

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOUNTAIN AMERICA, LLC, ET AL.

COPY

Appellants

Case No. 34426

v.

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

Appellees

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APPELLANTS' REPLY BRIEF

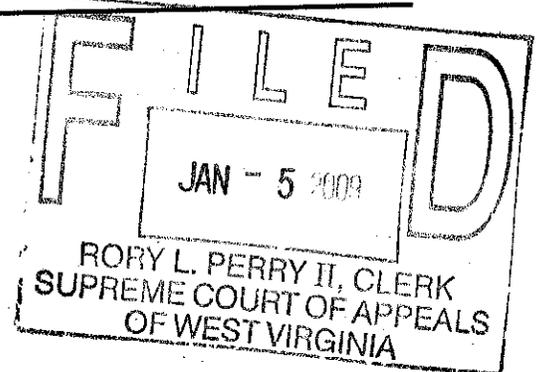
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Respectfully presented  
by

Michael E. Caryl, Esq. (WV Bar No. 662)  
Robert S. Kiss, Esq. (WV Bar No. 2066)  
Heather G. Harlan, Esq. (WV Bar No. 8986)  
BOWLES RICE MCDAVID GRAFF & LOVE LLP  
600 Quarrier Street  
Post Office Box 1386  
Charleston, West Virginia 25325-1386

Appellants' Counsel

January 2, 2009



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## ARGUMENT

I. THE ASSESSOR'S 2007 ASSESSMENTS OF THE APPELLANTS' PROPERTIES ARE CLEARLY ERRONEOUS BECAUSE THEY ARE NOT EQUAL AND UNIFORM WITH THE ASSESSOR'S 2007 ASSESSMENTS OF OTHER COMPARABLE PROPERTIES IN MONROE COUNTY.

A. To be valid, *ad valorem* property tax assessments of particular properties must be equal and uniform and in the same proportion to their value as all other properties.

It is a fundamental principle of law 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 mandates that, with certain express exceptions not applicable here, "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 (Emphasis added). 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.*

Simply put, *ad valorem* property tax assessments in West Virginia cannot be valid if they are shown to be not equal and uniform or not in proportion to the assessments of other taxpayers' property. Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia, 488 U.S. 336 (1989); In re Kanawha Valley Bank, 144 W.Va. 346, 109 S.E. 2d 649 (1959).

However much the Appellees would apparently prefer that this principle – of "equal and uniform" taxation of property "in proportion to its value" – would not apply, as demonstrated by the attempts in their respective briefs to avoid it, that essential foundation of *ad valorem* taxation of property in West Virginia must be honored by this Court. Thus, in asserting the Appellants' failure to show that the assessments of their properties, as determined by the

Assessor and upheld by the Commission ("the Assessments"), are not clearly erroneous, the Appellees fail to directly and effectively address, much less rebut, the overwhelming proof presented by the Appellants that the Assessments are not equal and uniform, and not in proportion, with the values reflected in the assessments of other property in Monroe County.

Instead, in an attempt to avoid that inevitable conclusion, the Appellees contend that the Assessor's segregation of the Appellants' properties into a separate "neighborhood" somehow justifies her discriminatory treatment of them. However, as shown in the following subdivision, neither the facts nor the governing rules of law support the Assessor's actions in that regard.

- B. The Assessor's segregation of the Appellants' properties into a separate "neighborhood" for assessment purposes was arbitrary and improperly based on illegitimate considerations and on anticipated, but currently non-existent factors.

To justify her failure to equalize the Assessments of the Appellants' properties in the Walnut Springs Mountain Reserve area (Walnut Springs) with other assessments in Monroe County, the Assessor designated the former as a separate and distinct neighborhood. Now, in her brief, she claims to have relied on the advice and guidance of officials of the West Virginia Tax Department, including its Administrative Notice 2006-16, in making that designation. Assessor's Brief, pp. 20 and 30. However, there is nothing in her testimony that refers to the Notice, or that reflects her awareness, much less understanding, of it.

By contrast, as the following shows, the Assessor's designation of the Appellants' properties as a separate neighborhood was, apparently, based on her consideration of both illegitimate and non-existent facts and on her ignoring other appropriate facts. As such, her segregation of Appellants' properties into a separate neighborhood was not in accord with the requirements for the same as described in Administrative Notice 2006-16.

Specifically, that Notice provides that “[t]he local Assessor divides his or her county into ‘neighborhoods’ giving consideration to similarities such as parcel size, roads, topography, costs, type and quality of improvements for land pricing.” Id. (Emphasis added). In addition, the Notice includes the definition of a “neighborhood” as being “a geographical area exhibiting a high degree of homogeneity in residential amenities, land use, economic and social trends and housing characteristics.” Id.

Implicit in the determination, of which properties to include in a particular neighborhood, is the conclusion that the properties included in that neighborhood are more similar to each other with respect to the listed characteristics than they are to other properties in the same vicinity.

Importantly, while the listed characteristics are for the ultimate purpose of “land pricing,” the characteristics themselves – to be considered in distinguishing the included properties from others not included – refer to parcel size, roads and topography, to the costs, type and quality of improvements and to the homogeneity of residential amenities, land use, economic and social trends and housing characteristics. Thus, in determining what properties are in a neighborhood, the Assessor should look to common features of the subject land such as the size of lots, its topography and vehicular access, and to the features of the improvements and amenities on it. Moreover, it is clear that, except for the reference to “economic and social trends,” the current – as opposed to anticipated future – circumstances with respect to such features are what the Assessor is to consider in her neighborhood determination.<sup>1</sup>

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<sup>1</sup> At the onset of what may soon be called the “*First Great Depression*,” this Court recognized the legitimacy of a reviewing court’s consideration, “on appeal from board of review in matters of taxation,” of “general business conditions.” Central Realty Co. v. Board of Equalization and Review, 110 W.Va. 437, 158 S.E. 537 (1931). Of course, as the entire world is now painfully aware, the economic and social trends relating to all new residential developments, including the Appellants’, as of July 1, 2006, were characterized by on a steep, downward spiral in values that persists to this day. See “Economic and Fiscal Implications for Metro Area: The Mortgage Crisis” at \*1-2, prepared by Global Insight, Inc. for the United States Conference of Mayors and the Council for the New American City, November, 2007 at [www.usmayors.org/metroeconomies/1107/report.pdf](http://www.usmayors.org/metroeconomies/1107/report.pdf).

The Assessor's determination, that the Appellants' properties should be separated from all others in Monroe County, violates those requirements of the neighborhood determination process in a number of ways. First, she did not include in the new neighborhood identical contiguous or proximate properties with similar parcel sizes, roads, topography, etc.. Tr., p 116-117.

Todd Goldman's testimony and Petitioners' Exhibit 8, demonstrate such discriminatory treatment in substantial detail. Specifically, the Exhibit identifies dozens of properties which are either contiguous, or in close proximity, to Walnut Springs. The Assessor admitted in her own testimony (*see* Tr., p.117) that these properties basically had the same physical characteristics and limited development status as those in Walnut Springs. In addition, such other properties have the same paucity of actually constructed dwellings on them as did most of the parcels in Walnut Springs.<sup>2</sup>

However, since those highly similar and contiguous, or closely proximate, properties were just outside the arbitrarily drawn geographic confines of her newly created Walnut Springs neighborhood, the taxable values the Assessor would set for them were not anywhere near the average of 152% of true and actual values she assigned 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; Petitioners' Exhibit [hereinafter "Ptrs' Ex."] 11.

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<sup>2</sup> See Appellants' Reply Brief Exhibit A on which are compiled the only amounts in the "Improvements" column for the entries in the 2007 Monroe County Land Book (Petitioners' Exhibit 13) associated with the property owner names, parcel numbers and tax map numbers of the Appellants' properties and of the adjacent properties identified on Petitioners' Exhibits 3 and 8.

Todd Goldman's testimony and the related exhibits, 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 far more established residential neighborhood in Monroe County. Tr., pp. 17-19, 32-33, 38-39; Ptrs' Ex. 9. Longview Estates is a subdivision in Monroe County that has far 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.

Second, the only rationale the Assessor offered, for designating the Appellants' properties as a separate neighborhood, were the relatively higher prices for which they had been recently transferred – the classic “welcome stranger” approach that the United States Supreme Court *unanimously* rejected in Allegheny Pittsburgh Coal Co., *supra*. Specifically, at the hearing the Assessor was asked “[w]hy did you decide that [the Appellants' property in Walnut Springs] is the neighborhood, as opposed to some larger geographic area?” Tr., p. 116. To that fundamental question, the Assessor's complete response was: “Because this is the only area that sold as high as they have in our county. Nothing else in our county is selling like this, so I had to.” Id.

Thus, instead of properly applying the neighborhood determination procedures requiring the use of the various land and improvements factors, all as directed by the Tax Department in Administrative Notice 2006-16 for the purpose of land pricing, the Assessor used nothing but land prices to determine the new neighborhood.

Moreover, the record reflects that the creation of the new neighborhood for the Appellants' properties was undertaken by the Assessor without her being capable of

demonstrating even a basic understanding of the correct neighborhood valuation methodology generally, or applying it in a uniform manner to other comparable neighborhoods in Monroe County. Tr., pp. 119-122.

Likewise, in their respective briefs, the Appellees would also defend such disparate, arbitrary and improper treatment by: (1) suggesting that amenities, which may, in the future, be developed in Walnut Springs, distinguish its properties from others in Monroe County today; and (2) defining the Walnut Springs neighborhood based on parcel pricing comparisons instead of on the comparability, with other properties in the county, of its actual current land features and similarly limited improvements.

Specifically, in the Assessor's brief, it is contended that the references in the restrictive covenants to contemplated future features, such as private roads and underground utilities, support the Assessor's segregation of the Appellants' properties as they existed on July 1, 2006. Assessors' Brief, p. 20. The Commission agreed, citing the Circuit Court's conclusion, erroneously stated in the past and present tenses, that lots in Walnut Springs "have been developed and contain many amenities not available on the adjoining lands and are only available in the new neighborhood..." Commission's Brief, p. 16.

In fact, the record is clear that as of that official assessment status date, no such amenities existed over the greatest portion of the Appellants' properties. Tr., p. 117; Appellants' Reply Brief Exhibit A. Nevertheless, the Appellees would allow the Assessor to abuse her discretion in designating neighborhoods, and to, thus, avoid application of governing rules of equalization, by referring to false distinctions between current circumstances of other properties in Monroe County and the possible future circumstances of the Appellants' properties in the new neighborhood.

The principle of law – prohibiting consideration of possible future developments in current valuations – is expressly manifested in the West Virginia statute governing the matter. 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.

However, the County Commission in its brief argues that the Appellants are not entitled to the benefit of any protection from premature undeveloped land valuation increases pursuant to W.Va. Code §11-3-1b, because of the failure of Appellant, Mountain America LLC, to record a plat of all its property in Monroe County. This is a clear misreading of the applicability of the statute and the logic for its passage by the Legislature in the first instance.

Implicit in the statutory rule is the long-standing policy that future use cannot be utilized for tax appraisal purposes until that potential use actually occurs. That is also why the highly subjective “highest and best use” approach to classifying property for tax appraisal purposes has been effectively rejected in the State Department of Revenue’s legislative regulations applicable to this matter.

Specifically, those regulations unambiguously direct that “[p]roposed land use may not be used as a basis for valuation until the actual use has changed to correspond with the proposed use.” 110 Code of State Regulations, Series 4, § 5.1. As a result, in recognizing this fundamental principle of West Virginia law in regards to the valuation of property for tax assessments, it should be apparent that the principle is even more compelling when no plat has been recorded.

Moreover, in enacting the subject statute, the filing of a plat was not intended by the Legislature to serve as insulation or a safe harbor for taxpayers. Rather, the passage of §11-3-1b occurred because assessors began utilizing the identification of specific property, for future

residential use, as a basis to increase such property's tax appraisal prior to the occurrence of the future identified use.

Contrary to the County Commission's argument that the utilization of § 11-3-1b provides a safe harbor to taxpayers, it was, instead, a statute promulgated and passed in order to preclude assessors from undertaking an action which general policy already prohibited under West Virginia law; to-wit: that the consideration of potential future uses of property as a factor in current valuations is not permitted.

Thus, in establishing a separate new neighborhood only for the Appellants' properties, the Assessor singled them out for taxation that was neither equal nor uniform with comparable properties in Monroe County. Moreover, the implication by the Assessor and the Commission, in their briefs, that the Assessor's creation of this purported "new neighborhood" was somehow an objective process the Assessor routinely applied throughout Monroe County, is inconsistent with her own testimony revealing a serious lack of understanding about the neighborhood designation process. Tr., pp. 96-97; 119-121.

The record also reveals that the requirements of the neighborhood designation process were not the only aspects of proper State assessment procedures that the Assessor failed to properly apply. Specifically, throughout her own tenure in that office (not to mention the tenure of her predecessors), the State Tax Department's standards for valuation accuracy and equalization, as manifested in its various statistical tests, were virtually never satisfied. Tr., pp. 71-80; Assessor's Exhibit (hereinafter, "Assr's Exs.") 6 - 8; Ptrs' Exs. 15 -16. As the following subdivision reveals, the Assessor's attempted explanation for such embarrassing results, and the Circuit Court's condonation of them, are wholly inapposite and substantively flawed.

- C. The Assessor's abysmal failure to meet mandatory State equalization standards belies her purported compliance with State assessment practices.

Perhaps the Circuit Court's most erroneous and inapposite conclusion was that "the Assessor acted in conformity with the statutory authority, state regulations, and case law pertaining to her position as a county Assessor and in doing so, she valued the property appropriately within the guidelines prescribed by the West Virginia Code." Order, dated January 25, 2008.

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. Specifically, over that time, the Assessor's office regularly failed several appraisal tests conducted by the Tax Department pursuant to the latter's oversight responsibilities. Assr's Exs. 6 - 8; Ptrs' Exs. 15 - 16.

Those tests were designed to reflect, in the 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, subsequent 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.<sup>3</sup>

Indeed, the Assessor's testimony, about the methodologies she purportedly followed, shows that she clearly did not understand the nature of her statutorily imposed duties, or the standards applied to measure her performance of those duties, and, as a result, the Assessments were exposed as lacking the equality and uniformity required by the West Virginia Constitution. This Court has held that, 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 In re: Tax Assessments of Foster Foundation's Woodlands Retirement Community*, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E. 2d \_\_\_ 2008 WL 4868290, W.Va., November 05, 2008 [No. 33891] ). Here, the unrefuted evidence of the non-uniform and unequal results of the Assessor's determinations of the taxable values of properties in Monroe County, as manifested by the State test results, is immutable proof that her methods in making those determinations were neither equal nor uniform, nor in proportion to the values of those properties.

First, when questioned about the reported results of those tests (Assr's Exs. 8-9, and Ptrs' Exs. 15-16), the Assessor could not even 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

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<sup>3</sup> 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.

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.

Instead, the Assessor's testimony blamed 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 truth, subsequent data from the State 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 Appellants' Circuit Court brief). Indeed, in her brief, the Assessor acknowledges the historic undervaluation of real property in Monroe County. Assessor's Brief, p. 3.

The Assessor's attempt to blame her own performance deficiencies, on sales activity involving 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. Furthermore, 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.

While, in her brief, she claims, without demonstration, that the values she determined for the Walnut Springs properties were within 97.46 % of their actual recent selling prices, the flawed assumption underlying that contention is that the Walnut Springs neighborhood

designation is valid and that consideration of the percentages of taxable values, to recent sales prices for other comparable properties in Monroe County, are not. Assessor's Brief, p. 23.

Clearly, such circular and inherently contradictory reasoning does nothing to explain the Assessor's persistent failure to satisfy the State tests for uniform, equalized and accurate assessment results. Further, 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. As if the abysmal record of her office in terms of State test results were not enough to demonstrate it, the 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.

Accordingly, the Circuit Court's rationale for sustaining the Assessments, on the basis of its finding that the Appellants failed to prove that the Assessor was out of compliance with applicable State appraisal regulations, is sharply at odds with the record of this matter.

More importantly, such a holding is, itself, ill-conceived because the Assessor's first obligation is to assure the compliance of her Assessments with the equal and uniform requirements of the Constitution. Indeed, no purported degree of compliance with the essentially clerical functions of mechanically entering purely objective data, as required by the State's mandated procedures, can serve to excuse the Assessor's on-going failure to satisfy each and every appraisal accuracy and equalization standard applied by the Tax Department.

As noted by the Supreme Court of Nebraska,

The rules as to uniformity and equal protection of the laws apply not only to acts of the legislative department but also to the valuation by the assessing officers. Discrimination in valuation, where it exists, does not necessarily result from the terms of the tax statute, but may be caused by the acts of the taxing officer or officers.

Constructors, Inc. et al v. Cass County Board of Equalization, 258 Neb. 866, 606 N.W.2d 786 (2000) (citing 1 Thomas M. Cooley, *The Law of Taxation* § 302 (4th ed.1924)). Thus, the Circuit Court erred in finding that the Assessor followed West Virginia law in determining the Assessments.

The following subsection of this brief explains, in detail, how the Appellants' evidence, showing the Assessor's intentional and systematic over-valuation of their property and her intentional and systematic under-valuation of other Monroe County properties, is compelling and essentially unrefuted.

- D. The proof of the Assessor's unequal assessments of the Appellants' properties, presented by their expert witness in the form of comparable sales statistics, was proper, relevant, compelling, un rebutted and conclusive as to the error of those assessment.

In its brief, the County Commission asserts that the Appellants' expert witness, Todd Goldman, failed to give an opinion on the value of their properties. Commission's Brief, p. 13. Likewise, the Assessor argues in her brief that the Appellants failed to prove, through Mr.

Goldman, or otherwise, what was the true and actual value of their respective properties. Assessor's Brief, p. 23. The County Commission also asserts that the Appellants failed to introduce evidence of purchase price, infrastructure costs and asking prices of their various properties. Commissioner's Brief, p. 14

In the first instance, these contentions are factually incorrect as the purchase prices for a number of relevant parcels are indicated in the deeds which are attached as exhibits in the record. See, Assr's Exs. 1- 5. Moreover, Mr. Goldman, who is a certified appraiser, testified at length as to the fair market value for many parcels of the Appellants' properties in Walnut Springs and he did present, through the introduction of his exhibits, evidence of their value based upon an extensive recent sales analysis. See, Tr., pp. 22-24; Ptrs' Ex. 4.

The Appellants' evidence then further shows that the values established by the Assessor for Walnut Springs property, in using her purported neighborhood methodology, created appraised values (for a number of properties which sold as recently as 2004 and 2005) on a per acre basis at substantially higher amounts than the amounts for which the same land was purchased within a prior period of just a few years. Finally, as shown by the testimony of the Appellants' expert and the exhibits, it was these same values which the Assessor then used in her arbitrary neighborhood formula methodology to over value the Appellants' properties when compared to other similar property throughout the County.

More importantly, in asserting such factually erroneous allegations about the lack of proof in the record, neither Appellee cites legal authority to support the underlying contention, that such evidence is all that can be presented to establish a violation of Article X, Section 1 of the West Virginia State Constitution mandating equal and uniform *ad valorem* property taxation. In fact, there is no authority that could be cited as even requiring evidence of that type in a case

the essence of which is an attack upon the underlying non-uniformity and non-equality of the assessments when compared to other properties in the County.

Rather, the case authority in West Virginia, as cited in the Appellants' initial brief, simply states that, in a matter such as this, a taxpayer must show, by clear and convincing evidence, that the Assessor's values are incorrect. Foster Foundation, supra. Clearly, values are incorrect if they are not equal and uniform. In re Kanawha Valley Bank, supra.

Indeed, noting that, while there may not have been sufficient evidence in the record to establish whether the value, set by the assessing authorities for property tax purposes, represented the fair market value of the subject property, the Supreme Court of Hawaii, in In the Matter of the Tax Appeal of County of Maui v. KM Hawaii Inc., 81 Hawaii 248, 256, 915 P.2d 1349, 1357 (1996), found that to be irrelevant because, when an assessment violates the equal protection clauses of the state and federal constitutions, simply ensuring that the assessment is set at fair market value does not adequately address the allegation of a violation. Id. (citing, by example, Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336, 346, (1989); Hillsborough v. Cromwell, 326 U.S. 620, 623, (1946); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247, (1931); Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 446, (1923); cf. In re Tax Appeal of Hawaiian Flour Mills, Inc., 76 Hawaii 1, 8-9, 868 P.2d 419, 426-27 (1994) (involving tax assessment that violated the commerce clause of the United States Constitution); McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 39-41 (1990) (same)).

Thus, throughout his testimony and exhibits [*See Tr.*, pp. 14-20, 26-33; *Ptrs' Exs.* 5 - 9], Mr. Goldman also presented evidence which showed that the Assessor's valuations of properties in Walnut Springs, (including both the lots conveyed and the residue, all of which remains in

dispute before this Court), are listed on her books at a percentage of fair market value far greater than the equivalent percentage used for the tax values of similar properties in other locations in Monroe County.

To challenge the relevance of Mr. Goldman's evidence in that regard, the Assessor argues that, in developing his extensive sample of comparable sales, his use of some transactions dated just outside of the official relevant assessment period of July 1, 2005, through June 1, 2006, is improper. Assessor's Brief, p. 23.<sup>4</sup> Of course, given the nature of valuation determinations, there is no authority supporting such an impractical requirement. Specifically, this Court has recognized that, with respect to the setting of values for property tax purposes, "[w]hile the assessment is to be made as of a certain date [here, July 1, 2006], the value of the property is established over a period of years." Central Realty Co. v. Board of Equalization and Review, 110 W.Va. 437, 158 S.E. 537 (1931). This appears to be the unanimous view throughout the other jurisdictions in this country.

Indeed, less than a month ago, the Court of Appeals of Maryland struck held that mid-cycle revaluation of property was caused by its sales price, rather than by one of the six permissible factors specified in the applicable statute and, thus, amounted to an impermissible retroactive assessment. Supervisor of Assessments v. Stellar GT, \_\_\_ A.2d \_\_\_, 2008 WL 5191477 (Md.) (Dec. 12, 2008) (unpublished).<sup>5</sup> Speaking to the issue, the Court reiterated that:

On the basis of an actual sale subsequent to the date of finality the County seeks to second guess the State's expert appraisers in the office of the Montgomery County Supervisor of Assessments and thus to make a retroactive reassessment. As a matter of fact, a sale during the year at a price in excess of the value placed on the

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<sup>4</sup> Interestingly, the Appellee, County Commission, apparently does not share the Assessor's view on this issue, having attached, as an exhibit to its brief purportedly to show the accuracy of the Assessor's values, a deed dated outside that period. Commission's Brief, Exhibit A.

<sup>5</sup> Copy attached as Appellants' Reply Brief Exhibit B.

property at the time of assessment does not necessarily indicate erroneous valuation. First of all, we have commented on several occasions that valuation of land is not an exact science and that experts will often differ as to their opinion of fair market value. Secondly, although assessments are as of the date of finality, the valuation upon which the assessment is based is necessarily made some time in advance of that date. A number of factors could occur even between the date of finality and the date of ultimate sale which would alter property values. An example of a reverse change in such values is the current report in the public press that real estate values have dropped substantially in recent months as a result of high mortgage interest rates.

Id. at \*8 (quoting Montgomery County Board of Realtors, Inc. v. Montgomery County 287 Md. 101, 109-110, 411 A.2d 97, 98 (1980)).

Finally, the Appellants challenge, as simply absurd, the Commission's assertion that an appraiser's testimony in property tax appeals cannot be based upon the appraiser's statistical analysis and that such analysis can only be presented by a professional statistician. Commission's Brief, p. 17, n. 7. A number of professional fields and endeavors require, as part of their practices, extensive training in statistics. That is the case for not only appraisers, but for dozens of other professions. Indeed, such statistical analysis is at the heart of the State Tax Department's assessment equality and accuracy tests with which the Assessor had persistent difficulties.

Thus, understandably, the County Commission can cite no legal authority, whatsoever, for its contention that an appraiser's testimony cannot be based upon the appraiser's statistical analysis. In fact, the record in this matter clearly reflects that the sampling and number of properties evaluated by Mr. Goldman, which were the basis of his testimony, relied upon an analysis of a broad sample of the Monroe County property records and a number of individual parcels which appeared to even exceed the number of parcels reviewed on an annual basis by the

State Tax Department in its own, official testing of the equality and valuation accuracy of the Assessor's work.

Therefore, the Assessor based her segregation of the Appellants' properties, from all others in Monroe County, on distinctions about amenities, etc. that did not and do not currently exist. Likewise, in order to establish the new Walnut Springs neighborhood, she had to ignore their many proven similarities to other nearby properties with respect to both fundamental features of the land and the absence of improvements and amenities.

As a result, her unequal and non-uniform Assessments of the Appellants' properties, as demonstrated by the Appellants' evidence, and her underassessment of the other taxpayers' properties, as demonstrated by her chronic failure of State assessment accuracy testing, compel the conclusion that the Assessments were neither equal nor uniform as required by the West Virginia Constitution. Therefore, they were clearly erroneous and should not have been upheld by the County Commission or affirmed by the Circuit Court.

That the Assessor's practices, which led to such erroneous Assessments, were intentional and systematic also compels the conclusion that they violated the Appellants' rights to Equal Protection under the Constitution of the United States.

## II. THE ASSESSOR'S DISCRIMINATORY ASSESSMENTS OF THE APPELLANTS' PROPERTIES VIOLATED THEIR RIGHTS TO EQUAL PROTECTION BECAUSE THOSE ASSESSMENTS WERE THE RESULT OF INTENTIONAL AND SYSTEMATIC PRACTICES THAT CANNOT BE EXCUSED AS MERELY "TRANSITIONAL."

The "welcome stranger" approach to property tax assessment administration – where, by having their properties taxed on the basis of their recent purchase prices, the newcomer owners of recently transferred properties bear a disproportionate share of a jurisdiction's tax burden, while long-time owners of other, unsold properties experience no increases – was decisively struck down by the United States Supreme Court in the seminal case of Allegheny Pittsburgh

Coal Company v. Webster County, supra. There, in reversing an earlier ruling of this Court to the contrary, the United State Supreme Court held, in an extraordinary 9-0 vote, that the intentional and systematic use of such practices by a West Virginia assessor violated the rights of the appealing taxpayers to Equal Protection as guaranteed by the United States Constitution. Id.

The Appellees would distinguish the Assessor's discriminatory treatment of the Appellants here, from the welcome stranger practices outlawed in Allegheny Pittsburgh Coal Company, by the contentions: (1) that the disparate treatment of the Appellants was neither intentional nor systematic; (2) that the Assessor's practices with regard to all property in Monroe County were designed to cure prior underassessments; and (3) that any current inequality among assessments (particularly between the Appellants' properties and all others) was merely transitional and temporary. Upon close examination, it is clear that such contentions are, at once, internally contradictory and sharply at odds with both logic and the proven facts.

First, the Appellees cannot realistically expect this Court to accept their mutually exclusive contentions that, at the same time, the Assessor's practices were not intentional and systematic, but that they were intentionally being pursued to remedy long-term underassessments in an orderly and systematic manner. More critically, the undisputed proof, that the Assessor's office's failure to satisfy State Tax Department assessment accuracy and equalization testing for the entire past decade, conclusively shows that such underassessment practices are intentional and systematic. Tr., pp. 70-78; Ptrs' Exs. 15 - 17. Indeed, it was on the basis of the same span of years of his using the "welcome stranger" practice which led the United Supreme Court to conclude that the assessor in the Allegheny Pittsburgh Coal Company case violated the taxpayers' Equal Protection rights.

Rather, but for the clear demonstration in the preceding subdivision of this brief showing otherwise, the only conceivable ground for debate about whether the Assessor here is engaged in the prohibited “welcome stranger” practice would be the one she makes that the disparate treatment of the Appellants is neither arbitrary nor capricious. Assessor’s Brief, p. 31, quoting Allegheny Pittsburgh Coal Company.

However, the Assessor’s disparate treatment of the Appellants’ properties having been exposed, in the preceding subdivision of this brief, as arbitrary and capricious, the Appellees are left to defend the Assessor’s practices on the grounds of their being, in due course, sufficiently timely and remedial to avoid violation of the Equal Protection standards described in Allegheny Pittsburgh Coal Company. Unfortunately, as the record demonstrates, they were neither.

Regarding the issue of timely future equalization of values, i.e. “we’re working on it,” the Appellees appear to argue perversely that, precisely because Walnut Springs was a new development and the Appellants were newcomers to Monroe County, the long-term, under assessments of other properties in the immediately preceding decade cannot be cited as proof of any unconstitutional discrimination against them. Commission’s Brief, p. 16; Assessor’s Brief, p. 30. That is so, the Assessor contends, because her purported “across the board” increases in the assessed values of other properties in Monroe County will seasonably cure any temporary lack of equalization with the Assessments of the Appellants’ properties. Assessor’s Brief, p. 30; Tr. pp. 92-93 and 112-113.

Of course, as shown in the Appellants’ initial brief, such a contention fails the test of simple logic (i.e. application of the same percentage increases to the values of A and B will never effect equality between A and B, if they are unequal before the increases are initiated). Appellants’ Brief, pp. 25-26. Moreover, as also shown in the Appellants’ initial brief, even if the

higher assessed values of the Walnut Springs properties were frozen while the alleged percentage increases in the assessed values of the other properties were increased as the Assessor claimed, it would take more than a decade to achieve parity among them. Id.

Even more significant, however, is the fact that the Assessor's claims to be making universal, multi-year, across-the-board increases to all property in Monroe County are simply false. Specifically, the website maintained by Monroe County and the Assessor's office would indicate even to a casual observer the minimal or non-existent property tax assessment increases for most properties in Monroe County for the past several years. This fact can be documented not only by the data maintained on the website at [www.monroecountywv.net](http://www.monroecountywv.net), but further as a matter of public record and the record in this matter as evidenced by the land books of Monroe County for the past several years.<sup>6</sup>

Thus, the Assessor's purported remedial actions cannot work to achieve equalization and, even if they could, her testimony about taking such actions is untrue.

The Assessor also argues, on the one hand, that the proven decade-long underassessment of property in Monroe County by her office, prior to 2007, is not relevant to the Appellants' complaint about the 2007 Assessments, and on the other hand, that the Appellants' proof of her perpetuation of such underassessment is merely "anecdotal." Assessor's Brief, pp. 3-4, 27. As to the former of the two points, the taxpayer's proof in Allegheny Pittsburgh Coal Company, of

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<sup>6</sup> The entire land books for 2007 and 2008 were made a part of the record of the Appellants' challenges to their Assessments for those two years. Those books are also public records and represent the assessed valuations for each and every parcel of real property in Monroe County as delivered by the Assessor prior to the Board of Equalization beginning its proceedings. This Court can further take judicial notice of the land books in this proceeding as public record facts and/or court records and decisions. WVRE § 201; also see Handbook on Evidence for West Virginia Lawyers, Fourth Edition, Volume One, Franklin Cleckley. Because, assessed (taxable) values are required by law to be sixty percent of fair market (appraised) values, a comparison of the land books listing assessed values for prior successive years should clearly indicate any uniform across-the-board percentage increases or lack thereof. An examination of the land books of Monroe County reveals the latter circumstance.

exactly the same decade-long pattern of employing his “welcome stranger” method, was at the heart of the high Court’s ruling.

Here, we do not know if the Assessor or her predecessors have previously engaged in the “welcome stranger” practice, but we do know that they have for at least a decade abjectly failed to assess property accurately and in a equal and uniform fashion. Tr., pp. 70-78; Ptrs’ Exs. 15 - 17. We also know, beyond a shadow of doubt, that the same “welcome stranger” violation of their Equal Protection rights is exactly what is going on with her Assessments of the Appellants’ properties.

As to the “merely ‘anecdotal’” contention about the Appellants’ proof of discrimination, one need only consider the extensive body of the proof of pervasive current inequality, both as offered through Mr. Goldman and through the reports of the State’s tests of the decades of under assessments by the Assessor’s office, to conclude otherwise.

Thus, despite the Appellees’ efforts to separate the fact of persistent, long-term underassessment of property in Monroe County from the issue of their discriminatory overassessment of the Appellants’ properties, those points are the two complimentary sides of the same unconstitutional coin. It was precisely because of the assessor’s multi-year pattern in Allegheny Pittsburgh Coal Company – of not adjusting property values which had not recently sold – that made his prejudicial recent sales-price-based adjustment, of the complaining taxpayer’s assessments, unconstitutional violations of their Equal Protection rights.

III. INSTEAD OF IMPARTIALLY REVIEWING AND CORRECTING THE ASSESSOR’S UNEQUAL AND ERRONEOUS ASSESSMENTS, THE COUNTY COMMISSION’S DENIAL OF THE APPELLANTS’ RIGHT OF JUDICIAL REVIEW, ITS ASSUMPTION OF AN ADVERSARIAL PARTY LITIGANT ROLE AND ITS OTHER ACTIONS GROSSLY VIOLATED THE APPELLANTS’ RIGHTS TO DUE PROCESS.

- A. Neither the Appellees nor the Circuit Court were confused about the identity of the Appellants as parties at any stage of this case.

The Appellees persist in their attempts to literally deny the right of judicial review, to all but one of the Appellants, by distorting applicable rules of procedure and by disingenuously contending that there was confusion as to the identity of all the others who have appeared of record throughout the three stages of this action. Specifically, they devote significant portions of their respective briefs to argue that all the Appellants, except Mountain America, LLC, failed to timely perfect their appeals of the County Commission's ruling to the Circuit Court. Assessor's Brief, pp. 12-17; Commission's Brief, pp. 26-30.

In fact, as thoroughly explained in the Appellants' initial brief, the identity of each and every one the Appellants in this action has been: (1) stated for the record at the outset of the evidentiary hearing before the County Commission [*See*, Tr., pp. 6-7; Joint Exhibit 1]; (2) expressly stipulated at the request of the County Commission's counsel [*See*, Stipulation of Parties Regarding Parties]; (3) expressly manifested within the four corners of the documents perfecting the appeal filed with the Circuit Court [*See*, Petition for Appeal from Ad Valorem Property Tax Assessments; accompanied by the Record Certified by the County Clerk, as an integral part thereof pursuant to W.Va. Code § 11-3-25] and (4) expressly manifested on the face of the Petition for Appeal filed with this Court.

Then, in a contradictory fashion, the Appellees argue, in effect, that even if all the other Appellants were parties to the Circuit Court appeal, they were later time-barred from appealing to this Court, and, thus, bound to the Circuit Court's interlocutory order agreeing with the Appellees on their contention that those Appellants were not parties before it. Assessor's Brief, pp. 14-17. Such a nonsensical argument cannot be dignified as pleading in the alternative.

Rather, it shows nothing more than the Appellees' willingness to even employ mutually exclusive contentions in order to deny the Appellants the right to judicial review.

Moreover, the attempt in the Assessor's Brief to distinguish, on the basis of an alleged failure of the Appellants to state an actionable cause under Rule 12(c) under the Rules of Civil Procedure, this Court's consistent holdings that appeals of such interlocutory orders are always permissive and never mandatory, is, obviously, devoid of merit. That is because, on the rare occasions when it is granted, the highly disfavored motion for dismissal of an action under that rule, for failure to state a claim, inherently turns on the substance of the claim – i.e. whether the facts plead are legally sufficient to support relief – not on some perceived clerical defect in the plaintiff's complaint.<sup>7</sup> Here, the essence of each and every Appellant's claims were identical; to-wit: that the Assessments determined by the Assessor violate their state and federal rights to equal and uniform taxation and to equal protection of the law, and that the process by which those Assessments were sustained by the Commission violated their rights to due process. No party litigant can raise more clearly actionable substantive claims than those.

Now, as a final distortion of applicable procedural rules, the Appellees argue that all of the Appellants, except Mountain America, LLC, have been improperly joined in the matter now before this Court. Assessor's Brief, p. 13. Such a contention is without merit because, as parties appellant to the same appeal, no joinder is necessary.

Of course, in light of this Court's rulings on the scope of standing in property tax appeals, even if the Appellants, other than Mountain America, LLC, were not actually parties to this appeal, given the nature of their interests in the same, it would be entirely proper for their intervention here. *See, In re Elk Sewell Coal*, 189 W.Va. 3, 427 S.E. 2d 238 (1993) [standing to

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<sup>7</sup> *See*, W.Va. Code §56-4-37, requiring courts to disregard such non-substantive defects when ruling on the former, functionally equivalent demurrer pleading (before such pleadings were abolished by the Rules of Civil Procedure).

intervene in a property tax appeal when a relevant issue emerges at the appellate stage]; In re Tax Assessments Against Pocahontas Land Corp., 172 W.Va. 53; 303 S.E.2d 691 (1983) [challenging the tax assessments of another taxpayer].

- B. The Legislature's designation of the County Commission, as an impartial tribunal to adjudicate the Appellants' case in the first instance, precludes its assumption of the role of party respondent adverse to the Appellants upon their appeal of its ruling.

In defending its patently conflicting roles of impartial tribunal and adverse party litigant, the Commission offers two points. First, it argues that it was the wording of the Circuit Court's order, prepared by the Appellants' counsel and directing the filing of their appeal petition, that compelled it to respond as a party opposing the petition. Specifically, the order provides in pertinent part:

IT IS FURTHER ORDERED AND ADJUDGED that an attested copy of this Order, together with a copy of the Petition, filed herein, be served by the Sheriff upon Donna Huffman, Assessor of Monroe County, West Virginia, and upon H. Rod Mohler, Prosecuting Attorney for Monroe County, West Virginia, and Paul Papadopoulos, attorney for the Monroe County Commission and John V. Hussell, IV, attorney for the Assessor, who shall file with this Court, and serve upon Petitioners' counsel, with thirty (30) days from the service on her or him, respectively, a response to the Petition filed herewith. (Emphasis added).

In fact, while the wording of that order could have been more clear on the question, when read in the context of the Civil Case Information Sheet filed with the Petition, the order should be taken to call for service of the petition on the Assessor as the only party respondent identified in the Civil Case Information Sheet, with courtesy copies to be served on her statutory legal counsel, and on the private counsel engaged by her office and the Commission. As such, then, the order provides that, within thirty (30) days of service, she should then, by such counsel, respond.

As the governing statute discloses, the only other party to such proceedings is the County Prosecuting Attorney, who represents the interests of the various levying bodies, and who, prior

to the matter being heard on its merits, is entitled to receive notice. W.Va. Code 11-3-25. In this case, the Prosecutors' role has been contracted out by the Commission to the private counsel it engaged. In all events, it should be clear that no amount of inartful wording by Appellants' counsel in an order entered, as a matter of routine by the Circuit Court, can install the quasi-judicial body, from which an appeal is taken by the adversely affected party, as itself a party respondent to that appeal.

The County Commission also points to a significant number of reported decisions by this Court in property tax appeal cases where the captions indicate that the respective county commissions are named as parties respondent. Without conceding the actual legitimacy of such a practice simply on the basis of its pervasive usage, it is clearly just another example of how flawed is this State's system of review of property tax assessments. Indeed, with respect to the county commission's role as the board of equalization and review, a former justice of this Court opined in a dissent that: "the procedure for appealing tax assessments, is probably the least competent of any similar procedure in the entire [West Virginia] Code."<sup>8</sup>

- C. This Court can and should give the Legislature the opportunity to reform the several statutory structures which provided the framework for the egregious violations of Due Process principles manifested by the actions of the County Commission in this case.

The Appellees cite the Court's recent holdings in In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, *supra*. and Bayer Materialscience, LLC v. State Tax Commissioner, \_\_\_\_ W.Va. \_\_\_\_, \_\_\_\_ S.E.2d \_\_\_\_ 2008 WL 4967058, W.Va.,

<sup>8</sup> Rawl Sales & Processing Co. v. County Commission. 191 W.Va. 127, 443 S.E.2d 595 (1994), Neely, J dissenting. Inspired by the same array of prejudicial arrangements impeding fair appeals in such matters, as the Appellants have described in their initial brief [*See*, Appellants' Brief, pp. 27-36], Justice Neely went on to observe: "... the county commission lacks expertise in property evaluation but is extraordinarily knowledgeable about the government's need for money, an ingrained bias that is particularly harmful to non-voting entities. Although someone should review the assessor's property evaluation, assigning this important review to the county commission is perhaps not a scheme whose design would prompt nomination for the Nobel Prize in jurisprudence. Indeed, a hearing before a county commission on a tax appeal is probably best described by the old Jewish expression: ['From your mouth to God's ear']."

November 19, 2008 (NO. 33378, 33880, 33881), for the proposition that the statute authorizing the County Commission to review property tax assessments does not facially violate taxpayers' rights to Due Process. Of course, as explained in the Appellants' initial brief, neither of those two recent cases presented the Court with the various other aspects of the statutory scheme and practices which implicate the due process issues here.

Most importantly, this case is distinguishable from Foster Foundation and Bayer in that, unlike the taxpayers in those cases, the Appellants here have also shown by clear and convincing evidence that their rights to due process were violated by the statutory scheme as applied by the County Commission.

Furthermore, to rebut the Appellants' due process claim about its direct pecuniary interest in the outcome of this matter, the County Commission also advances the superficial contention that it is the Legislature alone which sets the salaries of its members – not its own actions in sustaining increases in property tax assessments sufficiently large as to raise the county's total assessed value to a higher county officials pay bracket. Commission's Brief, p. 20. Notwithstanding the non-analytical dicta in this Court's Foster Foundation opinion, as quoted by the Commission, the legal reality is that, in the provisions of W.Va. Code § 7-7-1 et seq., the Legislature only establishes the ranges of compensation amounts for each county's commission members, and provides the total-assessed -value device by which it is determined where in that range that the compensation for a particular county's commission members would fall. However, it also gives the Assessor and the County Commission the unique authority to collaboratively use that device to directly influence the resulting levels of their own personal compensation.

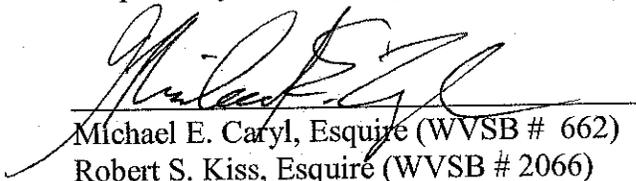
Finally, the public comments of Kanawha County Commission President, Kent Carper, an experienced attorney, vividly illustrate the compelling need for the Court to provide guidance to the Legislature on the true parameters of due process in the context of property tax appeals. Specifically, when expressing his understanding of this Court's ruling in Bayer giving its approval to the county commission's conflicting roles in these matters, President Carper stated: "We [the members of the County Commission] have a constitutional duty. We have to protect the tax base of the County." See Kelly Holleran, "Supreme Court Denies Bayer Tax Breaks," The Record, November 19, 2008 at <https://wvrecord.com/news/216013-supreme-court-denies-bayer-tax-breaks>.

In all events, as explained in the Appellants' initial brief, there is ample precedent for the fashioning of practical and prospective legislative remedies once this Court holds that some aspect of property tax administration is at odds with a constitutional principle. Appellants' Brief, pp. 36-38. Thus, the dire predictions of fiscal calamity, should this Court chose to recognize the constitutional infirmities of this State's property tax appeals process (either on its face or as applied), are unfounded.

## CONCLUSION

In light of the record of this matter, the arguments and authorities cited in the Appellants' initial briefs 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,



Michael E. Caryl, Esquire (WVSB # 662)  
Robert S. Kiss, Esquire (WVSB # 2066)  
Heather G. Harlan, Esquire (WVSB # 8986)  
BOWLES RICE MCDAVID GRAFF &  
LOVE LLP  
Post Office Box 1386  
Charleston, WV 25325-1386  
(304) 347-1100  
Appellants' Counsel

**CERTIFICATE OF SERVICE**

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

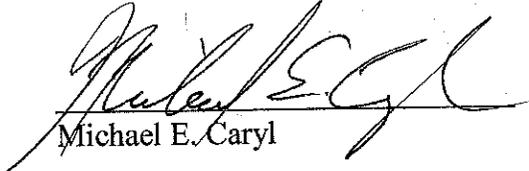
Justin R. St. Clair, Esquire  
Prosecuting Attorney of Monroe County  
Monroe County Courthouse  
Box 740  
Union, West Virginia 24983

John F. Hussell, IV Esquire  
Katie L. Hoffman, Esquire  
Joseph J. Buch, Esquire  
Dinsmore & Shohl LLP  
900 Lee Street, Suite 600  
Charleston, West Virginia 25301  
*Counsel for Monroe County Assessor*

Paul G. Papadopoulos, Esquire  
David K. Higgins, Esquire  
Robinson & McElwee PLLC  
Post Office Box 1791  
Charleston, West Virginia 25326  
*Counsel for Monroe County Commission*

Jack C. McClung, Esquire  
2211 Washington Street, East  
Charleston, West Virginia 25311-2218  
*Counsel for The West Virginia Association  
of County Officials, Amicus Curiae*

this 2<sup>nd</sup> day of January, 2009.

  
Michael E. Caryl

**EXHIBITS**

**ON**

**FILE IN THE**

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