

**REPORT OF THE VIRGINIA
DEPARTMENT OF TAXATION**

**Department of Taxation - 2018
House Joint Resolution 98
Final Report (HJR 98, 2018)**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 15

**COMMONWEALTH OF VIRGINIA
RICHMOND
2019**



COMMONWEALTH of VIRGINIA

Department of Taxation

December 2, 2019

The Honorable Ralph S. Northam
Governor of Virginia
Post Office Box 1475
Richmond, Virginia 23218

The Honorable Thomas K. Norment, Jr.
Co-Chairman, Senate Finance Committee
Post Office Box 6205
Williamsburg, Virginia 23188

The Honorable S. Chris Jones
Chairman, House Appropriations Committee
Post Office Box 5059
Suffolk, Virginia 23435

The Honorable Emmett W. Hanger, Jr.
Co-Chairman, Senate Finance Committee
Post Office Box 2
Mount Solon, Virginia 22843

The Honorable Lee R. Ware, Jr.
Chairman, House Finance Committee
Post Office Box 689
Powhatan, VA 23139

Attached is the Report from the Department of Taxation mandated by 2018 House Joint Resolution 98. If you have any questions regarding the report, please contact me at (804) 786-3332 or Craig.Burns@tax.virginia.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Craig M. Burns".

Craig M. Burns
Tax Commissioner

c: The Honorable Aubrey L. Layne, Jr., Secretary of Finance
The Honorable Kathy J. Byron, Virginia House of Delegates

**2018 House Joint Resolution 98
Final Report**

Department of Taxation

December 2, 2019

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Executive Summary

House Joint Resolution 98 was agreed to by the House and Senate in the 2018 Session of the General Assembly. It directed the Department of Taxation (“the Department”) to study and make recommendations regarding assessment methodologies and the appeals process for businesses disputing determinations of the fair market value of real and tangible personal property. The Department was to complete its meetings by November 1, 2019 and submit to the Governor and the General Assembly an executive summary and a report of its findings and recommendations no later than December 1, 2019.

The Department had initial conversations with representatives of 1) the Commissioners of the Revenue Association, 2) the Virginia Municipal League and the Virginia Association of Counties, 3) the Virginia Association of Assessing Officers, and 4) the Virginia Manufacturers Association in order to obtain a candid evaluation of the study issues from each group. The representatives were chosen by each organization. Additionally, a meeting was held at the Department’s offices on October 18, 2019 to allow the representatives designated by the stakeholders to present their positions. Information gathered by the Department at these conversations and the meeting and background information on the current appeals system in Virginia and surrounding states form the basis for this report.

This report explains the current system for assessing and appealing real and personal property in Virginia; examines three recent Virginia Supreme Court cases involving real estate assessment appeals; describes the current appeals process for both real and personal property in Virginia; compares the real and personal property appeals process in surrounding states; and examines recent studies published about relevant property tax issues.

The Department received input from manufacturing representatives, as well as from local officials and organizations that represent local governments. The Department is appreciative of the involvement of all the stakeholders. While many topics were discussed and debated, and evidence was produced from many different sources, there was no consensus among representatives of taxpayers and representatives of local governments on where problems exist within the current system or how to remedy them. Given this lack of agreement on any issue, the Department of Taxation will not issue any recommendations to change the procedures currently in place for appeals of real and personal property assessments. Rather, the Department urges taxpayers and local officials to work together to resolve disputed assessments using the current informal and administrative avenues of appeal in order to avoid litigation.

House Joint Resolution 98 Report of the Department of Taxation

Study Mandate

House Joint Resolution 98 was agreed to by the House and Senate in the 2018 Session of the General Assembly. It directs the Department of Taxation ("the Department") to study and make recommendations regarding assessment methodologies and the Commonwealth's appeals process for businesses disputing determinations of the fair market value of real and tangible personal property.

Specifically, the Department was to study the feasibility and merits of:

- i. the taxpayer determining the value of individual items of property by allocating a total appraised value for all the machinery and tools at a plant, facility, or any part thereof among the individual items of property at such plant, facility, or any part thereof, on the basis of the percentage of original cost that each such item bears to the total original cost;
- ii. the Tax Commissioner determining whether the local assessor's method for valuing and assessing machinery and tools is likely to estimate fair market value accurately and whether the assessor has taken into account all forms of depreciation, including obsolescence, and other appropriate factors reasonably necessary to determine fair market value;
- iii. determining whether the taxpayer has carried his burden to establish that the machinery and tools in question have been assessed at more than fair market value and the fair market value thereof;
- iv. stating the facts and law in support of his determinations, including an analysis of any appraisals or other valuation information presented by the taxpayer and the commissioner of the revenue or other assessing official; and
- v. affirming the assessment if the taxpayer has not carried his burden to establish that the property has a fair market value less than the assessed value, or if the taxpayer has carried his burden, directing that the assessment be corrected by the commissioner of the revenue or other assessing official.

This report explains the current system for assessing and appealing real and personal property in Virginia; examines three recent Virginia Supreme Court cases involving real estate assessment appeals; describes the current appeals process for both real and personal property in Virginia; compares the real and personal property appeals process in surrounding jurisdictions; and examines recent studies published about property tax issues. The final sections are dedicated to providing conclusions and recommendations.

Meetings and Discussions

The Department held an initial conversation with representatives from each of the major stakeholders. The stakeholders identified were 1) the Commissioners of the Revenue Association, 2) the Virginia Municipal League and the Virginia Association of Counties, 3) the Virginia Association of Assessing Officers, and 4) the Virginia Manufacturers Association. In order to obtain a candid evaluation of the study issues from each group, each conversation was limited to representatives chosen by the stakeholder organization and Department of Taxation staff experienced with local property taxes and the appeals processes available to taxpayers. Also, when it became aware of the study, McKee Foods Corporation reached out to the Department to provide an informal assessment of the study issues in conversations with Department staff.

A meeting was held at the Department's offices on October 18, 2019. All representatives who had been identified by the stakeholders were invited to attend. Some representatives were unable to attend and sent alternate representatives. Some stakeholders sent additional representatives. After an overview of the study mandate was provided by Department of Taxation staff, representatives of the different stakeholders were offered the opportunity to present their positions. Representatives from McKee Foods made a formal presentation to the attendees about their experience with the Virginia real estate assessment appeals process. Information from those meetings and background information on the current system in Virginia and surrounding states form the basis for this report.

Topics raised in the conversations and the meeting included:

- Constitutional requirements of uniformity and fair market value
- Virginia Code requirement that valuation for machinery and tools (M&T) be based on percent or percentages of original cost
- Original cost has not been defined by Supreme Court or in the Virginia Code
- Local control of property tax rates, depreciation schedules, and appraisal methodologies for M&T

- The cost of the property tax assessment appeals process in Virginia

Property Tax in Virginia

Constitution of Virginia

Article X of the *Constitution of Virginia* governs taxation. Section 1 provides that “[a]ll property, except as hereinafter provided, shall be taxed” and that “[t]he General Assembly may define and classify taxable subjects, but taxes must be uniform upon the same class of subjects.” Section 3 provides that “[a]ll assessments of real estate and tangible personal property are required be at their fair market value.” Section 4 provides that, in general, real estate and tangible personal property are subject to local taxation only, to be assessed as directed by the General Assembly by general law.

Code of Virginia

Real property is required to be assessed at 100 percent of fair market value under *Va. Code* § 58.1-3201.

Machinery and tools are valued by means of depreciated cost or a percentage or percentages of original total capitalized cost excluding capitalized interest. Further, for valuation of machinery and tools, the commissioner of the revenue must consider any bona fide, independent appraisal presented by the taxpayer, if it is requested in writing by the taxpayer under *Va. Code* § 58.1-3507.

Fair Market Value

Fair market value is generally defined as the price a property will bring when offered by one who desires, but is under no obligation, to sell it, and the buyer has no immediate necessity to purchase it. *Tuckahoe Women's Club v. City of Richmond*, 119 Va. 734 (1958).

The Virginia Supreme Court has consistently held that the constitutional requirements of uniformity and fair market value should be construed together, with the preference given to uniformity. *Skyline Swannanoa v. Nelson County*, 186 Va. 878 (1947).

Original Cost

The definition of original cost in Virginia has been developed through rulings and opinions of the Attorney General and the Tax Commissioner. Original cost is generally held to be the cost of the tangible property paid by the owner who first purchased the property, not the

costs paid by any subsequent purchasers. See 2009 *Op. Va. Att'y Gen* (8-109); Department of Taxation Public Document 12-27.

During the 2019 Session of the General Assembly, House Bill 2640 was proposed to provide a definition of "original total capitalized cost" for M&T purposes. This proposal would have made a distinction between property acquired in "arm's-length," and "non-arm's-length" transactions. If the machinery and tools were acquired in an arm's-length transaction, the original total capitalized cost would have been the cost of the machinery and tools when acquired by the current owner. This bill was not advanced out of the House of Delegates.

Property Tax Appeals Process in Virginia

Code of Virginia § 58.1-3980 provides for an appeal to the local commissioner of the revenue or other local assessing official within three years from the last day of the tax year for which such assessment is made, or within one year from the date of the assessment, whichever is later. Within one year, the assessing officer must issue a final written determination. The commissioner of the revenue and taxpayer may have a conference or the taxpayer may be required to produce further documentation.

Real Estate Assessment Appeal Process

The first step in an appeal of an assessment is usually an informal discussion or meeting with the local assessing official.

A taxpayer who wishes to appeal an assessment of real estate may file such appeal with (1) the appraiser; (2) the Board of Assessors appointed by governing body of the locality; or (3) the Board of Equalization (BOE), which is generally appointed by the circuit court. In localities where appeals to board of equalization or board of assessors is not a prerequisite to the jurisdiction of the court, the taxpayer may also appeal directly to appropriate circuit court.

In appeals, there is a presumption that the valuation determined by the assessor is correct. The burden of proof is on the taxpayer to rebut the presumption and show by a preponderance of the evidence that the property in question is valued at more than its fair market value; or that the assessment is not uniform in its application; and that it was not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations such as the International Association of Assessing Officers (IAAO) and applicable Virginia law relating to valuation of property. Mistakes of fact, including computation, that affect the assessment are deemed not to be in accordance with generally accepted appraisal practice.

The *Code of Virginia* does not permit taxpayers to file appeals involving local real property assessments with the Tax Commissioner. Expansion of the Tax Commissioner's jurisdiction would also likely necessitate increased staffing and training within the Department.

2019 House Joint Resolution 687

House Joint Resolution 687 asked the Small Business Commission to evaluate the possibility of creating a dedicated tax court or docket in Virginia. The Commission held two public meetings on the Resolution and heard comments from many of the same interested parties that participated in the HJ 98 discussions.

The chart below shows the number of real estate assessment appeals filed in 2017 and is based on data provided by the Weldon Cooper Center to the Small Business Commission.

Real Estate Tax Appeals (2017)

Administrative Appeals Filed	Relief Granted	Percent	BOE Appeals Filed	Relief Granted	Percent	Judicial Appeals Filed	Relief Granted	Percent
27,648	13,855	50.1%	5,145	2,603	50.6%	18	7	38.9%

After the hearings were completed the Commission adjourned without making any recommendation.

Business Personal Property and Machinery and Tools Appeal Process

Under Virginia law, a business taxpayer may appeal a personal property assessment to the commissioner of the revenue or other local assessing official under *Va. Code* § 58.1-3983.1. The commissioner of the revenue may hold a conference with the taxpayer if requested by the taxpayer, or require submission of additional information and documents, conduct an audit or further audits, or request other evidence deemed necessary for a proper and equitable determination of the application. The local assessing official must issue a written determination to the taxpayer setting forth the facts and arguments in support of his decision within 90 days after such appeal is filed.

After a final local written determination has been issued by the commissioner of the revenue, if a taxpayer is dissatisfied with the ruling, it may file an administrative appeal to the state Tax Commissioner within 90 days of the date of the final local determination. The assessment will be deemed prima facie correct. The Commissioner will issue a ruling on the appeal, stating the law and facts supporting the decision.

The taxpayer or commissioner of the revenue or other assessing official may apply to the appropriate circuit court for judicial review of final determination of the Tax Commissioner. The burden of proof is on the party challenging the determination of the Tax Commissioner to show that the ruling is erroneous.

Alternatively, under *Va. Code* § 58.1-3980, the taxpayer may appeal directly to the proper court whether or not such applicant has made application to the commissioner of the revenue for the correction of any such assessment.

Recent Judicial Developments

Three recent cases involving real estate assessment appeals have provided further guidance from the courts.

Hershey Chocolate of Va., Inc. v. County of Augusta

August County Circuit Court, October 24, 2018, Case Number CL14002172-00

In this case, the court ruled that Hershey had overcome the County's presumption of correctness because the county's appraiser had not properly rejected one of the approaches to determining value, namely the sales comparison approach. The court ruled further that fair market value was the value assigned by Hershey's primary appraiser, and the County was ordered to refund taxes that were overpaid.

McKee Foods Corp. v. County of Augusta

Virginia Supreme Court, July 18, 2019, Record Number 180521

In this case, the taxpayer appealed the assessment of its manufacturing facility to the Circuit Court, which upheld the County's assessment. The Virginia Supreme Court reversed the decision and remanded the case for a new trial. The Supreme Court held that because the county's appraisers did not consider all three approaches to value, they were not entitled to a presumption of correctness. On remand, McKee will still be required to prove its valuation is correct but the County will not be entitled to the presumption of correctness.

Virginia International Gateway, Inc. v. City of Portsmouth

Virginia Supreme Court, October 31, 2019 Record Number 180810

Virginia International Gateway, Inc. (VIG) claimed that the assessment of its property by the City exceeded its fair market value. The issue in the case was whether an appraiser must have an active Virginia appraiser's license to testify as an expert. The court held that VIG's

real estate appraiser could testify even though not licensed at trial because he was licensed when he did the appraisal.

With respect to the validity of the personal property valuation performed, the appraiser's testimony was rejected because he did not follow Uniform Standards of Professional Appraisal Practice (USPAP) when he deducted transportation costs in arriving at FMV. Because of that, the court ruled that VIG did not overcome the presumption of correctness enjoyed by the City.

Real Property Assessment Appeals in Surrounding States

The process for appealing real estate assessments in surrounding states is similar to the process in Virginia in many respects. The most notable exception is in Maryland where there is a dedicated Tax Court to rule on tax appeals.

The steps involved in the real estate appeals processes in the surrounding states are outlined in the chart below:

State	VA	KY	MD	NC	TN	WV
Informal Local Conference	Yes	Yes	Yes	Yes	Varies by locality	Yes
Local BOE or Similar	Yes	Yes	Yes	Yes	Yes	Yes
State BOE or Similar	No	No	No	Yes	Yes	No
State Tax Department Review	No	No	No	No	No	Yes
State Review Commission	No	Yes	No	Same as BOE	No	No
Court Review	Yes	Yes	Appeal from Tax Court	Yes	Yes	Yes
Must Exhaust Admin. Appeal Before Court	Varies by locality	Yes	Yes	Yes	Yes	Yes
Tax Court	No	No	Yes	No	No	No

Personal Property Assessment Appeals in Surrounding States

The steps involved in the personal property appeals processes in the surrounding states are outlined in the chart below. While the process for appealing personal property assessments is more varied among the surrounding states, all begin with an informal appeal and allow for the matter eventually to be decided by the circuit court or ultimately the state supreme court.

State	VA	KY	MD	NC	TN	WV
Informal Local Conference	Yes	Yes	No	Yes	Varies by locality	Yes
Formal Appeal to Local Official	Yes	No	No	No	No	Yes
Local BOE or Similar	No	No	No	Yes	Yes	Yes
State BOE or Similar	No	No	No	Yes	Yes for businesses	No
State Tax Department Review	Yes	Yes	Yes	No	No	No
State Review Commission	No	Yes	No	Same as BOE	No	No
Court Review	Yes	Yes	Appeal from Tax Court	Yes	Yes	Yes
Must Exhaust Admin. Appeal Before Court	No	Yes	Yes	Yes	Yes	Yes
Tax Court	No	No	Yes	No	No	No

Council on State Taxation Study

The Department reviewed the Council on State Taxation's (COST) June 2019 report on the *Best (and Worst) of International Property Tax Administration: COST-IPTI Scorecard on the Property Tax Administrative Systems of the US States and Selected International Jurisdictions*. COST publishes this "scorecard" to "provide tax policymakers (*i.e.*, national, state, provincial, county, *etc.*) with an indication of best practices and a comparative measure of the fairness and efficiency of their property tax administrative practices."

The report's analysis of Virginia resulted in the Commonwealth receiving an overall grade of "C," composed of scores of "D" for "Transparency;" a "B" for "Central Agency Oversight;" and a "C" for "Initial Review." The report was critical of information available on the Department's website regarding property taxation and information provided by the state regarding reassessments. The report gave high marks for the Department's *Assessment Sales Ratio Study* and the review process for assessments.

Below are the grades for surrounding states:

Kentucky: C
Maryland: B-
North Carolina: C-
Tennessee: C-
West Virginia: D-

Stakeholder Positions

All parties recognize that contesting an assessment through the courts is a lengthy and expensive proposition. A court appeal of a commercial or industrial real estate assessment can cost hundreds of thousands of dollars. Further, the parties agree that a preferred approach involves more direct contact between the assessor and the taxpayer trying to settle assessment disputes.

There is, however, a fundamental difference of opinion as to whether a systemic problem exists. Local officials and their representatives see no major problems with the current assessment and appeals processes. They view appeals that result in litigation as outliers that need to be addressed on an individual basis.

The manufacturing representatives, on the other hand, assert that the current system is broken. They state that localities hide behind the presumption of correctness and the high cost of court appeals to dissuade taxpayers from challenging over-assessments.

The manufacturing representatives also complain that localities set their own tax rates, depreciation schedules, and appraisal methodologies to reach their desired revenue goals, resulting in a local property tax system with no consistency from one locality to another.

In the discussions involving the valuation of M&T, local government representatives emphasize that the Virginia Constitution and state code require that property be assessed at fair market value and that valuations be uniform within each class of property. Further, by statute, M&T is to be valued using depreciated cost or a percentage or percentages of original total capitalized cost. Local officials assert that allowing manufacturers to challenge assessments with independent appraisals that do not conform to this assessment methodology is contrary to this statutory mandate. They also point out that using private appraisals has a negative impact on fairness and uniformity. Further, it was stated that there has been no noticeable increase in M&T appeals in recent years.

Manufacturers argue that while state law requires M&T to be valued using original capitalized cost, that term is not defined in the state code or by the Virginia Supreme Court. The current definition, which looks at the price paid by original purchaser, comes from an Attorney General's opinion and manufacturers assert that this leads to confusion and is burdensome on businesses. Representatives from the Commissioners of the Revenue Association responded to this assertion by stating that they have information regarding the original cost data on property from previous years' tax records.

With regard to real estate appeals, a similar pattern emerged from the discussions. Local assessors and their representatives believe that no major problems exist with current assessment and appeals processes. They assert that there are multiple checks and balances in place already, such as standards imposed by the International Association of Assessing Officers (IAAO) and the Uniform Standards of Professional Appraisal Practice (USPAP). They argue that the appeals process in Virginia is not perfect but it works well most of the time and it mirrors the appeals process in most states. Local real estate assessors state that they welcome independent appraisals because appraisals give assessors and taxpayers a starting point for discussions.

Manufacturers contend that because administrative appeals and BOE appeals are locally controlled, it makes it virtually impossible to correct an assessment unless the taxpayer has an unassailable position. Further, the cost of litigation keeps most local appeals out of court.

While local officials and manufacturers acknowledge the low number of real estate circuit court appeals, 18 in 2017, the most recent year for which data is available, they disagree as to its significance. Manufacturers see this low number of appeals as evidence that taxpayers are deterred from bringing appeals to court because of the cost involved. Local officials acknowledge the high cost of court appeals, and state that localities too are reluctant to engage in unnecessary litigation. However, localities also point to the low number of appeals as proof that the system is working.

Conclusion

The Department received input from business and manufacturing representatives, as well as from local officials and representatives of organizations that represent local governments. The Department is appreciative of the involvement of all the stakeholders. While many topics were discussed and debated, and evidence was produced from many different sources, there was no consensus among representatives of taxpayers and representatives of local governments on where problems exist within the current system or how to remedy them. On one side, representatives of business interests characterize the current appeals system as being “broken.” Representatives of local government view the few appeals that end in litigation as being outliers in a system that otherwise works well.

Given this lack of agreement on any issue, the Department of Taxation will not issue any recommendations to change the procedures currently in place for appeals of real and personal property assessments. Rather, the Department urges taxpayers and local officials to continue to work together to resolve disputed assessments using the current informal and administrative avenues of appeal in order to avoid costly litigation.

Appendix A
House Joint Resolution 98

2018 SESSION

ENROLLED

HOUSE JOINT RESOLUTION NO. 98

Directing the Department of Taxation to study and make recommendations regarding the Commonwealth's appeals process for businesses disputing determinations of the fair market value of real and tangible personal property. Report.

Agreed to by the House of Delegates, February 9, 2018
Agreed to by the Senate, March 5, 2018

WHEREAS, the Commonwealth's manufacturing sector ranked 37th in the United States for total capital expenditures per manufacturing employee in 2015 according to the U.S. Census Bureau and the Virginia Manufacturing Competitiveness Index; and

WHEREAS, Virginia's economic development strategy has a primary focus on expanding and attracting manufacturing investments in the Commonwealth; and

WHEREAS, the lack of a clear state appeals process for the property assessments costs taxpayers millions of dollars in court costs each year; and

WHEREAS, public and legal disputes over fair market valuations contribute to a negative image of the Commonwealth for economic development purposes; and

WHEREAS, § 58.1-3983.1 of the Code of Virginia already provides for administrative appeals to the Tax Commissioner but does not require him to state the facts and law in support of his determinations, including an analysis of any appraisals or other valuation information presented by the taxpayer and the commissioner of the revenue or other assessing official; and

WHEREAS, subdivision D 5 of § 58.1-3983.1 of the Code of Virginia prohibits the Tax Commissioner from making a determination regarding the valuation or the method of valuation of property subject to any local tax other than a local business tax; and

WHEREAS, it is imperative that there be a review of the Commonwealth's appeals process involving both real and personal property when there is a dispute over fair market value assessments; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Department of Taxation be directed to study and make recommendations regarding the Commonwealth's appeals process for businesses disputing determinations of the fair market value of real and tangible personal property.

In conducting its study, the Department of Taxation shall evaluate the following: the feasibility and merits of the taxpayer determining the value of individual items of property by allocating a total appraised value for all the machinery and tools at a plant, facility, or any part thereof among the individual items of property at such plant, facility, or any part thereof, on the basis of the percentage of original cost that each such item bears to the total original cost and the feasibility and merits of the Commissioner, based on the documents submitted by the taxpayer and the commissioner of the revenue or other assessing official, (i) determining whether the assessor's method for valuing and assessing machinery and tools is likely to estimate fair market value accurately and whether the assessor has taken into account all forms of depreciation, including obsolescence, and other appropriate factors reasonably necessary to determine fair market value; (ii) determining whether the taxpayer has carried his burden to establish that the machinery and tools in question have been assessed at more than fair market value and the fair market value thereof; (iii) stating the facts and law in support of his determinations, including an analysis of any appraisals or other valuation information presented by the taxpayer and the commissioner of the revenue or other assessing official; and (iv) affirming the assessment if the taxpayer has not carried his burden to establish that the property has a fair market value less than the assessed value, or if the taxpayer has carried his burden, directing that the assessment be corrected by the commissioner of the revenue or other assessing official.

Technical assistance shall be provided to the Department of Taxation by the Virginia Economic Development Partnership, and the Office of the Attorney General. All agencies of the Commonwealth shall provide assistance to the Virginia Department of Taxation for this report, upon request. All stakeholders, including but not limited to local government and the manufacturing sector trade associations, are requested to participate in this report.

The Department of Taxation shall complete its meetings by November 1, 2019, and shall submit to the Governor and the General Assembly an executive summary and a report of its findings and recommendations for publication as a House or Senate document. The executive summary and report shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports no later than December 1, 2019, and shall be posted on the General Assembly's website.

ENROLLED

HJ98ER

Appendix B
Department of Taxation Presentation and Meeting Agenda
December 18, 2019

Study of the Appeals Process for Businesses Disputing Determinations of the Fair Market Value of Real and Tangible Personal Property Pursuant to 2018 House Joint Resolution 98

Meeting of Interested Parties

October 18, 2019



Legislative Mandate

- ▶ **The Department of Taxation (the Department) to study and make recommendations regarding the Commonwealth's appeals process for businesses disputing determinations of the fair market value of real and tangible personal property**
- ▶ **The Department is to evaluate:**
 - ▶ **The feasibility of determining the value of individual items of property by allocating a total appraised value for all items of Machinery and Tools (M&T) or Business Tangible Personal Property (BTTP) on the basis of the percentage of original cost that each such item bears to the total original cost**



Legislative Mandate (Continued)

3

- ▶ **The feasibility of the Tax Commissioner:**
 - ▶ **Determining whether the assessor's method for assessing M&T is likely to estimate fair market value accurately, and whether all forms of depreciation were considered**
 - ▶ **Whether the taxpayer has carried his burden to establish that the M&T in question have been assessed at more than fair market value**
 - ▶ **Stating the facts and law in support of his determinations**
 - ▶ **Affirming the assessment if the taxpayer has not carried his burden, or directing that the assessment be corrected by the commissioner of the revenue if the taxpayer has carried the burden**



Initial Meetings

1

- ▶ **The Department has had initial discussions with:**
 - ▶ **Commissioners of the Revenue Association**
 - ▶ **Virginia Municipal League and the Virginia Association of Counties**
 - ▶ **Virginia Association of Assessing Officers**
 - ▶ **Virginia Manufacturers Association**



Initial Meetings (Continued)

5

Topics Discussed

- ▶ Constitutional requirements of uniformity and fair market value
- ▶ *Va. Code* requires valuation based on percent or percentages of original cost for M&T
- ▶ Original cost has not been defined by Supreme Court or in the *Va. Code*
- ▶ Different localities use different tax rates, depreciation schedules, and appraisal methodologies for M&T



Constitution of Virginia

6

Article X. Taxation and Finance

- ▶ Section 1. Taxable property; uniformity; classification and segregation
 - ▶ All property, except as hereinafter provided, shall be taxed
 - ▶ The General Assembly may define and classify taxable subjects
 - ▶ Taxes must be uniform upon the same class of subjects
- ▶ Section 2. Assessments
 - ▶ All assessments of real estate and tangible personal property shall be at their fair market value



Fair Market Value

7

- ▶ Fair market value is generally defined as the price a property will bring when offered by one who desires, but is under no obligation, to sell it, and the buyer has no immediate necessity to purchase it.
 - ▶ *Tuckahoe Women's Club v. County of Richmond*, 119 Va. 734, (1958)
- ▶ If the valuation methodology employed by a locality results in an assessment well above fair market value, the locality may use another methodology prescribed in the Code of Virginia
- ▶ Supreme Court has consistently held that the constitutional requirements of uniformity and fair market value should be construed together, with the preference given to uniformity
 - ▶ *Skyline Swannanoa v. Nelson County*, 186 Va. 878 (1947)



Original Cost

8

- ▶ The original cost is the cost of the tangible property paid by the owner who first purchased the property, not the costs paid by any subsequent purchasers
 - 2009 Op. Va. Att'y Gen (8-109)
 - PD 12-27, Opinion of the Tax Commissioner
- ▶ 2019 House Bill 2640 proposed a definition of "original total capitalized cost" for M&T, making a distinction between property acquired in "arm's-length," and "non-arm's-length" transactions
 - ▶ If the machinery and tools were acquired in an arm's-length transaction, the original total capitalized cost would have been the cost of the machinery and tools when acquired by the current owner
 - ▶ Legislation failed in the House of Delegates



Independent Appraisals

9

- ▶ Whenever a locality is considering the valuation of property for purposes of either the M&T tax or the BTPP tax, the Department's policy has been that the locality must consider a bona fide independent appraisal offered by the taxpayer
P.D. 05-129 and P.D. 12-145 (8/30/2012)



Real Estate Assessment Appeals

10

- ▶ Assessments may be appealed to:
 - ▶ Appraiser, who is either an employee qualified by the Department; or an independent contractor who holds a valid certification issued by the Department
 - ▶ Board of assessors appointed by governing body of locality and consisting of three members
 - ▶ Board of equalization appointed by circuit court under *Va. Code* 58.1-3370 or appointed by board of supervisors under 58.1-3371 (County Executive)
 - ▶ Directly to appropriate circuit court
 - ▶ Only in localities where appeals to board of equalization or board of assessors is not a prerequisite to the jurisdiction of the court



Next Steps

11

- ▶ Written comments will be solicited from all interested parties following the meeting
- ▶ A draft report will be prepared, including written comments in early November
- ▶ The draft will be circulated to meeting attendees for further input in mid-November
- ▶ The final report will be submitted by the Department on or before December 1, 2019

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Public Comments

**Agenda for Meeting to Discuss 2018 House Joint Resolution 98
October 18, 2019**

Introductions

Department of Taxation Overview of Study Mandate

Department of Taxation Brief Review of Initial Conversations

Public Comments

Adjourn

Appendix C
Presentations and Written Comments Submitted at Meeting

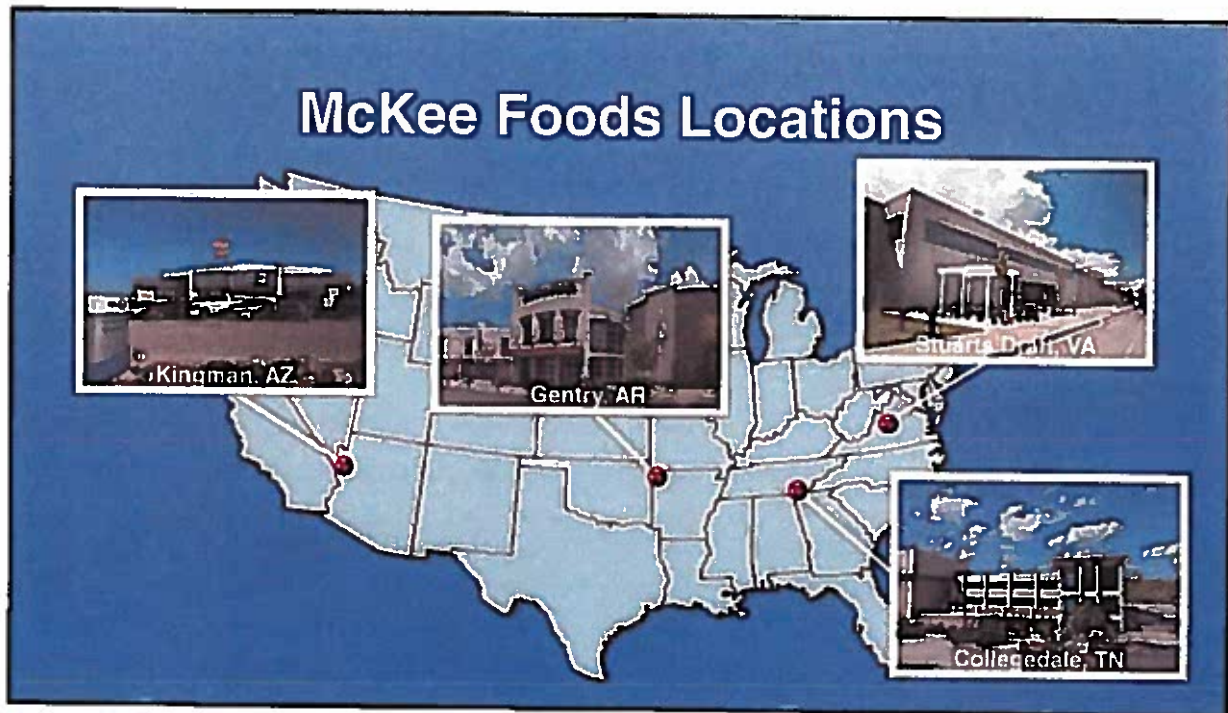


Real Estate Assessment—Our Experience

M. Leisa Cagle
VP and Controller
McKee Foods Corporation
October 18, 2019



McKee Foods Locations



Real Property Taxes—Our Journey with Augusta County

- 4/22/14—Appealed the 2014 Assessment to the Board of Equalization
 - Three of five board members stated publicly that they felt the assessment was too high
 - Tax Commissioner Jean Shrewsbury indicated can't work with MFC until we file a petition to the court
- 5/28/14—MFC filed an Application for Erroneous Assessment for Real Property Tax with the Augusta County Circuit Court.
 - Filed in response to Comm'r Shrewsbury's comments at BOE hearing
 - Intent was to get to a point to negotiate an assessment that both the county and MFC could live with for 2014.

Real Property Taxes—Our Journey with Augusta County

- June/14 – Contacted County to negotiate.
- 6/13/14 – Rather than commence settlement discussions as anticipated, County disputed our application and served us with interrogatories and requests to produce documents.
- 7/24/14 – Filed motion to amend our application to include 2011, 12, and 13 and offered to meet with county to discuss and determine an agreed resolution without risk, disruption and cost of litigation.
- 8/4/14 – County disputed our motion and forced us to incur the expense of a hearing on 9/2/14 in which court allowed us to amend.

Real Property Taxes—Our Journey with Augusta County

- October 2014 – County settles out of court with Hershey with Agreed Order in which the County agreed to correct its erroneous assessments for its 2006-13 tax years
 - Same mass appraisal contractor at issue for MFC's 2011-13 assessments
 - Same valuation methodology
- 6/19/15 – MFC reached out to County to attempt to settle to avoid ongoing costs of litigation.
- 6/23/15 – County refused to discuss possible settlement with MFC and accused us of trying to “intimidate” the County into settling

Real Property Taxes—Our Journey with Augusta County

- 6/19/17—Trial set; Judge Ricketts recuses himself after hearing MFC's argument that Comm. Shrewsbury wrongfully obtained MFC's federal and state tax returns and gave them to County's outside counsel, who then gave them to an expert witness. The recusal by the judge resulted in a 6 month delay.
- 12/5-12/7/17 – Trial held with Judge James Lane
- 1/24/18 – Judge Lane ruled against MFC
- 4/23/18 – McKee requests appeal to VA Supreme Court—appeal granted
- 4/18/19 – Oral argument before VA Supreme Court
- 7/18/19 - VA Supreme Court reverses Judge Lane's decision due to erroneous valuation methods employed by County's mass appraisal contractors

Real Property Taxes—Our Journey with Augusta County

- Va. Supreme Court's allows an option of having a new judge review the existing trial record—reducing ongoing cost of litigation
- County has appeared in the press stating it will insist on a new trial
- Spend to date related to Augusta County litigation exceeds \$500,000
- New Trial date not yet set
- Our journey goes on
 - We anticipate County will contest our application for 2015-18 tax years

Real Property Taxes—Our Journey with Augusta County

- Tax structure/policies in a state are one of the top considerations in all the company's expansion decisions.
- This ongoing litigation with Augusta County has cast a negative light on the State of Virginia and Augusta County.
- It is unfortunate that the State of VA allows such a complicated and costly process for settling property tax disputes.
- We ask that the state legislature address this issue by going beyond this study to appoint a tax task force to propose legislation to address this appeals process for property tax disputes.



The Journey With Augusta County Goes On

McKee Foods Corporation

2018 House JR 98

Real Estate Assessment Appeal Process: Taxpayer Perspectives

WILLIAMS MULLEN

Appeal Process Issues

> **Localities have little (or no) disincentive to litigate:**

- Appeals typically handled by County/City Attorney so no legal fees incurred
- Localities are not required to reimburse taxpayers for attorneys' fees and costs if taxpayers prevail in appeals
- Strategy often appears to drive up costs and drown taxpayers in unnecessary litigation to discourage appeals
 - **EXAMPLE:**
 - County demurred
 - After demurrer resolved, County filed plea in bar to challenge taxpayer's standing
 - After losing on plea in bar, County filed motion to compel joinder of add'l parties
 - County could (and should) have brought all three issues at once – but expressly refused to do so despite taxpayer's request for efficiency in litigating
 - County also objected and refused to answer interrogatories on grounds that taxpayer's 26 questions amounted to some 7,390+ interrogatories
 - **Sum:** County tied up litigation on procedural issues and withheld full and complete discovery responses for more than six months – all while urging court for a compressed pre-trial and trial schedule that would have made it extremely difficult (if not impossible) for taxpayer to be prepared for trial

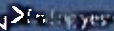
Appeal Process Issues

> Localities have no incentive to correct assessments following successful appeals:

- EXAMPLE:

- Taxpayer appealed eight (8) tax year assessments
- After litigating to within weeks of trial, County offered to settle
- County agreed to correct assessments for all 8 tax years
 - Corrected values were approximately half the original assessments and very close to the values alleged by Taxpayer
- County doubled the following year's tax assessment (back to pre-settlement levels), forcing taxpayer to appeal to circuit court all over again
- Taxpayer prevailed at trial, with court correcting two more years' assessments to approximately half the assessed values
- County now disputing taxpayer's appeal of the assessments for the remaining tax years in the reassessment cycle
- Sum: Taxpayer forced to litigate its assessments for more than thirteen years—with no end in sight—even though it has prevailed in all its appeals to date

3


WILLIAMS MULLEN 

Appeal Process Issues

> Inartful/imprecise/uncareful drafting of statutes doesn't help:

- Courts have grappled with interpretation of Va. Code § 58.1-3984(A)-(B), including the order of analysis they should follow
- Va. Code § 58.1-3984(B) requires taxpayers to rebut presumption of correctness by, in part, proving assessment was "not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations (such as the International Association of Assessing Officers)"
 - Localities argue courts should treat IAAO standards as the ultimate source of generally accepted appraisal standards due simply to this reference to the IAAO
 - BUT localities also argue IAAO standards are not "rules" that must be followed and are simply "guidelines" (i.e., suggestions) for assessing officials to consider
 - IAAO is not a professional appraisal organization - anyone can be a member
 - Compare to the Appraisal Institute, which has exacting professional standards - and only experienced, qualified, certified/licensed appraisers can become

4

WILLIAMS MULLEN 


Appeal Process Issues



> Valuation methodology details and supporting info are withheld from taxpayers routinely:

- Va. Code § 58.1-3984(A) requires courts to enter a protective order in real estate appeal cases
- Protective order, by statute, removes confidential taxpayer information from the applicability of Va. Code § 58.1-3
- Statute is intended to preclude discovery disputes due to localities' withholding of relevant information
 - Statute states, in pertinent part:
"Once the above-referenced order is entered, § 58.1-3 shall not be applicable to prevent the release of any relevant information that is responsive to a request for discovery made in the course of an appeal pursuant to this section."
- Localities still refuse to produce details of, and support for, valuation methodologies on grounds that they cannot provide confidential taxpayer information pursuant to Va. Code § 58.1-3

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WILLIAMS MULLEN  Tax by year


Appeal Process Issues



> Valuation methodology details and supporting info are withheld from taxpayers routinely (cont'd):

- Va. Code § 58.1-3331(B)-(C) provide taxpayers the right to:
 - Examine the working papers used by assessing officials in arriving at the appraised and assessed value of the taxpayer's property; and
 - Examine the locality's information regarding "the methodology employed in the calculation of a property's assessed value to include the capitalization rate used to determine the property's value, a list of comparable properties or sales figures considered in the valuation, and any other market surveys, formulas, matrices, or other factors considered in determining the value of the property."
- Localities routinely withhold this information despite being confronted with the statute
 - **EXAMPLE:** Just a few weeks ago, I confronted a City Assessor with his obligation to provide assessment work papers as required by statute. His reply: "I'll think about it." Papers still not provided.
- In my experience, BOEs often excuse localities from the statutory penalty for a failure or refusal to comply with this statute

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WILLIAMS MULLEN  Tax by year

Appeal Process Issues

> **Localities argue taxpayers should not be able to obtain testimony from individual BOA/BOE members because they "speak" as collective bodies**

- Intent appears to be to prevent taxpayers from obtaining evidence to prove assessments are not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards and Virginia law
- Another example of unnecessary litigation foisted on taxpayers

> **Presumption of Correctness**

- Assessing officials occupy a position of trust – if public trust is breached or violated, there should be no presumption for a taxpayer to rebut
 - Valuations by non-licensed, inappropriately licensed, or inadequately-trained persons are violations of public trust and should not be presumed correct
 - We once proved a County Assessor had lied under oath about his valuation methodology at his deposition – but that still wasn't enough for the judge to find the presumption of correctness was rebutted
- At least one state requires localities to carry initial burden of proving their assessment is correct (effect: strong disincentive for localities to

litigate)

WILLIAMS MULLEN 

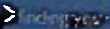
Conclusion

There is MUCH the General Assembly can do to improve the assessment appeal process, prevent (or reduce) costly, unnecessary litigation, and encourage manufacturers to invest in Virginia

Thank you!

Please note: This presentation contains general information only and is not intended to constitute legal advice. Individuals with particular needs on specific issues should retain the services of competent counsel.

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WILLIAMS MULLEN 

Appendix D
Comments Submitted Subsequent to Meeting

**Comments from
Virginia Association of Counties**

Virginia Association of Counties

Connecting County Governments since 1934



President
Timothy A. Reeves, Sr.
Wythe County

President-Elect
Stephen W. Bowen
Nottoway County

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Jeff C. McKay
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Second Vice President
Meg Bohmke
Stafford County

Secretary-Treasurer
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Accomack County

Immediate Past President
Sherrin C. Alsop
King and Queen County

Executive Director
Dean A. Lynch, CAE

General Counsel
Phyllis A. Errico, Esq., CAE

VIA ELECTRONIC MAIL

October 28, 2019

Mr. Craig M. Burns
Tax Commissioner
Commonwealth of Virginia
P.O. Box 1115
Richmond, VA 23218-1115

Dear Commissioner Burns:

Thank you for the opportunity to provide comments on behalf of the Virginia Association of Counties on the issues encompassed in HJ 98. We appreciate the Department's efforts to incorporate the views of all stakeholders in its study. We are grateful to you and your staff for meeting with us in person earlier in the summer and for inviting us to participate in the stakeholder meeting held October 18.

HJ 98's language posits that there is a significant problem with the processes for appeals of businesses' real and personal property in the Commonwealth. We respectfully disagree, and would oppose making major changes to long-established appeals processes, which we believe are fair to the taxpayer and provide ample opportunity to resolve disputed assessments without the need to incur the expense of a court case. Based on the discussion at the October 18 meeting, it appears that rather than widespread problems with current appeals processes, there may be some isolated cases where existing law was incorrectly applied; we would suggest that a possible remedy for these outlier cases could be enhancing training and education opportunities afforded to Commissioners of the Revenue, assessors, and members of Boards of Equalization.

Appeals of Real Property Assessments

With respect to appeals of real property, taxpayers have several avenues to appeal assessments that do not require the involvement of an attorney. A taxpayer may appeal administratively to the Commissioner of the Revenue or assessor, as well as to the Board of Equalization. Board of Equalization members are required to be "broadly representative of the community," with thirty percent of the board members required to be "commercial or residential real estate appraisers, other real estate professionals, builders, developers, or legal or financial professionals," and at least one of these members required to participate in all cases involving commercial, industrial, or multi-family residential property (unless waived by the taxpayer). Board of Equalization members must receive initial training from the Department, as well as continuing education at least once every four years.

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Richmond, Va. 23219-3627

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Fax: 804.788.0083

Email: mail@vaco.org
Website: www.vaco.org

As reflected in the statistics regarding real estate tax appeals in 2017 that were distributed at the October 18 meeting, taxpayer appeals were granted in a sizable portion of the appeals that were filed, both at the administrative level and at the Board of Equalization, with only 18 cases appealed to court. For the purposes of additional context, it should be noted that there were more than three million taxable parcels in 2017.

VACo would be opposed to changes to the manifest error standard in assessment appeals, which would represent a significant departure from long-standing precedent. The assessment of property is not an exact science, and establishing fair market value may produce a range of reasonable valuations; historically, the assessor's valuation has been afforded a presumption of correctness to avoid placing courts in the position of choosing among possible valuations submitted by experts. The manifest error standard sets a high bar for judicial intervention to avoid such a situation.

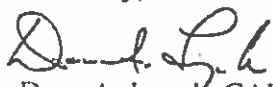
It is also worth noting that the annual Assessment/Sales Ratio Study conducted by the Department provides an independent review of assessors' work by measuring how closely assessments track sales prices in each locality, including how assessments match sales prices in specific categories of real property.

Appeals of Tangible Personal Property Assessments

HJ 98 suggests a number of changes to the appeals process for machinery and tools, generally to require a greater role for the Tax Commissioner in reviewing valuations by the local assessing official, to include determining the fair market value of machinery and tools. We do not believe that the existing appeals process for local business taxes, which is clearly spelled out in statute and guidance from the Department, warrants such a major change, which would eliminate the current presumption of correctness afforded to the assessing officer's final local determination and place the Tax Commissioner in the position of choosing between differing valuations. The current process allows for the resolution of cases at the local administrative level, and includes deadlines for responses to appeals so that cases may be resolved in a timely fashion. It should also be noted that the local assessing officer is required to consider any independent appraisal submitted by the taxpayer when valuing machinery and tools.

Thank you for your consideration of our views and we look forward to continuing to work with you and your staff on issues of concern to local governments.

Sincerely,


Dean A. Lynch, CAE
Executive Director

cc: Members, Virginia Association of Counties Board of Directors
Members, Virginia Association of Counties Finance Steering Committee

**Comments from
The Commissioner of the Revenue for Isle of Wight County**

COUNTY OF ISLE OF WIGHT



OFFICE OF THE COMMISSIONER OF THE REVENUE

*Post Office Box 107
Isle of Wight, Virginia 23397
(757) 365-6222*

Gerald H. Gwaltney
Commissioner of the Revenue

October 18, 2019

2018 House Joint Resolution 98

Good afternoon. My name is Gerald H. Gwaltney, Commissioner of the Revenue for Isle of Wight County and I am speaking on behalf of the Commissioners of the Revenue Association of Virginia. Our members deal directly with the issue the Department has been directed to study.

It is our position that the General Assembly has established a process for effectively hearing appeals on real estate and machinery and tools assessments. The Circuit Courts throughout the Commonwealth provide a means for any taxpayer to have their assessment reviewed by a Judge who is the "finder of facts." The Judge's decision is based on established law and previous court rulings.

Our goal is to ensure that our assessments are fair and meet the requirements of the Constitution of Virginia. Through the judicial process we are achieving this goal.

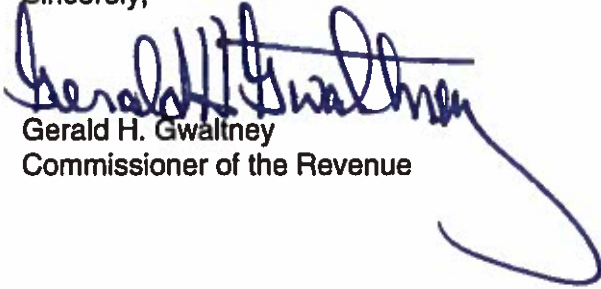
For the small "mom and pop" business, their assessment concerns are almost always resolved by the Commissioner of the Revenue. The cases going to court tend to be the larger taxpayer who can hire outside law firms and appraisers. This then requires the local governments to hire outside law firms and appraisers to defend the assessments. Changing the appeal process to the TAX Department will not eliminate the cost I just mentioned because both sides will spend money to defend their position.

Currently, appeals may originate in different Circuits and be heard at the same time by the various courts. What will happen is several appeals could be filed with TAX during the same time period jamming the review process. The problem with jamming the review process is the clock is ticking for local governments if a ruling is against the locality. The longer the clock is ticking, the amount of interest paid on a refund, usually at 10% annually, continues to grow forcing a locality to pay more through this process than if the courts had been able to hear the case. Localities with tight budgets are strapped for cash and cannot afford for a ticking clock to work against them.

2018 House Joint Resolution 98
October 18, 2019
Page 2

It is our request is for the report to recommend no changes to the current appeal process.

Sincerely,

A handwritten signature in blue ink, appearing to read "Gerald H. Gwaltney". The signature is stylized and cursive, with a long, sweeping tail that extends downwards and to the right.

Gerald H. Gwaltney
Commissioner of the Revenue

**Comments From
The Virginia Apartment Management Association and
The Apartment and Office Building Association (AOBA)
of Metropolitan Washington**



THE APARTMENT AND OFFICE BUILDING ASSOCIATION
OF METROPOLITAN WASHINGTON

THE VIRGINIA APARTMENT MANAGEMENT
ASSOCIATION



October 17, 2019

Mr. Steve Klos, Policy Analyst
Office of Tax Policy, Policy Development Division
Virginia Department of Taxation
Post Office Box 27185
Richmond, Virginia 23261-7185

Mr. Klos:

On behalf of the Virginia Apartment and Management Association (VAMA) and the Apartment and Office Building Association (AOBA) of Metropolitan Washington, I write to submit comments regarding the Department of Taxation's study of the appeals process for valuation of real and personal property of businesses pursuant to 2018 House Joint Resolution 98.

VAMA and AOBA collectively represent a membership comprising owners and managers of some 145 million square feet of commercial office space and 356,000 multifamily residential units across the Commonwealth of Virginia. These properties account for a combined \$24.7 billion in direct and indirect annual economic impact to the Commonwealth, account for 240,000 jobs and provide housing for nearly 1 million Virginians. They also represent a significant portion of local real estate tax revenues, funding the services that contribute to Virginia's high quality of life and offsetting residential tax burdens. These businesses engage frequently in the real estate tax appeals process and strongly believe that reform is needed to establish a level playing field between taxpayers and local government assessors.

An Insurmountable Burden for Overturning Real Property Assessments

In 2011, the Virginia General Assembly approved S.B. 1350, establishing a "preponderance of the evidence" standard for real estate tax appeals before local Boards of Equalization and Circuit Courts. This represents the lowest of three standards applied to judicial decision-making (along with "clear and convincing evidence" and "beyond a reasonable doubt") in which the adjudicating body is to rule in favor of the party which presents the most convincing evidence supporting validity of their respective

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THE APARTMENT AND OFFICE BUILDING ASSOCIATION
OF METROPOLITAN WASHINGTON

THE VIRGINIA APARTMENT MANAGEMENT
ASSOCIATION



argument. The legislation maintained that the valuation determined by the local assessor is presumed correct and that the burden of proof lies with the property owner to present a preponderance of the

evidence demonstrating the inaccuracy of the assessment and that it was not arrived at in accordance with generally accepted appraisal practices, procedures, rules and standards.

However, in spite of this legislative change, courts continue to enforce a "manifest error" standard. "Manifest error" is not cited anywhere in the Code of Virginia, nor is it specifically defined in case law. It may be loosely characterized as the acceptable leeway or room for error granted to the local assessor's valuation.

The lack of clarity surrounding the burden of proof was well demonstrated at a recent meeting of the Virginia Small Business Commission in which three attorneys practicing in the area of real estate assessment appeals each presented a different definition of "manifest error." This undefined range of acceptable overage is often seen by taxpayers as a nearly insurmountable hurdle to reversing real estate assessments.

The application of manifest error essentially creates a triple standard for taxpayers, wherein they must first overcome the presumption of correctness, then demonstrate by a preponderance of the evidence that the value was assessed at too high a level, and then overcome the undefined range of acceptable overage.

Taxpayers are further disadvantaged by code language stating that a taxpayer must show by a preponderance of the evidence that the property is valued at more than fair market or was not uniform in its application **AND** that it was not arrived at in accordance with generally accepted appraisal practices, procedures, rules and standards. That is to say that it is not enough for a taxpayer to prove that the assessment was too high, they must overcome additional hurdles.

Indeed, the Courts have opined on this very matter:

Staunton Mall Realty v. Bd. of Supervisors, No. 13002412-00 (July 8, 2015)

The result of the 2011 amendment is that what the Court explicitly declined to require, the statute now does. The amendment makes it clear that, despite evidence presented by the taxpayer that the property is valued at more than its fair market value, the taxpayer now must also show that the valuation of the taxing authority was not in accordance with generally accepted practices."

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PHF II Norfolk, LLC v. City of Norfolk, CL15-6886 (November 14, 2016)

“Court also cannot comprehend why the General Assembly would require the taxpayer to prove *both* nonuniformity and a GAAP violation to successfully challenge a real estate tax assessment.

Regardless, given that the GAAP provision clearly adds another requirement to an already substantial taxpayer burden, the Amended Statute appears to dramatically tilt the current landscape of Virginia real estate assessment law further in favor of the taxing authorities.”

Structural Reform is Also Needed

Aggrieved taxpayers filing appeals to the Circuit Court to contest erroneously high real estate assessments face a steeply uphill climb in seeking to overturn rulings of local Boards of Equalization. Reform is needed in light of confusion, disagreement and inconsistent application of the burden of proof adopted in 2011 that has resulted in a legal environment in which the cards are heavily stacked against taxpayers.

The high cost of appealing assessments at the Circuit Court level represents a further barrier to justice. Percentagewise, very few Circuit Court appeals are brought due to the overwhelming burden of proof and costs of filing. In addition to the up-front costs, many local governments make punitive use of the discovery process, driving up the costs of pursuing a Circuit-Court level appeal. Development of a tax court or statewide Board of Equalization could introduce efficiency and remove some of the cost barriers without tipping the scales of justice. Additionally, judges currently hearing Circuit Court level appeals do not possess any specific expertise relating to the valuation of complex revenue-generating commercial properties.

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ASSOCIATION



In order to ensure fair and proper valuation of commercial properties, Virginia must clarify and amend its burden of proof for real property appeals and streamline the judicial appeals process. We appreciate the Department undertaking this study and we very much look forward to engaging as stakeholders in the Department's evaluation process. Please let me know as we can be a resource or provide additional input for your consideration.

Sincerely,

Brian M. Gordon, Vice President, Government Affairs
Apartment and Office Building Association of Metropolitan Washington (AOBA)

Patrick McCloud, Chief Executive Officer
Virginia Apartment and Management Association (VAMA)

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**Comments From
The Virginia Association of Assessing Officers**

Comments pertaining to the October 18, 2019 meeting at the Department of Taxation regarding

House Joint Resolution No. 98

- 1) An earlier (October 8th) meeting centered around real estate assessment appeal processes (HJR 687), consequently the legislative committee for the Virginia Association of Assessing Officers (VAAO) assumed that the October 18th meeting would be focused on the assessment of manufacturing and tools (tangible personal property) and would be more applicable to the Commissioner community. In fact, several assessors did not attend the October 18th meeting because they believed the study on real property assessment appeals had been completed, and that the recommendation to the General Assembly would be to keep the processes the way they are. Representatives from VAAO in attendance were surprised and disappointed when the opening speaker indicated that she was not going to talk about M&Ts but rather planned to discuss real estate assessment processes. It seemed a touch unfair that the jurisdiction involved in that case had no idea that they would be under attack and consequently had no time to prepare so much as a 'no comment' response, but it is understood that this is the way public hearings and meetings work and that public speakers have the right to address any topic as long as it pertains to the study being conducted. That said, the opening presentation appeared to take advantage of an opportunity to make broad inflammatory statements without concern that they would be refuted or contradicted by facts.
- 2) The current appeals process starts with an informal review of the assessment by the office of the assessor/commissioner at the request of the tax payer. Most of the assessments brought under review in our state are resolved at this level. A survey conducted by the VAAO revealed that 55% of the assessments considered under informal appeal are decreased.
- 3) Should a resolution not be achieved (and a resolution does not always involve a decrease in assessed value), the tax payer is invited to appeal the assessment through the Board of Equalization (or other similar entity within the jurisdiction). In many jurisdictions (mine for instance), it is not necessary for the tax payer to go through the informal appeal process before being heard by the BOE, just as it is not always necessary for them to be heard by the BOE before seeking resolution in the Circuit Court. In the case of the McKee assessment, the presenter stated that 'when the company appealed to the BOE, three of the five board members agreed that the assessment should be lowered'. However this statement is incorrect. Had the BOE recommended a change to the assessment, the jurisdiction would have been legally bound to follow that recommendation. A review of the BOE file on the McKee property found that the Board recommended 'no change' to the assessment. You may remember that the VAAO survey revealed that approximately 30% of appeals to BOEs statewide result in a reduction in assessed value.
- 4) It is at this stage that the tax payer who has not found adequate resolution would proceed to the court system, where experts on both sides present the cases. The spokesperson for the McKee Company stated that, although they have facilities in several states around the country, the only state where they have had a problem with the appeals process is in Virginia. She did not indicate whether the company had appealed an assessment in a different state, or if so, what the differences were in their appeals processes that made them better. As a point of interest, tax laws themselves vary from state to state, making it extremely difficult to compare appeals processes across state lines.
- 5) After the presentation by the McKee representative, the attorney for that company gave a similar power point presentation. He indicated that the current appeals process in Virginia is having a negative effect on the recruiting and procurement of new businesses in the state. However he did not state how, why or to what extent they were being negatively impacted. In essence, he did not provide any empirical evidence to back up this statement. He indicated that small businesses could not afford to fight their assessments

in court, but he did not offer a better or more cost effective alternative to the current three levels of appeal. He also spoke of the ambiguity of the term 'manifest error', but offered no definitive language.

- 6) Following the power point presentation by the McKee attorney, an attorney from Williams Mullen made a power point presentation reinforcing the earlier statements regarding the prohibitive cost of going to court to appeal a tax assessment and the difficulty in proving 'manifest error'; again, never offering a more cost effective means of appealing assessment. He added that once in court, the 'burden of proof' (of value correctness) should lie with the assessor/commissioner. He stated in the power point that at least one state that he knew of, 'and probably several more', had reversed the 'burden of proof' rule and that it had significantly reduced the number of judiciary appeals. He did not, however, name the state, or the percentage of case load reduction, or whether there was an increase in overall assessments being adjusted due to the requirement that the assessor 'prove' the correctness of his/her valuation. . He indicated that many Assessing Officers are not licensed appraisers and therefore are not qualified to value properties (this statement rankled several of the assessors in attendance-I for one have been a certified real estate appraiser, licensed in three states since 1993- when states began requiring licensure for appraisers). He then made a suggestion that regulatory standards should not come from an organization such as the International Association of Assessing Officers (IAAO), but from an appraisal organization such as The Appraisal Institute: Section 58.1-3331 of the Code of Virginia provides in part:

(ii) testimony that explains the methodologies employed by the assessing officer to determine the assessed value of the property, and (iii) testimony that states that the assessed value was arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations such as the International Association of Assessing Officers [IAAO] and applicable Virginia law relating to valuation of property. Upon the conclusion of the presentation of the evidence of the assessing officer, the taxpayer shall have the burden of proof by a preponderance of the evidence to rebut such evidence presented by the assessing officer as otherwise provided in this section.

The attorney appears to be unaware that all standards regarding valuation practice, whether from the IAAO or the Appraisal Institute or any other organization are based in, and anchored by, the Uniform Standards of Professional Appraisal Practice-USPAP. Institutional standards are advisory in nature and only indicate when practices are in accordance with USPAP or when they are in violation. They do not regulate appraisers, they do not require any type of appraisal method, they do not recommend punitive or disciplinary measures. These matters are functions of the licensing body (the state) and the State Appraisal Board. Violations of the Appraisal Institute Standards would probably get you kicked out of the Appraisal Institute, but they wouldn't necessarily cause you to lose your license. The attorney further stated that 'anyone can be a member of the IAAO'. This is true, but the Appraisal Institute has non-appraiser members as well; it is designation by either of these organizations that requires the 'exacting professional standards' referred to in his power point. Standard 6 is the only USPAP standard pertaining to Mass Appraisal – both reporting and reviewing. This is the Standard that is detailed in the IAAO Standards. Following is the preamble to Standards adopted by the IAAO in July of 2017:

This standard replaces the January 2012 Standard on Mass Appraisal of Real Property and is a complete revision. The 2012 Standard on Mass Appraisal of Real Property was a partial revision that replaced the 2002 standard. The 2002 standard combined and replaced the 1983 Standard on the Application of the Three Approaches to Value in Mass Appraisal, the 1984 Standard on Mass Appraisal, and the 1988 Standard on Urban Land Valuation. IAAO assessment standards represent a consensus in the assessing profession and have been adopted by the Executive Board of IAAO. The objective of IAAO standards is to provide a systematic means by which concerned assessing officers can improve and standardize the

operation of their offices. IAAO standards are advisory in nature and the use of, or compliance with, such standards is purely voluntary. If any portion of these standards is found to be in conflict with the Uniform Standards of Professional Appraisal Practice (USPAP) or state laws, USPAP and state laws shall govern.

- 7) The next presenter was from the Small Business Commission (SBC). He reviewed a handout detailing the result of a survey performed by the SBC regarding assessment districts in the state for the year 2017. The total number of appeals were listed at each stage of the appeals process, and the percentage of appeals granted at each stage was calculated. His final point was that there were very few judicial appeals (18) because the cost to appeal is too high, that it should be easier and more affordable to go to court. This rationale ignores the goal of the current appeals process: to get the valuation correct, before ever going to court.
- 8) Following these presentations, Andrew McRoberts made a short statement (without power point) that he had worked on many real estate tax cases in the Commonwealth, and that in the vast majority of those cases the assessor was correct. A representative from the Virginia Municipal League spoke in support of Mr. McRoberts statement, relaying that the VML had studied several of the judiciary cases in recent years and had found incorrect assessments to be 'outliers' - few and far between. Ron Agnor, the assessor for the City of Virginia Beach stood and reiterated the findings of the survey of appeals conducted by the VAAO, to which several references have been made in this commentary.

Finally, to restate the conclusion of the survey presented at the meeting regarding real estate tax assessment processes (October 8, 2019): Our system is working—We have checks and balances—We have uniformity and equity. There are always going to be unique circumstances, but the processes in place ensure that those unique circumstances are limited. The current processes are there to protect the tax payers as well as municipalities by establishing a system that provides for values that are not only fair and equitable, but are made in the most efficient and cost effective manner.

**Comments from
The Commissioner of the Revenue for Augusta County**

House Joint Resolution No. 98
Jean Shrewsbury
Augusta County Commissioner of the Revenue

First Response to McKee Presentation

The statement that “Three of five Board of Equalization members stated publicly that they felt the assessment was too high” is misleading.

After McKee’s representative presented their request for an adjustment, the five BOE members discussed their thoughts and potential changes. When the chairperson called for a vote all five members voted unanimously for “no change”.

The statement that “Commissioner Jean Shrewsbury indicated can’t work with MFC until we file a petition to the court” is misrepresented.

After the BOE concluded their deliberations and voted unanimously for “no change”. The next question from MFC representative was “What is the next step in the appeal process. My response is and always has been that the taxpayer would need to file their appeal in the circuit court. Not so that I could discuss it with them further because I do not have the authority to change values provided through a general reassessment contracted out by County Administration. The code of Virginia allows for corrections of errors but not corrections of value.

Code of Virginia §58.1-3980 (A) paragraph two states

Sections 58.1-3980 through 58.1-3983 shall also apply to erroneous assessments of real estate if the error sought to be corrected in any case was made by the commissioner of the revenue or such other official to whom the application is made, or is due to a factual error made by others in connection with conducting general reassessments as provided in subsection C of § 58.1-3981.

There are three different ways that a taxpayer can appeal their real estate assessment.

1. Immediately after notices are mailed, taxpayers can meet with either the contractor who conducts the reassessment, or with a Board of Assessors to discuss any concerns they have with their reassessed values.
2. Circuit Court appointed Board of Equalization will conduct hearings to listen to any complaints and appeals of reassessed values.
3. Finally a taxpayer can appeal their case directly to the Circuit Court.

Overall, taxpayers bring their concerns to the first two levels of Board hearings for review and resolution

The number of cases which proceed to circuit court is miniscule and the system is adequate to handle the ones that advance to circuit court.

I do not think there is a need to change a system that is handling the vast majority of real property appeals closest to the taxpayer(s).

IT IS BLANTENLY INCORRECT TO SAY THAT COUNTIES/CITIES INCUR NO LEGAL FEES WHEN DEFENDING REAL PROPERTY APPEALS – EVEN WHEN IN HOUSE LEGAL STAFF ARE AVAILABLE THEY CANNOT HANDLE THE ADDITIONAL DEMANDS REQUIRED FOR A LARGE COMMERCIAL INDUSTRIAL APPEAL

Business Personal Property & Machinery & Tools

58.1-3503 (18). All tangible personal property employed in a trade or business other than that described in subdivisions 1 through 17, which shall be valued by means of a percentage or percentages of original cost.

In 2014 the Attorney General addressed the issue of “original total capitalized cost”. In AG Opinion 14 – 018 (6/26/2014) the Attorney General stated that the terms “original cost” and “original total capitalized cost” as used in subsection B of §58.1-3507, mean the original cost paid by the original purchaser of the property from the manufacturer or dealer and not the price paid the by current owner.

In 2016 the Hanover Circuit Court ruled in favor of Commissioner of the Revenue Harris, Hanover County by upholding the definition as stated.

In 2018 the same case was appealed to the Virginia Supreme Court which again ruled in favor of Commissioner of the Revenue Harris of Hanover County by upholding the definition as stated.

Starting with original cost supports the Virginia Constitution which requires fair and equitable taxation within each class of property.

Attempting to set up systems which allow some taxpayers to provide a different valuation method would impact the locality’s ability to maintain fair, equitable, and uniform taxation.

There is currently an appeal process in place for taxpayers and I do not support changing that valuation or appeal process.

**Comments from
The Virginia Municipal League**



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MAGAZINE

VIRGINIA TOWN & CITY

November 5, 2019

Mr. Craig M. Burns
Tax Commissioner
P.O. Box 1115
Richmond, VA 23218-1115

Dear Commissioner Burns:

VML appreciates the time and energy you and your staff have invested in the HJR 98 (2008 Session) study. We are impressed by the professional and even-handed approach taken by the Department of Taxation to ensure that all stakeholders were provided an opportunity to express and present their positions.

Based on VML's analysis of the resolution, we concluded that the study language implicitly raises two basic questions.

Are the property assessment and the assessment appeals processes broken?

The answer is no.

According to the 2017 Virginia Local Tax Rates published by the Weldon Cooper Center there were roughly 3.2 million taxable parcels. In the same year there were 20,777 real property assessment appeals, equaling 0.007 percent of the taxable universe in Virginia. Out of 20,777 appeals, 10,472 were resolved by the local Commissioner of the Revenue or local Assessor. Another 2,341 assessment appeals were addressed by local boards of equalization. That means at the administrative level roughly 62.0 percent of the appeals were resolved.

It is important to note that the Taxpayer has, at no cost, access to the local assessing body and the local board of equalization. In addition, local circuit court judges are charged with appointing members of the boards of equalization. Board members are not local government employees or appointed by a local governing body.

It is also interesting to note that in 2017, there were only 18 assessment appeals filed with the circuit courts of which seven were granted relief. That's 0.00022 percent of all the taxable parcels.

Is the court process prejudiced against the taxpayer?

The answer is no.

Some of the arguments asserted by the HJR 98 proponents focus on the supposed difficulty in pursuing court action. These critics assert that the legal challenges are too difficult to make and that legal costs are too high.

VML points out that the Virginia Supreme Court in the McKee Foods decision recognized that, in general, a taxing authority's assessment of a property's fair market value is presumed valid and a circuit court will reject and correct a tax authority's assessment only if the taxpayer demonstrates that the taxing authority committed manifest error or disregarded controlling evidence in making the assessment.

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However, the Virginia Supreme Court ruled that if the assessment was based on a single approach rather than the multiple approaches incorporating cost, income and sales and that the taxing authority failed to consider and properly reject the other approaches, it was not entitled a presumption of validity. In such instances, the taxpayer only has to show the assessment was erroneous and does not have to prove the taxing authority committed manifest error or disregarded controlling evidence in making its decision.

In other words, does the taxpayer have a case based on the template set out by the Justices? In any lawsuit it is the duty of the parties to measure the cost of litigating or coming to a financially sound resolution. The decision to appeal or not to appeal in tax cases is no different from any other disputed case where the parties can contest a circuit court judge's rendering.

VML also concluded that the assessment process like every other administrative process can be improved.

First, the Commonwealth can do more to share changing best management assessment practices with the Commissioners of the Revenue and local assessors. Webinars, seminars, workshops, publications, and conferences can be the forums used to educate and update the knowledge and practices of local taxing authorities. The General Assembly can appropriate funds for this educational purpose.

Secondly, the Supreme Court can offer more education and training for interested circuit court judges with the objective to provide a greater understanding of state tax law. The General Assembly can appropriate funds for this purpose as well.

Simply put our position is that legislative action to alter state statutes governing the assessment and appeals processes is neither necessary nor appropriate.

VML thanks you again for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to be 'MG' with a long horizontal stroke extending to the right.

Michelle Gowdy
Executive Director
Virginia Municipal League

Comments From
McKee Foods, Inc.

I had a few additional comments for your report if it is not too late.

- Need a clear hierarchy of decision process at County level for who can negotiate value—We appealed to Board of Equalization/Supervisors who said too high and no one other than Commissioner of Revenue appears to have authority to decide on value and she insisted on litigation.
- At county level, there is no incentive to avoid litigation and there is really no appeal process in place. As mentioned, 3 of 5 on Board of Equalization said value of MFC property was too high, but didn't have an idea as to what it should be. The circuit courts appoint members of Boards of Equalization, but most of them do not have knowledge or experience to serve. The general consensus among taxpayers and their representatives is that Boards of Equalization tend to rubberstamp whatever the Assessor suggests.
- Need something to incent counties to negotiate a settlement in lieu of litigation.
 - Change law on presumption of correctness.
 - Have county responsible for legal fees if value determined to be less.
 - Need rules that prohibit a tax assessor from increasing the value to previous levels once they have settled a tax dispute—whether by informal settlement or through the circuit court system. In Augusta County, the assessor settled with a tax payer and then raised the value back up causing the taxpayer to continue to incur costs to litigate.
- Need a less costly process between Board of Equalization and Circuit Court—such as a state mediation group.
- Need a tax subcommittee to develop guidelines to improve how tax disputes are to be handled in the state. This current process is likely to impact companies decisions to expand or locate in the county and state.

Thank you,

M. Leisa Cagle

VP & Controller

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