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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOUNTAIN AMERICA, LLC, ET AL.

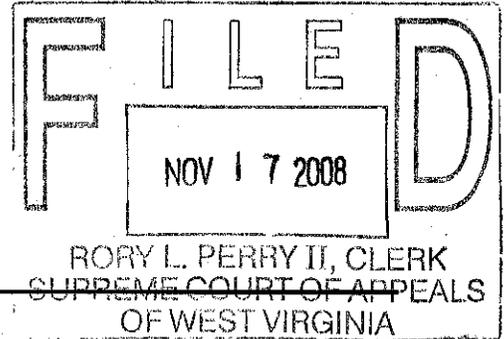
Appellants

Case No. 34426

v.

THE HONORABLE DONNA HUFFMAN,
ASSESSOR OF MONROE COUNTY, WEST VIRGINIA,
ET AL.

Appellees



APPELLANTS' BRIEF

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November 14, 2008

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This appeal is taken from an Order of the Circuit Court of Monroe County (the "Circuit Court"), dated January 25, 2008 (the "Order"). The Order denied the Appellants' Petition for Appeal from certain *ad valorem* property tax assessments, first issued by the Assessor of Monroe County (the "Assessor") and later upheld by the Monroe County Commission sitting as a Board of Equalization and Review (the "Commission").

The Appellants are Mountain America, LLC ("Mountain America"), along with several dozen individuals, who own developed lots and undeveloped residue in the area of Monroe County, West Virginia, designated as the Walnut Springs Mountain Reserve ("Walnut Springs"), which is being developed by Mountain America, and five (5) other related entities. In this appeal, the Appellants seek relief from, and correction of, erroneous assessments of their property for 2007 *ad valorem* property tax purposes. As determined by the Assessor, the assessments of the property of Mountain America were in the total amount of Four Hundred Thirty Six Thousand Nine Hundred Eighty Dollars (\$436,980) and the total amount of the assessments of the other Appellants' properties was Nine Million One Hundred Sixty Seven Thousand One Hundred Sixty Dollars (\$9,167,160), (collectively, "the Assessments").

The Appellants respectfully assert that the Assessments are excessive and unequal as compared to the 2007 tax assessments of the property of other taxpayers in Monroe County, and that the Assessments are the result of the Assessor's use of improper and discriminatory methods in violation of the Appellants' rights to equal and uniform taxation under the West Virginia Constitution and in violation of the Appellants' rights to equal protection of the law under the United States Constitution. In addition, the Appellants respectfully assert that the process, by which they had to seek review of the Assessments before the Commission, as erroneously affirmed by the Circuit Court in its Order, also violate their constitutional rights to due process.

Upon learning of the proposed taxable values determined by the Assessor for the subject property for 2007 tax purposes, the Appellants filed, on a timely basis, their applications for review by the Commission and relief from the Assessments.¹ A hearing of most of the Appellants' applications for relief was held before the Commission on February 7, 2007 (the "Hearing"). At the Hearing, the Appellants argued and presented evidence which established: (a) that the true and actual values of the subject properties as of July 1, 2006, was far less than the values set by the Assessor; (b) that the values set by the Assessor involved her use of improper methodologies and (c) that the values set by the Assessor were discriminatory as to the Appellants and, thus, in violation of applicable provisions of West Virginia law and the Constitutions of the United States and the State of West Virginia.

At a subsequent meeting, the Commission voted unanimously to sustain all of the Assessments. A written notice of its decision, dated February 15, 2007, was mailed to the

¹ In light of the limited time and in the interest of efficiency, the lead Appellant, Mountain America (after receiving numerous questions and inquiries and complaints about the massive property tax increases from the other Appellants) agreed to facilitate the delivery of review applications for the owners of parcels acquired from Mountain America. As a result, on behalf of the other Appellants, through its counsel, Mountain America did deliver the several other Appellants' notices of increases, along with a request for review of each of the same to the Clerk of the County Commission of Monroe County (the "County Clerk"), thus notifying the County Clerk of the desire of those many particular Appellants to challenge the taxable values proposed by the Assessor for their respective properties.

In fact, there were three (3) sets of these communications to the County Clerk with the attached notices of increased assessments advising the County Clerk that the owners, of those individual parcels identified in the attached notices, were requesting to be made part of the appeal and to be represented by counsel for Appellants herein. Further, at the beginning of a February 7, 2007 hearing before the Commission (the "Hearing"), counsel for Appellants again submitted the various notices and requested that they be made part of the record to identify each of the taxpayer/parcels as Appellants appealing and seeking review of their proposed 2007 tax assessments at the Hearing. (See Tr. Exhibit J-1). In addition, there were a few other individuals or entities who actually had the proposed property tax values of their respective properties in the Walnut Springs area increased by the Commission *after* the Hearing. On behalf of those other property owners, counsel for the Appellants timely notified the County Clerk that those individuals and entities also desired to be added to the group of Appellants challenging their proposed 2007 tax assessments. Prior to the issuance of its decision in the matter of all the Appellants' appeals, the Commission, through its counsel (Mr. Paul Papadopoulos, who attended and observed the entirety of the Hearing) communicated with counsel for the Assessor and counsel for the Appellants its desire to have a formal written stipulation submitted identifying each of the parties who were Appellants presenting an appeal of their assessments.

Ultimately, counsel for the Assessor and the Appellants agreed to a Joint Stipulation identifying each of the parties who had appealed their assessments and that Stipulation of Facts was accepted and filed by the County Clerk in fulfillment of the request initiated by counsel for the Commission, Mr. Paul Papadopoulos. (See Stipulation of Parties Regarding Parties).

Appellants' counsel by the Commission (the "Commission's Decision"). The Commission's Decision was based solely upon an unexplained finding that the Assessor's methods of appraisal were pursuant to West Virginia Law. *See* Commission's Decision at p 8, ¶1. On March 14, 2007, the Appellants filed their Petition for Appeal in the Circuit Court, appealing the Commission's Decision (the "Petition"). Concurrently, and as a legally integral part of the Petition, a certified and complete record of the proceedings before the Commission was filed with the Circuit Court on March 14, 2007. On March 28, 2007, the Commission filed an answer to the Petition and on April 13, 2007, the Assessor filed a separate answer.²

On January 25, 2008, the Circuit Court issued the Order which affirmed the Commission's Decision, and from which Order the Appellants sought appeal. On May 27, 2008, the Appellants filed their Petition for Appeal to this Court. The Assessor and the Commission, through counsel, responded in opposition to that petition. By Order dated October 9, 2008, and

² The Commission's answer and the Assessor's answer assert additional positions that operate to deny the Appellants' due process rights.

Specifically, the Assessor's answer was filed by law firm of Dinsmore & Shohl notwithstanding a motion filed earlier by Appellants in the proceedings before the Commission to disqualify that firm for an asserted conflict of interest (*See* Appellants' Motion to Disqualify Counsel). The Commission's order with respect to said motion is manifestly unclear as to what, if any, ruling was being made. (*See* Board of Equalization and Review's Order dated February 15, 2007). In her answer, the Assessor expressly denied that any of the Appellants, except Mountain America, had perfected an appeal of the Commission's Decision due to the reference to the Appellants in the caption of the Petition being "In re: The 2007 Assessments of the Property of Mountain America, LLC *et al.*" Later, the Commission filed a motion seeking a ruling to that same effect, which the Circuit Court erroneously granted.

The Commission's answer also went far beyond the scope of its prior Decision that simply denied Appellants' relief and concluded, without any substantive explanation, that the Assessor's actions had been in compliance with West Virginia law. By contrast, in its answer, the Commission asserted several new arguments to rebut the Appellants' evidence. Those arguments included: (a) assertions that the Appellants did not present any evidence by expert witness or otherwise as to true and actual value of the Appellants' real property; (b) that the testimony presented by the Appellants to compare their assessments to other assessments in Monroe County was statistical in nature, but was not presented by a qualified statistician, and (c) that Mountain America had failed to follow certain statutory procedures to obtain reduced valuations of land sold by land developers.

These "affirmative defenses" either did not involve issues raised before the Commission, or, even if they did, were not grounds upon which the Commission, sitting as a Board of Equalization and Review, had issued its final Decision. As a result, the Appellants moved to strike the Commission's answer, which motion, the Circuit Court erroneously denied. Likewise, in the face of the Commission's having so starkly abandoned its statutory role as an impartial tribunal in favor of the role of an adversarial party resisting the appeal of its own rulings, the Appellants sought to amend the Petition to include a claim of violation of their due process rights. That motion was, also, erroneously denied by the Circuit Court.

received in the mail by the Appellants' counsel on October 15, 2008, this Court granted the Appellants' Petition for Appeal. As directed in that Order to do so within thirty days (30) of their receipt thereof, the Appellants now respectfully hereby present their brief.

II. STATEMENT OF THE FACTS

From July 1, 2006 through January 31, 2007, the Assessor and her staff were engaged in the process of determining taxable values of property as required by law. As part of that process, the Assessor undertook the valuation of real properties owned by the Appellants in Walnut Springs, which, on July 1, 2006, included some developed lots and undeveloped residue.

Walnut Springs had been acquired in the last several years by a number of limited liability companies (led by Mountain America), with the general intent to develop the area to include residential uses and related amenities. Walnut Springs was, as of July 1, 2006, and still remains, in the very early stages of development, but its developers anticipate that, ultimately, it would provide buried electric and telephone service, a private road system, and other amenities, in addition to a rural community living environment.

The developed lots are subject to uniform restrictions and covenants which are recorded in the County Clerk's office. February 7, 2007, Hearing Transcript [hereinafter, "Tr."] p. 101; Assessor's Exhibit [hereinafter, "Assr's Ex."] 10. Said restrictions and covenants are recited in the deeds for individual parcels which have been conveyed by Mountain America and the other entities. Assr's Exs 1, 3. Those restrictions reflect an intent to provide for primarily residential uses, but they do give the developer the discretion to permit other uses. Neither Mountain America, nor any other entity or person developing Walnut Springs, has recorded a separate development plat or designation of land use with the County Clerk. Tr. pp. 97-98.

As the Assessor endeavored to perform her annual assessment duties, a determination was made either independently by the Assessor, or in consultation with the West Virginia State Tax Department (the "Tax Department"), to concentrate upon the Walnut Springs properties because of a recent number of sales transactions there. Tr., pp 83-84.

In the course of that effort, the Assessor proceeded to create an entirely new "neighborhood" for appraisal and assessment purposes for the 2007 tax year. Tr., p 84. It included only the Walnut Springs properties, both developed and undeveloped, to the extent that the Assessor understood the geographic scope of those properties. Tr., p. 84. At the same time, the designated neighborhood excluded comparable contiguous properties. Tr. pp 115-117.

At the time the Assessor was creating a new neighborhood for the Walnut Springs properties, and for several years prior to that time, her office had been cited for many deficiencies in its annual valuation and assessment work. Tr., pp. 71-80. The Assessor's office had failed several appraisal study tests conducted by the Tax Department pursuant to the latter's oversight responsibilities. Assr's Exs 6- 8; Petitioners' Exhibits [hereinafter, "Ptrs' Exs.,"] 15 - 16. Specifically, the tests conducted were designed to reflect, in aggregate, a general measure of compliance within permitted deviations between the Assessor's land book values and actual market values for the relevant periods. The preliminary reports of the results of those tests for September and December of 2006, reflected a failure by the Assessor on nearly every test conducted by the Tax Department. Assr's Exs. 7-8' Ptrs' Exs. 15-16.

At the Hearing, the Assessor testified that her failure to comply with the Tax Department tests was due to the recent sales of properties in Walnut Springs and that her actions for tax year 2007 would correct these deficiencies. Tr., pp. 83-84. However, the most recent assessed-to-

ratio studies conducted by the Tax Department, which includes the Assessor's 2007 valuations for Walnut Springs, show continued non-compliance with those tests.³

The evidence in the record further reflects that the Assessor failed to update the taxable values of other real property in the immediate vicinity of the Walnut Springs properties so that there was an enormous and unjustified deviation between the percentage of fair market value at which the taxable values of the Appellants' properties were set as compared to the taxable values of all other real property in Monroe County. Tr., pp. 14-15; Ptrs' Exs. 4-9.

A number of the Appellants informally learned of the Assessor's actions during the summer and fall of 2006, and made an attempt to communicate with her to understand her actions and logic leading to the proposed valuation increases of property in Walnut Springs. In doing so, those Appellants attempted to determine the methodologies and processes by which the Assessor was valuing their properties. However, they were largely unsuccessful in this regard other than to gain a general impression that the proposed values and resulting tax assessments were going to represent significant increases in the taxable values of their property, and significant increases in their property taxes, for the 2007 tax year.

During the 2007 assessment, equalization and review cycle, the Appellants (many of whom reside and receive their mail out of State) were given very little time to challenge the Assessments. Specifically, the Assessor delivered her property books to the Commission in the last week of January and the Commission adjourned as a board of equalization and review on the first day it could legally do so (February 15th). This provided Appellants less than three weeks to

³ See June 4, 2007 Report attached to Appellants' Circuit Court brief. Appellants acknowledge that the attached June 4, 2007 report is not part of the record in this matter since it did not exist prior to the date of the filing of the Appellants' Petition to the Circuit Court. However, it is a judicially noticeable fact and public record which clearly contradicts the Assessor's purported defense of her actions, and further shows the continued non-compliance of Monroe County as to this State monitored sales ratio equality standard. Further, the Appellants' have appealed their 2008 property tax valuation. Some of the sales ratio equity studies done in 2008 show continued non-compliance by the Assessor.

actually confirm the increased taxable values of their properties, consult with experts including counsel, and prepare and present evidence in opposition to the Assessments. In the case at bar, the taxable values of literally dozens of parcels of property including both undeveloped residue and out-conveyed lots in Walnut Springs were subjected to massive increases. Although, to avoid redundancy, the specific details of those increases are described under Section V. of this Petition, at Point A. *infra* starting at p.11, the aggregate excessive and unequal effect of them is further reflected in one particularly shocking measure.

Specifically, the evidence herein shows that, for 2007 taxes, there was an aggregate increase in the taxable values of *all* lands in Monroe County of \$29,591,216.00. Of that amount, \$10,908,366.00, or 36.86%, is solely attributable to increases of the proposed taxable values of the Appellants' properties urged by the Assessor. Tr. p. 19; Ptrs' Exs. 10-11. Yet, the property in Walnut Springs represents only one percent (1%) of the land area of Monroe County. Put another way, one percent (1%) of the taxable land area of all the real property to be taxed in the County in 2007 (representing the Appellants' mostly undeveloped, rural residential properties), would, according to the Assessor's methods, be compelled to bear 36.86% of the total one-year increase in property taxes to be experienced by all County property owners.

III. ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT ERRED IN AFFIRMING THE FAILURE OF THE COMMISSION TO EQUALIZE THE 2007 TAXABLE VALUES OF THE APPELLANTS' PROPERTIES IN VIOLATION OF THE MANDATE OF THE WEST VIRGINIA CONSTITUTION THAT TAXATION MUST BE APPLIED EQUALLY AND UNIFORMLY THROUGHOUT THE STATE.
- B. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE EXCESSIVE AND UNEQUAL 2007 TAX ASSESSMENTS OF THE APPELLANTS' PROPERTIES WERE NOT THE RESULT OF INTENTIONAL AND SYSTEMATIC UNDER-ASSESSMENTS BY THE ASSESSOR OF OTHER TAXPAYERS' PROPERTIES IN MONROE COUNTY IN VIOLATION OF THE APPELLANTS' CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF THE LAW.

- C. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, AND DISREGARDED THE FACTS OF THIS CASE, IN CONCLUDING THAT WEST VIRGINIA'S STATUTORY SYSTEM FOR REVIEW OF PROPERTY TAX ASSESSMENTS DOES NOT VIOLATE THE APPELLANTS' RIGHTS TO DUE PROCESS OF LAW.
- D. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, AND DISREGARDED THE FACTS OF THIS CASE, IN CONCLUDING THAT THE PARTICULAR MANNER, BY WHICH THE COMMISSION USED THE STATUTORY PROCEDURES FOR REVIEW OF THE APPELLANTS' PROPERTY TAX ASSESSMENTS, DID NOT OPERATE TO EFFECTIVELY VIOLATE THE APPELLANTS' RIGHTS TO DUE PROCESS OF LAW.
- E. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN DENYING THE RIGHT OF ALL BUT ONE OF THE APPELLANTS TO ANY JUDICIAL REVIEW OF THE DECISION OF THE COMMISSION SUSTAINING THE EXCESSIVE AND UNEQUAL TAXABLE VALUES OF THEIR PROPERTY.

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V. DISCUSSION OF THE LAW

Introduction

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

The assessor is required to complete that valuation work by the first day of February each year. Then, assessors are required to deliver to the county commission of their respective counties the property books reflecting the proposed true and actual values of the properties in the county. W.Va. Code §§11-3-1 et seq. The county commission is then required to equalize all such assessments so that they will, *inter se*, be taxed in an equal and uniform manner. *See Id.*

However, as determined by the Assessor, the taxable values of the property in Walnut Springs are clearly not reflective of their true and actual value. Likewise, the Commission did not adjust those Assessments to be equal and uniform with the assessments of the property of

other taxpayers in Monroe County. Accordingly, as the following points demonstrate, in sustaining the actions of the Assessor and the Commission, the Circuit Court erred.

A. THE CIRCUIT COURT ERRED IN AFFIRMING THE FAILURE OF THE COMMISSION TO EQUALIZE THE 2007 TAXABLE VALUES OF THE APPELLANTS' PROPERTIES IN VIOLATION OF THE MANDATE OF THE WEST VIRGINIA CONSTITUTION THAT TAXATION MUST BE APPLIED EQUALLY AND UNIFORMLY THROUGHOUT THE STATE.

It is a fundamental principle in the State of West Virginia that comparable properties should be taxed equally and uniformly. This equal treatment is guaranteed by both the West Virginia Constitution and the United States Constitution. The West Virginia Constitution guarantees that, with certain express exceptions, "taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value" Art. X, Sec. 1. Moreover, "no one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value." *Id.*

A systematic valuation of property at a higher percentage of its true and actual value, than that at which a similar species of property is valued, has long been a clear and fundamental constitutional violation in the State of West Virginia. Section 1, Article X, WV Constitution.⁴

The right to equal and uniform taxation is seen as so fundamental and important to all of the citizens and taxpayers of the State that this Court has even applied relevant statutory provisions in a manner which allows standing to challenge improper assessments by individuals and parties other than just the owner of the property being taxed.⁵

⁴ This clear and fundamental constitutional principle dates nearly to the beginning of the State of West Virginia as a political entity, and has been steadfastly applied by this Court throughout its history to this day. *In re Kanawha Valley Bank*, 144 W.Va. 346, 109 S.E.2d 649 (1959). In *Kanawha Valley Bank*, this Court, clearly provided that a banking institution which had its shares of stock assessed at 100% of true and actual value for property tax purposes, while other similar properties in the taxing unit were systematically assessed at a lower percentage of their true and actual values, was entitled to have the taxable value of its stock reduced to comply with the provisions of Section 1, Article X of the Constitution of the State of West Virginia. *Id.*

⁵ This expansion of standing by this Court even includes other residents of the county not owning property, other taxpayers of the county and impacted governmental officials. *See Tug Valley Recovery Center v. Mingo*

1. The Appellants' un rebutted proof that the 2007 taxable values of their properties were not equalized with comparable properties of other taxpayers in Monroe County demonstrates that the Circuit Court erred in concluding that the Assessor had properly followed the requirements of her office.

In its Order, the Circuit Court found that the Commission came to a "reasonable conclusion" in finding that the Assessor followed state law regarding the Assessments. See Order, at page 7, ¶2. In doing so, the Circuit Court cited the case of Kline v. McCloud, 174 W. Va. 369, 326 S.E.2d 715 (1985), wherein this Court determined that a taxpayer must "show more than the fact that other property is valued at less than true and actual value" in order to obtain relief under Section 1 of Article X of the West Virginia Constitution. See id. at Syl. pt. 1.

However, this Court has held that, to obtain relief, a taxpayer must present "competent evidence, such as that equivalent to testimony of qualified appraisers, that the property has been under- or over-appraised by the tax commissioner or wrongly assessed by the assessor." Id. at 719, 373 (quoting Killen v. Logan Co. Comm'n, 170 W. Va. 602, 295, S.E.2d 689 (1985), Syl Pt. 8), *overruled in part on other grounds by In Re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, W.Va., November 5, 2008 (No. 33891) (referred to herein as "Woodlands"), at *27 (holding that a taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence, rather than a preponderance of the evidence, that such tax assessment is erroneous).

Contrary to the assertions of the Assessor and the County Commission in their responses in opposition to the Petition, the Appellants did, in fact, present testimony that clearly shows that their property was significantly over-valued and thus "wrongly assessed by the Assessor." Mindful of this Court's ruling that valuation of property for taxation purposes by an assessor

County Commission, 164 W.Va. 94, 261 S.E.2d 165 (1979) and In Re Tax Assessments Against Pocahontas Land Corporation, 172 W.Va. 53, 303 S.E.2d 691 (1983).

enjoys a presumption of correctness, see Woodlands, at *22 (citing Western Pocahontas Props., Ltd v. County Comm' of Wetzel County, 189 W. Va. 322, 431 S.E.2d 661 (1993) and In re Tax Assessments Against Pocahontas Land Co., 172 W.Va. 53, 303 S.E.2d 691 (1983) (herein "Pocahontas Land") the Appellants presented the testimony of Todd Goldman, a well known and qualified appraiser, that showed by "clear and convincing evidence" that the Assessments are, in fact, erroneous. In his testimony, Mr. Goldman referred to extensive comparative evidence of recent sales prices of property in Monroe County, gleaned from its public records, in reliance on this Court's holding that the "price paid for property in an arm's length transaction, while not conclusive, is relevant evidence of true and actual value." Kline v. McCloud, *supra*. at 725, 379.

First, Mr. Goldman, testified that, for the several dozen parcels of the Appellants' property in Walnut Springs, the Assessor's values ranged from a low of 15% of recent sales prices to a high of 438% of recent sales prices, with an average value, being proposed by the Assessor, of 152% of documented recent sales prices. Tr., pp. 13-14; Ptrs' Ex. 4.

The foregoing evidence was not rebutted by the Assessor. Incredibly, the Assessor, in her own testimony and through her counsel's arguments, admitted that the sales prices for those properties were the best evidence to support a determination of true and actual value, yet the Assessor's methodology valued those properties at 152% of their average sales price.⁶

⁶ The Assessor pointed to some minimal discrepancy between the contract prices utilized by Mr. Goldman to determine recent sales prices of a few of the Taxpayers' parcels. However, even after making the mathematical adjustments to accommodate the Assessor's reliance on the net rebated sales contract values for those properties, the actual effect on Mr. Goldman's calculations, exhibits and opinions represent an entirely insignificant deviation from his original exhibit. Specifically, his exhibit originally reflected an average value set by the Assessor to be 152.81% of average recent sales prices; while the adjustment to conform to the Assessor's data only changes that to an average value of 152.22% of recent sales prices that the Assessor would set for the Taxpayers' properties.

At the Hearing, Mr. Goldman next presented evidence of a random sample that he performed of 113 sales of parcels of other property from other parts of Monroe County. Tr., pp. 14-15; Ptrs' Ex. 5. The 2007 values for those properties, as presented by the Assessor to the Commission were, on average, only 38.15% of true and actual value as shown by the analysis of recent sales prices (which were obtained from the public records of Monroe County). Id.

Appellant's expert further sampled several dozen properties throughout the county that sold subsequent to July 1, 2006. The analysis of that data reflect that the taxable values presented by the Assessor to the Commission for those sample properties were, on average, only 47.13% of their true and actual values as reflected by their recent sales prices. Tr, p.15; Ptrs' Ex. 6. Additionally, Appellant's expert found six (6) properties in the sample whose taxable values, as set by the Assessor, were less than eight percent (8%) of their recent sales price and averaged only 5.42% of their sale prices. Tr., p. 15; Ptrs' Ex. 7. Because Mr. Goldman's testimony presented clear and convincing evidence that the Assessments were erroneous, the Appellants easily satisfied their "clear and convincing" burden of proof as recently reaffirmed by this Court's decision in Woodlands, at *32.

On the other hand, the Assessor's testimony and methodologies show that she clearly does not understand the nature of her statutorily imposed duties and, as a result, utilized an illogical and unfair method. Central to a uniform and equal system of taxation is "uniformity in both methodology and result." Killen v. Logan County Comm., 170 W.Va. 602, 619, 295 S.E. 2d 689, 706 (1982) (*overruled in part on other grounds by Woodlands*, W.Va., November 5, 2008, No. 33891). Here, the unrefuted evidence of the non-uniform and unequal results of the Assessor's determinations of the taxable values of the Appellants' properties is immutable proof

that her methods in making those determinations were neither uniform with, nor equal to, the methods she used to determine the taxable values of all other properties in Monroe County.

First, the Assessor could not adequately explain the basis of her Assessments. Further, when questioned about Assr's Exs. 8-9, and Ptrs' Exs. 15-16, the Assessor could not identify or explain the various tests undertaken by the State Tax Department to measure fairness and equality of the Monroe County land books. Tr, pp. 71-78. She could not identify the types of tests, how they worked, the names of the tests or how they measured equality or fairness of the property tax values she had set. If one fairly evaluates the exhibits and the Assessor's testimony, it is clear that she did not have any understanding of the various tests that are applied by the Tax Department. Assr's Exs. 8-9; Ptrs' Exs. 15-16.

The Assessor's testimony regarding Appellants' restrictive land covenants is even more confused, but that testimony is important since her testimony, as to how she defined the boundaries of the new "neighborhood" she created for Walnut Springs, clearly indicates her lack of knowledge of the appraisal process, which then resulted in her presentation of the unfair, unequal and non-uniform taxable values for the Appellants' properties.

The Assessor vacillated in changing her testimony at several points as to what the restrictive covenants applicable to the Appellants' properties permitted or did not permit. It at least appeared at the completion of her testimony, that she did acknowledge that the restrictive covenants did not preclude the development of the residue of Walnut Springs as commercial property. Tr; pp. 78-81, 107-110. At the same time, she asserted in her testimony and admits that, in setting its value, she made a determination that the residue is residential property and must be appraised as such since she believed that the "proposed use" of the residue was residential. Tr. pp 79-80. Such an action clearly violates applicable West Virginia law.

Specifically, W.Va. Code §11-3-1b(c) expressly prohibits the Assessor from considering or using a proposed future use of a property to determine its value for current tax purposes. Thus, it is a further clear violation of equalization standards when she substantially increased the taxable value of this potentially commercial property while admitting she had not adjusted the taxable value of any other commercial property in Monroe County in the current or recent years because she did not have adequate sales data to do so. Tr.; pp. 78-81.

The Assessor's testimony blames her office's many years' deficiencies in property tax assessments, and its failure of the 2006 Tax Department compliance testing (Assr's Exs. 8-9; Ptrs' Exs. 15-16), on the sales in Walnut Springs. However, other than stating her unsupported opinion to that effect, the Assessor provided no specific documentary evidence or testimony which showed that her failure to meet the State's requirements, was in fact, a result of transactions involving the Walnut Spring properties. In fact, subsequent data from the Tax Department indicates that all the assessments in Monroe County continue to be out of compliance. *See* n.3, *supra* (June 4, 2007 Report attached to Appellant's Circuit Court brief). Indeed, in her own Response to Appellant's Petition for Appeal (the "Assessor's Response"), she acknowledges the historic undervaluation of real property in Monroe County. *See Assessor's Response* at pp. 3-4.

The Assessor's attempt to blame her performance deficiencies on the Walnut Springs properties lacks credibility for several reasons. First, many sales transactions in the Walnut Springs area occurred prior to July 1, 2005, and would have, if her contention is to be believed, caused these same problems in the prior 2006 tax year. A review of Assessor's Exhibits. 8-9 and Appellants' Exhibits. 15-16 clearly shows that the sampling used by the Tax Department in testing her performance was from several parts of Monroe County – not just Walnut Springs.

Second, the testimony of Ms. Huffman and the evidence in the record indicates a pattern of deficiencies in the Assessor's property tax values going back several years prior to the time of the first Walnut Springs sales. Tr., pp. 70-78, 112-115; Assr's Exs. A-6 --A-9; Ptrs' Exs. 14-16. Finally, if the Assessor does not understand how the Tax Department's tests work, how they are applied, and what data they are designed to measure, she cannot be viewed as a credible witness to opine as to the reasons why the values she set for Monroe County property taxes in 2007 did not comply with those various tests. Tr. pp. 70-76.

Ultimately, the Assessor was forced to acknowledge that the longstanding, intentional and systematic undervaluation of real property in Monroe County predates the sales activity occurring in Walnut Springs, and was left to merely claim that she was attempting to correct it. Tr., pp-77-80. Appellants' expert analysis and cited exhibits establish beyond question that the Assessor's results could not more clearly describe a system which epitomizes unfairness, inequality and non-uniformity. The evidence presents a clear showing of an intentional and systematic over-valuation of Appellants' properties and a systematic and intentional undervaluation of other properties. Accordingly, the Circuit Court erred in finding that the Assessor followed West Virginia law in determining the Assessments.

2. The Monroe County Assessor acted arbitrarily in designating the Appellants' properties as a separate neighborhood for property tax valuation purposes.

The Assessor's selection of Walnut Springs as a new, separate "neighborhood" for valuation adjustments, without including identical contiguous or proximate properties or other similar neighborhoods, with similar geography and infrastructure, is a clear violation of applicable standards of fairness and equality. The Appellants assert that the development of these facts clearly shows that the Assessor made no effort or attempt (even though the sales data was available for her to do so) to treat similarly situated property the same.

Further, the record reflects that the creation of the neighborhood was solely for the purpose of increasing property tax assessments in Walnut Springs and was undertaken by the Assessor without having even a basic understanding of the neighborhood valuation methodology generally, or applying it in a similar manner to other comparable neighborhoods in Monroe County. Tr. pp. 119-122. Todd Goldman's testimony and Appellants' Exhibit 8, further point out the absurdity and unfairness of the Monroe County property tax values as presented by the Assessor in her 2007 land books. Specifically, this Exhibit identifies dozens of properties which are either contiguous, or in close proximity, to Walnut Springs. The Assessor further admitted in her testimony, (*see* Tr., p.117) that these properties basically had the same physical characteristics and development status as, and geographic proximity to, those in Walnut Springs.

However, since they were not included within the geographic confines of her newly and arbitrarily created neighborhood for Walnut Springs, the taxable values the Assessor would set for those contiguous and proximate other properties are not anywhere near the average of 152% of true and actual values she would assign to the Walnut Springs properties. Instead, she set the taxable values of the other properties to be, on average, \$606.00 per acre, as compared to the taxable values of the Appellants' properties which she set, on average, in a range between \$26,000.00 to \$30,000.00 per acre. Tr. pp. 17-20, 34; Ptrs' Ex. 11.

Todd Goldman's testimony and Appellants' Exhibit 9, further show the absurd relationship between the values urged by the Assessor for the Appellants' properties when compared to the values she would set for properties in a comparable neighborhood in Monroe County. Longview Estates is a subdivision in Monroe County that has more completely developed infrastructure, water, sewer, roads, etc. than Walnut Springs. However, a detailed

sampling of the Longview Estates properties reflects that the values in the 2007 land books proposed by the Assessor for them are at an average of \$2,640.50 per acre. Tr. p. 18.

Thus, in establishing only a separate new neighborhood for Walnut Springs, the Assessor singled out the Appellants for taxation that was neither equal nor uniform with comparable properties in Monroe County. Thus, the implication by the Assessor and the Commission that the Assessor's creation of this purported "new neighborhood" is somehow an objective process which the Assessor routinely applied throughout Monroe County is patently false.

3. The Commission, sitting as a Board of Equalization and Review, abjectly failed to perform its duty to equalize 2007 property tax assessments in Monroe County.

The primary obligation of the Commission sitting as a Board of Equalization and Review is embodied in its name, to-wit: equalization. Common sense indicates that exclusive reliance on recent selling prices inherently precludes equalization unless all properties in the county have sold recently, which clearly has not occurred. Given that the Assessor's property tax values clearly had failed the September 21, 2006 and the December 14, 2006, Tax Department statistical analysis (Assr's Exs. 8-9; Ptrs' Exs. 5-16), her failure to undertake any actions to accommodate this unequal and disparate treatment is a violation of law, and when upheld by the Commission, is, likewise, a violation of its duty should to correct and equalize property tax assessments. WV State Constitution, Article X, Section 1; W.Va. Code §11-3-24.

The result of the Assessor's methodology and the systematic undervaluation of other property by her office must be seen as an intentional discrimination against Appellants in violation of the equal and uniform taxation provisions of Section 1, Article X of the West Virginia Constitution as applied to Appellants. See Kline v. McCloud, 174 W. Va. 369, 326 S.E.2d 715, Syl. Pt. 1 (1985) (requiring a showing of intentional and systematic undervaluation

in order to obtain relief under Section 1, Article X).⁷ The Circuit Court's holding to the contrary was clear error.

B. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE EXCESSIVE AND UNEQUAL 2007 TAX ASSESSMENTS OF THE APPELLANTS' PROPERTIES WERE NOT THE RESULT OF INTENTIONAL AND SYSTEMATIC UNDER-ASSESSMENTS BY THE ASSESSOR OF OTHER TAXPAYERS' PROPERTIES IN MONROE COUNTY IN VIOLATION OF THE APPELLANTS' CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF THE LAW.

1. Equal protection does not allow the Assessor to intentionally and systematically assess recently sold properties at (or above) their current selling prices while not making comparable adjustments to properties that have not been recently sold.

A similar concept to the equal and uniform clause in Article 1, Section X of the West Virginia Constitution is embedded in the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The case of Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336 (1989) (cited herein as "Allegheny") illustrates these concepts and is authority that controls the outcome of the present matter. In Allegheny, *on facts essentially identical to these*, the United States Supreme Court held — in an extraordinary unanimous 9-0 decision — that the property tax values set by the Assessor of Webster County, West Virginia violated the Equal Protection Clause of the United States Constitution.

In that case, the assessor had set the value of certain property, for real property tax purposes, at a figure equal to fifty percent (50%) of the price paid for that property during a

⁷ With regard to intent, this Court, in In Re U.S. Steel, 165 W.Va. 373, 268 S.E.2d 128 (1980), considered whether it was an intentional discrimination against a taxpayer by knowingly applying a different formula to the computation of its property taxes than that generally used for the property of all other owners of similar species of property. This Court ruled that such discrimination cannot be excused as a sporadic deviation and that the aggrieved taxpayer was entitled to have its taxes computed in the same manner and on the same basis as other more favored taxpayers. In Re U.S. Steel, (*supra*), this Court stated: "Appellant also argues persuasively that the action of the Circuit Court in setting the assessed value of their property at 100% of the appraised value, while allowing the assessed value to the other coal properties in the County to remain at 68% of their appraised values, denies them their right to equal protection and due process of law under the 14th Amendment to the Constitution of the United States. Considering our disposition of this case on the basis of the [assessments' violation of the Equal and Uniform Taxation mandate of the] West Virginia Constitution, we need not reach the Federal Constitutional questions presented." In Re U.S. Steel, 268 S.E.2d, at page 125.

recent arm's length transaction (i.e., as with the present matter, the Webster County Assessor relied on recent sales figures). Under that approach, however, the values of the recently sold properties were then set for tax purposes at roughly 8 to 35 times more than the values of comparable neighboring property which had not been recently sold. The United States Supreme Court, on the basis of those facts, found that the conduct of the Webster County assessor violated those taxpayers' federal constitutional rights to equal protection of the law.

In its Allegheny decision, the Court also concluded that the real property tax assessment system, utilized by the Webster County Assessor, systematically and intentionally discriminated against the coal companies there in question in violation of the Equal Protection Clause of the United States Constitution and rejected the argument that Allegheny Pittsburgh Coal should be limited to seeking relief which would require that the assessments of other taxpayers' properties be raised to reflect true market values.

While the Court, in Allegheny, did observe that disgruntled landowners have no constitutional complaint simply because their property is assessed for real property purposes at a percentage of the price paid for it in a recent arm's length transaction, the leap by the Assessor and the Commission (the "Commission's Response"), in their Responses to the Appellants' Petition to this Court, see Assessor's Response, at pp. 25-30, Commission's Brief, at pp. 15-17, that such mere *dicta* somehow justifies the Assessor's discriminatory treatment of the Appellants is at the very least, simplistic and misplaced and more likely, misleading.

Both the facts and the legal logic of Allegheny, (*supra*), are so similar to those in the case at bar that it would appear almost impossible to reconcile a different result. Appellants in this case assert that the excessive and unequal Assessments are the result of a similarly intentional plan by the Assessor to discriminate against them. The result of the Assessor's intentional

actions is to value Appellants' property at a much greater portion of their true and actual value than the portion used for the comparable real property of others within Monroe County.⁸

Here, the Assessor's own admission and the Tax Department's testing clearly show that, generally, property tax values in Monroe County are suspect and clearly have been for years. Indeed, there has been an ongoing systematic and intentional under-valuation of real property not only in the immediate geographic vicinity of the Appellants' properties but throughout the county. The evidence in the record which supports this includes the Assessor's admissions of that deficiency and her purported remedies to cure it.

Specifically, the testimony and documentary evidence clearly shows that, for a number of years, the Monroe County Assessor's office has not been in compliance with applicable standards and tests applied by the Tax Department designed to assure that property is taxed uniformly and equally throughout the county. Tr., pp. 71-80; Assr's Exs. 5, 9; Ptrs' Exs. 5 - 9, 15-16. The evidence clearly reflects that the Assessor, due to her office's having clearly been, for several years, out of compliance with State standards measuring whether all properties were being treated equally and valued properly, attempted to resolve those disparities by selecting out the Appellants and their properties for special treatment. Tr. pp 83-86; Ptrs' Exs. 5-16.

Thus, because Appellants' properties were recently purchased, it was easier for the Assessor to substantially increase the appraisals for those properties, while continuing her

⁸ This Court has clearly provided that similar actions by other assessors in other counties at other times, requires a remedy for the Appellants herein which will allow for similar treatment of their properties, and does not necessarily require an increase in all of the other undervalued properties which are valued for tax purposes at a lesser percentage of true and actual/fair market value. The permitted remedy can be a decrease of the taxable values of the Appellants' properties to an appropriate range which brings them into conformance with the values of similar properties. See In Re U.S. Steel Corporation, 165 W.Va. 373, 268 S.E.2d 128 (1980), In Re Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649 (1959), and Allegheny, 488 U.S. 336 (1989).

intentional and systematic undervaluation of similar species of real property throughout the rest of Monroe County – even in the immediate vicinity of Appellants’ properties.

As shown, *supra*, the Walnut Springs properties, owned by Appellants and the subject of appeal in this matter, were specifically and intentionally selected out by the Assessor for discriminatory taxation by creating an entirely new neighborhood. Tr. pp. 95-98, 114-121. That action is at least as overt and intentional as the actions of the Assessor of Webster County in the Allegheny case. In fact, the degree of disparate tax valuations and resulting disparate tax liabilities, faced by the taxpayers in Allegheny, as a percentage of true and actual value, is not nearly as great as that presented by the case currently before this Court. Specifically, those other Monroe County taxpayers’ properties are valued on average at not more than 38% of fair market value, as opposed to the Appellants’ properties which are valued at an average of 150% of their fair market value.

Thus, West Virginia case law cited herein and the United States Supreme Court decision in Allegheny, clearly shows that the Appellants are entitled to the relief they requested, i.e., an appropriate reduction of the value of their properties for tax purposes to a percentage of true and actual that is in line with what evidence in the record reveals that other similar properties are valued for such purposes.⁹

⁹ The Appellants’ new-comer and non-resident status makes the Assessor’s discriminatory treatment of them all the more pernicious under the United States Constitution. U.S. Constitution, Amend V, U.S. Constitution, Amend. XIV, Section 5. Mountain America is a limited liability company, formed in 2004, that operates in West Virginia as a foreign entity whose purpose is to develop residential communities in Monroe and neighboring counties. Many of the other individual Appellants are either new-comers to West Virginia, or purchased their Walnut Springs lots to build second homes and presently remain non-residents of West Virginia. Given that similar communities i.e., Longview Estates, and other long-term residents of Monroe County were not taxed in the same manner as Appellants, the discriminatory actions of the Assessor reflects an unconstitutional bias against Mountain America, and each of the individual Appellants who are either new to Monroe County or who remain non-residents of West Virginia. Thus, this case presents the classic “Welcome Stranger” property tax discrimination that the United States Supreme Court unanimously rejected in Allegheny. Indeed, on many other occasions and in many other legal settings, the United States Supreme Court has found such discrimination as violative of the Constitution. See, Eg. Armco v. Hardesty, 469 U.S. 912 (1984) (finding, on Commerce Clause grounds, that no state may, in a discriminatory manner, tax the products manufactured or the business operations performed in any other state).

2. In this case, the Assessor's purported modest across-the-board increases of the taxable values of the property of other taxpayers would not seasonably cure the inequality with the taxable values she set for the Appellants' properties, even if the latter were frozen in the meantime.

In her testimony, the Assessor admits that she was aware of the systematic undervaluation of property in Monroe County. However, she claims that she attempted to alleviate years of intentional and systematic undervaluation of properties in Monroe County by undertaking annual across-the-board increases in order to increase generally all real property values in the County for tax purposes. Tr., pp 92-94, 112-115.

The serious flaws in this contention are several. Common sense dictates that if the base values at any beginning point are not fair, equal and uniform in proportion to fair market value as to all of the properties within a particular species, any equal across-the-board increase of all such properties will, by simple mathematical necessity, simply assure a perpetuation of that unfairness, inequality and non-uniformity and will, instead, assure that the inequality will never be remedied. The Assessor attempted to explain her across-the-board increase as follows:

Q [by Appellants' Counsel]. Let me ask you this question: There's been some testimony that the values, and the Property Valuation Commission has indicated that for ten years the actions in Monroe County were not up to snuff, also you had testified that under your predecessor assessor there were some problems that you tried to correct. Let's assume, before you became assessor, that the values of the properties were not correct, they were not fair and equal. By increasing everything by a set percentage, would you explain to me how that would accomplish fairness and equality?

A [by Assessor] It won't them first two years; it's going to take a while. Next year - -

Q. I'm sorry, go ahead.

A. Next year I will probably raise them again.

Q. Wouldn't you agree with me that if we have two pieces of property, and one of them is assessed 20 percent of fair market value, and the other is assessed at 80 percent of fair market value,

that when you raise all of them by a uniform percentage, all you are doing is perpetuating the inequality?

A. I'm raising them, and I'm going to have to keep doing a study to make sure those don't go over.

Q. Let me back up to my question. Wouldn't you agree with me that if you have a piece of property, starting at whatever base you want to pick – before you were assessor, let's go back to before you were assessor. A piece of property that was appraised at 40 percent of fair market value, and another that was appraised at 80 percent of fair market value, if you raise both of those properties by 6 percent, haven't you continued the inequality between the two parcels?

A. I guess. Tr., pp. 113-114.

The record reflects that the average property in the county is appraised for 47 percent of what it has recently sold for. Tr. p.15; Ptrs' Ex. 10. However, if, as she claims, the Assessor applies an annual "across the board" increase of six percent (6%) to bring her values in line with 2007 levels (even if she lowered and froze the values of the Walnut Springs properties to just 100% of 2007 levels in the meantime) absent any appreciation, it would take thirteen (13) years to achieve constitutional equalization. That is hardly the seasonable cure to temporary inequality that might be said to slightly mitigate the abject lack of equalization here.

Further, settled legal authority indicates that an equal across-the-board increase, within the same species of property, is an improper method of valuation for assessors in this State and violative of Section 1, Article X of the Constitution of the State of West Virginia cited above. See In Re Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649 (1959) and U.S. Steel, 165 W.Va. 373, 268 S.E.2d 128 (1980) (herein "U. S. Steel"), and also reported opinions by the Attorney General of the State of West Virginia, specifically excluding an across-the-board approach to increasing values for a particular species of property. 51 Op. of the Atty. Gen 542 (1965).

Therefore, by disregarding and misapplying the mandates of Allegheny and the foregoing precedents of this Court, the Circuit Court erred in failing to overrule the Assessments which, as applied to Appellants, violate their rights to equal protection of the law.

C. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, AND DISREGARDED THE FACTS OF THIS CASE, IN CONCLUDING THAT WEST VIRGINIA'S STATUTORY SYSTEM FOR REVIEW OF PROPERTY TAX ASSESSMENTS DOES NOT VIOLATE THE APPELLANTS' RIGHTS TO DUE PROCESS OF LAW.

1. The Appellants respectfully preserve their contention that the arrangement in W.Va. Code §11-3-24, whereby the County Commission reviews taxpayers' challenges to property tax assessments, facially violates their rights to due process of law.

With full respect and deference to the immediately dispositive legal significance of this Honorable Court's holding nine days ago, that the review of challenges to property tax assessments under W. Va. Code §11-3-24 is facially constitutional, see Woodlands, W.Va., November 5, 2008 (No. 33891), at *20, for the purposes of possibly necessary further appeals in this matter, the Appellants respectfully hereby preserve their assignment of error to the contrary. However, in doing so, given the Court's holding in Woodlands, and in the interests of time and space, the Appellants hereby refer the Court to the authorities cited and points made in the portions of their Petition expressly addressing that particular question.¹⁰

2. In concluding that West Virginia's statutory system for review of property tax assessments by the County Commission does not violate the Appellants' rights to due process of law, the Circuit Court erroneously disregarded the direct personal pecuniary interest the members of the County Commission had in the outcome of the Appellants' challenge of the Assessments.

In Woodlands, this Court held that the Commission's overarching interest, as the governmental body charged with superintendence of the fiscal affairs of the county, in the outcome of every challenge to its tax base, was not a sufficient conflict of interest to support a taxpayer's due process violation claim in deciding the outcome of such challenges. Id. at *20.

¹⁰ Appellants' Petition to this Court, Section V.C.1, pp. 26-28.

In doing so, this Court held that only a direct pecuniary interest – apparently personal instead of official in nature – could sustain such a claim. Id.

In so holding, the Court overlooked the direct, pecuniary interest the Commissioners have in the outcome of property tax assessment challenges by virtue of the express terms of the provisions of West Virginia's statutes, setting the compensation for those officials. Specifically, the Legislature found long ago that there should be "a direct correlation" between the amount of the assessed value of property in a county and the amount of the compensation to be paid its various elected officials, including county commissioners. W.Va. Code § 7-7-1.

Acting on that finding, the Legislature established a sliding scale of statutory compensation for county officials that rises in amount as the assessed valuation of the property in the county increases. W.Va. Code §§ 7-7-3 and 7-7-4. Moreover, as the evidence in this case indicates, by virtue of those statutory provisions, the salaries authorized for the members of the Commission, did, in fact, increase – in large measure because of the excessive Assessments they sustained against the Appellants.

Specifically, at the Hearing, the Appellants presented evidence based upon work performed by their expert, Todd Goldman, that demonstrates the foregoing point. *See* Appellant's Exhibit P-11, entitled "Exhibit H, Portion of Tax Appraisal Attributed to Walnut Springs." As the exhibit and supporting testimony explain, the assessed value of just the land in Monroe County increased from 2006 to 2007 by almost \$ 18 million, of which nearly 37 percent, or more than \$6.5 million of that one-year increase, is due to the increase of the Appellants' property at Walnut Springs. *See* Appellant's Exhibit 11, entitled "Exhibit H, Portion of Tax Appraisal Attributed to Walnut Springs", Tr., p. 34.

For the year in question, the total gross assessed valuation of all property in Monroe County (the measure used under W.Va. Code §§ 7-7-3 and 7-7-4 to classify counties and to set county officials' compensation), including land, improvements and personal property, for increased more than \$30 million over that total for the preceding tax year.¹¹ Under the cited statutory scheme, as a result of that increase in assessed values on all properties (approximately 20% of which was imposed on the Appellants), Monroe County moved from compensation classification 9 to compensation classification 8. W.Va. Code §7-7-3. Thus, as a result of their actions in upholding the assessed values set by the Assessor for 2007 taxes, each of the members of the County Commission became entitled to salary increases of \$660 for their part-time positions.¹²

Thus, the statutory scheme for compensation of county commissioners in West Virginia gives them a direct pecuniary interest in the outcome of property tax assessment appeals.

3. Even if any one particular aspect of the system by which the West Virginia statutes provide for the review of challenges to property tax assessments is not seen, in isolation, as violative of due process standards, the cumulative effect of the numerous aspects of that system – all prejudicial to taxpayers' interests – does, on its face and in practical operation, violate those standards.

The inherent institutional bias, against the Appellants and other taxpayers seeking review of their property tax assessments under West Virginia's statutes governing such matters, does not end with the role of the county commission. The statutory scheme itself demonstrates that virtually every aspect of it is strongly aligned in favor of any assessment being challenged.

¹¹ The grand total of the assessed value of all classes of property in Monroe County (taxable and exempt) for tax year 2006 was \$270,563,711 making Monroe County a Class 9 County as provided in W.Va. Code §7-7-3(b). 2006 Monroe County Real and Personal Property Books. The increase in the assessed value of all property (more than \$30 million) in Monroe County from fiscal year 2006-2007 to fiscal year 2007-2008, resulted in a total assessed value of over \$300,000,000 and, under W.Va. Code §7-7-3(b), made Monroe County for the 2007 tax year (the year at issue in this case) a Class 8 County. Id. and 2007 Monroe County Real and Personal Property Books.

¹² Starting in 2006, the statutory salary for the part-time position of a county commissioner in a Class 9 County was \$24,420, while the salary for a county commissioner in a Class 8 County was \$25,080, a difference of \$660. W.Va. Code §7-7-4(e)(5).

At issue in any tax valuation dispute is the Assessor's proposed taxable value of the taxpayer's property. Yet, during the adversarial stage of a hearing before the Commission sitting as the board of equalization and review, the statute directs the Assessor to "attend and render every assistance possible [to the commission] in connection with such [proposed taxable values]." W.Va. Code § 11-3-24. In effect, the Commission, sitting as the board, has, in the Assessor, a statutorily assigned advocate for its interests in maximizing its revenue, while at the same time the Commission is operating under the legal fiction that it is a neutral judge of the matter that directly affects those very interests.

Likewise, the elected county prosecuting attorney is, by law, the general legal counsel to the county commission. *See* W.Va. Code § 7-4-1. In the context of a hearing, of a taxpayer's challenge to the taxable value proposed by the county assessor for his property, before a county commission sitting as the board of equalization and review, both the county commission and the county assessor (a party litigant before the commission opposing the taxpayer) are entitled to call on the prosecuting attorney to assist them at that hearing. *See Pocahontas Land*, 172 W. Va. 53, 303 S.E.2d 691 (1983), *supra*.

Moreover, except in cases involving natural resource or industrial property, on appeals of decisions of the county commission, the prosecuting attorney is required to appear to represent the interests of the various property tax levying bodies, to-wit: the county, the State and the school district. *See* W.Va. Code §§ 11-1C-10(h), 11-3-25. The duplicity and conflicts inherent in the structured interplay of such multiple roles, of the county assessor and the prosecuting attorney with the county commission, fly in the face of the standard of a neutral hearing that due process demands.¹³ Beyond the inherent bias of the officials in charge of it, there are numerous

¹³ It should be noted that, like the members of the Commission, the Assessor and the Prosecuting Attorney, also have a direct, personal pecuniary interest in the outcome of challenges to assessed values, when the amount of

other aspects of West Virginia's system for review of property tax assessments which, separately, and collectively, also operate to deny due process to taxpayers.

Specifically, the West Virginia Constitution requires that, except for the effect of tax rate classifications based on usage, and certain exemptions, the taxation of property shall be equal and uniform throughout the State, and that property shall be taxed in proportion to its value to be ascertained by law. W.Va. Const. Art. X, § 1. As this Court has repeatedly held, "determining 'true and actual value' is the first step in taxing real property." Kline v. McCloud, 174 W. Va. 369, 372, 326 S.E.2d 715 (1985). Further, "[t]rue and actual value' means fair market value-what property would sell for if sold on the open market." Id. (citing W. Va. Code §11-3-1).

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

Integral to raising a challenge to a proposed taxable value on either ground is timely access to information about the true and actual values and proposed taxable values of other taxpayers' properties. As a practical matter, the former can only be ascertained by engaging the services of a professional appraiser to survey recent sales of comparable properties and the latter

their County's assessed valuation for all property can be raised enough to put them in the next higher statutory classification. W.Va. Code §7-7-4(e)(7).

typically requires the filing of a request under the Freedom of Information Act (FOIA) to actually obtain access to the assessor's proposed property books containing such data.¹⁴

Even if the essential information about other taxpayers' assessments was readily available, the time a taxpayer has to use it to prepare a challenge to the proposed taxable value of his property is unreasonably limited. Of course, a taxpayer will only be able to know the taxable value proposed for his property if he either: (a) receives a notice of an increased taxable value from the assessor as little as fifteen (15) days before the board of equalization and review first meets; or (b) inquires of the assessor once the property books are completed as late as the first day of February in any given year.

The Legislature has provided that county commissions sit as boards of equalization and review only during the month of February, thus leaving taxpayers with scarce time to prepare challenges to a taxable value once made known to them. The inadequacy of such an abbreviated opportunity for review often is exacerbated as the law allows the county commission to adjourn as a board of equalization and review as early as the fifteenth day of February.

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

¹⁴ None of these costly actions are within the means of most individuals and small businesses. Moreover, given the few weeks (or even days) between the time a taxpayer receives the earliest notice of the proposed taxable values of his own property and the time when he must present a challenge to that value, the practical opportunity to effectively use such data is virtually nil even if a taxpayer can afford to obtain it by such costly and inconvenient means. Thus, even in the case of larger, better-funded business entities, it is not so much the cost of such actions, but the brief time allowed to take them that make the opportunity to do so largely unavailing.

the unusually high burden of proof imposed on such a taxpayer, the actual prejudice of such time constraints is only compounded.¹⁵

The United States Supreme Court has held, “[t]he fundamental requisite of due process of law is the opportunity to be heard ... [with such hearing] at a meaningful time and in a meaningful manner.”¹⁶ In the present context, these principles of due process require that a taxpayer have timely and adequate notice detailing the reasons for the assessments, and a reasonable opportunity to prepare and present a challenge of the same with his own arguments and evidence to an impartial official. Clearly, that does not describe West Virginia’s system of review of *ad valorem* property tax assessments.

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

¹⁵ The immediate and predictable result, of compressing the period during which the board of equalization and review will hear taxpayers’ challenges, is to limit the actual time it allocates to hear and rule on each taxpayer’s challenge. Although practices vary radically across the fifty-five counties of West Virginia, it is common for the owners of residences or lower value properties to be given as little as fifteen minutes to present their cases to the boards of equalization and review.

¹⁶ Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) (holding that procedural due process requires that a pre-termination evidentiary hearing be held when public assistance payments to welfare recipient are discontinued and that procedures followed by city of New York in terminating public assistance payments to welfare recipients were constitutionally inadequate in: (a) failing to permit recipients to appear personally with or without counsel before an impartial official who finally determined continued eligibility and (b) failing to permit recipient to present evidence to that official orally or to confront or cross-examine adverse witnesses.)

No justice can be had where a taxpayer has inadequate time to prepare for the hearing and has inadequate time to present his case before the board of equalization and review.¹⁷

Finally, the right of taxpayers to obtain judicial review of property tax assessments is practically unavailing for various reasons. First, the Commission, sitting as a board of equalization and review, is not required to even issue a written decision – much less to provide any reasons for it. Second, the brief time to perfect the appeal (complete with the entire record including a transcript), to-wit: thirty (30) days from the adjournment of the board of equalization and review – undoubtedly prevents many taxpayers from appealing. W.Va. Code § 11-3-25.

Taken together, all of the prejudicial aspects of the West Virginia's property tax appeals system weigh heavily against the "appearance of justice." See Louk v. Haynes, 159 W. Va. 482, 223 S.E.2d 780 (1976) (finding failure of due process because the judge was impartial and failed to recuse himself). In Louk, 159 W. Va. at 500, 223 S.E.2d at 791, this Court quoted the United States Supreme Court:

'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a Possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of

¹⁷ While the Appellants in the immediate case were able to present extensive and persuasive evidence of the many errors in the Assessor's proposed taxable values of their property, that does nothing to alter the grim reality that, by the intentional design of the statutory system, for most West Virginia taxpayers there is entirely inadequate time to prepare their cases. Moreover, notwithstanding the extraordinary cost, effort and inconvenience these Appellants obviously endured to marshal their challenge, there can be little doubt from a review of the record made before the Commission that their opportunity to present that challenge was unduly constrained by the time allowed for the same.

justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (99 L.Ed. 11).' In Re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). (emphasis added)

Even if, taken in isolation, any one of the above-described prejudicial arrangements were not seen, alone, as enough to support a conclusion that the system lacks the appearance of justice, or violates due process requirements, cumulatively, they do. Some jurisdictions, including West Virginia, have recognized that prejudice may result from the cumulative effect of errors and that the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. See State v. Walker, 188 W. Va. 661, 425 S.E.2d 616 (1992), Syl. pt. 5.¹⁸

Here, the cumulative effects of the difficulty of obtaining essential information, the compressed time to prepare and present a challenge, the high burden of proof and standard of judicial review, the lack of an orderly process of appeal and the absence of any requirement for the institutionally-biased Commission to issue any written decision explaining its decision, at the least, constitute a cumulative denial of due process.¹⁹

¹⁸ ("Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.") (internal citations omitted).

¹⁹ It is well recognized that the familiar constitutional guarantees of due process of law do not involve a single set of rigid or static rules of procedure imposed on every circumstance where proposed government action puts an individual citizen's legal interests in jeopardy. See Cafeteria Workers v. McElroy, 367 U.S. 886, 894 (1961). Rather, they embody a flexible concept whereby the requirements for particular circumstances are determined by reference to the context in which they are applied. See Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

While the judicial discussion of factors considered in testing due process adequacy has been wide-ranging, there appears to be regular gravitation by the courts toward a three-dimensional, sliding scale standard in such matters. See Matthews v. Eldridge, 424 U.S. 319 (1976). Specifically, the courts have regularly looked to a triumvirate of factors which are to be concurrently weighed and balanced in each case where concerns about due process are raised. See Id. These factors are: (1) the nature of the individual interest to be affected by official action; (2) the risk of erroneous deprivation of such interest under current procedures and the efficacy of greater safeguards to reduce such risk; and (3) the government's competing interest in the particular function involved and in avoiding any fiscal or administrative burdens that greater safeguards would likely entail. See Id. at 335.

It is well settled that before a citizen is permanently deprived of tax dollars, he must be given notice and an opportunity for an impartial administrative tribunal to hear any objections to such taxation. See McGregor v.

For these reasons, in this and every other case under West Virginia's system, a taxpayer's rights to due process provided by the United States and West Virginia Constitutions are violated. Thus, it should come as no surprise that, in the case at bar, as described in detail in section D. *infra.*, the Commission executed the system's due process deficiencies in a manner that actually manifested their unconstitutional effect.

4. Practical considerations involving disruption of local government revenues should not and need not preclude this Court's declaration that, as proven in this case, the Appellant's rights to due process of law have been violated.

In its Response to Petitioner's Petition for Appeal here, the Commission argues that only the Legislature can remedy any inherent due process flaws in the property tax appeals system. See Commissioner's Response, at p. 17. Preliminarily, it should be noted that the Legislature will next be meeting in full, plenary session, starting on February 11, 2009, and that, in its 2008 session, a bill was introduced there, S.B.585, and remains under study by an interim committee of the Legislature, whereby many of the shortcomings of the present property tax appeals system would be addressed and cured. Moreover, time and again this Court has struck down, as unconstitutional, other statutory schemes and has issued its mandates regarding the same in a manner that allows the Legislature to timely respond with remedial legislation. One such example involves the administration of the very tax that is at issue here.

Specifically, in its July 2, 1982 decision in the case of Killen v. Logan Co. Comm., *supra*, this Court held, *inter alia*, that the provisions of former W.Va. Code § 18-9A-11, allowing property tax assessments to be set by county officials at anywhere between 50% and 100% of the true and actual value of property, violated article ten, section one of the West Virginia

Hogan, 263 U.S. 234, 237 (1923); Turner v. Wade, 254 U.S. 64, 67-68 (1920) (emphasis added). Moreover, the government's interest in avoiding disruption or interference with its revenue sources (the third Matthews factor) must be balanced against the risk of depriving a taxpayer of the right not to overpay his or her taxes (the second Matthews factor).

Constitution. In doing so, the Court recognized the practical difficulty in applying its ruling to either the 1981 taxes, with respect to which the case first arose, or to the 1982 taxes which had already been assessed by the time of this Court's ruling. Id., at 620, 707-708. As a result, this Court effectively made its July 2, 1982 Killen ruling prospective in effect, starting with taxes to be imposed in 1983, based on values, etc. to be established in the next succeeding months, but as of July 1, 1982, being only one day before its ruling was issued. Id.

Thereafter, later in 1982, the Legislature met in a succession of special sessions, adopting a subsequently ratified amendment to the State's Constitution, and, later, enacting implementing and other remedial legislation, (e.g. W.Va. Code § 11-1A-1 et seq., establishing a statewide reappraisal of property; 11-3-31, ratifying prior assessment practices, etc.). As evidenced by SB 585, *supra*, in this case, a comprehensive remedy for the constitutional flaws of the current statutory scheme is fully susceptible to legislative remedy and is already under active legislative consideration. Of course, the details of that remedy could, and should, be informed by the due process considerations this Court might specifically announce in affirmatively responding to the Appellants' claims here.

Accordingly, the obvious and significant practical implications of a ruling by the Court, that the current system of review of challenges to property tax assessments is unconstitutional, is not a legitimate bar to such a ruling. Moreover, no inconvenience or even substantial disruption of administrative functions can operate to defeat this Court's power and obligation to determine the constitutional rights of the citizens of this State. See Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

At the same time, under well-established judicial principles controlling the timing of the application of a court's precedential rulings that implicate a large portion, or even all, of the body

politic, notwithstanding the prospective application of a ruling generally, the Appellants, as the parties who raised the successful point of new law, are entitled to the full benefit of the ruling with respect to the immediate matter that would be the subject of their successful litigation. See Adkins v. Kline, 216 W. Va. 504, 607 S.E.2d 833 (2004).

Thus, it is respectfully contended that, even under the narrow view of due process requirements expressed in this Court's recent decision in Woodlands, the Appellants have proven that the statutory arrangements in this State for review of challenges to proposed property tax assessments are such as to enable the officials, who execute those arrangements, to do so in a manner that clearly violates taxpayers' rights to due process of law. As the following subdivision of this brief demonstrates, that is exactly what the facts show happened in this case.

D. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, AND DISREGARDED THE FACTS OF THIS CASE, IN CONCLUDING THAT THE PARTICULAR MANNER, BY WHICH THE COMMISSION USED THE STATUTORY PROCEDURES FOR REVIEW OF THE APPELLANTS' PROPERTY TAX ASSESSMENTS, DID NOT OPERATE TO EFFECTIVELY VIOLATE THE APPELLANTS' RIGHTS TO DUE PROCESS OF LAW.

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

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

Ellis, 145 W. Va. at 74, 112 S.E.2d at 644. The requirements of due process are unquestionably applicable to the proceedings at which taxpayers contest the valuation of their property for

property tax purposes before a county commission acting as a board of equalization and review. See In Re Eastern Associated Coal Corporation, 157 W. Va. 749, 204 S.E.2d 71 (1974); Pocahontas Land, 172 W. Va. 53, 303 S.E.2d 691 (1983).

1. The Commission unreasonably exacerbated the already too brief review period by adjourning *sine die* on earliest day allowed.

When the Commission ended its consideration of the Appellants' appeals on the earliest day it was permitted to do so, that being February 15th, the period of time allowed to the various Appellants, to receive the mailed notice sent by the Assessor, to notify the Board of their desire to appeal and to prepare evidence to support their challenges of the proposed increases in the taxable values of their properties, was unreasonably compressed. The prejudice of that compressed time frame was further exacerbated by the fact that many of the Appellants' mailing addresses, listed for purposes of notification, are out-of-state addresses.

The compressed three-week period, defined as such by the Commission's arbitrary decision to adjourn *sine die* on February 15th, required that the Appellants receive their notices of increased assessments, obtain information regarding those assessments and the process by which it can be appealed, obtain counsel and prepare and present evidence in their defense, all within a three weeks. As such, it was a process which the Appellants assert that both by its design and nature, and by the Commission's abuse of it, failed to respect and protect, in any meaningful manner, the due process rights of the Appellants presenting their challenges to the Assessments.

2. The Commission's self-view as an adversarial party-opponent to the Appellants confirms its bias against them.

Even more damaging to the Appellants' due process rights was the Commission's filing of an answer to the Appellants' Petition for Appeal to the Circuit Court. The Commission was not a party to the proceedings before itself sitting as the Board of Equalization and Review, but, instead, pursuant to West Virginia law, it was the tribunal charged with initial jurisdiction to

fairly and objectively determine the merits of Appellants' claims. The very act of filing an answer to the Petition by the Commission demonstrates a bias and utter lack of impartiality in overt violation of Appellants' due process rights.

Moreover, the parts of the County Commission's answer, challenging the status of all but one of the Appellants as appealing parties, and attempting to rewrite its prior final Decision, by asserting new "defenses" of its actions, evidences a blatant lack of impartiality in this matter from its onset. As such, it must be seen as an unconstitutional attempt by the Commission to frustrate Appellants' due process rights and to unseasonably create a rationale for its Decision.

This Court has made clear that an appeal pursuant to W. Va. §11-3-25 must be determined solely upon the original record of the proceeding taken below. See Gilbert v. County Court, 121 W. Va. 647, 5 S.E.2d 808 (1939); In Re Tax Assmt. Against Stonestreet, 147 W. Va. 719, 131 S.E.2d 52 (1966); In Re Assmt. of Real Estate of Morgan Hotel Corp., 151 W. Va. 358, 151 S.E.2d 676 (1966).

Accordingly, its subsequent Decision-embellishing answer filed by the Commission is inappropriate and untimely given its having adjourned *sine die* six weeks earlier as a Board of Equalization and Review. To hold otherwise would be to further deny the Appellants' due process rights, inasmuch as it, in effect, permits an additional pleading by the Commission, acting in its unique, self-anointed hybrid litigant/arbitrator role, to which Appellants were never afforded any opportunity to respond in the first instance.

3. By using a particularly prejudicial summary procedure, the Commission raised other taxpayers' assessments after the hearing on the other Appellants' assessments.

If, while a county commission is sitting as a board of equalization and review, it proposes an increase in a property's taxable value as set by the assessor, such increase may also be implemented after giving the affected property owner as little as five (5) days prior written

notice. W. Va. Code §11-3-24. The Commission exercised this utterly unfair option in this matter under highly suspect circumstances.

On the very next day following the February 7, 2007 hearing before it, the Commission and the Assessor took yet another step which serves to prove the Appellants' assertions of intentional and systematic discrimination in the Monroe County 2007 property tax valuations.

Esther Halperin, the 83-year old mother of Appellant and Walnut Springs developer, Jonathan Halperin, had purchased a parcel of land at Walnut Springs totaling 18.638 acres (identified as Parcel ID 07-15000500000000). On January 9, 2007, Ms. Halperin received a notice from the Assessor setting the 2007 taxable value of her property at \$6,480.00. However, one day after Hearing, the Commission, issued her a new "Notice of Increase in Assessment." This new "assessment" for the same property raised its taxable value to an incredible \$302,160.00 with no explanation to defend the more than 46-fold increase.²⁰

With regard to procedural due process, this Court most recently held that "[t]he failure of [Bayer Corporation] to notify the Prosecutor *before* the application [for relief in the county commission for erroneous assessments] was heard was a direct violation of West Virginia Code §11-3-27." State of West Virginia el re. Prosecuting Attorney of Kanawha County, West Virginia, v. Bayer Corporation, W.Va., November 5, 2008 (No. 33871), at *12.

In so holding, the Bayer Court, *quoting* Cremeans v. Goad, 158 W. Va. 192, 195-196, 210 S.E.2d 169, 171 (1974) reiterated that:

²⁰ Ms. Halperin, who purchased her lot in 2005 for \$40,000 (less than 1/7 of the Assessor's revised value), was not the only Walnut Springs owner singled out for a subsequent unfair, unequal and, perhaps, malicious tax value increase – a "Walnut Springs Penalty" of sorts. Two (2) other Walnut Springs property owners, William and Carol Matthews, also received a new "Notice of Increase in Assessment" also dated February 8, 2007, informing them, without explanation, that the tax value for their 6.25 acre property had been changed, from an initial value proposed by the Assessor in January of 2007 of \$8,340.00, to \$100,620.00. Like Ms. Halperin, the Matthews had not altered their lot at Walnut Springs in any way since January of 2007. They simply appear to be the victims of the systematic and intentional discriminatory plan to single out Walnut Springs property owners for excessive tax values.

The original movants in this case were given almost no notice of a hearing, and had no time to prepare for it. This is a denial of procedure due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article III, Section 10 of the Constitution of West Virginia.

Bayer, at *12. Esther Halprin and others were denied the very rights set forth above.

Thus, the Circuit Court erred in sustaining the Commission's actual and unconstitutional abuse of its statutory authority to deny due process to the Appellants.

E. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN DENYING THE RIGHT OF ALL BUT ONE OF THE APPELLANTS TO ANY JUDICIAL REVIEW OF THE DECISION OF COMMISSION SUSTAINING THE TAXABLE VALUES OF THEIR PROPERTY.

1. The names of each Appellant was contained in the parties' express stipulation in the record which was an integral part of the Petition for Appeal that the Circuit Court ordered the Clerk to file.

Notwithstanding the several different occasions and varied means by which all of the Appellants are clearly identified in the record below, and the specific stipulation identifying those persons comprising the Appellants, the Assessor and the Commission persist in contending that the non-Mountain America Appellants were not parties to the Circuit Court appeal.

The substance of the Commission's motion to deny those Appellants' right of appeal further demonstrates its complete lack of impartiality, its overt bias against Appellants, and its cynical and aggressive manipulation of rules that are, by design, undeniably prejudicial against taxpayers. Both the Commission and the Assessor disingenuously allege that they "cannot identify" which 'individuals and entities' other than Mountain America LLC properly prosecuted an appeal." See Commission's Response, at pp. 14-15, Assessor's Response, at 15-17.

The actions of the Commission and the Assessor belie such a statement and are absurd. Prior to the Hearing, counsel for Appellants presented copies of the assessment notices for each party appealing the matter. It is beyond challenge that, as the detailed description of the

proceedings below disclose, the record of this matter contains extensive, detailed and jointly stipulated proof of the identity of each of the Appellants as such. *See supra*, n.1.

Moreover, it is well established that stipulations are binding upon the parties who make them, provided that they are not contrary to law, particularly where, as here, the Appellants, the prejudiced parties, have no further opportunity to respond and where such an inherent bias exists against any taxpayer appealing an assessment before a county commission.²¹

By the very nature of this unique type of proceeding under West Virginia law the Appellant's petition to the Circuit Court included, as an integral component thereof, the record which adequately identifies the names and parcel numbers of all appealing parties. W.Va. Code §11-3-25. Given the numerous notices of the parties filed with the Commission and the existence of the stipulation that was initiated by the Commission itself, any response by the same Commission now questioning the existence or the name and parcel numbers of the parties defies logic, further demonstrates its bias against the Appellants and the adversarial role taken by a tribunal that is required, by due process standards, to be impartial.

2. The Rules of Civil Procedure do not apply when the Circuit Court is exercising its jurisdiction as an appellate court, and, even if they did, they would not operate to deny the Appellants' right of appeal in this case.

²¹ See Norfolk Nat. Bank of Commerce and Trusts v. Comm'r, 66 F.2d 48, 50 (4th Cir 1933) ("But the [United States] Board [of Tax Appeals] on its part is bound to accept as true the facts stipulated by the parties, and if it fails to do so, and makes a finding contrary to the evidence or the necessary inferences there from, it commits an error of law which the court has power to correct."); United States v. Saunders, 886 F.2d 56 (4th Cir. 1989) (holding that absent exceptional circumstances, pretrial stipulations are binding upon the parties who make them); Carolina Stevedoring Co. v. Davis, 1999 U.S. App. LEXIS 22102 (4th Cir. 1999) (unpublished) (finding that the parties and the court are bound by stipulations or concessions of fact made below); Richardson v. Director, Office of Workers' Compensation Programs, U.S. DOL, 94 F.3d 164 (4th Cir. 1996) (holding that stipulations and admissions are binding on the parties and the court on appeal as well as at trial) (emphasis added). See also Quest Medical, Inc. v. April, 90 F.3d 1080, 1087 (5th Cir. 1996) ("Under federal law, stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them, unless manifest injustice would result there from or the evidence contrary to the stipulation was substantial.").

The Circuit Court sustained the Commission's motion to bar all but one of the Appellants' right to appeal on the basis that Rule 10 of the West Virginia Rules of Civil Procedure (the "Rules") requires that every initial pleading shall name all parties thereto within its four corners. Thus, the Circuit Court reasoned, since this matter was initiated as a petition for appeal, the petition should be held to the same requirements of the aforesaid rule.

The Rules do not apply to property tax appeals [*See* Rule 81(a)(1)]. *See Haines v. Kimble*, 654 S.E.2d 588; 2007 W.Va. LEXIS 60, Docket No. 32844 at page 20, footnote 7. Furthermore, the Commission's counsel cites no West Virginia authority for its position that the Rules are applicable – other than the Rules which are silent on the question.

Moreover, even if the Rules would apply, Appellees' argument fails since it is clear that a petition for appeal is not the same thing as a complaint in a civil action where an action is initiated and the parties are first identified. In the unique proceeding involving a petition for appeal of the ruling in an initial proceeding to the Circuit Court, the parties have already been identified in the proceedings below and the petition for appeal is required to include said record as an integral part of that pleading. W. Va. Code §11-3-25; In re Tax Assmt. Against Stonestreet, 147 W. Va. 719, 131 S.E.2d 52 (1963).

This proceeding was initiated in the lower tribunal (the Commission sitting as a Board of Equalization and Review) and the parties to it have been clearly identified. The petition for appeal clearly indicates in its first paragraph that the appeal is being taken by all of the Appellants who were identified by the record submitted as part of their appeal to Circuit Court. Even if the Rules were applicable, Rule 10(c) also defeats the Commission's argument by its language that reads as follows:

"Adoption by reference; Exhibits" – Statements in a pleading may be adopted by reference in a different part of the same pleading or

in another pleading or in any Motion. A copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes.” (underscore supplied)²²

For these reasons, the Commission’s assertion that all of the Appellants are not clearly identified within the four corners of the Petition is in error. All of the Appellants are identified within the four corners of the Petition which includes the record below as part of the Petition. The Appellants are identified by name and real property parcel in Exhibit J-1 to the February 7th hearing transcript and further by a Joint Stipulation of the parties below.

The Commission cited the rulings of other courts to support its position that the sole party perfecting an appeal in the matter before the Circuit Court was Mountain America, LLC. In sustaining that position, the Circuit Court relied on Challice et al. v. Clark, 175 S.E. 770 (Supreme Ct. Va 1934) which is clearly not applicable and is easily distinguishable for several reasons, to-wit: (1) Challice is not binding authority in West Virginia; (2) paragraph one of the Petition expressly identifies the Appellants as Mountain America, LLC and several dozen other individuals and entities owning real property in Monroe County, West Virginia; and (3) paragraph six of the Petition includes within the Petition the record below which is, pursuant to West Virginia law, a necessary and required part of the Petition for Appeal for this the unique type of appeal. *See Stonestreet*, 147 W.Va. 719, 131 S.E. 2nd 52 (1963)].²³

²² The record below, while it could easily be referred to as an exhibit, is in fact pursuant to West Virginia law much more than an exhibit. In this unique type of appeal, it is required to be filed as a part of the petition for appeal. W.Va. Code § 11-3-25. While Appellants assert that paragraph six of their petition for appeal is adequate to incorporate the record as part of the petition, Appellants believe even that “incorporation” is not necessary in as much as West Virginia law designates the record as part of the petition. There can, therefore, be no conclusion but that the identification of all Appellants is adequate, clear, and unambiguous.

²³ Moreover, in Challice, it is unclear whether it was even possible for the appellate court to determine whom were the parties who the party was referring to in her pleading when she used the term *et al.* It also appears from a reading of the decision that perhaps the party in Challice was attempting to include, within her application for appeal, parties who did not even participate in the dispute below except for an attempt to intervene after the case in its entirety had been completed, but for the issuance of a final order. These extremely pertinent factors clearly would distinguish the Virginia court’s decision in Challice.

3. Even one party with standing is entitled to obtain equalization of the assessments of all taxpayers in a county.

Even if Mountain America were the only party which had perfected its appeal rights, because of the unique nature of the type of proceeding before the Circuit Court, and applicable case law surrounding these types of proceedings, that single Appellant has the clear right to contest and challenge the assessments of all of the other Appellants. The Appellants herein, including Mountain America, are, in essence, asserting that their rights pursuant to Article X, Sec. 1 of the West Virginia Constitution, as recognized by this Court in Pocahontas Land, et al., 172 W.Va. 53, 303 S.E.2d 691 (1983) and Tug Valley Recovery Center, Inc. v. Mingo County Commission etc. et al., 164 W.Va. 94, 261 S.E.2d 165 (1979), can only be preserved if all real property in Monroe County is taxed equally and uniformly.

Mountain America and all of the other Appellants, as a primary part of their Petition for Appeal, asserted that their properties are unconstitutionally valued for tax purposes at a percentage of fair market value far in excess of the taxable values assigned to real property generally in Monroe County. The only remedy for such a claim, available to the Circuit Court, would be to lower the taxable values of the property of all Appellants, including Mountain America, to a range which is in conformity with and similar to the tax values of other real property in Monroe County. In fact, this is the relief which was requested by Appellants below and is now prayed for from this Honorable Court by Mountain America and all other Appellants.

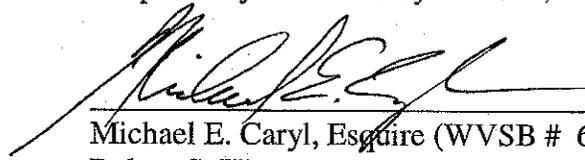
Thus, the Circuit Court erred in granting the Commission's motion to bar the appeals of all of the Appellants except Mountain America.

VI. CONCLUSION

In light of the record of this matter and the foregoing legal points and authorities, it is respectfully submitted that the Assessments of the Appellants' property in Monroe County are

unequal, excessive, substantively unconstitutional and were determined by unconstitutional procedures. As such, the Appellants respectfully submit that the Order of the Circuit Court should be overruled and reversed, and that the Assessments should be lowered so that they represent no greater percentage of their recent sales prices than is the average of that same measure for all real property in Monroe County for 2007 *ad valorem* property tax purposes.

MOUNTAIN AMERICA, LLC ET AL
Respectfully submitted by Counsel,



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CERTIFICATE OF SERVICE

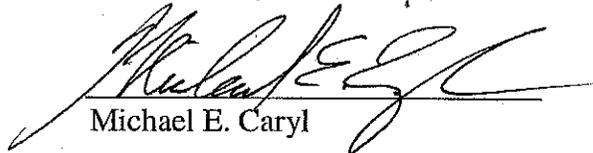
I, Michael E. Caryl, counsel for Appellants, do hereby certify that I have served the foregoing "*Appellant's Brief*," by mailing a true and exact copy thereof by first class United States mail, postage prepaid, upon the following:

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