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## Small Business Commission

Executive Summary of 2019 Interim Activity

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Pursuant to the powers and duties authorized under § 30-183 of the Code of Virginia, the Virginia Small Business Commission (the Commission) held two meetings during the 2019 interim with Delegate Tony O. Wilt, chair, presiding. Materials presented at the meetings are accessible through the [\*Commission's website\*](#).

The Commission's meetings occurred on June 18, 2019, and October 8, 2019. Pursuant to HJR 687, which was enacted by the 2019 Session of the General Assembly, the Commission studied information and policy proposals related to the real estate tax assessment and appeals process. It did not recommend any changes to existing policy.

### June 18, 2019, Meeting

Connor Garstka, an Attorney for the Division of Legislative Services, reviewed past legislation on the real estate tax assessment and appeals process, including bills that would have modified existing burdens of proof, standards of proof, and legal presumptions. Most recently, in 2018, Delegate Mark L. Keam introduced legislation that would have made the standard of proof uniform and specified that a property owner did not have to prove "manifest error" or "disregard of controlling evidence." Both bills passed the House of Delegates unanimously and were continued to 2019 by the Senate Finance Committee. The bills were not taken up again during the 2019 legislative session.

Adam Melita, Deputy City Attorney for the City of Norfolk, described to the Commission how the assessment process and appeals of valuations work in practice. He noted that tax appeals tend to last for several months or more than a year, involving an extended discovery period and the use of experts on both sides.

Mr. Melita stated that the requirement that a property owner prove "manifest error" in a real estate tax case was first identified by the Supreme Court of Virginia in the 1933 case *Norfolk v. Snyder*. He indicated manifest error should not be considered part of the standard of proof because it is an element of the cause of action. If courts were prohibited from considering manifest error, they would have to make a *de novo* valuation of the property owner's real estate. In Mr. Melita's view, this would create an unfair system for taxpayers in general because taxpayers who could not afford to appeal to circuit court would be forced to accept an assessor's valuation, but taxpayers who could afford an appeal would be afforded a *tabula rasa* before the circuit court with no consideration given to the initial valuation.

During public comment, several citizens spoke about the "manifest error" element of a real estate tax appeal. Andrew McRoberts, a real estate tax practitioner, indicated he was not aware of any case in which a court has not required a taxpayer to prove manifest error. Brian Gordon, representing the Apartment and Office Building Association of Metropolitan Washington, stated that according to the speakers so far, he had heard three different versions of the "manifest error"

standard, so clearly there is a great deal of confusion surrounding the issue. Mr. Gordon believed that there are a limited number of tax appeals because the costs of appeal are so high and, with the "manifest error" standard, taxpayers "have the cards stacked against them."

Delegate Wilt indicated there would be a future Commission meeting, on a date to be announced, to continue discussing and researching the relevant issues. He explained he would like to offer the patron of HJR 687 (2019), Delegate Keam, the opportunity to provide testimony regarding the issue.

### **October 8, 2019, Meeting**

Delegate Keam, the patron of HJR 687, stated that the main policy problem before the Commission is artificially high property values creating unfair tax burdens for some taxpayers. He mentioned he had introduced substantive legislation in previous sessions that tried to fix part of the problem by standardizing language related to the burden of proof in real estate tax appeals, but this legislation did not pass. Therefore, he introduced HJR 687, which, as enacted by the General Assembly, directed the Commission to study options for streamlining the real estate tax assessment and appeals process.

In Delegate Keam's view, the reason the system is not working now is that if a small business receives a high assessment, it faces exorbitantly high appeal costs: it must hire lawyers, an independent auditor, and other experts in order to make its case in court. For most businesses, an appeal is not cost-effective. Since the Constitution of Virginia requires property to be taxed according to uniform processes and at fair market value, the General Assembly has a constitutional obligation to work to eliminate these unfairnesses and nonuniform assessment practices that exist in the current system. Delegate Keam introduced multiple real estate practitioners to speak to the issue.

Delegate Christopher T. Head asked whether defining "fair market value" in the Code of Virginia would address some of the problems he described. David Chitlik, one of the real estate practitioners, answered that this would only solve part of the problem, since there still would be disputes between assessors and taxpayers over how that definition should be applied. Leopoldo Martinez asked how much Virginia would save if it were to establish a tax court. Mr. Chitlik responded that savings were not the point; instead the issue was fairness to taxpayers who currently are overpaying their taxes due to prohibitively high litigation costs.

Delegate Keam concluded his presentation by recommending that the Commission support legislation that would establish a tax docket, which would allow practitioners and judges to specialize in real estate tax law, and by doing so would help reduce legal fees. He emphasized that Article X, Section 1 of the Constitution of Virginia requires property to be assessed uniformly and at fair market value, and that the current system was not accomplishing that.

Fred Nicely and Pat Reynolds, Senior Tax Counsel for the Council on State Taxation, presented on national real estate tax assessment and appeals processes. They explained how they evaluated Virginia compared with other states. Under the transparency criteria, Virginia could improve its ranking by putting in place a centralized website, instead of directing taxpayers to local websites for real estate tax information. In terms of consistency, it could improve its score by requiring standardized forms to be used among localities. However, Virginia succeeded on the consistency front by requiring assessors to undergo training and obtain certification. For procedural fairness, Virginia received a lower ranking because the burden is on the taxpayer to overturn the assessor's



valuation based on the preponderance of the evidence. In the view of their organization, the burden of proof should be equal between the government and the taxpayer, because assessors generally have more information available on local property values and thus already have an advantage over the taxpayer.

The Commission members discussed whether there would be a formal recommendation from the Commission on HJR 687. Senator Bryce E. Reeves addressed Delegate Keam's idea of establishing a docket specific to tax cases within the Virginia court system. He mentioned that several years ago, he worked with other members of the General Assembly to establish a specialty docket, the Veterans Treatment Docket. He observed that courts also are under financial constraints, and creating a docket can be costly to them in terms of time and resources. Therefore, he recommended that Delegate Keam contact Chief Justice Donald Lemons to discuss the idea.

Senator Frank M. Ruff, Jr., suggested that courts could, without making any changes to statutory law and setting up a specialty docket, decide to have certain judges specialize in tax issues. Delegate R. Lee Ware stated that, based on the totality of the evidence to come before the Commission over the course of the study, the problem does not seem like one that would merit a broadly sweeping solution like creating a tax court or establishing a specialty docket. Senator George L. Barker agreed and stated his view that the system mostly works well: while there are some outlier cases, there are not fundamental problems with the assessment and appeals process. Leopoldo Martinez stated that a new court system is an overly ambitious solution for the scope of the problem. However, he agreed with Delegate Keam that there are practical steps that could be taken to improve negotiation and fairness between taxpayers and assessors.

Delegate Wilt asked whether any Commission member wished to offer a formal recommendation on any of the policy ideas the Commission had considered over the course of studying HJR 687. Hearing none, the Commission concluded its work on the study by not making a recommendation.

### **Referred Legislation and Policy Proposals**

HJR 687 directed the Commission to study models and streamlined procedures for appealing tax assessment decisions. The Commission heard presentations and public comment from local government officials, property ownership and management associations, the judicial branch, the Department of Taxation, and local tax administrators. It invited a nonprofit organization to present research on the tax court systems of other states, and it considered a variety of policy proposals for streamlining the appeals process.

The Commission did not recommend any changes to the current statutes that govern the real estate tax assessment and appeals process. Its findings consist of the research and comments of the Commission members over the course of its study; therefore, this document concludes its final report of the study.



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For more information, see the [\*Commission's website\*](#) or contact the Division of Legislative Services staff:

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