The Fundamental Unfairness of West Virginia's Property Tax Appeals Process

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West Virginia's system for resolving disputes over property tax assessments is fundamentally unfair. The Legislature created the property tax appeal process and has tinkered with its details over the years, but its fundamental unfairness remains very much alive. The West Virginia Supreme Court of Appeals has occasionally corrected a few egregious applications of the law, but unfortunately has declined multiple opportunities to address the fundamental unfairness.

Two defects in the property tax appeals process that give rise to the fundamental unfairness are:

(1) A taxpayer does not have the opportunity to have his dispute heard and resolved by an impartial tribunal, and

(2) The standard of proof that a taxpayer must meet to prove his assessment is wrong is ridiculously high

Lack of an Impartial Tribunal

A taxpayer who believes that the assessed value of his property is too high can first attempt to convince the assessing officer[1] that the appraised value is excessive. If that attempt is unsuccessful, however, the first step in the appeals process is an appeal to a county commission. A county commission's main job is, of course, to run the county government, and as such it administers the fiscal affairs of the county. Property taxes are the main source of funding for a county and its school system, and there is probably not one county commissioner in West Virginia who believes that the county has sufficient money to meet all of the worthy demands placed on it by its constituents. The taxpayer's appeal, then, is first heard by a tribunal that will directly benefit from ruling against the taxpayer. This is not to suggest that any county commissioner acts in bad faith; rather, being human, it is simply impossible for a county commissioner not to weigh the taxpayer's claim against the county's need for funds. This conflict is more obvious when the amount in dispute is large, as is often the case for corporate taxpayers owning industrial or natural resource property; in these cases, a ruling in the taxpayer's favor would have an immediate adverse impact on the county's finances and perhaps on the county commissioner's political future. Even a ruling in favor of an individual taxpayer contesting the value of her residence, however, could result in a flood of similar future claims.

[1] Either a county assessor (for residential, farm, and commercial property) or the State Tax Commissioner (for industrial and natural resource property and managed timberland).

The appraisal of the property owned by corporate taxpayers is usually complex; as a result, the Legislature has assigned the responsibility of valuing that property to the State Tax Department rather than to the county assessors. Nevertheless, the county commission is still the first tribunal to hear the company's appeal, and there is no reason to expect that any county commissioner will have the technical appraisal background and expertise to permit her to understand and effectively resolve the complex issues[2] presented.

Complex technical issues also often confront individual homeowners. County assessors value residential real property using a computer system provided by the State Tax Department. In reality, this computer system is seen by taxpayers and assessors alike as a "black box" that spits out a value for each property. It is a detailed and tedious process for the taxpayer to review the data input into this essentially undocumented system by the assessor, and there is no practical way for the taxpayer to determine whether the system spits out the correct value even if the input data are all correct.

Finally, a county commission has a limited amount of time in which to hear appeals, which can result in the imposition of an arbitrarily short time limit on each taxpayer's presentation. [3]

High Standards of Proof and Review

As a result of decisions by the West Virginia Supreme Court of Appeals, any homeowner who believes that the assessed value of his property is too high must bear the significant expense of obtaining a professional appraisal of his property and must have an independent licensed appraiser testify before the county commission and explain his conclusion that the value as assessed is excessive.[4] The technical nature of the appraisal of commercial, industrial, or natural resource property virtually guarantees that an expert appraiser must testify on behalf of a large taxpayer.

In civil litigation, the plaintiff must prove his case by a "preponderance of the evidence". The "preponderance of the evidence" standard of proof means essentially that the plaintiff in a

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[2] Examples of these complex issues include the amount of economic or functional obsolescence present due to external factors or design constraints or bottlenecks, the valuation of coal reserves, etc.

[3] Unless a taxpayer elects to defer his hearing until the next October when the county commission meets as a "Board of Assessment Appeals" (this option was added by the Legislature in its most recent significant change to the property tax appeals process in 2010), the commission must meet as a Board of Equalization and Review beginning February 1 and must decide all appeals no later than the end of February.

[4] Syl. pt. 8, *Killen v. Logan County Comm'n*, 170 W.Va. 602, 295 S.E.2d 689 (1982) provides that "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". The Court recently cited this language in *In re: Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (2008) but has never explained what other types of evidence would be sufficient; therefore, the only safe course for a taxpayer to take is to have his property professionally appraised.

civil case must show that each element of his claim is more likely than not to be true. The Legislature has never defined the standard of proof that a taxpayer must meet in a hearing before the county commission, but the West Virginia Supreme Court of Appeals has stepped in and decided that the taxpayer must prove his case, not with a "preponderance of the evidence", but with "clear and convincing evidence". By imposing this higher standard of proof,[5] a county commission can't rule in favor of the taxpayer *even if* it believes that it is more likely than not that the assessment is too high. In practice, this high standard of proof simply serves as a convenient excuse for a commission already inclined to rule against the taxpayer: "We see your point, and it's a close call, and that means that the taxing authority prevails".

The elevated standard of proof has also been applied to exonerations, those proceedings that begin before the County commission seeking relief from a clerical error or a mistake occasioned by an unintentional or inadvertent act. Relief by exoneration does not involve a dispute over a judgment made by an assessor or held by taxpayer. Rather, it is a mechanism to correct what all parties recognize to be a simple mistake. The Supreme Court of Appeals has made this process more complicated and less beneficial by holding that a taxpayer who acted negligently in providing information to the assessing authority is not entitled to an exoneration.[6]

A taxpayer's only avenue of appeal from the inevitable adverse decision from the county commission in a second level appeal to a circuit court. The good news is that the taxpayer has his appeal heard by an impartial tribunal at this level, but the bad news is that he doesn't get a fresh start at the second level. By statute, the circuit court can't hear any new evidence but can only review the undoubtedly sparse record made before the county commission. Unless the taxpayer understood this limitation and bore the significant expense of having a court reporter transcribe the initial hearing (and many, if not most, taxpayers are unaware to this limitation), it is very possible that the record made before the county commission is insufficient to permit the circuit court to make an informed ruling.

In 2010, the Legislature added a provision to allow the Circuit Court to remand a case to the County Commission to conduct a new hearing in which to develop a sufficient record. This, however, just makes the appeal more expensive for the taxpayer, who by this time has been through an initial hearing before the county commission, who has then had to hire an attorney for the circuit court appeal, and who is now is confronted with having to pay the attorney to help develop a record before the county commission before the circuit court can eventually rule.

When the circuit court finally issues a ruling, the Supreme Court has decided that the circuit court can't rule in the taxpayer's favor absent a finding that the county commission abused its discretion. This is a very high standard of review indeed: even if the judge believes he or she would have ruled in favor of the taxpayer had he heard the case initially, he or she has to affirm the county commission's decision unless he or she can point to some abuse of discretion by the county commission.

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[5] The only higher standard of proof is the "beyond a reasonable doubt" standard applicable in criminal cases.

[6] *State of West Virginia ex rel Prosecuting Attorney of Kanawha County West Virginia V Bayer Corporation*, 223 W.Va. 146, 672 S.E.2d 282 (2008)

Even a victory in the Circuit Court may prove pyrrhic. Many assessors consider the next assessing year to be a clean slate, allowing her to issue an assessment for the new year generally while the appeal of the old assessment is pending in the Circuit Court. Often, an assessor will persist in the excessive assessment of a property even after that assessment has been reversed by the Circuit Court for previous year' requiring the taxpayer to return to the Circuit Court for relief from the new assessment.

Further appeal to the West Virginia Supreme Court will surely be met with a court that seems in its recent decisions determined not to interfere with the taxing authority's discretion. Recent decisions by the Supreme Court all too well demonstrate the validity of Mr. Michael E. Caryl's suggestion in the Fall 1995 edition of the West Virginia Law Review that judicial review by that Court is generally superficial and confirms his prediction that the Court is unlikely to be "the principal agent of reform."

In fact, the only decision of the Supreme Court that has provided any relief at all to taxpayers may have made the Assessor's job unmanageably difficult. Syllabus point *Stone Brooke Limited Partnership v. Sisinni,* 224 W.Va. 691, 688 S.E.2d 300 (2009) dictates that "[w]hen a circuit court reviews an appraisal of commercial real property made for *ad valorem* taxation purposes, the court shall, in its final order, make findings of fact and conclusions of law addressing the assessing officer's consideration of the required appraisal factors set forth in W. Va. C.S.R. §§ 110-1P-2.1.1 to 2.1.4 (1991)". The twenty-odd factors to which the Court refers are set forth in the Tax Commissioner's legislative rule for valuing commercial and industrial property. If, however, the Assessor uses the computer system provided by the Tax Commissioner to value commercial real property, it is unlikely that the Assessor knows or understands whether and/or how that system takes each of those factors into account. Even if the Assessor had that knowledge, it would be quite time consuming to introduce such detailed information, much of which may be uncontested.

In the Regular Session of the Legislature in 2010, the Legislature made changes to the property tax appeals process. The Legislature certainly had it within its power to make the system more fair, but it elected instead to protect the many advantages enjoyed by the taxing authorities. The Legislature failed to eliminate the fundamental unfairness having a county commission act as the first level tribunal and, while it enacted new language dealing with the standards of proof, failed to make the burden of proof and review more evenhanded.

Taxpayers, therefore, are still confronted with a system that is fundamentally biased against them. As Justice Neely once observed, this bias is particularly applicable to large corporate taxpayers that can't vote: "the county commission lacks expertise in property evaluation but is extraordinarily knowledgeable about the government's need for money, an *ingrained bias* that is particularly harmful to non-voting entities".[7]

[7] *Rawl Sales & Processing Co. v. County Commission of Mingo County,* 443 S.E.2d 595 at 601 (1994).