FILED
NOV 2 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

APPEAL NOS. 12-0764, 12-0765, 12-0766, 12-0767 and 12-0768

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Judith Collett, Assessor of Taylor County,
and the County Commission of Taylor County,
Respondents below, Appellants,

v.

Eastern Royalty, LLC, as successor petitioner to
West Virginia Coal Mine, LLC, Petitioner below,
Appellee,

and

CoalQuest Development, LLC, Petitioner below,
Appellee,

and

Patriot Mining Company, Inc. Petitioner below,
Appellee,

and

Trio Petroleum Corporation, Waco Oil & Gas, Inc.,
Mike Ross, and I.L. Morris & Mike Ross, Inc.,
Petitioners below, Appellee,

and

CoalQuest Development, LLC, Petitioner below,
Appellee.

RESPONSE BRIEF FOR RESPONDENTS COALQUEST DEVELOPMENT, LLC AND PATRIOT MINING COMPANY, INC.

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I. STATEMENT OF THE CASE

The system adopted by the Legislature was designed to ensure fair and equitable taxation across all 55 counties in West Virginia. The guarantee of fair and equitable taxation has its roots in Article 1, Section 10 of the West Virginia Constitution. That section provides that "taxation ***shall*** be ***equal and uniform throughout the State***, and all property, both real and personal, shall be taxed in proportion to its value ***to be ascertained as directed by law***." The Legislature specifically stated as much:

> (a) The Legislature hereby finds and declares that ***all property in this state should be fairly and equitably valued wherever it is situated*** so that ***all citizens*** will be treated fairly and no individual species or class of property will be overvalued or undervalued ***in relation to all other similar property within each county and throughout the state.***

W. Va. Code § 11-1C-1(a) (emphasis added).

Various procedural mechanisms were adopted to make certain taxpayers were treated fairly and equitably. The State Tax Department adopted a tool called the Reserve Coal Valuation Model ("RCVM") which uses various inputs to estimate the recoverability of coal reserves in the future. The inputs are applied universally to all coal reserves in all 55 West Virginia counties. The inputs include data such as the rock strata above and below the coal seam, sulfur content of the coal, the presence of oil wells in the area, the presence of historical mining in the area, and the presence or absence of environmental factors that may impact the recoverability of the coal reserves. The quality of the mapping for each parcel of coal owned by the taxpayer is also important as better mapping allows the State Tax Department to fine tune the various input data.

In this instance, the State Tax Department utilized the RCVM in 2010 and 2011 to appraise the coal reserves for CoalQuest Development, LLC ("CoalQuest") and Patriot Mining

Company, Inc. ("Patriot"). The State Tax Department forwarded its appraisals to the Taylor County Assessor, Judy Collette ("Assessor"). The Assessor accepted the State Tax Department's appraisals and, pursuant to statute, multiplied the appraised value by 60% to determine the assessed values. She then placed the assessed values on the books.

The assessed values placed on the books by the Assessor were improperly overridden by the Taylor County Commission sitting as a Board of Equalization and Review ("Board"). The revisions to the State Tax Department's figures were made without providing proper notice to the tax payer and without following the mandatory procedural mechanisms set forth in W. Va. Code § 11-1C-10(g). As a consequence, the assessed value of the CoalQuest and Patriot coal reserves were increased using improper methods which were applied only to CoalQuest and Patriot properties in Taylor County, in derogation of the express statutory purpose of ensuring fair and equitable taxation to all property owners for all properties throughout the State of West Virginia.

Contrary to Appellants' brief, the Circuit Court's Final Order did not hold that the Assessor and Board have no authority to correct errors they may find in the State Tax Department's appraisals of natural resources property. However, in this instance, the Assessor and the Board did not try to correct "errors." Instead, they chose to abandon the State Tax Department's model by overriding the environmental factor assigned by the RCVM that is used throughout the state to reach a predetermined result – to increase Respondents' coal reserve appraisals by more than 1,000%.

II. STATEMENT OF FACTS

The coal reserves owned by CoalQuest and Patriot were singled out in Taylor County as opposed to other similar property within Taylor County and the other 54 counties throughout West Virginia. The Legislature unequivocally intended that coal reserves in Taylor County be

taxed consistently with coal reserves in Logan County, Boone County, Monongalia County, and so on. Moreover, the Legislature intended that CoalQuest's coal reserves in Taylor County be taxed consistently with any other entity's coal reserves in Taylor County. Taxation must be fair and consistent to every individual and entity throughout the State of West Virginia.

A. THE STATUTORY FRAMEWORK

West Virginia Code § 11-1C-10 requires that all coal reserves be appraised by the State Tax Department. That section explains the roles of the tax department, the tax commissioner and the county assessors in appraising and assessing coal reserves:

> **§ 11-1C-10. Valuation of Industrial Property and Natural Resources Property by Tax Commissioner; Penalties; Methods; Values Sent to Assessors**
>
> ***
>
> (2) "Natural resources property" means ***coal*** ... and other minerals.
>
> ***
>
> (d) Within three years of the approval date of the plan required for natural resources property required pursuant to subsection (e) of this section, ***the state tax commissioner shall determine the fair market value of all natural resources property in the state.*** The commissioner shall thereafter maintain accurate values for all such property.
>
> ***
>
> (2) In the case of all other natural resources property [other than managed timberland], the commissioner shall develop an inventory on a county by county basis of all such property and may use any resources, including, but not limited to, geological survey information; exploratory, drilling, mining and other information supplied by natural resources property owners; and maps and other information on file with the state division of environmental protection and office of miners' health, safety and training. Any information supplied by natural resources owners or any proprietary or otherwise privileged information supplied by the state division of environmental protection and office of miner's health, safety and training shall be kept confidential unless needed to defend an appraisal challenged by a natural resources owner. Formulas for natural resources valuation may contain differing variables based upon known geological or other common factors.

> ***The tax commissioner shall forward each natural resources property appraisal to the county assessor of the county in which that property is located and the assessor shall multiply each such appraisal by sixty percent and include the resulting assessed value in the land book or the personal property book, as appropriate, for each tax year. The commissioner shall supply support data that the assessor might need to explain or defend the appraisal.*** The commissioner shall directly defend any challenged appraisal when the assessed value of the property in question exceeds two million dollars or an owner challenging an appraisal holds or controls property situated in the same county with an assessed value exceeding two million dollars. At least every five years, the commissioner shall review current technology for the recovery of natural resources property to determine if valuation methodologies need to be adjusted to reflect changes in value which result from development of new recovery technologies.
>
> (e) ***The tax commissioner shall develop a plan for the valuation of industrial property and a plan for the valuation of natural resources property.*** The plans shall include expected costs and reimbursements, and shall be submitted to the property valuation commission on or before the first day of January, one thousand nine hundred ninety-one, for its approval on or before the first day of July of such year. Such plan shall be revised, resubmitted to the commission and approved every three years thereafter.
>
> ***
>
> (g) ***The county assessor may accept the appraisal provided, pursuant to this section, by the state tax commissioner: Provided, That <u>if</u> the county assessor fails to accept the appraisal provided by the state tax commissioner, the county assessor <u>shall</u> show just cause to the valuation commission for the failure to accept such appraisal and <u>shall</u> further provide to the valuation commission[1] a plan by which a different appraisal will be conducted.***
>
> ***

Id. (emphasis added).

Pursuant to subsection (e), the tax commissioner was assigned the task of developing a "plan" to fairly and equitably value natural resources property. In that vein, the tax

[1] The "valuation commission" is the "Property Valuation Training and Procedures Commission" ("Valuation Commission") which consists of the state Tax Commissioner or a designee, three county assessors, two county commissioners, and five citizens, one of which must be a certified appraiser. *See* W. Va. Code § 11-1C-2(d) and W. Va. Code § 11-1C-3.

commissioner developed the RCVM to appraise coal reserves throughout the state. The Legislature adopted regulations, titled "Valuation of Active and Reserve Coal Property for Ad Valorem Property Tax Purposes" set forth in 110 CSR 1I. Section 4.2 of the regulations states that "[r]eserve coal ***shall*** be valued according to the reserve coal valuation model (RCVM)." 110 CSR 1I.4.2 (emphasis added). According to the Tax Commissioner, the RCVM consists of a computer model, which utilizes a database consisting of coal bed maps, mine maps, property boundaries, prices, transactions, royalties, environmental conflicts, etc., for the entire state. An extensive algorithm calculates in-place tonnage, expected time of mining and present value for the mineable coal on every property. *See generally* 110 CSR 1I .4.2.

Subsection (g) provides the statutory process by which an assessor may ignore the State's "plan." Subsection (g) is clear: once a county assessor is provided appraisals from the state, she must either (1) accept the appraisal provided by the state tax commissioner or (2) show just cause to the Valuation Commission for refusing to accept the State's appraisal and provide a plan by which a different appraisal will be used. The Valuation Commission is a division of the State Department of Tax and Revenue. W. Va. Code § 11-1C-3(a). The State Tax Commissioner or his designee serves as the chair of the Valuation Commission. *Id.* The West Virginia Supreme Court of Appeals has stated that the procedure set forth in subsection (g) "provides the protocols for an assessor to question the appraisal of the natural resources property." *In re 1994 Assessments of Property of Righini*, 197 W.Va. 166, 171 n. 17, 475 S.E.2d 166, 171 n. 17 (1996).

In this case, the assessor admitted that she did not utilize the process set forth in subsection (g) and instead "accepted the tax commissioner's appraised value." *Joint App Volume, p. 163.* However, the Assessor's consultant, Jerry Knight, argued that the Assessor was before the Board of Equalization and Review asking for increases to specific CoalQuest tax

accounts as an ordinary citizen of the county, rather than in her role as assessor. After admitting that the Assessor had "accepted" the tax department's appraisals on the CoalQuest tax accounts, the Assessor's consultant argued as follows:

> MR. KNIGHT: ... Now the issue here is the appeal of those values under a different statute, totally different statute. The statute is 11-3-24, the board of equalization and review statute. This particular statute, bear with me a moment till I get there, indicates that generally that any person can apply to the board of review and equalization for the correction of the assessment. There's supreme court case law on that that suggests that any individual can appeal any entry on those books. It's the *Tug Valley Recovery* case. And the assessor in exercising her ***right just like any other person in the state of West Virginia*** who has that right, is presenting these issues before this board so that the board can carry out its duty of examining the information and correcting any and all errors that are found in the property books.
>
> So the assessor has accepted the tax commissioner's appraised value. She did so by placing them on the property books, on the land books and personal property books. This is---this is a--a review under a different statute that ***any person*** has the standing to come before this commission and bring information before this commission for their review and their determination of whether an adjustment need to be made to the property books so delivered by the assessor no later than the first day of February....

Joint App Volume I, pp. 164-65. The obvious problem with Mr. Knight's argument is that his reading of W. Va. Code § 11-3-24 contradicts the clear purpose of W. Va. Code § 11-1C-10(g). Such a reading of these two statutes renders subsection (g) meaningless.

The State Tax Department utilizes the RCVM, which was created pursuant to subsection (e), to allow it to fairly and equitably calculate the value of each cubic foot of coal reserves throughout different areas of West Virginia. The model uses coal seam thickness maps to determine whether seam thickness is greater than 30 inches. If it is, it is deemed mineable. If not, it is deemed unmineable. Logically, the value of mineable coal is higher than the value of unmineable coal, and it is taxed accordingly. The RCVM refines its appraisal of mineable coal

reserves using a complex calculation called a coal bed index factor, or "T-score." To determine the T-score for a given tax account, the model assigns numerical figures for six "factors," adds them together, and divides the sum by three. The tax department rounds that number to the nearest 20, 40, or 80. *See* 110 CSR 1I.4.2.3.17.g. To illustrate how the T-score affects the coal reserve valuation, the tax department's representative in 2010, Scott Burgess, testified that a T-20 might equal $1,000 per acre, a T-40 might equal $100 per acre, and a T-80 might equal $80 per acre. *Joint App Volume I, pp. 188-90.*[2]

The six factors which are added together and divided by three to equal the T-score include the following:

1. Market interest factor (also called the transaction factor - the tax department assigns a factor between 20 and 80 based upon a geostatistical analysis of the correlation between transaction density and mining activity) *See* 110 CSR 1I.4.2.3.17.a.

2. Market mineability factor (also called the mine factor - the tax department assigns a factor of 20, 40, or 80 based upon the history of mining within a certain radius around the property) *See* 110 CSR 1I.4.2.3.17.b.

3. Prime coal bed factor (also called the seam factor - if a seam of coal is the "prime coal bed" as defined at 110 CSR 1I.3.43, it is given a factor of 20, if not, it is given a factor of 80) *See* 110 CSR 1I.3.43, 110 CSR 1I.4.2.3.16 and 110 CSR 1I.4.2.3.17.c.

4. ***Environmental factor*** **(the tax department assigns a factor of 0, 20, 40, or 80 to each coal seam based upon environmental obstacles that may affect or impede mining)** *See* 110 CSR 1I.4.2.3.17.d (emphasis added).

[2] In actuality, the change is even greater. For instance, when the Board revised the T-score on CoalQuest's tax account 46-03-9999-0000-7750-0000, the appraisal increased from $540,036 to $6,133,931. *Joint App Volume I, p. 21.*

5. Use conflict factor (also called the well factor - the tax department assigns a factor of 0, 20, 40, or 80 based upon a geostatistical analysis of the number of oil and gas wells in an area) *See* 110 CSR 1I.4.2.3.17.e.

6. Volatility factor (the tax department assigns a factor of 0 or 80 based upon the volatility content of the coal seam) *See* 110 CSR 1I.4.2.3.17.f.

The regulations adopted by the Legislature detail the considerations in determining the appropriate environmental factor:

> 4.2.3.17.d. Environmental factor – ***The Tax Commissioner shall assign an environmental factor*** to each coal bed occurring on the property as follows:

identified environmental problem which would significantly preclude mining	factor of 80
identified environmental problem which would significantly impede mining	factor of 40
identified environmental problem which may affect mining	factor of 20
no identified environmental problem affecting mining at a location	factor of 0

110 C.S.R. 1I.4.2.3.17.d (emphasis added). In these cases, the Board revised the environmental factor from a score of 40 to a score of zero. The result of that downward adjustment was to change the overall T-score from T-40 to T-20, which increased the resulting appraisals more than tenfold.

B. MANIPULATING THE ENVIRONMENTAL FACTOR

After the Assessor "accepted" the State Tax Department's appraisals, multiplied them by 60% and entered them into the property books, she hired a consultant, Jerry Knight, to review whether the appraisals could be challenged. *Joint App Volume I, p. 7, Joint App Volume II, p. 310.* Mr. Knight, who previously worked at the State Tax Department, contacted his former colleague, Scott Burgess, who was the Deputy Director of the West Virginia State Property Tax Department in 2010. *Joint App Volume II, pp. 194, 320; Joint App Volume III, pg. 486.* Mr. Burgess assisted Mr. Knight in singling out CoalQuest and Patriot tax accounts for potential revisions to the overall T-Score. Mr. Burgess performed his review without the knowledge or approval of the State Tax Department. *Joint App Volume III, pp. 479, 561.* Indeed, the State Tax Department's attorneys, speaking as officers of the Court, disavowed Mr. Burgess as a "rogue" employee whose actions were "unauthorized" by the State Tax Department. *Id.*

Appellants' brief concedes that Mr. Burgess appeared at the Board hearings in 2010, "but was not present with counsel." *See* Appellants' Brief, at 5, 7. The reason he was not present with counsel is because the State Tax Department was not notified of the hearing or that a State Tax Department employee was going to appear at the hearing. *Joint App Volume III, pg. 564.* The State Tax Department's consultant, Jeffrey Kern,[3] was specifically told by Mr. Burgess that he should not come to the hearing in Taylor County. *Joint App Volume III, pg. 591.* Mr. Kern testified that he was told "Scott Burgess was busy overriding numbers as quick as he could, which was illegal." *Joint App Volume III, pg. 619.*

The RCVM initially assigned an environmental factor of 40 for each property at issue by utilizing maps for the subject properties and considering actual environmental impediments to

[3] Mr. Kern is President of Resource Technologies Corporation, which has assisted the State Tax Department in formulating and operating the RCVM since it began in approximately 1998. *Joint App Volume III, pp. 503-509.*

mining coal. *Joint App Volume III, pg. 567;577; 591.* Mr. Burgess, however, suggested that the environmental factor for each property should be zero. *Joint App Volume I, pp. 192-97.* The basis for that recommendation was found in a notation on spreadsheets for each tax account. That notation stated simply ... "ICG-Taylor." *Joint App Volume I, pp. 72.*

When asked to explain the "ICG-Taylor" notation attached to each decreased environmental factor, Scott Burgess stated that "... nobody at - - in our shop is aware of the reason for this notation." *Joint App Volume I, pp. 72-73.* Later in the same hearing, however, he testified that the RCVM may be disregarded if the market has "spoken." *Joint App Volume I, pg. 191.* In this case, Mr. Burgess testified that he relied upon statements from 2006 attributed to ICG's President, Ben Hatfield, who supposedly stated that ICG would mine all of the Kittanning coal in Taylor County in the next 15 years to conclude that the property had "spoken." *Joint App Volume I, pg. 192.* Based upon that statement, Mr. Burgess suggested that the Board ignore environmental obstacles to mining coal (the very obstacles which the RCVM found to exist on the property) and override the environmental factor to result in a T-score of 20 instead of 40 for all Kittanning coal seams on all CoalQuest and Patriot properties in Taylor County.[4] The Board adopted Mr. Burgess's recommendations in full.

The Circuit Court ruled that the Assessor failed to utilize the statutory protocols for challenging the appraisal she accepted from the State Tax Department, she was estopped from hiring a consultant and bringing proposed revisions to Respondents' coal reserve accounts before the Board. *Joint App Volume I, pg. 32.* Taking such action in 2010 violated statutory provisions and was made upon unlawful procedures. The Board admitted that its revisions on CoalQuest's accounts in 2011 were instituted due to the improperly revised assessments in 2010. *Joint App*

[4] During the 2011 hearing before the Board, the State Tax Department's consultant, Jeff Kern, testified at length as to why anticipatory statements of tax payers cannot be relied upon to assign T-scores. *See generally Joint App Volume III, pp. 580-91.*

Volume III, pg. 478. As such, the 2011 revisions also violated statutory provisions and were made upon unlawful procedures.

III. SUMMARY OF ARGUMENT

The hearings in 2010 and 2011 were fatally flawed for various reasons. First, the Assessor and her consultant, Mr. Knight, asked the Board to revise the CoalQuest and Patriot appraisals after she had already "accepted" them, multiplied the figures by 60% and placed them on the books. The Assessor failed to follow the protocols for an assessor to question the appraisal of the natural resources property. Those protocols are clearly set forth in W. Va. Code § 11-1C-10(g), and it is undisputed that the Assessor chose not to go before the Valuation Commission to show just cause for refusing to accept the State Tax Department's appraisals and provide a plan by which a different appraisal would be conducted. Failure to follow the mandatory protocols in subsection (g) forecloses the Assessor's ability to challenge the appraisals she accepted from the State Tax Department.

Second, as the Circuit Court found:

> [I]t is clear that the model applied by the State Tax Commissioner in valuing active and reserve coal properties can only be applied in an equal and uniform manner by applying the various formulas in the exact same manner in each county in the state.... A failure to do so, as in these instant appeals, would result in unequal taxation for properties in Taylor County as compared to similar properties in all the other counties of the state, and would thus violate the Taxpayer's constitutional rights. If the procedure used in this matter was proper, valuation of active and reserve coal properties in the State of West Virginia would devolve into chaos as each county hires its own consultant to fight the State Tax Commissioner's appraisals to increase and alter valuations.

Joint App Volume I, p. 31. The record is clear that the coal reserves belonging to CoalQuest and Patriot in Taylor County were not assessed in a fair and equitable manner under the Board's

revisions when compared to other coal companies' properties in Taylor County or throughout the State of West Virginia.

Mr. Burgess's basis for decreasing the environmental factor, which was adopted by the Board, requires total disregard for the statutory framework put in place by the Legislature. First, the Legislature required the tax commissioner to adopt a "plan." W. Va. Code § 11-1C-10(e). The "plan" was the adoption and utilization of the computer model, the RCVM. Second, the regulations adopted by the Legislature state that "[r]eserve coal ***shall*** be valued according to the reserve coal valuation model (RCVM)." 110 CSR 1I.4.2. Third, if the assessor does not accept the appraisal generated using the RCVM, she ***shall*** show just cause to the Valuation Commission for the failure to accept such appraisal and ***shall*** further provide to the Valuation Commission a plan by which a different appraisal will be conducted. The assessor did not do that. Unilaterally overriding the RCVM or disregarding the RCVM for one company in one county does not comply with the strict statutory mechanism adopted by the Legislature for taxing natural resource reserves.[5]

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary as the record and briefs provide the Court sufficient basis to affirm the Final Order of the Taylor County Circuit Court.

V. STANDARD OF REVIEW

As stated in Appellants' brief, the standard of the review in this court is multifaceted. The circuit court's order is reviewed under an abuse of discretion standard. Challenges to the circuit court's findings of fact are reviewed under a clearly erroneous standard and challenges to a circuit court's conclusions of law are reviewed de novo. *Century Aluminum of W. Va., Inc. v. Jackson County Comm'n*, __ W. Va. __, 728 S.E.2d 99 (2012) *citing* Syl. pt. 4, *Burgess v.*

[5] *See generally Joint App Volume I, pp. 197-201* for a concise synopsis of this argument.

Porterfield, 196 W. Va. 178, 469 S.E.2d 114 (1996). The lower court's standard in reviewing the Board's revisions to the State Tax Department's appraisals is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A. *In re Tax Assessment Against Am. Bituminous Power Partners, L.P.*, 208 W. Va. 250, 254-55, 539 S.E.2d 757, 761-62 (2000). The West Virginia Administrative Procedures Act provides:

> (g) The court ... shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because of the administrative findings, inferences, conclusions, decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedures; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g).

VI. ARGUMENT

A. THE ASSESSOR FAILED TO FOLLOW THE MANDATORY PROTOCOLS TO CHALLENGING THE APPRAISAL METHODOLOGY UTILIZED BY THE STATE TAX DEPARTMENT ON ALL COAL RESERVE PROPERTIES THROUGHOUT THE STATE

West Virginia Code § 11-1C-10(g) is clear: once a county assessor is provided appraisals from the State Tax Department, she must either (1) accept the appraisal provided by the state tax

commissioner or (2) show just cause to the Valuation Commission for refusing to accept the State's appraisal and provide a plan by which a different appraisal will be used. In this case, the Assessor admits that she accepted the appraisals, multiplied them by 60% pursuant to statute, and entered them into the books for Taylor County. The Assessor did not attempt to show just cause to the Valuation Commission for her refusal to accept the State's appraisal.

As set forth above, the Assessor's argument that she appeared at the hearing just as any other individual may appear and argue for increases on another taxpayer's appraisals without complying with the mandates of subsection (g) is disingenuous. The Assessor is not just "any other individual" – she is an elected official who has rights and responsibilities that are defined by West Virginia Code. As Assessor, she is tasked with the obligation of working with the State Tax Department, reviewing appraisals, deciding whether to accept appraisals, and deciding whether to ask the Valuation Commission to approve an alternative appraisal method for certain parcels or taxpayers. As the Assessor, she is mandated to either "accept" the appraisals or go to the Valuation Commission, which is under the West Virginia Department of Tax and Revenue, if she believes it is warranted. She may not, however, accept the appraisals and seek revisions to appraisals through the Board without complying with subsection (g).

Subsection (g) was specifically drafted by the Legislature to provide a mechanism by which the county assessor, and no one else, may challenge the tax department's appraisals. For an assessor to challenge a property owner's assessments, she ***shall*** utilize the procedures set forth in subsection (g). As noted in the Circuit Court's Final Order, "[g]enerally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary[,]" *See State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999), and its use

negates any discretion. *See State ex rel. Bennett v. Whyte*, 163 W. Va. 522, 524, 258 S.E.2d 123, 125 (1979).

Moreover, a controlling statute may not be ignored out of convenience. In a medical malpractice lawsuit, a plaintiff cannot simply ignore the mandatory prerequisites to filing a medical professional liability action set forth in the Medical Professional Liability Act [W. Va. Code § 55-7B-1 *et seq.*] and instead opt to proceed under the more lenient pleading requirements for a normal negligence case. Such a result would thwart the Legislative purpose of W. Va. Code § 55-7b-6 [dealing with the prerequisites to filing a medical professional liability case]. The same logic applies here and subsection (g) should not be stripped of meaning:

> It is presumed that the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective.

Syl. Pt. 2, *L.H. Jones Equipment Co. v. Swenson Spreader LLC*, 224 W.Va. 570, 687 S.E.2d 353 (2009) *citing* Syl. Pt. 7, *Ex Parte Watson*, 82 W.Va. 201, 95 S.E. 648 (1918).

Because the Assessor failed to utilize the statutory protocols for challenging the appraisal she accepted from the State Tax Department, she was estopped from hiring a consultant and bringing proposed revisions to Respondents' coal reserve accounts before the Board. Taking such action in 2010 violated statutory provisions and was made upon unlawful procedures. Because the Board admitted that its revisions on CoalQuest's accounts in 2011 were instituted due to the improperly revised assessments in 2010, the 2011 revisions also violated statutory

provisions and were made upon unlawful procedures. Accordingly, this Honorable Court should affirm the decision of the Circuit Court in all respects.

B. THE BOARD'S REVISIONS TO THE COALQUEST AND PATRIOT APPRAISALS DENIED RESPONDENTS OF THEIR CONSTITUTIONAL GUARANTEE TO FAIR AND EQUITABLE TAXATION

Appellants argue that the Board of Equalization and Review has the power and authority to revise any appraisal in any way under its authority to correct "all errors" pursuant to West Virginia Code § 11-3-24(c). However, the Board's actions in this case were not correcting "errors" – they were overriding the entire RCVM to reach a predetermined result. Had new information come before the Board regarding the amount of acreage owned by a taxpayer, the Board could have corrected that error. Likewise, if new evidence regarding an error in the environmental factor came to light (for instance, a surface feature that may affect mining coal is removed, such as dam was removed and a lake disappeared), then the environmental factor could be an error that needed correction. However, at no time during any of the hearings was any surface feature or coal seam feature discussed by Mr. Knight or Mr. Burgess. In fact, Mr. Burgess's only mention of surface or coal seam features was a denial of any such knowledge.

Mr. Burgess admitted he had no objective factors or data which supported changing the environmental factor from 40 to 20 on the subject property. *Joint App. Volume II, pp. 319-20, 327.* Mr. Burgess further testified as follows:

> MR. GODDARD: That's fair. With regard to the surface features for this particular account---this parcel---are you familiar with it at all?
>
> MR. BURGESS: Not at all. It's my understanding this would be a deep mine property and I don't know the surface features with the exception of a lake or a---perhaps a nearness of a national forest or something.
>
> Q: But you don't know?

A: I don't know; honestly.

Q: And as far as the site specific seam features---

A: Uh-huh [Yes].

Q: ---okay for these two seams; the Middle Kittanning and the Lower Kittanning and the environmental factor and how that would play. Is it fair to say you're not familiar with that at all either?

A: That's fair to say.

Joint App. Volume II, pg. 329. Mr. Burgess had zero facts to determine what the environmental factor should be.

It begs the question: Upon what did Mr. Burgess base his recommendation to decrease the environmental factor? The answer ... nothing. In short, the Board did not correct "errors" in the State Tax Department's calculation of the environmental factor. It manipulated the environmental factor at the suggestion of the Assessor's consultant and his former colleague, Mr. Burgess.[6]

Appellants argue that *In re Property of Righini*, 197 W. Va. 166, 475 S.E.2d 166 (1996) stands for the proposition that the Assessor and the Board can disregard the mandates of West Virginia Code § 11-1C-10(g) and hire counsel and consultants to challenge the Tax Department's appraisals by overriding the RCVM. *In re Property of Righini* does not stand for such a proposition. However, *In re Property of Righini* is quite instructive:

> The valuation process begins with the assessment of property. **The premise upon which the entire assessment process is built is that the State Tax Commissioner has the power of supervising the entire valuation process.** W. Va. Code 11-1-2 (1933); W. Va. Code 18-9A-11 (1993).

[6] The reason the environmental factor was adjusted rather than one of the other factors is perhaps because it is "the least scientific of any we have." *Joint App Volume II, pg. 326.*

> **Subject then to the State Tax Commissioner's overriding authority**, the Legislature has directed the assessor to assess all property annually as of July 1 at its true and actual value. W. Va. Code 11-3-1 (1977).

Id. 197 W. Va. at 169, 475 S.E.2d at 169 (emphasis added). Thus, the entire assessment process is subject to the State Tax Commissioner's supervision and authority, including the powers and authority of the county assessor. *In re Property of Righini* dealt with a narrow question, whether the Division of Forestry could invade the Assessor's authority (which is subject to the State Tax Commissioner) to designate forested property as "managed timberland" for assessment purposes. The question was purely jurisdictional and the Court did not consider the factual bases for the County Commission's decision. It is clear, however, that the Court did not rule that Assessor and the Board are independent of the State Tax Commissioner, the RCVM and the mandatory requirements of subsection (g). To the contrary, the *In re Property of Righini* Court stated that "[t]he premise upon which the entire assessment process is built is that the State Tax Commissioner has the power of supervising the entire valuation process." *Id.*

CoalQuest and Patriot, like any citizen of West Virginia, are entitled to fair and equitable taxation of their coal reserves in Taylor County. To help ensure all citizens are treated fairly and equitably, West Virginia Code § 11-1C-7(a) provides that:

> Except for property appraised by the state Tax Commissioner under section ten [§ 11-1C-10] of this article and property appraised and assessed under article six [§§ 11-6-1 et seq.] of this chapter, all assessors shall, within three years of the approval of the county valuation plan required pursuant to this section, appraise all real and personal property in their jurisdiction at fair market value except for special valuation provided for farmland and managed timberland. They shall utilize the procedures and methodologies established by the Property Valuation Training and Procedures Commission and the valuation system established by the Tax Commissioner.

Consistent with these tenants, Syllabus points 7, 10, and 13 of *Killen v. Logan County Commission*, 170 W. Va. 602, 295 S.E.2d 689 (1982) state as follows:

> 7. The tax commissioner's appraisal should be presumed to be correct and the assessed value should correspond to the appraisal value in the usual case.
>
> 10. It is the tax commissioner's duty to ensure that assessment occurs at market value. The tax commissioner must see that county officials are complying with the constitutional and statutory requirements of full value assessment. W. Va. Const. art. 10, § 1; W. Va. Code §§ 11-3-1; 18-9A-11.
>
> 13. Fifty-five sovereign entities do not exist within the sovereign state of West Virginia. Rather, 55 geographically-defined governmental organizations exist to carry out the purpose of state government. The counties are subdivisions of the state, and county officials and governments are generally subject to supervision by state officials acting for the state government.

In West Virginia, the Tax Commissioner appraises coal reserves using the RCVM, which was adopted by Valuation Commission and the West Virginia Legislature.

The State Tax Department appraisals were derived using the RCVM in the same manner it is used in all 55 counties in West Virginia. The "ICG-Taylor" override was not applied to any other entities in any other counties.[7] To single out ICG subsidiaries in one county for increased taxation is the epitome of unfair and inequitable taxation. The conduct of the Appellants violated Article 1, Section 10 of the West Virginia Constitution, West Virginia Code § 11-1C-1(a) and long-standing West Virginia case law. Simply stated, a property owner's tax bill should not be vastly different based upon the name of the owner or the county where the property lies.

VII. CONCLUSION

WHEREFORE, based upon all of the foregoing, Respondents CoalQuest Development, LLC and Patriot Mining Company, Inc. respectfully request that this Court AFFIRM the lower

[7] It may seem obvious that "ICG-Taylor" was not used in another county. To clarify, "ICG-Raleigh" and "ICG-Webster" were not used either, even though ICG had coal mines in both counties. Only in Taylor County was ICG singled out for inequitable taxation in this manner.

court's ruling which overturned the changes adopted by the Taylor County Commission sitting as a Board of Equalization and Review to the appraisals determined by the State Tax Department.

Respectfully submitted this 2nd day of November, 2012.

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APPEAL NOS. 12-0764, 12-0765, 12-0766, 12-0767 and 12-0768

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Judith Collett, Assessor of Taylor County,
and the County Commission of Taylor County,
Respondents below, Appellants,

v.

Eastern Royalty, LLC, as successor petitioner to
West Virginia Coal Mine, LLC, Petitioner below,
Appellee,

and

CoalQuest Development, LLC, Petitioner below,
Appellee,

and

Patriot Mining Company, Inc. Petitioner below,
Appellee,

and

Trio Petroleum Corporation, Waco Oil & Gas, Inc.,
Mike Ross, and I.L. Morris & Mike Ross, Inc.,
Petitioners below, Appellee,

and

CoalQuest Development, LLC, Petitioner below,
Appellee.

CERTIFICATE OF SERVICE

I, David E. Goddard, counsel for Respondents CoalQuest Development, LLC and Patriot Mining Company, Inc., hereby certifies that on this 2nd day of November, 2012, I served a copy of the foregoing **"RESPONSE BRIEF FOR RESPONDENTS COALQUEST DEVELOPMENT, LLC AND PATRIOT MINING COMPANY, INC."** by depositing the same in the U.S. Mail, postage prepaid and sealed in an envelope upon:

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