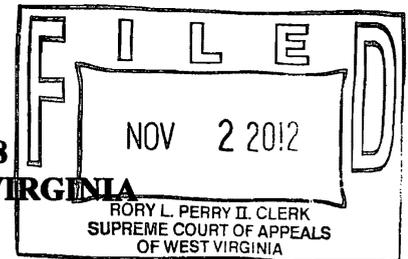


**Nos. 12-0764, 12-0765, 12-0766, 12-0767, 12-0768  
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



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

**vs.**

**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.**

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**BRIEF OF APPELLEE**  
**Eastern Royalty, LLC, as successor petitioner to**  
**West Virginia Coal Mine, LLC, Petitioner Below**

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## I. Statement of the Case

The Appellants assert in their Statement of Facts that “[t]he State Tax Department is not mandated to use the RCVM in valuing coal reserves”. *Appellant’s Brief* at 4. Eastern Royalty disputes this assertion; the Tax Commissioner’s own legislative rule found at W. Va. C.S.R. § 110-11-1 *et seq.* mandates the use of that model to value coal reserves, and an arbitrary departure from the use of the model in any respect would result in a violation of the mandate found at W. Va. Const. art. X § 1 that taxation be “equal and uniform”. That’s exactly what happened here; the result of the decision of the Board of Equalization and Review pertaining to Eastern Royalty in this case is that Eastern Royalty’s reserve coal is valued much higher in Taylor County than it would be anywhere else in West Virginia. As will be more fully developed below, the legislative rule includes detailed and objective provisions for how probable time of mining for coal reserves (which is, in turn, a critical element in the valuation of those reserves) is to be determined. The Board, however, decided to arbitrarily ignore those provisions and to substitute a subjective opinion in place of the objective criteria specified by the rule. As a result, Eastern Royalty’s property was not valued in the same way similar property would be in any other county in West Virginia.

There are also a couple of glaring errors in the Appellant’s summary of what occurred in the February 12, 2010 and February 22, 2012 hearings before the Board of Equalization and Review (herein the “Board”). First, the Appellants assert that Mr. Knight, a consultant who testified on the Assessor’s behalf, had been contacted or was retained by the Assessor. In fact, as will also be developed below, that is incorrect; rather, Mr. Knight was hired not by the Assessor but by the Taylor County Commission. That is an enormously important distinction, because the County Commission is charged with acting as the tribunal to hear the taxpayer’s appeal, and due

process requires that the tribunal be independent and unbiased. If the County Commission has already decided that the State Tax Commissioner's values are too low and has already hired a consultant to provide a basis for that belief, would a disinterested observer really expect the County Commission not to look with favor on the consultant's recommendations to increase the appraisals?

The Appellants also assert in multiple places in their Statement of Facts that Mr. Scott Burgess appeared and testified on behalf of the State Tax Department and that he agreed with Mr. Knight's assertions that the Tax Commissioner had made mistakes in the Tax Commissioner's appraisals. The Tax Commissioner's agreement with the proposed changes is also critically important to the Appellant's case, because the Tax Commissioner, not the Assessor, is responsible for valuing the property in question. Without the Tax Commissioner's agreement to the consultant's recommended changes, the county is powerless to make the changes.

The Appellants cite Mr. Burgess's testimony repeatedly in their brief, but they don't get around to mentioning that there are substantial issues with Mr. Burgess's testimony until much later in the document (page 13). In fact, there was substantial and uncontroverted testimony in the hearing on February 28, 2011 that Mr. Burgess was NOT authorized to testify in the 2010 hearings on behalf of the Tax Commissioner. *See* Finding of Fact No. 42, Joint App. Vol. I pp. 16-21. Despite that fact, however, Appellants continue to rely on Mr. Burgess's false testimony. As will be explained in more detail below, that reliance is just one of many that resulted in a denial of due process in these proceedings to Eastern Royalty.

## II. Summary of Argument

The State Tax Department has two responsibilities with respect to natural resource properties in West Virginia: first, to establish and maintain the plan by which those properties are to be valued for *ad valorem* tax purposes, and secondly, and to appraise or value each of those properties each year. Once the State Tax Department determines the appraised value for each natural resource property each year, it transmits the value to the Assessor in the county where the property is located. By statute, the Assessor has only two choices: either accept the State Tax Department's value, fractionally assess it, and enter that value on the land books for the year, or reject the value and show just cause for doing so to the Property Valuation Training and Procedures Commission (herein also called the "Valuation Commission") and apply to that Commission for permission to use a different plan for valuing the property.

In this case, however, Taylor County neither used the State Tax Commissioner's values, nor asked the Valuation Commission to approve an alternative approach to valuing the property. Rather, the Taylor County Commission hired a consultant to review the Tax Commissioner's values. The consultant not surprisingly recommended that the values for several properties should be increased. Although the Assessor initially placed the State Tax Commissioner's values on the property books, she then appeared before the Taylor County Commission sitting as a Board of Equalization and Review and asked the Board to accept different values; values that the consultant *hired by the Taylor County Commission* recommended. Again not surprisingly, the Board accepted all of its own consultant's recommendations and ruled against every taxpayer.

The Tax Commissioner's plan for valuing natural resource property is implemented in a computer model described in detail in the Tax Commissioner's legislative rule for valuing coal

properties. The consultant hired by the County Commission contended that he was suggesting only that the Board correct simple errors that he discovered in the Tax Commissioner's application of his own computer model used to value reserve coal property. The consultant conceded that the Tax Commissioner had the responsibility to appraise the reserve coal properties in question, and emphasized that the specific change that he recommended had, in fact, been approved by an employee of the State Tax Commissioner, who indeed testified that he was in agreement with the proposed changes.

The consultant maintained that it was within the purview of the Board to correct such simple errors, just as it is to correct errors in the name of the property owner, the description of the property, and other objective and obvious errors. Assuming *arguendo* that the Board does have that power (which is by no means certain, given that the State Tax Department has the responsibility for valuing all such properties statewide and given the Constitutional requirement of equal and uniform taxation statewide), this case nevertheless involves far more fundamental changes than the mere correction of simple data entry errors. Rather, the proposed changes instead involve a major departure from the Tax Commissioner's plan for valuing reserve coal properties and require substituting subjective evidence for objective scientific evidence required by the computer model. The Court below was therefore correct in finding that, in the absence of the approval of the Valuation Commission, the Board's decisions to accept the recommendations of its own consultant were outside the scope of its statutory authority and should be affirmed.

As to Eastern Royalty specifically, the Court below also found that the notice provided to the taxpayer was inadequate; since this conclusion was not appealed to this Court, the decision below should also be affirmed on this basis.

Finally, there is substantial and uncontroverted evidence in the record, which was set forth at length in the final order below, that the witness who testified in the 2010 hearings before the Board on behalf of the State Tax Department was not authorized to testify on behalf of the Tax Commissioner and that the Tax Commissioner, in fact, objected to and rejected those recommendations. Yet despite the fact that the Board's decisions for 2010 were clearly based on false testimony, the Board has made no move to correct them; rather, the Board relied on the values it established for tax year 2010 as the basis of its values for 2011.

While this Court has decided that the statutory appeals process for property tax appeals is facially constitutional, there are multiple unfair aspects in how that process was applied in this case. The fact that the Board relied on false testimony, together with the inadequate notice provided to the taxpayer, the lack of an opportunity for the taxpayer to prepare an effective defense, and the fact that the consultant was hired by the Board and was therefore beholden to it, amounts to a denial of due process to the taxpayer.

### **III. Statement Regarding Oral Argument and Decision**

This case presents the Court with the opportunity to emphasize that there are due process boundaries within which a Board of Equalization and Review must operate. It also presents the opportunity to identify and/or restrict the types of errors in the valuation of natural resource property that a Board of Equalization and Review has the authority to correct (if any) in the absence of the agreement by the Tax Commissioner, and to articulate when an Assessor must refer a disagreement to the Valuation Commission. For those reasons, and for the reasons articulated by the Appellants, Eastern Royalty concurs in their recommendation that oral argument under Rule 20 of the Revised Rules of Appellate Procedure is desirable.

## IV. Argument<sup>1</sup>

### A. The Assessor Failed to Discharge Her Statutory Duties

The Appellants assert that

under the West Virginia Constitution, Art. IX, § 1, and the provisions W. Va. Code §11-3-1 and 24, the Assessor and the Taylor County Commission have the ultimate legal authority to establish the true and actual value of all real and personal property within the county, including that of all natural resources properties.

*Appellant's Brief* at 17. Accordingly their second Assignment of Error is:

2. The Circuit Court erred in its Final Order in ruling that, as a matter of law, under W. Va. Code §11-1C-7a, the State Tax Commissioner has the exclusive jurisdiction to assess natural resources property and that the Assessor had no legal authority to hire a separate consultant to review appraisals conducted by the State Tax Commissioner and to question the methods of the State Tax Commissioner.

As authority for their proposition that the Assessor and the Taylor County Commission have the ultimate legal authority to establish the true and actual value of all real and personal property within the county, including that of all natural resources properties, the Appellants cite *In re Property of Righini*, 197 W. Va. 166, 475 S.E.2d 166 (1996). Syllabus Point 2 of that case appears to support their assertion:

W.Va.Code 11-1C-11 (1990) authorizes the Division of Forestry to assist other taxing authorities in the managed timberland certification process, but does not preempt the assessor and county commission from their ultimate authority and responsibility of determining the true and actual value of real and personal property.

However, a more detailed reading of the case reveals that the basis for the Court's decision was that the Legislature did not elect to make the Division of Forestry's determination dispositive of the issue of whether a parcel of land should be treated as managed timberland:

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<sup>1</sup> The *Appellants' Brief* includes five assignments of error, but their Argument is not organized under headings that correspond to those assignments of error as required by Rule 10(c)(7) of the Revised Rules of Appellate Procedure. Accordingly, the Argument this brief is organized to respond to the arguments presented by the Appellants in a logical fashion.

We do not agree that W. Va.Code 11-1C-11 (1990) represents the legislative expression that vests managed timberland assessment authority in the Division of Forestry. This statutory provision authorizes the Division of Forestry to assist other taxing authorities in the managed timberland certification process, but does not preempt the assessor and county commission from their ultimate authority and responsibility of determining the true and actual value of real and personal property. *If the Legislature intended W. Va.Code 11-1C-11 to endow the Division of Forestry with such authority so as to replace the assessor and the county commission in its assessment role, then the Legislature can and should have clearly indicated their intention to do so.*

*In re Property of Righini*, 197 W. Va. at 171, 475 S.E.2d at 171 (emphasis added, footnote omitted). Here, however, the Legislature has unequivocally indicated its intention that the Tax Commissioner, not a county assessor, has the responsibility both to (1) establish and maintain the plan by which natural resource property in West Virginia is to be valued for *ad valorem* tax purposes, and (2) to annually value all natural resource property in West Virginia.

The version of W. Va. Code § 11-1C-10(e) (1994) that governs the property taxation process for tax years 2010 and 2011<sup>2</sup> provides that:

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 training and procedures 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, re-submitted to the commission and approved every three years thereafter* (emphasis added).

W. Va. Code § 11-1C-10(d) (1994) provides:

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.

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<sup>2</sup> Ch. 11 Art. 3 of the W. Va. Code was significantly changed by the Legislature in the 2010 Regular Session with the enactment of SB 401. However, W. Va. Code § 11-3-32 provides that “[u]nless specified otherwise in this article, all amendments to this article adopted in the year 2010 shall apply to the assessment years beginning on or after July 1, 2011. Since this case concerns the assessment years beginning July 1, 2010 and July 1, 2011, the current provisions of W. Va. Code § 11-3-24 are not applicable, and the previous version (effective before the 2010 amendments) is used.

The legislature findings codified at W. Va. Code § 11-1C-1(a) (1990) explain the Legislature's intent in enacting this article:

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.

By enacting Article 1C of Chapter 11 of the Code, the Legislature was implementing the provisions of W. Va. Const. Art. X § 1, which provides, in part, 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 Tax Commissioner has, in fact, established the plans by which natural resource property in West Virginia is valued; for coal, the plan is described in detail in W. Va. C.S.R. §110-11-1 *et seq.*, which is the Tax Commissioner's legislative rule titled "Valuation of Active and Reserve Coal Property for Ad Valorem Tax Purposes". As the Tax Commissioner revises and updates the plan for valuing these properties, this rule is updated; it was last updated in March 2006 and approved by the Legislature in SB 357, passed on March 11, 2006. Mr. Goddard correctly explained that: "[t]he state has a system in place. The tax commissioner is assigned with that duty. The state tax commissioner formed a plan. The plan was to use a computer model. Uses it across county lines; all over the state, in every county." Joint App. Vol. II p. 307.

The Legislature also clearly articulated the responsibilities of the County Assessor with respect to natural resources that are valued by the Tax Commissioner. W. Va. Code §11-1C-10(d)(2) (1994) provides, in part:

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 (emphasis added).

W. Va. Code §11-1C-10(g) (1994) further provides that:

(g) The county assessor may accept the appraisal provided, pursuant to this section, by the state tax commissioner: *Provided, That if the county assessor fails to accept the appraisal provided by the state tax commissioner, the county assessor 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* (emphasis added).

This section is clear: the Assessor here had only had two choices: either accept the Tax Commissioner's value, or show just cause to the Valuation Commission for the failure to accept that appraisal. In the latter case, the Assessor is also required to provide to the Valuation Commission a plan by which a different appraisal will be conducted. Here, the Assessor did neither: she refused to accept the value as appraised by the State Tax Commissioner and instead cooperated in the effort to find fault with that appraisal. She failed, however, to show just cause to the Valuation Commission for her failure to accept that appraisal, and she failed to provide to the Valuation Commission a plan by which a different appraisal would be conducted.

**B. The Assessor's Attempted Justification for Her Actions is Unavailing**

In the hearings before the Board, various justifications for the Assessor's failure to go to the Valuation Commission were advanced. In the February 12, 2010 hearing, Mr. Knight stated that the Assessor had, in fact, accepted the Tax Commissioner's values by entering them on the land books, in part because she was forced to do so by time constraints. She therefore had no reason to "show just cause to the valuation commission" as required by W. Va. Code §11-1C-10(g). *See* Joint App. Vol. I p. 163-165. Mr. Knight then asserted that the Assessor then had the

right under the *Tug Valley Recovery [Ctr., Inc. v. Mingo County Comm'n*, 164 W. Va. 94, 261 S.E.2d 165 (1979)] case to appear before the Board to contest those values, just as any private citizen has the right to do. *See* Joint App. Vol. I p. 164-165.

At the February 22, 2010 meeting, her position changed somewhat; there, she asserted that she was, in fact, appearing as in her official capacity as the Assessor of Taylor County in the discharge of her duty to “attend and render every assistance possible” as required by W. Va. Code §11-3-24. *See* Joint App. Vol. II p. 312 (Mr. Knight testifying).

The Court below properly rejected both of those justifications for the failure of the Assessor to adhere to her statutory duties, concluding that “this argument is disingenuous, because the issue would not have been before the Board had the Assessor not challenged the State Tax Commissioner’s appraisals”. Conclusion of Law No. 9, in part, Joint App. Vol. I p. 26.

The Assessor’s attempt to subvert the requirement imposed by W. Va. Code §11-1C-10(g) that she either accept the Tax Commissioner’s value or gain the approval of the Property Valuation Training and Procedures Commission for an alternate plan or method of valuing the property cannot succeed for several reasons.

First, she misreads the applicable Code sections. W. Va. Code §11-3-24 requires the Assessor only to “render every assistance possible in connection with the value of property *assessed by [her]*”. By contrast, W. Va. Code §11-1C-10(d)(2) requires the Tax Commissioner to “supply support data that the assessor might need to explain or defend the appraisal”, which precludes the Assessor’s ability to do anything other than support the Tax Commissioner’s appraisal, using the information supplied by the Tax Commissioner. The Court below correctly held that

as expressed by §11-1C-7a, the assessment of natural resources property is simply not within the jurisdiction of the Assessor. It is exclusively the jurisdiction of the

State Tax Commissioner. Further, as provided by §11-1C-10(d)(2), “The commissioner shall supply support data that the assessor might need to explain or defend the appraisal” The commissioner has a mandatory duty to provide data to the Assessor to support the Commissioner’s appraisal. It is outside of the Assessor’s duties to hire a separate consultant to review appraisals conducted by the State Tax Commissioner and to question the methods of the State Tax Commissioner when the Assessor has not followed the mandatory statutory duty to present these issues to the Property Valuation Training and Procedures Commission.

Conclusion of Law No. 9; Joint App. Vol. I p. 28.

Secondly, the Legislature had a very good reason to assign to the Tax Commissioner the responsibility to value all natural resource property in the State. The valuation of such property is complex and requires a host of information from a variety of sources. If the constitutional mandate of equal and uniform taxation is to be realized, the Legislature had every reason to assign this responsibility to a single entity that has the wherewithal to develop the required expertise. If every county Assessor is free to disregard the values for natural resource property as appraised by the State Tax Commissioner and substitute his or her own values, the Legislature’s goal and the constitutional mandate for equal and uniform taxation could not and would not be achieved.

Finally, the Assessor asserted in the hearings before the Board that she was not disputing the plan established by the Tax Commissioner for valuing coal reserves; rather, she was asking only that the Board correct simple errors made by the Tax Commissioner in the application of his own method. The Board’s power to correct such simple errors is not entirely clear; on one hand, under the provisions of W. Va. Code §11-3-24, it would appear that the Board, in fact, has to power to correct all errors in valuation; on the other hand, at least if the Tax Commissioner objects to the proposed “correction”, the constitutional mandate of equal and uniform taxation might be violated in the event that the Board decides to make the “correction”.

In this case, in apparent recognition that there were substantial questions as to the propriety of what the County was doing, the consultant retained by the County Commission was very careful to assert both that he was recommending only that that the Board correct simple errors made by the Tax Commissioner in the application of his own model, and that the Tax Commissioner was in full agreement with the corrections he was recommending. The evidence, however, supports neither of those assertions.

**1. The Assessor's Proposed Corrections Were Not Consistent with the Tax Commissioner's Plan**

This case involves the valuation of reserve coal property. An important element in determining the value of this type of property is when the coal on the property will be mined. Here, Taylor County officials had reason to believe that one company (ICG) planned to mine coal the Kittanning seams on their property in Taylor County within the next 15-20 years. The Assessor explained the basis of that belief in the hearing for ICG/Coalquest on February 12, 2010:

MS. COLLETT: I just wanted to speak to y'all a few minutes regarding some meetings that I had attended with Mr. Hatfield and Mr.---talking to Gene Kitts when the development of this mine first started.

Back in the fall of '06, ICG put on a very informative meeting at Tygart Lake State Park, I think in conjunction with the chamber of commerce. And I don't believe any of you gentlemen were maybe there at the time. But, anyway, this is in relation to the intent of the company to mine and they were talkin' about when and so forth---just to kind of give you a time frame at that point.

At that meeting, Mr. Hatfield discussed hop---hoping to have Tygart One opened by the winter of 2008. Of course that's come and past and that hasn't happened. And then he said after they got Tygart One open, within a few years they would open Tygart Two. And the expected time of mining for Tygart One, he said, was about twelve years. And the expected time of mining for Tygart Two would probably be longer than that; and I don't remember if he gave an exact number of years. But it was to start a few years after the opening of Tygart number one.

Then in June of '07, Mr. Kitts came back to the chamber and presented another meeting regarding times of mining. And then they were hoping to have Tygart One, you know, going sometime in '09. And then he addressed the issue, again, of Tygart Two and was hoping from 2012 to 2014 to have that mine in operation.

We know that they have been working toward getting the mine open. They built a new bridge across Three Fork Creek connecting Route 50 to their property. And they bought several farms in the area---in the Knottsville area to use in preparation of the mine. And also I---just looking at their website they've indicated on their website they plan to start operations again toward Tygart One in the middle of 2011. And what we're trying to determine is, you know, is this coal going to be mined within the next 20 years. And from all indications of what they've done toward permitting and the work that they're doing it appears that their plans are to try to mine this coal within the next 20 years.

Joint App. Vol. I p. 214-216.<sup>3</sup> Scott Burgess also testified that “[y]ou’ve had this taxpayer [IGT/Coalquest] in the form of the president of the company stand in this county and say we’re going to mine all the Kittanning seam in this county in 15 years”. Joint App. Vol. I p. 192. He asked rhetorically “[d]id Ben Hatfield not say we’re going to mine all this coal in 15 years?” Joint App. Vol. I p. 194. He also testified that “[a]t that time Mr. Hatfield had already been in town already; said we’re going to mine all the Kittanning in 15 years”. Joint App. Vol. I p. 195.

Mr. Hatfield’s announcement<sup>4</sup> was of great interest to the Taylor County Commission, because they knew that the Tax Commissioner’s model establishes the probable time of mining and uses that variable to value coal reserves. The probable time of mining has an enormous

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<sup>3</sup> No objection was made to this hearsay testimony in the hearing before the Board. It should be noted, however, that Eastern Royalty had no opportunity to make any objection, because it was not notified of this hearing before the Board and did not attend that hearing. *See* discussion at page 34, *infra*.

<sup>4</sup> The Assessor introduced an exhibit, which was an article published in the online edition of the Mountain Statesman dated June 15, 2007. In that article, Mr. Gene Kitts of ICG is reported to have said that

Tygart #2 mine will access the Lower Kittanning seam which lies west of Tygart Lake and south of Tygart River. The reserve contains approximately 150 million tons of coal with the tentative project design utilizing railroad shipment of the mined coal. Exploration is stated for 2008 with engineering, design and permit acquisition *tentatively scheduled* for 2009-2011. Development of the Tygart #2 mine *hinges on market conditions*, but ICG is leaning toward a probable 2012-2014 time frame (emphasis added).

effect of the value of the coal reserves as determined by the Tax Commissioner's model.

Reserve coal that is going to be mined within 20 years is valued approximately 10 times higher than in coal that is going to be mined in 40 years. Mr. Burgess testified that "I think we said generically a T-20s going to be around \$1,000 an acre give or take. A T-40s going to be around \$100 an acre give or take". Joint App. Vol. II p. 310. The higher the value, the higher the tax revenue available to the County.

However, the probable time of mining is not simply an input that is pulled out of thin air and entered into the model; rather, the probable time of mining is a variable in the model's complex calculations that predicts when mining will occur. The probable time of mining variable is actually called the "coal bed index factor". See W. Va. C.S.R. § 110-11-4.2.3.17.g; Joint App. Vol. I p. 149. This factor is then used as the exponent "t" for each coal bed in the present worth formula as described in W. Va. C.S.R. § 110-11-4.2.3.18. The coal bed index factor is therefore often referred to as the "T-factor" or the "overall T-score". It represents the probable time of mining properties (20, 40 or 80 years). See Joint App. Vol. II p. 313.

For the properties at issue in the February 22, 2012 hearing, the value that the model determined for the coal bed index factor was 40; that is, it predicted that mining on these reserve properties would begin in about 40 years. Based on the statements made by ICG officials, however, Taylor County officials believed that mining would begin much earlier than that, and that the coal bed index factor should be 20, not 40. See the Assessor's testimony quoted above.

By the legislative rule, however, the coal bed index factor is made up of six other factors. It is defined as "the sum of all reserve coal bed valuation factors, divided by three and rounded to the nearest value of 20, 40, or 80". See W. Va. C.S.R. § 110-11-3.21. W. Va. C.S.R. § 110-11-4.2.3.17 defines six "reserves coal bed valuation factors" including the *market interest factor*

(see W. Va. C.S.R. § 110-11-4.2.3.17.a), the *market mineability factor* (see W. Va. C.S.R. § 110-11-4.2.3.17.b), the *prime coal bed factor* (see W. Va. C.S.R. § 110-11-4.2.3.17.c), the *environmental factor* (see W. Va. C.S.R. § 110-11-4.2.3.17.d), the *use conflict factor* (see W. Va. C.S.R. § 110-11-4.2.3.17.e), and the *volatility factor* (see W. Va. C.S.R. § 110-11-4.2.3.17.f).<sup>5</sup>

In order to reduce the T-factor from 40 to 20, then, one or more of the factors that make up the T-factor had to change. In this case, the consultant recommended that the environmental factor be reduced from a 40 to a 20. The environmental factor is defined as “an index that reflects the environmental impediments to mining, such as wild and scenic rivers, severe acid mine drainage problems, areas designated unsuitable for mining as identified by the Division of Environmental Protection, and other identified impediments”. W. Va. C.S.R. § 110-11-3.27. W. Va. C.S.R. § 110-11-2.3.17.d. provides:

**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

What was the justification for changing the environmental factor? Mr. Burgess simply testified as follows: “[t]he 40 in this would be identified environmental problem which would significantly impede mining. And that's where it landed this year from our computer model and

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<sup>5</sup> See also Mr. Knight’s testimony at Joint App. Vol. II p. 313.

it's what's being contested today. Then a 20 is an identified environmental problem which may affect mining. And then a zero would be no environmental problem affecting the location. And as Mr. Goddard said, this came out a 40 from our computer model this year. ....*I think I can speak from the tax department point of view in that the environmental concern with the Kittanning seams in this county would not significantly impede mining*". Joint App. Vol. II p. 310 (emphasis added).

However, the legislative rule does not contemplate that one simply reviews the description for each of the values for the environmental factor and selects the value that he somehow feels is most appropriate; rather, the rule includes very specific provisions as to the types of information that are to be considered in the determination of the environmental factor, the sources of that information, and how that information is to be stored. W. Va. C.S.R. § 110-11-4.2.3.1 provides, in relevant part that:

**Data collection and maintenance procedures -- The Tax Commissioner shall maintain a Geographic Information System (GIS) which includes the following data sets:...**

**4.2.3.1.f. Environmental Conflicts: Information indicating the general location of potential environmental problems which could impede the permitting of mining operations....**

**These data sets shall be used to create maps and tabular data for the determination of reserve coal property value. The data sets and maps shall be managed as specified in Subdivisions 4.2.3.2 through 4.2.3.16 of this rule:**

W. Va. C.S.R. § 110-11-4.2.3.7 then provides:

**Environmental conflicts -- The Tax Commissioner shall maintain data files compatible with the Geographic Information System (GIS) which provide general information concerning environmental restrictions and impediments to mining of coal. This data shall be incorporated into the GIS. Information shall be obtained from the following sources.**

**West Virginia Division of Environmental Protection  
West Virginia Division of Natural Resources**

West Virginia Geological and Economic Survey  
United States Department of the Interior  
Any other sources that may come to the attention of the Tax Commission

The maps and data files created shall be updated when necessary, as determined by the Tax Commissioner. The maps shall be interpolated from the known data points using computer software containing accepted geologic and geographic interpolation procedures, as determined by the Tax Commissioner. Map interpolation shall be limited by the resolution of the reserve property location, and in the absence of specific location information, valuation parameters shall default to District-level parameters.

And there is no doubt that the Tax Commissioner has complied with these provisions for assigning a value for the environmental factor. In the February 28, 2011 hearing, Mr. Kern, a consultant hired by the Tax Commissioner to develop and maintain the coal valuation model, explained how the maps from which the environmental factor were originally produced and how they are maintained:

Originally, there was a map produced by folks at the DEP, who are now retired; folks at the West Virginia Geologic Survey, who I think Nick Fedorco (phonetic) and his boss are now retired. Nick Fedorco (phonetic) was a geologist and his boss was - it escapes me right now; and some folks at the University of West Virginia in the mining division, and folks at the Tax Department.

And we looked at various seams and various mining history and various problems in mining across the state and produced maps by seam based on environmental problems, such as roof fall. We also involved a number of industry personnel from some of the major coal companies. We asked for their contribution, as well. And we produced a series of maps which were used to define potential environment problems either because of roof fall, acid drainage, those kind of factors. Those were the initial mapping that was done.

Those maps were circulated a number of times among all the participants. In the statistical world, it's call the Delphi method. You run things around a group of experts until they reach a consensus, and that was considered the basis for the environmental. From that point, just like the coal maps, they have been refined over time because of the location of state parks, the denial of permits, specific knowledge of roof fall problems, specific knowledge of acid drainage problems, the location of schools and cemeteries and things like that, which make mining more or less difficult from a surface or under-mining point of view. And they're refined every year by personnel at the State Tax Department, geology and geography personnel every year.

Last year they had fairly large change in some of the areas based on some of the information that they have been collecting over the last couple of years. So those are updated every year, so the idea of updating them every year is to take into account the economic aspects of environmental problems. And so they're applied annually across the state. The same procedure is used in all counties and all coal seams across the state.

Joint App. Vol. III pp. 595-597. Mr. Kern also explained how the factors that the Tax Commissioner considered for the particular seams at issue:

So what we do, every year we do an analysis of what seams are being mined, where they're being mined, how many coal companies are mining them, geographically where are they being mined at.

The seam that we're talking about that we call the Middle Kittanning seam in Taylor County is a seam that historically has been considered to be of some environmental questionable ability to mine because of its acid bearing strata above it and below it; there's some pyrites above it and below it; and because the sulfur in the coal make it more difficult seam to mine environmentally and difficult seam to sell environmentally.

When we first put the environmental maps together concerning the condition of mining across the state, the Middle and Lower Kittanning coals came out as problematic coals, and so those environmental maps noted that.

Joint App. Vol. III pp. 588-589.

While Mr. Burgess did mentioned a few considerations that might affect when mining might begin, but all of those made mining less, rather than more, likely: mining permits being costly to obtain, environmental opposition to the permits, an Administration in Washington opposed to coal, and debate over global warming. Joint App. Vol. II pp. 310-311, 319. What he didn't do was offer any objective evidence of the type defined in the rule upon which the determination of the proper value for the environmental factor is to be based. He produced no maps generated by the Tax Department's GIS that indicated any data that had been entered incorrectly that should be changed or the extent and effect of that change. He offered no objective evidence of the propensity for roof falls or acid drainage in the seams in question. He did not dispute that pyrites occur both above and below the seams in question or the amount of

sulfur in the coal. He didn't dispute the location of schools and cemeteries or any other objective evidence that would justify a change in the environmental factor - a fact which he readily admitted at least twice on cross examination:

MR. SAYRE: Do you have any objective factors that you can point to to show why that 40 was changed to 20.

MR. BURGESS: Objective factors; no. Subjective; yes.

Joint App. Vol. II p. 319. Specifically, for the property owned by Eastern Royalty, the only subjective factor was that other taxpayers were permitting the same seams on different properties in Taylor County:

MR. ROSE: Do you have any---any objective knowledge of the circumstances of the property owned by West Virginia Coal Mines, which is identified here as parcel 5140, with regard to the environmental factors?

MR. BURGESS: I would say no objective knowledge.

MR. ROSE: What subjective knowledge do you have?

MR. BURGESS: The fact that taxpayers permitting these seams in the county for mining. And as we talked a couple of Fridays ago, and I'm sorry you two gentlemen weren't here, ultimately the---the regs are simply an allocation. It's weighing one property against another. It's sayin' is this going to be mined 20, 40 or 80. And this process that we go through is hopefully going to get us to the correct answer. But just keep in mind that 20, 40 and 80 is the---is the answer that the regs are asking for. And when you have a fairly large tract that's owned by a mining company in a seam that's being sought in the county it logically would follow that that's probably going to be in a 20 year buffer versus a 40 or 80.

Joint App. Vol. II p. 320. He also mentioned in the February 22, 2010 hearing that ICG had, in fact, obtained a permit on other property, but that property was 6½ miles from the property owned by ICG that was the subject of that hearing and was not part of any planned mine. Joint App. Vol. II p. 319.

In the absence of any type of objective evidence that the environmental factor should be changed, Mr. Burgess simply cut to the chase:

MR. BURGESS: As I recall, and again this is subject to a very bad memory---recent and long term memory---sometime in, I'm going to say mid to

late January Jerry, on behalf of the county, asked me to look at a number of parcels, some of which we talked about a couple Friday's ago; some of which we're here for today. And asked that we review those and he particularly directed us to the environmental because the environmental did increase on those properties from a 20 to a 40. And his question was why they'd be a T-20 if they had no increase.

And I said certainly we'll do that. So I looked at the data; did some of the same screen prints Jerry has provided. I asked Pat White and her people to review that. And after considerable review it was suggested that this should not be a 40 environmentally; it should be a 20. *Particularly given, you know, what's going on in the county.*

Joint App. Vol. II p. 320 (emphasis added). He also testified that:

As you hear these discussions, just keep in mind all we're tryin' to do is guess. All we're trying to do---all you need to try to do in trying to set the value is is this going to be mined in 20, 40 or 80 years."

Joint App. Vol. I p. 195-196.

There are at least a couple of things wrong with selecting a value for the environmental factor so that the T-factor ends at the desired value. Mr. Goddard promptly and correctly responded that Mr. Burgess's latter statement was "just totally false. What he said was totally, unconditionally false", because "[t]he tax commissioner chooses the methodology upon which all tax accounts in the state will be assessed. If there is a problem with the model as they say there is; you don't throw it away and you don't come in here to the Board of Equalization and Review, ignore it, choose a number". Joint App. Vol. I p. 196.

Secondly, Mr. Kern specifically denied that subjective factors are ever used by the Tax Department in their model to determine an appropriate value for the environmental factor:

(MR. KERN:) Lastly, don't take into account as gospel, if you will, or verbatim, if you will, one statement from one owner or one whatever.

If we did that, and I'm a mine operator and I have adjacent property over here, and we judge it to be the next in sequence to be mined based on the factors that we look at, and that mine operator came and said, "Oh, I'm not going to mine that for at least 80 years," I would have to accept that as statement that's similar as you've been asked to accept the statement by mine operators who said, "I'm going to mine that next month. I'm going to mine that in 12, 15 years."

We're not - we can't do that on a property by property basis.

Joint App. Vol. III p. 590.

MR. GODDARD: In any part of the environmental factor analysis is the subjective estimation or guesstimation or prediction of anyone, including coal operators, about a time table for mines? Does that come into play? Is there an input for that?

MR. KERN: Not particularly, no, other than in the original mapping, when we asked the coal operators to tell us about problems they had with the seam, they would have said, "We've tried 14 times to get a permit here and we can't get a permit. We have a real problem, or we end up having to have too many water quality monitoring wells. This proves that we've got some acid problems here," or, "We've had difficulty mining successfully here because of roof problems."

So that information would have been captured in the original environmental queries, if you will, back in 1999, 2000.

MR. GODDARD: But as we go through it year by year, there's not an input for someone's prediction or hopes about what may come as mining starts and progresses and what may or may not occur?

MR. KERN: No.

Joint App. Vol. III pp. 596-597. Mr. Kern also explained the effect that ICG's decision to mine those seams in Taylor County had already been taken into account by the Tax Commissioner's model, both for ICG's property and had for other properties, including Eastern Royalty's, in the immediate vicinity:

When this coal company decided they were going to mine this coal, we went back in and said, "They think under their present economic conditions they can mine this coal in this permitted area, so we're going to take the environmental factors off of it. Go ahead and mine it."

But we were unwilling to extend that analysis to adjacent properties, because at what point -- how far do you extend it? And as I showed you on that one map, there's only a couple of mines in the whole state that are mining this coal successfully.

And the adjacent coal mining in the adjacent counties that mines this coal closed early and closed when we had significant -- a substantial value on those properties, even when they closed. We assumed they were going to mine longer because of their mining history.

Joint App. Vol. III pp. 589-590.

Finally, Mr. Burgess offered the only testimony that attempted to justify the change in the environmental factor. It is important to realize that Mr. Knight, the consultant hired by the County, did not recommend to the Board that the environmental factor be changed; rather, he relied only on Mr. Burgess's testimony:

MR. SAYRE: Mr. Knight did you do any independent study to determine the environmental factor for these properties?

MR. KNIGHT: No. I relied on the state tax department's recommendation.

MR. SAYRE: So any change that was made to the fac--- the environmental factor would've been done by the state tax commission?

MR. KNIGHT: It would have been done on the recommendation---it would have be---it would have been perform on the recommendation of the state Commissioner; yes.

Joint App. Vol. II p. 314. Mr. Knight also testified that:

The assessor's office asked me to review accounts in Taylor County. I reviewed several accounts in Taylor County. There was a question concerning the environmental factor. That question was posed at the state tax department. The state tax department then reviewed it. The state tax department made a determination that the environmental factor should not be a 40 on these properties---all these seams---the environmental factor should be a 20.

Based upon that determination I then recalculated the values and---and the information was presented by the assessor to the county commission for their review and determination of whether they wanted to hold this hearing today to inform taxpayers of their intention to increase values as the result of that determination *by the state tax department*.

Joint App. Vol. II p. 315. *See also* Mr. Knight's testimony at Joint App. Vol. II p. 311 (“[t]he assessor isn't---isn't rejecting the appraisals. The assessor is suggesting that---that one factor, *at the recommendation of the state tax department*, should be changed”)(emphasis added); Joint App. Vol. II p. 312 (“[e]xhibit 1 is a recapitulation of the value changes that the assessor is bringing before this---this board *as a result of a recommendation on the part of the state tax department* to change the environmental factor on the properties---on the seams properties identified in the---in the Exhibit”) (emphasis added); Joint App. Vol. II p. 312 (“[t]he increases

are simply the result of a recommendation *from the state tax department* that the environmental factor on these properties, which in all instances as I recall are at a 40, should be changed to a 20”) (emphasis added); Joint App. Vol. II p. 312 (“[a]s Mr. Burgess has testified, what that means is that *in tax department’s opinion* the environmental factor does not significantly impede mining it rather may affect mining”); and Joint App. Vol. II p. 314 (“[n]ow if we---if we accept *the tax department’s recommendation* that this should be a---a---the environmental factor should be a 20 and not 40 we go back in and the volatility factor would be a zero again... So the changing of the environmental factor from a 40 to a 20 *as recommended by the state tax department* changes the T-factor on this property and thus the---the discount factor that’s used to apportion the value to the property”).

In summary, in the 2011 hearing, the State Tax Department offered abundant testimony that demonstrated that extensive analysis and data gathering has been devoted to developing the Tax Commissioner’s plan for how the environmental factor is to be determined, and that explained how the Tax Department arrived at an environmental factor of 40 in conformance with the legislative rule for all of the properties in question for tax years 2010 and 2011. Mr. Burgess, by contrast, only offered a subjective opinion that the environmental factor should be changed, but did not offer any objective evidence to contradict the Tax Commissioner’s evidence. The Appellants adopted Mr. Burgess’s approach in their brief:

In effect, Taylor County Commission made the corrections *based on the plans to begin mining of the subject properties in approximately twelve (12) to fourteen (14) years for the Tygart 2 Mine, as testified under oath and subject to cross examination, by the Project Manager of all Tygart Reserves for Appellees.*

*Appellant’s Brief at 26* (emphasis added).

This argument must fail. The future plans that another company has to mine another property are simply not an element that is specified in the legislative rule that is to be considered

when establishing either the environmental factor or the T-factor for this property. If every other coal reserve property in West Virginia is valued according to the Tax Commissioner's plan, which includes the detailed objective process described by the Tax Commissioner's witnesses for arriving at an appropriate value for the environmental factor, then allowing the subject properties to be valued by means of only subjective judgments clearly makes a mockery of the concept of equal and uniform taxation. As Mr. Goddard correctly explained: "using that model, that technology, an entity in Taylor County is taxed the same as an entity in Raleigh County; an entity in Wood County; or Marshall County, it doesn't matter where we are the state. To come in and say arbitrarily we should ignore the states data is inappropriate". Joint App. Vol. II p. 307.<sup>6</sup> The Court below correctly concluded that "the procedures in all the above styled cases were in violation of constitutional provisions, as the method applied would result in unequal taxation that is not uniform across the State, as it would treat property in Taylor County vastly differently from similar natural resource property in the other 54 counties in the State". Conclusion of Law No. 14; Joint App. Vol. I p. 33. The Appellants assign no error to that Conclusion of Law, and upon that basis, the Circuit Court's order should be affirmed.

**2. There Was No Evidence that the Tax Commissioner Agreed to the Assessor's Proposed Changes**

In its *Final Order* filed on May 12, 2012, the Court below noted that five witnesses appeared at that hearing on behalf of the State Tax Commissioner at the hearing before the Board conducted on February 28, 2011, and included extensive excerpts from the testimony of those witnesses in its Findings of Fact No. 42. *See* Joint App. Vol. I pp. 16-21. The testimony offered

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<sup>6</sup> Mr. Sayre, appearing on behalf of taxpayers Trio Petroleum Corporation, Waco Oil & Gas, Inc., Mike Ross, and IL. Morris & Mike Ross, Inc. at the January 12, 2012 hearing before the Circuit Court, also explained that the Tax Department has objective methods for determining the correct value for the environmental factor and that Mr. Burgess ignored those in favor of his subjective approach. *See* Joint App Vol. VII pp. 1276-1277.

by these witnesses is very disturbing picture: they unequivocally assert that Mr. Burgess was not authorized to testify on behalf of the State Tax Commissioner in the 2010 hearings before the Board, and they explicitly disavowed his testimony that the environmental factor assigned by the model was erroneous and asserted that the value of 40 that was originally assigned by model was, in fact, the correct value. Moreover, while Mr. Burgess was, in fact, employed by the State Tax Commissioner in 2010, he was no longer an employee by the time the 2011 hearing occurred.

In its Conclusion of Law No. 9, the Court below concluded, *inter alia*, that

... the Court finds Mr. Burgess's presence without any type of representation highly suspect... It appears that at the eleventh hour, Mr. Burgess attempted to make changes to the appraisals without time to submit such appraisals to the Assessor for entry on the land books as is her mandatory duty... given the numerous procedural defects and extremely short notice on changes in the appraisals regarding significant and complex issues, this Court would entertain a motion to develop the issues of the actual/apparent agency of Scott Burgess should this matter be reversed on appeal for consideration on the substantive issues, as the Court believes it would be improper to accept that Scott Burgess had actual authority from the State Tax Department when considering the substantive issues set forth below having viewed the allegations against Mr. Burgess in the February 28, 2011 transcript.

*See* Joint App. Vol. I pp. 28-31.

If the statute required the first level appeal hearings to be conducted in a circuit court instead of before a Board of Equalization and Review, and had the taxpayers lost in the original hearings, there is no doubt that, under the provisions of Rule 60(b) of the Rules of Civil Procedure, they would have the right to have the original order set aside on the basis of the newly discovered evidence offered in the 2011 hearing that demonstrated that the *only* evidence that the environmental factor of 40 was erroneous was both false and unauthorized. That remedy, however, is not available here because the Rules of Civil Procedure are not applicable to hearings before the Board (*see* Rule 1 of the West Virginia Rules of Civil Procedure, limiting

the rules to “all trial courts of record”)<sup>7</sup>, and because a new trial before the Board is not possible since the Board has adjourned *sine die* (see *In re Morgan Hotel Corp.*, 151 W.Va. 357, 362, 151 S.E.2d 676, 679 (1966))<sup>8</sup>.

Nevertheless, it is a violation of due process for the State to convict a defendant of a crime based on false evidence, at least if it is shown that the false evidence had a material effect on the jury verdict. *Matter of Investigation of W. Virginia State Police Crime Lab., Serology Div.*, 190 W. Va. 321, 324-26, 438 S.E.2d 501, 504-06 (1993). And in *Jones v. State, Dept. of Health*, 170 Wash. 2d 338, 242 P.3d 825 (2010), the Supreme Court of Washington found that the same due process right applies in a civil proceeding.

In the criminal law context, the deprivation of liberty based on fabricated evidence is a violation of a person's constitutional right to due process. *We conclude that this due process right applies with equal force in a civil proceeding*, such as the administrative adjudication in this case, because a pharmacist's professional and business licenses are property interests protected by the due process clause.

*Jones v. State, Dept. of Health*, 170 Wash. 2d 338, 350, 242 P.3d 825, 831-32 (2010) (emphasis added, citations omitted).

Here, Mr. Burgess offered the only evidence that the environmental factor should be changed, and that evidence was both false and unauthorized. Therefore, the Board’s decision to increase Eastern Royalty’s value in 2010 is a violation of due process, and the Assessor’s value for 2011, which was also arrived at by changing the environmental factor from the Tax Commissioner’s model, is similarly tainted.

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<sup>7</sup> In *In re Tax Assessments Against Pocahontas Land Co.*, 172 W.Va. 53, 61, 303 S.E.2d 691, 700 (1983), this Court also noted that the Rules of Evidence are not applicable to hearings before a Board of Equalization and Review.

<sup>8</sup> SB 401 has removed this restriction, but was not yet in effect. See footnote 2, *supra*.

Moreover, because the Tax Commissioner manifestly did not agree with the change proposed by the Assessor, and because the proposed change cannot be characterized as a simple correction of a clerical error, the Assessor was obligated to submit the proposed change to the Valuation Commission. It seems reasonable to speculate that the Valuation Commission might well reject a proposal to change the current detailed procedure by which the environmental factor is determined from objective scientific data from a variety of reliable sources to one based on subjective assertions made by property owners, lest every property owner announce that no new mines will be opened in the next hundred years. In the face of this likely rejection, the Assessor and the County Commission attempted to avoid the statutory procedures, and the Court below correctly found that the provisions of W. Va. Code §11-1C-10(g) are mandatory and that the Assessor was required to apply to the Valuation Commission to show just cause for failure to accept the Commissioner's appraisal and to provide the Valuation Commission a plan by which a different appraisal will be conducted, Conclusion of Law No. 7, Joint App. Vol. I p. 24, and that "[r]egardless in what capacity the Assessor appeared before the Board, it was a violation of her mandatory statutory duty to fail to present the issue to the Property Valuation Training and Procedures Commission. Upon accepting the value and placing it on the land books, she was foreclosed from attempting to attack the assessment before the Board". Conclusion of Law No. 9, Joint App. Vol. I p. 26.

The Court below correctly concluded that

it 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. If the Assessor wishes to change how the formula is applied or have factors adjusted, the Assessor must follow her mandatory duty to present the issue to the Property Valuation Training and Procedures Commission. A failure to do so, as in these instant appeals, would result in unequal taxation of 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.

Conclusion of Law No. 10 (in part), Joint App. Vol. I p. 31. The lower Court's decision should be affirmed.

**C. Notice Issue**

The Court below made this finding of fact:

Eastern (West Virginia Coal Mine, LLC at the time) was noticed of a proposed increase in the 2010 appraisal by notice received in its St. Louis, Missouri offices on Tuesday, February 16, 2010 notifying it of a hearing before the Taylor County Board of Equalization and Review ("the Board") at 9:00 A.M. on Monday, February 22, 2010. The proposed increase in assessment was from \$119,634 to \$1,449,447. The Board ordered the increase in value to \$1,449,447 after the hearing.

Finding of Fact No. 2, Joint App. Vol. I p. 5. The Court then concluded that "West Virginia Code § 11-3-2a provides various mechanisms by which notice of an increased assessment is to be provided to a taxpayer prior to the meeting of the Board". Conclusion of Law No. 9, in part, Joint App. Vol. I p. 26. After quoting both the version of W. Va. Code § 11-3-2a(a) in effect at the time of the hearings (which requires the notice to be given by the Assessor at least fifteen days prior to the first meeting in February at which the county commission meets as the Board of Equalization and Review)<sup>9</sup> and the version of that section as amended effective June 11, 2010, the Court further concluded that

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<sup>9</sup> § 11-3-2a. Notice of increased assessment required; exceptions to notice

(a) If the assessor determines the assessed valuation of any item of real property is more than ten percent greater than the valuation assessed for that item in the last tax year, the increase is one thousand dollars or more and the increase is entered in the property books as provided in section nineteen of this article, the assessor shall give notice of the increase to the person assessed or the person controlling the property as provided in section two of this article. The notice shall be given at least fifteen days prior to the first meeting in February at which the county commission meets as the board of equalization and review for

By entering the initial assessment on the land books as being accepted, the Assessor prevented the notice required at that time from being sent to the taxpayer prior to the meeting of the Board.... It appears that at the eleventh hour, Mr. Burgess attempted to make changes to the appraisals without time to submit such appraisals to the Assessor for entry on the land books as is her mandatory duty. Even if Scott Burgess is assumed to be a representative with actual authority from the State Tax Department, such late changes would render parties nearly incapable of addressing the changed appraisals. Further, notice could not have been served as required by the version of West Virginia Code § 11-3-2a in effect at that time.

Conclusion of Law No. 9, Joint App. Vol. I p. 28-29. This conclusion was one of several that supported the Court's ultimate conclusions that it was a violation of [the Assessor's] "mandatory statutory duty to present the issue to the Property Valuation Training and Procedures Commission. Upon accepting the value and placing it on the land books, she was foreclosed from attempting to attack the assessment before the Board". Conclusion of Law No. 9, in part, Joint App. Vol. I p. 26.

The Appellants did not assign error to this conclusion or to any aspect of the lower court's ruling as to this notice issue, and therefore the Circuit Court's order should be affirmed, at least insofar as it applies to Eastern Royalty, LLC.

#### V. Cross Assignment of Error

This Court has held that "W. Va. Code § 11-3-24 (1979) (Repl.Vol.2008), which establishes the procedure by which a county commission sits as a board of equalization and review and decides taxpayers' challenges to their property tax assessments, is facially constitutional". Syllabus Point 4; *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (2008); see also *Mountain Am., LLC v. Huffman*, 224 W. Va. 669, 682, 687 S.E.2d 768, 781 (2009). In this particular case, however, the

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that tax year and advise the person assessed or the person controlling the property of his or her right to appear and seek an adjustment in the assessment...

application of the statutory procedure was so unreasonable and so arbitrary that a denial of the protections of due process of law provided by section one of the Fourteenth Amendment to the United States Constitution or by section ten of Article III of the West Virginia Constitution resulted.

In *Foster, supra*, this Court explained that “W. Va.Code § 11-3-24 must be construed in favor of the government, represented here by the Commission. Nevertheless, the Foundation may overcome this presumption and establish that W. Va.Code § 11-3-24 is unconstitutional if it satisfies the burden of proof reiterated in Syllabus point 1 of *Schmehl v. Helton*, 222 W.Va. 98, 662 S.E.2d 697 (2008):

“ ‘To establish that a taxing statute, valid on its face, is so unreasonable or arbitrary as to amount to a denial of due process of law when applied in a particular case, the taxpayer must prove by clear and cogent evidence facts establishing unreasonableness or arbitrariness.’ Point 4, Syllabus, *Norfolk and Western Railway Company v. Field*, 143 W.Va. 219 [, 100 S.E.2d 796 (1957) ].” Syllabus Point 2, *State ex rel. Haden v. Calco Awning [& Window Corp.]*, 153 W.Va. 524, 170 S.E.2d 362 (1969).

*In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. at 22-23, 672 S.E.2d at 158-159 (footnote omitted).<sup>10</sup> Specifically, this Court determined that the County Commission's overarching interest, as the governmental body charged with superintendence of the fiscal affairs of the county, in the outcome of every challenge to its tax base, was not a sufficient conflict of interest to support a taxpayer's due process violation claim

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<sup>10</sup> Mr. Goddard, appearing on behalf of ICG/Coalquest at the January 12, 2012 hearing before the Circuit, argued that, for various reasons, the entire hearing violated the taxpayer's due process rights. Joint App. Vol. VII p. 1295. Even had the due process issue not raised in the Court below, as this Court observed in *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, supra*, “we nevertheless may consider [an issue] for the first time on appeal to this Court insofar as it raises an issue of constitutionality that is central to our disposition of this case. See Syl. pt. 2, *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005) (“A constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case.”). *Foster*, 223 W.Va. at 20, 672 S.E.2d at 156; see also *Mountain Am., LLC v. Huffman*, 224 W. Va. 669, 681-82, 687 S.E.2d 768, 780-81.

in deciding the outcome of such challenges. *Foster*, 223 W.Va. at 24, 672 S.E.2d at 160; *see also Mountain America*, 224 W. Va. at 682, 687 S.E.2d at 781.

In this case, however, in addition to the conflict of interest inherent in the Board's incompatible responsibilities tribunal to hear property tax appeals and as the budgetary entity responsible for administering a county's fiscal affairs advanced in *Foster*, and in addition to the fact that (as is true here) the County Commission appeared in *Mountain America* as a party litigant to defend its own ruling, there are additional facts that demonstrate a level of bias on the part of the County Commission that is simply unacceptable.

**A. The County Commission Hired the Consultant**

In the 2010 hearings before the Board, Mr. Knight was presented as a consultant hired by the Assessor. In the February 12, 2010, Mr. Knight testified that he was "here with Ms. Collett [the Assessor]"; Joint App. Vol. I p. 41. He also testified that 2010 was not the first year he had been involved with coal property valuations in Taylor County. *Id.* at 80-81 ("We, the board, made adjustments last year in that area"). In Eastern Royalty's hearing on February 22, 2012, he testified that he was "here assisting the assessor's office and the county commission today in their duties under the Board of Review Statute in West Virginia Code 11-3-24". Joint App. Vol. II p. 311. He also testified that "[t]he assessor's office asked me to review accounts in Taylor County". Joint App. Vol. II p. 315. Throughout Eastern Royalty's hearing, he referred to the exhibits that he introduced as "Assessor's Exhibits". *See e.g. id.* at 312.

It's easy to see why it was important for the Assessor to have hired the consultant: If the taxpayer brings in an expert appraisal to testify that the Assessor's appraisal is excessive, and the Assessor brings in an expert to support her value, an independent tribunal could weigh the testimony presented by both experts to arrive at the truth of the matter. But that's not at all what

happened here. The truth didn't come out until the February 28, 2011 hearing, at which this testimony was taken:

MR. GODDARD: Mr. Knight, in 2010, who retained you?

MR. KNIGHT: In 2010, I was retained by the County Commission.

MR. GODDARD: But not the Assessor?

MR. KNIGHT: No.

Joint App. Vol. III p. 527. Mr. Knight was not hired by the Assessor; he was hired by the tribunal itself; the same tribunal that is charged with determining the correct value of the property in question. Given the Assessor's testimony about the County's interest in the announcements by ICG as to its plans to open new mines, no one would have been surprised if the Assessor hired an expert that agreed with her position that the expected time of mining should be changed. When the tribunal itself hires the consultant, the inference is the same - the County Commission hired a consultant whose opinion was the same as theirs. No disinterested person would doubt that, under these circumstances, the County Commission would ultimately vote to accept their own consultant's recommendations<sup>11</sup>.

#### **B. Inadequate Time to Prepare Defense**

In *Mountain America, supra*, the taxpayer complained that it was not given meaningful notice of the government's taking of its money and meaningful opportunity to prepare and present a challenge to the taking because the period of time allowed to receive the mailed notice sent by the Assessor, notify the Board of Equalization and Review of its desire to appeal, and prepare evidence to support its challenges of the proposed increase in the taxable value of its

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<sup>11</sup> As Judge Moats said in the January 12, 2012 hearing before the Circuit Court, "How does the taxpayer have a hearing before an impartial tribunal when the tribunal has already hired its own consultant and its own attorney to have a hearing? That's the part that I have a difficult time with... What's the taxpayer going to do if the cards have already been dealt? Joint App. Vol. VII p. 1313. He also asked "But you would have to admit, wouldn't you, that a taxpayer comes in, that the tribunal deciding the issue has decided we are going to raise this valuation and we have already hired our own consultant and our own lawyer and now we're going to have a hearing to see whether we're going to accept...that there's going to be a hearing to raise your assessment." *Id.* at 1314-1315.

property was unreasonably compressed into *three weeks*. This Court disagreed and pointed out that Mountain America did not explain what evidence it was prevented from presenting at the hearing due to insufficient time and because Mountain America had adequate time to hire a real estate appraiser who appears to have performed the analysis asked of him and who testified on its behalf at the hearing. *Mountain Am., LLC v. Huffman*, 224 W. Va. at 685, 687 S.E.2d at 784.

Here, by contrast, as explained above, Eastern Royalty had only three business *days*, not *three weeks*, in which to prepare a response - and it didn't know what it was responding to, since the notice only stated that its assessment was going to be increased and did not include any explanation of the basis of the increase. Rather, Mr. Burgess explained that the hearing was intended to be an ambush of the taxpayer:

MR. ROSE: Okay. And does the department have any practice wherein when a decision of that character is made with the resulting substantial increase that the taxpayer is let in on the secret or...I shouldn't say that. I don't mean to imply that it was a secret. But that the taxpayer is let in on the information and advised of that?

MR. BURGESS: That's this hearing.

MR. ROSE: I'm sorry?

MR. BURGESS: *That's this hearing.*

MR. ROSE: That's what---so we come to the hearing and find out?

MR. BURGESS: Right.

Joint App. Vol. II p. 320 (emphasis added). Three days is not a sufficient amount of time to permit a taxpayer to obtain a professional appraisal of its property, which is the only evidence that a taxpayer is certain will meet the clear and convincing standard of proof.<sup>12</sup> Nor was it

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<sup>12</sup> In *Foster*, this Court stated that

...the Foundation states that the Assessor's initial assessment was presumed to be correct and that it was required to prove that the Assessor's initial assessment was incorrect by clear and convincing evidence. To meet this standard, the County Commission notified the Foundation as to the evidence required, by letter dated January 24, 2007, as follows: "Please be advised it will be necessary for you to present '**Clear and convincing evidence**', which by definition means '**formal appraisals and/or expert testimony by qualified people**', to prove that the assessment is in fact erroneous."<sup>FN21</sup> (Emphasis in

possible for the taxpayer to find an expert to opine as to the proper value for the environmental factor and as to whether the recommended change conformed to the Tax Commissioner's legislative rule, since the taxpayer didn't find out that the environmental factor was the factor that the consultant wanted to change until that fact was sprung at the hearing. Therefore, Eastern Royalty could not and did not present expert testimony in this case.

Also, a review of the transcripts of the hearings before the Board of Equalization and Review makes it clear that many of the factors upon which the Board based its decision with respect to all of the taxpayers including Eastern Royalty were first discussed at length in the hearing conducted on February 12, 2010. As Mr. Sayre pointed out in the hearing before the Circuit Court conducted on February 12, 2010, neither Eastern Royalty nor Mr. Sayre's clients had any notice of the February 12, 2010 hearing and did not attend that hearing. Joint App. Vol. VII p. 1299-1300. Notice contemplates meaningful notice which affords an opportunity to prepare a defense and to be heard upon the merits. *State ex rel. Hawks v. Lazaro*, 157 W. Va. 417, 440, 202 S.E.2d 109, 124 (1974), *holding modified by State ex rel. White v. Todt*, 197 W. Va. 334, 475 S.E.2d 426 (1996). In this case, Eastern Royalty had neither opportunity.

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original).

FN21. The requirement of an appraisal and/or expert testimony is not contained in the statute governing taxpayers' appeals of property assessments but is alluded to in Syllabus point 8 of *Killen*. See W. Va. Code § 11-3-24. See also Syl. pt. 8, *Killen v. Logan County Comm'n*, 170 W. Va. 602, 295 S.E.2d 689 ("An objection to any assessment may be sustained only upon the presentation of competent evidence, *such as that equivalent to testimony of qualified appraisers*, that the property has been under- or over-valued by the tax commissioner and wrongly assessed by the assessor.

*Foster*, 223 W. Va. at 28, 672 S.E.2d at 164. This Court has never unequivocally identified any type of evidence other than the testimony of qualified appraisers that would satisfy the taxpayer's standard of proof.

**C. False testimony.**

As discussed earlier, Mr. Burgess offered the only evidence that the environmental factor should be changed, and that evidence was both false and unauthorized. Therefore, the Board's decision to increase Eastern Royalty's value in 2010 is a violation of due process, and the Assessor's value for 2011, which was also arrived at by changing the environmental factor from the Tax Commissioner's model, is similarly tainted.

Nor was Mr. Burgess's testimony the only false testimony offered in this case. In Eastern Royalty's hearing on February 22, 2010, Mr. Knight explained that he was recommending increases in value to eleven separate properties. *See* Assessor's Exhibit No. 1, Joint App. Vol. II p. 346. He explained that, for all eleven properties, the increases were "simply the result of a recommendation from the state tax department that the environmental factor on these properties, which in all instances as I recall are at a 40, should be changed to a 20". Joint App. Vol. II p. 312. Thereafter, he explained that if the environmental factor changed from 40 to 20, in all instances the T-factor would also change on *all eleven properties* from 40 to 20. *Id.*

Mr. Knight then introduced Assessor's Exhibit 3, which is a "NR154PTD" report. And what this report shows is the---the variables or the characteristics of the seams that come into play in determining the---the value estimate that has performed consistently with legislative rule Title 110 Series 1I" for parcel 06-9999-0000-2850-0000 (thereafter referred to as "2850" in the transcript) owned by Patriot Coal". Joint App. Vol. II p. 313. That exhibit shows that changing the environmental factor from 40 (left hand column) to 20 (right hand column) and leaving the other five factors unchanged results in a decrease in the total of all six factors from 100 to 80. Since  $100/3$  is 33.33, which rounds to 40, and  $80/3 = 26.66$ , which rounds to 20, the result is a change in the T-factor from 40 to 20. Joint App. Vol. II p. 313-314.

After several more assurances from Mr. Knight that exactly the same changes were applicable to all eleven properties (*see* Joint App. Vol. II p. 314-315), Mr. Knight also testified explicitly for the property owned by Eastern Royalty that

I have exhibits similar to the exhibits for account 2850 that I can put into evidence if the commission would so desire.

The issues---the issues are the same. The calculations are same. The result is the same. It changes the environmental factor from a 40 to 20. It resulted in a recalculation and a change in the T-factor from a 40 to a 20 which in turn increased the value on the property. In that particular instance the value was \$119,634. It increased to \$1,449,447 or it was a \$1,329,813 increase.

Joint App. Vol. II p. 315. Based on those repeated assurances, the parties agreed that the Assessor could introduce her exhibits for the remaining ten properties (including Eastern Royalty's) at a later time. Joint App. Vol. II p. 317.

In fact, however, Assessor's Exhibit 23, which is the NR154PTD report for Eastern Royalty, does not match Mr. Knight's description. True, the environmental factor changed from 40 to 20 - but two other factors also changed, and in the opposite direction: the "Trans Factor"<sup>13</sup> and the "Mine Factor"<sup>14</sup> both changed from 20 to 40. Instead of the total of all six factors dropping from 100 to 80, as was the case on Assessor's Exhibit 3, Eastern Royalty's total increases from 100 to 120. As a result, Assessor's Exhibit 23 shows that the T-factor should remain at 40 (since  $120/3=40$ ), *see* Joint App. Vol. II p. 340 and provides no basis for increasing Eastern Royalty's appraisal.

Because in this case, the impartiality of the tribunal is subject to question in that the tribunal actually hired the consultant that identified the change to be made that resulted in an increase in value, because the taxpayer was not informed prior to the hearing as to the nature of the change and had literally no time to prepare an effective defense, and because the County

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<sup>13</sup> The "market interest factor" – *see* W. Va. C.S.R. § 110-11-4.2.3.17.a.

<sup>14</sup> The "market mineability factor" – *see* W. Va. C.S.R. § 110-11-4.2.3.17.b.

Commission clearly relied on testimony that later turned out to be false and unauthorized, the appeals process as applied to this taxpayer in this case was so unreasonable and so arbitrary that it resulted in a denial of due process of law.

## **VI. Conclusion**

The State Tax Commissioner has devoted an enormous amount of effort into creating and maintaining the computer models with which active and reserve coal properties are modeled. An enormous amount of thought has gone into each aspect of the model, as exemplified by the fact that six individual factors go into determining the probable time of mining. Each of those six factors is carefully defined in the Tax Commissioner's legislative rule, and the data that is used to determine the value of all of those factors (mine maps for the market mineability factor, transactions for the market interest factor, environmental conflicts for the environmental factor, use conflicts for the use conflict factor, and reserve coal property locations for the prime coal bed factor, and coal bed characteristic for the volatility factor) are maintained in one or more Geographic Information Systems (GIS) which contain geographic information for all of West Virginia.

Certainly, erroneous data can end up in these computer systems in a variety of ways. Certainly, there needs to be a mechanism whereby these errors can be corrected, and the current property value appeals process can certainly meet that requirement. No matter who discovers such an error, they should have the right to bring it to the Tax Commissioner's attention, and experience indicates that the Tax Commissioner actively welcomes input that serves to improve the overall accuracy of his models.

But what transpired in these cases is something far different. There was no simple data entry error by which incorrect data was entered into the model. Rather, Taylor County simply

didn't agree with the T-Factor generated by the model, and the consultant hired by the Taylor County Commission recommended substituting the objective data and objective method incorporated in the model for determining the T-factor with a subjective opinion based on tentative predictions of when mining might occur in the future.

This type of change is exactly what the Legislature tried to prevent when it enacted chapter 11 article 1C of the Code and assigned to the Tax Commissioner the responsibility to value all natural resource property. What the Board did here subverts the constitutional mandate for equal and uniform taxation, and the Circuit Court was correct to reverse the actions of the Board. If the Taylor County officials believe that there's a better way to determine how the T-factor should be determined, the Legislature provided them a mechanism whereby they can propose that change to the Valuation Commission. If the Valuation Commission agrees, then the policy can be applied prospectively statewide, and everyone benefits. The change suggested here, however, would very likely not be approved, lest all coal reserve property owners announce that they have no plans to mine any reserve coal for the next 100 years.

This Court should also take the opportunity here presented to emphasize that there are due process boundaries within which a Board of Equalization and Review must operate. Trials by ambush are inherently unfair; taxpayers are entitled to reasonable notice that informs them not only that a change in value will be considered but that informs them of the exact basis for that change, so that they may prepare an effective defense to the proposed change. A county commission must do everything in its power to remain impartial; paying consultants to find fault with the Tax Commissioner's values and then ruling on whether or not to accept the consultant's recommendations doesn't just give the appearance of impropriety – such actions *are* improper because the Commission has prejudged the outcome.

Finally, the use of false testimony cannot be countenanced at any step in the process. As soon as the discovery is made that false testimony may have been used, all involved parties must immediately take steps to correct any injustice that has occurred. The entire appeals process here has been tainted with not one but all of these evils. As a result, the Board's decisions based on this flawed process cannot stand.

**Respectfully Submitted,**

**EASTERN ROYALTY, LLC**

**By Counsel**

A handwritten signature in black ink, appearing to read "Herschel H. Rose III", written over a horizontal line.

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Submitted: November 2, 2012

**Nos. 12-0764, 12-0765, 12-0766, 12-0767, 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,**

**vs.**

**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.**

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**Certificate of Service**

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I, Steven R. Broadwater, hereby certify that on November 2, 2012, I caused to be served a copy of the “Brief of Appellee Eastern Royalty, LLC, as successor petitioner to West Virginia Coal Mine, LLC, Petitioner Below” by mailing true and exact copies thereof to:

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in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail.

  
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