IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COLLINGWOOD APPALACHIAN MINERALS III, LLC, formerly known as Somerset Minerals LP, a Texas limited liability company,

OXY USA, INC., a Delaware corporation,

COLLINGWOOD APPALACHIAN MINERALS I, LLC, formerly known as BP Minerals II, LLC, a Texas limited liability company, and

WACO OIL & GAS CO., INC., a West Virginia corporation

Defendants Below/Petitioners,

v.

RICHARD L. ERLEWINE,

Plaintiff Below/Respondent.

CASE NO. 22-0139
CASE NO. 22-0140

PETITIONERS' BRIEF

Appeal Arising from Order Entered on January 21, 2022, in Civil Action No. 20-C-54 in the Circuit Court of Wetzel County, West Virginia

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IV. Statement of the Case

This appeal asks whether a tax deed is void where surface and mineral interests of a single land owner, each of which in fact delinquent at the time of sale, were sold to separate purchasers via separate deeds. In 1991, Respondent and Petitioners[1] both took part in the tax sale at issue, with Respondent purchasing the surface interest and Petitioners purchasing 25% of the oil and gas rights underlying Respondent's surface. In 2020, Respondent petitioned the Circuit Court, seeking Declaratory Judgment with respect to Petitioners' oil and gas interest by arguing the tax sale that conveyed Petitioners' oil and gas interest was void as the result of a double or duplicative assessment. Respondent further sought to void a 1995 tax sale, claiming that there, the delinquent land owner had no interest in the land at the time of the tax sale because he had conveyed it in fee simple years prior. The owners of the land prior to the tax sales at issue are not parties to the case.

The dispute in this case centers on three assessments and three corresponding tax deeds, all of which pertain to the same 135-Acre subject property commonly known as Huff Ridge (hereinafter the "Subject Property"). Two of the tax deeds were sold in the name of Russell F. Stiles, Jr., in 1991, and one was sold in the name of Osburn Dunham in 1995. Specifically, a tax

[1] Each Petitioner's interest in the 25% oil and gas rights are more particularly described in the briefing below. *See* APP 174 (for Petitioner Oxy USA, Inc.); APP 200–01 (for Petitioner Waco Oil & Gas Co., Inc.). Petitioners Collingwood Appalachian Minerals III, LLC and Collingwood Appalachian Minerals, I LLC set forth the full chain of title in their Memorandum in Support of Motion for Summary Judgment. *See* APP 394–99. As used herein, "Petitioners" shall include each Petitioner's predecessors in interests.

deed dated April 1, 1991, and recorded April 11, 1991, sold "135 A Huff Ridge OG 1/4 Int." in the name of Russell F. Stiles, Jr., to Trio Petroleum Corp. and Waco Oil & Gas, Inc. (hereinafter the "Oil and Gas Deed"); a tax deed dated April 1, 1991, and recorded April 17, 1991, sold "135 acres of land on Huff Ridge" in the name of Russell F. Stiles, Jr., to Richard L. Erlewine (hereinafter the "Land Deed"); and a tax deed dated April 1, 1995, and recorded April 12, 1995, sold "[a] 1/4th undivided interest in the oil and gas underlying a 135.00 acre tract of land, situated on Huff Ridge" in the name of Osburn Dunham, to Trio Petroleum Corp. and Waco Oil & Gas, Inc. At the time of these tax sales, the relevant interests in the Subject Property were assessed as follows: "Russell F. Stiles – 135 Huff Ridge", "Russel F. Stiles -135 Huff Ridge Road OG 1/4 Int", and "Osburn dunham – 135 Huff Ridge Road OG 1/4 Int." Stiles paid both assessments for a period of time, but failed to pay either assessment immediately prior to the 1991 tax deed. *See* App 637.

With respect to the 1995 tax deed and the second assignment of error on appeal, the root of Osburn Dunham's interest in the Subject Property began in 1944, when the James W. Sivert and Maggie M. Sivert conveyed a 25% oil and gas interest, and 100% of the surface of the Subject Property, to Joseph E. Rogers and Myrtle Rogers, with the Siverts retaining a 25% oil and gas interest. *See* APP 636–37. The Rogerses then conveyed their 25% oil and gas interest and 100% surface interest to Osburn Dunham. *See id.* Also in 1945, the Siverts conveyed their 25% oil and gas interest to Joseph Palmer and Amanda Palmer, who, in 1949, conveyed said 25% oil and gas interest to Osburn Dunham. *See id.* Thus, by 1949, Osburn Dunham owned a 50% oil and gas interest and 100% surface interest in the Subject Property.

From 1951 to 1967, two assessments appeared on the land books, one in the oil and gas section of the land books for Dunham's 50% oil and gas interest, and one in the land section of the

land books for Dunham's 100% surface interest. Both assessments were paid by Dunham during that period. In 1968, Osburn Dunham conveyed to Russell F. Stiles "the same land conveyed to the said Osburn Dunham by Joseph E. Rogers and Myrtle Rogers." APP 629–30. Both Dunham and Stiles' subsequent conduct indicates that the 1968 deed conveyed only a 25% oil and gas interest to Stiles, with Dunham retaining ownership over the remaining 25%. Dunham continued to pay taxes on his 25% oil and gas interest well after the 1968 conveyance and Stiles executed an Oil and Gas Lease for "1/4 of all monies" derived from oil and gas on in the Subject Property. APP 632, 637. Moreover, the reference to the Rogers deed in the 1968 conveyance, which itself only conveyed a 25% oil and gas interest, indicates the intent of the parties to convey only a 25% oil and gas interest. Additionally, the oil and gas section of the 1968 land book shows Dunham's "1/2" (50%) oil and gas interest crossed out and replaced with "1/4" (25%) and further shows an oil and gas assessment for Stiles as "1/4," with a note that states: "From Osburn Dunham Deed Book 248, page 20." *Id.* at 637. As noted in footnote 1 above, Petitioners Collingwood Appalachian Minerals III, LLC and Collingwood Appalachian Minerals, I LLC set forth the full chain of title in their Memorandum in Support of Motion for Summary Judgment. *See* APP 394–99.

Below, Respondent argued that the 1991 Oil and Gas Deed, which conveyed "135 A Huff Ridge OG 1/4 Int.," is void because Russell F. Stiles, Jr.'s oil and gas interest in the Subject Property was also assessed within the assessment for "135 acres of land on Huff Ridge" sold via the Land Deed, thereby resulting in a duplicate assessment. Respondent further argued that Osburn Dunham possessed no oil and gas interest in the Subject Property to be sold at tax sale in 1995, and thus, the 1995 tax sale was void. In Respondent's view, Osburn Dunham's 1968 conveyance to Stiles failed to reserve a 25% oil and gas interest for himself, and thus, Respondent concludes

all of Dunham's interest in the Subject Property was conveyed to Stiles in 1968, leaving none to convey at the 1995 tax sale.

Petitioners argued that, with respect to the 1991 Oil and Gas Deed, even if there was a duplicative assessment, it still does not result in a void tax sale in this instance because payment of one of the underlying double assessments is a necessary prerequisite to holding the tax sale void *ab initio* pursuant to West Virginia caselaw, and there was no such payment in this case. Petitioners also argued that to extent that the assessor's separate assessments of the surface and oil and gas interests was in error, the error does not result in a void tax sale, but rather a voidable tax sale that must be resolved pursuant to the West Virginia Code's statute of limitations. Finally, Petitioners argued that Osburn Dunham did in fact possess an oil and gas interest in the Subject Property to be sold at tax sale in 1995 according to the terms of the deed itself and evidence pertaining to the intent of the parties.

Motion for Summary Judgment was granted in favor of Respondent on both issues. Petitioners brings the instant appeal and respectfully requests that this Court reverse the decision of the Circuit Court.

V. Summary of the Argument

The Circuit Court erred in holding the 1991 tax sale of the Oil and Gas Deed void as a result of a duplicate assessment. In so holding, the Circuit Court relied heavily on this Court's decision in *Orville Young, LLC v. Bonacci*, 246 W. Va. 26, 866 S.E.2d 91, 100 (2021), which was decided after the briefing on the Motions for Summary Judgment below and held a tax deed for oil and gas interests void because "the taxes on the entirety of the surface under which the separately assessed oil and gas interests lie were paid, remained current, and never were

delinquent."[2] The instant appeal presents the Court with a test case for how far the holdings of *Bonacci* and the long line of duplicative assessment cases upon which it relies will reach. Whereas prior duplicative assessment cases held tax deeds void when the underlying tax was in fact paid via one of the duplicative assessments, the Circuit Court's holding would find a tax deed void even though the underlying tax was in fact delinquent. This takes the duplicative assessment holdings a step too far as it ignores the critical issue of actual delinquency, thereby producing an unnecessary wave of uncertainty throughout the State's records rooms – all while securing an inequitable and unjustifiable windfall for Respondent, who was himself a participant in the tax sale at issue.

As noted, the instant appeal is distinguishable from *Bonacci* in two critical respects. First, no taxes, neither surface nor oil and gas, were paid here, and second, all parties to the present case, including Respondent, are purchasers of the tax sale deeds or predecessors in interest thereto.

Duplicate assessment cases hold resulting tax deeds void because the state cannot require a double tax on the same interest. Indeed, in *Bonacci*, this Court explained that because "full payment of the 500+-acre estate satisfied" the tax obligation on the subject oil and gas interest, there could be no valid tax sale as "'actual delinquency is a condition precedent to the right to sell land under a tax assessment.'" 866 S.E.2d at 100 (quoting *State v. Allen*, 65 W. Va. 335, 339, 64 S.E. 140, 142 (1909)). Thus, in cases where a tax sale results from the nonpayment of one

[2] In *Bonacci*, this Court further held, "when a single landowner owns both the surface and the subjacent mineral estate in a parcel of property and such mineral estate has not been severed from the surface, the property should be assessed as a single, whole unit and not as separate assessments." 866 S.E.2d at 98. Petitioners argued below that there is legally significant distinction between separate and duplicative assessments and that the assessments in this case were separate and not duplicative. However, on appeal they do not challenge the Court's holding that "a sole owner's undivided interest in the surface estate and the associated, unsevered mineral estate of a single parcel of property is considered to be a single tract of land that is subject to one tax assessment and not separate tax assessments for each constituent component interest." *Id.* at 99 (citing W. Va. § 11-4-9). Petitioners assert that when the underlying tax was in fact delinquent, the separate deeds are not void but, at most, voidable.

duplicate assessment but not the other, the tax sale is void because the state can only require one payment and the state has no legitimate tax lien to enforce. However, in this case, there was no payment whatsoever. Where no surface assessment and no mineral assessment was paid, it cannot be said that the land owner satisfied his tax burden, thereby voiding the tax deed. Given the actual delinquency in this case, the Court should hold the Oil and Gas Deed valid, or in the alternative, merely voidable as opposed to void *ab initio*. *See L&D Investments, Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 55, 818 S.E.2d 872, 881 (2018) (explaining that tax sale deeds are void where there is no actual delinquency due to a duplicative assessment while voidable tax sale deeds created by procedural irregularities are protected by a three-year statute of limitations).

The other critical distinction between this case and *Bonacci* is that the respondent brothers in *Bonacci* had an interest in the subject property prior to the tax sale, whereas here, Respondent was himself a purchaser at the tax sale. Instead of claiming that the state illegally sold the land out from under him, as the respondent brothers claimed with respect to their predecessors in interest in *Bonacci*, Respondent in the present case claims that the Land Deed that he purchases in 1991 conveyed to him both the surface and the oil and gas while the Oil and Gas Deed purchased by Petitioners or their predecessors in interest was void *ab initio*. Because the Respondent in the present case had no interest in the Subject Property prior to purchasing the Land Deed, the policy principles guiding this Court's resolution of the dispute are different than those at play throughout the law of duplicative assessments. In the absence of the core concerns regarding the limits of the State's tax power and the due process rights of delinquent land owners, this Court should defer to "preeminent compelling public policy" of certainty in title as it has consistently observed that "confidence in one's title to land is of paramount importance." *Mingo Cty. Redevelopment Auth. v. Green*, 207 W. Va. 486, 491, 534 S.E.2d 40, 45 (2000) (quoting *Hock v. City of Morgantown*,

162 W. Va. 853, 856, 253 S.E.2d 386, 388 (1979)). Without accepting such a distinction, the question arises as to which tax deed is void – the Land Deed to Respondent or Petitioners' Oil and Gas Deed recorded six days prior? There is no legal or policy reason to void the earlier-recorded Oil and Gas Deed rather than Respondent's Land Deed.

The Circuit Court also erred in holding the 1995 tax sale deed void. According to the court, the 1995 tax deed was void because Osburn Dunham had previously conveyed his entire interest in the property to Russell Stiles at the time of the assessment. But the court erred in so holding because Osburn Dunham's conveyance to Russell Stiles was limited to that which was "conveyed to the said Osburn Dunham by Joseph E. Rogers and Myrtle Rogers." APP 630. Because Joseph and Myrtle Rogers only convcyed 25% of the oil and gas interest in the Subject Property to Osburn Dunham, Osburn Dunham's subsequent conveyance to Russell Stiles only conveyed a 25% interest in oil and gas underling the Subject Property (as opposed to Osburn Dunham's entire 50% interest). The intent of the parties to so limit the conveyance was confirmed in their contemporaneous and subsequent conduct. Osburn Dunham continued to pay taxes on 25% of his oil and gas interest for years after his limited conveyance to Russell Stiles, and Russell Stiles executed an oil and gas lease which yielded only "1/4 of all monies" as opposed to 1/2. *See* APP 636–37. Accordingly, the lower court erred in holding the 1995 tax deed void.

"A circuit court's entry of summary judgment is reviewed *de novo*." *Bonacci*, 866 S.E.2d at 96 (internal quotation marks omitted).

VI. Statement Regarding Oral Argument and Decision

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure because: 1) all parties have not waived oral argument; 2) this appeal is not frivolous; and 3) the dispositive issues have not been authoritatively decided. W. Va. R. App. P. 18(a).

This matter is appropriate for a Rule 20 argument because the matter concerns an issue of first impression for this Court, to wit, whether this Court's duplicate assessment jurisprudence applies where no tax was in fact paid. Morcover, the matter presents an issue of fundamental public importance because the decision of the Circuit Court below would jeopardize the stability of countless real property titles. *See* W. Va. R. App. P. 20(a).

VII. Argument

1. THE CIRCUIT COURT ERRED IN APPLYING THE LAW OF DUPLICATIVE ASSESSMENTS TO THE CASE AT BAR BECAUSE THE ASSESSMENTS WERE IN FACT DELINQUENT AND RESPONDENT HIMSELF TOOK PART IN THE TAX SALE RESULTING FROM THE DELINQUENT ASSESSMENTS.

In 1991 Petitioners and Respondent each purchased their respective interests in the Subject Property at a tax sale. After the previous land owner failed to pay the tax on both of the assessments, Respondent purchased the surface interest in thc Subject Property and Petitioners purchased a 25% interest in the oil and gas underlying the surface interest. These simple facts illustrate the incongruence of Respondent's position with those who have previously sought to have tax deeds declared void as a result of duplicative assessments, such as the respondent brothers in *Bonacci*. A review of the duplicative assessment caselaw and the underlying public policies supporting it reveal that the Oil and Gas Deed was not void but, at most, voidable.

A. The law of duplicative assessments is inapplicable because the taxes on the Subject Property were in fact delinquent.

Although Stiles paid both the surface and oil and gas assessments for a period of time, there is no evidence in this case that Stiles paid either assessment during the period these assessments were marked delinquent and sold in 1991, and the same was not meaningfully disputed in the briefing below by Respondent. *See* App 503; 635–37. In Response to Petitioner Collingwood raising the issue below, Respondent asserted that nonpayment of the underlying taxes was irrelevant because he satisfied the tax burden with his tax sale purchase. *See id.* at 503. But this counterpoint fails to observe the critical importance that delinquency plays in the role of duplicative assessment analysis. Indeed, Respondent's own interest in the Subject Property is dependent on the fact that the previous land owner failed to pay either tax because throughout the duplicative assessment case law, this Court has clearly held that "[a]ctual delinquency is a condition precedent to the right to sell land under a tax assessment." *Orville Young, LLC v. Bonacci*, 866 S.E.2d 91, 100 (2021) (quoting *State v. Allen*, 65 W. Va. 335, 339, 64 S.E. 140, 142 (1909)); *See also State v. Low*, 46 W. Va. 451, 33 S.E. 271, 274 (1899) ("Payment of the taxes by the owner, or by any one entitled to make payment, is an absolute defeat and termination of any statutory power to sell."); *State v. Allen*, 65 W. Va. 335, 64 S.E. 140, 142 (1909) ("The state is not entitled to double taxes on the same land under the same title. A man cannot be held to lose his estate under the rigid principles applicable to tax titles from such an unjust cast"); *L&D Investments, Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 52 818 S.E.2d 872, 878 (2018) ("Because of the double assessments *and the payment of the taxes by the petitioners*, we find that the mineral interests were never delinquent) (emphasis added).

Accordingly, if the underlying tax had been paid, then Respondent himself would have no interest in the land pursuant to the very law on which he relies. Thus, instead of squarely relying

on the duplicative assessment caselaw for the proposition that the tax sale was void as a result of a duplicative assessment that was in fact paid and therefore lacking delinquency, Respondent has distorted the duplicative assessment caselaw to argue that his Land Deed is valid while Petitioners' Oil and Gas Deed is not. But there is no support in the duplicative assessment case law for the proposition that where land and oil and gas interests were separately assessed and then separately sold pursuant to actual delinquency, the purchaser of the land interest automatically takes title to the oil and gas interest regardless of the substance of the respective tax deeds. Indeed, the posture of the duplicative assessment cases would suggest that to the extent either tax deed is void, the owner of the property prior to the tax sale would be the proper owner upon a void tax sale. But again, this cannot be the case here because, as Respondent ultimately must agree, if his tax deed is to be maintained, the prior owner was in fact delinquent.

Thus, instead of claiming the State has illegally attempted to exceed the limits of its tax collection power, the essence of Respondent's claim is that because Section 11-4-9 disallows separate assessments of unsevered oil and gas interests, such interests also cannot be sold separately. Therefore, in Respondent's view, the oil and gas interest must have been granted to Respondent despite the fact that Petitioners recorded the Oil and Gas Deed six days before Respondent recorded his Land Deed.

Support for this assertion is not explicitly found in the text of Section 11-4-9 or the duplicative assessments caselaw. As the Court held in *Bonacci*, Section 11-4-9 of the West Virginia Code disallows separate assessments of a single land owner's surface and oil and gas assessments. 866 S.E.2d at 99. But that Section does not describe the appropriate remedy where, as here, separate tax sales resulted from actual delinquency on each interest sold. And as established above, the duplicative assessment caselaw holds that tax sales stemming from duplicate

assessments that have been paid are void, and the land owner prior to the tax sale is the proper owner because their tax burden was in fact satisfied.

"This Court has long recognized that 'forfeiture of lands is a harsh, even dreadful remedy, and courts lean from it and *never apply it except where the law clearly warrants.*'" *L&D Investments, Inc.*, 241 W. Va. at 55, 818 S.E.2d at 881 (quoting *Sate v. Cheney*, 45 W. Va. 478, 480, 31 S.E. 920, 920 (1898)) (emphasis added). Neither Section 11-4-9 nor the duplicative assessment caselaw clearly warrant holding a tax deed after thirty years where the tax sale condition precedent of actual delinquency, as defined in *Bonacci*, was in fact met. In the absence of such clear rule, the Court should hold that the assessor's error in separately assessing the surface and the oil and gas interests was either harmless because the underlying taxes were in fact delinquent or merely voidable as a result of the assessor's error. *See L&D Investments, Inc.*, 241 W. Va. at 55, 818 S.E.2d at 881 (explaining that tax sale deeds are void where there is no actual delinquency due to a duplicative assessment while voidable tax sale deeds created by procedural irregularities are protected by a three-year statute of limitations). A voidable holding would acknowledge the assessor's error while not disturbing a land title that was purchased 30 years ago pursuant to a tax sale where the underlying tax was in fact delinquent because the three-year statute of limitations applies to voidable deeds. *See id.* (citing W. Va. Code § 11A-4-2, 3, 4). As discussed below, the public policy and equitable considerations at stake in this case urge such a holding.

B. Respondent's position as a purchaser at the tax sale strongly tips the policy considerations guiding the resolution of this appeal in favor of Petitioners.

The Court must decide the proper course where oil and gas interests were assessed separately from surface interests and upon actual delinquency, each respective interest was separately sold to distinct purchasers thereafter. As established above, the duplicative assessment caselaw implies that such a deed may be voidable given the procedural nature of the error, but it

docs not answer the question directly because ultimately the duplicative assessment caselaw is built on a foundation of paid assessments. And where, as here, the tax sale at issue is the result of actual delinquency and it is a fellow tax sale purchaser who is attempting to challenge a parallel tax deed, the concerns at the core of the duplicative assessment case law—the limits on the State's tax power and the fundamental rights of delinquent land owners—are wholly absent. *See Bonacci*, S.E.2d at 100 (holding "the State had no tax lien to enforce" because "full payment of the taxes on the 500+acre estate satisfied the [subject] property's tax obligation.").

Without the presence of those core concerns, the Court should prioritize certainty in land title when resolving this appeal and hold both Respondent and Petitioners received the anticipated benefit of their respective purchases at the 1991 tax sales, the surface for Respondent and the 25% oil and gas interest for Petitioners. *See Mingo Cty. Redevelopment Auth. v. Green*, 207 W. Va. 486, 491, 534 S.E.2d 40, 45 (2000) (explaining the "preeminent compelling public policy" of "confidence in one's title to land"). Granted, in *Bonacci*, this Court held that West Virginia Code Section 11-4-9 evidenced the Legislature's "intent that a sole owner's undivided interest in the surface estate and the associated, unsevered mineral estate or a single parcel of property is considered to be a single tract of land that is subject to one tax assessment and not separate tax assessments for each constituent component interest." 866 S.E.2d at 99. But here, the intent behind Section 11-4-9 of Code is outweighed by the equally clear policy favoring security of land titles because all parties to the dispute are themselves tax sale purchasers.

A thorough review of legal history surrounding delinquent assessments and tax sales establishes a hierarchy of competing policies, none of which cut in Respondent's favor. Within that hierarchy of competing policies are the prime considerations of the fundamental protections of delinquent land owners balanced against the State's interest in collecting tax, both of which are

directly followed by certainty of land titles. In *Shaffer v. Mareve Oil Corp.* this Court discussed the Legislature's enactment of Chapter 11A of the West Virginia Code at length. 156 W. Va. 816, 204 S.E.2d 404 (1974). The Court observed that the enactment of the short statute of limitations and presumptive validity of tax deeds in Chapter 11A was intended to further the "concomitant public policies to produce certainty in land titles and to vest title to real estate in responsible individuals who would bear their share of the tax burden." *Id.* at 823, 408. Indeed, the West Virginia Legislature in 1941 expressly declared that its purpose was: first, to provide for the speedy enforcement of the tax claims of the State; second, to provide for the transfer of delinquent lands to land owners more capable of bearing the tax burden; and third, "in furtherance of the policy favoring the security of land titles, to establish an efficient procedure that will quickly and finally dispose of all claims of the delinquent former owner and secure to the new owner the full benefit of his purchase." *Id.* at 825, 409–10 (quoting W. Va. Code § 11A-3-1).

This Court revisited the legislative intent behind Chapter 11A when it observed "that this area of the law has undergone significant change in the last several years, with each change increasing the protections afforded the delinquent land owner." *Mingo Cty. Redevelopment Auth. v. Green*, 207 W. Va. 486, 491, 534 S.E.2d 40, 45 (2000). For example, in *Lilly v. Duke*, this Court reevaluated the version Chapter 11A that was previously analyzed in *Shaffer* because of intervening U.S. Supreme Court decisions that "prescribe certain constitutional due process requirements for notice of a tax sale of real property." 180 W. Va. 228, 231, 376 S.E.2d 122, 125 (1988). After this Court's *Lily v. Duke* decision, the Legislature amended Chapter 11A's declaration of purpose to "secure adequate notice to owners of delinquent and nonentered property" and to ensure that tax sales "may be conducted in an efficient manner while respecting the due process rights of owners of real property." W. Va. Code § 11A-3-1; *see also Mingo Cty.*

Redevelopment Auth., 207 W. Va. at 491, 534 S.E.2d at 46 (quoting *Stewart v. SMC Inc.*, 192 W. Va. 441, 447, n. 18, 452 S.E.2d 899, 905 n. 18 (1994)). Thus, the 1994 Legislature adjusted the balance of competing policies to place greater emphasis on the importance of respecting the fundamental due process rights of delinquent land owners.

Respondent's position in this case is notably absent among the competing policies of respecting rights of delinquent land owners, allowing the State to enforce its tax claims, and providing certainty in land titles. Respondent was not a delinquent land owner. Nor is his certainty in land title threatened. Indeed, the Circuit Court expressed concerns at the hearing on the cross motions for summary judgment that illustrate the point. When referring to the assessor's decision to sell the surface and oil and gas interests separately, the Circuit Court noted, "[a]s a land owner myself, I find it disturbing that an assessor could change the characteristics of my ownership of real property, whether it be the surface or below." APP 751. This is a compelling concern, but not one that Respondent, as a purchaser at the tax sale, shares. He did not have an ownership interest in the property that could have been altered by the assessor's actions until *after* he purchased at the tax sale. And the Circuit Court's concern with respect to delinquent land owners who do face the potential of having ownership characteristics of their property altered is in fact alleviated by the law of duplicative assessments. As established above, if either of the duplicative surface or mineral assessments are in fact paid, then there is no delinquency and both of the resulting tax deeds for the surface and minerals are void, thereby restoring to the delinquent land owner his original character of ownership.

In sum, Respondent was a purchaser at a tax sale who is attempting to secure a windfall based on rulings that should not, and ultimately, do not apply to him as a tax sale purchaser – all to the detriment of the Petitioners, which purchased their interests for value. It is against this

backdrop of a dispute between tax sale purchasers, that policy regarding certainty in land titles should control. As this Court has observed, "confidence in one's title to land is of paramount importance [and] 'certainty above all else is the preeminent compelling public policy to be served.'" *Mingo Cty. Redevelopment Auth. v. Green*, 207 W. Va. 486, 491, 534 S.E.2d 40, 45 (2000) (quoting *Hock v. City of Morgantown*, 162 W. Va. 853, 856, 253 S.E.2d 386, 388 (1979)). This preeminent public policy weighs heavily in favor of Petitioners.

Respondent's position in this case and the order of the Circuit Court below would be severely detrimental to the certainty of land titles obtained at tax sale. As Petitioners argued below, assessments of unsevered surface and mineral interests were routinely made separately. APP 736–37. Indeed, until 1985 the land books in the office of the Clerk of the County Commission of Wetzel County, West Virginia had been divided into three sections: Land, Royalty (and later, Oil & Gas), and Coal. *Id.* Thus holding the Oil and Gas Deed void despite the fact that the underlying taxes were unpaid, would send a wave of uncertainty surging throughout Wetzel County and many other counties throughout the State due to the once common place practice of separately assessing, albeit improperly pursuant to *Bonacci*, the surface and oil and case or mineral interests. *See L&D Investments, Inc. v. Mike Ross, Inc.*, 241 W. Va. 46, 52 818 S.E.2d 872, 878 (2018) ("This is the third appeal to this Court from Harrison County stemming form the creation of duplicate assessments of certain mineral estates by the Harrison County Assessor beginning in the 1980s.") (citing *Haynes v. Antero Resources Corp.*, No. 15-1203, 2016 WL 6542734 (W.Va. Oct. 28, 2016) (memorandum decision); *Hill v. Lone Pine Operating Co.*, No. 16-0219, 2016 WL 6819878 (W. Va. Nov. 18, 2016) (memorandum decision)); APP 752 (Circuit Court noting the uncertainty in records rooms that will inevitably extend from holding in favor of Respondent here).

If this Court holds in favor of Respondent, then every instance of a tax sale where two separate interests were sold as a result of assessments that were in fact delinquent will be susceptible to challenge. This outcome would simultaneously present an unjustified windfall for certain of those tax sale purchasers and an unjustified loss for other tax sale purchasers. All while failing to further any of the relevant policies in this area of the law. Contrary to the uncertainty that must be borne with respect to tax deeds in order to ensure the rights of the previous owner of the delinquent land are respected, the uncertainty produced by a holding in favor of Respondent in this case would have no articulable upside.

Therefore, this Court should hold that although the assessor was not permitted to separately assess the surface and the oil gas interests, the resulting tax deed was either valid, or merely voidable rather than void because the land owner was in fact delinquent. This holding would provide certainty by securing to each party the full benefit of his tax sale purchase without calling into question the long line of clearly established duplicative assessment caselaw because such caselaw is distinguishable on the basis of the actual delinquency in the underlying tax.

2. THE CIRCUIT COURT ERRED IN HOLDING THE 1995 TAX DEED VOID BECAUSE OSBURN DUNHAM RETAINED AN OWNERSHIP OF A 25% OIL AND GAS INTEREST IN THE SUBJECT PROPERTY AFTER HIS 1968 CONVEYANCE TO RUSSEL STILES PURSUANT TO THE LANGUAGE OF THE DEED AND THE CLEAR INTENT OF THE PARTIES.

The Circuit Court's holding that the 1995 tax deed was void turns on its conclusion that the 1968 deed by which Dunham conveyed his interest in the Subject Property to Stiles unambiguously failed to except or reserve any oil and gas interest in the Subject Property to Dunham. But this conclusion was in error as the language of the deed itself and the conduct of the parties to the conveyance confirms the clear intent of the parties.

Dunham acquired the surface and a 25% interest in oil and gas in the Subject Property from Joseph E. Rogers and Myrtle Rogers in 1945 (the "Rogers Deed"). *See* APP 636. Dunham later acquired an additional 25% interest in the oil and gas from Joseph and Amanda Palmer in 1949 (the "Palmer Deed"). *See id.* Thus, prior to his conveyance to Stiles in 1968, Dunham owned all of the surface and 50% of the underlying oil and gas. The 1968 deed from Dunham to Stiles conveyed that which was "conveyed to the said Osburn Dunham by Joseph E. Rogers and Myrtle Rogers, his wife, by deed bearing date the 8th day of September, 1945, and recorded in . . . Deed Book 165, at page 327." *Id.* Petitioners contended below and again on appeal that the conveyance to Stiles unambiguously conveyed only the 25% oil and gas interest that Dunham received in the Rogers Deed according to the plain language of the deed. Alternatively, to the extent the language of the deed is ambiguous, the contemporaneous and subsequent conduct of Stiles and Dunham confirms that this interpretation of the deed captures the intent of the parties. Dunham's oil and gas assessment was changed from a 50% interest to a 25% interest in the land books and he continued to pay taxes assessed for the 25% oil and gas interest he received from Palmer well after Dunham's conveyance to Stiles. *See* APP 635–37. Furthermore, Stiles paid taxes assessed for a "1/4" [25%] oil and gas interest, not a 50% interest, for over 10 years until becoming delinquent. *Id.* And finally, after the conveyance from Dunham, Stiles executed an Oil and Gas Lease covering "1/4 of all monies" derived from Stiles' interest in the Subject Property rather than 1/2 or 50%. APP 632.

Thus, the Circuit Court erred when it held Dunham's entire interest in the Subject Property, including all of his oil and gas interest, was conveyed to Stiles pursuant to pursuant to the presumption in Section 36-1-11 of the West Virginia Code. Section 36-1-11 7 of the Code sets forth the default rule that "any real property is conveyed or devised to any person, and *no* words

of limitation are used in the conveyance or devise, such conveyance or devise shall be construed to pass the fee simple . . . *unless a contrary intention shall appear in the conveyance.*" (emphasis added). Therefore, the Circuit Court erred by holding pursuant to presumption of Section 36-1-11 without giving any weight to the contrary intention to limit the conveyance to that which was "conveyed to the said Osburn Dunham by Joseph E. Rogers and Myrtle Rogers" that was contained within the deed.

Moreover the Circuit Court should have considered the conduct of the parties before concluding there was no ambiguity in the language of the deed. "Courts sometimes may ponder extrinsic evidence to determine whether an apparently clear term actually is uncertain." *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 103, n. 8, 468 S.E.2d 712, 718, n.8 (1996); *see also* Restatement (Second) of Contracts, § 212 cmt. b (suggesting that determinations of ambiguity are best "made in light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between parties"). Contrary to the Circuit Court's holding, the deed could not have *unambiguously* conveyed Dunham's entire interest in fee simple in light of language of the deed compounded with the fact that both parties to the transaction clearly acted as though the deed conveyed only the surface and 25% of the oil and gas interest. And where there is uncertainty, case law confirms that "[i]n construing a deed, will or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith." Syl. Pt. 5, *Hall v. Hartley*, 146 W. Va. 328, 119 S.E.2d 759 (1961). Therefore, the

Court should enforce the clear intention of the parties and reverse the Circuit Court's holding that the 1968 deed conveyed Dunham's interest in fee simple and that the 1995 deed was thereby void.

Yet again, this Court has reason to consider the "preeminent compelling public policy" of certainty in land titles. *Mingo Cty. Redevelopment Auth.*, 207 W. Va. at 491, 534 S.E.2d at 45. Upending Petitioners' title after nearly 30 years is an extraordinary result where the deed itself and every aspect of the extrinsic evidence indicates the relevant parties' intent to limit the conveyance. This is especially true given the fact that Respondent himself was not a party to the 1968 conveyance and had no reasonable expectation of ownership in Dunham's 25% oil and gas interest when he purchased his surface title in 1991. Indeed, if Respondent thought he had a right to Dunham's 25% Oil and Gas interest at the time of his 1991 tax purchase, he could have and should have enforced it then. Thus, Respondent's equitable position on this issue fares no better than his position on the 1991 issue—he would have the Court ignore the plain evidence surrounding the conveyance and disrupt certainty of title so that he can secure yet another unjustified personal windfall.

In light of the foregoing, this Court should hold the 1968 conveyance was not in fee simple and that Petitioners' 1995 tax deed is valid.

CONCLUSION

As discussed herein, the Circuit Court's decision is flawed in two ways. First, there cannot be a duplicate assessment if no assessment is actually paid. Also, the clear and unambiguous conduct of the parties, which was consistent with the plain language used in the deeds, cannot be disregarded simply for the lack of an exception clause because West Virginia law requires the

document be read as a whole. For the foregoing reasons as discussed herein, the Circuit Court erred in holding both the 1991 Oil and Gas Deed and the 1995 tax deeds invalid.

WHEREFORE Petitioners respectfully request that this Honorable Court reverse that Order entered January 21, 2022, by the Circuit Court of Wetzel County, West Virginia.

DATED the 23rd day of May 2022.

PETITIONERS

COLLINGWOOD APPALACHIAN MINERALS III, LLC, formerly known as Somerset Minerals LP, a Texas limited liability company,

OXY USA, INC., a Delaware corporation,

COLLINGWOOD APPALACHIAN MINERALS I, LLC, formerly known as BP Minerals II, LLC, a Texas limited liability company, and

WACO OIL & GAS CO., INC., a West Virginia corporation

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the PETITIONERS' BRIEF was served upon counsel listed below by Email on the 23rd day of May 2022.

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