The Illusion of Due Process in West Virginia's Property Tax Appeals System: Making the Constitution's Promise a Reality

Michael E. Caryl
Bowles Rice McDavid Graff & Love

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THE ILLUSION OF DUE PROCESS IN WEST VIRGINIA'S PROPERTY TAX APPEALS SYSTEM: MAKING THE CONSTITUTION'S PROMISE A REALITY

MICHAEL E. CARYL*

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* B.S. West Virginia University, 1968; J.D. Yale Law School, 1974; Partner, Bowles Rice McDavid Graff & Love, 1989-present; West Virginia State Tax Commissioner, 1985-1988; adjunct lecturer, West Virginia University College of Law, 1991-1992. The author expresses his appreciation to Professor Carl M. Selinger, B.A., J.D., of the West Virginia University College of Law, for his advice and guidance in preparing this article. The author also gratefully acknowledges the assistance of his colleague, David A. DeJarnett, B.S., J.D., L.L.M., in identifying and analyzing the historical materials described in this article.
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I. INTRODUCTION

Perhaps few features of the federal constitution are more familiar (or, at least, more litigated) than the guarantee that no person shall "be deprived of life, liberty or property, without due process of law." Although its exact formulation varies with the circumstances, the legal process which is due to every person generally requires that before a citizen is permanently deprived of property, she or he is entitled to: (1) meaningful notice of the government's intent to effect such deprivation; (2) a reasonable opportunity to prepare proof and arguments to challenge the government's proposed action; and (3) a reasonable opportunity to present such proof and arguments at a hearing before an impartial tribunal.

While there may be an inherent tension between the due process requirement and the central mission of most law enforcement agencies, what if there were special police appointed to enforce that constitutional guarantee? What would such Due Process Police say about a system of administrative and judicial review of property tax assessments which affords landowners pre-deprivation notice of increased assessments and a hearing to challenge them? How would they regard a system which permits not just one or two, but three levels of review by independently elected officials before tax bills are even prepared? About such a

1. U.S. CONST. amends. V (applicable to Congress) and XIV, § 5 (applicable to the states). The West Virginia Constitution similarly provides that: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." W. Va. CONST. art. III, § 10. It has frequently been said that, in certain circumstances, the standard of due process, under the state constitution, may be interpreted by the state courts to be a higher level of protection than under the federal constitution. See, e.g., State v. Neuman, 371 S.E.2d 77, 80, Syl. Pt. 3 (W. Va. 1988). However, application of that higher standard appears to be largely confined to criminal cases, and has never been employed by the courts in West Virginia in cases involving the due process rights of taxpayers against the government's assessment of taxes. Therefore, it may be assumed that, in matters of taxation, the state and federal standards of due process are identical.


system, the Due Process Police would doubtless say: "Have a good
day, and go on about your worthy business."

On the other hand, how would the Due Process Police react to a
property tax system which gives no notice of increased assessments to
the owners of certain kinds of property? How would they regard a
system which permits the denial of all remedies to taxpayers who fail,
for any reason, to timely deliver any statement required by law? What
would be their view of a system that allows the primary reviewing
body\(^4\) to remain in session for only a few days before all assessments
in that county become final? How would they respond to a system
which puts the same body that is responsible for the fiscal affairs of
local government\(^5\) in charge of reviewing the merits of individual at-
tacks on its tax base?

"You are under arrest and you have the right to remain silent,"
would be the response to the latter system expected of the Due Process
Police. However, these two systems are the single system governing
review of property tax assessments in West Virginia. Moreover, the
only Due Process Police we have — the courts — have consistently
accepted the first description as the valid one in upholding that system
and the results it yields.

The purpose of this Article is to thoroughly analyze from a due
process perspective the troublesome realities of West Virginia’s current
procedures for administrative and judicial review of property tax as-
sessments (the system) and to propose a comprehensive reform of that
system.\(^6\) In the course of that analysis, the substantial, but often conf-
fused and contradictory, body of case law addressing these issues will
be discussed, as will the efforts of practitioners, academics, public

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5. The county commission. See infra note 19.
6. Please note that the scope of this Article is confined to the procedural aspects of
the property tax assessment review process. It expressly does not touch on the related, but
entirely distinct, matter of the methods by which the value of property is established for
assessment purposes. The system contemplates that the county assessor, or in some cases, the
State Tax Commissioner, first determines the true and actual value of property (the "ap-
praised" value) and then a constitutionally established percentage (60%) is applied to the
appraised value to determine the "assessed" value. See discussion infra Part III.D.1.
officials and others to bring more fairness, uniformity and order into the system.

II. DUE PROCESS: THEORY AND APPLICATION

The familiar constitutional guarantees of due process of law do not involve a single set of rigid or static rules of procedure imposed on every circumstance where proposed government action puts an individual citizen's legal interests in jeopardy. Rather, they embody a flexible concept whereby the requirements for particular circumstances are determined by reference to the context in which they are to be applied.

While the judicial discussion of factors considered in testing due process adequacy has been wide-ranging, there appears to be regular gravitation by the courts toward a three-dimensional, sliding scale standard in such matters. Specifically, the courts have regularly looked to a triumvirate of factors which are to be concurrently weighed and balanced in each case where concerns about due process are raised. These factors are: (1) the nature of the individual interest to be affected by official action; (2) the risk of erroneous deprivation of such interest under current procedures and the efficacy of greater safeguards to reduce such risk; and (3) the government's competing interest in the particular function involved and in avoiding any fiscal or administrative burdens that greater safeguards would likely entail.

In most matters involving taxation, courts have given the third factor substantially more weight than the other two, which results in relatively summary proceedings. This approach rests principally on

10. Id.
11. Id. at 335.
12. In an early case, the U.S. Supreme Court upheld West Virginia's process for the sale of lands on which property taxes were delinquent, long before the court had enunciated the three factor test in Mathews, stating that "laws for assessment and collection of general taxes stand upon a somewhat different footing [from other forms of deprivation] and are construed with the utmost liberality [in favor of the tax collector] . . . ." Turpin v. Lemon,
recognition of how essential the prompt and regular collection of revenues is to a government's functioning and existence and its role as guarantor of an orderly society.13

In fact, in virtually all cases involving the effect of administrative action on private economic interests, including the imposition of taxes, due process does not guarantee a plenary hearing before a judicial officer.14 It is sufficient that before a citizen is permanently deprived of tax dollars, the taxpayer be given notice and an opportunity for an impartial administrative tribunal to hear any objections to such taxation.15 The subsequent right to claim a refund of overpaid taxes, previously remitted under legal compulsion, has been held to satisfy due process requirements.16

When compared with the virtually conclusive weight assigned by the courts to the government's interest in avoiding disruption or interference with its revenue sources, the risk of depriving a taxpayer of the right not to overpay his or her taxes (the second dimension of the due process measure) typically attracts much less judicial concern. So long as some semblance of process for review of challenges to tax assessments is provided, the courts tend not to closely scrutinize the actual efficiency of such process.

However, upon careful examination, the official arrangements for review of tax assessments are often less than meaningful — particularly in the case of individuals and small businesses.17 Rather, the often

187 U.S. 51, 58 (1902).
13. State v. Sponaugle, 32 S.E. 283 (W. Va. 1898). Compare, however, this view that "[n]o attribute of sovereignty is more pervading [than taxation]", id. at 285, with the leisurely, after the fact, fiscal time table set by the Legislature for local government bodies prior to 1961. See infra note 123.
14. Sponaugle, 32 S.E. at 284-85. See also Walter Hellerstein, Judicial Review of Property Tax Assessments, 14 TAX L. REV. 327 (1959) [hereinafter Hellerstein, Judicial Review]. What the Court in Sponaugle did not discuss was why the additional requirement of the due process provision of the West Virginia Constitution, involving "the judgment of his peers," does not apply to tax cases.
17. See Nancy J. Stara, Property Tax Appeals: An Appeal for Practical Due Process,
informal, uneven and hurried tax review procedures frequently conducted in an institutionally biased environment make the risk of erroneous deprivation particularly acute.

Regrettably, much of the West Virginia case law on this subject also reflects a highly theoretical, even unrealistic, approach to the analysis of due process questions raised about tax review mechanisms. Such superficial judicial inquiry into the matter fails to detect both the practical inaccessibility to timely and meaningful review opportunities for ordinary citizens (the second factor) and the absence of any realistic threat to the government’s functioning if steps were taken to make such review more meaningful (the third factor).18

The Supreme Court of Appeals of West Virginia (the court) appears to be so enamored with the primacy of the third factor, it is essentially blind to the inherent institutional bias, against protesting taxpayers, of the tribunal presently assigned the task of initially hearing their protests.19 Because of a recently reaffirmed minimum jurisdictional amount imposed on its review of such cases,20 the court probably is also officially unaware of the daunting effect that the unforgiving (and often uneven) requirements for review, as permitted by the

18. Indeed, as will be suggested later, due process improvements for taxpayers can be accompanied by, and are fully compatible with, steps to ameliorate the potentially serious threats to local government finances also inherent in the present system.
19. Presently, the county commission occupies the dual (competing) roles of the chief county levying (taxing) body and of the exclusive tribunal to consider challenges to the county’s tax base. In his dissent in Rawl Sales & Processing Co. v. County Comm’n, 443 S.E.2d 595 (W. Va. 1994), Justice Neely observed that:

[T]he 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. Although someone should review the assessor’s property evaluation, assigning this important review to the county commission is perhaps not a scheme whose design would prompt nomination for the Nobel Prize in jurisprudence. Indeed, a hearing before a county commission on a tax appeal is probably best described by the old Jewish expression ["from your mouth to God’s ear."]

Id. at 600 (Neely, J., dissenting).
current system, have on individuals and small businesses. Although the court has recognized the right of every person affected by the property tax base (other taxpayers, and citizens) to challenge a proposed assessment of any property in the same county, it has displayed little awareness of the practical difficulties in exercising that right.

Indeed, the court seems so unconcerned with maintaining of a clear rule of law in these matters that it has, in its pronouncements spanning nearly the entire history of this state, spastically oscillated between vastly disparate concepts when describing the applicable standard of proof upon administrative review and the scope of judicial review.

21. As will be demonstrated in substantial detail later in this article, the ordinary property owner often does not even know to file a property tax return, which failure automatically subjects such taxpayer to denial of any review of the assessment of his or her property. See infra note 49. Moreover, if the taxpayer did file a return, the general assessment information, which is necessary to any challenge of his or her assessment, is practically unavailable to him in any usable form or timely manner. Most critically, the taxpayer is not entitled to any notice of the amount of taxes owed in a given year, until, under the system, it is too late to raise any objections. See infra note 178. None of these realities have been recognized in the more recent judicial discussions of the adequacy of the system. Only in some dicta in the early case of State ex rel. Hallanan v. Woods, 111 S.E. 634 (W. Va. 1922), is there a reference to that last difficulty when the Court observed that “it might well be that a taxpayer would not discover an assessment wrongfully made against him until he went to pay his taxes in the fall of the year, after the time had expired when he could make application to the board of review and equalization [sic] for correction . . . .” Id. at 636.


24. Although a detailed discussion of the case law on these issues will be presented later in this article, the essence of the varietal (often clashing) flavors of these decisions is eloquently captured and made available for sampling in an early — but timeless — article on judicial review and in a recent judicial pronouncement. Kenneth Davis, a renowned administrative law authority, addressed the chaotic case law on the scope of judicial review of administrative tax decisions in a 1938 article. Kenneth Culp Davis, Judicial Review of Administrative Action in West Virginia — A Study in Separation of Powers, 44 W. Va. L.Q. 270 (1938) [hereinafter Davis, Separation of Powers]. See discussion infra Part V.A.1. See also CSX Transp., Inc. v. Board of Pub. Works, 871 F. Supp. 897 (S.D.W. Va. 1995) (Chief Judge (and former state tax commissioner) Charles Haden, carefully wades through the morass of cases attempting to lay down the standard of proof in administrative hearings.
These, of course, are serious charges which, particularly outside the context of a dissenting judicial opinion, impose on their author a substantial burden of proof and persuasion. Beyond demonstrating the existence of a multitude of problems, a critic, to be constructive, is similarly obliged to offer a viable, comprehensive solution that accommodates the wide array of interests at stake. In searching for such a solution, a brief consideration of past practices in this state and of current practices in other states is also in order. First, however, there must be a thorough discussion of the present system in its practical operation.

III. THE CURRENT SYSTEM

To be meaningful and complete, a study of the system must begin at a point prior to the first level of administrative review because actions taken or omitted by taxpayers or tax assessors at earlier stages of the property tax assessment process significantly affect the subsequent course of review.25

A. Policy Issues

Although the description of the system which follows will be essentially chronological in arrangement, the accompanying analysis of the system will be approached from the perspective of the major policy issues presented by it. Those issues may be labeled and defined as follows:

Notice. Specifically at issue is the adequacy of the system's arrangements for notice to taxpayers of tax information reporting rules, of the penalties for failing to obey those rules, of the proposed tax assessments of their property, of the availability of general assessment data for comparative purposes and of their rights to administrative and judicial review.26

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25. For example, any tax information reporting default is grounds for later denying the offending taxpayer any review of his or her assessment. See infra Part III.B.2.
26. See discussion infra part III.B.3.
**Tax Information Reporting Rules.** The required contents and practical deadlines for the filing and amending of property tax returns and other required information can be seen as lacking clarity and uniformity.27

**Penalties for Defaults in Reporting Tax Information.** The seemingly benign inconvenience to taxpayers of ambiguities in tax information reporting rules escalates into the potential for serious prejudice by virtue of their co-existence with little-known and seldom-applied, but relatively harsh, cumulative penalties for violating those rules.28

**Access to Assessment Information.** The system’s lack of arrangements for taxpayer access presents practical concerns regarding timely, useful, and complete information about the past and present assessments of their and others’ property(ies).29

**Time Table for Review.** The system’s tightly constricted time table for administrative and judicial review of tax assessments presents practical difficulties for taxpayers.30

**Hearing Process.** The degree of informality permitted in the conduct of administrative hearings often leads to uneven practices, lack of administrative accountability and inadequate records for judicial review of the results of such hearings.31

**Institutional Bias.** Not only does the tribunal assigned to administratively review proposed tax assessments have a directly competing,

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27. See discussion infra Part II.B.1.
28. See discussion infra Part II.B.2.
29. Under the state constitutional mandate that property taxation be equal and uniform throughout the state, W. Va. Const. art. X, § 1, the chief means to challenge the assessment of one’s property is to compare it to the assessments of others’ property. See infra Part III.C.2. Moreover, to make meaningful the judicially recognized right to challenge the assessments of others, reasonable access to such information is essential. See infra Part III.D.5.
30. See discussion infra Parts III.D.6. and III.E.1. Due process requires the allowance of an adequate time for a citizen to prepare a response to a proposed deprivation. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). It also requires a reasonable time to prepare and file a protest of the proposed deprivation. See Krupica, 254 S.E.2d at 816-17.
31. See discussion infra Part III.D.4.
and often transcendent official duty,\textsuperscript{32} but also the roles of the other local government officials involved in such reviews are, at least ambiguous, if not directly conflicting.\textsuperscript{33}

\textit{Standard of Proof.} The degree of proof required of a taxpayer to overcome the presumed correctness of an assessment has varied widely under the case law in West Virginia.\textsuperscript{34}

\textit{Scope of Judicial Review.} Courts have stated (and acted on) a wide range of views regarding the breadth (or limits) of the inquiry they are permitted to make into the correctness of the administrative assessment review process' results.\textsuperscript{35}

\textit{Standard of Judicial Review.} Historically, the test to be applied by different courts reviewing the result of an assessment challenge administrative hearing has lacked certainty and consistency.\textsuperscript{36}

\textit{Lack of Uniformity.} Uneven tax information reporting rules, inconsistent administrative hearing procedures, and institutional bias all operate to thwart realization of the constitutional mandate that property taxes be equal and uniform throughout the state.\textsuperscript{37}

\textit{Fiscal Time Table.} Local government officials share legitimate concerns about the continued integrity of well-established time tables for the adoption and implementation of their annual budgets.\textsuperscript{38}

\textit{Lump-sum Refunds.} The system's requirement that property taxes found to have been overassessed and overpaid be refunded can play havoc with implementation of each affected local government body's fiscal plan.\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{32} See infra note 61.
\item \textsuperscript{33} See infra Part III.D.5.
\item \textsuperscript{34} See discussion infra Part III.D.3.
\item \textsuperscript{36} See discussion infra Part III.E.3.
\item \textsuperscript{37} W. VA. CONST. art. X, § 1.
\item \textsuperscript{38} See discussion infra Part III.D.6. But see how much greater concern such officials should have had about those matters prior to 1961. See infra note 123.
\item \textsuperscript{39} See discussion infra Parts III.F.1. and III.F.2.
\end{itemize}
Local Governments' Cash Flow. Because of the tight fiscal timetable they must meet, a local government body's implementation of its fiscal plan can be seriously disrupted if taxpayers withhold payment of expected taxes pending completion of the judicial review process regarding their assessments.40

Costs of Administration. Modification of the system by the imposition of additional duties and expenditures on local assessment administrators is a natural concern of local governments.

Having labeled and defined the principal policy issues arising from the system, this Article next outlines the detailed steps in its process.

B. Tax Information Reporting Rules

1. Forms, Time and Place to File

Most property owners are required to file lists of their property with the county assessor by October 1 of the calendar year preceding the tax year.41 However, natural resource property lists are required to be filed with the state tax commissioner by September 1, and industrial property lists are required to be reported to the State Tax Commissioner (the Tax Commissioner) by October 1.42

Generally, property is reported on forms designed by the Tax Commissioner which in the case of industrial property owners, also includes property to be reported to the assessor. However, some assesse-
sors require the use of other, locally developed reporting forms for various kinds of property.\footnote{43}

The broad power of each county assessor, to make reasonable but thorough inquiries in carrying out his or her statutory responsibilities (to determine the true and actual value of property), has been cited by the court a number of times in upholding the authority of individual assessors to develop and to require taxpayers to timely complete and file detailed questionnaires.\footnote{44} Indeed, in questions involving tax administration procedure, such as the content of tax information reports, the court has held that laws providing for such matters will be construed in favor of the government and against the taxpayers.\footnote{45} The implications of endorsing such localized reporting practices for uniformity of taxation throughout the state has not, to date, been directly addressed by the court.\footnote{46}

Property owners are also required by statute to report to the assessor any addition or removal of an improvement to real property which increases value by more than $1,000 within sixty days after commencement of the improvement.\footnote{47} Industrial taxpayers must report improvements over the previous twelve months by June 15 of the following year. Furthermore, in the case of any real property, where a

\footnote{43. In a growing number of counties, assessors have developed their own unique reporting forms to be used by individual (non-business) taxpayers in those counties in lieu of the standardized state forms. While the information requested on these forms often differs from county to county, many of them do employ a potentially more convenient deck-of-cards or coupon-book type of format for different types of personal property. However, these local forms seldom solicit information about an individual's real property or certain common types of taxable property such as television satellite dish antennas. Interview with Robert A. Hoffman, Director, Legal Division West Virginia Department of Tax and Revenue (July 28, 1995) [hereinafter Interview with Robert A. Hoffman]. Given that all interior household furnishings are exempt from taxation, these must be seen as major omissions.}

\footnote{44. Calhoun County Assessor v. Consolidated Gas Supply Corp., 358 S.E.2d 791 (W. Va. 1987) (assessor sought identity of property owners from third party lessees of the same property); In re Assessment of Shonk Land Co., 204 S.E.2d 68 (W. Va. 1974) (county assessor required completion of special form for coal properties); In re Assessment of Certain Real Estate of Eastern Assoc. Coal Corp., 204 S.E.2d 71 (W. Va. 1974).}

\footnote{45. Calhoun County Assessor, 358 S.E.2d at 793.}

\footnote{46. But see infra note 158, regarding the interplay between uniformity of administrative practice and uniformity of tax assessment result.}

\footnote{47. W. Va. CODE § 11-3-3a (1995).}
building permit has been obtained, delivery to the assessor of the permit constitutes sufficient compliance with the reporting requirement.\textsuperscript{48} As a practical matter, few individual, and only some business, taxpayers regularly comply with these additional tax information reporting requirements.\textsuperscript{49}

Unlike virtually every other tax administration arrangement, no clear authority exists in any of these cases for the officer with whom the information is to be filed to grant an extension of time to file it or to allow subsequent amendments. Moreover, the present reporting forms are far from "user friendly" in their format and content, and they contain little information regarding filing requirements and the serious penalties for non-compliance.

2. Penalties for Defaults in Reporting Tax Information

Failure to make timely and complete reports of property, for any reason, carries a (presumably) mandatory, but seldom enforced, penalty of $25 to $100 and the forfeiture of any right of review or other remedy for correction of the assessment of that property.\textsuperscript{50} Additionally, a penalty equal to 1% of the assessed value of property not reported can also be imposed for each of up to five years preceding the time when the omission of the property is discovered.\textsuperscript{51} Failure to comply with required reporting of improvements to real property is a misdemeanor

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} The number of individual taxpayers who file any property tax returns at all varies widely from county to county, sometimes falling as low as 30\% and rarely exceeding 60\%. The number of individuals who file the required real property improvement report is even less. As a practical matter, most assessors regularly examine building permit records at the agency which issued them, effectively eliminating the problem which would be caused by such pervasive non-filing — except in the rural, unincorporated areas of counties which have no county-wide building permit system. Interview with Robert A. Hoffman, \textit{supra} note 43.

\textsuperscript{50} W. VA. CODE § 11-3-10 (1995). These penalties, including the denial of remedies for review and correction of erroneous assessments, apply to a failure or refusal "to deliver any statement required by law." \textit{Id.} Such quoted language has been held to include, not only the regular tax returns, but also any special, locally designed report required by a particular assessor. \textit{Shonk Land Co.,} 204 S.E.2d at 68. Moreover, the court has held that an assessor does not need to prove willfulness in sanctioning a taxpayer for non-compliance with such tax information reporting rules. \textit{Id.; Eastern Assoc. Coal Corp.,} 204 S.E.2d at 71.

\textsuperscript{51} W. VA. CODE § 11-3-10 (1995).
punishable by a fine of not less than $10 nor more than $100.52 Despite the potential severity of such penalties, particularly when compared to the relatively innocuous circumstances in which they may, in theory, be applied, it is disturbing that the law contains neither the authority nor the grounds for the abatement of any of these penalties once they are imposed.53

3. Notice of Tax Information Reporting Rules and Penalties

Except for giving notice of the potential misdemeanor penalty for failing to report real property improvements, neither the current forms for reporting property nor any other documents required to be provided to taxpayers contain any notice of the penalties for non-compliance with the reporting requirements. The forms do, however, state the deadline for filing the property reports.

C. Proposed Assessed Values, Taxability and Classification

1. Notice

The assessor must give written notice to the owner of any real property if the assessed value of such property is proposed to be increased by more than 10% over the prior tax year.54 That notice is to be given at least 15 days prior to the first meeting in February of the county commission sitting as a board of equalization and review (the

52. W. VA. CODE § 11-3-3a (1995). Although assessors often have a ready means to discover such information unilaterally, see supra note 49, nothing in the law suggests that the assessor’s actual knowledge of the improvement exonerates a property owner’s default in not reporting the improvement. The statute does provide that “delivery of a copy of the building permit to the assessor by the owner or the issuing authority shall be sufficient notice . . . .” W. VA. CODE § 11-3-3a (1995).

53. Despite massive non-compliance with the tax information reporting rules by individuals, enforcement of the various penalties for non-filing is also virtually non-existent for such taxpayers. Presumably, this lax enforcement is because local assessing officials recognize the harshness of such penalties. Interestingly, there is authority for the view that taxpayers, who have not been provided, or even asked to file, lists of their real property, (such as in a county using local forms for only personal property), are not subject to the bar-of-all-remedies penalty for such non-filing. Killen v. Logan County Comm’n, 295 S.E.2d 689, 696 n.9 (W. Va. 1982).

However, if the increase is a result of a general increase of the entire valuation in any one or more districts, the notice may be given by publication to minimize the costs of administration. No such notice is owed with respect to personal property.

If, during the meeting of the board, any increase in a property’s assessed value is approved beyond that proposed by the assessor at the beginning of the term of the board, such increase may only be implemented by giving the affected property owner at least five days prior written notice. Again, to reduce the cost of administration of the system, an exception to individual written notice is also made in the case of a general increase of the entire valuation in any one district when publication of the notice is permitted. The contents of such notice are not specified, and, as a practical matter, even when given on an individual basis, it rarely contains both the property’s appraised and assessed values or similar information with respect to the prior year’s assessment of the same property.

Anytime after the property owner has filed a tax return through the time the county commission is sitting as the board, the property owner may “apply to the assessor for information regarding the classification and taxability of the property.”

2. Access to Assessment Information

Although comparisons with other properties are the principal method to challenge an assessment, present statutes contain no procedure

55. Id.
56. Id.
58. Id.
59. W. VA. CODE § 11-3-24a (1995) (emphasis added). “Taxability” refers to the question of whether, because of its use or nature, certain property is expressly exempted by the state constitution from the imposition of property taxes. “Classification” refers to the constitutional tax rate class to which different kinds of property are assigned (e.g., owner-occupied residences are taxed under class 2, the maximum rate of which is one-half of the maximum rate imposed under class 4 on tenant-occupied residences located in a municipality). However, there is no current requirement that the assessor initiate notice to a taxpayer of any proposed adverse determination regarding his or her property’s taxability or classification.
for, or right of, disclosure of the appraised values, proposed assessed values, taxability or classification of the property of other taxpayers, or classes of taxpayers, prior to the meeting of the board.60

D. Administrative Review of Proposed Assessments

1. Allocation of Authority to Review

The county commission,61 sitting as a board of equalization and review, considers questions regarding proposed assessed values for property generally.62 Such proposed assessments are initially based on a constitutionally fixed percentage (60%) of the property’s true and actual value, the latter of which has been determined by the assessor.63 However, in the case of special properties such as natural resource properties and industrial properties, which are appraised by the Tax Commissioner, if the assessor does not agree with the values of such properties as proposed by the Tax Commissioner, then just cause for failure to accept such values must be shown by the assessor to the Valuation Commission, a statewide body whose meetings are sporadic and infrequent at best.64

Moreover, under the recently completed statewide reappraisal of property for tax purposes,65 as revaluations of property in a county were completed, to the extent that the total valuation of property was determined, such valuation was required to be delivered by the assessor

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60. Predictably, in the absence of any statutory mandate to do so, it is highly unusual for such information to be made readily available to taxpayers by county assessors. Perhaps, this is an even greater impediment to exercise of the right to challenge another’s assessment than it is to the right to object to one’s own assessment. At least, in the latter case, there is some limited right to notice. See supra Part III.C.1.

61. The county commission, which now sits as a board of equalization and review in passing on disputed valuation matters, is one of the levying bodies whose operations are funded by property tax revenues, and, even more critically, it has an overarching constitutional duty for the superintendence of the county’s fiscal affairs. W. VA. CONST. art. IX, § 11. Except for certain requirements involving age and residency, there is no particular qualification to be elected and to serve as a member of the county commission.


64. W. VA. CODE § 11-1C-10(g) (1995).

65. See supra note 42.
to the county commission. The county commission, sitting as a board of equalization and review, was then required to "use such appraised valuations as a basis for determining the true and actual value for assessment purposes."66

Questions of the taxability or classification of property are presented first to the assessor and then, if still unresolved, to the Tax Commissioner who must rule on the question by February 28.67

Finally, clerical errors in assessments and mistakes occasioned by an unintentional or inadvertent act (as distinguished from a mistake growing out of negligence or an exercise of poor judgment) may be presented to the county commission for correction within one year from the time the property books are delivered to the sheriff or within one year from the time that the clerical error or mistake is discovered or reasonably could have been discovered.68 This procedure, however, does not apply to matters involving judgments about value or matters of classification or taxability being reviewed under Section 11-3-24a or "any other such clerical error or mistake involving the classification or taxability of property, may be corrected . . . only when approved in writing, by the county assessor."69

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66. W. VA. CODE § 11-1C-12(a) (1995) (emphasis added). The emphasized language appears to be the basis for the widely accepted view that, notwithstanding the Tax Commissioner's statutorily assigned duty to appraise such special properties in the first instance, the board retains its pre-existent power and duty to make changes in any assessment to assure that such property is assessed at its true and actual value. W. VA. CODE § 11-3-24 (1995).

67. W. VA. CODE § 11-3-24a (1995). As used in this context, the term "classification" refers to assignment of property to one of the four constitutional tax rate classes, supra note 59, and not to the classification of certain types of properties for purposes of applying special valuation methods (e.g., farm land, managed timber land, and pollution control facilities). The authority to determine eligibility for classification as such is vested by law in the assessor and the Tax Commissioner for farm land (W. VA. CODE §§ 11-3-1, 11-1C-5 (1995)); in the West Virginia Division of Forestry for managed timber land (W. VA. CODE § 11-1C-11 (1995)); and in the West Virginia Division of Environmental Protection for pollution control facilities (W. VA. CODE § 11-6A-2 (1995)).


69. Id. (emphasis added). Presumably, judicial review of an assessor's disapproval (of the correction of any such clerical error) may be sought through application for a writ of certiorari. See discussion infra Part III.E.1.
Although there is now no mandated arrangement for a preliminary meeting with an assessor, an assessor will normally be willing to discuss, immediately prior to the meeting of the board in February, any objections taxpayers may have to their proposed assessments. Of course, the practical availability of such informal and voluntary administrative review opportunities must be considered in light of the highly unlikely prospect that a taxpayer (given the arrangements for notice) will be informed about the proposed assessment in time to have such a meeting.

2. Form of Request for Review

The statutes contain no specific requirements establishing the form of a property owner’s request for review by the board. In the case, however, of a question of taxability or classification presented to the Tax Commissioner, both the property owner and the assessor must make a sworn statement giving a full description of the property and certain other information which the Tax Commissioner requires.

As a matter of practice, the Tax Commissioner has designed forms which are used in some counties by taxpayers protesting their assessment. By its terms, this form requires information about the values of three (or more) comparable properties for the protest to be considered.

3. Presumptions, Burdens, and Standards of Proof

The statutes contain no prescription regarding the presumptions, burden, or standard of proof required in connection with administrative review of proposed assessments. However, case law is clear that there

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70. It is interesting to note that in both the prior statutes in West Virginia, and in the current practices of other states, a preliminary meeting with the assessor, to attempt to resolve objections to assessments, was required as a prerequisite to any further review. See, e.g., 1904 W. Va. Acts ch. 4, § 18; KY. REV. STAT. ANN. § 133.120(1) (Michie/Bobbs-Merrill 1991 & Supp. 1994).
72. The form created by the West Virginia State Tax Department is entitled LGR (Local Government Relations) 12.75A (Revised 1971).
is a presumption of correctness in favor of the assessor’s proposed assessed value, thereby imposing the burden of proof on the property owner. Nevertheless, even relatively recent judicial authorities seem to be split as to the standard of proof required to carry that burden and to overcome the presumption.

Within less than a year’s time, the court, in two separate decisions, stated: (1) that, before the board, an “objecting party ... must show by a preponderance of the evidence that the assessment is incorrect” and (2) that, “where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous.” Not only did the latter of the two decisions not mention the former, regarding this blatant contradiction, but also ten years later in a per curiam opinion, the court, citing the earlier of the two (Killen), reasserted the “preponderance of the evidence” standard. Interestingly, the court also cited the Pocahontas Land Co. ruling in Syllabus Point 1 of its Eastern American Energy opinion, presumably for the principle that taxpayers bear the burden of proving that their assessments are erroneous because assessments are presumed correct.

Nevertheless, in the fast-paced 1990s, it only took the court a mere 28 days, not a full year as in the previous decade, to issue yet another decision which, in precise pendulum fashion, cited Pocahontas Land Co., and omitted reference to Killen or Eastern American Energy, and unequivocally stated that “the burden ... was on the [taxpayers] to demonstrate by clear and convincing evidence that the tax assessments were erroneous.” The court, however, for reasons it kept to itself, chose to abandon the whipsaw approach in its latest pronouncement on the issue, when, in its ruling in Maple Meadow Mining

73. In re Maple Meadow Mining Co., 446 S.E.2d 912, 916 (W. Va. 1994).
74. Killen, 295 S.E.2d at 706.
77. Id. at 57 (citing Pocahontas Land Co., 303 S.E.2d at 699).
it reasserted the “clear and convincing evidence” standard for administrative reviews of property tax assessments.\textsuperscript{89} Regrettably, in doing so, the Court omitted any comment as to whether Killen and Eastern American Energy retain any precedential value. It is one thing for U.S. District Judge Haden to confidently conclude that “West Virginia presently utilizes a burden of proof standard of ‘clear and convincing evidence,’”\textsuperscript{81} but ordinary taxpayers, assessing officials and their advisors, who have to follow such rules (not make them) deserve clearer guidance regarding such a fundamental issue (unless, of course, the court actually intends to abolish, by such imprecise usage, the long-standing distinction between the two measures of proof).

In the context of ruling on taxability questions, the Tax Commissioner applies the well-established rule that an exemption from tax is strictly construed against the person claiming it.\textsuperscript{82} Apparently, there is also an analogous rule which applies when classification issues arise.\textsuperscript{83}

4. Hearing Process

Although the statutes are silent on the question, the case law establishes that formal rules of evidence do not apply in proceedings before the board.\textsuperscript{84} There is no express provision for witnesses to be sworn or even that testimony be received in any formal sense.

Likewise, the statutes do not expressly provide for the manner of making a record before the board or what it should contain. Similarly, there is no express requirement in the statute for the board to even give the affected taxpayer written notice of its decision, much less to explain the reasons for its decision. The case law simply advises that

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\textsuperscript{79} 446 S.E.2d 912 (1994).
\textsuperscript{80} Id. at 916.
\textsuperscript{81} CSX Transp., Inc., 871 F. Supp. at 900 (emphasis added).
\textsuperscript{82} In re Hillcrest Memorial Gardens, Inc., 119 S.E.2d 753, Syl. Pt. 2 (W. Va. 1961).
\textsuperscript{83} Based on the view that more favorable classification is in the nature of a partial exemption, in passing on such questions, the state applies the same rule of strict construction against taxpayers claiming the benefit of a lower classification. Interview with Robert A. Hoffman, \textit{supra} note 43.
\textsuperscript{84} Pocahontas Land Co., 303 S.E.2d at 700.
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such proceedings need not be surrounded by extensive due process procedures.\(^8\)

5. Parties and Counsel

All citizens in a county have a right to contest the assessment of the property of other owners before the board.\(^6\) The statutory language is unclear as to who are the other proper parties in a hearing before the board (aside from the property owner and other county residents) except in certain cases involving large natural resource properties.\(^7\) Inherently, it would seem that the assessor, whose proposed assessments are at issue, would be the principal other party resisting taxpayer challenges, but the statute curiously provides that the assessor “shall attend and render every assistance possible [(to the board)] in

\(^8\) Id. In Pocahontas Land Co., the inadequacy of the hearing before the board (described as “chaotic” by the parties) was exacerbated to the point of invalidity when one commissioner departed to coach a basketball game at 4 p.m. of the last day when the board could conduct hearings, thereby depriving the board of the quorum needed for it to lawfully act. 303 S.E.2d at 699-700. Similarly, in the earlier case of Crouch v. County Court, 181 S.E. 819 (W. Va. 1935), there was “a total lack of evidence in the record tending to establish a basis for the valuations reflected in the assessment.” Id. While the cited cases represent isolated events, insofar as judicial intervention to correct them may be concerned, this author, and every practitioner appearing before the various county boards, can recall incident after incident where unrepresented taxpayers have had to contend with unrecorded discussions of issues rather than sworn testimony, with 15-minute limitations on hearings, with unexplained and unsupported rulings upholding assessments, and with many other such deficiencies in making a reviewable record for the circuit court.

\(^6\) In Tug Valley Recovery, the court relied on language in Section 11-3-25 (“any person . . . aggrieved”) and the former version of Section 18-9A-11 (“any other interested party”) to assert such right, which the court ruled, extended not only to other taxpayers but also to any “recipient of tax supported services.” 261 S.E.2d at 174. Although Section 11-3-25 refers to judicial review of assessments, and former Section 18-9A-11 conferred standing to seek a writ of mandamus in circuit court, the court in Tug Valley Recovery had little trouble identifying such a right to administrative review. Such a conclusion logically follows from the requirement in Section 11-3-25, that its remedies are only available to persons “who shall have appeared and contested the valuation” before the board. 261 S.E.2d at 169.

\(^7\) W. VA. CODE § 11-1C-10(d)(2) (1995) (requiring the Tax Commissioner to defend, before the board, against challenges to the appraisals of natural resource properties, having an assessed value of more than two million dollars, and challenges of the appraisal of any property owned by a person who owns or controls natural resource property in the county with an assessed value exceeding two million dollars).
connection with the value of property assessed . . . ." There is also judicial authority for the proposition that both the assessor and the board may call upon the services of the county prosecuting attorney to assist them at any such hearing. 

The prosecuting attorney is also the general legal counsel for the county commission. Further, on appeals of rulings made by the county commission in assessment of most matters, the prosecuting attorney attends to the interests of the state, county and district. Such multiple roles of the assessor, and of the prosecuting attorney, simply compound at least the appearance of institutional bias against taxpayers in these proceedings.

6. Time Table for Administrative Review

Taxpayers, wishing to raise valuation questions regarding their current year assessment, may only present their challenges to the board after it starts to meet and before it adjourns. The board must meet

89. In Pocahontas Land Co., the court explained the foregoing statutory language by describing a bifurcated process whereby, at the initial meeting of the board, it works collaboratively with the assessor in an administrative setting “to monitor the accuracy of the assessor’s performance [in preparing the proposed assessments].” 303 S.E.2d at 700 (quoting Krupica, 254 S.E.2d at 816). Then, the court contemplates, after corrections of all apparent errors have been made, the board turns to the second phase of the process, and puts on its quasi-judicial, administrative tribunal hat to hear taxpayer protests of those same assessments. Id. Presumably, the assessor then steps down from his or her advisor role and reappears before the board as a litigating party defending such challenged assessments.
91. W. VA. CODE §§ 11-3-25, -27 (1995). If the case involves natural resource or industrial property, the state attorney general represents “the tax commissioner or the assessor” on appeal. W. VA. CODE § 11-1C-10(h) (1995). By using the disjunctive “or” there, the Legislature may be said to have revealed its intent that the assessor is, in fact, the proper party appearing before the board in such matters. W. VA. CODE § 11-1C-10(d)(2) (1995). This assumes, of course, that the right of appeal is only given to those who litigate a matter in the lower tribunal. Unfortunately, by omitting any reference to the Tax Commissioner’s role in appearing before the board (except in large natural resource property cases), while clearing giving the Tax Commissioner a right of appeal to circuit court, the statutory language casts some doubt on the validity of that assumption. Doubtless, an interpretation of these various code sections could be adopted which harmonizes them, but they are hardly a model of clarity.
92. The board must complete its work to certify annual assessments of property at true
by February 1 (the assessor is only obliged to deliver the proposed assessments by that date) and it can adjourn as early as February 15 and as late as February 28.93 These tightly constricted time tables for review have been established based on an abiding concern that the exact amount of the county’s tax base be settled in sufficient time for each local government body’s annual budget to be adopted prior to the commencement of the fiscal year on July 1.94

Taxability and classification questions can be presented to the assessor and Tax Commissioner anytime after a property return is filed, so long as it is presented within sufficient time to allow the Tax Commissioner to rule on the matter by February 28.95 The assessor has, by law, only until March 3 to make a certified statement to the various levying bodies (county commissioners, school boards and municipal councils), broken down by class, of the aggregate value of all property.96 Levying bodies must meet between March 7 and March 28 to determine their fiscal condition and to set a tax rate which will produce sufficient revenues to meet their financial requirements.97 Then, in April, the various levying bodies meet to hear objections to their estimated financial needs and proposed levy rates.98 By June 7, the assessor must complete the books upon which the assessor has applied the finalized levy rates to the final assessed values.99 Tax collections by the sheriff begin on, or soon after, July 15. Clerical errors must be raised within one year after the property books are delivered to the sheriff, or within one year from discovery of the error, or one year from when the error was reasonably discoverable.100

and actual value and adjourn sine die by February 28 of each year. W. VA. CODE § 11-3-24 (1995).

98. W. VA. CODE §§ 11-8-10a, -12a, -14a (1995).
100. W. VA. CODE § 11-3-27 (1995). The deadline for such delivery is June 7, but the assessor may deliver the books sooner, thus starting the one-year period for correction on that earlier date. W. VA. CODE § 11-3-19 (1995).
E. Judicial Review of Proposed Assessments

1. Time Table for Judicial Review

Any appeal from the decision of the board regarding valuation or of the Tax Commissioner regarding classification or taxability must be filed (in the circuit court in which the property is located) within 30 days after adjournment of the board.  

The statute contains no express provision authorizing judicial review of a decision of the county commission in a matter involving a clerical error brought under the separate one year rule. Case law indicates, however, that review of a county commission's action shall be brought under the general statutory provisions by writ of certiorari. However, the time within which an application for such a writ must be made (following the entry of the order of the county commission) is unclear.  

2. Scope of Review

In cases where a taxpayer has appeared before the board, the circuit court hears an appeal on the record made before the board. However, if the taxpayer has not appeared before the board because

101. W. VA. CODE § 11-3-25 (1995). In measuring the beginning of the appeal period by the adjournment of the board, the statute makes it possible that such period, for an aggrieved party to seek judicial review, would end as early as March 17 (March 16 in leap years) in counties where the board adjourns as early as February 15.  
103. Humphreys v. County Court, 110 S.E. 701, 702 (W. Va. 1922).  
104. The statute authorizing the issuance of writs of certiorari does not expressly provide a time within which application for such a writ must be made. The court has, by way of analogy to an appellate proceeding, essentially engrafted the comparable appeal time onto the certiorari statute. State ex rel. Gibson v. Pizzino, 266 S.E.2d 122, 124-25 (W. Va. 1980). But what is the comparable appeal time in cases of this nature? Is it the normal four months generally allowed for an appeal of most orders of a county commission? See W. VA. CODE § 58-3-4 (1995). Or is it the thirty days from adjournment of the county commission sitting as a board which is allowed in property tax matters involving review of assessments based on objections to valuation? See W. VA. CODE § 11-3-25 (1995).  
she or he did not receive a required notice, such taxpayer may procure a *de novo* proceeding in circuit court.

Generally, the procedures for such appeals from county commissions are governed by West Virginia Code Sections 58-3-1 to -7. Applications to the circuit court for a writ of certiorari, to review the action of the county commission in such cases under these code sections, are by leave of the court and are not appeals of right. In cases where the circuit court grants such a writ, it is generally empowered to take additional evidence if it is alleged that substantial rights have been violated and there is no other opportunity for review of the question. However, in property tax appeals, the limitations of West Virginia Code Section 11-3-25 apply to generally preclude such additional evidence.

3. Standard of Review

Although the statutes are silent on the point, the Supreme Court of Appeals of West Virginia has ruled that when a taxpayer has appeared before the board, any judicial review by the circuit court will be limited and the assessment established by the assessor or the board will not be set aside if there is substantial evidence to support such a decision.

106. See *supra* Part III.C.1.
111. *Killen*, 295 S.E.2d at 706. While the issue of the standard of judicial review in such cases cannot be said to be as unsettled, as the standard of proof at the administrative hearing level, questions about the continuing viability of earlier judicial pronouncements, regarding the standards to be applied by the circuit courts and by the Supreme Court of Appeals of West Virginia, and whether there are differences between them, leave a latent but persistent ambiguity for all involved in the system. On this question, it appears that, as Justice McGraw explained in footnote 27 of *Killen*, upon review of board determinations, both the circuit courts and the supreme court will follow a "substantial evidence" standard and will only set aside assessments in the absence of such evidence in the record to support them. *Id.; cf.* Central Realty Co. v. Board of Equalization & Review, 158 S.E. 537, 538 (W. Va. 1931) (authorizing the reviewing court to consider, independent of the evidence in the record made before the board, "general business conditions" in deciding whether to up-
4. Record of Administrative Proceeding

Appeals from a ruling of the board, "when allowed by the court or judge, in vacation, shall be determined from the evidence [taken at the hearing before the board of equalization and review]."112 Because the tax statute does not prescribe the manner by which such an appeal is perfected, the Supreme Court of Appeals of West Virginia has held that the provisions of West Virginia Code Section 58-3-4 are mandatory.113 That latter code section also requires that any such petition for appeal to the circuit court must be accompanied by the original record of the proceeding in the county commission and, if it is not, the appeal must be refused.114

5. Form of Petition

The record of the proceeding before the county commission must include bills of exception or certificates in lieu thereof.115 However, bills of exception have been abolished by the court.116 In an earlier case, involving an appeal of a probate ruling from the county commission, the court, in construing West Virginia Code Section 58-3-4, required that the record, made before the county commission, must also be authenticated by the certificate of the county clerk or the appeal must be dismissed.117

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114. Rawl Sales, 443 S.E.2d at 600.
F. Remedies

1. Taxpayers' Remedies

Prevailing taxpayers are entitled to a lump-sum refund of taxes, which were initially paid on assessments, but later reduced or nullified upon judicial review.\(^{118}\) However, case law has also recognized that initial payment of the tax may, alternatively, be withheld by a property owner during an appeal until the date of the sheriff's sale (of the property to satisfy the resulting tax delinquency) or at the very latest, until the end of the property owner's redemption period after such sale has occurred.\(^{119}\)

Following appeal, prompt, lump-sum refunds of overpaid taxes must be paid following successful challenges to the assessments on which they were based.\(^{120}\) A similar right to a lump-sum refund is provided in the statute allowing for the correction of clerical errors (except when the error is discovered more than a year after the tax books are delivered to the sheriff).\(^{121}\)

\(^{118}\) W. VA. CODE § 11-3-26 (1995).

\(^{119}\) In Syllabus Point 1 of its opinion in State ex rel. Ayers v. Cline, 342 S.E.2d 89, 90 (W. Va. 1985), the court stated:

The statutory scheme for relief from an excessive property tax assessment is for an owner of real property contesting the assessed value thereof to pay the tax assessment under protest, to appeal to circuit court and if the assessment is reduced, to obtain a refund of the overpayment. Payment may be withheld during an appeal in such a case only until the date of the sheriff's sale, or, at the very latest, until the end of the redemption period after such sale has occurred.

As a practical matter, the limitation stated in the second quoted sentence offers little relief to local governments because the referenced redemption period extends more than three years beyond the time when the taxpayer's petition for appeal must be filed with the circuit court — well beyond the end of the fiscal year in which receipt of such taxes was contemplated. W. VA. CODE §§ 11-3-25, 11A-1-3 (1995). It would be the rare case, where all appeals of an assessment challenge are not resolved within such a three-year time frame. See, however, the recent case of In re Elk Sewell Coal, 427 S.E.2d 238 (W. Va. 1993), where the court invalidated an arrangement permitting payment of protested taxes into escrow (instead of to the local government bodies) pending resolution of multiple taxpayers' appeals, which, in fact, encompassed three tax years. Of course, that ruling leaves undisturbed the apparent right of any appealing taxpayer to unilaterally withhold payment of his or her taxes for the entire period described in Ayers.

\(^{120}\) W. VA. CODE § 11-3-26 (1995).

\(^{121}\) W. VA. CODE § 11-3-27 (1995).
2. Levying Bodies' Remedies

The only present relief in the statutes for levying bodies, whose cash flow is disrupted in cases where taxes are withheld pending appeal, is found in West Virginia Code Section 18-9A-12(b)(3). That section provides that county school boards will not be charged as having collected such protested and withheld property taxes under the state school aid formula, thus permitting county school boards, in effect, to be temporarily reimbursed for such withheld taxes through the school aid formula in the following year. This, however, does nothing to relieve the impact on school districts of such cash flow interruptions in the tax year to which they relate, or even address the problems that withheld tax payments present to other local government bodies' cash flow.

G. Summary of the System

To summarize the present system, a concern for the costs of administration likely explains the limited notice and assessment information access for taxpayers. Further, the dangerous confluence of unclear, obscure, and disparate tax information reporting rules with potentially harsh, overlapping, and disproportionate penalties for defaults in such reporting, seems to have resulted in a high incidence of noncompliance with reporting rules and a low incidence of enforcement of penalties.122

Perhaps the single most remarkable feature of the system, however, is the brevity of the time tables for administrative and judicial review which are driven by the local government's tight fiscal time tables and by the related concerns for avoiding disruption of their cash flow if budgets are not settled in a timely manner. Indeed, the informality of the administrative hearing process, and the institutional bias surrounding it can likely also be explained by the overriding desire to avoid these same problems.

122. That one of the penalties is the denial of any review of the merits of an assessment challenge makes the risk of erroneous deprivation in this context all the more acute.
Yet, such concerns of public officials are hardly dispelled by the features of the system which require that lump-sum refunds be immediately paid to prevailing taxpayers, following a successful appeal, or by the feature, which is possibly even more troublesome to local governments' cash flow, that permits the withholding of expected tax payments by taxpayers for up to three years pending resolution of their appeals.

Finally, the unsettled posture of such fundamental issues as standard of proof, scope and standard of judicial review, while having an historical explanation, does little to provide a taxpayer-litigant, or his or her legal counsel, with the reliable guidance that is expected of a system of laws — not of men.

IV. THE SYSTEM'S GENESIS AND COUNTERPARTS

Both to better explain what it is, and to lay the foundation for how it might be improved, this Article next takes a brief look at the history of the current West Virginia property tax appeals system, and at the arrangements presently employed for such purposes in other nearby jurisdictions.

A. Historical Background of the Current West Virginia System

It would be natural to assume that a structure as obsolete and practically unavailing as the current system for review of property tax assessments can trace its roots to the largely agrarian, early years of West Virginia's history.\textsuperscript{123} An examination of the old statutes reveals,

\textsuperscript{123} One of the most commonly repeated myths, about the present system, is that the board has always met in February to accommodate the work schedules of farmers who have more free time in the winter to come to the county seat to attend to their tax assessments. In fact, before 1961, the board met in early July — the peak of the crop cultivation season in most areas — to resolve assessment disputes for the year in which the meeting was being held. 1907 W. Va. Acts ch. 80, § 18. Even more interesting is the fact that, since counties' fiscal years have always started on July 1 (W. VA. CODE § 2-2-4 (1994)), local governments' budgets were annually set after the fiscal year began until 1961. Specifically, prior to their amendment in 1961 (1961 W. Va. Acts ch. 142), the governing provisions of the statute set early August as the time when the local government bodies met to commence
however, that in a number of important ways, our state ancestors enjoyed far more due process in the context of challenging their property tax assessments, than we do today.

Under prior law dating back to the previous century, taxpayers desiring to challenge their assessments were not always faced with today’s tight time tables for review or with the institutional bias which characterizes the administrative review stage of the current system. Specifically, until 1909, taxpayers had at least one full year following completion of the assessments to raise a challenge and obtain an administrative review of their objections. Moreover, in those earlier years, a party dissatisfied with the resulting administrative decision could seek judicial review within a full year, not thirty days.

Finally, starting in 1909 (until 1933), the board was made up of an independent group of individual citizens, appointed by the state planning for the current year’s budget. W. VA. CODE § 11-8-9 (prior to amendment in 1961). In his article explaining the convoluted interplay of statutory assessment years, tax collection years, calendar years and fiscal years, the late Professor Londo H. Brown, referred to this as the “fingers crossed” approach to budget making. Londo Brown, Changes in West Virginia Real Property Tax Laws, 66 W. VA. L. REV. 271, 287 (1964) [hereinafter Brown, Changes]. This more leisurely approach to settling the tax base, and to adopting a spending plan (which approach persisted well into the second half of this century), certainly belies the fiscal time table urgency often cited in support of the current system of assessment reviews.

124. Such administrative reviews of assessments were conducted by the functional predecessors of the county commission, to-wit: the board of supervisors from 1863 to 1875 (1863 W. Va. Acts ch. 118, § 200), and the county court from 1875 to 1909 (1875 W. Va. Acts ch. 54, § 94). For seven of those years (1875 to 1881) the statutes extended, to two full years, the period within which a taxpayer could challenge an assessment after it was issued. Id. Starting in 1909, taxpayers, who received only general published notices of their right to, had to promptly (within the 25 days it was in session) appear before a new body — the board of equalization and review — to challenge their assessments. 1907 W. Va. Acts ch. 80, § 18. Later, starting in 1911, the separate one-year period to seek administrative review, was reinstated but confined to matters involving clerical errors. 1911 W. Va. Acts ch. 50, § 132(a). This latter provision is the predecessor to current West Virginia Code Section 11-3-27. See supra note 68 and accompanying text.

125. 1882 W. Va. Acts ch. 152, § 14. Starting in 1923, four months was set as the general time within which a party could seek judicial review by the circuit court of a decision of the board of supervisors or the county court (now the county commission). W. VA. CODE § 58-3-4 (1923). However, in cases involving challenges to assessed values, a thirty-day period to seek judicial review was first adopted in 1907. 1907 W. Va. Acts ch. 80, § 129. That was the forerunner to current W. VA. CODE § 11-3-25 (1995). See supra Part III.E.1.
board of public works, instead of being the members of the county commission.126

Many of the other features of the earlier system for review of assessments, such as the notice,127 the hearing process, the limited assessment information access, the tax information reporting rules and related penalties and the uncertainty about the scope of judicial review presented the same difficulties for taxpayers then that they do today. However, the important ways in which the earlier system was more availing suggest that the current system may be improved.

B. Current Practices in Other States

The arrangements for administrative and judicial review of property tax assessments found in other states vary widely, but a number of patterns have been identified.128 These patterns have been found to form around combinations of critical variables — the principal ones

126. This arrangement, replacing the county court as the body administratively reviewing assessment challenges, was a part of legislation which provided, for the first time, that any party who failed to seek review in this manner, was precluded from further review of his or her assessment for that year. 1907 W. Va. Acts ch. 80, § 18. Earlier, the Legislature had enacted, but repealed before it became effective, a system whereby taxpayers were to seek administrative review by meeting with the assessor. 1904 W. Va. Acts ch. 4, § 18. Although the designation of the reviewing official changed in the final effective version of this procedure, the other features — including its mandatory nature — were in the original 1904 version. Finally, in 1933, the Legislature designated the county court (now the county commission) to be the board, but retained the mandatory nature of its proceedings as the exclusive avenue for administrative review of all challenges to assessed values except for those resulting from later discovered clerical errors. 1933 W. Va. Acts ch. 41.

127. The first statutorily required advance notice to a taxpayer of a proposed increase in the taxpayer's assessment was enacted in 1904 (1904 W. Va. Acts ch. 4, § 18), but that requirement was repealed before it became effective. 1907 W. Va. Acts ch. 80, § 18. Except for published general notice of the board's meeting to review assessments, the law did not contain any specific requirement of notice of increased assessments until 1929, when the current five-day notice of increases proposed by the board (over the assessor's value) was adopted. 1929 W. Va. Acts ch. 56, § 18. It was not until 1979, that any requirement was imposed on the assessor to give individual notice of an increased assessment to a taxpayer. W. VA. CODE § 11-3-2a (1995); see also supra Part III.C.1.

being the degrees of political control, of professionalism, of centralization, of judicial involvement and of taxpayer participation.\textsuperscript{129}

While a survey of the details of all fifty states' review systems is well beyond the scope of this Article, it is instructive to sample the variety of arrangements by examining those employed in the states bordering West Virginia. For comparative purposes, our neighbors' systems will be analyzed from the perspective of several of the major policy issues described at the outset.\textsuperscript{130}

Maryland provides its taxpayers with extensive assessment information access, both in its initial notice of a proposed change in an assessment,\textsuperscript{131} and in the course of the first level of formal administrative review.\textsuperscript{132} Protests are heard in Maryland by appointed, trained assessment officials who are substantially independent of local government fiscal responsibilities.\textsuperscript{133}

All tolled, Maryland provides a taxpayer with five levels of review, including informal and formal reviews at the administrative level, together with three judicial review opportunities starting in its special tax court.\textsuperscript{134} However, pending appeal, taxes on real estate must be paid as they come due, but taxpayers are expressly allowed interest on any overpayments resulting from final disposition of those appeals.\textsuperscript{135}

Of the five states adjacent to West Virginia, Pennsylvania's system is probably the most similar at the administrative level with brief time tables for review, notice by publication and highly localized procedures.\textsuperscript{136} However, in Pennsylvania, taxpayers must pay their taxes

\begin{flushleft}
\textsuperscript{129} Id. at 107-13.  \\
\textsuperscript{130} See supra Part III.A.  \\
\textsuperscript{131} Md. Code Ann., Tax-Prop. § 8-401 (1994). The initial notice must include both the prior and the proposed values, a description of the process to appeal the assessment and a statement of the availability of valuation information. Id.  \\
\textsuperscript{132} Md. Code Ann., Tax-Prop. § 14-511 (1994). At this level of review, a taxpayer is entitled to receive, upon request, at least 15 days prior to the hearing, a list of the location, and name of the owner, of each comparable property used by the assessor to support the proposed assessment. The list must also show, as to each such comparable property, the date and amount of its last sale and or construction and its assessed values for those years.  \\
\textsuperscript{133} Pops, An Overview, supra note 128, at 113.  \\
\textsuperscript{135} Md. Code Ann., Tax-Prop. § 14-916 (1994).  \\
\textsuperscript{136} Act of June 26, 1931, 1931 Pa. Laws 1379, 1380-81; Act of June 6, 1939, 1939
\end{flushleft}
pending resolution of their appeals, the time for which can become more extended by virtue of the fact that the scope of judicial review there is a *de novo* trial.\textsuperscript{137}

The border state with the longest time to seek administrative or judicial review is Virginia, which allows challenges up to three years after the assessments are set.\textsuperscript{138} There, taxpayers are also provided with relatively complete assessment information access to assist them in presenting their appeals.\textsuperscript{139}

In Kentucky, taxpayers are required to meet with the assessor to discuss their objections before they may seek more formal administrative review.\textsuperscript{140} Local elected officials appoint the local administrative review board, but its members must have certain minimum qualifications to serve.\textsuperscript{141}

Kentucky’s method of addressing the local governments’ cash flow concerns in the face of pending property tax appeals is to require a taxpayer to pay a tax, based on the value of the property that the taxpayer is asserting as correct, and if the taxpayer loses later, she or he is issued a supplemental bill which includes interest.\textsuperscript{142}

The most notable feature of Ohio’s system is that upon judicial review of administrative rulings on property tax challenges, the court may, in its discretion, and based on the circumstances surrounding the first review, either hear the appeal based on the administrative record or receive additional evidence to supplement that record.\textsuperscript{143}

If one were to expand such a survey of property tax appeal systems to more states, doubtless, an even greater variety of practices

\begin{itemize}
  \item \textit{E.g.}, Act of May 22, 1933, 1933 Pa. Laws 1199.
  \item VA. CODE ANN. §§ 58.1-3980 to -3984 (Michie 1995).
  \item VA. CODE ANN. §§ 58.1-3330 to -3332 (Michie 1995).
  \item KY. REV. STAT. ANN. § 133.120(1) (Michie/Bobbs-Merrill 1994).
  \item KY. REV. STAT. ANN. § 133.020(2) (Michie/Bobbs-Merrill 1994). “Each member shall have extensive knowledge of real estate values, preferably in real estate appraisal, sales, management, financing or construction.” \textit{Id.}
  \item KY. REV. STAT. ANN. § 133.120(9) (Michie/Bobbs-Merrill 1994).
  \item OHIO REV. CODE ANN. §§ 5715.19(G), 5717.05 (Anderson 1991).
\end{itemize}
would be uncovered, not all of which are more effective in addressing the major policy issues present in West Virginia’s system. However, the fact that there is no perfect system should not keep us from allowing some of the better features of the systems in other states to inspire improvements to West Virginia’s system.

V. **THE STRUGGLE FOR REFORM**

The adequacy of arrangements for the review of tax levies and collection actions has been a subject of relentless discussion throughout the course of civilization. In West Virginia, that debate has taken on a particularly formal tone over the last decade. This can be seen in the work and reports of the West Virginia Tax Study Commission and the West Virginia Law Institute. It can also be found in the frequency with which one facet or another of the overall subject is the focus of articles and student notes in this publication.

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144. In the final chapter of his book, Charles Adams calls for judicial immunity from federal income taxes to mitigate the Internal Revenue Service’s threat to federal judges’ independence in ruling on tax disputes. CHARLES W. ADAMS, FOR GOOD AND EVIL: THE IMPACT OF TAXES ON THE COURSE OF CIVILIZATION 466-68 (1993).

Earlier, in a major subdivision of his acclaimed study of the evolution of judicial review, Professor Davis exhaustively described the chaotic state of West Virginia case law regarding property tax appeals.\textsuperscript{146} Indeed, the starting point for discussion of efforts to reform the system must also be with the written decisions of the tribunal, in which at least some of these issues have regularly been raised and confronted: the Supreme Court of Appeals of West Virginia.

A. Judicial Pronouncements

1. Scope of Judicial Review

In the early decades of West Virginia’s sovereignty, the court wavered back and forth over the permitted scope of judicial review of administrative action setting or modifying property tax assessments.\textsuperscript{147} Such uncertainty arose not from a struggle to strike the right due process balance between taxpayer and tax collector but from an almost obsessive fear of violating the constitutional doctrine of separation of powers.\textsuperscript{148}

One inherent result of such a focus on the proper allocation of power within the government was to subordinate and relegate to largely superficial analysis the issue of the proper procedural limits on the imposition of that power in the form of taxation upon the governed. Now, while it appears that modern jurisprudence is well beyond the

\textsuperscript{146} Davis, \textit{Separation of Powers}, supra note 24.

\textsuperscript{147} Id.

\textsuperscript{148} Id. Stepping back from this debate, both in the court and in the commentaries, one is struck by the perversity of agonizing over careful adherence to the separation of powers doctrine in the context of deciding the degree of deference to be extended to the quasi-judicial rulings of the one governmental institution in this state which, by virtue of its myriad of assigned duties, inherently violates that revered principle every day. Specifically, in its modern form, the county commission clearly discharges all three functions of government — executive, legislative and judicial. Of course, as Justice Cleckley, Professor Davis and others have instructed us, such classifications cannot be applied with great precision in today’s modern governmental context. Moreover, to be overly concerned about application of the separation of powers doctrine — where fundamental due process is prominently at issue — is to lose sight of the ultimate purpose of our constitutional government to-wit: to serve and protect the people — not to referee internal turf battles among competing public officials.
formalistic labels which formerly confounded practical resolution of due process concerns in the taxation context, a new-found respect for stare decisis likely precludes the present court from being the principal agent of reform.149

2. Standard of Proof

Aside from the scope of judicial review, another fundamental feature of the system on which the court’s rulings still lack consistency is the standard of proof to be met by a taxpayer challenging an assessment at the county commission level. In several relatively recent opinions, the court has held variously that the standard of proof required by the county commission to overturn an assessor’s proposed assessed value, is either: (1) whether the taxpayer has shown the assessment to be in error by a preponderance of the evidence; or (2) whether the assessment is clearly erroneous and not supported by substantial evidence.150

3. Institutional Bias

As to the contentions that the informality and institutional bias present in the administrative hearing process before the county commission fail to satisfy due process, the court’s majority has dismissed such arguments almost as summarily as the county commission does many taxpayer challenges.151

149. In his opinion in Teresa Frymier-Halloran v. James H. Paige, III, 458 S.E.2d 780 (W. Va. 1995), Justice Cleckley observes that, after “nearly forty years,” it “is too late in the day [for the court] to change [the practice of strictly limiting judicial review of administrative tax rulings].” Id. at 787. The force of that statement is made all the greater when considered in the context in which it was made, to-wit: examining the authority of a circuit court to take evidence under the statute for appeals of state tax administrative decisions which directs the reviewing court to “determine anew all questions submitted to it.” Id. at 768 (emphasis added). There, the Supreme Court of Appeals of West Virginia outlines the highly limited circumstances where, even under such broad statutory language, additional evidence may be taken by the reviewing court.

150. See supra Parts III.D.3. and III.E.3.

151. See supra Parts III.D.4. to III.D.5.
In the face of what appears to be the most serious challenge to the legitimacy of that system based on its institutional bias, the court, in its *Pocahontas Land Co.* opinion, misstated, attempted to distinguish and buried in a footnote, the critical significance of a compelling United States Supreme Court holding. Such misapplication of otherwise mandatory precedent was necessary to sustain our court’s conclusion that “courts do not demand that a hearing before a board [of equalization and review] be surrounded by extensive due process procedures.”

Building on that generally valid but overly broad assertion, the court, a dozen years later in its opinion in *Ayers v. Cline*, appeared to foreclose further debate of the question by opining that “[t]he adequacy of the [administrative] review system provided by West Virginia Code Section 11-3-24 is confirmed by the numerous opinions of this court.”

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152. In Clarence Ward v. Village of Monroeville, 409 U.S. 57 (1972), the U.S. Supreme Court, in a 7-2 decision, reversed the Ohio Supreme Court, and held that, in a case involving the imposition of $50 fines for minor traffic offenses, the presiding judicial officer’s competing fiscal responsibilities as mayor had the effect of denying the accused a hearing before a disinterested and impartial tribunal, thus violating the accused’s due process rights. In Syllabus Point 4 of the opinion, Justice Brennan stated that since an accused is entitled to a neutral and detached judge in the first instance, the trial by the mayor was not constitutionally acceptable merely because the case was subject to appeal and a trial *de novo* in a higher state court. *Id.* Although, in some respects (e.g., the timing of a hearing in relation to the deprivation) due process requires more in criminal cases than in cases involving property interests, particularly matters of taxation (Phillips v. Commissioner, 283 U.S. 589 (1931)), nowhere is there a suggestion that civil litigants (including taxpayers) are entitled to less impartiality — at some point in the process — than criminal defendants. Marshall v. Jerrico, Inc., 446 U.S. 238 (1980). In attempting to distinguish *Ward*, the court in *Pocahontas Land Co.* emphasized the absence of personal pecuniary benefit to the board members. 303 S.E.2d at 691 n.13. However, in *Ward*, it was the benefit of collecting fines to the mayor in connection with his or her “executive responsibilities for village finances,” which violated the defendant’s due process right to have an impartial tribunal hear the case. 409 U.S. at 60.


154. *Ayers*, 342 S.E.2d at 94.
4. Procedural Issues

a. Insistence on Formalities

In sharp contrast to its extreme deference to both the results of administrative review of tax assessments and to the informal and uneven process by which such reviews are conducted, the court has displayed little flexibility in its insistence that taxpayers must precisely follow the often vague, but unforgiving procedures established to obtain judicial review of such assessments.  

What is even more disturbing is the court's apparent unawareness of the practical obstacles such rigid procedures present to individuals and small businesses, making a fair review virtually unattainable for such taxpayers. When the system bars judicial review to three well-established coal companies, because they, despite all the resources presumably at their disposal, were unable to obtain a transcript of their administrative hearing within the mandatory 30-day appeal period, it emboldens local officials to "have their way" with even less protected taxpayers.

155. Rawl Sales & Processing Co. v. County Comm'n, 443 S.E.2d 595 (W. Va. 1994) (holding that the circuit court lacked jurisdiction to hear an appeal because the three coal companies challenging their assessments were unable to obtain a transcript of their hearings before the board within the 30-day period following its adjournment). The court's holding in Rawl Sales relied on its earlier ruling in In re Tax Assessment Against Stonestreet, 131 S.E.2d 52 (W. Va. 1963). In Stonestreet, the court first engrafted the nineteenth century procedures for judicial review of county commission actions onto property tax challenges. The unforgiving nature of such procedures may be illustrated by the case of In re Durham's Estate, 191 S.E. 847 (W. Va. 1937), where a circuit court appeal of a county commission ruling in a probate matter was dismissed because the original record of the hearing before the commission was not authenticated by the county clerk when it was filed in the circuit court. Closely related in those procedures is the still existent requirement that the record also be accompanied by a bill of exceptions, a method for raising issues which has been abolished by the court. See supra Part III.E.5. It is just such obsolete procedures, which are treacherous even to well-represented litigants, that led Justice Neely to observe in his Rawl Sales dissent: "Together these appeal procedures substantially bar most appeals to the circuit court of tax assessments made by the county commission." 443 S.E.2d at 600 (Neely, J., dissenting).

156. Rawl Sales & Processing Co. v. County Comm'n, 443 S.E.2d 595 (W. Va. 1994). Indeed, it seems to require the most egregious violation of due process to convince the
In fairness to the court, the $50,000 jurisdictional minimum assessed value, set by statute as a prerequisite to its review of any lower court’s property tax ruling, probably explains, in large part, why it has not been confronted with, much less passed on, the efficacy of the administrative review system from the small taxpayer’s perspective. That is, the court likely has no official notice of the virtually nonexistent assessment information access for such taxpayers, which information, nevertheless, must serve as the basis for any meaningful challenge to a proposed assessment.

b. Lack of Uniformity Among Counties

Similarly, beyond the official gaze of the court is the radical unevenness of the administrative hearing process from county to county which does not just prejudice substantial property owners with holdings in different counties. Rather, such a lack of uniformity of procedure virtually precludes the equal and uniform taxation results the Constitution guarantees to all taxpayers throughout the state, large or small. Finally, the court cannot be said to have directly confronted

Court that the interests of ordinary taxpayers are similarly (if not more) prejudiced when unduly restrictive procedures for review are adopted in the cases of large corporations. Specifically, in its opinion in Krupica, the court, in holding that a taxpayer must be given a reasonable time to file its assessment protest, stated:

We base this conclusion [(that 3:45 p.m. on the first day of the board’s term is timely filing of an assessment protest)] not only on the foregoing legal analysis, but on the practical consideration that in this era of rising taxes and inflation there are those small businessmen and homeowners who may wish to contest the correctness of their property assessments. These individuals may not be able to afford legal assistance and should not be unduly hampered by a narrow and constricive interpretation of a tax statute designed to afford them relief.

254 S.E.2d at 818. While the court in Krupica did not “survey the outer boundaries” of a reasonable time to file, it did recognize the benefit that would accrue if clarifying legislation were to be adopted. Id. at 818 n.7.

157. See supra note 85.

158. In Killen, the court held that, under the state constitution’s mandate of equal and uniform taxation (see supra note 29), “both the method and the result of taxation are essential to compliance with the constitution.” 295 S.E.2d at 707. Although in Killen the court was confronted with the issue of varying valuation methodologies among the counties when it laid down that quoted principle, logically, there is no reason it should not apply with equal force to the procedures by which assessments, resulting from valuation methodologies,
the insidious effect that the system's lack of many mundane, but common, administrative features has on the rule of law in these matters such as clear tax information reporting rules. 159

Perhaps, because of such history and the jurisdictional limitations on the court, it has become more appropriate for academic commentators, looking down from their towers of ivory, for battle-weary veteran practitioners, looking up from the trenches of case-by-case combat, and for others, with even more independent perspectives, to suggest both the full scope of the present system's difficulties and the comprehensive reforms which will make it work better for all parties.

B. Recent Reform Efforts

1. Tax Study Commission

In 1982, the West Virginia Legislature created the West Virginia Tax Study Commission (the Commission) to study and recommend improvements to the state's tax structure. 160 Although the centerpiece

are reviewed.

159. For example, what if an extraordinarily diligent taxpayer who, unlike many of his or her peers, timely files a property tax information, but then, a few days later, after the deadline for filing has passed, discovers that she or he has inadvertently omitted some property? Although the taxpayer is duty-bound to amend the original listing, by informing the assessor of the omitted property, when doing so, is the taxpayer irrevocably admitting his or her initial report was incomplete, thus subjecting the taxpayer to not only the dollar and percentage penalties for defaults in reporting, but also to the denial of any remedy to seek correction of an erroneous assessment? The court, in the 1925 case of State v. Page, 130 S.E. 426 (W. Va. 1925), held that, where there was no prescribed deadline for tax information reporting, the filing of a delayed return by a recently deceased taxpayer's administrator, before the end of the assessment year would avoid imposition of the penalties. Now the statute contains express (and, apparently, unalterable) deadlines for tax information reporting. See supra Part III.B.1. Can we be confident that the ruling in Page on this point is still applicable under a penalty statute which punishes any person who "shall fail . . . to deliver any statement required by law?" W. Va. Code § 11-3-10 (1995). Perhaps not because, in the later Shonk Land Co., 204 S.E.2d at 68, the board denied a taxpayer, which belatedly filed its tax information report on February 24, any review or remedy for taxes later assessed against it in the same year. This denial was upheld by the court. If assessors had clear authority to accept amended returns, to extend filing deadlines and to consider circumstances and intent in imposing and abating penalties for filing defaults, such questions would be less troublesome.

of the Commission’s work was the replacement of the business and occupation tax at the state level, its final report contained eighty-seven detailed recommendations on a wide range of state and local taxation topics, including three addressing property tax appeal procedures.\(^\text{161}\)

Specifically, the Commission recommended on the grounds of accessibility, fairness, and disclosure that property owners be given more adequate assessment information access as a way to compare their proposed assessments with those of other properties.\(^\text{162}\) The Commission also recommended that the hearing process before the county commission for review of assessments be retained, but made even more informal, and, thus, more availing to ordinary taxpayers.\(^\text{163}\)

As a part of the latter reform, the Commission also called for limiting the record of the county commission proceeding to a simple final order announcing the commission’s decision and the reasons for it.\(^\text{164}\) That order would be served on the property owner and would contain a notice of his or her right to appeal.\(^\text{165}\)

The Commission recommended that the appeal should be heard \textit{de novo} by a statewide board of tax appeals, the establishment of which was a separate recommendation.\(^\text{166}\) Independence (overcoming the institutional bias at the county level) and uniformity of the hearing process were the guiding considerations leading the Commission to call for the reference of property tax matters to such a forum.\(^\text{167}\)

\(^{161}\) \textit{West Virginia Tax Study Commission, A Tax Study for West Virginia in the 1980's; Final Report to the West Virginia Legislature} (May 2, 1984) (presented to the 67th Leg., 1st Reg. Sess., on file with author) [hereinafter W. VA. TAX STUDY COMM’N REPORT].

\(^{162}\) "[P]roperty owners must have clear standards and information by which to compare their assessments to those of others . . . ." \textit{Id.} at 136-37 (Recommendation 84).

\(^{163}\) \textit{Id.} at 137 (Recommendation 85).

\(^{164}\) \textit{Id.} This is to be compared with the present statutory structure which contemplates a record of the proceeding before the county commission, but does not provide how it is made or how the board's decision is communicated to the parties.

\(^{165}\) \textit{Id.}

\(^{166}\) W. VA. TAX STUDY COMM’N REPORT, \textit{supra} note 161, at 137-38 (Recommendation 86).

\(^{167}\) "While most studies recognize the need for, and encouragement of, informal settlements at the lowest possible level, all seem to agree upon the need for an \textit{independent} tribunal beyond the local agency for the trial of important and difficult issues of property
Although a number of the Commission’s recommendations were adopted by the Legislature in 1985, including the repeal of the business and occupation tax, the recommendations regarding reform of property tax appeals were not implemented or even then seriously discussed in the principal policy-making circles of state government.

2. West Virginia Law Institute

It was not until May of 1992, that such dormant issues resurfaced in a public venue. This time the governing council of the West Virginia Law Institute (the Institute), a statutory law reform body,\(^{168}\) made an official recommendation to the West Virginia Legislature’s Joint Committee on Government and Finance (the Joint Committee) to authorize funds for the Institute to study and recommend reforms of the state’s property tax appeals system. The Joint Committee, apparently sharing the Institute’s concerns for the inadequacies of the present system, approved funding for the project.

The Institute’s governing council appointed this author to act as official reporter for the project with a deadline for submission of a final report to the Joint Committee by the end of 1992, so that any necessary legislation could be introduced in the 1993 legislative session. That final report recommended a comprehensive overhaul of the present system, and the primary objectives were to provide due process to taxpayers while avoiding disruption of the fiscal operations of local governments.\(^{169}\)

The Institute’s proposals included: (1) to mail and publish notice to taxpayers of tax information reporting rules and of the penalties for default; (2) to clarify and reform those penalties;\(^{170}\) (3) to mail and

\[^{168}\] W. VA. CODE §§ 4-12-1 to -6 (1995); See also Carl M. Selinger, The West Virginia Law Institute: Unitig the Legal Community to Modernize State Law, 91 W. VA. L. REV. 211 (1989).

\[^{169}\] WEST VIRGINIA LAW INSTITUTE, 1992 PROPERTY TAX APPEALS REFORM PROJECT, FINAL REPORT TO JOINT COMMITTEE ON GOVERNMENT AND FINANCE (December 8, 1992) (on file with author) [hereinafter 1992 REFORM PROJECT REPORT].

\[^{170}\] The amounts of the various dollar penalties would be made more meaningful in
publish notice to taxpayers of their opportunities for administrative and judicial review; (4) to expand access to both historic and comparative assessment information;¹⁷¹ (5) to clarify tax information reporting rules by requiring greater uniformity in the information sought and by expressly allowing assessing officials to grant extensions to file and to allow amendments of property tax returns; (6) to enhance notice of proposed assessments;¹⁷² (7) to improve the hearing process before the county commission by requiring that the proceedings be electronically recorded and that witnesses testify under oath; (8) to authorize both a pre-assessment and a post-assessment review by the county commission;¹⁷³ (9) to overcome the system’s institutional bias by providing for a trial de novo upon a taxpayer’s appeal to circuit court; (10) to address the effects of lump-sum refunds on local governments’ cash flow, a provision that larger refunds of taxes, found to be overpaid as a result of the judicial review of an assessment, could be remitted to the taxpayer over a number of years; (11) to require, for the same reason, that a taxpayer’s prompt payment of taxes as they become due would be a continuing prerequisite to maintaining an appeal of the assessment on which such taxes were based; and (12) to clarify the standard of proof in the de novo hearing before the circuit court and the scope and standard of judicial review upon appeal to the Supreme Court of Appeals of West Virginia.¹⁷⁴

light of modern purchasing power; a reasonable-cause defense to imposition of penalties would be recognized and the penalty for failure to file the presently obscure real property improvement report would be decriminalized. Id. at 5.

¹⁷¹ All taxpayers would be entitled to notice of any increase in their assessments over the prior year (whether by virtue of increased values, or by adverse changes in taxability or classification status). Such notice would be in a form which disclosed detailed information about the present and past assessment of each of the taxpayer’s properties which were affected. The mailed, written notice would also include extensive general information about assessments in the same county for the present and immediately preceding tax year. Finally, large, retail-type display notices of the availability of such information would be published in newspapers for the benefit of all other taxpayers who did not receive such mailed notices. 1992 REFORM PROJECT REPORT, supra note 169, at 7-9.

¹⁷² Id.

¹⁷³ The system’s current pre-assessment opportunity for review by the board was retained in the Law Institute proposal, but supplemented by a new post-assessment review, the latter of which was triggered by a taxpayer’s receipt of a tax bill disclosing an increased assessment. In either case, the review would be conducted by the board at its next February meeting. 1992 REFORM PROJECT REPORT, supra note 169, at 1.

¹⁷⁴ Because of the availability of a de novo hearing in circuit court, and in order to
The Institute’s reform bill was not introduced at the 1993 or 1994 legislative sessions because of a combination of different legislative priorities and the absence of an organized effort to promote its passage. However, following a thorough consideration of the proposal by a subcommittee of the Legislature’s Standing Joint Judiciary Committee which met monthly in interim sessions held during 1994, the bill was finally introduced more than halfway through the sixty-day 1995 legislative session.175

Although the bill received no further attention in the 1995 Legislature, it contained important refinements from the Institute’s original proposal. Specifically, (1) to reduce the costs of administration, it eliminated the potentially duplicative pre-assessment administrative review by the county commission, except in certain limited cases,176 and (2) to diffuse the time pressure created by the system’s current time table for review, it set the period for the post-assessment review to occur in between the time tax bills are issued and the time the first half installments of tax are due.177

The Joint Judiciary Committee intended this innovation to recognize the practical reality that receipt of a tax bill is the first time a taxpayer gains actual notice of the financial cost of his or her assessment.178 Thus, the proposal would allow a taxpayer an opportunity,

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176. The pre-assessment review would only be retained in cases where the board, meeting in February, desires to increase an assessment(s), over the levels proposed by the assessor at the commencement of the meeting.
177. Tax bills are issued on or around July 15, and, to obtain a 2.5% early payment discount, taxpayers must pay the first half of the taxes by September 1. The refinement would have set the period of July 20 to August 15 as a time for the board to consider challenges to assessments for the current tax year. See S. 437, supra note 175, at 51-52.
178. Presently, any notices of increased assessed values, which are provided to taxpayers (individually or by publication), do not contain (nor could they contain, given the fiscal
following that notice, to obtain a relatively informal administrative review of the assessment before such taxpayer is compelled to pay taxes based on it.

3. Role of Public Officials in Reform Process

Throughout these various efforts at reform, senior officials of the West Virginia Department of Tax and Revenue (the Department) have participated actively in the studies and development of reform recommendations and have occasionally initiated their own informal efforts to identify improvements in the system which would satisfy the concerns of assessing officials at all levels. The Department has recognized the need for extensive reforms. However, the Department has understandably raised a concern that any resulting changes in the system should not exploit their limited professional appraisal staff or tip the tactical litigation scale in cases involving large industrial or natural resource properties unduly over to the well-staffed, and sometimes better represented, taxpayers’ side.

Beginning with the Institute’s broad-based advisory committee and continuing through the Department’s informal discussions, the input and participation of local government officials, particularly assessors and county commissioners, has also been solicited and received.179 With a few isolated exceptions, the most vocal representatives of those constituencies have shown little enthusiasm for any major changes to the

time table) the amount of taxes which will be imposed as a consequence of such increase. This largely explains why taxpayers seem to pay little attention to such notices which only reveal what is, typically, still a relatively conservative, updated value, standing alone, out of the context of commensurately increased tax liabilities. See, e.g., State ex rel. Hallanan v. Woods, 111 S.E. 634 (W. Va. 1922).

179. The 18-member advisory committee, assembled by the Institute to work on the reform project, included three county commissioners (all attorneys by profession), two assessors, two circuit judges and the legal counsel to the West Virginia Association of Counties. It also included representatives of the state tax agency (including Robert Hoffman, supra note 43, who was then director of the agency’s property tax division), a prominent tax law professor, Professor Gerald M. Pops, who provided the national survey on tax assessment review systems (supra note 128), a former state tax commissioner, and representatives of senior citizens, public education, citizen action and legal profession organizations.
system, particularly for the more radical changes requiring elaborate notice and allowing a de novo appeal to circuit court.\footnote{180}

Outside the Institute’s project, the stated reasons usually given for objection to the reform proposals center around increased costs of administration, disruption of well-settled fiscal time-tables and loss of control of decisions affecting the tax base on which they depend for much of their offices’ funding.\footnote{181}

Even more remarkable, though hardly surprising, is the abiding lack of concern for the system’s inequities on the part of these local officials. At most, they tend to view the institutional bias, the draconian penalties, the lack of access to assessment information, and the absurdly inadequate and unforgiving time tables for review as practically harmless because they, in their official benevolence, regularly assure us that they would never exploit such features to the actual

\footnote{180. Specifically, the six county government representatives on the Institute advisory committee (three county commissioners, two assessors, and the legal counsel to the West Virginia Association of Counties) expressed their collective views in a letter to this author which stated in pertinent part:

[W]e do not perceive a need for extensive changes in the current procedure. Generally, we do not find that any significant proportions of taxpayers are unhappy or unfairly treated. We do see opportunities for improvement which we will outline below.

As the system currently exists, we feel that it is an excellent example of representative government at work. We have local officials responding to the needs and concerns of local citizens. We do not feel that the interests of citizens will be served by creating a more complicated or burdensome appeals process.

With regard to the Board of Equalization and Review, we feel this Board serves in basically an administrative role and not a judicial one, thus not requiring judicial standards with respect to the qualifications of the County Commissioners or to the Board’s proceedings. Due process is currently being afforded anyone who wishes to appeal.

Letter from six county government representatives on the Institute’s Advisory Committee to the author (Oct. 20, 1992) (on file with author). The letter followed an extended first meeting of the advisory committee. The specific recommendations for improvement contained in the county representatives’ letter were to make taxpayers aware of the various existing penalties for tax information reporting defaults, to expand notice of increased assessments by the use of larger published newspaper advertisements, to create a standardized appeal request form, to create an (unspecified) procedure to be followed by the board, and to improve the arrangements for making a record before the board. \textit{Id.}

181. Such concerns have been expressed by state tax agency officials and legislators, as well as by county officials.}
prejudice of any taxpayer. To such officials, the fundamental precept that ours is a system of laws, not of men, appears to be a rather frivolous concern when the base of their offices' funding, and, hence, their practical political authority, would be the subject of any proposed reform.

In the face of such determined opposition from a well-entrenched political sector, it is apparent that any reform proposal must effectively respond to the opponents' legitimate policy concerns regarding cost of administration, fiscal time table, and local government cash flow disruption and destabilization. It seems, in fact, that the search for a truly viable solution necessarily remits one to the traditional three-prong test for proper due process balance.182

182. In effect, proposals for the enhancement of notice; for the clarification of tax information reporting rules; for reform of penalties; for improved access to assessment information; for improvement of the administrative hearing process to yield a more adequate record for judicial review (or to simply enhance accountability); for alleviating the pressure caused by the tight time tables for both administrative and judicial review; for mitigating the effect of institutional bias; for clarifying the standard of proof and the scope and standard of judicial review; for maintenance of a stable fiscal time table; for mitigating the effect of lump-sum refunds; for reducing the adverse impact of withheld tax payments on local government cash flow; and for minimizing the cost of administration of the system must all be measured by the distinct standards of the nature of the individual and governmental interests involved; the risk of erroneous deprivation of the individual's interest under the present system; the efficacy of a particular reform to reduce that risk; and the fiscal and administrative burdens attendant to implementation of any particular aspect of reform. Such balancing must not, however, be applied to each specific reform issue in isolation from the others. For example, the individual taxpayer's interest in improved notice of increased assessments and in a more availing time table for seeking administrative review might be adequately served by having a post-assessment opportunity for such a review, triggered by receipt of his or her tax bill, but, by requiring the taxpayer to pay his or her taxes as they come due during the course of the review process, local government bodies' interest in avoiding disruption of their fiscal time table and cash flow would also be served. Correspondingly, the interest of local government bodies, in eliminating the potentially disastrous impact of having to pay large amounts or large numbers of lump-sum refunds in the wake of unsuccessful assessment defenses, might justify the additional administrative cost of improving access to assessment information, so that taxpayers will, in turn, be better informed about their assessments and, thus, better able (and more inclined) to resolve assessment challenges before they reach the payment, much less, the refund stages.
VI. A Refined Solution

The Institute's comprehensive proposal, at the least, offers a well-developed starting point for the fashioning of a final structure for reform. It certainly is designed to provide the basic due process elements of meaningful notice and an opportunity for a pre-deprivation hearing before an impartial tribunal — the circuit court. However, in light of the objections it has fostered, the Institute's proposal clearly requires refinement which strikes the optimum balance of the three factors the courts employ in balancing the interests of the affected parties.183

A. Risk of Erroneous Deprivation

As is often the case in such matters, the nature of the citizens' interests to be protected here — the first prong — is readily seen by all parties, local officials included, as of high importance and fully worthy of adequate safeguards. Otherwise, the calls for reform would not have arisen with the persistence and fervor that they have.

Although, from their prior comments, few local officials have recognized any serious risk of erroneous deprivation under the present system,184 that is not a universally shared view.185 Perhaps, before the implementation of the triennial reappraisals of all properties — including residences — recently mandated by HB 4127, the relatively modest assessments on homes kept the local, grass roots concern about these issues at a minimum. Now, however, the frequent and successive updating of values, now permanently in place, can be expected to stir the passions of newly burdened homeowners.186

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183. See supra Part II.
184. See supra note 180 and accompanying text.
185. While each and every specific incident of erroneous assessment can be dismissed as merely anecdotal in the context of the number of assessments issued statewide, the editorial recognition of the unavailing time table for review — ending before most taxpayers realize the amount of their assessments — suggests: (1) that the prospect of erroneous assessments is systemic, not aberrational; and (2) that recognition of the problem is not limited to a few private tax practitioners. See Quirky Property Taxes, THE SUNDAY GAZETTE-MAIL, Aug. 28, 1994, at 2B (editorial quoting The Herald-Dispatch of Huntington).
186. Between 1991 and 1994, annual property taxes on existing class two property (primarily owner-occupied homes) in West Virginia increased by more than $50 million after
The risk of erroneous deprivation can also take the form of improper undervaluation of another taxpayer’s property. In that regard, there has recently been raised wide-spread concern by several statewide office holders, public educators, and other local officials, over the accuracy of the state tax agency’s appraisals of coal reserves for property tax purposes. While many of those perceiving the undervaluation of coal reserves have called, in part, for reforms in the methodology for appraising such properties — the grounds for their complaints also point to simple errors in data collection and value computation under existing methodology. Thus, it may be concluded that the risk of erroneous deprivation under the present system is perceived by many to be significant — although that risk is manifested in a variety of ways.

B. Administration

However, the efficacy of a particular arrangement to reduce such risks of erroneous deprivation — the second part of the second prong of the analysis — is an issue which must be approached more deliberately. This is because, while the first factor merely calls for a relatively simple (and, here, virtually obvious) value judgment, and the existence of a serious risk of erroneous deprivation appears to be a relatively well-established matter, the second component of that second factor necessarily involves a measurement of practical results expected from the interplay of the system’s multiple facets.

Specifically, to apply the reform efficacy test, the behavioral traits of taxpayers, whose sophistication about such matters is as varied as

subtracting increases attributable to new construction.
188 In Kermit Lawson v. James H. Paige, III, No. 95-MISC-43 (Kanawha County Cir. Ct., June 27, 1995), a group of citizens, teachers and other labor unions, environmentalists and others had sought a writ of mandamus against the state tax commissioner to compel his office to correct the property tax values of coal reserves in the state. An agreed order was entered giving the tax commissioner more time to effect any needed corrections until tax year 1996.
189 Id. Petition for Writ of Mandamus at 5-8, Kermit Lawson v. James H. Paige, III, No. 95-MISC-43 (Kanawha County Cir. Ct., June 27, 1995).
our entire populace, must be projected into the context of the highly structured, unforgiving, often arbitrary system. That system is, in turn, conducted by a wide array of separately elected officials whose own levels of technical expertise and perspectives about the subject matter are hardly uniform.

Turning to the details, the Institute’s call for such mundane improvements to tax information reporting rules as giving assessing officials the clear authority to extend return filing and to accept amended returns should not be seen as posing any threat to public bodies committed to orderly government functioning. Likewise, requiring greater uniformity of information from similarly situated taxpayers across the state would seem to enhance the attainment of the constitutional mandate of equal and uniform taxation.

Further, the proposal to increase the dollar penalties to more meaningful levels for certain tax information reporting defaults, while limiting the more serious denial-of-remedies sanction to persistent and intentional violations, merely makes the punishment better fit the misdeed. Moreover, granting the assessing officials the express discretion to impose such sanctions, but also to abate them on a showing of reasonable cause, hardly undermines the administrators’ effectiveness.

C. Notice

It is in the area of notice where the Institute’s original proposal and legitimate concerns for cost of administration first appear to clash. The pattern of detailed individual assessment information and high-profile newspaper notices of review opportunities drafted into the Institute’s bill were inspired, in large measure, by similar arrangements adopted by the Legislature in connection with the first statewide reappraisal.190 Nevertheless, they do call for labor and expenditures not

190. W. VA. CODE §§ 11-1B-1 to -19 (1995). In 1986, the Legislature found that public confidence in the accuracy of the constitutionally mandated, statewide reappraisal was sufficiently lacking as to prompt an additional review of the appraisals. W. VA. CODE § 11-1B-1 (1995). In the course of that additional review process, both mailed and published notices were mandated in the legislation which set forth the actual text of such mailed notices, and directed the use of prominent “retail display advertisements” notifying taxpayers of
presently devoted to operation of the assessment system, thus increas-
ing its cost of administration.

However, the Joint Judiciary Committee’s modification of the bill, eliminating the duplicative, pre-assessment administrative review for most cases and interposing the new post-assessment review stage between billing and first payment, provides the basis to competently address a number of important concerns as it reflects a basic behavioral reality. That is, throughout the development of the current reform proposals, taxpayer advocates have regularly expressed two important concerns: (1) that, no matter how much notices are enhanced, most taxpayers will not focus serious attention on a proposed assessment until the taxpayer receives a bill stating how much is owed; and (2) that a taxpayer should be able to object to such assessment, after receiving real notice of it, but before the taxpayer is compelled to pay it.

The Joint Judiciary Committee’s 1995 change to the proposal is not only well calculated to accommodate both points, but it also permits the substantial curtailment of the admittedly elaborate notice structure contained in the Institute’s bill. Indeed, that refinement appears to offer a splendid example of public policy formulation which precisely comports with the judicially designed standards (the second and third due process balancing factors) to test review structures.

such matters. W. VA. CODE §§ 11-1B-6, -7 (1995).
192. This concern was expressed in a comment made by Senator Donna J. Boley at a meeting of the Joint Committee on November 10, 1992.
193. Simply put, if a property tax bill can serve as the primary notice of an increased assessment, after receipt of which a taxpayer may obtain administrative review, then more extensive pre-assessment notice, contemplated in the Institute’s proposal, is no longer needed.
194. The practical efficacy of using the tax bill, as the notice of increased assessments, will, if followed by an opportunity for administrative review, both enhance due process for taxpayers and avoid the greater increase in administrative costs to local government that more extensive pre-assessment notice and review would entail. Further, by retaining the Institute’s requirement that taxes be paid as they come due, the later time for the administrative hearing does not cause disruption of local governments’ cash flow, and also, by scheduling such hearings before tax payments have to be made, taxpayers have an opportunity for review before having to pay such taxes.
In practical effect, the greatest reduction in the notice arrangements would be confined to the earlier warnings of increased assessments.\textsuperscript{195} For the newly scheduled administrative hearing time to provide a meaningful opportunity for review, there still must be clear and adequate notice of tax information reporting rules, of the penalties for default, of the process for administrative and judicial review and of access to assessment information. Moreover, as to that last factor, efficient and "user-friendly" arrangements must be established to make such data readily available in a timely manner to taxpayers who chose to contest their assessments.\textsuperscript{196}

Fortunately, because most of their critical messages are simple, many of those notice objectives can be accomplished through relatively inexpensive, but well-designed, generic printed materials that can be included in the tax bill mailing thus minimizing their additional cost of administration.\textsuperscript{197} High profile newspaper advertisements would only need to be retained to give adequate notice of initial filing requirements, but that should be seen as strongly facilitating the work of assessing officials, not hindering it.\textsuperscript{198}

The reformatting of assessment data to allow easier taxpayer access would admittedly not be a minor undertaking but it represents a largely one-time, initial commitment to open, responsible, local government which helps avoid future decades of continued unfairness.

\textsuperscript{195} See supra note 171.

\textsuperscript{196} Facilities to provide such improved assessment information access are presently available in certain local jurisdictions in other states. As in most matters, involving making information more available to the public, the principal issue today is not whether common technology exists to efficiently provide such information, but the cost of doing so. Interview with Robert A. Hoffman, supra note 43.

\textsuperscript{197} When considered outside the context of large, newspaper advertisements, the content of such notices, as set forth in the Institute's bill, is relatively brief in its language, and would be easily contained in a mass preprinted circular included in the envelope with tax bills. See S. 437, supra note 175, at 22 (line 19) to 25 (line 8).

\textsuperscript{198} While it should not become a legal substitute for performance of the assessor's duty to provide a listing form to taxpayers, and to make them aware of the obligation to complete and timely return them, such an advertisement should help make some inroads into the woefully low tax information reporting compliance described earlier. See discussion supra note 49.
D. Institutional Bias

Perhaps the most difficult features of the system to reform are the role of the county commission and the nature and scope of judicial review. While it is critical to preserve and enhance the opportunity of ordinary citizens to obtain administrative review of their assessments in an informal setting, a reasonable balance must be struck with the equally critical requirement of access to a truly impartial tribunal at some stage of the proceedings. That is, institutional bias at a lower level can be tolerated if, somewhere along the way, independent review is available.\(^{199}\)

E. Fiscal Time Tables and Local Government Cash Flow

Beyond institutional bias, one other feature of the present system which does more than any other to hinder access to the avenues of relief is the tight time table allowed for any such reviews. Of course, the policy rationale for the current statutory schedule is the local government's need to settle its tax base within the period required by the equally tight fiscal time tables imposed by law so that the county can adopt an orderly fiscal plan for the ensuing year.\(^{200}\)

Here, the Institute's proposal is particularly responsive in calling for: (1) no disturbance of such fiscal time tables; (2) timely payment of current tax liabilities as a jurisdictional prerequisite to post-assess-

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199. Of course, for taxpayers whose assessment stakes and/or resources are sufficiently large to justify application to circuit court for review, the availability of a \textit{de novo} hearing there virtually eliminates their practical concern about the institutional bias of the board. For others, at least the Institute's bill requires swearing of witnesses and recording the proceedings which makes for greater accountability in the board hearings (simply because of the possibility of an appeal, based on such record) without rendering such administrative hearings unduly formal.

200. In its decision in West Virginia Nat'l Bank v. Spencer, 77 S.E. 269 (W. Va. 1913), the court labeled such arrangement (then, relatively new) as "a wholesome one, meant to so settle and foreclose questions in relation to assessments that, when the books are completed and collection begins, the matters of public revenue will not be interfered with or retarred." \textit{Id.} at 270. Of course, at the time that arrangement was first adopted, the hearings were in early July, after the fiscal year had already commenced (see \textit{supra} note 123), and the one-year period for correction of clerical errors was still in place. \textit{See infra} note 201 for an example of the substantial magnitude of a recent clerical error.
ment administrative and judicial reviews; and (3) deferral and orderly curtailment of any substantial refund payment obligations resulting from such reviews. These changes very competently address the concerns about the impact of large, lump-sum refunds and disruption of local government’s cash flow, without calling for a return to the “fingers crossed” approach to local government budgeting that existed prior to 1961.

The almost absurdly brief period allowed in current law to conduct administrative and judicial reviews of assessments acutely challenges the resources of both taxpayers and assessing officials, particularly in the cases of complex valuations of industrial and natural resource properties. Because such properties represent a major component of the total tax base in many counties, the Department, which is statutorily obligated to defend against any challenges to its proposed valuations of such properties but does not have a deep staff of valuation experts, is unable to present testimony about such highly technical subjects at county commission hearings being held concurrently around the state. This results in a serious disservice to all parties — including other taxpayers in the same county.

F. Appeals Procedure

A viable solution to these major flaws in the present system also lies in the Institute’s proposal — once another important refinement is adopted. Specifically, instead of simply layering a de novo appeal to circuit court on the administrative review process for all cases, an option should be provided to taxpayers whose assessments exceed a certain jurisdictional amount to by-pass the county commission review

201. By also applying such pay-as-you-go and deferred refund rules to taxpayers challenging their assessments under the one-year clerical error correction process, the latent threat to local government treasuries is largely mitigated, and, thus, county commissions will be more open-minded about granting such relief, if justified. Simply because something is labeled a clerical error does not inherently assign it to a de minimis magnitude. For example, see the recent action of the Monongalia County Commission in correcting an admitted $30 million overassessment of one taxpayer.  Lee Chottiner, Mon OKs Bechtel tax deal, THE DOMINION POST, Dec. 15, 1994, at A1.

202. Brown, Changes, supra note 123.
and to seek first impression, *de novo* review of the assessment in circuit court.203 All other taxpayers, whose issues were less complex or whose resources less extensive, would still be able to obtain the less formal and less expensive, post-assessment/pre-payment review by the county commission and would be able to obtain judicial review based on a more adequate record made before the county commission by virtue of a relatively more accountable process.204

A further refinement of the Institute’s proposal would be to give the circuit court the discretion, in cases involving appellate review of a case first presented to the county commission, to either take additional evidence or remand the matter to the county commission for additional evidentiary proceedings.205 In exercising such power, the court would apply its experience from other administrative appeals to find whether it is appropriate to supplement the record to advance the interests of justice among the parties, all with due consideration for economy of judicial resources.206

203. Presumably, most taxpayers, with substantial properties and complex valuation issues (*e.g.*, shopping centers and industrial plants), would opt for the *de novo* hearing in circuit court, thus freeing up otherwise limited hearing time before the board. Moreover, because proceedings in the various circuit courts can proceed in a more orderly fashion (the scheduling conflicts of both expert witnesses and counsel can be more readily managed), the playing field as between taxpayer and tax assessor becomes more level.

204. *See discussion supra* Part V.B.2. (listing item 7 of the Institute’s proposal).

205. By retaining the discretion to receive additional evidence, and to do so either directly or by remand to the board, the circuit court possesses considerable flexibility to consider the nature of the issues, and the circumstances of the parties in directing the course of judicial review. This arrangement, which is similar to that found in Ohio, along with the enhanced administrative hearing process, should go far to mitigate the prejudicial effect of both the institutional bias and the excessively tight time tables for both judicial and administrative review. *See supra* note 143 and accompanying text; *accord* Stara, *Property Tax Appeals, supra* note 17, at 611. *See also*, Hellerstein, *Judicial Review, supra* note 14, at 349 (stating that “[t]he nature and scope of judicial review . . . must depend on the character of the review provided in the administrative process”).

206. Frymier-Halloran v. Paige, 458 S.E.2d 780 (W. Va. 1995) (Justice Cleckley applied the standards for a reviewing court to take additional evidence and allow limited discovery under the Administrative Procedures Act (APA) of Sections 29A-1-1 to -3 of the West Virginia Code). Included in the circumstances authorizing such expansion of judicial review were the tax commissioner’s disregard of a significant fact or issue, the commissioner’s failure to explain a ruling, and the commissioner’s reliance on facts outside the administrative record. *Frymier-Halloran*, 458 S.E.2d at 780. The court, in fact, remanded the case to the circuit court to either take more evidence or to refer it back to the tax
Such a structure would both defuse the pressure imposed on all parties by the system's tight time tables for review, and would give all parties, by one course or another, the opportunity for meaningful, independent review, and, thus, relief (when needed) from the prejudicial effects of the latent institutional bias at the administrative level. 207

A final feature of such a modified system of judicial review would be to clarify the provisions that all the assessing officials — the county assessor and the Tax Commissioner — have the right, along with any affected taxpayer, to seek judicial review of a county commission's determination of a matter first heard in that forum. 208 Such an arrangement would balance the tax litigation playing field by discouraging forum shopping otherwise made available by virtue of the option being given exclusively to certain taxpayers. 209 It would also give

commissioner for the same purpose, based on the failed efforts of an unrepresented taxpayer to supplement the record once she was confronted with her own prior inconsistent statements in sworn testimony. Id. at 789. In similar manner, when either a taxpayer with limited resources or the tax commissioner, whose small appraisal staff is called to testify simultaneously in distant counties on the same day, is, by virtue of such obstacles, unable to present adequate evidence to support the taxpayer's position in the tight time table allowed for administrative review, the circuit court should be able to follow the same course, as described in Frymier-Halloran, to supplement the record from the administrative hearing.

207. Id.

208. Under the current statutory language, the role of the assessor at the judicial review stage is unclear. W. VA. CODE § 11-3-25 (1995). Unlike the situation at the board proceedings when the assessor seems to have at least two independent roles (see supra Part III.D.5), the assessor is not referred to as a party in the statute authorizing judicial review. In fact, many practitioners, in styling their petition to circuit court, designate the county commission as the respondent — a curious role for an inferior, quasi-judicial tribunal. On the other hand, in virtually all taxpayer appeals to circuit court, it is the valuation of either the assessor or the tax commissioner which, because it was upheld by the county commission, is being challenged by the taxpayer. In the circumstances where the board overrules the assessor's (or the tax commissioner's) valuation, either of those parties should have a clear right to seek administrative review. Presently, only the "applicant [aggrieved taxpayer or other person] and the State, by its prosecuting attorney or tax commissioner" may take an appeal of the board's ruling on an assessment matter to the circuit court. W. VA. CODE § 11-3-25 (1995).

209. In theory, a large, politically influential taxpayer, confident in a favorable hearing from the board, could decide, to present its protest of the assessment there (as under the current system) and exploit the scheduling conflicts of the assessing officials' professional staffs as described earlier. By allowing either assessing official to appeal to circuit court and to seek to supplement the record, based on such prejudicial circumstances, the advantages of engaging in such tactics are largely eliminated in the interests of fair play.
both sides the considerable benefit of the more orderly scheduling of proceedings typically available in the established court system.

While individual members of county commissions may see the foregoing arrangements as significantly diminishing their role, a careful analysis of their legitimate interests, in the context of property tax assessment adjudication, belies such concerns. In the proposed structure, the parties whose primary duty is to protect the county tax base — the county assessor and the tax commissioner — are given clarified and somewhat expanded power to carry out that mission. It is only when county commissioners believe that they also should use their impartial, quasi-judicial role, to protect the tax base that these due process improvements appear threatening. Of course, such an approach to the board’s duties clearly exposes one of the principal evils these reforms are designed to overcome: institutional bias.

VII. THE PROSPECTS FOR REFORM

In judging the due process adequacy of any particular arrangement, the courts have endeavored to strike a balance among the nature of the parties’ interests at stake in the proceeding, the risk of erroneous deprivation, the efficiency of changes in the system to reduce that risk, and the interest of the governmental bodies to avoid costly or disruptive changes.

Measured by such factors, West Virginia’s system for property tax assessment review may easily be said to contravene due process — even in the judicial sense of that term.210 However, marshalling the

210. The importance of the interests of all citizens in fair, accurate and equitable property tax assessments is easily beyond any debate. Further, the risk of erroneous deprivation of those interests should be apparent from the features of the system which provide inadequate notice, ambiguous tax information reporting rules, overly harsh penalties for any non-compliance, little access to assessment information, uneven hearing procedures, uncertain standards of proof, and, most critically, institutional bias and far too brief time tables for review. Unless one cynically views the foregoing as well-designed to minimize threats to the local governments’ fiscal interests (i.e., the high risk of erroneous deprivation, through an unfair review system, prevents changes in assessments), the system’s remedies for erroneous assessments must also be seen to pose a substantial threat to the governments’ interests as well. Such problems take the form of lump-sum refunds and extended withholding of tax payments, pending review of particular assessments.
legal arguments for a judicial declaration to such effect is not the focus or objective of this Article.

Indeed, there are many reasons why we should not anticipate a judicial solution to the system's many shortcomings described in this Article. Those reasons involve the court's long-standing acquiescence in, and affirmance of, the legitimacy of the system. An even more compelling reason is the inherent difficulty (and general undesirability) of fashioning a judicial reform to what must be recognized as a fundamentally flawed public administration structure involving a highly complex combination of fiscal, political, and legal features.

Rather, the traditional tests of due process adequacy also almost precisely comport with the realities of public policy development, which ultimately culminates in legislative action. Of course, that is as it should be in a democratic society where common public complaining about the burden of government and the arbitrariness of its workings will, if too long ignored in connection with such fundamental operations as public revenue administration, lead to the breakdown of public confidence — the bedrock of the system's viability.

From a somewhat theoretical (but non-legalistic) political science perspective, the arrangements for the review of property tax assessments are to be analyzed by reference to the goals of revenue base maintenance and maximization, uniformity of taxation, accountability and compliance with legal standards. 211 Here it is also said that "[e]quity in the treatment of taxpayers is . . . the key to serving these goals, and not efficiency . . . . " 212 However, practical political considerations also preclude adoption of a structure for such matters which disregards the cost of its operation.

Thus, balancing competing interests remains a critical principle in effecting any reform of the system through the political system. Moreover, in a larger sense, the interests of the public and of its government should not be viewed as "competing" because to insist on a structure for such reviews which grossly tramples on the citizens' sense

211. See Pops, An Overview, supra note 128, at 105.
212. Id.
of fair play or their confidence in the fairness of the system can never be ultimately efficient.

Professor Hellerstein wrote over a quarter century ago that:

A fair hearing before an impartial reviewer is indispensable if the citizenry are to feel, whether they agree or disagree with the decision, that they have had a fair hearing and that the property tax system, too, effectively operates as government by law and not merely by the caprice or favoritism of the local assessor.213

Such a feeling of fair treatment is in great jeopardy in a system where taxpayers have no reasonable access to information by which to compare their assessments with others, where the tribunals reviewing the assessments are contaminated in their perspective by an inherent institutional bias against reduction of the assessments, where the procedures for challenging the assessments are onerous, at best, and practically unavailing, at worst, and where taxpayers do not receive practically sufficient or timely notice of their assessments or review opportunities.214

Therefore, both the authority for, and the design of, an improved system must come from the public policy-making branch of government (the Legislature) after it is informed as to such matters by the views and experiences of academics, practitioners, taxpayers, public officials, and others with an interest in the results of the system. In the course of fashioning such reforms, the earlier arrangements adopted in this state and the structures presently employed in other jurisdictions may legitimately suggest the directions such improvements can take.

A refined proposal has now been presented which, inspired by both the importance of the taxpayers’ interests at stake and the substantial risk of erroneous deprivation of those interests presented by the current system, offers practical safeguards to effectively reduce such risk. At the same time, the proposal includes features which enhance the prospects for the achievement of the competing local government objectives of fiscal stability and administrative cost containment.

Although the solution described in this Article is designed to faithfully respond to the three-part judicial test for due process adequacy, whether it will actually be implemented necessarily depends on the workings of largely political structures. In turn, the existence of the political will to effect these reforms will depend on the breadth and depth of public concern over the rising burden of taxation, the worthiness of the government programs which are the recipients of the resulting revenues and the fairness of the system by which those taxes are imposed.

As this Article was going to the printer on February 16, 1996, Delegate Robert S. Kiss, Chairman of the House Finance Committee of the West Virginia Legislature, sponsored introduction of House Bill 4630. This Bill would implement the refined proposal for reform of West Virginia's property tax appeals system as described in this Article. The Bill is currently being considered by Chairman Kiss' Committee. Given the short time remaining in the current legislative session, the prospects for passage of House Bill 4630 are, at best, uncertain.

VIII. CONCLUSION

All taxpayers, large and small, and however antagonistic they (or their advocates) may see their separate interests to be, are at a serious disadvantage under the present system. Large industrial entities, and individual homeowners, alike, who complain of overassessment of their properties, and others who complain of the relative underassessment of those same properties, are all prejudiced by a system where review opportunities are so practically unavailing. Recent developments and debates regarding the fairness and accuracy of the tax assessments of West Virginia's vast natural resource reserves and the statutory institutionalization of triennial appraisal updates suggest elevated public interest in these matters.

Few arrangements in public administration in West Virginia are less able to measure up to minimal due process legal standards, or to grass-roots, fair-tax political forces, than our current system of property tax assessment review. A competent, thoroughly studied, developed and refined solution has been presented. Who will embrace it, whether in the high-minded spirit of reform, or simply to exploit the political
currents it may represent? Who will lead — or at least participate in — the movement to make the constitutional guarantee of due process a legal and political reality? All parties vitally interested in either or both the process and results of our system of property taxation, and desiring to be constructive, should be involved.