

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1058

(Circuit Court Civil Action No. 09C-24)

Mountain America, LLC; Feroz Alloo; Robert and Beverly Amico; Ron Andrews; William Andrews; Reed Atkins; William and Nancy Atkins; Sergio and Cheryl Baez; Thanos Basdekis; Edward and Tracy Bober; Peter Calderon; Jimmy Carroll; Chris and Dina Cashwell; Bob and Linda Chamberland (Artha, LLC) ; Wayne Clibum; Justin and Mary Daly; Peter and Sherry DelCloppo; John Eagle; Dale and Michelle Enzor; Charles and Cynthia Evans; William Farley; Lon Fountain; Fernando Garcia; Jonathan Halperin; Esther Halperin; Mike and Vivian Hollandsworth; Jan Jerge; Judy Leon; Freda Livesay; Victor Long; Jean Jacques Millard; Jonathan and Erin Panks; Stephen and Lauren Rice; Michael Robey; Hee Soo Roh; George Ross; Robert Schlossberg; Neil Patrick Welsh; Teddy Kim; Obie Woods, Jr.; Gulam Younossi, WBMA LLC; Walnut Ridge LLC; Sugar Tree, LLC; JF Investment Holdings; and Greentree LLC,

Petitioners,

v.

DONNA HUFFMAN, ASSESSOR OF MONROE COUNTY, et al.

Respondents.

PETITIONERS' BRIEF

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II. ASSIGNMENTS OF ERROR

1. The Circuit Court's ruling is erroneous, and ought to be reviewed and reversed since the doctrine of *res judicata* is inapplicable to the instant matter for several reasons. The parties are different and each annual assessment for taxation presents a separate and distinct issue such that the causes of action are not identical. The instant action was not nor could not have been resolved in any prior action.

- a. Final Judgment on the Merits.
- b. The Identity of Parties in the 2007 Claim and the Instant Claim are Entirely Different.
- c. The Cause of Action Identified in the Instant Cause of Action is Substantially Dissimilar to the Cause of Action Determined in the 2007 Claim.
 - (i) The Assessor's Valuations of the Petitioner's Properties for 2009 Property Tax Purposes Violate the Equal and Uniform Taxation Mandate of the West Virginia Constitution and the Equal Protection Clause of the United States Constitution.
 - (ii) The Assessor's Valuations of the Petitioner's Properties for 2009 Property Tax Purposes Violate Applicable Provisions of the Statutes and Regulations Governing the Administration of Property Taxes in West Virginia in a Manner that Systematically Overvalues the Petitioners' Properties.
- d. In Disregard for Case and Statutory Law, the Circuit Court Erred in Failing to Present Findings of Fact and Conclusions of Law to Support its Order.

III. STATEMENT OF THE CASE

This appeal is taken from an Order of the Circuit Court of Monroe County (the "Circuit Court") dated June 13, 2011 (the "Order"). Appendix (App.) pp. 000621-000622. The Order denied the Petitioners' Petition for Appeal from Ad Valorem Property Tax Assessments for the year 2009 (the "Petition") which were issued by the Assessor of Monroe County (the "Assessor") and affirmed by the Monroe County Commission sitting as Board of Equalization and Review (the "Commission"). App. pg. 2.

The Petitioners are Mountain America, LLC ("Mountain America"), along with several dozen individuals and entities, who owned developed lots and undeveloped residue in the area of Monroe County, West Virginia, designated as the Walnut Springs Mountain Reserve ("Walnut Springs") which, at the time of the 2009 Petition, were being developed by Mountain America,

and five (5) other related entities. App. pp. 000032. The properties in Walnut Springs are located outside of Union, West Virginia, and had predominantly been acquired in the last several years by a number of limited liability companies (with the leading entity being Mountain America, LLC), with the intent to develop a residential living neighborhood. App. pg. 00032. Mountain America, LLC has recently filed bankruptcy and many of the subject property lots are now owned by various banks, who were able to perform independent appraisements of the property which was not available during the 2007 Claim (hereinafter defined) because it was difficult to determine the fair market value of the property, causing an undue influence of recent sales prices for the property in question.

In this appeal, the Petitioners seek relief from, and correction of, erroneous assessments of their property for 2009 *ad valorem* property tax purposes (collectively, “the Assessments”). As this Court is aware, several of the Petitioners unsuccessfully appealed their 2007 assessments to this Court (the “2007 Claim”) and is currently appealing before this Court assessments of their property for 2008 *ad valorem* property tax purposes (the “2008 Claim”). While counsel for the undersigned recognizes that the record, certified to this Court in regards to the 2009 assessments (the “2009 Claim”), is the record upon which any final decision must be issued by this Court, the Petitioners in their brief herein for the purposes of elaborating upon similarities and differences between the 2009 Claim, the 2008 Claim and the 2007 Claim may on occasion refer to the record in the 2007 Claim which in its entirety was before this Court in the case of Mountain America, LLC, et al, v. Huffman, 224 W. Va. 669, 687 S.E.2d 788 (2009). Further, such differences in the 2007 Claim, the 2008 Claim and the 2009 Claim appear in the record. App. pp. 000066.

During the period of time from July 1, 2006 through January 31, 2009, the Assessor and her staff undertook a new valuation of real properties owned by the Petitioners in the geographic area of Walnut Springs Mountain Reserve. App. pg. 000033-000034. The property as it was

configured on July 1, 2006, and as it was later configured on July 1, 2007 and July 1, 2008, included some developed lots and undeveloped residue. App. pp. 000033-000034.

The properties in Walnut Springs area are located outside of Union, West Virginia, and had predominantly been acquired in the last several years by a number of limited liability companies (the leading such entity being Mountain America, LLC), with the general intent to develop the area to include residential uses and related amenities. Neither Mountain America, LLC, nor any other entity or person developing the Walnut Springs area has recorded a separate development plat or designation of land use with the County Commission. (*See* West Virginia Code §11-3-1b.)

At the time of the 2009 Claim, the Walnut Springs area was still not developed and even at that time, its developers hoped that ultimately, it would provide some basic services and amenities in a unique rural community living environment. Most of those services and amenities did not exist at the time of the 2009 Claim and many still do not exist. The developed lots were subject to uniform restrictions and covenants which were recorded in the Monroe County Clerk's office. Said restrictions and covenants were referenced in the deeds of out-conveyed individual parcels which had been conveyed by Mountain America, LLC and the other limited liability companies over the past several years. Those restrictions generally reflected an intent to provide for primarily residential uses, but did give the developer the discretion to permit other uses.

In 2007, as the Assessor endeavored to perform her countywide assessment duties and responsibilities under West Virginia law, 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. App. pp. 000034. 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, which was carried over to the 2008 tax year and now the 2009 tax year. App. pp. 000034. It included only the Walnut Springs properties, both developed and undeveloped, to the extent that the Assessor understood the geographic scope of those properties. App. pg. 000035. That same neighborhood has been maintained by the Assessor for the 2009 Claim. App. pg. 000035. At the same time, the designated neighborhood and resultant increased values ignored comparable contiguous properties notwithstanding the similarities in geography, type of land and infrastructure available. App. pp. 000039-000041.

At the time the Assessor was creating a new neighborhood for the Walnut Springs properties, and for several years prior to that time, the Monroe County Assessor's office had been monitored and cited for many deficiencies in its annual valuation and assessment process. App. pp. 000037-000041;000096-000108. The Assessor's office had failed several appraisal study tests conducted by the State Tax Department pursuant to the latter's oversight responsibilities. App. pp 000037-000041; 000096-000108. In addition many of those same tests reflected deficiencies during the subsequent 2008 and 2009 tax periods. App. pp. 000040-000041; 000099-000108. Specifically, the tests conducted in 2007, 2008 and 2009 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 2007, reflected a failure by the Monroe County Assessor on many of the ratio evaluation tests conducted by the State Tax Department. App. pp. 000099-000108.

During the Board of Equalization and Review hearing of this matter at the February 7, 2007 hearing, the February 14, 2008 and the February 17, 2009 hearing, the Assessor testified that her office's failure to attain compliance with the State Tax Department compliance tests was due to the recent sales of properties in the Walnut Springs area and that her actions in

the most recent assessment cycle would correct these deficiencies. However, sales ratio studies conducted by the State Tax Department, for Monroe County for the 2008 and 2009 tax years, continues to show significant non-compliance with those tests. App. pp. 00040-00041; 000099-000108.

The evidence in the record further reflects for a third year that the Assessor made no or only minimal efforts to update the taxable values of other real property in the area of the Walnut Springs properties, and that there was an enormous, and unacceptable, deviation between the percentage of fair market value at which the tax values of the Petitioners' properties were set when compared to the tax values of all other real property in Monroe County. App. pp. 000062; 000091.

In the case at bar, during the 2007 *ad valorem* property tax cycle the tax values of literally dozens of parcels of property in the Walnut Springs "neighborhood," including the undeveloped residue and previously out-conveyed lots, were subjected to massive increases, with the values of most or all of those parcels far exceeding the 10% state law notice requirement. In fact many of the increases were several thousand percent higher than the prior year's assessment. While the increases for the 2009 *ad valorem* property tax year in most instances were not significant like those experienced in 2007, the record reflects that the unconstitutional disparity in assessments for the Petitioners' properties in Monroe County has continued and perhaps been exacerbated. App. pp. 000061; 000091.

At the February 17th hearing, the only two witnesses who testified were licensed and certified real estate appraiser, Mr. Todd Goldman, who was called as an expert witness by the Petitioners, and Donna Hoffman, the Assessor of Monroe County.

a. Todd Goldman's Testimony and Relevant Factors Based on His Testimony and Exhibits

The values of property in Walnut Springs, including the Petitioners' lots and residue, as determined by the Assessor are clearly not, as required by law, representative of the true and actual value of the parcels as required by W.Va. Code § 11-3-1 *et seq.* Nor were they equal and uniform as required by the West Virginia Constitution. W. Va. State Constitution. Art. X, Sec. 1.

As Mr. Goldman described in his testimony, the primary purpose of his 2009 analysis is to compare property values relative to the appraised values for tax purposes within Monroe County and Mr. Goldman performed this analysis in several different ways to highlight the differences in certain groups or classes of property. App. pg. 000033.

In said analysis, Mr. Goldman first looked at properties that were sold prior to the most recent assessment date (historical transactions) that would have occurred during the last four years. App. pp. 34. Mr. Goldman felt this analysis was important because those are the property transactions that the Assessor's office would have had knowledge of and that were available in determining the valuations for the 2009 taxes. App. pg. 000034.

Secondly, Mr. Goldman examined transactions that occurred after the most recent assessment date, and he deemed those important because they include properties that the Assessor's office did not have firsthand information on because they occurred after the assessment date, and, the comparison with those two classes of properties was based on what they sold for and what they were appraised for on the 2009 land books. App. pg. 000034.

The third group Mr. Goldman examined was the neighboring property owners that are within close proximity to Walnut Springs and generally have the same location factors, similar topography, similar uses, and similar proximity to amenities downtown. App. pp. 000034; . 00054-00091.

Petitioners' Exhibit 3A, Walnut Springs Mountain Reserve Sale and Assessment Data, reflects that, for the several dozen parcels of property encompassed within the Walnut Springs Mountain Reserve (the Petitioners' properties), the Assessor's values range anywhere from a low of 17.90% of recent sales prices to a high of 411.92% of recent sales prices. App. pp. 000057; 000069-000071. Exhibit 3A compared 2009 land appraisals to 2009 land assessments and found that 2009 land appraisals are based on an average as 145% of sale prices. App. pg. 000057. Further, this analysis revealed that a recent sale from April of 2008 of 8.39 acres for \$120,000 was appraised by the Assessor for \$225,000 in 2009. App. pp. 000016; 000069-000071.

The Assessor never rebutted this evidence. Instead, the Assessor, in her own testimony and through her counsel's arguments, asserted that the sales prices for those properties were the best evidence to support a determination of true and actual value, never explaining the fact that, on average, the Assessor's methodology valued those properties at 145% of the average sales price. App. pp. 000016; 000039. Further, the Assessor, in her 2009 valuation of those properties, set some as high as 413.70% of the true and actual value as evidenced by recent sales of those same properties.¹ App. pp. 000057.

Petitioners' Exhibit Number 3B, titled Market Transactions, presents for the past several years an additional analysis of more than 200 randomly selected parcels of property which are from other geographic areas in Monroe County besides Walnut Springs Mountain Reserve and which were recently sold. App. pp. 00074-00091. Specifically, Mr. Goldman reviewed 216 sales occurring between July 1, 2004 and June 30, 2008. App. pp. 000016; 000058. He found the sales in his sample for those periods yielded an average sale price of \$105,348.79 and average

¹ In fact, in 2007 many of those parcels reflect a several thousand percent increase in their assessments from the prior year.

tax appraisal of \$67,285.093. App. pp. 00016; 000058. Further, Mr. Goldman found that the average tax appraisal was 73.22. App. pp. 00016;00058.

Petitioners' Exhibit Number 3C, Non-Transacted Properties As of Recent Assessment Date, reflects a further sampling of several dozen other properties which the property records of Monroe County show had not changed hands in an arms-length transaction for several years, until a recent sales transaction for those properties occurred between 2005 and 2007. App. pp. 000016; 000059; 000081-000084. Mr. Goldman's testimony and supporting exhibits reveal that he reviewed 90 sales occurring after June 30, 2008 and compared those sale prices to the Assessor's appraised value. App. pp. 000016; 000059. In that analysis, Mr. Goldman found that the average sales price was \$71,395 and the average tax appraisal was \$43,657.87. App. pp. 000016; 0000059. The analysis further finds that average property was appraised for tax purposes at 66.42 of sales price. App. pp. 000016-000059.

Petitioners' Exhibit Number 3D, Examples of Excessively Low Assessments, examined fifteen properties with appraised values of less than 20% of recent transaction prices. App. pp. 000016-000017; 000060, 000085. This exhibit further found that the Assessor's average appraisal is 12.35% of recent sale prices. App. pp. 000016-000017; 000060; 000085. Finally, this exhibit shows that properties in this example sold for an average of \$81,250 and were appraised for an average of \$11,136.67. App. pp. 000016-000017; 000060; 000085. Further, many properties which recently sold in Monroe County continue to be valued for tax purposes on the Assessor's 2008 property books on average, at only an unbelievable 12.35% of true and actual value. App. pp. 000016-000017; 000060; 000085.

This testimony and the exhibits show that the 2009 tax values delivered by the Assessor does not treat in a fair, equal and uniform manner the Petitioners or any Monroe County property owner. The records show similar real property being valued for tax purposes at less than 12.35%

of its true and actual value, while at the same time the Assessor, in her 2009 land books, is attempting to set the taxable value of the Petitioners' property on average at 145% and often at 413% or higher of its true and actual value. There is no evidence in the record which can support a difference between 12.35% and 145% as reasonable, fair, or equal, or as anything other than an intentional and systematic, multi-year, over-valuation of Petitioners' properties and an intentional and systematic under-valuation of nearly all other real property in Monroe County, which has been ongoing for several years.

Todd Goldman's testimony and Petitioners' Exhibit Number 3E, Neighboring Property Tax Appraised Values, further points out the absurdity and unfairness of the Monroe County property tax values as presented by the Assessor in her 2009 land books. App. pp. 000017; 000061; 000081-000090. Petitioners' Exhibit 3E identifies dozens of properties which are either contiguous, or in close proximity, to the Petitioners' Walnut Springs properties. App. pp. 000017; 000061; 000081-000090.

In this exhibit, Todd Goldman examined and reviewed 21 properties that adjoin or are near Walnut Springs. App. pp. 000017; 000061; 000081-000090. Mr. Goldman concluded that the average appraised land value was \$1,641 per acre compared to \$27,250.00 per acre for the residue land. App. pp. 000017; 000061; 000081-000090. This amounts to 3.3 times the average appraised land values for neighboring properties. App. pp. 000017; 000061; 000081-000090

In Exhibit 3F, Todd Goldman created a five year summary of the residue land at Walnut Springs as compared to other owners in Monroe County. App. pp. 000015; 000065; 000091. He found that the Walnut Springs residue increased significantly in 2007, as compared to other owners, whose appraisals have barely increased from 2005 to 2009. App. pp. 000065; 000091. Mr. Goldman's exhibit is entitled, "Equitable Taxation? Annual Increase in Assessments" and

puts in graph form the assessed values for years 2005 through 2009 for properties within Walnut Springs as compared to an average of other landowners. App. pp. 000018; 000091.

Petitioners' expert presented a 2009 Tax Appraised Land Value Comparison that compared the appraised values of Walnut Springs lots and residue to that of its neighbors. App. pp. 000017-000018; 000062. This analysis revealed that the neighbors are at roughly \$1,640 per acre; the Walnut Springs lots are \$27,250 per acre and the residue is \$5,390 per acre. App. pp. 000017-000018; 000061-000062. The last three categories on Mr. Goldman's chart at page 000062 are land tables developed by the Assessor's Office, and these categories represent a summary of sales that have occurred that the Assessor used for comparable sales. App. pp. 000018; 000062. This chart shows that with respect to these three categories, the average price per acre of undeveloped lots was \$6,172 for 2009, the average price per acre of woodland was \$1,398 for 2009 and the average price per acre of pasture was \$3,003. App. pp. 00018; 000062.

Mr. Goldman also discovered many inequities, two of which are so extreme as to require their own separate attachment to Exhibit F. The first example is that on May 27, 2005, Ester Halperin acquired 18.638 acres for \$40,000.00 or \$2,146 per acre. App. pp. 000018; 000063. On May 17, 2006 that property was conveyed to Sunrise Mountain, LLC without consideration. The 2009 tax appraisal is \$315,960.00 or \$26,330.00 per acre. App. pp. 000018; 000063.

The second example of inequity relates to the Forest Knobs Estate purchased by Robert and Susan Morrison for \$120,000.00 or \$124,306.15 per acre. App. pp. 000018; 000064. Two months later, the Assessor appraised the very same site for \$225,100 or \$26,835.96 per acre, representing an appraised value of 187.58% of fair market value. App. pp. 000018; 000064.

Petitioners' expert analysis and cited exhibits establish beyond question that the Assessor could not more clearly define, describe, or design a system which epitomizes the definition of unfairness, inequality and non-uniformity. The evidence presents a clear showing of an intentional and systematic over-valuation of Petitioners' properties and a systematic and intentional under-valuation of other properties. The 2009 land books delivered by the Assessor, are not fair, equal or uniform. They do not reflect the true and actual/fair market value of all the properties in Monroe County, or of Taxpayer' properties.

b. Assessor of Monroe County, Ms. Donna Huffman's, Testimony and Relevant Factors Based Upon Her Testimony and Exhibits

The Assessor's testimony clearly reflected that she was attempting to place the blame for the failure of her office's continuing several years' long deficiencies in Monroe County's property tax assessments, and its failure of the 2007, 2008 and 2009 Tax Department compliance testing, on the sales of the Walnut Springs Mountain Reserve properties, which she asserts caused her overall compliance with those tests to fail. App. pp. 000036-000037; 000096-0000108. These are the same arguments she made in 2007 and again in 2008 when she indicated she was attempting to solve the deficiencies via the substantial increase upon Petitioners' properties. However, a year has passed since she "solved" the problem by increasing Petitioners' appraisal values and her office continues to fail the State Tax Department equality tests. App. pp. 000036-000037; 000096-0000108. Furthermore, other than stating her unsupported opinion, the Assessor again this year provided no specific documentary or testimony evidence which proved or showed that the failure of her proposed values for 2009 Monroe County real property taxes to meet the required standards, was in fact, a result of transactions involving the Walnut Spring properties. In fact, subsequent data from the State Tax Department indicates Monroe County continues to be out of compliance with these tests, while at the same time no new sales in

the Walnut Springs Reserve area occurred during the past year. The testimony of Ms. Huffman and the evidence in the record once again indicates an ongoing pattern of deficiencies in the Assessor's property tax values going back several years even prior to the time that the first Walnut Springs sales occurred. App. pp. 000041-000043; 00096-000108.

The evidence in the record clearly reflects a long-standing, intentional and systematic under-valuation of real property in Monroe County by the Assessor which predates the sales activity occurring in the Walnut Springs area. The Assessor acknowledged this fact and was left to simply assert, without elaboration, that she was attempting to correct it. While the Assessor is to be commended for her acknowledgement of this problem, her solutions of across-the-board increases and the targeting of the owners of properties in the Walnut Springs area are not constitutionally permissible as solutions.

W.Va. Code §11-3-1b(c) also specifically prohibits the Assessor from considering or using a proposed future use of a property to determine its value for tax purposes. There is a further clear violation of equalization standards since she has, without justification, substantially increased the valuation of potentially commercial property in the Walnut Springs "neighborhood," while admitting that she has 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. App. pp.000045-000046.

The Assessor's selection of the Walnut Springs 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 standards of fairness and equality. Petitioners would 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, as described in detail herein, the record reflects that the creation of the neighborhood was solely for the purpose of increasing property tax assessments in the Walnut Springs area 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. App. pp. 000045-000046.

Finally, the Assessor presented testimony, similar to that presented in 2007 and 2008, that she was continuing to attempt to deal with the broad inequalities between properties in Monroe County appraised values by implementing across the board increases on all real property of nine percent. App. 000032; 000042-000047; 0000158. This is similar to her sworn testimony of last year.

While the Assessor may assert these actions have been undertaken to attain equality, as pointed out earlier, even assuming these increases have occurred, Petitioners expert has testified (and has not been rebutted in this testimony) that, even without any further increases to the taxable values of the Walnut Springs properties, equality will not be attained for decades.

More importantly, as pointed out herein and in prior years, it appears that the Assessor's testimony as to across-the-board increases over the last several years is simply not true. The Assessor has testified that she has been attempting to erase the inequalities in real properties assessed values in Monroe County by conducting across the board increases of real estate property assessments for the past several years. However, her sworn testimony and a cursory review of the record 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.

In fact, this corresponds almost precisely to the nearly twelve year time period throughout which the State Tax Department has cited the Monroe County Assessor's office for improper low

values in regards to comparisons with fair market values based on documented recent sales prices. App. pp. 000096-000108.

This testimony is of critical importance given the fact that the State Tax Department has identified and documented this lack of compliance, for in excess of eleven (11) years, by the Monroe County Assessor's office, in failing to maintain adequate taxable property values compared to actual fair market values. The substantial increases in the Walnut Springs properties by simple mathematical necessity will cause unequal and non-uniform treatment of the Walnut Springs property owners under the Constitution unless the pervasive defects in the Monroe County property tax books are remedied.

The Assessor's testimony for 2007, 2008 and 2009 was to acknowledge, under oath, these defects in the land books in regards to State-imposed tests and to suggest that she is attempting to resolve that inequality by increasing on an across-the-board basis all other real property assessments in Monroe County. The Assessor's testimony in 2007, 2008 and 2009 was clear in her claim of increasing, across-the-board, the taxable values of residential and perhaps also commercial properties in Monroe County.

IV. SUMMARY OF ARGUMENT

This matter represents an appeal by Petitioners to this Honorable Court seeking relief from, and correction of, erroneous assessments of their real property situated in Monroe County for 2009 *ad valorem* property tax purposes. The Petitioners respectfully assert that the Assessments are excessive and unequal as compared to the 2009 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 Petitioners' rights to equal and uniform taxation under the West Virginia Constitution and in violation of the Petitioners' rights to equal protection of the law under the United States Constitution.

Upon learning of the proposed taxable values determined by the Assessor for the subject property for 2009 tax purposes, the Petitioners filed, on a timely basis, their applications for review by the Commission and relief from the Assessments. On February 17, 2009, pursuant to notice given to the Assessor and the Petitioners, the Commission conducted a hearing on the Petitioners' applications for review (the "Hearing"). At the Hearing, the Petitioners argued and presented evidence which established: (a) that the true and actual values of the subject properties as of July 1, 2008, 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 Petitioners 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 20, 2009, was mailed to the Petitioners' counsel by the Commission (the "Commission's Decision"). App. pg. 00002. The Commission's Decision was based upon a finding that the Assessor's methods of appraisal were within the guidelines provided by law pursuant to the Circuit Court's order dated January 28, 2008 with respect to the 2007 tax year. On March 19, 2009, the Petitioners filed their Petition for Appeal in the Circuit Court, appealing the Commission's Decision. App. pp. 000563. On June 13, 2011, the Circuit Court issued the Order which affirmed the Commission's Decision, and from which Order the Petitioners now seek this appeal. App. pp. 000621-000622. Notably, While the instant appeal is similar to the appeal of Mountain America's 2007 appeal, which appealed the 2007 order of the Circuit Court of Monroe County relating to the 2007 *ad valorem* property taxes of Petitioner Mountain America, the instant appeal includes substantially different parties and relates to substantially different fair market values of the properties in issue.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 10(c)(6) of the West Virginia Rules of Appellate Procedure, the Petitioners respectfully request that the Court allow oral argument in this matter and, pursuant to Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, respectfully represent that oral argument is necessary because although the ultimate issue in this matter is relatively straightforward, i.e., whether the Circuit Court erred in holding that the Petition is *res judicata*, the legal principles underlying this issue are such as to require some full detailed development so that oral argument would significantly aid the Court's decisional process.

Pursuant to Rule 10(c)(6) of the West Virginia Rules of Appellate Procedure, the Petitioners also state that the time allotted by Rule 19 of the West Virginia Rules of Appellate Procedure is insufficient and that the extended time provided by Rule 20 of the West Virginia Rules of Appellate Procedure is necessary here because this matter involves constitutional questions regarding the validity of a court ruling.

VI. STANDARD OF REVIEW

In Mountain America, LLC, et al, v. Huffman, 224 W. Va. 669, 678, 687 S.E.2d 788, 777 (2009), this Court held that:

Given the various assignments of error raised, our standard of review is multifaceted. We have held that “ [t]his Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo.’ Syllabus Point 4, Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996).” Syl. Pt. 1, In re: Tax Assessment of Foster Foundation's Woodlands Retirement Community, 223 W.Va. 14, 672 S.E.2d 150 (2008). With respect to questions of law raised regarding the constitutionality of the governing statutes, we employ a de novo standard of review. Id. at 155. Furthermore, “ [a]n assessment made by a board of review and equalization and approved by the circuit court will not be reversed when supported by substantial evidence unless plainly wrong.’ Syl. Pt. 1, West Penn Power Co. v. Board of Review and Equalization, 112 W.Va. 442, 164 S.E. 862 (1932) (other internal citations omitted).” Id. at Syl. Pt. 3.

VII. ARGUMENT

1. The Circuit Court's ruling is erroneous, and ought to be reviewed and reversed since the doctrine of *res judicata* is inapplicable to the instant matter for several reasons. The parties are different and each annual assessment for taxation presents a separate and distinct issue such that the causes of action are not identical. The instant action was not and could not have been resolved in any prior action .

In the Order, the Circuit Court erroneously concluded that this case is barred by the doctrine of *res judicata* because “the claims in this matter are identical to the claims in a previous proceeding before the Court.” Order, at *2, par 1. In reaching this conclusion, the Circuit Court relied upon its earlier decision in Mountain America, LLC v. Donna Huffman, Assessor of Monroe County, Civil Action No. 07-C-30 (January 28, 2008, Circuit Court of Monroe County, West Virginia) (the “2007 Claim”). With respect to the 2007 Claim, the Circuit Court found that:

the Assessor acted in conformity with 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. In addition, the Court ruled that the County Commission properly weighed the evidence before it and did not err in its decision to uphold the assessments made by the Assessor. Order, at *2.

As this Court is aware, Appellant Mountain America, LLC appealed the 2007 Claim to this Court and the Court affirmed the Circuit Court's order regarding the 2007 Claim. See Mountain America, LLC, et al, v. Huffman, 224 W. Va. 669, 687 S.E.2d 788 (2009), *cert denied* by Mountain America, LLC v. Huffman, 130 S. Ct. 1377 (April 26, 2010, No. 09-1007).

As authority for its ruling, the Circuit Court cites Lloyd's Inc v. Lloyd, 225 W. Va. 377, 693 S.E.2d 451 (2010). In Lloyd's, this Court upheld the circuit court's finding of *res judicata*, based upon circumstances wholly different from those in this case. Lloyd's involved an action brought by a corporation against its bookkeeper for misappropriation, misapplication, conversion of payments it had made in satisfaction of its debts and for unjust enrichment. The Court found

that the claims were barred by *res judicata* because the cause of action could have been resolved by the prior claim. Lloyd's, 225 W. Va. at 383, 693 S.E.2d at 457. However, as demonstrated below, not only is the instant cause of action wholly separate from the 2007 Claim, the Circuit Court erred in failing to even consider whether the other requisites for *res judicata* were satisfied. As this Court has stated,

Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. Lloyds, at Syl. Pt. 3 (internal citations and quotations omitted).

In issuing the Order, the Circuit court misapplied the third element of *res judicata* and completely ignored the other two elements of the legal concept. Nevertheless, upon addressing each element separately below, it will become apparent that the Circuit Court erred in summarily concluding that the instant claim was somehow resolved and forever barred in light of the 2007 Claim.

a. Final Judgment on the Merits.

The Petitioners do not dispute that the Circuit Court's Order with respect to the 2007 Claim was a final adjudication on the merits with respect to that claim and therefore will not elaborate on this element.

b. The identity of the parties in the 2007 Claim and the instant claim are entirely different.

Ironically, one of the issues argued passionately by counsel for the County Commission and the Assessor, ruled upon favorable to them by the Circuit Court in the 2007 Claim and stated

as an assignment of error to this Court in Mountain America, LLC, et al. v. Huffman, 224 W. Va. 669, 687 S.E.2d 788 (2009), squarely involved the identity of the parties. Specifically, Mountain America argued in the 2007 Claim that the County Commission erred in denying the right of all but one of the Petitioners (Mountain America) to any judicial review of the decision of the County Commission which sustained the taxable values of the subject properties. The error Mountain America claimed there was three fold. First, that the names of each petitioner in the 2007 Claim were contained in the parties' express stipulation in the record which was an integral part of the 2007 Claim at all stages. Secondly, Mountain America argued that the West Virginia Rules of Civil Procedure do not apply when the Circuit Court is exercising its jurisdiction as an appellant court and, even if they did, they would not operate to deny the Petitioners' right of appeal in the 2007 Claim. Finally, the Petitioners in the 2007 Claim argued that even one party with standing is entitled to obtain equalization of the assessments of all taxpayers in a county.

Rejecting this argument, this Court, in Syllabus Point 3 of Mountain America, LLC, et al. v. Huffman, 224 W. Va. 669, 687 S.E.2d 788 (2009), held that “[a] petition for appeal which names only one of multiple complainants appeals only the cause of them complainant named and is wholly insufficient as a petition for an appeal by any person other than the person named.”

Elaborating on this syllabus point, this Court, in the body of its opinion stated that:

While we appreciate Appellants' contention that the identity of each and every one of the Appellants had been stated for the record at the outset of the evidentiary hearing before the County Commission, and that the record below contains a stipulation with regard to the taxpayers and tracts of land at issue at the February 7, 2007, hearing before the Board of Equalization and Review, the fact that certain property owners were involved in the February 7, 2007, hearing does not have any bearing on whether the property owners properly perfected their appeal of the Board of Equalization's determination to the circuit court. We, too, find persuasive the authority of our neighboring state, Virginia, and

find that a petition for appeal which names only one of multiple complainants, appeals only the cause of the complainant named and is “wholly insufficient as a petition for an appeal by any person other than the person named.

Mountain America, LLC, et al, v. Huffman, 224 W. Va. at 679, 687 S.E.2d at 778 (2009)

(internal citations and quotations omitted).

As this Court has stated in Conley v. Spilers, 171 W. Va. 171 W. Va. 584, 301 S.E.2d 216 (1983), the underlying purpose and policy reasons for the identity of parties requirement in *res judicata* is:

“To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”

Id. at 588, 216 (quoting Montana v. United States, 440 U.S. 147 (1979)). The Appellants in the instant action did not have the benefit to fully and fairly litigate the 2007 Claim and therefore cannot be precluded from pursuing their claims in the instant litigation. To the extent the Circuit Court so ruled, it is in error and ought to be reversed.

c. The cause of action identified in the instant cause of action is substantially dissimilar to the cause of action determined in the 2007 Claim.

In Lloyd’s Inc v. Lloyd, 225 W. Va. 377, 693 S.E.2d 451 (2010), the only case cited by the Circuit Court in its Order, this Court held that, with respect to the third element of *res judicata*,

The third element of *res judicata* requires that “the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.” *Id.* (internal citation and quotations omitted)

The cause of action for the 2009 Claim could not have been resolved in 2007 because the 2009 Claim had not yet occurred, the 2007 Claim and the 2009 Claim have substantially different parties, and the 2007 Claim and 2009 Claim present different facts. Further, the Circuit Court fails to take into account that the fair market value of the subject properties is different each year and that the Assessor must assess property as of July 1 for each year. Thus, the principles of equal protection and uniform and equal taxation are violated by holding that the claims in the instant year are identical to the 2007 Claim.

Indeed, such a ruling is directly at odds with a prior ruling from this Court. In the case of In re United Carbon Co., 118 W. Va. 348, 190 S.E. 546 (1937), the Court held that

The judgment of a circuit court rendered in a statutory proceeding brought by a taxpayer for the purpose of testing the validity of an ad valorem property tax for one year does not constitute an estoppel to a like inquiry for a subsequent year, except to the extent that it appears that the facts upon which the former judgment rested are the same as those to be litigated in the proceeding for the subsequent year. Id. at syl pt. 2.

Accordingly, the Circuit Court erred in concluding that the 2009 Claim is identical to the 2007 Claim and in thus, refusing to address Petitioners' arguments relative to the equal protection and uniform and equal taxation arguments as set forth herein.

(i) The Assessor's Valuations of the Petitioner's Properties for 2008 Property Tax Purposes Violate the Equal and Uniform Taxation Mandate of the West Virginia Constitution and the Equal Protection Clause of the United States Constitution.

Mr. Goldman's testimony, showing the many errors in the Assessor's valuations of the Petitioners' properties, was, to a large extent, uncontroverted by any contrary testimony or other evidence. As a result, the County Commission, acting as a Board of Equalization and Review, was obligated to reduce the excessive and erroneous values which the Assessor set for the Petitioners' properties for the 2009 Claim and the Circuit Court erred in failing to find as much.

Once a taxpayer in West Virginia has made a showing that tax appraisals/assessments are erroneous, the Assessor is then bound by law to rebut the taxpayer's evidence. In Re Tax Assessments Against Pocahontas Land Co., 172 WV 53, 303 S.E.2d 691 (1983). Except for *de minimus* errors as to consideration values and rebates, the Assessor has introduced no evidence to rebut Mr. Goldman's testimony and exhibits.

While the law in West Virginia clearly requires that assessors appraise property at true and actual value (fair market value), Mr. Goldman's evidence, drawn from the public records of Monroe County over three years, clearly shows that the values being urged by the Assessor for the Walnut Springs properties are not true and actual, fair market value, but are, on average, 145% of that true and actual value as indicated by recent sales prices for those same properties. App. pp. 000038.

It is also a fundamental constitutional principle in the State of West Virginia that similar property should be taxed similarly. This principle of equal treatment under the law is guaranteed by both the West Virginia Constitution and the United States Constitution. Specifically, the West Virginia Constitution guarantees to its citizens that, with certain unrelated 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 similar concept is embedded in 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), which will be discussed in more detail below, illustrates these concepts and Petitioners submit it also controls the outcome of the pending dispute. In that case, *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 on real estate by a West Virginia county (Webster County) violated the Equal Protection Clause of the United States Constitution.

In short, the assessor in Webster County 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 recent arm's length transaction (i.e., as with the dispute before this Court, the assessor in Webster County 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. U.S. Const., Art. XIV.

Section 1, Article X of the Constitution of the State of West Virginia is clear and unambiguous in prohibiting the higher taxation of any one species of property when compared to the taxation of any other similar species of equal value. A systematic valuation of property at a higher percentage of its true and actual value, than that 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.

In the case of In Re Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649 (1959), the West Virginia Supreme Court of Appeals echoed this clear and fundamental constitutional principle which dates nearly to the beginning of the State of West Virginia as a political entity, and has been steadfastly applied throughout its history to this day. In Kanawha Valley Bank, the West Virginia Supreme Court of Appeals, 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.*

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 the Supreme Court of Appeals of West Virginia 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. This expansion of standing by the Courts 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 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).

Thus, the Supreme Court of Appeals of the State of West Virginia has been so cognizant of, and so protective of, the fundamental constitutional right set forth in Section 1, Article X of the Constitution of the State of West Virginia, to go so far as allowing individuals, entities and persons, other than the specifically impacted property owners, to intervene or even maintain a separate cause of action to assure compliance with these constitutional protections. As a result, such protections accrue to the benefit of all citizens and taxpayers who have a fundamental interest in preserving the integrity of a fair, equal and uniform taxation system and the constitutional priority of that concept as set forth in Section 1, Article X of the Constitution of the State of West Virginia.

The evidence in the case at bar, by the Assessor's own admission, and the State Tax Department testing, clearly shows that the property tax values in Monroe County continue to violate the constitutional mandate and clearly have done so for many years. There has been an

ongoing, systematic and intentional under-valuation of real property not only in the immediate geographic area of the Petitioners' properties but throughout the county. The evidence in the record which supports this includes the admissions of that deficiency by the Assessor and her attempted remedies to cure it.

Further, 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 West Virginia State Tax Department designed to assure that property is taxed uniformly and equally throughout the county. In addition, this Honorable Court should note the clear and unrebutted evidence submitted by the Petitioners' expert who found, from a significant and broad sampling of values pursuant to arms-length sales documented by the records of the County Commission of Monroe County, that the Petitioners' properties are, in fact, valued by the Assessor at an average of 145% of fair market value as evidenced by the actual sales transaction values for the recent sales of those properties. In fact, the range of tax values, for the properties owned by the Petitioners herein, runs as high as 413% of fair market value. App. pp. 000038; 000069-000071.

Insomuch as the best evidence available for determining fair market values is actual arms-length sales transactions, it is shocking that in the case currently before this Court, the values of the Petitioners' properties for tax purposes, when compared to those recent arms length transactions, average of 145% of fair market value, while other properties similarly situated in Monroe County are generally valued at an average percentage of fair market of 12.35% .

In, Mountain America, LLC, et al, v. Huffman, 224 W. Va. 669, 690, 687 S.E.2d 788, 789 (2009), this Court found significant, in holding that a systematic and intentional equal protection violation had not occurred with respect to Mountain America, that 2007 was the only year in which any dispute had arisen over property taxes in the Walnut Springs area. In 2008

and 2009, Petitioners presented evidence that such a violation had, in fact, occurred and thus a pattern of overassessment was established with respect to the Walnut Springs properties.

As previously noted, the 2007 Claim included only Mountain America as a party. *Id.* at 680, 779. Thus, it is patently unfair to find that in 2009, the other Petitioners holding property in the Walnut Springs area are bound by this Court's previous ruling.

Todd Goldman's testimony, including the exhibits discussed herein and in the record, alone establish clear and convincing evidence of an intentional and systematic discrimination as to the Petitioners' tax appraisals in Monroe County in 2007, 2008, and 2009. On the other hand, the Assessor's claims she has attempted to alleviate the accrual of years of intentional and systematic undervaluation of properties in Monroe County by recently undertaking several annual across-the-board increases in order to increase generally all real property values in the County for tax purposes is entirely without merit.

There are several major problems with the Assessor's view. 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 those properties by simple mathematical necessity will assure a perpetuation of that unfairness, inequality and non-uniformity and will assure that the inequality existing at the beginning will never be remedied. In addition, there now appears to be clear evidence that the testimony as to asserted across-the-board increases is simply not true.

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 In Re U.S. Steel Corporation, 165 W.Va. 373, 268 S.E.2d 128 (1980), 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)).

In its decision in In Re U.S. Steel Corporation, 165 W.Va. 373, 268 S.E.2d 128 (1980), the West Virginia Supreme Court of Appeals also considered the issue of 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. The West Virginia Supreme Court of Appeals 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.

The record in this matter clearly reflects that the Walnut Springs properties, owned by Petitioners and the subject of appeal in this matter, were specifically and intentionally selected out by the Assessor for the purpose of creating an entirely new neighborhood for the purposes of *ad valorem* property taxation.

In Re U.S. Steel Corp. (*Supra*), the Court stated as follows:

“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 [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 Corp., 268 S.E.2d, at page 125.

Petitioners in this case assert that what has occurred because of the Assessor’s actions is a similar intentional plan to discriminate against them. The result of the Assessor’s intentional actions is to value Petitioners’ property at a fundamentally different and higher level of fair

market value than that applied to other similarly situated real property owned by others within Monroe County.

The West Virginia Supreme Court of Appeals has clearly provided that similar actions by other assessors in other counties at other times, requires a remedy for the Petitioners 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 Petitioners' 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 Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336 (1989).

Perhaps one of the more recent preeminent decisions on *ad valorem* property tax treatment, and the requirements that equal and uniform standards must be maintained to satisfy the equal protection clause of the United States Constitution, is a United States Supreme Court case which had its genesis in the State of West Virginia. In the case of Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336 (1989), the United States Supreme Court addressed these concepts in a case arising from assessment practices in Webster County, West Virginia. Petitioners herein assert that the facts and circumstances of the Allegheny Pittsburgh Coal Co. decision are essentially identical to the case before this Court. Specifically, just as in Allegheny Pittsburgh, Petitioners allege that the Assessor has violated Petitioners' federal constitutional rights to equal protection of the law. United States Constitution, at Art. XIV; West Virginia Constitution, at Art. X, Sec. 1.

In its Allegheny Pittsburgh Coal Co. decision, the United States Supreme Court, by an extraordinarily rare unanimous 9-0 vote, held that the assessments of real property by a West Virginia County (Webster County), violated the Equal Protection Clause of the United States Constitution. The facts in the Allegheny Pittsburgh Coal Co. case were very similar to those here in that the Assessor of Webster County had utilized recent sales transaction data to substantially increase real property tax appraisals and assessments for the taxpayers' coal properties. In the Allegheny Pittsburgh Coal Co. decision, the Webster County Assessor's reliance upon recent sales data, in a manner similar to the actions taken by the Assessor in the case at bar, resulted in assessments in the range of only 50% of recent sales prices of similar property sold in arms length transactions. In the case at bar the facts are even more egregious. Evidence introduced by the Petitioners reflect that the tax values challenged here are at an average of 150% of fair market value based upon recent arms-length transactions.

In Allegheny Pittsburgh Coal Co., the United States Supreme Court was further faced by evidence in the record – similar to that in the case at bar – which reflected that the resulting valuations of the taxpayers' coal properties there were from eight (8) to thirty-five (35) times greater than comparable neighboring property which had not been recently sold. The Supreme Court of the United States, on the basis of those facts, found that the conduct of the Webster County Assessor constituted unequal treatment under the law in violation of the United States Constitution.

In its Allegheny Pittsburgh Coal Co. 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.

Both the facts and the legal logic of Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, (*supra*), are so similar to the case at bar that it would appear almost impossible to reconcile a different result in this case.

The evidence clearly reflects that the Assessor of Monroe County, due to her office's having clearly been, for several years, out of compliance with State standards, attempted to resolve those disparities by deliberately selecting out the Petitioners and their properties for special treatment.

Specifically, Petitioners' properties evidenced a number of recent sales transactions, thereby making it easier for the Assessor to substantially increase the appraisals for those properties, while continuing her intentional and systematic neglect and under-valuation of similar species of real property throughout all of Monroe County and even in the immediate geographic area of Petitioners' properties.

The degree of disparate tax valuations and resulting disparate tax liabilities, faced by Allegheny Pittsburgh Coal Company, as a percentage of fair market value, is not nearly as great as that presented by the case currently before this Court. The Petitioners would assert that both an appropriate reading of West Virginia case law cited herein and the United States Supreme Court decision in Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, clearly provide that the Petitioners in this matter are entitled to the relief they requested. That relief would be an appropriate reduction of the value of their properties for tax purposes to a percentage of fair market value that is in line with what the evidence in the record reveals that other similar properties are valued at for such purposes. Specifically, those other taxpayers'

properties are valued on average at not more than 12.35% of fair market value, as opposed to the Petitioners' properties which are valued at an average of 145% of their fair market value.

(ii) The Assessor's Valuations of the Petitioner's Properties for 2008 Property Tax Purposes Violate Applicable Provisions of the Statutes and Regulations Governing the Administration of Property Taxes in West Virginia in a Manner that Systematically Overvalues the Petitioners' Properties.

In the case at bar, the Assessor admitted in her testimony that she created an entirely new "neighborhood" for the purposes of segregating for tax purposes the geographic area in question (Walnut Springs Mountain Reserve). In doing so, she did not take into consideration required factors such as the percentage of completion of improvements or infrastructure development in the relevant area.

The evidence in the case at bar also reflects that, to the extent that there are similar other residential areas of Monroe County, those areas are valued by the Assessor's methodologies at a percentage of fair market value far less than that of the Walnut Springs Mountain Reserve properties owned by the Petitioners herein.

110 C.S.R. 4 § 3.1.3 clearly provides that the remaining lots and/or residue within a *recorded* plan or plat will not, in any case, be revalued by the Assessor or Tax Commissioner based solely on the sales of other lots described within the recorded plan or plat.

What makes the Assessor's actions in the case at bar even more questionable is the fact that there is not even a recordation of a plan or plat. There is no evidence to reflect in the record that such recordation has occurred. Notwithstanding that fact, in a systematic and discriminatory manner, the Assessor has ignored practices and procedures set forth in statute and regulation which would protect the remaining unconveyed lots from inappropriate valuation based upon sales transaction of other previously sold lots.

During counsel's direct examination of the Assessor and during her examination by her own counsel, the Assessor attempted to emphasize the selling prices of real estate as the critical factor to consider in establishing true and actual values for property tax purposes. While recent selling prices of specific properties are a legitimate consideration, the use of such a concept cannot operate in a vacuum. This State's Constitution mandates that properties are appraised at true and actual values, and that they are to be appraised similarly and equally with similarly situated properties, including those that have recently sold and those which have not.

The primary obligation of the County Commission sitting as a Board of Equalization and Review is embodied in its name, that of 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 continued to fail the State Tax Department's statistical analysis, her failure to undertake any actions to accommodate this unequal and disparate treatment is a violation of law, and if upheld, a violation of the requirements that the Board of Equalization and Review should have, but failed to fulfill. WV State Constitution, Article X, Section 1; W.Va. Code §11-3-24.

The Assessor and her counsel attempt to defend, as legally temporary, the unequal appraisal of Walnut Springs Mountain Reserve property as being based upon a required three-year evaluation cycle. W.Va. Code § 11-1C-9 and 11-3-1 *et seq.* Petitioners assert that this position is not a legitimate defense of the Assessor's actions, and is a misreading of applicable West Virginia law. In essence, counsel for the Assessor asserts and the Circuit Court essentially agreed, that the Board of Equalization and Review, should not undo the Assessor's "good work" when the simple fact of the matter is that West Virginia law provides no course of action but to undo the unequal and non-uniform results of her work.

The three-year re-evaluation cycle provided for at W.Va. Code § 11-1C-9 does not by its stated language, or any decision based upon that language, permit the three-year cycle to be used as an implementation of unequal treatment for a period until the remaining properties in the county are appraised properly. It is simply a statutory requirement set forth by the Legislature requiring that assessors actually view each and every parcel of property in the County no less often than every three years.

Any assertion by the Assessor, that the inequality is legally temporary, is not a valid defense and would only have merit if the Assessor had undertaken a methodology to annually adjust the tax values of at least one third of the total land, parcels, or neighborhoods within Monroe County to current market values, an action which she clearly did not undertake. Furthermore, Petitioners' expert testified that this "temporary" inequality would last at least twenty years or more – hardly the uniform and equal taxation required by the State Constitution.

When less than one percent of the land, only a hand full of the 12,000 or more parcels in Monroe County and only one in fifty neighborhoods are targeted by the Assessor for current true and actual fair market valuation, a more clear definition of blatant discrimination and unequal treatment cannot be conceived. In fact, the evidence is clear that the only properties singled out for increases are those owned by Petitioners herein. This discrimination cannot be shrugged off as merely the results of the first of a three-year process of even-handed reevaluation.

The Assessor stated on a number of occasions in her testimony that she was attempting to manipulate the results to help soften the blow to the Walnut Springs properties once she made the illogical and improper decision not to reevaluate the county as a whole. If that were true she could have easily "softened" the blow by phasing in the increased valuations of the Walnut Springs properties and all other properties in the county during a three-year period. The Assessor has clearly undertaken no such action and, without significantly lowering the Walnut

Springs properties while raising the others, she will never accomplish equalization as required by West Virginia law and the State's Constitution.

As demonstrated above, because the Petitioners are substantially different and the fair market values of the subject properties are wholly separate and distinct, the Circuit Court committed reversible error in holding that the cause of action in this appeal is *res judicata*.

d. In disregard for case and statutory law, the Circuit Court erred in failing to present findings of fact and conclusions of law to support its Order.

In the Order, the Circuit Court summarily concludes, citing only one case that as demonstrated above, is not on point except for the principal of law that it states as the basis for its decision. It presents no findings of fact and conclusions of law and demonstrates neither an understanding of nor appreciation for the facts and law surrounding this case. In this regard, a recent holding of the West Virginia Supreme Court of Appeals suggested that with respect to property tax cases, more than just a conclusory statement with one cited case is required in a Circuit Court's order. See, Stone Brooke Limited Partnership v Phyllis Sisinni, Assessor, et al., 688 S.E.2d 300, 224 W.Va. 692 (2009). ("We hold that when a circuit court reviews an appraisal of commercial real property made for ad valorem taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer's consideration of the required appraisal factors set forth in [applicable legislative regulations].") In that consolidated appeal of cases arising from three separate counties, the Supreme Court instructed the circuit courts to "consider whether the Assessors correctly applied the cost approach when appraising the Petitioners' properties, including considering depreciation through physical deterioration, functional obsolescence, and economic obsolescence as required by [applicable legislative regulations].") Id., note 15.

For this separate reason, the Circuit Court erred in issuing its Order without submitting findings of fact and conclusions of law.

VIII. CONCLUSION

Wherefore for the reasons set forth in this Petitioners' Brief, the Petitioners respectfully request that the Order be reversed and overruled in its entirety and that judgment be entered for Petitioners.

Respectfully submitted by Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1057

(Circuit Court Civil Action No. 08-C-24)

Mountain America, LLC; Feroz Alloo; Robert and Beverly Amico; Ron Andrews; William Andrews; Reed Atkins; William and Nancy Atkins; Sergio and Cheryl Baez; Thanos Basdekis; Edward and Tracy Bober; Peter Calderon; Jimmy Carroll; Chris and Dina Cashwell; Bob and Linda Chamberland (Artha, LLC) ; Wayne Clibum; Justin and Mary Daly; Peter and Sherry DeCloppo; John Eagle; Dale and Michelle Enzor; Charles and Cynthia Evans; William Farley; Lon Fountain; Fernando Garcia; Jonathan Halperin; Esther Halperin; Mike and Vivian Hollandsworth; Jan Jerge; Judy Leon; Freda Livesay; Victor Long; Jean Jacques Millard; Jonathan and Erin Panks; Stephen and Lauren Rice; Michael Robey; Hee Soo Roh; George Ross; Robert Schlossberg; Neil Patrick Welsh; Teddy Kim; Obie Woods, Jr.; Gulam Younossi, WBMA LLC; Walnut Ridge LLC; Sugar Tree, LLC; JF Investment Holdings; and Greentree LLC,

Petitioners,

v.

DONNA HUFFMAN, ASSESSOR OF MONROE COUNTY, et al.

Respondents.

CERTIFICATE OF SERVICE

I, Robert S. Kiss, counsel for Petitioners, do hereby certify that I have served the foregoing "*Petitioners' Brief in Support of Appeal from Ad Valorem Property Tax Assessments*," by mailing a true and exact copy thereof by first class United States mail, postage prepaid, upon the following:

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this 13th day of October, 2011.



Robert S. Kiss