sup>175</sup> Even though this statute clearly permits the Tax Commissioner to use "income" approach and the law generally is that a taxing authority has discretion to choose which among several available valuation method should be used in a particular case, Bayer argues, "the Tax Commissioner erred by adopting a valuation method that was not the 'most reliable' under the circumstances." Brief at 34. Bayer later concedes, however, that in order to determine whether a deduction for economic obsolescence was appropriate, the Tax Commissioner also employed an "income" analysis. Brief at 37. With respect to the 2006 assessments, Bayer's own expert admitted that the "income" method, which Bayer now challenges, is superior to the cost method for determining economic obsolescence:

COMMISSIONER CARPER: Now, let me ask this question. This economic obsolescence, when is it best measured? Remember, I read your book.

MR. SVOBODA: Well, ---

COMMISSIONER CARPER: You know, that's a simple question. It comes right out of your book. What's the answer to that.

MR. SVOBODA: I don't remember exactly what I wrote, but the ---

COMMISSIONER CARPER: You don't remember exactly what you wrote? Your whole testimony is based upon your book.

MR. SVOBODA: Sir, I wrote this in 1998.

COMMISSIONER CARPER: Well, let me read it to you. Page 104 -- maybe I'm in the wrong part of the book, because I certainly don't understand. Economic obsolescence is best measure[d] through the use of the income approach. Does that apply to this?

MR. SVOBODA: If I had income and data available to me, I would look at and consider and perform an evaluation based on income.

COMMISSIONER CARPER: And you could have got income data from . . . the

economic obsolescence is governed by W. Va. C.S.R. § 110-1-2.5.3.3, which provides only that “When physically inspecting commercial and industrial personal property for appraisal, three (3) types of depreciation should be considered; physical deterioration, economic obsolescence and functional obsolescence.” (emphasis added). Nothing in the regulations explains how to calculate economic obsolescence – and, indeed, the rule vests the Tax Commissioner with discretion in such determination since it uses the permissive “should” instead of the mandatory “shall.”<sup>176</sup>

Bayer does not keep plant level data – data that the Tax Commissioner has consistently used and which all other taxpayers (except Bayer) who seek economic obsolescence provide.

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same people who paid you \$125,000; right? Did you ask for it?

MR. SVOBODA: Yes, I did. . . .

COMMISSIONER CARPER: Did they give it to you?

MR. SVOBODA: They do not have that available. . . .

COMMISSIONER CARPER: But I’ve read your book. You say this is the best way to sue this, yet they don’t have the information or won’t give it to you. And so you’re not using the best method; correct? And if I’m wrong, just straighten me out. Am I wrong?

MR. SVOBODA: To quantify economic obsolescence, you’re correct. You are correct.

2006 Tr. at 107-110. Plainly, under these circumstances, the election among several available valuation methodologies is within the sound discretion of the Tax Commissioner.

<sup>176</sup>See 3 SUTHERLAND ON STATUTORY CONSTRUCTION § 57:3 at 86 (6th ed.) (“Should’ generally denotes discretion and should not be construed as “shall.”). See also *Roanoke Mem. Hosp. v. Kenley*, 352 S.E.2d 525, 529 (Va. App. 1987) (quoting *Starks v. Kentucky Health Fac.*, 684 S.W.2d 5, 7 (Ky. App. 1984) (quoting *University of South Fla. v. Tucker*, 374 So.2d 16 (Fla. Dist. App.1979)) (“[T]he word ‘should,’ when used in an administrative code, denotes discretion.”“). In fact, under the C.S.R. the Commissioner is not *required* to consider economic obsolescence at all, but is vested with the discretion to do so or not to do so.

“[W]hile 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.”<sup>177</sup> “[T]he Government may not be required to acquiesce in the taxpayer’s election of that form for doing business which is most advantageous to him.”<sup>178</sup> “The use of bookkeeping terms and accounting forms and devices cannot be permitted to devitalize valid tax laws.”<sup>179</sup> While 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.”<sup>180</sup> Hence, “[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.”<sup>181</sup>

It is important to emphasize what Bayer is contending. It wants this Court to set aside assessments based upon its experts’ testimony that there should be an adjustment for “economic obsolescence,” even though those same experts could not testify as to how much income was produced at the facilities involved. 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? Indeed, when the Commission asked for the data

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<sup>177</sup>*C.I.R. v. National Alfalfa Dehydrating*, 417 U.S. 148-49 (1974).

<sup>178</sup>*Higgins v. Smith*, 308 U.S. 473, 477 (1940).

<sup>179</sup>*Foster v. U.S.*, 303 U.S. 118, 121 (1938).

<sup>180</sup>*Wyman v. James*, 400 U.S. 309, 324 (1971).

<sup>181</sup>*JPMorgan Chase & Co. v. C.I.R.*, 458 F.3d 564, 571 (7<sup>th</sup> Cir. 2006).

relied upon by Bayer’s expert for the 2007 assessment, it refused to produce the data on the grounds that “[i]t contains substantial trade secrets.”<sup>182</sup> 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? In this regard, this case is a poster-child for why taxpayers have the burden of overcoming the presumption of accuracy in tax assessments by “clear and convincing” evidence.

The Tax Commissioner was well within his discretion as a matter of decisional law, legislation, and administrative rule. Indeed, other courts, in similar cases, have held that a taxpayer’s claim of “economic obsolescence”<sup>183</sup> unsupported by clear and convincing evidence, does not warrant setting aside a tax assessment.<sup>184</sup> For example, in *Washington Beef, Inc. v. County of Yakima*,<sup>185</sup> the court recently held:

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<sup>182</sup> 2007 Tr. at 66.

<sup>183</sup> “‘Economic obsolescence’ is the loss of value brought about by conditions in the neighborhood of a property causing the loss of business.” 72 Am. Jur. 2d *State and Local Taxation* § 687 (2008)(footnote omitted).

<sup>184</sup> See, e.g., *Pedcor Investments – 1990 – XIII, L.P. v. Franklin Township Assessor*, 866 N.E.2d 881 at \*5 (Ind. Tax. 2007)(“Here, the Court cannot say, after reviewing the administrative record in its entirety, that the Indiana Board erred in denying Pedcor an [economic] obsolescence adjustment for the 1995, 1996, and 1997 tax years.”); *Beta Steel Corp. v. Scott*, 863 N.E.2d 1 at \*3 (Ind. Tax. 2007)(“Based on this evidence, Beta contends that it prima facie established its entitlement to an [economic] obsolescence adjustment. The Court, however, disagrees.”); *Stoddard v. Commissioner*, 1939 WL 12387 (Bd. of Tax Appeals)(“In both instances, however, petitioner maintains that respondent erred in not allowing for economic obsolescence of the buildings. . . . The burden of proof is upon the taxpayer to overcome the Commissioner’s determination and full information must be presented to show that the rate determined by the Commissioner was not reasonable. Moreover, the 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. We affirm the Commissioner on this issue.”); *Cataract Theatre Corp. v. Commissioner*, 1934 WL 5390 (Bd. of Tax Appeals)(“The petitioner’s first contention is that in the year 1930 its buildings suffered a sudden economic obsolescence due to the erection by others of two modern office buildings a short distance from its buildings. It is our opinion that the petitioner has failed to produce evidence sufficient to sustain this

Washington Beef next contends the trial court erred by not setting out the formula it used for its calculations, and in particular by not showing that it accounted for economic obsolescence. But that is not the question before us. The question is whether the court's valuation can be said to be within the range of the evidence presented by these experts during this trial. . . .

Again, this is because “appraising property is more of an art than a science[.] . . . [I]t necessarily deals in imponderables and may involve wide disputes in expert opinion or judgment. Even functional obsolescence is a vague and imprecise concept, and when related to the idea of economic obsolescence it becomes even more so.” Boise Cascade, 84 Wash. 2d at 680, 529 P.2d 9 (Hale, C.J., concurring). Washington Beef asks that the trial judge do something none of the experts here was able to do: come up with one specific formula for arriving at the value of this plant and facilities. That is not possible and it is not required. *Id.* at 678, 529 P.2d 9. Fair market value is a matter of opinion rather than of hard fact. Each expert witness is called upon to use his or her judgment regarding the appropriate factors to be considered in each particular case. *Nw. Chemurgy Sec. Co. v. Chelan County*, 38 Wash.2d 87, 94, 228 P.2d 129 (1951). A trial court is entitled to rely on its determination of the credibility of these expert witnesses. *Xerox Corp. v. King County*, 94 Wash. 2d 284, 287, 617 P.2d 412 (1980).

Here, the trial court considered relevant facts and expert opinions on fair market value. It made factual determinations with the proper standards in mind. . . . It did not assign a monetary value to the extraordinary economic obsolescence. But it did not have to. The trial court took economic obsolescence into consideration. No further findings were necessary. The findings of fact are supported by the evidence and support the conclusions of law. The values are well within the range of that evidence.

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contention.”). Moreover, courts have questioned the concept of reducing a property’s value due to “economic obsolescence” when the property, as in the instant case, is actually in use. *CSY Liquidating Corp. v. Harris Trust & Sav. Bank*, 1998 WL 154065 at \*11 (N.D. Ill.) (“As a general rule, value-in-use appraisals do not consider the economic obsolescence of an asset.”)(footnote omitted).

<sup>185</sup> 143 Wash. App. 165, 169-70, 177 P.3d 162, 180-81 (2008)(emphasis supplied).

Likewise, in the instant case, merely because the Tax Commissioner considered, but rejected the taxpayer's evidence of economic obsolescence does not warrant setting aside his valuations. Because "nothing in the statutory formula requires consideration of obsolescence,"<sup>186</sup> the Tax Commissioner was not required "to use obsolescence in [his] valuation process."<sup>187</sup>

#### IV. CONCLUSION

None of the issues raised by Bayer in these consolidated appeals have merit. A county commission sitting as a board of equalization and review does not violate equal protection or due process. The imposition of a clear and convincing evidence standard on a taxpayer challenging an assessment does not violate equal protection or due process. Finally, Bayer failed to establish by clear and convincing evidence that the tax assessments were erroneous.

WHEREFORE, the Appellees, the Kanawha County Commission, the Kanawha County Assessor, and the Prosecuting Attorney of Kanawha County, respectfully request that the judgments of the Circuit Court of Kanawha County be affirmed.

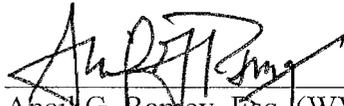
**COUNTY COMMISSION OF KANAWHA  
COUNTY; ASSESSOR OF KANAWHA  
COUNTY; and PROSECUTING ATTORNEY  
OF KANAWHA COUNTY**

**By Counsel**

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<sup>186</sup> *Arizona Dept. of Revenue v. Questar Southern Trails Pipeline Co.*, 215 Ariz. 577, 580, 161 P.3d 620, 623 (Ariz. Ct. App. 2007)

<sup>187</sup> *Id.* at 581, 161 P.3d at 624.



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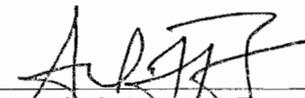
**CERTIFICATE OF SERVICE**

I hereby certify that on the 17<sup>th</sup> day of July 2008, I served the foregoing *Brief of Appellees County Commission of Kanawha County, Assessor of Kanawha County, and Prosecuting Attorney of Kanawha County* upon all counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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