

9

LOCAL TAXATION

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9-1 SCOPE

This chapter contains a comprehensive discussion of local taxation, including underlying state and federal constitutional principles and limitations to such taxation. This chapter will cover the subjects of property and other local taxes, including miscellaneous local taxes and tax exemptions. Local powers to collect delinquent taxes and levy on property are discussed in [Chapter 10, Collection of Delinquent Taxes](#).

9-2 GENERAL CONSIDERATIONS

9-2.01 Power to Tax

The power of taxation is fundamental to local government. *Williams v. City of Richmond*, 177 Va. 477, 14 S.E.2d 287 (1941); *Fallon Florist, Inc. v. City of Roanoke*, 190 Va. 564, 58 S.E.2d 316 (1950). The power to tax in Virginia is vested in the General Assembly by the Constitution of Virginia. *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 657 S.E.2d 71 (2008). Virginia localities have no power to tax unless it is plainly conferred by the General Assembly, and laws conferring such powers must be strictly construed against the government and in favor of the citizen. *See, e.g., Hampton Nissan Ltd. P'ship v. City of Hampton*, 251 Va. 100, 466 S.E.2d 95 (1996) (city unable to identify any statute authorizing it to collect overpayments of license taxes on motor vehicles paid by purchasers to dealers; no power to tax can be implied (ruling contrary to 1992 Op. Va. Att'y Gen. 163, which found authority to assess such tax overpayments)); *City of Winchester v. Am. Woodmark Corp.*, 250 Va. 451, 464 S.E.2d 148 (1995) (furniture, fixtures, and office equipment in company headquarters are capital used in manufacturing within the meaning of applicable statute; not subject to city's personal property tax because statute does not require that items be used directly in a manufacturing process (result later codified in Va. Code § 58.1-1101)); *City of Richmond v. Valentine*, 203 Va. 642, 125 S.E.2d 854 (1962) (ordinance requiring auctioneers to pay license tax measured by gross receipts of their business does not authorize inclusion of receipts from auctioneer's appraisal business).

The General Assembly provides the framework, through statutory provisions, for local taxing powers, subject to mandates and limitations in the Constitution of Virginia. In particular, Article VII, section 2, and Article X of the Virginia Constitution specify the General Assembly's authority to empower local governing bodies to levy local taxes. *Wise Cnty. Bd. of Sup'rs v. Wilson*, 250 Va. 482, 463 S.E.2d 650 (1995). But note that while Article VII, section 2 of the Virginia Constitution authorizes the General Assembly to delegate taxing

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power to counties, cities, towns, and regional governments, it does not empower the General Assembly to delegate such power to other entities if they are composed of persons not elected for the purpose of imposing those taxes. *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 657 S.E.2d 71 (2008) (statutory delegation of complete discretion whether to impose certain taxes to governing board of Northern Virginia Transportation Authority, composed of chief elected official of nine localities, ex officio, plus two members of House of Delegates, one Senator, and two citizens appointed by Governor, held to be unconstitutional). Local taxing powers also are subject to federal constitutional limitations. Federal and state constitutional limitations are discussed below in sections 9-3 and 9-4.

9-2.01(a) Legislative Nature of Local Taxing Power

Levying local taxes is a legislative function and thus may be exercised only by the governing body of a local taxing jurisdiction. Va. Const. art. VII, § 7 (no ordinance or resolution imposing taxes shall be passed except by recorded affirmative vote of majority of full membership of the governing body); Va. Code § 58.1-3001 (governing body of each county fixes amount of county and local district taxes each year); Va. Code § 58.1-3005 (city and town councils order imposition of taxes in such amounts as they deem necessary). The legislative character of local taxing authority was discussed in *Wise County Board of Supervisors v. Wilson*, 250 Va. 482, 463 S.E.2d 650 (1995) (board of supervisors has sole authority to set assessment ratio for computing merchants' capital tax).

The Attorney General has concluded that a local governing body lacks the authority to compromise claims or suits relating to legally assessed taxes absent specific statutory authority. 1996 Op. Va. Att'y Gen. 197. But note Va. Code § 58.1-3994, which allows offers in compromise with respect to local taxes under some circumstances, as discussed in section 9-9.01. Furthermore, a locality may enter an agreement to delay collection because such an agreement is not a refusal to collect or an exemption. *City of Richmond v. Tobacco Row Property L.P.*, 35 Va. Cir. 369 (City of Richmond 1995).

9-2.01(b) Double Taxation

Illegal double taxation requires the same person or the same subject of taxation to contribute directly twice to the same burden, while other subjects of taxation in the same class are required to contribute only once. *Peninsula Transit Corp. v. Commonwealth*, 165 Va. 614, 183 S.E. 446 (1935). Unless both taxes are levied upon the same property within the same jurisdiction, no double taxation exists in a legal sense. *Hope Natural Gas Co. v. Hall*, 135 S.E. 582 (W.V. 1926), *aff'd*, 274 U.S. 284, 47 S. Ct. 639 (1927). A license tax on a business and an ad valorem tax on property used in the business is not double taxation because the subject of each tax is different. *Id.*; *Postal Tel. Cable Co. v. City of Norfolk*, 118 Va. 455, 87 S.E. 555 (1916).

9-2.01(c) Retroactive Application

A tax may be applied retroactively if the taxpayer had or should have had a reasonable expectation that the tax would be imposed on the transaction or condition in question. *Colonial Pipeline Co. v. Commonwealth*, 206 Va. 517, 145 S.E.2d 227 (1965).

9-2.02 Key Definitions and Distinctions

Definitions for purposes of Title 58.1 of the Code of Virginia, entitled "Taxation," appear in Va. Code § 58.1-1 as well as in other specific statutory provisions throughout the Title.

9-2.02(a) "Taxes" and "Levies"

As used in Title 58.1 of the Code of Virginia, the terms are interchangeable. The terms do not include certain assessments for local improvements provided for in Title 15.2 of the Code of Virginia, as set forth in Va. Code § 58.1-1. A tax is an enforced contribution imposed by government for governmental purposes or public needs. It is not founded on contract or agreement. *United States v. LaFranca*, 282 U.S. 568, 51 S. Ct. 278 (1931); *United States v. City of Huntington*, 999 F.2d 71 (4th Cir. 1993).

9-2.02(b) “Fee” Distinguished

A fee is imposed for the purpose of regulation, with the enabling statute generally requiring compliance with certain conditions. In contrast, a tax is exacted primarily for the purpose of raising revenue. *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 657 S.E.2d 71 (2008); *Chambers v. Higgins*, 169 Va. 345, 193 S.E. 531 (1938). The test for a fee is a reasonable correlation between a benefit conferred and the cost exacted. *Mt. View P’ship v. City of Clifton Forge*, 256 Va. 304, 504 S.E.2d 371 (1998) (refuse collection fees that generated surplus loaned to general fund were not a tax). For fee classifications to be reasonable, they must be distinct or different from each other. *Estes Funeral Home v. Adkins*, 266 Va. 297, 586 S.E.2d 162 (2003); *see also Tidewater Ass’n of Homebuilders, Inc. v. City of Va. Beach*, 241 Va. 114, 400 S.E.2d 523 (1991) (fees to pay the cost of the city’s water supply project were not assessed against property and thus were not a tax). Note that by applying this distinction to the flat business license fee authorized by Va. Code § 58.1-3703, that “fee” constitutes a tax. *See also Fairfax Cnty. Water Auth. v. City of Falls Church*, 80 Va. Cir. 1 (Fairfax Cnty. 2010) (revenue from water service “fee” charged to non-residents that is transferred to locality’s general fund as surplus profit and used to provide other services to locality’s residents is an unconstitutional tax on non-residents; “reasonable correlation” requirement applies to extraterritorial service).

The Virginia Supreme Court addressed the “tax versus fee” question in *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 749 S.E.2d 176 (2013). The relevant issue was whether legislation authorizing an agreement that permitted tolls on two existing tunnels under the Elizabeth River between Portsmouth and Norfolk was unconstitutional because some of the toll revenue would be used to pay a portion of the cost of a new third tunnel. The Supreme Court ruled that the tolls would be permissible user fees and not taxes because (1) the toll road users pay the tolls in exchange for a particularized benefit not shared by the general public, (2) drivers are not compelled by the government to use the tolled facilities and therefore to pay the tolls or accept the benefits of the tunnel project, and (3) the tolls are collected solely to fund the tunnel project, not to raise general revenues. In doing so, the Court found that the three tunnels were properly considered part of a single unified project. The Fourth Circuit reached a similar conclusion with regard to tolls on the Dulles Toll Road being used to pay part of the cost to construct a Metrorail line to Dulles Airport. *Corr v. Metro. Wash. Airports Auth.*, 740 F.3d 295 (4th Cir. 2014).

9-2.02(c) “License Tax”

A “license tax” refers to a tax payable for the privilege of engaging in or carrying on a business activity in a particular business location. It is not an income tax, although the amount of tax payable may be measured by the amount of business transacted or the earnings therefrom. *See Commonwealth v. Werth*, 116 Va. 604, 82 S.E. 695 (1914). It is not a direct tax on property subject to the uniformity provisions of Va. Const. art. X, § 1, but rather a privilege tax. *Town of Ashland v. Bd. of Sup’rs of Hanover Cnty.*, 202 Va. 409, 117 S.E.2d 679 (1961); *Hunton v. Commonwealth*, 166 Va. 229, 183 S.E. 873 (1936).

9-2.02(d) “Property Tax”

Generally speaking, a property tax is a direct tax based on the value of the thing being taxed, i.e., an ad valorem tax. *See, e.g., Hunton v. Commonwealth*, 166 Va. 229, 183 S.E. 873 (1936); *Pocahontas Consol. Collieries Co. v. Commonwealth*, 113 Va. 108, 73 S.E. 446 (1912).

9-2.03 Secrecy of Tax Information

Virginia Code § 58.1-3 provides for the secrecy of tax information acquired by local revenue officers, permitting the disclosure of such information only as specified therein. *But see* Va. Code § 58.1-3122.3 (exception for commissioners of the revenue providing certain tax information to the Virginia Economic Development Partnership Authority (VEDP)). *See also Lee Gardens Arlington L.P. v. Arlington Cnty. Bd.*, 250 Va. 534, 463 S.E.2d 646 (1995) (per the statute, income and expense information taxpayers provide to tax officials is

confidential); 1999 Op. Va. Att’y Gen. 185 (confidential tax information may be provided “in the line of duty” to collector of delinquent taxes); 1999 Op. Va. Att’y Gen. 211 (personal property information obtained but not required to be entered in personal property books is confidential); 1998 Op. Va. Att’y Gen. 123 (subpoena duces tecum not a proper judicial order so as to authorize disclosure of confidential tax information).

Local revenue officials may assert a qualified privilege in response to requests to disclose confidential tax information to the federal government in response to a federal grand jury subpoena, administrative subpoena, or summons issued pursuant to § 7602 of the Internal Revenue Code, and then forward the information in a sealed envelope with instructions that it not be opened until there is a judicial order therefor consistent with federal law. 2003 Op. Va. Att’y Gen. 161.

Virginia Code § 58.1-3017 provides that Social Security numbers may be required by tax officials for local taxation purposes, but they must be treated as confidential tax information. See *also* 1999 Op. Va. Att’y Gen. 193 (city council does not have the authority to acquire such information); *cf.* Va. Code § 2.2-3808.

When a taxpayer applies to a court to correct an assessment, the court, prior to the release of any information deemed confidential under Va. Code § 58.1-3, is required to enter an order limiting the disclosure of such information to those persons and for such uses as necessary in connection with the assessment review. Va. Code § 58.1-3984.

9-3 FEDERAL CONSTITUTIONAL PROVISIONS

Several provisions of the United States Constitution limit local government tax authority. These provisions are invoked in claims filed in both the federal and state courts, and it is important to be familiar with them. The Commerce Clause and the First and Fourteenth Amendments to the U.S. Constitution are most frequently relied on to attack local taxes. Some challenges have also relied on the Supremacy Clause or the related doctrine of intergovernmental tax immunity.

9-3.01 Commerce Clause

Article I, section 8, clause 3 of the United States Constitution vests in Congress the power to “regulate Commerce . . . among the several States.” The Commerce Clause is recognized as a limitation on state power, prohibiting states from interfering with interstate commerce. The Commerce Clause, however, does not eclipse the reserved power of the states to tax companies doing interstate business. *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 97 S. Ct. 599 (1977). The U.S. Supreme Court has made clear that “[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.” *Gen. Motors Corp. v. State of Washington*, 377 U.S. 436, 84 S. Ct. 1564 (1964), *overruled on other grounds*, *Tyler Pipe Indus., Inc. v. Washington State Dep’t of Revenue*, 483 U.S. 232, 107 S. Ct. 2810 (1987) (quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S. Ct. 546 (1938)). Conversely, however, Congress has the authority to exempt businesses from state taxation if there is sufficient evidence that such taxation will burden interstate commerce. *Montgomery Cnty. v. Fannie Mae*, 740 F.3d 914 (4th Cir. 2014) (Congress can exempt Fannie Mae and Freddie Mac from state recordation taxes).

A state may levy a tax on the property of a corporation engaged in interstate commerce when that property is within the taxing state. *Old Dominion Steamship Co. v. State of Virginia*, 198 U.S. 299, 25 S. Ct. 686 (1905), is an early statement of this rule. But if property is used both within and without the state, the tax must be fairly apportioned to its use within the state to survive Commerce Clause review. Under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076 (1977), a tax withstands Commerce Clause review if it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly

related to the services provided by the state. As explained in *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582 (1989), the fourth factor focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue. That case noted that a "taxpayer's receipt of police and fire protection, the use of public roads and mass transit, and the other advantages of civilized society satisfied the requirement that the tax be fairly related to benefits provided by the State to the taxpayer." *Id.*

In *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S. Ct. 1331 (1995), the Supreme Court held that a sales tax based on the total gross receipts of a bus transportation company, whose services included interstate performance, is valid under the Commerce Clause. Although recognizing that sales taxes and gross receipts taxes have the same economic significance, the Court distinguished between the sales tax and gross receipts taxes on the identical type of services prohibited by the Court in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 68 S. Ct. 1260 (1948), on the ground that gross receipts taxes are imposed on the sellers of interstate services, who are exposed to a risk of multiple taxation, whereas sales taxes are imposed on the buyers (albeit collected and paid by the seller), who are not subject to double taxation.

Overruling decades of precedent, the Supreme Court in *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 138 S. Ct. 2080 (2018), found that a physical presence in the state is not necessary to establish a substantial nexus with the state in order to require the collection and remittance of sales tax by a remote seller, as previously held in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904 (1992). Rather, the Court held that the nexus is clearly sufficient based on both the economic and virtual contacts remote sellers have with the states. Thus, out-of-state sellers can be required to collect and remit sales tax to the consumer's state.

Ryder Truck Rental v. County of Chesterfield, 248 Va. 575, 449 S.E.2d 813 (1994), addressed Commerce Clause concerns over the personal property taxation of leased vehicles operated outside the state. The Virginia Supreme Court held that Ryder had failed to show a substantial nexus with other jurisdictions to establish a risk of multiple taxation and thus was not entitled to apportionment. Compare *McLane Co. v. Stafford County*, 45 Va. Cir. 180 (Stafford Cnty. 1998), in which the court held that apportionment was required when the company established a sufficient nexus with other jurisdictions by proving its vehicles traveled regular, scheduled routes outside Virginia.

In *City of Winchester v. American Woodmark Corp.*, 252 Va. 98, 471 S.E.2d 495 (1996), the Virginia Supreme Court held that the Commerce Clause was violated when the city assessed business, professional, and occupational license (BPOL) taxes against 100 percent of American Woodmark's gross receipts. American Woodmark had its headquarters in the city and operated facilities in 13 states. The Court held that "common sense" compelled the conclusion that the out-of-state facilities were revenue producing and therefore taxation of 100 percent of gross receipts was out of proportion and had no rational relation to the business transactions in the city. The Court distinguished the case from *Short Brothers v. Arlington County*, 244 Va. 520, 423 S.E.2d 172 (1992), which held that a gross receipts tax on sales and lease activity outside the locality was taxable if the headquarters was within the locality, on the basis that the plaintiffs in *Short Brothers* failed to show a legitimate basis on which to allocate gross receipts to another taxing jurisdiction.

Another Supreme Court decision in the Commerce Clause area is *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S. Ct. 2009 (1992), in which the Court held that an additional disposal fee imposed by Alabama on hazardous waste generated outside the state and disposed of at a commercial facility in the state discriminated against interstate commerce in violation of the Commerce Clause. The Court stated that Alabama's concern

over the volume of hazardous waste within the state was not a legitimate local purpose absent evidence that out-of-state waste was more dangerous than that generated within.

The Court suggested in *Hunt* that a discriminatory surcharge might be justified as a “compensatory tax” necessary to make out-of-state shippers of waste pay their fair share of the costs imposed on a state by the disposal of their waste in the state. However, in *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 114 S. Ct. 1345 (1994), the Court indicated that a “compensatory tax” would be hard to justify. Oregon claimed that its surcharge was based on the cost to the state for the disposal of out-of-state waste and specified the costs on which the surcharge was based. The Supreme Court ruled that to justify a “compensatory tax,” a state must identify a specific charge on intrastate commerce equal to the out-of-state surcharge. The assertion that intrastate users pay their share through general taxation is insufficient. See also *S. Cent. Bell Tel. Co. v. Ala.*, 526 U.S. 160, 119 S. Ct. 1180 (1999) (foreign franchise tax unconstitutional under Commerce Clause; not complementary because foreign and domestic taxes were not roughly approximate); cf. *Alabama Dep’t of Revenue v. CSX Transp., Inc.*, 575 U.S. 21, 135 S. Ct. 1136 (2015) (negative dormant Commerce Clause case; “There is simply no discrimination when there are roughly comparable taxes.”)

In *Associated Industries v. Lohman*, 511 U.S. 641, 114 S. Ct. 1815 (1994), the Supreme Court in part upheld a challenge to a 1.5 percent compensatory state use tax on the privilege of storing, using, or consuming any article of personal property purchased outside Missouri that the state imposed to match a supplemental sales tax that local governments could impose. The Court applied a strict rule of equality, requiring a relation of the assessed use tax to the amount of supplemental sales tax imposed by each political subdivision, rather than to a statewide average of such taxes. Thus, the Commerce Clause was violated in any locality where the use tax exceeded the supplemental sales tax.

Waste disposal and the Commerce Clause again attracted the Supreme Court’s attention in *C & A Carbone Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S. Ct. 1677 (1994). A local ordinance required that all non-hazardous solid waste within the town be deposited at a private central transfer station set up to sort recyclables. The tipping fee was greater than private market rates. The town guaranteed a minimum waste flow and had the right to purchase the facility for one dollar in five years. Other companies in town, while still permitted to receive and sort waste, were required to bring their non-recyclable residue to the transfer station and pay the tipping fee. The Court held the ordinance affected the interstate commerce of “servicing” waste. The ordinance discriminated against interstate commerce in favor of a local business and was therefore per se invalid under the Commerce Clause.

In another important Commerce Clause decision, *Dennis v. Higgins*, 498 U.S. 439, 111 S. Ct. 865 (1991), the Court held that suits claiming a violation of the Commerce Clause could be brought under 42 U.S.C. § 1983. The Court also noted that individuals injured by state action violating the Commerce Clause could sue and obtain injunctive and declaratory relief, citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990). In *McKesson*, the Court also ruled that taxpayers who are required to pay taxes before challenging a state tax later found to violate due process and the Commerce Clause are entitled to retrospective relief “that will cure any unconstitutional discrimination against interstate commerce during the contested tax period.” *Id.*

In *Fulton Corp. v. Faulkner*, 516 U.S. 325, 116 S. Ct. 848 (1996), the Court ruled that North Carolina’s intangibles tax facially discriminated against interstate commerce under the dormant Commerce Clause by taxing corporate stock of state residents in a manner inversely proportional to a corporation’s exposure to state income tax. The Court has also held that the dormant Commerce Clause applies to the nonprofit sector and to real estate taxation, finding unconstitutional a real estate and property tax exemption for

charitable institutions incorporated in the state which did not apply to such institutions operated principally for the benefit of nonresidents. *Camps Newfound/Owatonna Inc. v. Town of Harrison*, 520 U.S. 564, 117 S. Ct. 1590 (1997). The Court held in *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 135 S. Ct. 1787 (2015), that the dormant Commerce Clause principles apply to the taxation of individuals, finding that a state's tax on out-of-state income without giving full credit for income tax paid to the state in which the income was earned fails the "internal consistency test" and thus violates the dormant Commerce Clause. See *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, 588 U.S. ___, 139 S. Ct. 2449 (2019), for an extensive discussion of the dormant Commerce Clause. See also *Corporate Exec. Board Co. v. Dep't of Taxation*, 297 Va. 57, 822 S.E.2d 809 (2019) (discussing "external consistency test" for apportionment of state income tax between states).

In *Department of Revenue v. Davis*, 553 U.S. 328, 128 S. Ct. 1801 (2008), the Court held that a state income tax structure that exempts interest on bonds issued by that state or its political subdivisions but that taxes interest income on bonds of other states and their subdivisions does not violate the dormant Commerce Clause. The opinion of the Court and the various concurring and dissenting opinions include a reasonably comprehensive review of the Court's Commerce Clause jurisprudence and present a pointed debate on the scope of that constitutional provision.

9-3.02 Due Process Clause

The Due Process Clause of the Fourteenth Amendment prohibits any state from depriving "any person of . . . property without due process of law." One early Virginia case held that the Due Process Clause required a special assessment statute to provide an opportunity for the taxpayer to be heard and to contest the assessment before it became final. *Violett v. City Council of the City of Alexandria*, 92 Va. 561, 23 S.E. 909 (1896). Today, Va. Code § 58.1-3984 allows an aggrieved taxpayer to challenge local taxes after they become final. A modern state-level requirement to pay taxes before challenging them, not applicable at the local level, was held constitutional in *Kaufman v. Department of Taxation*, 21 Va. Cir. 437 (City of Richmond 1990).

Taxpayers also have cited the Due Process Clause to challenge taxes they considered to be excessive or discriminatory. For example, in *Rogers v. Miller*, 401 F. Supp. 826 (E.D. Va. 1975), a massage parlor tax of \$5,000 was found not to be an unreasonable or arbitrary impairment of the right to conduct a legitimate business, and thus not to violate the Due Process Clause. In addition to invoking the Commerce Clause, taxpayers have relied on the Due Process Clause to challenge taxation of income generated in interstate commerce. The Supreme Court has held that the Due Process Clause imposes two requirements: (1) a "minimal connection" between the interstate activities and the taxing state, and (2) a rational relationship between the income attributed to the state and the intrastate value of the enterprise. *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 100 S. Ct. 1223 (1980).

For a Virginia Supreme Court opinion applying the Due Process Clause to a tax challenge, see *Corning Glass Works v. Virginia Department of Taxation*, 241 Va. 353, 402 S.E.2d 35 (1991).

9-3.03 Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment prohibits any state from denying "to any person within its jurisdiction the equal protection of the laws." To state an equal protection violation based on a tax statute, the taxpayer must show that the tax bears unequally on persons or property of the same class. But the U.S. Supreme Court has consistently ruled that government retains broad power to classify property, and to tax different property differently. See, e.g., *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S. Ct. 1001 (1973) (state has "widest possible latitude" to establish different tax

classifications; personal property tax on corporations but not individuals does not violate equal protection).

The Supreme Court has emphasized that the Equal Protection Clause “imposes no iron rule of equality” but “there is a point beyond which the [s]tate cannot go [It] must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.” *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S. Ct. 437 (1959) (and cases cited therein) (citations omitted); see also *Armour v. City of Indianapolis*, 566 U.S. 673, 132 S. Ct. 2073 (2012) (administrative considerations can justify a tax-related distinction).

The Virginia Supreme Court has recognized the generosity of this interpretation, called the “rational basis test,” and restated it in a case concerning a local occupation tax classification:

Perhaps in no other constitutionally-regulated area does the Constitution of the United States, as interpreted by the Supreme Court, give more latitude to state legislative bodies than in the area of taxpayer-classification. ‘The power of the State to classify according to occupation for the purpose of taxation is broad. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the differences in classification, as to be wholly arbitrary.’

City of Richmond v. Fary, 210 Va. 338, 171 S.E.2d 257 (1969) (quoting *Walters v. City of St. Louis*, 347 U.S. 231, 74 S. Ct. 505 (1954)).

One commentator observed over forty years ago that the United States Supreme Court only rarely had declared a tax classification unconstitutional unless it also found that the classification infringed on some other constitutionally favored principle, such as interstate commerce or freedom of speech. 2 A. E. Dick Howard, *Commentaries on the Constitution of Virginia* 1043-44 (1974); see, e.g., *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S. Ct. 1676 (1985) (state tax on out-of-state insurers at higher rate than on in-state violated equal protection); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 69 S. Ct. 1291 (1949) (taxing certain accounts receivable owned by nonresidents of state but exempting those owned by residents violated equal protection). Note that one of the reasons the Ohio tax classification attacked in *Allied Stores* was upheld by the Supreme Court was that it actually discriminated against Ohio residents and thus did not create the kind of burden on interstate commerce that might have resulted if, instead, it had discriminated in their favor and against the residents of other states. *Allied Stores*, *supra* (Brennan, J., concurring).

Subsequently, the Supreme Court has articulated this distinction explicitly, indicating, for example, that while the rational basis test still controls in the usual circumstances, a tax classification affecting a fundamental constitutional value such as interstate commerce should be judged on a strict scrutiny standard. See, e.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 116 S. Ct. 848 (1996); see also *Fitzgerald v. Racing Ass’n*, 539 U.S. 103, 123 S. Ct. 2156 (2003) (held that rational basis standard applied after noting that tax classification at issue did not distinguish on basis of race or gender, between in-state and out-of-state businesses, or between longtime residents and more recent arrivals); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 105 S. Ct. 2862 (1985) (tax exemption for Vietnam veterans residing in state before specified date violated equal protection). But see *Nordlinger v. Hahn*, 505 U.S. 1, 112 S. Ct. 2326 (1992) (tax system based on property

value at time of acquisition rather than on current value did not violate equal protection, despite substantial disproportionate effect on more recent arrivals).

Accordingly, as applied to property taxation in Virginia, the Equal Protection Clause seems to add little that is not already covered by Virginia's uniformity requirement, Va. Const. art. X, § 1. Both rules require tax classifications to be reasonable, but as applied, both defer strongly to the legislature's power to classify. Thus, a property tax distinction that violates the uniformity requirement likely also would run afoul of the Equal Protection Clause. Compare, e.g., *Perkins v. Albemarle Cnty.*, 214 Va. 240, 198 S.E.2d 626, modified and aff'd on reh'g, 214 Va. 416, 200 S.E.2d 566 (1973) (reassessment of only portion of county, not selected based on evidence of disproportionate change in value, violated uniformity requirement), with *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 109 S. Ct. 633 (1989) (practice of assessing recently purchased real property based on actual sale prices but making only minor modifications to assessments of other properties violated equal protection because inadequate adjustments for unsold properties amounted to intentional systematic undervaluation); see also *FFW Enters. v. Fairfax County*, 280 Va. 583, 701 S.E.2d 795 (2010) (LGA filed amicus brief) (finding statutes imposing various taxes on commercial and industrial real properties did not violate uniformity requirement).

Sometimes the Virginia Supreme Court has not even bothered with a separate uniformity analysis when a claim of unlawful classification has been made but instead has relied on rules and precedents applicable to equal protection claims, thus strongly implying general recognition by both the litigants and the Court that resolution of the equal protection claim ipso facto resolves any potential uniformity issues. See, e.g., *Bd. of Dirs. of the Tuckahoe Ass'n v. City of Richmond*, 257 Va. 110, 510 S.E.2d 238 (1999); *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 247 Va. 64, 439 S.E.2d 366 (1994) (city-imposed license tax on a television cable company with a non-exclusive franchise did not violate equal protection clause because transmission and programming differences between cable company and satellite master antenna television systems supported a rational basis for different tax treatment).

Other Virginia Supreme Court cases on the Equal Protection Clause include *Town of Ashland v. Board of Supervisors*, 202 Va. 409, 117 S.E.2d 679 (1961) (clause prohibits inequality "occasioned by clearly arbitrary action especially such as is attributable to hostile discrimination against particular persons or classes") (citing *Caskey Baking Co. v. Commonwealth*, 176 Va. 170, 10 S.E.2d 535 (1940), aff'd, 313 U.S. 117, 61 S. Ct. 881 (1941)); *Langston v. City of Danville*, 189 Va. 603, 54 S.E.2d 101 (1949); *Estes Funeral Home v. Adkins*, 266 Va. 297, 586 S.E.2d 162 (2003) (classifications between households and businesses and among various businesses violated equal protection because there was no evidence to show that the classifications bore a reasonable relation to a legitimate governmental objective).

9-3.04 First Amendment

The United States Supreme Court has considered whether state and local tax schemes violate the guarantee of freedom of the press or the Free Exercise Clause of the First Amendment to the federal Constitution. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722 (1987), the Court held that a state sales tax that taxed general interest magazines but exempted newspapers and religious, professional, trade, and sports journals violates the First Amendment. In *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438 (1991), the Court considered a question left open in *Arkansas Writers' Project*, namely, whether the First Amendment prevents a state from imposing its sales tax on selected segments of the media. The Court upheld the tax, reasoning that the First Amendment was not implicated because the tax was not directed at suppressing particular ideas.

In *Cox Cable Hampton Roads v. City of Norfolk*, 242 Va. 394, 410 S.E.2d 652 (1991), the Virginia Supreme Court held that a city-imposed license tax on a television cable

company with a non-exclusive franchise did not violate the First Amendment because the tax was of general applicability and not content based. The Court remanded the case for consideration of an Equal Protection Clause claim. *See also Chesterfield Cablevision v. Cnty. of Chesterfield*, 241 Va. 252, 401 S.E.2d 678 (1991) (county tax on cable operator did not violate First Amendment).

9-3.05 Import-Export Clause

Article I, section 10 of the U.S. Constitution provides that “[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.” In *Dulles Duty Free v. County of Loudoun*, 294 Va. 9, 803 S.E.2d 54 (2017), the taxpayer challenged as violative of the Import-Export Clause the imposition of BPOL taxes on duty free merchandise sold to international travelers at Dulles Airport. Extensively discussing the jurisprudence of the Clause, the Court held that BPOL taxes on gross receipts of such sales are taxes that fall directly on “export goods in transit” and thus violate the import-export clause.

9-3.06 Supremacy Clause

Article VI of the U.S. Constitution provides that the “Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.” In *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), the Court struck down a Maryland tax on notes of the Bank of the United States as a violation of the Supremacy Clause. Since that time, the Court has relied frequently on this clause, and the related doctrine of intergovernmental tax immunity, to rule that a state or local tax may not discriminate against the United States or those with whom it deals. *See, e.g., Moses Lake Homes, Inc. v. Grant Cnty.*, 365 U.S. 744, 81 S. Ct. 870 (1961). Nevertheless, an independent contractor rendering services for the federal government can be subject to state and local taxation, even if the United States shoulders the entire economic burden of the tax, *United States v. New Mexico*, 455 U.S. 720, 102 S. Ct. 1373 (1982); *Alabama v. King & Boozer*, 314 U.S. 1, 62 S. Ct. 43 (1941); 2012 Op. Va. Att’y Gen. 129. But such taxation must treat equally those who deal with the federal government and those who deal with the state. *See, e.g., United States v. City of Manassas*, 830 F.2d 530 (4th Cir. 1987) (Va. Code § 58.1-3502 struck down because it did not tax those leasing from the Virginia Port Authority and transportation districts in the same manner as those leasing from the United States).

The Supreme Court has applied this doctrine in other cases. In *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 109 S. Ct. 1500 (1989), the Court held that a state violates the doctrine of intergovernmental tax immunity when it taxes the retirement benefits paid by the federal government but exempts from taxation all retirement benefits paid by the state or its political subdivisions. Similarly, the Court held in *Barker v. Kansas*, 503 U.S. 594, 112 S. Ct. 1619 (1992), that the doctrine is violated when a state taxes the federal benefits of military retirees but does not tax the benefits received by retired state and local government employees.

In *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 113 S. Ct. 2510 (1993), the Court held that its determination of the invalidity of the discriminatory taxation applies retroactively and that if the state did not provide a meaningful pre-deprivation hearing, then either a refund or some other remedy that creates in hindsight a nondiscriminatory scheme must be provided. On remand, the Virginia Supreme Court ruled that the taxpayers were entitled to refunds as a matter of due process, and that the proper remedy was a full refund. *Harper v. Va. Dep’t of Taxation*, 250 Va. 184, 462 S.E.2d 892 (1995) (citing *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547 (1994)).

The United States Supreme Court also has ruled that the availability of a pre-deprivation hearing is not a sufficient remedy for the collection of unconstitutional taxes if the apparent post-deprivation remedy is not legally available. *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547 (1994). There, a state supreme court had ruled that a state statute providing for the refund of illegal taxes did not apply to the situation where the law under which the taxes were collected was declared unconstitutional.

For a Virginia Supreme Court decision finding that the Commonwealth had the power to tax airplanes hangared at Washington National Airport in Arlington, even though the airport is a federal enclave, see *Charles E. Smith Management, Inc. v. Department of Taxation*, 251 Va. 353, 467 S.E.2d 772 (1996). Although, given the unique facts of the case, its application is likely to be fairly limited, the opinion may be of interest to those localities encompassing federal enclaves. See, e.g., 2004 Op. Va. Att’y Gen. 205 (locality may not impose real property tax on private leasehold interest in military housing granted by the federal government under the Military Housing Privatization Initiative).

9-4 STATE CONSTITUTIONAL PROVISIONS

A number of Virginia constitutional provisions deal with local taxing powers. Article X of the Virginia Constitution, titled “Taxation and Finance,” presents the most comprehensive treatment. However, there are other provisions of the Virginia Constitution that also affect local taxation.

9-4.01 Article X

9-4.01(a) Section 1—Property Taxed Unless Exempt; Uniformity; Classification

Article X, section 1 of the Virginia Constitution sets forth a number of fundamental principles of taxation in Virginia. First, it requires that “[a]ll property, except as hereinafter provided, shall be taxed.” Second, it mandates that taxes must be levied and collected under general law. Third, it requires uniformity of taxation upon the same class of subjects within the jurisdiction levying the tax. Fourth, it authorizes the General Assembly to establish certain exceptions to these general rules. Fifth, it authorizes the General Assembly to define and classify taxable subjects and segregate property for state or local taxation except as otherwise expressly segregated elsewhere in Article X.

The power to classify is significant because different classes of tax subjects may be assessed differently and in certain cases may be taxed at different rates. *R. Cross, Inc. v. City of Newport News*, 217 Va. 202, 228 S.E.2d 113 (1976). See Va. Code § 58.1-3008 (authority for localities to impose different rates on different classes of property); § 58.1-3503 (general classification of tangible personal property); § 58.1-3506 (authority to impose tax at different rates on different classes of tangible personal property); and §§ 58.1-3507 to 58.1-3508.6 (establishing separate classifications and authority for different rates on specified uses of machinery and tools).

The Virginia Supreme Court has clearly recognized the practical limitations of the uniformity requirement. In *Rixey’s Executors v. Commonwealth*, 125 Va. 337, 99 S.E. 573 (1919), the Court observed that “[t]he difficulties of securing absolute equality in assessments are everywhere recognized, but no machinery has yet been devised by which these difficulties may be fully overcome.” Even more striking was the Court’s flat pronouncement in upholding a tax classification in *Commonwealth v. Whiting Oil Co.*, 167 Va. 73, 187 S.E. 498 (1936), that “[e]quality and uniformity in taxation, while desirable, is impossible.” Nonetheless, the uniformity requirement remains a fundamental taxation principle of which localities must be cognizant. See, e.g., *Int’l Paper Co. v. Cnty. of Isle of Wight*, 299 Va. 150, 847 S.E.2d 507 (2020) (describing uniformity requirement as “the promise of equality of treatment among members of a tax class” and finding county’s machinery and tool tax plan not uniform; on remand, International Paper was awarded a

full refund of the M&T tax paid) (discussed in section 9-4.01(a)(2)(vi)); see also *FFW Enters. v. Fairfax County*, 280 Va. 583, 701 S.E.2d 795 (2010).

9-4.01(a)(1) Taxable Property

The provision in the Virginia Constitution that all property be taxed is not self-executing. *Commonwealth v. United Cigarette Machine Co.*, 120 Va. 835, 92 S.E. 901 (1917). The Virginia Supreme Court has also held that local governments may not contract to exempt property from taxation, *City of Bristol v. Dominion National Bank*, 153 Va. 71, 149 S.E. 632 (1929), or contract for the advance payment of taxes, *City of Richmond v. Virginia Railway & Power Co.*, 124 Va. 529, 98 S.E. 691 (1919). See also *Certain Citizens of Augusta Cnty. v. Augusta Cnty. Bd. of Supervisors*, 82 Va. Cir. 200 (Augusta Cnty. 2011) (counties are mandated to levy property taxes; uniformity requirement applies both to levy of taxes and valuation of property).

9-4.01(a)(2) Uniformity

9-4.01(a)(2)(i) Background

Virginia's first version of a uniformity requirement, added to its Constitution of 1851, provided generally that taxation be "equal and uniform throughout the commonwealth." See, e.g., *Slaughter v. Commonwealth*, 54 Va. (13 Gratt.) 767 (1856). Later constitutional amendments made uniformity applicable to taxation by localities, not just to statewide taxation, eliminated the requirement that taxation be "equal" as well as uniform, and specified that taxes need only be uniform on the same class of property within the boundaries of the taxing jurisdiction, thus permitting different subjects of taxation to be put into different classes and taxed at different rates.

Accordingly, a locality may impose different tax rates on different classes of property within the locality, as well as different tax rates than other localities, even on the same class of properties. Thus, for example, uniformity is not violated if the tax rate on a class of property in a city is greater than on the same class of property in a county. *Tresnon v. Bd. of Sup'rs of Henrico Cnty.*, 120 Va. 203, 90 S.E. 615 (1916).

Although the uniformity requirement apparently was intended originally merely to require the same *rate* of taxation on all kinds of property, it thereafter was interpreted to apply not only to tax rates but also to the tax valuation process. See, e.g., *Day v. Roberts*, 101 Va. 248, 43 S.E. 362, 363 (1903) (uniformity required both in the rate of taxation and "in the mode of assessment upon the taxable valuation"). Attempts to tax properties in the same class at different rates are rare, although the idea still appears to have appeal in certain contexts. See, e.g., 2005 Op. Va. Att'y Gen. 32 (progressive tax rates on residential real estate within city would violate uniformity).

Since "the dominant purpose" of the uniformity and fair market value requirements of the Virginia Constitution "is to distribute the burden of taxation, so far as is practical, evenly and equitably," it follows that "[i]f it is impractical or impossible to enforce both the standard of true value and the standard of uniformity and equality, the latter provision is to be preferred as the just and ultimate end to be attained." *Skyline Swannanoa, Inc. v. Nelson Cnty.*, 186 Va. 878, 44 S.E.2d 437 (1947). However, the two requirements must be construed together. *Id.*; *Lehigh Portland Cement Co. v. Commonwealth*, 146 Va. 146, 135 S.E. 669 (1926); see also *Cnty. of Louisa v. Va. Elec. & Power Co.*, 249 Va. 351, 457 S.E.2d 100 (1995); *Bd. of Sup'rs of Fairfax Cnty. v. Leasco Realty, Inc.*, 221 Va. 158, 267 S.E.2d 608 (1980).

9-4.01(a)(2)(ii) What Kinds of Taxes Must Be Uniform?

A number of older Virginia Supreme Court cases address issues regarding whether taxes other than so-called direct taxes on property are subject to the uniformity requirement and whether a particular tax was direct or indirect. The exact scope of the term "direct tax" has not been ruled on by the Virginia Supreme Court, and the term can be defined in different

ways. However, ad valorem taxes on real estate and tangible personal property, as levied by Virginia localities, are classic examples of direct taxes. *See, e.g., The Federalist No. 12* (Alexander Hamilton) (distinguishing direct taxes such as property taxes from indirect taxes such as duties and excise taxes).

It is now firmly established that there is no constitutional requirement for uniformity between direct taxes on property and other kinds of taxes. *See, e.g., Sheppard v. Moore*, 207 Va. 498, 151 S.E.2d 419 (1966) (and cases cited therein). Even though a tax may affect property indirectly, that does not bring it within the scope of the uniformity requirement. *See, e.g., Town of Ashland v. Bd. of Sup'rs of Hanover Cnty.*, 202 Va. 409, 117 S.E.2d 679 (1961) (local license tax for motor vehicles not subject to uniformity because it is a tax on the privilege of operating a vehicle and not on the vehicle itself).

Note that the Virginia Supreme Court has occasionally ruled that a kind of internal consistency is required in imposing taxes other than direct taxes on property (*e.g., Commonwealth v. Moore & Goodsons*, 66 Va. (25 Gratt.) 951 (1875) (a license tax must be applied equally to all in the same business)). While not mandated by Va. Const. art. X, § 1, such a uniformity requirement for license taxes is imposed by statute. Va. Code § 58.1-3705.

Besides the license taxes at issue in *Sheppard* and *Moore & Goodsons*, other cases have addressed the applicability (or lack thereof) of uniformity to taxes on transfers of estates (*Eyre v. Jacob*, 55 Va. (14 Gratt.) 422 (1858)); local taxes on railroad property (*e.g., Norfolk & W. R.R. v. Sup'rs of Smyth Cnty.*, 87 Va. 521, 12 S.E. 1009 (1891); *Shenandoah Valley R.R. v. Sup'rs of Clarke Cnty.*, 78 Va. 269 (1884); *Va. & Tenn. R.R. v. Washington Cnty.*, 71 Va. (30 Gratt.) 471 (1878)); taxes on the recording of deeds (*Pocahontas Consol. Collieries Co. v. Commonwealth*, 113 Va. 108, 73 S.E. 446 (1912)); and taxes on dividends (*Hunton v. Commonwealth*, 166 Va. 229, 183 S.E. 873 (1936) (taxes on dividends held to be taxes on income, not on property, i.e., the underlying shares of stock)). *See also Tidewater Ass'n of Homebuilders, Inc. v. City of Virginia Beach*, 241 Va. 114, 400 S.E.2d 523 (1991) (uniformity requirement did not prohibit imposition of fees to pay cost of city's water supply project because fees were not assessed against property and were not taxes).

9-4.01(a)(2)(iii) Uniformity and Classification

The separation of various kinds of real or personal property into different classes for tax purposes is entirely at the discretion of the General Assembly, subject only to the general requirement that all tax classifications must be reasonable. This is "a generous test, and it is rare that a court will see a legislative body as acting unreasonably in classifying subjects for tax purposes." 2 A. E. Dick Howard, *Commentaries on the Constitution of Virginia* 1047 (1974); *see, e.g., FFW Enters. v. Fairfax Cnty.*, 280 Va. 583, 701 S.E.2d 795 (2010) (uniformity not violated by two statutory tax classes that each includes only commercial and industrial real property; party challenging classification has burden to prove that it has no reasonable basis and thus must negate every basis that might reasonably support legislature's presumptively constitutional decision to classify specified kinds of real property as objects of taxation) (amicus brief filed by LGA); *see also Commonwealth v. Whiting Oil Co.*, 167 Va. 73, 187 S.E. 498, 500 (1936) (classification must be sustained if it rests on any reasonable basis; unless essentially arbitrary, it is in the discretion of the legislature). *See also* section 9-3.03.

9-4.01(a)(2)(iv) Uniformity and Methodology

In general, a locality may use different methods to value property. This can be true even with respect to different kinds of property within a single class, if justified by fair market value considerations; with respect to "categories" of tangible personal property as specified by the General Assembly in Va. Code. Ann. § 58.1-3503, however, a uniform method must be used to value property within each such category.

In *Commonwealth v. Brown*, 91 Va. 762, 21 S.E. 357 (1895), the Virginia Supreme Court held that uniformity does not compel that only one method be used to value all property for taxation. In rejecting a claim that uniformity was violated by a statute that specified a methodology for valuing commercial oyster harvests that was different than for any other kind of property (at a time before the Virginia Constitution permitted the classification of property for taxation), the Court stated that:

The Constitution does not prescribe that the valuation of all property for taxation shall be ascertained in the same way or manner. It is not even implied. In the nature of things, it could not be done. The many kinds or species of property with their diverse characteristics render it impossible. The valuation is to be ascertained as prescribed by law—that is, by the legislature—and in as just a manner as possible The requirement of equality and uniformity is satisfied by such regulations as will secure an equal rate and a just valuation, without reference to the method of valuation, and in order to be uniform, a tax need not be imposed and assessed upon all property by the same agency or officer. The legislature may prescribe any method it may deem best for attaining a just and fair valuation of any species of property, and the court could not declare any such law void, unless it manifestly violated the principles required by the Constitution.

Id.

In the case of *R. Cross, Inc. v. City of Newport News*, 217 Va. 202, 228 S.E.2d 113 (1976), the Virginia Supreme Court held that a taxpayer failed to prove a violation of the uniformity requirement by showing that different methods were used to determine the value of different kinds of motor vehicles (automobiles, motorcycles, boats, aircraft, recreational vehicles, and trucks), even though all of the kinds of vehicles were members of the same tax classification. Significantly, the evidence did not show that these different methods failed to replicate variations in the way the market actually valued the different kinds of vehicles. The Court emphasized the duty of the assessor to assess at fair market value and quoted much of the language from *Brown* set out above in reiterating that there was no constitutional requirement that identical methods be used to value different property.

Following the decision in *R. Cross*, the statute at issue was amended to specify that different methods reasonably expected to derive market value could be used to value personal property. The comparable current statute, Va. Code § 58.1-3503, lists twenty “categories” of tangible personal property and provides that “[m]ethods of valuing property may differ among the separate categories, so long as each method used is uniform within each category . . . and may reasonably be expected to determine actual fair market value as determined by the . . . assessing official [However,] categories . . . are not to be considered separate classes for rate purposes.”

The holding in *R. Cross* makes sense especially considering that the fundamental purpose of tax classification is not necessarily to group together all similar kinds of property, but rather to group together kinds of property that are to be taxed at the same rate. Very different kinds of property can be taxed at the same rate, yet the market for each of those different kinds of property may have very different methods of valuing each, and the point of the valuation process is to derive fair market value. Accordingly, merely because different kinds of properties are in the same tax class does not logically demand that they should be valued using the same methods. Thus, the taxpayer’s failure in *R. Cross* to prove that the use of different methods resulted in valuations that were not at fair market value was a fatal flaw in its case.

In contrast, *Perkins v. Albemarle County*, 214 Va. 240, 198 S.E.2d 626, *modified and aff’d on reh’g*, 214 Va. 416, 200 S.E.2d 566 (1973), is a rare uniformity decision of the

Virginia Supreme Court that did not defer to a methodology choice made by a taxing authority. It involved a county's effort to switch over from a six-year general reassessment cycle for real property to an annual reassessment process. Given budget limitations, the county developed a plan to implement the change over a four-year period by each year reassessing and bringing into the system properties in one of four specified geographic areas of the county. As each property was reassessed, its taxes would be adjusted accordingly. Thus, during the transition some properties would be taxed under the new plan while others would not. The Court ruled that this "piecemeal, segmental assessment methodology" violated the uniformity requirement. *Id.* However, on rehearing, the Court emphasized that it was not barring assessors from using common tools like "continuous maintenance" and "hotspotting" to update and check assessments, cautioning that while "such tools cannot be applied *arbitrarily* to all tax parcels within one geographic segment of the tax jurisdiction to the exclusion of all tax parcels in other geographic segments," *for the sake of uniformity* "such tools must be applied in the jurisdiction at large *wherever* value changes are disproportionate." *Id.* (emphasis added).

In *IPROC Norfolk v. City of Norfolk*, 86 Va. Cir. 435 (City of Norfolk 2013), the assessor agreed that the practice of including a replacement reserve to cover ongoing hotel renovations and improvements is customary under International Association of Assessing Officers (IAAO) guidelines, but testified that a replacement reserve was not considered in assessing any hotel property in the city because it would have produced a lack of uniformity, since there was no consistency in how hotels reported such reserves. The circuit court ruled that the absence of a standard percentage to be deducted for reserve, the failure of some hotels to spend reserve funds, and the potential for misuse of such an account justified the assessor's approach, holding that assessors are not required to follow IAAO guidelines.

9-4.01(a)(2)(v) Uniformity and Value Comparisons

In a number of cases, the Virginia Supreme Court has addressed the issue of whether and how a lack of uniformity can be demonstrated by a comparison of the amount of a subject assessment with the assessments of allegedly comparable properties. In general, a taxpayer attempting to use comparisons of assessed values to prove non-uniformity first must be certain that the other properties truly are comparable to the subject property. If so, then the taxpayer *also* must show *either* that the differences in the compared valuations resulted from the use of unlawful or different appraisal methods (and that any use of different methods could not reasonably have been expected to derive fair market values), *or* that the valuation of the subject property is unreasonably or arbitrarily disproportionate to the valuations of comparable properties *generally*.

In *Board of Supervisors of Fairfax County v. Leasco Realty, Inc.*, 221 Va. 158, 267 S.E.2d 608 (1980), a taxpayer claimed that its land was not assessed uniformly in 1973–75 based primarily on the fact that a court had ordered reductions in the 1972–74 assessments of an abutting tract. As originally assessed, both tracts were valued at similar amounts, but the court-ordered reductions for the adjacent tract gave it a much lower assessed valuation. The Virginia Supreme Court affirmed the original assessments of the subject property, stating that "when the taxpayer attacks an assessment alleging nonuniformity and there is no showing that disparate or unlawful methods have been employed in the appraisal process, it is not sufficient to show the valuation is excessive as compared with another valuation of like property; it must plainly appear that the appraisal upon which the assessment was made is out of line generally with appraisals of other neighborhood properties, which in character and use bear some relation to that of the taxpayer." *Id.*

Furthermore, non-uniformity cannot be proven merely by offering the opinions of an expert who disagrees with the value conclusion of an assessment, when a locality uses a lawful appraisal technique that is employed throughout the jurisdiction and is applied uniformly to a subject property. "Even if [the expert's] conclusions were to be accepted

totally, the assessments are nevertheless not rendered invalid; uniform operation of law does not mandate uniformity of results." *Id.* Even assuming that two properties are "'closely comparable,' mere proof of disparity in [the] valuation of one adjacent property will not sustain a claim of non-uniformity. When . . . the attack does not focus on a claim that the subject property is assessed at more than fair market value and when . . . it does not appear, using evenhanded, lawful techniques, that the subject assessment is unreasonably or arbitrarily disproportionate to assessed valuation of similar properties throughout the [jurisdiction], the assessment does not violate the constitutional mandate of uniformity." *Id.*

In *County of Mecklenburg v. Carter*, 248 Va. 522, 449 S.E.2d 810 (1994), a taxpayer's expert testified that the taxpayer's house was assessed significantly higher than two immediately adjacent houses. But the evidence showed that a consistent appraisal methodology was applied throughout the county and also that there were numerous differences between the subject property and the two adjacent houses and between the subject property and houses recently sold in the neighborhood at prices appreciably less than the subject's assessed value. The Virginia Supreme Court ruled that there was no evidence that an erroneous appraisal methodology was used in assessing the subject property or that the methodology was not consistently used in appraising the subject and other comparable properties, or that any of the assessments were not at fair market value. Thus, comparisons of the subject property with the adjacent houses, even if "based on a competent study of their current market values . . . are insufficient to establish a lack of uniformity." *Id.* "It is not enough to show that the assessment is excessive as compared with an assessment against A, or against B. It must plainly appear that it is out of line with methods of valuation adopted in the taxing district as a whole." *Id.* (quoting *City of Roanoke v. Gibson*, 161 Va. 342, 170 S.E. 723 (1933)).

Other Virginia Supreme Court cases on this subject include *Orchard Glen East, Inc. v. Board of Supervisors*, 254 Va. 307, 492 S.E.2d 150 (1997) (when condominium documents had been filed for a property that was used exclusively as rental apartments, no uniformity violation in assessing it using a different method than that used to assess other apartment properties because, under Virginia law, a property becomes a condominium when documents are filed, regardless of actual use, and uniformity is only required when assessing properties having like characteristics and qualities); *City of Waynesboro v. Keiser*, 213 Va. 229, 191 S.E.2d 196 (1972) (evidence showed that properties offered in comparison to subject property in attempt to prove non-uniformity were not actually comparable); *Davy v. Cnty. Bd. of Arlington Cnty.*, 210 Va. 332, 171 S.E.2d 176 (1969) (erroneous assessments of other properties undervalued by mistake cannot be used to prove non-uniformity; no evidence of error in assessment of subject property); *Smith v. City of Covington*, 205 Va. 104, 135 S.E.2d 220 (1964) (where assessor admitted that he had no idea whether valuation of the subject property reflected what anyone would pay for it, evidence proving a disparity between that valuation and those of comparable properties was sufficient to prove that the subject assessment "was out of line with the assessments of like and similar property" and thus that uniformity was lacking); *City of Norfolk v. Snyder*, 161 Va. 288, 170 S.E. 721 (1933); *City of Roanoke v. Gibson*, 161 Va. 342, 170 S.E. 723 (1933); and *City of Roanoke v. Williams*, 161 Va. 351, 170 S.E. 726 (1933).

The Attorney General has opined that evidence of the assessment of several residential properties at different percentages of fair market value is not a per se violation of the uniformity and fair market value requirements, but material, systematic, and intentional discrimination may violate Virginia and federal constitutional requirements. 2005 Op. Va. Att'y Gen. 35.

9-4.01(a)(2)(vi) Uniformity and De Facto Tax Exemptions

Another subject of frequent litigation has been the question of whether uniformity is violated by a particular de facto tax exemption, typically one not explicitly sanctioned by the

exemption provisions of Article X, section 6 of the Virginia Constitution. Cases have addressed an alleged failure to enforce taxation against certain persons (*e.g.*, *Shepherd v. Moore*, 207 Va. 498, 151 S.E.2d 419 (1966)); various attempts to exempt town residents from county taxes, all held to violate uniformity (*e.g.*, *Woolfolk v. Driver*, 186 Va. 174, 41 S.E.2d 463 (1947); *Campbell v. Bryant*, 104 Va. 509, 52 S.E. 638, 640 (1905); *Day v. Roberts*, 101 Va. 248, 43 S.E. 362 (1903)); an attempt to levy an additional amount of tax only on abutting properties for the cost of improvements to an adjacent public street (*City of Norfolk v. Chamberlain*, 89 Va. 196, 16 S.E. 730 (1892) (held to violate uniformity and equality requirements of Constitution of 1869; note, however, that Va. Const. art. X, § 3 now gives the General Assembly the power to authorize local assessments on abutting properties for particular benefits resulting from public improvements)); an agreement to exempt from future taxes an owner agreeing to make certain improvements (*City of Bristol v. Dominion Nat'l Bank*, 153 Va. 71, 149 S.E. 632 (1929) (agreement to exempt property from taxes for ten years in return for development of property as subdivision violated uniformity requirement)); an agreement to pay a fixed sum in lieu of property taxes (*Indus. Dev. Auth. of the City of Chesapeake v. Suthers*, 208 Va. 51, 155 S.E.2d 326 (1967) (statute permitting lessee of industrial development authority to pay fixed sum as additional rent in lieu of local property taxes violated uniformity requirement)); and an attempt to levy a city tax only on certain kinds of fire insurance companies to create a relief fund for firemen (*City of Hampton v. Ins. Co. of N. America*, 177 Va. 494, 14 S.E.2d 396 (1941) (uniformity violated because others who were not taxed, such as owners of uninsured property, also benefited as much or more from activities of City's fire department). *But see FFW Enters. v. Fairfax Cnty.*, 280 Va. 583, 701 S.E.2d 795 (2010) (decision in *City of Hampton* limited to its specific circumstances; even if applicable, *City of Hampton's* benefit/burden test requires proof that those not included in tax class will benefit as much or more than those included, not merely that those excluded will enjoy some benefits from improvements funded by tax) (amicus brief filed by LGA).

In a significant uniformity decision, *International Paper v. County of Isle of Wight*, 299 Va. 150, 847 S.E.2d 507 (2020), the Virginia Supreme Court reviewed the locality's machinery and tools (M&T) tax plan. In tax year 2016, following a loss in an M&T tax case that resulted in a major revenue shortfall, the county adjusted its valuation methodology and raised the M&T tax rate. It then retroactively applied the new methodology to the earlier tax year assessments and issued tax "grants" in the same amount as credits against the 2017 M&T assessments. To fund the grants, the county increased the 2017 rate significantly. At the same time, it authorized a tax relief program. Relief amounts were calculated with the goal that "no M&T taxpayer [would] pay more because of the increased tax rate than the taxpayer [had] received in a refund." As a result, M&T taxpayers paid 2017 taxes at rates varying between \$1.75 and \$4.24 per \$100 of assessed value. A paper production company challenged the 2017 tax rate increase and the relief program as retroactively revising previous assessments and as non-uniform, excessively burdening of the sub-class of M&T taxpayers who had overpaid M&T taxes in previous years.

The Virginia Supreme Court first held that the 2017 tax plan was not a retroactive revision of the M&T valuations and tax rates, even though it may have had the practical effect of "clawing back" the M&T tax refunds paid by the county. The county had authority under Code § 58.1-3507(A) and Article X, section 4 of the Virginia Constitution to impose taxes on M&T property, and authority per Code §§ 15.2-940 and 15.2-950 to execute the M&T tax relief program.

Regarding the uniformity challenge, the Court focused on the *effect* of the legislation rather than applying "a formalistic analysis" of the legislative *means* used to create that effect. *Id.* The Court listed several factors to be considered when determining whether a particular legislative act is, effectively, part of the taxation process: (1) whether the stated purpose of the grant or tax credit is directly related to the tax; (2) whether it is structured and administered to directly reduce a specific tax obligation; (3) whether the legislative act was

enacted at substantially the same time as the tax act; (4) whether the legislative relief act lasts for the same duration as the tax; and (5) whether the legislation's funding is linked to the tax. *Id.* Applying these factors to the Isle of Wight facts, the Court found the tax relief program was structured, funded, administered, and calculated "within the closed circuit of the M&T taxation process," and, accordingly, constituted a partial tax exemption. *Id.*

Because the Relief Program was effectively a partial tax exemption, it was subject to the uniformity requirement, which it did not meet. "By design, the relief formula treated M&T taxpayers differently," based upon whether the county had lawfully owed that taxpayer a refund on M&T taxes overpaid in prior years. *Id.* Only those M&T taxpayers who had received a refund were required to pay the 2017 M&T tax increase. This was prima facie evidence that the relief program payments had the same effect as partial tax exemptions. Accordingly, the lower court had erred in striking the related counts from the paper company's application for correction of its M&T tax assessment. On remand, the plaintiff was awarded a full refund of the 2017 M&T tax amount, and the Virginia Supreme Court affirmed, 301 Va. 486, 881 S.E.2d 776 (2022).

9-4.01(a)(3) Exception for Annexed Areas

An exception from the uniformity requirement for annexed areas and newly created units of government exists to encourage voluntary mergers or consolidations by removing what has sometimes been a practical obstacle to such combinations: the natural fear of people living in a more rural area that, if their county merges with a more urbanized county or city, they will pay higher property taxes even though they may not enjoy the same facilities, such as paved streets and street lights, as do people in more built-up areas. 2 A. E. Dick Howard, *Commentaries on the Constitution of Virginia* 1045 (1974). In such exceptional cases, differences in the rate of taxation must "bear a reasonable relationship to differences between nonrevenue producing governmental services giving land urban character which are furnished in one or several areas in contrast to the services furnished in other areas." Va. Const. art. X, § 1. Governmental services "giving land urban character" include streets, streetlights, curbs, gutters, and fireplugs, but not schools, libraries, hospitals, or welfare programs. Howard, *supra*.

9-4.01(a)(4) Exception for Elderly or Disabled

Virginia Code § 58.1-3506.1 allows localities to provide for different personal property tax rates for the elderly or disabled.

9-4.01(b) Section 2—Fair Market Value

Article X, section 2 of the Virginia Constitution requires that "[a]ll assessments of real estate and tangible personal property be at their fair market value, to be ascertained as prescribed by law." The fair market value standard "has been the subject of countless decisions, editorials and articles. It has [been considered by] the General Assembly, the courts, the State Corporation Commission and numerous study commissions. All recognize that assessment of property is not an exact science. The value of land, buildings and tangible personal property is dependent upon many factors which cannot be prescribed by any general rule." *Southern Ry. Co. v. Commonwealth*, 211 Va. 210, 176 S.E.2d 578 (1970).

Nevertheless, the basic definition of "fair market value" is well established in Virginia law. *E.g.*, *Bd. of Sup'rs of Fairfax Cnty. v. Telecommc'ns Indus., Inc.*, 246 Va. 472, 436 S.E.2d 442 (1993) (quoting *Bd. of Sup'rs of Fairfax Cnty. v. Donatelli & Klein, Inc.*, 228 Va. 620, 325 S.E.2d 342 (1985) ("fair market value is the price property will bring when offered for sale by a seller who desires but is not obliged to sell and bought by a buyer under no necessity of purchasing")). Everything which affects market value must be considered. *Arlington Cnty. Bd. v. Ginsberg*, 228 Va. 633, 325 S.E.2d 348 (1985); *Appalachian Elec. Power Co. v. Gorman*, 191 Va. 344, 61 S.E.2d 33 (1950). However, the Supreme Court held in another context that an appraisal cannot be relied upon in determining damages if there is no "evidence of a willing buyer or other proof to show the existence of a viable market

for the property at the appraised price.” *Suntrust Bank v. Farrar*, 277 Va. 546, 675 S.E.2d 187 (2009) (valuing property in a trust).

A detailed discussion of the fair market value rule with respect to local taxation in Virginia is in section [9-5.01\(e\)](#).

9-4.01(c) Section 3—Tax for Public Improvements

Article X, section 3 of the Virginia Constitution gives the General Assembly the power to authorize localities to provide for local tax and assessment on abutting property owners for local public improvements. The tax or assessment may not exceed the enhanced value of the improvement to the abutting lots. *City of Richmond v. Eubank*, 179 Va. 70, 18 S.E.2d 397 (1942).

9-4.01(d) Section 4—Segregation of Certain Property for Local Taxation

Section 4 establishes a principle of local assessment and taxation of real estate, coal and other mineral lands, and tangible personal property (except the rolling stock of public service corporations), based on the value in the jurisdiction where located. The state cannot impose taxes on such segregated property. *Fallon Florist, Inc. v. City of Roanoke*, 190 Va. 564, 58 S.E.2d 316 (1950). The section should be read in conjunction with Article X, section 1, which allows the General Assembly to segregate other classes of property and specify upon what property state, and upon what property local, taxes, may be levied.

9-4.01(e) Section 6—Exemptions Authorized

Section 6 provides for exemptions from state and local taxes of specified property. Tax exemptions are discussed in detail in section [9-6](#).

9-4.01(f) Section 8—Amount of Tax Limited

Section 8 restricts the amount of tax to be levied to the amount “required for the necessary expenses of government.” See *May v. Bd. of Sup’rs of Augusta Cnty.*, 23 Va. Cir. 513 (Augusta Cnty. 1980).

9-4.02 Other Provisions of the Virginia Constitution Relating to Local Taxation

9-4.02(a) Article I

The Virginia Constitution, Article I, section 6, prohibits taxation without the consent of the taxpayer “or that of their representatives duly elected.” A Virginia federal court has held that taxpayers are not being taxed against their consent when county supervisors are judicially appointed, since “[i]t is their representatives in the state legislature who determined how empty seats on county boards should be filled, and the counties are but subdivisions of the state.” *Avens v. Wright*, 320 F. Supp. 677 (W.D. Va. 1970).

9-4.02(b) Article IV

Article IV, section 14 of the Virginia Constitution gives the General Assembly authority over all subjects of legislation not forbidden or restricted by section 14. That section also provides that the legislature may not enact any local, special, or private law for, among other things, “the assessment and collection of taxes, except as to animals which the General Assembly may deem dangerous to the farming interests,” or “extending the time for the assessment or collection of taxes,” or “exempting property from taxation.” Va. Const. art. IV, §§ 14(5), 14(6), and 14(7), respectively.

Article IV, section 15 provides that “[n]o general or special law shall surrender or suspend the right and power of the Commonwealth, or any political subdivision thereof, to tax corporations and corporate property, except as authorized by Article X.” Article IV, section 11 requires “the affirmative vote of a majority of all the members elected to each house” to enact any bill imposing, continuing, or reviving a tax. Article IV, section 12 provides that no law shall embrace more than one object, which is to be in the title, and that no law shall be revived or amended with reference to its title but only by reenactment

and publication of the entire section. The intent is to prevent use of deceptive titles to cover the true purpose of legislation. *Fairfax Cnty. Indus. Dev. Auth. v. Coyner*, 207 Va. 351, 150 S.E.2d 87 (1966); *Commonwealth v. Brown*, 91 Va. 762, 21 S.E. 357 (1895).

9-4.02(c) Article VII

Article VII, section 2 of the Virginia Constitution authorizes the General Assembly to create counties, cities, and towns and to grant powers of taxation and assessment to them and to regional governments but not necessarily to other political subdivisions of the Commonwealth. See, for example, *Marshall v. Northern Virginia Transportation Authority*, 275 Va. 419, 657 S.E.2d 71 (2008), and the discussion of that case in section 9-2.01. Article VII, section 7 requires any local tax ordinance or resolution to be passed by a recorded affirmative vote of a majority of the members elected to the governing body. If such an ordinance or resolution is vetoed, then, where such power exists, "it shall require for passage thereafter a recorded affirmative vote of two-thirds of all members elected to the governing body." On a final vote the names of each voting member and how he or she voted must be recorded. *Wright v. Norfolk Electoral Bd.*, 223 Va. 149, 286 S.E.2d 227 (1982), held that this section prohibits the setting of a city tax rate by citizen initiative.

9-5 SUBJECTS OF PROPERTY TAXATION

Virginia Code § 58.1-3000 provides that all taxable real property, mineral lands, tangible personal property, and merchants' capital are segregated for local taxation only. Virginia Code § 58.1-3008 permits but does not require the local governing body to impose different rates of levy on these separate classes.

9-5.01 Real Property

9-5.01(a) Taxation of Real Property Generally

All nonexempt real property is subject to annual taxation. Va. Code §§ 58.1-3200 and 58.1-3201. Real property is segregated for local taxation only. Va. Code § 58.1-3000. The real property tax is levied on a calendar year basis unless the local governing body has adopted an ordinance providing that taxes be levied and imposed on a fiscal year basis of July 1 to June 30. Va. Code §§ 58.1-1 and 58.1-3010. A locality may provide by ordinance for a discount for the early payment of real property taxes. Va. Code §§ 15.2-1104 (cities and towns) and 15.2-1201.2 (counties).

A local governing body is authorized and empowered to change the rate of levy during the tax year provided, however, that for a locality operating on a calendar year basis, the change is made before the date on which the personal property and land books are delivered to the local treasurer. Va. Code §§ 58.1-3010 and 58.1-3012; 2000 Op. Va. Att'y Gen. 191. If the levy is to be increased in any tax year, notice of proposed increase must be published in a newspaper having general circulation in the locality at least seven days before the increased levy is made, and citizens must be given an opportunity to appear before, and be heard by, the local governing body on the subject of such increase. Va. Code § 58.1-3007.

When an annual or biennial assessment or a general reassessment of real property results in an increase of 1 percent or more in the total real estate tax assessed, a locality must reduce the rate of levy to produce no more than 101 percent of the previous year's real property tax levies, or, after advertisement and a public hearing (held at a time different from the annual budget hearing), it may retain or increase the rate. Va. Code § 58.1-3321. If the locality conducts its reassessment more than once every four years, the notice of proposed tax increase must be published on a different day and in a different notice than the notice for the annual budget hearing. Va. Code § 58.1-3321(C). The amount of the annual levy on real estate is unlimited by statute. However, Article X, section 8 of the Virginia Constitution prohibits levying any "greater amount of tax" than "may be required for the necessary expenses of the government." See *May v. Bd. of Sup'rs of Augusta Cnty.*,

23 Va. Cir. 513 (Augusta Cnty. 1980). A locality by ordinance may develop a method for returning surplus real property tax revenues (or personal property tax revenues, or both) to taxpayers who are assessed such taxes in any fiscal year in which the locality reports a surplus. Va. Code § 15.2-2511.1. The locality may reduce a taxpayer's refund by the amount of any taxes, penalties, and interest that are due from such taxpayer, or any past-due taxes, penalties and interest that have been assessed within the appropriate period of limitations. *Id.*

9-5.01(b) Taxable Interests and Owners

Real estate taxes are assessed against the "owner" of property as of the first day of the calendar or fiscal tax year. Va. Code §§ 58.1-3281 and 58.1-3010. See 2007 Op. Va. Att'y Gen. 136 (cannot assess new home sales on an annual basis regardless of the date of sale; must wait until next year's annual assessment to incorporate sale price into fair market value). Note that notice should be given to the locality within sixty days of any sale of residential property under a deed of trust. Va. Code § 15.2-979.

The "owner" includes any person who has the usufruct, control, or occupation of the real estate, whether his interest is an absolute fee, or an estate less than a fee. *City of Richmond v. McKenny*, 194 Va. 427, 73 S.E.2d 414 (1952). A life tenant is an "owner" of property for real estate tax purposes. *Stark v. City of Norfolk*, 183 Va. 282, 32 S.E.2d 59 (1944). The term "owner" may include a person sui juris, a minor through his guardian, trustee or person in possession, the estate of a deceased person, an incompetent or mentally ill person through his committee or person in possession, a trustee of property held in trust for another and a corporation or firm. Va. Code § 58.1-3015. A municipal corporation may not tax a non-exempt entity for an exempt entity's ownership interest in property owned by the two entities as tenants in common. See *City of Richmond v. SunTrust Bank*, 283 Va. 439, 722 S.E.2d 268 (2012).

However, Virginia statutes, especially in the real property tax arena, tend to emphasize that the property tax is a tax on the property itself, not on the owner of the property as such. See, e.g., Va. Code § 58.1-3344 (real estate taxes are "a lien on the property and the name of the person listed as owner shall be for convenience in the collection of the taxes. The lien for taxes shall not be limited to the interest of the person assessed but shall be on the entire fee simple estate.") This is consistent with the requirement of Article X, section 1 that "[a]ll property, except as hereinafter provided, shall be taxed." Otherwise, a property might partially escape taxation if separate bills were not sent to each and every person who had any interest in the property, computed based on the value of each such individual interest, an impractical burden to put on local assessors. But this is not required in Virginia except in certain limited circumstances. See, e.g., Va. Code §§ 58.1-3203, 58.1-3282, 58.1-3283, 58.1-3284, and 58.1-3286 (setting forth exceptional circumstances requiring separate assessments of certain interests in real property).

Leasehold interests in real estate that are exempt from taxation to the owner are included in the term "taxable real estate," Va. Code § 58.1-3200, and, with certain exceptions, see Va. Code § 58.1-3203, must be assessed for local taxation to the lessee. For the method of assessing such leasehold interests, see Va. Code § 58.1-3203. See also 2000 Op. Va. Att'y Gen. 211 (discussing whether a facility use agreement constitutes a lessor/lessee relationship).

The General Assembly has authorized localities to tax transferable development rights (TDRs) from a "sending" property before they are attached to a "receiving" property. The value of the TDR is deemed appurtenant to the sending property until the TDR is either severed from and recorded as an interest in real property, or is used at a receiving property and becomes appurtenant to it. Va. Code § 15.2-2316.2. For a Supreme Court opinion

discussing implementation of this statutory provision, see *Johnson v. Arlington County*, 292 Va. 843, 794 S.E.2d 389 (2016).

The law of fixtures determines whether an item of personal property placed upon realty becomes real property. Three general tests are applied in making that determination: (a) annexation of the property to the realty; (b) adaptation to the use or purpose to which that part of the realty with which the property is connected is appropriated; and (c) the intention of the parties. The intention of the party making the annexation is the chief factor to be considered. *Transcon. Gas Pipe Line Corp. v. Prince William Cnty.*, 210 Va. 550, 172 S.E.2d 757 (1970).

9-5.01(c) Provisions Regarding General Reassessments

General reassessments of real estate must be conducted regularly. See Va. Code §§ 58.1-3250 to 58.1-3256. At a minimum, counties must conduct a general reassessment of real estate every four years (smaller counties may elect to reassess every five or six years), Va. Code § 58.1-3252, and every two years in cities, Va. Code § 58.1-3250. General reassessments may, under certain circumstances, be conducted more frequently. See *e.g.*, Va. Code §§ 58.1-3252 (permitting a county, by majority vote of board of supervisors, to conduct assessment every three years) and 58.1-3253 (authorizing a biennial or annual reassessment of real estate when the local governing body so directs). *But see* 2010 Op. Va. Att’y Gen. 209 (no authority for city to conduct more than one general reassessment in any one year). Failure to conduct general reassessments on a regular basis may result in withholding from the county or city its share of the net profits from the State’s alcoholic beverage control system. Va. Code § 58.1-3259. Virginia Code § 15.2-1300 allows two or more localities to establish a joint department of real estate assessment. 2000 Op. Va. Att’y Gen. 68.

Notice of any change in assessment must be given to the property owner. The notice must include (i) the final appraised values of land and appraised value of improvements for the new tax year, and for each of the two prior tax years, as well as the assessed values of such, if different from the appraised values; (ii) the new tax rate and the rates for the prior two tax years; (iii) the total new tax levy and the tax levies for the prior two tax years; and (iv) the percentage changes in such levies. Va. Code § 58.1-3330. Additionally, in any county, city, or town that conducts an annual or biennial reassessment of real estate or in which reassessment of real estate is conducted primarily by employees of the county, city, or town under direction of the commissioner of the revenue, if the proposed rate exceeds the lowered tax rate, as that term is described in subdivision (C)2 of § 58.1-3321, the notice shall set out the effective tax rate increase, as that term is described in subdivision (C)3 of § 58.1-3321. *Id.*

Manufactured homes must be assessed at the same time the real estate on which the homes are located is assessed and in the same manner as other improvements and buildings are assessed. Va. Code § 58.1-3522. Manufactured homes that are not affixed to the real estate are still tangible personal property even though § 58.1-3522 requires that they be treated in the same manner as real property. Accordingly, such manufactured homes are treated as tangible personal property for all other purposes, and applications to correct such assessments should be as for tangible personal property pursuant to § 58.1-3980 and not through the board of equalization (see next section). 2001 Op. Va. Att’y Gen. 197. Assessments of manufactured homes subsequent to the general reassessment should be made pursuant to Va. Code § 58.1-3281. 1995 Op. Va. Att’y Gen. 273.

9-5.01(d) Boards of Equalization

In each year following a general reassessment, the circuit court of each city or county is required to appoint a board of equalization (BOE) to hear, and if necessary correct, citizen assessment complaints. See Va. Code §§ 58.1-3370 to 58.1-3389. Any county or city that uses the annual assessment method or the biennial assessment method under Va. Code

§ 58.1-3253 in lieu of periodic general assessments may elect to create a permanent BOE. Va. Code § 58.1-3373. However, in any county having the county manager or county executive form of government where a permanent BOE has not been appointed, the governing body may appoint the members of the BOE. Va. Code § 58.1-3371.

The BOE hears complaints regarding lack of uniformity in assessments, errors in acreage, and assessments in excess of fair market value. Va. Code § 58.1-3378. In all cases brought before the BOE, the valuation determined by the assessor is presumed 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 in accordance with generally accepted appraisal practice. Va. Code § 58.1-3379(B).

If a taxpayer who owns less than four residential units has made a written request for valuation records as provided for in § 58.1-3331 (see section [9-5.01\(e\)\(2\)\(ix\)](#)) and the assessor failed to provide those records within fifteen days of that request, then the locality must introduce the following evidence before the presumption comes into effect:

- i. copies of the assessment records maintained by the assessing officer;
- 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 regarding the valuation of property.

Upon the conclusion of the presentation of the evidence of the assessing officer, the taxpayer has the burden of proof by a preponderance of the evidence to rebut such evidence presented by the assessing officer as stated above.

A BOE consists of three to five members, or the number of local election districts in the locality, whichever is greater, Va. Code § 58.1-3374, except in counties having the county executive form of government, where the BOE can have a membership of from three up to the number of supervisor districts in the county, Va. Code § 58.1-3371. The members must be residents of the county or city. A majority of the members of a BOE must be freeholders and 30 percent must be real estate professionals, builders, developers or legal or financial professionals, who (i) have attended the basic course of instruction given by the Department of Taxation and (ii) at least once in every four years of service, have attended continuing education as required by Virginia Code § 58.1-206. There are special membership requirements for larger localities when the appeal involves commercial or multi-family residential property. Va. Code § 58.1-3374. A locality may provide for an alternate member. Va. Code §§ 58.1-3373(B) and 58.1-3374.

Members of a BOE receive compensation to be fixed by the local governing body, Va. Code § 58.1-3375, and serve terms of one to three years, Va. Code §§ 58.1-3370 to 58.1-3374. The BOE sits as necessary to discharge its duties but must give public notice at least seven days beforehand by publication in a newspaper having general circulation in the city or county. Va. Code § 58.1-3378. Either taxpayers (or their representative) or local

authorities may apply, either by paper or electronically, for equalization of an assessment, with the local governing body to fix the date by which applications must be made. Va. Code §§ 58.1-3378, 58.1-3380. The BOE has the authority to summon taxpayers or their agents to furnish information and records regarding any real estate assessment under review by the board. Va. Code § 58.1-3386.

Board of Equalization relief for a residential property assessment cannot be denied on the basis of a lack of information on the application for relief, as long as the application includes the address, the parcel number, and the owner's proposed assessed value for the property. Relief for commercial properties on the basis of the fair market valuation cannot be denied on the basis of a lack of information on the application, as long as documentation of any applicable assessment methodologies is submitted with the application, and the application includes the address, the parcel number, and the owner's proposed assessed value for the property. Va. Code § 58.1-3378. Statements of income and expense or market sales that occurred through the December 31st prior to the effective date of the assessment can be considered so long as the information is submitted to the BOE no later than the locality's deadline for the application for relief. However, no studies or analyses published after that December 31st date can be considered. Va. Code § 58.1-3379.

In the interval between general reassessments, the value of real estate for tax purposes may not be changed except to reflect one or more of the following:

- a. addition of value of improvements, see Va. Code § 58.1-3351;
- b. easement, see Va. Code §§ 58.1-3351 and 58.1-3354;
- c. subdivision into lots, see Va. Code § 58.1-3285;
- d. rezoning, see Va. Code § 58.1-3285;
- e. ownership changes resulting in division of tract into two or more parcels, see Va. Code § 58.1-3290; 2002 Op. Va. Att'y Gen. 312;
- f. transfer or removal of standing timber, see Va. Code §§ 58.1-3309 and 58.1-3293;
- g. completion or substantial completion of new buildings, or repairs or additions to a building increasing its value by \$500 or more, see Va. Code §§ 58.1-3291 and 58.1-3292;
- h. \$100 or more reduction in value of building due to natural decay or other causes, see Va. Code § 58.1-3293;
- i. erroneous assessment, see Va. Code § 58.1-3981; and
- j. changes ordered under authority of the board of equalization pursuant to § 58.1-3385.

See Elkwood Downs Ltd v. Cnty. of Culpeper, 202 B.R. 232 (W.D. Va. 1996) (valuation date for interim assessments required by rezoning is the date of the last general assessment at which the comparison properties were last valued, not the year following the zoning change).

9-5.01(e) Assessments at Fair Market Value

9-5.01(e)(1) Basic Valuation Principles

9-5.01(e)(1)(i) Professional Valuation Practices

Before considering the legal bases for some of the valuation principles that control real property taxation in Virginia, it should be noted that the profession of real estate appraisal

recognizes a body of principles and practices to be applied in that field. Perhaps the best source of information regarding principles and practices generally accepted by the appraisal profession is *The Appraisal of Real Estate*, published by the Appraisal Institute, often referred to by appraisers simply as “The Bible.”

Note, however, that while *The Appraisal of Real Estate* often is quite persuasive when cited to a court, it is not binding and, indeed, on some subjects the jurisprudence of the Virginia Supreme Court appears to contradict *The Appraisal of Real Estate*. Nonetheless, it is a definitive source of information on accepted professional appraisal practices. Accordingly, the following discussion will refer to *The Appraisal of Real Estate* as appropriate and helpful to indicate the generally-accepted views of the appraisal profession.

Another important publication to be aware of is the *Uniform Standards of Professional Appraisal Practice* (known as “USPAP”) published annually by the Appraisal Standards Board of The Appraisal Foundation. USPAP promulgates concise statements of the professional standards to which appraisers of real, personal, and business property must adhere. It is relied upon by many state and federal regulatory agencies, and a failure to adhere to USPAP often is used in litigation to challenge an appraisal performed on behalf of one of the parties. Of particular interest to local assessors, USPAP sets forth separate standards for performing mass appraisals.

Note that USPAP contains a so-called “jurisdictional exception,” which states in essence that if a particular USPAP standard violates the law or public policy of a particular jurisdiction, then that standard is void in that jurisdiction. In other words, USPAP yields to any contrary court decisions or statutory provisions.

9-5.01(e)(1)(ii) Valuation of Real Versus Personal Property

As described in section 9-4.01(b), the Virginia Constitution, Article X, section 2, generally requires taxation at fair market value. Since this is true of both real and personal property, it follows that valuation principles developed in a real property case should be applicable in valuing personal property, and vice versa, and accordingly the Virginia Supreme Court has relied on principles established in personal property tax cases to decide real property tax cases. See, e.g., *Tidewater Psychiatric Inst., Inc. v. City of Va. Beach*, 256 Va. 136, 501 S.E.2d 761 (1998).

While Article X, section 2 specifies that assessments must be at fair market value “to be ascertained as prescribed by law,” the General Assembly has enacted relatively few statutory provisions pertaining to the derivation of fair market value for real property, and those that exist apply only in exceptional circumstances. See, e.g., Va. Code § 58.1-3202 (assessments of multifamily residential real estate to be determined without regard to potential for condominium conversion or cooperative ownership); Va. Code § 58.1-3284.1 (open or common space in certain planned development subdivisions is to be assessed as having no value itself but merely contributing to the value of individual properties enjoying the benefits of the space, even if the space is used by a lessee to operate a commercial enterprise open to non-members of the property association owning the space, *Saddlebrook Estates Cmty. Ass’n v. City of Suffolk*, 292 Va. 35, 786 S.E.2d 160 (2016)). Thus, the “rules” for determining the fair market value of real property have been established primarily by the courts.

The General Assembly has authorized a specific methodology for assessment of machinery and tools used in manufacturing: such property “shall be valued by means of depreciated cost or a percentage or percentages of original total capitalized cost excluding capitalized interest.” See Va. Code §§ 58.1-3507(B) and 58.1-3503(A)(18). See section 9-5.03. The Virginia Supreme Court recognized that this methodology may result in machinery and tools being significantly undervalued when new, but noted it would provide a reasonable

approximation of fair market value over time. See *W. Refining Yorktown v. Cnty. of York*, 292 Va. 804, 793 S.E.2d 777 (2016).

9-5.01(e)(1)(iii) Valuation for Taxation Versus Condemnation

Fair market value is the standard not only for valuing property for taxation per Va. Const. art. X, § 2, but also for valuing property taken in eminent domain. *E.g.*, *Tremblay v. State Highway Comm'r*, 212 Va. 166, 183 S.E.2d 141 (1971). Accordingly, the Virginia Supreme Court has determined that principles of valuation announced in its tax jurisprudence apply in eminent domain cases. *Fairfax Cnty. Park Auth. v. Va. Dep't of Transp.*, 247 Va. 259, 440 S.E.2d 610 (1994) (in citing four tax assessment cases in support of valuation principles applied in condemnation case, the Court ruled that “[t]o adopt one set of principles for determining the fair market value of real property in a condemnation proceeding and another set to make the same determination for taxation purposes could result in a single parcel of land having more than one fair market value. Such a result would be inconsistent and inequitable and is unnecessary.”)

By implication, therefore, the reverse should be true, and valuation principles from eminent domain cases should apply generally in tax cases. See also *Russell v. Commonwealth Transp. Comm'r*, 261 Va. 617, 544 S.E.2d 311 (2001) (testimony of appraiser in condemnation case regarding valuation of property permitted to be impeached by evidence of appraiser’s prior inconsistent lower valuation of same property for tax purposes). Accordingly, fair market value principles as adopted and explained in condemnation decisions of the Virginia Supreme Court should be considered good authority in tax cases.

9-5.01(e)(1)(iv) Taxation at Value or at Some Fraction of Value

From 1851 to 1902, property taxation was required to be “in proportion” to value but not to meet any particular valuation standard, *e.g.*, fair market value. The fair market value standard was added to Virginia’s Constitution in 1902. However, this requirement to tax *at* fair market value was effectively ignored for most of the twentieth century, with most localities (and even the Commonwealth itself) choosing instead to tax property based on some specified fraction of fair market value, a practice to which the Virginia Supreme Court acquiesced. See, *e.g.*, *Washington Cnty. Nat’l Bank v. Washington Cnty.*, 176 Va. 216, 10 S.E.2d 515 (1940); *Lehigh Portland Cement Co. v. Commonwealth*, 146 Va. 146, 135 S.E. 669 (1926); see also *City of Richmond v. Commonwealth*, 188 Va. 600, 50 S.E.2d 654 (1948) (State Corporation Commission’s practice of assessing railroad property at 40 percent of fair market value was consistent with statewide average of assessments of real and personal property made by local assessors at the time).

This long-standing practice of assessing property well below fair market value had the effect of heightening the importance of the uniformity requirement in challenging property tax valuations. For example, if an assessor tried to assess a property at only 50 percent of its value, then absent gross miscalculation (the assessor has to be wrong by a factor of at least twice the assessed value), the requirement not to assess in excess of fair market value would not come into play. Nevertheless, the taxpayer likely would be upset if all the other property in the locality was assessed at, for example, only 25 percent of value. The taxpayer’s only recourse in that situation under Virginia’s Constitution was to try to prove a violation of the uniformity requirement (although taxation at different percentages of value resulting from intentional discrimination also would violate the federal Equal Protection Clause, see, *e.g.*, *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 43 S. Ct. 190 (1923)). Thus, in the first part of the twentieth century, uniformity often was a more significant limitation, at least on real property tax valuations, than fair market value.

However, in the last several decades, Virginia localities have been steadily moving closer to compliance with the constitutional mandate to tax *at* fair market value. For example, a study reported that eighty-nine of Virginia’s ninety-five counties and thirty-

seven of its thirty-eight cities had median ratios exceeding 80 percent. Virginia Department of Taxation, [The 2020 Virginia Assessment/Sales Ratio Study](#). This compares to an average ratio for Virginia counties of only 33.5 percent in 1914. *Report of the Joint Subcommittee on Tax Revision* 11 (1914).

Note that Va. Code § 58.1-3259 provides that prima facie proof that a locality has failed to comply with the provisions of Va. Code § 58.1-3201 requiring taxation at 100 percent of fair market value, for purposes of receiving a share of net ABC operation profits, is an assessment to sale ratio of less than 70 percent or more than 130 percent.

9-5.01(e)(1)(v) Fee Simple

The requirement of Article X, section 1 of the Virginia Constitution to tax all property implies that the interest in real property to be valued and taxed generally is the fee simple and not merely some lesser interest that might be held by the title holder of record. Decisions of the Virginia Supreme Court confirm this. A fee simple "is the highest estate known to the law, and is absolute, so far as it is possible for one to possess an absolute right of property in lands." *Goin v. Absher*, 189 Va. 372, 53 S.E.2d 50 (1949) (quoting *Yeager v. Town of Fairmount*, 43 W. Va. 259, 27 S.E. 234 (1897)). It "necessarily implies absolute dominion and control over the land." *Wickowski v. Swift*, 203 Va. 467, 124 S.E.2d 892 (1962). Thus, only an assessment of the fee simple will result in the taxation of "all property" as required by the Virginia Constitution. See, e.g., *Clarke Assocs. v. Arlington Cnty.*, 235 Va. 624, 369 S.E.2d 414 (1988); *Bd. of Sup'rs of Fairfax Cnty. v. Nassif*, 223 Va. 400, 290 S.E.2d 822 (1982).

9-5.01(e)(1)(vi) Effect of Use on Property Valuation

A consideration that can become quite complex in application is based on the simple fact that the value of property can be affected profoundly by the uses that can be made of it. An overarching principle that controls all Virginia Supreme Court decisions on the effect of use on the valuation of property, either for the purposes of taxation or eminent domain, is that property is to be valued at its "highest and best" use. Two broad issues can arise when assessing property for purposes of taxation: (i) the effect of existing uses on value and (ii) consideration of uses other than existing uses. A variety of specific issues have arisen within these broad subject areas. However, all of these variations merely are subsets of highest and best use analysis.

9-5.01(e)(1)(vi)(a) Highest and Best Use; Defined

Highest and best use is "the most advantageous and valuable use of the [property] . . . having regard to the existing business demands of the community or such as may reasonably be expected in the near future." *Appalachian Power Co. v. Anderson*, 212 Va. 705, 187 S.E.2d 148 (1972). "Remote or speculative advantages and disadvantages . . . are not to be considered." *Lynch v. Commonwealth Transp. Comm'r*, 247 Va. 388, 442 S.E.2d 388 (1994). Although most Virginia Supreme Court highest and best use rulings have come in condemnation cases, it has recognized that fair market values for tax purposes also are to be based on the property's highest and best use. See, e.g., *Shoosmith Bros. v. Cnty. of Chesterfield*, 268 Va. 241, 601 S.E.2d 641 (2004); *Orchard Glen East, Inc. v. Prince William Cnty. Bd. of Sup'rs*, 254 Va. 307, 492 S.E.2d 150 (1997); *Cnty. Bd. v. Commonwealth*, 240 Va. 108, 393 S.E.2d 194 (1990).

According to appraisal practice, there are five criteria for determining the highest and best use of a particular piece of real property. The highest and best use is the one which is (1) reasonably probable, (2) physically possible, (3) legally permissible, (4) financially feasible, and (5) maximally productive. Appraisal Institute, *The Appraisal of Real Estate* (15th ed. 2020). The "legally permissible" criterion does not demand that only uses legal under *current* law be considered. Rather, reasonably probable changes of law, e.g., likely zoning changes, may be assumed. *Id.* Thus clarified, these criteria do not seem inconsistent with Virginia law as stated above.

Highest and best use principles, while applicable in all real property valuations, have particular application to a number of specific valuation problems, as described in the following subsections.

9-5.01(e)(1)(vi)(b) Speculative Uses and Methodologies

In *Richmond & Petersburg Electric Railway Co. v. Seaboard Air Line Railway*, 103 Va. 399, 49 S.E. 512 (1905), the property owner contended that a condemnation for a railroad line would frustrate plans to expend large sums to develop the tract as a privately owned park, and thus the tract should have been valued as a planned park rather than in its actual condition. However, the Court ruled that the condemnation commissioners correctly rejected this claim based upon future investment and development "as too speculative, remote or conjectural . . . and [instead] took the said land in its present conditions with its adaptability as it at present stands to-day." *Id.* "It is the present actual value of the land with all its adaptations to general and special uses, and not its prospective, or speculative, or possible value, based upon future expenditures and improvements, that is to be considered." *Id.* (emphasis added).

In *Pruner v. State Highway Commissioner*, 173 Va. 307, 4 S.E.2d 393 (1939), the issue was whether farm land condemned for a road should have been valued for subdivision use as well as for farm uses. The Virginia Supreme Court held that subdivision use should have been considered given that the "location and surroundings likely rendered the land available for subdivision." *Id.* The Court stated that "all uses to which [the property] may be reasonably adapted [should be considered and the property valued] upon the basis of its most advantageous and valuable use, having regard to the existing business demands of the community or such as may be reasonably expected in the immediate future. The uses to be considered must be so reasonably probable as to have an effect on the present market value of the land. Purely imaginative or speculative value should not be considered." *Id.*

Appalachian Power Co. v. Gorman, 191 Va. 344, 61 S.E.2d 33 (1950), involved the condemnation of a power line easement. The power company conceded that the property was most valuable for subdivision purposes but objected to evidence purporting to show the "value of and damages to the lots in a subdivision of the land with the easement imposed thereon," in particular "an unrecorded map showing a subdivision of the . . . tract, although there had never been any lots sold therefrom, or any improvements, as shown on the map, made thereon." *Id.* However, the Court ruled that the evidence was properly admitted, stating that "[i]t is not contended here that the landowners were entitled to recover for their property as platted land; but that they were entitled to show by the map the capabilities of the land, and that its susceptibility to platting in the manner proposed made it more valuable than it would otherwise be." *Id.*

Appalachian Power Co. v. Anderson, 212 Va. 705, 187 S.E.2d 148 (1972), involved the condemnation of a power line easement over an unimproved portion of a tract used in part for a trailer park. After the condemnation petition was filed, the landowners hired a surveyor to subdivide and plat the property to show ninety additional trailer parking sites reflecting the landowners' future development plans. The landowners claimed that the condemnation award should be determined by capitalizing anticipated income from the operation of the nonexistent trailer sites shown on the plat and then computing the adverse effect on this anticipated income allegedly resulting from the easement. But while it would have been proper for the landowners to introduce evidence to establish that the highest and best use of their property was for future expansion of the trailer park, the Virginia Supreme Court found that "it is clear that the platting and subdividing of this vacant and unimproved property into lots with driveways to show its present market value was not proper." *Id.* The Court distinguished *Gorman* on the ground that here "we not only have a plat that does not reflect all existing conditions, but a plat, made subsequent to the filing of the condemnation suit, which subdivides into specific lots land embraced within the easement sought." *Id.* While the Virginia Supreme Court could "envision a case where the suitability of land for a

specific purpose might be an issue and where a plat showing how the land could be subdivided into lots would be admissible for that purpose, . . . that is not the instant case Here the map . . . was used . . . to refer to specific lots and to point out how and the amount by which they were damaged. In essence, [the landowners] treated the affected land . . . as divided into lots when in fact it is undeveloped acreage [They computed] value and damages . . . on the value of the hypothetical and nonexistent lots, rather than on the tract as a whole." *Id.*

Fruit Growers Express Co. v. City of Alexandria, 216 Va. 602, 221 S.E.2d 157 (1976), is the most significant tax case on this issue. The taxpayer sought to prove the present fair market value of raw land by deducting the estimated cost of developing it into finished, subdivided industrial sites from the estimated income expected from the sale or lease of those finished sites. However, the Virginia Supreme Court ruled that this evidence was properly excluded, emphasizing that the issue was not whether the evidence was "admissible to show the feasibility of a particular land use option but rather whether such evidence is admissible to prove the fair market value of the land." *Id.* Quoting a treatise on valuation, the Court observed that "[v]aluation based upon an estimate of the potential income which might be realized from utilization by the owner of the property in a manner of which it is capable (but of which he has not yet availed himself) has generally been rejected on the ground that such income is too uncertain and conjectural to be acceptable." *Id.* While a property owner "may offer a plan showing a possible scheme of development for the purpose for which it is most available, provided it appears that the likelihood of demand for the property for that purpose is such as to affect market value," he cannot describe in detail "a speculative enterprise for which in his opinion (or that of some expert) the land might be used, and base his estimate of value upon the profits which he would expect to derive from the Enterprise. In other words, *he cannot capitalize the projected earnings of a non-existent enterprise or projected use.*" *Id.* (emphasis supplied); see also *PHF II Norfolk, LLC v. City of Norfolk*, 94 Va. Cir. 454 (City of Norfolk 2016) (distinguishing *Fruit Growers* to the extent that future revenue projections based on a property improvement plan, while involving some degree of speculation, can be used to establish fair market value when the improvement is to an existing business).

Lynch v. Commonwealth Transportation Commissioner, 247 Va. 388, 442 S.E.2d 388 (1994), involved a highway condemnation. At the time of the take, the property was zoned residential, but sixteen months earlier the owner had applied for rezoning to an industrial category. "Although the rezoning application had not been approved on the date of the taking, the County staff had endorsed [the owner's] application, and the record indicates that approval of the application was a virtual certainty. Both parties agreed that the highest and best use of the property was for industrial purposes, not for residential purposes." *Id.* The Virginia Supreme Court ruled that exhibits generally showing the purported effect of the taking on the development plan submitted in connection with the rezoning application should have been admitted into evidence. Citing both *Gorman* and *Anderson, supra*, the Court found that the trial court had recognized that the property was adaptable and suitable for development as an office/industrial park and that such may be the highest and best use. Therefore, the development plan was not speculative but instead "represented a real and present potential use in the light of existing conditions and circumstances." *Id.* The Court concluded that the rejected evidence "demonstrated the property's potential, the adaptability and suitability of the property for its highest and best use, and the impact of the taking on the remaining property." *Id.* Thus, the Court held that the owner's claim was "not based upon frustration of speculative plans for future use of property . . . [but rather] upon a use that [the owner] reasonably might have made of his property in the light of existing conditions and circumstances." *Id.* (citation omitted); see also *Helmick Family Farm, LLC v. State Comm'r of Highways*, 297 Va. 777, 832 S.E.2d 1 (2019).

Circuit court cases concerning speculative methodologies include *IPROC Norfolk LLC v. City of Norfolk*, 86 Va. Cir. 435 (City of Norfolk 2013) (assessment based on consideration of income earned over prior two years; taxpayer's expert testified that buyer would not look at two-year old data but instead would consider forward looking data such as overall outlook for property at the time; court held that the city's approach was not error because it was based upon "concrete data" and not speculative "guesswork as to what the [property] may or may not earn," and that taxpayer's expert's approach was not mandated by law and was "impractical, if not impossible, for a taxing authority to employ"); *Vienna Metro LLC v. Bd. of Sup'rs of Fairfax Cnty.*, 86 Va. Cir. 421 (Fairfax Cnty. 2013) (taxpayer's expert's approach in valuing vacant land was conjectural and speculative; court also found his non-quantifiable "adjustments" for differences between subject property and allegedly comparable properties "to be a mix of objective and subjective standards that is ingenuous but troubling"); *NA Properties Inc. v. Cnty. of Loudoun*, 84 Va. Cir. 551 (Loudoun Cnty. 2012) (expert opinion using income capitalization analysis that assumed vacant building would be renovated and leased was conjectural and speculative; assumption that another building was unusable and had zero value despite absence of legal restrictions on development also speculative; assumption of potential development density of vacant land based on alleged study of unidentified parcel also speculative); *United Servs. Auto. Ass'n v. City of Norfolk*, 84 Va. Cir. 385 (Norfolk 2012) (expert opinion based on assumption that owner-occupied office property would be converted into investor-owned multi-tenant space was speculative because it did not accurately reflect present value of the property); *Army-Navy Country Club v. City of Fairfax*, 86 Va. Cir. 1 (Fairfax Cnty. 2012) (per *Fruit Growers*, 216 Va. 602, 221 S.E.2d 157 (1976), manifest error for assessor to use "development cost" approach to value a country club by considering its value as a developed residential subdivision less the cost of such development); *Saul Holdings, L.P. v. Fairfax Cnty. Bd. of Sup'rs*, 43 Va. Cir. 193 (Fairfax Cnty. 1997) (remote and speculative uses of realty should not be considered in assessing it, but development costs necessary to attain income stream used in income capitalization valuation must be considered in determining fair market value; involved renovation of shopping center); *Van Dorn Assocs. v. City of Alexandria*, 2 Va. Cir. 171 (City of Alexandria 1983) (assessment of apartment properties based on potential condominium conversion erroneous in light of evidence that condominium conversion was not economically viable on assessment date; note that any consideration of condominium conversion potential in assessing multifamily residential property now is prohibited by Va. Code § 58.1-3202).

For a federal case rejecting the use of a speculative methodology in valuing real property, see *Mountain Valley Pipeline, LLC v. 9.89 Acres of Land*, No. 7:19-cv-145 (W.D. Va. Sept. 29, 2023 (summary judgment granted); Sept. 27, 2021 (motion in limine) (in eminent domain proceeding, evidence of value based on conceptual subdivision not legally permitted under applicable zoning ordinance was excluded).

9-5.01(e)(1)(vi)(c) Effect of Current Use on Value

The fact that property is to be assessed at its fair market value based on its highest and best use necessarily "require[s] consideration of a property's use when assessing the property." *Shoosmith Bros. v. Cnty. of Chesterfield*, 268 Va. 241, 601 S.E.2d 641 (2004). However, an assessor must take care to base fair market value on a use that would be considered relevant in the sale of the property, not a use that has some special value to the owner but would not necessarily be reflected in an open market sale price. Common examples of the latter include sentimental value or "use value." Use value is "the value a specific property has for a specific use. Use value focuses on the contributory value of the real estate to the enterprise of which it is a part, without regard to its highest and best use or the monetary amount that might be realized upon its sale." *Cnty. Bd. of Arlington Cnty. v. Commonwealth*, 240 Va. 108, 393 S.E.2d 194 (1990) (quoting Appraisal Institute, *The Appraisal of Real Estate* 20 (9th ed. 1987)). Except in a few particular circumstances mandated by statute (see section 9-5.01(g)(1)), use value is not relevant in determining fair market value. Machinery and tools that are not relevant to the highest and best use of

a particular parcel of real property, but for which there is a re-sale “market” in which willing purchasers may be interested in purchasing the machinery and tools for use elsewhere, may be said to have a market value for purposes of taxation, even though they have little or no utility to the current owner/user of the real estate. *W. Refining Yorktown v. Cnty. of York*, 292 Va. 804, 793 S.E.2d 777 (2016).

The most important Virginia case in this subject area is *Tuckahoe Woman’s Club v. City of Richmond*, 199 Va. 734, 101 S.E.2d 571 (1958). It concerned a 1955 assessment of a property subject to a restrictive covenant, not expiring until 1977, that it be used only as a woman’s club. It was assessed at \$105,000 based on depreciated reproduction cost. The assessor testified that his purpose in valuing the property was to equalize the tax burden, that there are many properties with no market value except to their owners, that he assumed that the only market for the subject property was its present owner, that the property could never be rented for any purpose, that he could not conceive of it being sold in his lifetime because there was no other club that would want it, that the value to the present owner was the only value he had to go by in assessing it, and that the property had no market value elsewhere that could be compared or justified. The assessor opined that if the property was offered for sale it would bring no more than \$85,000, but that it had value to its present owner in excess of \$100,000. Another appraisal witness testified that there was no fair market value for properties such as clubs, lodges, or churches and that when asked to estimate the fair market value of such a property “you more or less pull it out of the air” because it “is just one of those things that is a matter of judgment.” *Id.* The trial court affirmed the assessment.

The Virginia Supreme Court reversed and ordered the assessment reduced to \$85,000. The Court observed that in estimating fair market value “all the capabilities of the property and all the uses to which it may be applied or for which it is adapted, are to be considered, but it is not a question of the value of the property to the owner.” *Id.* The Court recognized the particular difficulty in ascertaining fair market value when property is of a kind not usually involved in sales and having no general market value. However, the Court emphasized that here the method used by the assessor “produced an amount in excess of what the property could be sold for. The value of the property to the owner is not the question and the answer to it does not supply the answer to the essential inquiry as to what is the fair market value.” *Id.*; see also *Shoosmith Bros.*, 268 Va. 241, 601 S.E.2d 641 (involved tax valuation of property used as sanitary landfill; county can consider such use in assessing property, even though use required taxpayer to obtain non-transferable permits; income capitalization method was appropriate, even though this particular property was owner-occupied and generated no rental income).

9-5.01(e)(1)(vii) Approaches to Valuation—Sales, Cost, and Income

According to appraisal theory, in order to achieve a well-supported value conclusion that reflects all pertinent factors, an appraiser can use three alternative viewpoints, referred to as the “approaches to value.” Appraisal Institute, *The Appraisal of Real Estate* (15th ed. 2020). These are the cost approach, by which “value is estimated as the current cost of reproducing or replacing the improvements (including an appropriate entrepreneurial incentive or profit) minus the loss in value from depreciation plus land or site value”; the sales comparison approach, by which “value is indicated by recent sales of comparable properties in the market”; and the income capitalization approach, by which “value is indicated by a property’s earning power, based on the capitalization of income.” *Id.* “All three approaches are applicable to many appraisal problems, but one or more of the approaches may have greater significance in a given [appraisal] assignment.” *Id.* In determining which approach or approaches to use, an appraiser considers the nature of the property being valued and the availability or lack of sufficient reliable data needed to perform each approach. “Appraisers should apply all the approaches that are applicable and for which there is data.” *Id.*; see also *CSX Transp., Inc. v. Ga. State Bd. of Equalization*, 552 U.S. 9, 128 S. Ct. 467 (2007) (citing, inter alia, *The Appraisal of Real Estate* in

discussing different approaches to valuation and observing that the choice of appraisal methodology can have a significant impact on the resulting estimate of value); *United Servs. Auto. Ass'n v. City of Norfolk*, 84 Va. Cir. 385 (City of Norfolk 2012) (omission of sales comparison approach in appraisal of owner-occupied office property failed to reliably and accurately establish fair market value).

With respect to the cost approach, there are two alternative bases for estimating cost. One is to estimate the cost to *reproduce* the improvements, or in other words, to build an exact duplicate of the existing improvement, embodying whatever deficiencies, superadequacies (i.e., better than it has to be for its highest and best use), and obsolescence exist. The second is to estimate the cost to *replace* the improvement, i.e., to build an improvement with the same utility as the existing structure using current materials, standards, design, and layout. *Appraisal of Real Estate, supra*. Often the replacement method is considered preferable for estimating fair market value, primarily because it can eliminate the need to measure some forms of functional obsolescence. Note that the reliability of the cost approach in valuing older properties may diminish because of the difficulty in estimating depreciation. *Id.* Conversely, the cost approach may yield a more accurate value when improvements are new or nearly so, since there usually will be little or no depreciation at that time.

The income capitalization approach, properly applied, is best suited for valuing properties that typically are purchased as an investment in the revenue expected to be derived from the property. *Id.* Obvious examples are office, retail, or multifamily residential properties purchased with the intent to lease space in them to tenants. The income capitalization approach can be extremely complex. Often, the data involved can be extensive and quite complicated, e.g., detailed leases with very complex terms for rental space in comparable properties. Income capitalizations performed by local assessors usually are in the form of a "direct capitalization, which uses the relationship of one year's income to conclude a value." *Id.* However, another and more complicated method is "yield capitalization [sometimes called discounted cash flow], which considers a series of cash flows over time together with any reversion value or resale proceeds." *Id.* At least one Virginia court has held that an assessor need not use a yield capitalization. *J.C. Penney Co. v. Fairfax Cnty. Bd. of Sup'rs*, Law No. 111399 (Fairfax Cnty. Cir. Ct. Apr. 21, 1994) (not error to rely on direct capitalization rather than discounted cash flow in assessing anchor department store).

Sales comparison seems to be the most easily understood approach to valuation. Sometimes it has been referred to as the "market approach," a terminology that misleadingly can suggest that only it yields a market value. But in fact, all three approaches can produce market values, because each approach attempts to replicate a way in which participants in the market for particular kinds of property use information to determine how much they are willing to accept or pay for such properties. One way is to see what others have paid recently for comparable properties. That is the sales comparison approach. Another is to determine how much it would cost to build a comparable property rather than buy one for sale. That is the cost approach. A third is to base the price of an income-producing property on the amount of income it is likely to produce. That is the income capitalization approach.

Note that it is the nature of the market collectively, not that of particular sellers and buyers, that should determine which approach or approaches to value are most appropriate. For example, "[i]ncome capitalization can be particularly unreliable in the market for commercial or industrial property where owner-occupants outbid investors," *The Appraisal of Real Estate*, because owner-occupants tend to be indifferent to the potential income stream that may be realized by renting out the property. Alternatively, it may be entirely appropriate to use income capitalization to value a property that is actually owner-occupied if the market for such a property is driven by purchasers who are more interested in the

potential rental income stream. Similarly, although single-family homes sometimes are purchased by individuals interested in renting them to tenants, and a particular home being valued may in fact be a rental property, nonetheless the market for such properties usually is composed primarily of potential owner-occupiers, and so income capitalization rarely is used to value single-family homes. *Id.* Note that by statute, real property generating income as affordable rental housing must be assessed using the income approach. Va. Code § 58.1-3295(E).

There have been a number of Virginia cases that have discussed some of the myriad factors that can and usually do complicate one or more of the approaches to value, such as the scarcity of reliable data or the need to apply sophisticated and ultimately subjective “adjustments” in considering data about properties that are reasonably comparable to but not exactly the same as the subject property. See, e.g., *Jackson Warehouse, LP v. City of Richmond*, 80 Va. Cir. 563 (City of Richmond 2010) (describes gross income multiplier as a check on sales approach); *Sterling Park Shopping Ctr., L.P. v. Loudoun Cnty. Bd. of Sup’rs*, 50 Va. Cir. 196 (Loudoun Cnty. 1999) (describes data adjustments made in valuing a shopping center); *Dulles Indus. Assocs. G.P. v. Loudoun Cnty. Bd. of Sup’rs*, 36 Va. Cir. 360 (Loudoun Cnty. 1995) (describes data adjustments made in application of mass appraisal technique).

The Virginia Supreme Court has expressed some definite preferences with respect to the various approaches to valuation. Two are most significant. First, the Court generally has favored the use of the income capitalization approach in valuing income-producing property. See, e.g., *Tyson’s Int’l L.P. v. Bd. of Sup’rs of Fairfax Cnty.*, 241 Va. 5, 400 S.E.2d 151 (1991); *Bd. of Sup’rs of Fairfax Cnty. v. Nassif*, 223 Va. 400, 290 S.E.2d 822 (1982). As discussed more fully below, however, it is clear that all approaches must be at least considered. See *McKee Foods Corp. v. Cnty. of Augusta*, 297 Va. 482, 830 S.E.2d 25 (2019) (although assessor stated he considered and rejected sales and income approaches, evidence showed he did not correctly consider them).

Second, the Virginia Supreme Court has indicated that the cost approach is least favored and so should not be the primary method of valuation if data is available to support either of the two other methods. Real estate assessments based on cost approaches have been ruled erroneous in several Virginia Supreme Court decisions. See, e.g., *First & Merchants Nat’l Bank v. Cnty. of Amherst*, 204 Va. 584, 132 S.E.2d 721 (1963) (assessments of two dams using cost approach failed to properly consider effect of deed restrictions limiting use of the dams and thus affecting their market value); *Tuckahoe Woman’s Club v. City of Richmond*, 199 Va. 734, 101 S.E.2d 571 (1958) (assessments of clubhouse based on cost approach were excessive; assessor testified that property had no value as a clubhouse to anyone except present owner; the Court held that “[d]epreciated reproduction cost may be an element for consideration in ascertaining fair market value, but it cannot of itself be the standard for assessment.”); see also *Skyline Swannanoa Inc. v. Nelson Cnty.*, 186 Va. 878, 44 S.E.2d 437 (1947).

However, in *Tidewater Psychiatric Institute v. City of Virginia Beach*, 256 Va. 136, 501 S.E.2d 761 (1998), the Virginia Supreme Court reaffirmed the vitality of the cost approach in certain circumstances when it held that an assessment of a psychiatric hospital was not erroneous merely because it was based solely on a cost approach. The Court explicitly limited the application of *Tuckahoe Woman’s Club* and other prior decisions repudiating assessments based on cost to situations “where the taxing authority fails to consider other factors that plainly show such a method ‘would patently lead to unfair and improper results.’” *Id.* (quoting *First & Merchants Nat’l Bank*, 204 Va. 584, 132 S.E.2d 721 (1963)). The Court found that the assessor had properly considered and rejected other methods of valuation, due in part to a lack of reliable data, and cited *Norfolk & Western Railway Co. v. Commonwealth*, 211 Va. 692, 179 S.E.2d 623 (1971), for the proposition that “where a taxing authority considers and properly rejects other methods of calculating

the value of property, an assessment based on depreciated reproduction cost is entitled to a presumption of validity where that method is the only one remaining.” *Id.* The alternative methods must actually be evaluated, however, as it was error for a county to use the depreciated reproduction cost method based on its unsubstantiated determination that it did not have the data to use other methods. *Bd. of Sup’rs of Fairfax Cnty. v. HCA Health Servs.*, 260 Va. 317, 535 S.E.2d 163 (2000); *see also IPROC Norfolk v. City of Norfolk*, 86 Va. Cir. 435 (City of Norfolk 2013) (when overall value of two jointly owned and operated parcels (hotel and convention center) was determined based on income approach, it was not error to use cost approach to assign a value to one parcel (convention center) when it was impossible to separate income between the parcels).

In *Keswick Club, L.P. v. County of Albemarle*, 273 Va. 128, 639 S.E.2d 243 (2007), the Virginia Supreme Court again found fault when an assessor relied only on a cost approach in performing an assessment, this time of a private golf club, citing *HCA Health Services* in rejecting the assessor’s proffered justifications for not using either a sales or income approach. The Court recognized that while an assessor may conclude that one or more approaches is not feasible with respect to a particular property, if it fails to consider and properly reject unused approaches, then a resulting assessment based on a single approach is not entitled to a presumption of validity. But *see Jackson Warehouse LP v. City of Richmond*, 80 Va. Cir. 563 (City of Richmond 2010), where the circuit court stated that there is no right to a preferred method of valuation and held that assessor’s use of gross income multiplier (ratio of property’s sale price to its annual gross income) as a check on valuation derived from sales approach effectively constituted use of an income approach and thus satisfied *Keswick Club*.

In *McKee Foods Corp. v. County of Augusta*, 297 Va. 482, 830 S.E.2d 25 (2019), the Virginia Supreme Court found that the county assessor had failed to properly use any of the three accepted valuation methods and thus the assessment made before the 2011 amendment to Va. Code § 58.1-3984(B) was not entitled to any presumption of correctness. Regarding the assessments made after the amendment, the Court found that the presumption of correctness still does not apply if the taxing authority makes an assessment based on a single approach, failing to consider and properly reject the other approaches.

9-5.01(e)(2) Selected Valuation Issues

9-5.01(e)(2)(i) Bulk Valuations

In *City of Richmond v. Jackson Ward Partners*, 284 Va. 8, 726 S.E.2d 279 (2012), the Virginia Supreme Court made clear that separate parcels of real property must be assessed on an individual basis. The properties at issue consisted of eleven structures with a total of eighteen rental units located on eight separate non-contiguous parcels, with a deed of trust and regulatory agreement that prohibited the sale of individual units and required them to be rented to low-income households with limitations on rental rates. The taxpayer argued, and the circuit court agreed, that the property should be valued as an eighteen-unit apartment complex based on what an investor would pay to acquire it all in a single sale, with that hypothetical sale price allocated on a per unit basis and individual parcels assessed based on the number and kind of units located on each parcel. However, the Supreme Court rejected this approach, relying on *West Creek Associates, LLC v. County of Goochland*, 276 Va. 393, 665 S.E.2d 834 (2008), and *TB Venture, LLC v. Arlington County*, 280 Va. 558, 701 S.E.2d 791 (2010), discussed fully in section 9-5.01(e)(2)(iii). While noting that the restrictions that applied to the property undoubtedly could affect the fair market value of each of the eight parcels, the Court held that did not obviate the taxpayer’s burden to prove the fair market value of each separate parcel.

9-5.01(e)(2)(ii) Mass Appraisals

In *Portsmouth 2175 Elmhurst, LLC v. City of Portsmouth*, 298 Va. 310, 837 S.E.2d 504 (2020), the Virginia Supreme Court recognized that professional standards permit mass appraisals, described as a “process of valuing a universe of properties as of a given date

using standard methodology, employing common data, and allowing for statistical testing.” It also noted that inherent in the mass appraisal method was the understanding that the method presupposes that it may be unreasonable as applied to an individual piece of property. It is the taxpayer’s burden to show that the mass appraisal “indefensibly inflated the fair market value.” Moreover, a report by one expert citing “potential” violations of USPAP standards was not sufficient to demonstrate that the city’s assessment was not arrived at in accordance with generally accepted appraisal practices.

9-5.01(e)(2)(iii) Actual Sales Price

The recent sales price of property is not conclusive evidence of fair market value, but must be given substantial weight. *Arlington Cnty. Bd. v. Ginsberg*, 228 Va. 633, 325 S.E.2d 348 (1985); see also *City of Harrisonburg v. Taubman*, 212 Va. 28, 181 S.E.2d 654 (1971); *Am. Viscose Corp. v. City of Roanoke*, 205 Va. 192, 135 S.E.2d 795 (1964); *Portsmouth 2715 Elmhurst, LLC v. City of Portsmouth*, 298 Va. 310, 837 S.E.2d 504 (2020) (evidence that property was twice sold for well below assessed value each time, along with testimony of expert, presented prima facie case that property was assessed at more than its fair market value). A forced sale, however, is not evidence of fair market value. *Lake Monticello Serv. Co. v. Bd. of Sup’rs of Fluvanna Cnty.*, 237 Va. 434, 377 S.E.2d 446 (1989); *Rittenhouse Square, L.C. v. City of Richmond*, 49 Va. Cir. 100 (City of Richmond 1999); see also *Britt, L.P. v. Fairfax Cnty. Bd. of Sup’rs*, 43 Va. Cir. 171 (Fairfax Cnty. 1997) (manifest error to assess real property at \$25.8 million two weeks after it had been sold for \$16 million).

A further Virginia Supreme Court decision on this subject is *West Creek Associates, LLC v. County of Goochland*, 276 Va. 393, 665 S.E.2d 834 (2008). The trial court opinion can be found at 73 Va. Cir. 64 (Goochland Cnty. 2007). *West Creek* presented the issue of whether an actual bulk sale price should control the subsequent assessed values of numerous individual parcels created from the property sold in bulk. In 2000, some 2,500 acres of undeveloped land in a business park were sold by a bank trustee for \$34.1 million. For federal income tax purposes, the sale was structured as a sale of 144 individually recorded (though not legally subdivided) parcels of various sizes ranging from seven to twenty-five acres, and each parcel was conveyed to a different limited liability company. Some six months later the county assessed each of the 144 parcels separately, and the total of the 144 separate assessments was approximately \$105.4 million. The 144 property owners sued, claiming that the sum of the 144 assessments could not exceed the recent \$34.1 million sale price for the total 2,500 acres.

For the first time, the Virginia Supreme Court explicitly recognized that a bulk sale price is not necessarily a reliable indicator of individual parcel values. In affirming the trial court’s decision that the assessments were not controlled by the \$34.1 million sale price, the Court noted that the taxpayers did not challenge the trial court’s conclusion that the transaction was a bulk sale. The Court also observed that the trial court had found that the taxpayers’ evidence ignored the economy of scale inherent in the bulk purchase and found, as did the trial court, that the testimony of the taxpayers’ expert, who had merely allocated various portions of the sale price to the different individual parcels, failed to prove that the parcels were assessed at more than fair market value. The Court also quoted a county witness who characterized the taxpayers’ expert’s methodology as “an arithmetic formula,” which is not an accepted appraisal method,” and quoted the testimony of the county’s appraisal expert that “[r]elying on [the bulk] sale as an independent indicator of value for any of the 144 parcels would produce an appraisal report that would lack total credibility.” *Id.*

In *TB Venture, LLC v. Arlington County*, 280 Va. 558, 701 S.E.2d 791 (2010), the Virginia Supreme Court again rejected a valuation based on a bulk sale, this time of twenty-one residential condominium units to the plaintiff. The Court noted that Va. Code § 55-79.42 (now § 55.1-1903) provides that each such condominium unit constitutes for all purposes a separate parcel of real estate, yet the plaintiff’s expert witness admitted that he had not

separately appraised the individual units but instead had appraised all twenty-one units as a whole and then merely allocated values to each unit. That witness also admitted that he had appraised the twenty-one units on a leased fee rather than fee simple basis and further admitted that his valuation was a "bulk valuation" because individual unit prices had not been negotiated for the bulk sale to the plaintiff.

Keswick Club v. County of Albemarle, 273 Va. 128, 639 S.E.2d 243 (2007) ("*Keswick I*"), involved a 2003 assessment of a private golf club. The assessment was performed using a cost approach. The county claimed that it had considered and properly rejected the sales and income approaches. A 1999 agreement between two corporations essentially gave each the right to require that a complex corporate stock transaction take place at some time in the future that would have the effect of transferring beneficial ownership of the golf club from one corporation to the other at a price established by the 1999 agreement. The right was not exercised until 2002. The assessor testified that he did not rely on this transaction because it was not recorded in the county's land records and he did not consider it to be at arm's length. However, the Virginia Supreme Court held that the assessor had failed to properly consider whether this transaction could be used in a sales comparison approach, emphasizing the assessor's admissions at trial that he had not asked for nor seen any of the documentation of the transaction and had known nothing of its terms and conditions. Under those circumstances, the Court held that "the county's refusal to sufficiently investigate, or investigate at all, the terms and circumstances" of the transaction "amounts to a failure by the county to consider and properly reject the sales approach."

Keswick I did not discuss what seems to be an obvious problem with the transaction, namely, should it be considered a "recent" sale of the subject property so as to invoke the Court's precedents cited above? Although the right was exercised in 2002, the terms actually were negotiated and the price agreed to when the agreement was entered into in 1999, so it can be argued that the 2002 sale price could not have reflected market conditions in 2002. It also seems questionable whether a transaction so structured ought to even be considered a sale of real estate. However, on remand the circuit court did not address these questions but ruled that neither the county nor the property owner had arrived at a correct figure, and instead fixed the assessment at a figure approximately halfway in between. In particular, the circuit court ruled that the county still had failed to show consideration and proper rejection of the income and sales approaches and had simply reasserted its previous value based on the cost approach, but that the landowner also was relying on the same appraisal value it previously had asserted. *Keswick Club, L.P. v. Cnty. of Albemarle*, CL04-9810 (Albemarle Cnty. Cir. Ct. Jan. 27, 2009), *aff'd*, 280 Va. 381, 699 S.E.2d 491 (2010) ("*Keswick II*") (circuit court erred in stating that *Keswick I* found that assessment was erroneous, because *Keswick I* only addressed the county's assessment methods and not resulting value, but nonetheless circuit court applied correct standard on remand when considering whether assessment was erroneous).

9-5.01(e)(2)(iv) Actual Income in Income Capitalization

A persistent valuation question to come before the Virginia Supreme Court is whether and how the "contract rent" for a commercial property (i.e., the rent payable under the actual leases on the property) should be considered in using income capitalization. It is particularly significant and most commonly arises when contract rent is the product of a long-term lease and is significantly above- or (more commonly) below-market at the time of the assessment.

The usual first step in a fee simple income capitalization is selecting the economic rent. The Virginia Supreme Court has said that "economic rent" means the amount a typical lessee should be willing to pay for the right to use and occupy the property for a stated period. *Bd. of Sup'rs of Fairfax Cnty. v. Nassif*, 223 Va. 400, 290 S.E.2d 822 (1982) (quoting *Shaia v. City of Richmond*, 207 Va. 885, 153 S.E.2d 257 (1967)). The appraisal profession defines "economic rent" and its synonym "market rent" as "the rental income a property

would probably command in the open market. It is indicated by the current rents that are either paid or asked for comparable space with the same division of expenses as of the date of the appraisal." Appraisal Institute, *The Appraisal of Real Estate* (15th ed. 2020).

Appraisal theory provides that an income capitalization based on contract rent instead of economic rent values not the fee simple but merely the partial interest in the property held by the landlord, usually called the "leased fee." *Id.* (the misleading term "fee simple subject to existing leases" sometimes is used instead of "leased fee," perhaps to disguise the fact that it is not a fee simple interest at all). The contract rent specified in a lease may not necessarily be at market at the time of valuation for any number of reasons, including, e.g., that it was not entered into at arm's length, or was part of a sale/leaseback transaction and so represents an "artificial" number not negotiated in the open market for rental property, or was at market at the time it was entered into but market rent rates have since changed. See, e.g., *Richmond, F. & P. R.R. v. Commonwealth*, 203 Va. 294, 124 S.E.2d 206 (1962) (example given of a lease between friends or close business associates).

If contract rent is below market, the leased fee generally is worth less than the fee simple, because the landlord's income stream is less than if rent was at the higher market level. The difference can be considered to be the market value of the tenant's interest, i.e., the leasehold. See, e.g., *Smith v. Payne*, 153 Va. 746, 151 S.E. 295 (1929) (lease of a parcel of real estate divides the fee simple estate between the landlord and tenant); *Stonegap Colliery Co. v. Kelly & Vicars*, 115 Va. 390, 79 S.E. 341 (1913) (tenant gains the portion of the divided fee simple referred to as the leasehold estate, which generally gives the tenant the right to use and occupy the real estate for a period of time). But see Appraisal Institute, *The Appraisal of Real Estate* (15th ed. 2020) (value of leased fee plus value of leasehold does not necessarily equal value of fee simple in all cases). The Virginia Supreme Court has recognized this relationship in condemnation cases, requiring fee simple awards to be split between landlords and tenants who prove the market value of their leaseholds. See, e.g., *Exxon Corp. v. M & Q Holding Corp.*, 221 Va. 274, 269 S.E.2d 371 (1980).

However, in a series of seven cases decided from 1982 to 1991, the Virginia Supreme Court ruled that contract rent must be "considered" in selecting economic rent. In doing so, the Court explicitly rejected the idea that economic rent must be the same as contract rent or that any interest other than the fee simple should be valued. However, the Court has never set forth the mechanics of how it thinks an assessor properly can or should "consider" contract rent in the selection of economic rent while still valuing the fee simple.

The seven cases are: *Board of Supervisors of Fairfax County v. Nassif*, 223 Va. 400, 290 S.E.2d 822 (1982) ("*Nassif I*") (while assessor erred in ignoring contract rent completely, trial court also erred in holding that contract rent must be inserted into the income capitalization formula, so case was remanded); *Board of Supervisors of Fairfax County v. Donatelli & Klein, Inc.*, 228 Va. 620, 325 S.E.2d 342 (1985) (Virginia Supreme Court affirmed trial court's decision to set assessment at the amount of a recent sale of the subject property); *Arlington County Board v. Ginsberg*, 228 Va. 633, 325 S.E.2d 348 (1985) (Virginia Supreme Court affirmed trial court's decision to set assessment at the amount of the previous year's assessment); *Nassif v. Board of Supervisors of Fairfax County*, 231 Va. 472, 345 S.E.2d 520 (1986) ("*Nassif II*") (on remand from *Nassif I*, Virginia Supreme Court found error when assessor testified that that he considered contract rent but decided not to use it to change his economic rent because contract rent did not reflect current market; Court adopted value of taxpayer's expert who testified that he increased his previous value estimate by \$250,000 because he had now used economic rent instead of contract rent in the income capitalization but had considered contract rent as relevant evidence of economic rent; Court gave no indication of basis for concluding why effect of considering contract rent was a \$250,000 value change); *Smith v. Board of Supervisors of Fairfax County*, 234 Va. 250, 361 S.E.2d 351 (1987) (Virginia Supreme Court held that actual rents and expenses cannot be ignored "or given only token consideration" by assessor; Court adopted values

derived by using actual rents and expenses but cited evidence that those figures in fact were at market); *Clarke Associates v. Arlington County*, 235 Va. 624, 369 S.E.2d 414 (1988) (Virginia Supreme Court remanded, ruling that assessor erred in claiming that he considered contract rent but did not use it in his value computations because it did not reflect current market rent rate; Court explicitly rejected argument “that any method of assessment which gives effect to a contract rental rate below the economic rental rate violates the constitutional mandate to tax the full market value of the fee simple interest” but again provided no guidance as to what such method would be constitutional); and *Tyson's International L.P. v. Board of Supervisors of Fairfax County*, 241 Va. 5, 400 S.E.2d 151 (1991) (Virginia Supreme Court again emphasized that contract rent must be factored into the income capitalization formula but concluded that there was sufficient evidence that contract rents at issue in fact were at market to adopt values based on them).

However, *Sterling Park Shopping Center, L.P. v. Loudoun County Board of Supervisors*, 50 Va. Cir. 196 (Loudoun Cnty. 1999), suggests a possible way to satisfy the requirement that contract rent be “considered.” In that case, the Court held that the assessor properly considered contract rent in selecting the economic rent used to value an aging shopping center that was commanding below-market rents. The evidence showed that the assessor had developed an economic model based on statements of income and expenses received from all county shopping centers and then had made adjustments for the subject property based on its condition, configuration, existing leases, and competitors. The Court held that the assessor had complied with requirements of *Nassif I* and *Nassif II* because his adjustments showed that he clearly had applied a “low end” economic rent in the assessment.

Note that market data almost never indicates only one possible figure for economic rent. Rather, usually the data will show a range of rents for comparable properties, and an appraiser then generally uses his or her professional judgment to select a specific figure within that range. *Sterling Park Shopping Center* seems to suggest that if an assessor, faced with valuing a property with below-market contract rent, selects an economic rent for a property within the range of the market data but lower than he or she otherwise would have selected *but for* the contract rent on the subject property, then the assessor has adequately “considered” contract rent but still has managed to derive a value that reflects a fee simple interest in the property. However, the Virginia Supreme Court has yet to consider this precise question.

See also *Woodstock Assocs. v. Shenandoah Cnty.*, 43 Va. Cir. 96 (Shenandoah Cnty. 1997) (held to be manifest error to use estimates rather than actual income in the income capitalization approach); *Saul Holdings, L.P. v. Fairfax Cnty. Bd. of Sup'rs*, 43 Va. Cir. 193 (Fairfax Cnty. 1997) (manifest error not to consider actual vacancy rates, even though such rates are not conclusive; non-speculative development costs must also be considered in determining fair market value of income-producing property).

9-5.01(e)(2)(v) Residential Rentals

Residential rental property consisting of more than four units must be assessed using the income approach unless (i) the property has been sold since the previous assessment, in which case the board may consider the sales price of such property; (ii) improvements are being constructed or renovated, in which case the board may consider the market value of such property; or (iii) the value arrived at by the income approach is not otherwise in accordance with generally accepted appraisal practices and standards, in which case the board may consider market value. When an owner of more than four residential rental units appeals an assessment, the board of equalization must consider (i) the actual gross income generated from such real property and any resultant loss in income attributable to vacancies, collection losses, and rent concessions; (ii) the actual operating expenses and expenditures and the impact of any additional expenses or expenditures; and (iii) any other

evidence relevant to determining fair market value of such real property. Va. Code § 58.1-3295.1.

9-5.01(e)(2)(vi) Business Enterprise Value

When a property is valued by income capitalization, should its entire earning potential be used to select economic rent, or should some portion be considered “non-realty” and excluded from the computation so as to reduce the resulting value? If the property is sold, should some portion of the price be allocated other than to realty in considering the sale price as evidence of value? Arguments have raged in the appraisal profession over whether there should be a non-realty deduction for “business enterprise value” (“BEV”) (sometimes called “business value” or “capitalized economic profit”) in an income capitalization or sales comparison valuation and, if so, then for what kinds of property, under what circumstances, to what extent, and how should it be calculated.

BEV has been called “one of the most important and controversial topics confronting appraisers.” Appraisal Institute, *The Appraisal of Real Estate* 644 (15th ed. 2020). While it is generally accepted that there is a BEV component to the revenue of certain kinds of properties (most notably hotels), the question of whether such an element exists in the value of other kinds of properties is hotly debated by appraisers. See, e.g., *id.* One court has referred to it as “income that the property owner received [that] is not income from the rental of the real estate but rather the net income of a business conducted at the facility,” although that formulation has not been generally endorsed elsewhere. *Chesapeake Hotel LP v. Saddle Brook Twp.*, 22 N.J. Tax 525 (N.J. Tax Ct. 2005). The appeal of BEV to taxpayers challenging commercial property assessments is that it can make a portion of a property’s income in an income capitalization analysis (or a portion of the price paid in sales of comparable properties) effectively disappear, thus leading to lower taxable value conclusions. See *id.* BEV described as a “residual intangible personal property component in certain properties”).

The Virginia Supreme Court has recognized that it is possible for a valuation based on income from business operations to include non-realty elements and, if so, it should not form the basis for a real property tax assessment. *Cnty. Bd. of Arlington Cnty. v. Commonwealth*, 240 Va. 108, 393 S.E.2d 194 (1990) (“unit method” of appraising railroad real estate, which instead of capitalizing rental income from real estate capitalized operating income of entire railroad, was invalid because resulting value was influenced by many elements unrelated to land and improvements). Unanswered is the question of whether the Virginia Supreme Court would extend this reasoning to standard valuations of commonplace kinds of real estate. See also *State Highway & Transp. Comm’r v. Donelson*, 221 Va. 822, 273 S.E.2d 814 (1981) (condemnation case in which the Virginia Supreme Court found “that while profits or income attributable to the land may be admissible in some instances, those derived from the operator’s skill and expertise in management of a business are not. Nevertheless, such a line is not always easy to draw”). However, this still leaves open a question: Would completely ignoring management skill be consistent with the requirement to value at highest and best use, since that standard arguably implies at least competent management?

Some important BEV litigation in other states has concerned shopping malls. However, mall owners have met with little success. See, e.g., *State ex rel. N/S Assocs. v. Bd. of Review*, 473 N.W.2d 554 (Wisc. App. 1991) (rejected claim that shopping mall assessment improperly included business value; court distinguished cases cited by taxpayer where some business value had been recognized (involving property of a cable television franchisee and a motel complex) principally on ground that those cases concerned property values “substantially influenced by the non-transferrable nature of the business conducted on the property,” in contrast to a mall, whose “*raison d’être*—namely, the leasing of space to tenants and related activities such as trash disposal, baby stroller rentals, etc.—is a transferrable value that is inextricably intertwined with the land and [improvements and

appurtenant rights and privileges]"); *Merle Hay Mall v. City of Des Moines Bd. of Review*, 564 N.W.2d 419 (Iowa 1997) (court found that BEV is not a generally recognized appraisal method; noted that BEV "seems to be used almost exclusively in tax assessment cases; it is not used in all mall appraisals . . . [O]ne appraiser who had used the theory several times in tax assessment cases testified that he had never used it when a mall requested an appraisal for the purpose of obtaining a mortgage loan").

Even in a situation where all parties agree that the subject property is a type for which some form of a deduction for intangible values should be taken, there can be significant disputes regarding the methodology to be used and the effect on real property value. See, e.g., *Chesapeake Hotel L.P. v. Saddle Brook Twp.*, 22 N.J. Tax 525 (N.J. Tax Ct. 2005) (Rushmore method (producing fewer deductions) accepted and Lennhoff (or BEV) method (producing more deductions) rejected in valuing hotel property).

See also *WXIII/Oxford-DTC Real Estate, LLC v. Bd. of Sup'rs of Loudoun Cnty.*, 64 Va. Cir. 317 (Loudoun Cnty. 2004) (version of BEV valuation adopted in assessment of "very unique" conference center property). But see *Keswick Club v. Cnty. of Albemarle*, 273 Va. 128, 639 S.E.2d 243 (2007) (using only cost approach to perform assessment unjustified in part because assessor's failure to request private golf club's financial information indicated failure to consider and properly reject income approach; but no discussion in opinion regarding if or why golf club's income and expenses should be considered attributable to the underlying real estate).

9-5.01(e)(2)(vii) Valuations Affected by Easements

"[W]here a servient estate is burdened by an easement for the benefit of dominant estates then, for tax purposes, the value of the servient estate is to be reduced and that of the dominant estate increased in accord with the corresponding burden and benefit." *Lake Monticello Owners' Ass'n v. Ritter*, 229 Va. 205, 327 S.E.2d 117 (1985) (citing *First and Merchants Nat'l Bank v. Cnty. of Amherst*, 204 Va. 584, 132 S.E.2d 721 (1963)). But note that contractual restrictions on the use of real property that do *not* benefit any other real property do not reduce the value of the burdened property for tax purposes. E.g., *Richmond, F. & P. R.R. Co. v. State Corp. Comm'n*, 219 Va. 301, 247 S.E.2d 408 (1978).

9-5.01(e)(2)(viii) Other Valuation Issues

Virginia courts have addressed a wide variety of other valuation issues. See, e.g., *WXIII/Oxford-DTC Real Estate v. Bd. of Sup'rs of Loudoun Cnty.*, 64 Va. Cir. 317 (Loudoun Cnty. 2004) (manifest error not to consider effect on value of conference center property of, among other factors, economic downturn and world events such as the terrorist attacks of September 11, 2001); but cf. *IPROC Norfolk v. City of Norfolk*, 86 Va. Cir. 435 (City of Norfolk 2013) (not error in annual assessment to use concrete income and expense data from prior two years despite awareness of economic downturn); see also *Shenandoah Assocs. v. Cnty. of Shenandoah*, 62 Va. Cir. 231 (Shenandoah Cnty. 2003) (failure to consider restrictions on loan prepayment which affected marketability of the property deemed manifest error); *Woodstock Assocs. v. Cnty. of Shenandoah*, 62 Va. Cir. 184 (Shenandoah Cnty. 2003) (affirmed county's "market study" appraisal even though none of the three commonly accepted appraisal methods (i.e., sales comparison, cost, or income capitalization) were used); *Dulles Indus. Assocs. G.P. v. Loudoun Cnty. Bd. of Sup'rs*, 36 Va. Cir. 360 (Loudoun Cnty. 1995) (assessor may rely on mass appraisal technique).

9-5.01(e)(2)(ix) Disclosure and Justification of Methodology Used

The taxpayer or his representative must be allowed to examine the working papers used by any assessing official in arriving at the appraised and assessed value of such person's land and any improvements thereon. The assessing officer of the governing body must also make available 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. If such information is not provided at least five days prior to a court or board of equalization proceeding, the locality cannot use the information in any manner in such proceeding. If requested, the assessing officer must provide a written explanation for an increase in the property's assessed value. Va. Code § 58.1-3331.

There are special disclosure requirements for when an owner appeals to a court or BOE an assessment of residential property of less than four residential units. At least forty-five days prior to the hearing on the appeal, the assessor must mail or post at the address of the taxpayer a written notice that informs the taxpayer of his rights under Va. Code § 58.1-3331 to review and obtain copies of all of the assessment records pertaining to the assessing officer's determination of fair market value of such real property and advises the taxpayer of his right to request that the assessor make a physical examination of the property. This notice can be part of the written notice providing the date of the hearing of the BOE. Va. Code § 58.1-3331(E). Any records so requested by the taxpayer must be provided within fifteen days of the written request. Va. Code § 58.1-3379. Failure to provide this notice affects the evidentiary requirements on appeal. See sections [9-5.01\(d\)](#) and [9-9.04\(c\)](#).

9-5.01(f) Uniform Property Taxation

An extended discussion of the constitutional requirement for uniformity in property taxation appears above in section [9-4.01\(a\)\(2\)](#).

9-5.01(g) Selected Statutory Provisions

9-5.01(g)(1) Permitted Use Valuations

Real estate devoted to agricultural, horticultural, forestal, or open space use may qualify to be assessed on the basis of its use value, as distinguished from its fair market value, if the local governing body has adopted an appropriate ordinance pursuant to Va. Code § 58.1-3231. Virginia Constitution Article X, section 2 authorizes the General Assembly to allow tax relief for such real estate. Real estate used in an agricultural or forestal district automatically qualifies for use value assessment. See Va. Code § 15.2-4312; *Ticonderoga Farms Inc. v. Loudoun Cnty.*, 54 Va. Cir. 542 (Loudoun Cnty. 2001) (revalidation of qualified use may not be required in agricultural and forestal districts). If property is situated within a county and a town, and the county has an agricultural land use ordinance but the town does not, the entire acreage of the property is entitled to the use value assessment. 2009 Op. Va. Att'y Gen. 164. If the locality has adopted an ordinance to provide for use value assessment for property devoted to forest use, it may apply for an allocation from the Forest Sustainability Fund to offset the amount of revenues foregone due to the use value assessment. Va. Code § 58.1-3242.1.

Lots created after July 1, 1983, by a recorded plat subject to a subdivision ordinance, but not falling within the ordinance's definition of "subdivision," may be aggregated for purposes of meeting minimum acreage requirements for land-use taxation established by § 58.1-3233(2). See 2013 Op. Va. Att'y Gen. 292; 2004 Op. Va. Att'y Gen. 201. A locality has no authority to grant a tax credit for agricultural or forestal land use or conservation easements, however. 2000 Op. Va. Att'y Gen. 210. Nor may a local governing body determine if property qualifies for special land use assessment and taxation in an individual case. 2002 Op. Va. Att'y Gen. 318. Where a locality has adopted a local land use ordinance, such determination is to be made by the local assessing officer as provided in Va. Code § 58.1-3233. Any prior, discontinued use of property is not to be considered in determining its current use. Va. Code § 58.1-3230. A locality has the authority to increase the minimum acreage for use valuation only for land classified for open space use. 2002 Op. Va. Att'y Gen. 315; see also 2004 Op. Va. Att'y Gen. 212 (wetlands mitigation banks as open space use). A parcel with mixed use, *i.e.*, part forestal and part agriculture, cannot qualify for use value assessment unless each such use acreage meets the required acreage by itself. 2009 Op. Va. Att'y Gen. 168.

Other than highest and best use, all other valuation factors may be considered in valuing agricultural land for land use taxation. The assessor must consider, but is not required to accept, the recommendations of the State Land Evaluation Advisory Council (SLEAC). The assessor may consider the economic conditions in the locality, but may not adjust the fair market value on the basis of the effect the ultimate determination will have on the taxpayer. The assessor may not consider the value of governmental services the taxpayer may receive. 1997 Op. Va. Att’y Gen. 196. Property that qualifies for land use assessment may not be assessed at a value greater than fair market value. 1997 Op. Va. Att’y Gen. 199.

A locality may provide a sliding scale tax rate for land subject to use value taxation based on the length of time the property is used for the activity by which it qualifies for use value taxation. Va. Code § 58.1-3231. If a sliding scale is used, a written agreement is required between the locality and the landowner for a term not to exceed twenty years. Va. Code § 58.1-3234. A change in use prior to the end of the agreed upon holding period will result in rollback taxes from the date of the agreement. Va. Code § 58.1-3237(C).

The locality may limit the annual increase on the assessed value with a cap on the dollar amount per acre. Va. Code § 58.1-3231.

When the use by which the land qualified for use value taxation changes to a non-qualifying use or the zoning of the real estate is changed to a more intensive use at the request of the owner or his agent, it shall be subject to rollback taxes. Such additional taxes shall be assessed against only that portion of such real estate that no longer qualifies. By ordinance, a locality may provide an exception to the above by allowing rezoning to a more intensive use as specified in the ordinance at the request of the owner without subjecting the property to rollback taxes as long as the change does not result in a non-qualifying use of the property. Va. Code § 58.1-3237(G); see *also* Va. Code § 58.1-3231 (use value assessment cannot be denied solely because the real estate is located in a newly created zoning district that was not requested by the real estate owner).

Except in the case of sliding scale agreements as described above, the rollback tax is equal to the sum of the deferred tax for each of the five most recent complete tax years including simple interest on such rollback taxes at a rate no greater than the rate applicable to delinquent taxes. The deferred tax for each year is equal to the difference between the tax levied and the tax that would have been levied based on the fair market value assessment of the real estate for that year. Va. Code § 58.1-3237.

Rollback taxes are imposed only when actual use of land changes to a non-qualifying use; land remaining idle does not trigger rollback. 1997 Op. Va. Att’y Gen. 195. When land subject to a use valuation is acquired by eminent domain, the residual parcel, although it no longer meets the minimum acreage requirements, is not subject to rollback taxes. 1997 Op. Va. Att’y Gen. 193. The sale or gift of a portion of land in an agricultural or forestal district to a member of the immediate family shall not in and of itself constitute a withdrawal or removal of any of the land from a district. Va. Code § 15.2-4314. There is no liability for rollback taxes when a change in ownership of the title takes place if the new owner does not rezone the real estate to a more intensive use and continues the real estate in the use for which it is classified. Va. Code § 58.1-3237(D). See also 2008 Op. Va. Att’y Gen. 141, discussing the obligation to roll back taxes in different situations.

Subdivision of land into parcels that meet the land use taxation requirements does not subject the land to rollback taxation. Separation or split-off of lots by conveyance or other action by the owner subjects the separated parcels to rollback taxation, but it does not impair the eligibility of the separated land for future land use valuation or affect the remaining real estate’s right to continuance of land use valuation if it still meets the requirement. Va. Code § 58.1-3241; 2002 Op. Va. Att’y Gen. 318. Although county rezoning

not requested by the owner to a more intensive use does not trigger rollback, the owner's subsequent sale of a portion of that property would. 1999 Op. Va. Att'y Gen. 202. However, at the option of the locality, rollback taxes need not apply to a subdivision, separation, or split-off of property which results in parcels that do not meet minimum acreage requirements, provided that title to such parcels is held in the name of an immediate family member for at least sixty months after the division. Va. Code § 58.1-3241(B)(2).

In *Chesterfield County v. Stigall*, 262 Va. 697, 554 S.E.2d 49 (2001), the Virginia Supreme Court held that Va. Code § 58.1-3241 applies only when a conveyance or other action by the owner causes a legal, versus a mere physical, separation. The Court found that a taking by eminent domain is not an action by the owner and thus a physical division by construction of a public road by the condemnor was not a legal subdivision of the property. Moreover, § 58.1-3241 applies only when a portion of the property is legally separated or subdivided. It is not applicable in the situation when the entire parcel is conveyed to one or more owners. In such a case, the liability for rollback taxes, if any, is controlled by the provision of Va. Code § 58.1-3237(D).

9-5.01(g)(2) Mineral Lands

The local commissioner of the revenue is charged with separately assessing at fair market value all mineral lands and improvements. Alternatively, locality county or city may impose a severance tax on all locally extracted coal and gasses. The local commissioner is authorized to enter into agreements with taxpayers pertaining to the fair market value of the property taxed. Va. Code § 58.1-3286. Minerals are subject to local taxation whether or not the property is under development. 2010 Op. Va. Att'y Gen. 205.

9-5.01(g)(3) Geothermal Resources

Note that if energy is being extracted from a geothermal resource, that is a factor that may be considered in assessing the fair market value of the surface property, the same as for a geothermal resource that remains in its natural state. There is no authority for separate local taxation of a geothermal resource from which energy is being extracted. If geothermal resources are leased, they are to be assessed as leaseholds taxable as real estate to the lessees. 2014 Op. Va. Att'y Gen. 81.

9-5.01(g)(4) Wetlands

A property owner may request that areas designated as wetlands be specially and separately assessed. Va. Code § 58.1-3284.3.

9-5.01(g)(5) Elderly and Disabled

Article X, section 6(b) of the Virginia Constitution authorizes the General Assembly to provide an exemption from taxation for real estate owned by elderly or disabled persons, with localities authorized but not required to establish income or financial worth limitations. Real estate owned or jointly held, including in trust, by certain elderly or disabled persons may qualify for an exemption from or deferral of taxes, or both, if the local governing body has adopted an appropriate ordinance pursuant to Va. Code §§ 58.1-3210 through 58.1-3217. However, per § 58.1-3212, no local ordinance may require that a citizen reside in the jurisdiction for a designated time period as a precondition to participation in a program of exemption or deferral. The Attorney General has opined that the proprietary lessee of a co-op unit is not an owner of real estate such that this exception could apply. 1999 Op. Va. Att'y Gen. 205.

The treasurer of any county, city, or town shall enclose written notice, in each real estate tax bill, of the terms and conditions of any such local real estate tax exemption or deferral program established in the jurisdiction. Va. Code § 58.1-3213.1.

9-5.01(g)(6) Energy-Efficient Buildings

Localities may tax energy-efficient buildings, defined as any building that exceeds the energy efficiency standards prescribed in the Virginia Uniform Statewide Building Code by 30 percent, at a lower rate than that imposed on the general class of real property. Va. Code § 58.1-3221.2.

9-5.01(g)(7) Redevelopment or Conservation Areas; Rehabilitation Districts

In 2006, voters approved an amendment to the Virginia Constitution permitting the General Assembly to "authorize the governing body of any county, city, town, or regional government to provide for a partial exemption from local real property taxation, within such restrictions and upon such conditions as may be prescribed, (i) of real estate whose improvements, by virtue of age and use, have undergone substantial renovation, rehabilitation or replacement or (ii) of real estate with new structures and improvements in conservation, redevelopment, or rehabilitation areas." Va. Const. art. X § 6.

Anticipating that amendment, the General Assembly enacted Va. Code § 58.1-3219.4, which authorizes localities to provide a partial exemption from real property taxes for (i) new structures located in redevelopment or conservation areas or in rehabilitation districts, and (ii) other improvements located in such areas or districts. The partial exemption is a percentage of the increase in assessed value as a result of the new structure or improvement, not to exceed 50 percent of the construction cost or to result in a total exemption. The local governing body can establish criteria for qualifying real estate, including, but not limited to, the square footage of new structures. Written notice of the amount and period of the exemption must be provided to the property owner. The exemption is a covenant that runs with the land for the period of the exemption, up to thirty years, and may not be reduced by the local governing body during the period of the exemption, unless the property owner was advised in writing at the initial time of approval of the exemption that the exempt amount may be decreased during the period of the exemption.

9-5.01(g)(8) Multifamily Residential Rental Real Estate

A statutory exception to the general rule regarding highest and best use applies to multifamily residential real estate primarily leased to tenants. Such property is to be assessed without regard to its potential for condominium conversion or cooperative ownership. Va. Code § 58.1-3202.

9-5.01(g)(9) Open or Common Space

In general, open or common space in most planned development subdivisions must be assessed as having no value in itself but merely contributing to the value of the individual properties having the right to enjoy the benefits of the space by easement, covenant, deed, or other interest. Va. Code § 58.1-3284.1. This is true even if the space is used by a commercial lessee in the operation of a commercial venture that is open to both members and non-members of the property association owning the space. *Saddlebrook Estates Cmty. Ass'n v. City of Suffolk*, 292 Va. 35, 786 S.E.2d 160 (2016).

9-5.02 Tangible Personal Property**9-5.02(a) Taxation of Tangible Personal Property Generally**

Nonexempt tangible personal property is subject to local taxation as of the first day of January of each year, Va. Code § 58.1-3515, unless the local governing body has duly provided for the assessment and taxation of such property as of July 1 of each year. Va. Code §§ 58.1-3010, 58.1-3011. Localities may permit taxpayers to pay the tangible personal property tax monthly, bimonthly, quarterly, semiannually, or in a lump sum. Va. Code § 58.1-3916.

The amount of tangible personal property tax owed before a locality must assess the tax is \$15. Va. Code §§ 58.1-3001 and 58.1-3005. A commissioner of the revenue may

elect not to require a tangible personal property tax return when the value of the property is insufficient to generate a tax assessment. Va. Code § 58.1-3518.

A locality by ordinance may develop a method for returning surplus personal property tax revenues (or real property tax revenues, or both) to taxpayers who are assessed such taxes in any fiscal year in which the locality reports a surplus. Va. Code § 15.2-2511.1. The locality may reduce a taxpayer's refund by the amount of any taxes, penalties, and interest that are due from such taxpayer, or any past-due taxes, penalties and interest that have been assessed within the appropriate period of limitations. *Id.*

The constitutional requirements for uniformity and fair market value, Va. Const. art. X, §§ 1 and 2, apply to the taxation of personal as well as real property. The uniformity requirement is discussed in section 9-4.01(a)(2). The fair market value requirement as applied to real property is discussed in section 9-5.01(e). However, there are some important differences in the application of the fair market value requirement to personal property.

While Article X, section 2 of the Virginia Constitution specifies that assessments are to be at fair market value "as prescribed by law," the General Assembly has enacted few statutory provisions pertaining to the derivation of fair market value for real property, and what there is generally applies only in exceptional circumstances, as discussed in section 9-5.01(g). In contrast, the General Assembly has been proactive in specifying methods for determining the fair market value of many kinds of personal property for taxation. Va. Code § 58.1-3503, which categorizes various kinds of personal property, in many cases also specifies how the fair market value of a particular kind of property is to be determined. See, e.g., Va. Code § 58.1-3503(A)(3) (automobiles); Va. Code § 58.1-3503(A)(4) (trucks under two tons); Va. Code § 58.1-3503(A)(6) (manufactured homes); Va. Code § 58.1-3503(A)(11) (boats under five tons and boat trailers); Va. Code § 58.1-3503(A)(15) (property used in a research and development business); Va. Code § 58.1-3503(A)(16) (programmable computer equipment and peripherals used in business); Va. Code § 58.1-3503(17) (data center computer equipment); and Va. Code § 58.1-3503(A)(19) (billboards). Va. Code § 58.1-3503(B) provides, in general, that "[m]ethods of valuing property may differ among the separate categories, so long as each method used is uniform within each category, is consistent with requirements of this section and may reasonably be expected to determine actual fair market value."

For examples of cases where the valuation of personal property was at issue, see *Board of Supervisors of Fairfax County v. Telecommunications Industries, Inc.*, 246 Va. 472, 436 S.E.2d 442 (1993) (error for county to use its uniform depreciation schedule to assess computer equipment); *R. Cross, Inc. v. City of Newport News*, 217 Va. 202, 228 S.E.2d 113 (1976) (use of different methods to value different kinds of motor vehicles did not violate uniformity); *Norfolk and Western Ry. Co. v. Commonwealth*, 211 Va. 692, 179 S.E.2d 623 (1971) (railroad tangible personal property not required to be valued based on reuse or salvage value; under that approach, "the Mona Lisa would be valued, for tax purposes, at the reuse or salvage value of its pigments, canvas and wood"); *Raytheon E-Systems, Inc. v. Fairfax County Board of Supervisors*, No. 157950 (Fairfax Cnty. Cir. Ct. Apr. 8, 1998) (taxpayer's multiple depreciation schedule method of valuing certain computer and scientific equipment not appropriate because inconsistent with Va. Code § 58.1-3503(A)(16)); *Software AG of N. Am. v. Fairfax County Board of Supervisors*, 42 Va. Cir. 423 (Fairfax Cnty. 1997) and *Wang Federal v. Fairfax County Board of Supervisors*, No. 133943 (Fairfax Cnty. Cir. Ct. June 19, 1997) (sales and use taxes are a taxable part of the value of tangible personal property).

9-5.02(a)(1) Excluded Property

Tangible personal property does not include (a) the inventory of stock on hand that is held for resale directly or indirectly by a trade or business taxable on capital pursuant to Va.

Code § 58.1-3510, (b) daily rental property taxed in accordance with § 58.1-3510, or (c) personal property, tangible in fact, used in a manufacturing, mining, radio or television broadcasting, dairy, dry cleaning, or laundry business taxable on capital, except for machinery and tools, motor vehicles, and delivery trucks. Va. Code §§ 58.1-3507 and 58.1-1101 (excepting farm wineries as defined in Va. Code § 4.1-100). Tangible personal property also does not include personal property physically annexed to land under such circumstances that it has become realty by operation of the law of fixtures. *Transcon. Gas Pipe Line Corp. v. Prince William Cnty.*, 210 Va. 550, 172 S.E.2d 757 (1970). Leased business equipment may be assessed as the personal property of the lessor as long as the equipment is not the type of business equipment defined as intangible personal property used in manufacturing and therefore segregated for state taxation only. 1992 Op. Va. Att'y Gen. 165.

9-5.02(a)(1)(i) Property Used in Manufacturing

Manufacturing is defined as the transformation of a new material into an article or a product of a substantially different character. *Solite Corp. v. King George Cnty.*, 220 Va. 661, 261 S.E.2d 535 (1980). Whether such a transformation actually occurs depends on the facts of the situation. For example, in *Prentice v. City of Richmond*, 197 Va. 724, 90 S.E.2d 839 (1956), the Virginia Supreme Court concluded that the processing of poultry did not constitute manufacturing because there was no change or transformation of the live poultry into an article of substantially different character. In contrast, in *Commonwealth v. Meyer*, 180 Va. 466, 23 S.E.2d 353 (1942), the Virginia Supreme Court concluded that meat packers engaged in the processing of hogs into cured hams, shoulders, and bacon were manufacturers. *Meyer* rested upon the conclusion that a "hog on the hoof put through plaintiffs' packing plant is no longer a hog," but instead had been transformed into consumable products having little resemblance to the hog brought into the plant." *Solite, supra* (quoting in part *Meyer, supra*); see also, e.g., *City of Richmond v. Richmond Dairy Co.*, 156 Va. 63, 157 S.E. 728 (1931) (pasteurization of milk and cream not manufacturing because "no difference in the characteristic form, appearance, taste and use" after pasteurization).

When a taxpayer is engaged in both manufacturing and non-manufacturing activities, it nonetheless will be classified as a manufacturer for tax purposes if the manufacturing portion of its business is substantial. *Cnty. of Chesterfield v. BBC Brown Boveri, Inc.*, 238 Va. 64, 380 S.E.2d 890 (1989). However, the non-manufacturing component of the business must be "ancillary" to the manufacturing component. In *Coca-Cola Bottling Co. v. County of Botetourt*, 259 Va. 559, 526 S.E.2d 746 (2000), the Virginia Supreme Court concluded that the ownership and operation of an extensive network of vending machines to distribute soft drinks was a non-manufacturing sales business separate from the manufacturing business of making and bottling soft drinks (the trial court's determination that the bottling business was manufacturing was not challenged on appeal). As a result, the vending machines owned and serviced by the bottler were personal property subject to local taxation. The Court rejected the taxpayer's argument that, if a substantial part of its business is the actual process of manufacturing, then it should be classified as a manufacturing business for the purpose of taxation. Whether a taxpayer's business activities constitute one or more separate businesses for purposes of taxation is not determined by a firm's own organizational structure; rather, tax classification is determined by the manner in which the taxpayer actually conducts its business. *Id.*

Generally, property owned by a manufacturer is classified as intangible personal property, subject to state taxation only and not subject to local property taxation. *City of Roanoke v. Michael's Bakery Corp.*, 180 Va. 132, 21 S.E.2d 788 (1942). However, localities may tax machinery and tools, motor vehicles, and delivery equipment of manufacturing businesses. Va. Code § 58.1-1101(A)(2). Computers used or employed in a manufacturing business are considered capital and segregated for state taxation only. *City of Martinsville v. Tultex Corp.*, 238 Va. 59, 381 S.E.2d 6 (1989).

In 1996, the General Assembly amended Virginia Code § 58.1-1101 to define “capital” not subject to local taxation consistent with the Virginia Supreme Court’s expansive treatment of that term in *City of Winchester v. American Woodmark Corp.*, 250 Va. 451, 464 S.E.2d 148 (1995). Subsequently, in *Daily Press, Inc. v. City of Newport News*, 265 Va. 304, 576 S.E.2d 430 (2003), the Virginia Supreme Court held that equipment and machines used in information gathering and pre-printing activities of a newspaper, e.g., computers used by staff reporters and cameras used by staff photographers, should be classified as intangible personal property and not as taxable machinery and tools. The Court stated that although the newspaper’s business operations were completely integrated, the focus should be on the machinery’s use in the actual manufacturing process that produces a new product.

9-5.02(a)(1)(ii) Public Service Corporations; Generating Equipment

Virginia Code § 58.1-2606 authorizes local taxation of real and personal property of public service corporations, including generating equipment. Assessments, however, are generally made by the State Corporation Commission, not by local taxing officials. Formerly, the local tax rate for all such equipment could not exceed the locality’s real estate tax rate. However, 2006 Va. Acts ch. 517 amended the statute to provide that the generating equipment of electric suppliers utilizing wind turbines may be taxed at a rate exceeding the real estate rate but not exceeding the rate for the “general” class of personal property.

9-5.02(a)(2) Classification

The General Assembly has exercised its constitutional power to classify taxable subjects, placing different types of tangible property into separate classes for property tax purposes. See Va. Code §§ 58.1-3500 to 58.1-3503. Sections 58.1-3500 and 58.1-3503 specify categories of tangible personalty that constitute separate classifications for valuation purposes, but not for rate purposes. Virginia Code § 58.1-3506 establishes separate classifications for rate purposes. The rates allowable under one class may be limited by rates prescribed for another class. If an item of personal property is included in multiple classifications, its rate is the lowest rate assigned. See Va. Code § 58.1-3506(B).

Among the classifications now included in § 58.1-3506(A), there are separate classifications for rate purposes for most business personal property and programmable computer equipment and peripherals, for personal property used in the provision of Internet services, and for motor vehicles powered solely by electricity or with a seating capacity of at least thirty persons. Such classifications may not be taxed at rates higher than that applicable to the general class of tangible personal property. Va. Code § 58.1-3506(B). There also is a separate classification for motor vehicles, trailers, and semitrailers with a gross vehicle weight of 10,000 pounds or more used to transport property or passengers for hire by a motor carrier engaged in interstate commerce. *Id.* Note, however, that taxation of motor carrier transportation property at a rate greater than machinery and tools violates the Interstate Commerce Act. 1995 Op. Va. Att’y Gen. 274.

The Commonwealth reimburses localities for car tax relief by splitting a fixed sum among participating localities. See Va. Code § 58.1-3523. A vehicle owned by an elderly or handicapped person may be classified and taxed at a different rate. See Va. Code § 58.1-3506.1. While § 58.1-3523 specifies certain circumstances which render use of a vehicle business rather than personal, other facts and circumstances also may indicate it is not used preponderantly as a personal vehicle. Thus, the Attorney General opined that evidence of commercial advertising on a vehicle more than 50 percent of the time creates a rebuttable presumption that the vehicle does not qualify for car tax relief. 2004 Op. Va. Att’y Gen. 197.

Virginia Code § 58.1-3506(A)(16) also establishes as a separate class of property motor vehicles owned by members or auxiliary members of volunteer emergency medical services agencies or fire departments, or vehicles leased by such members if they are obligated by the lease terms to pay the property tax on the vehicles. Vehicles owned or

leased by auxiliary deputy sheriffs and auxiliary police officers are similarly separately classified as are vehicles leased by a county, city, town, or constitutional officer.

Virginia Code § 58.1-3506(A)(3) establishes separate tax classifications for aircraft having an empty gross weight of at least 20,000 pounds that are not owned and operated by regularly scheduled air carriers and for watercraft weighing five tons or more and used for business purposes only.

The definition of “certificated motor vehicle carrier” provides that a common carrier of property by motor vehicle is subject to local property taxes. Va. Code § 58.1-2600. The Attorney General has also opined that a charter tour bus company that does not operate over regular routes is subject to personal property tax. 1995 Op. Va. Att’y Gen. 278.

In *Fairfax County Board of Supervisors v. Telecommunications Industries*, 246 Va. 472, 436 S.E.2d 442 (1993), the Virginia Supreme Court held that the assessing official erred in failing to consider “technological obsolescence” in taxing the fair market value of a business computer system. In 1994, the General Assembly codified this decision by amending Va. Code § 58.1-3503 to provide that, upon request, the tax assessor must consider technological obsolescence. In 1996 that statute was amended to permit programmable computer equipment to be classified for valuation (but not rate) purposes as a separate category. 1996 Va. Acts ch. 529.

A discussion of the effect of the constitutional requirement for uniformity on the classification of property for taxation appears in section [9-4.01\(a\)\(2\)](#).

9-5.02(a)(3) Property That May Be Exempt

Virginia Code § 58.1-3504 specifies categories of household goods and personal effects that a local governing body may, by ordinance, exempt in whole or in part from taxation. A tax exemption for such property is authorized by Article X, section 6(e) of the Virginia Constitution. Virginia Code § 58.1-3505 also specifies categories of farm and silviculture property and products that a local governing body may, by ordinance, exempt in whole or part, from taxation, or may tax at a different rate. A tax exemption for such property is also authorized. Va. Const. art. X, § 6(e).

Virginia Code § 58.1-3506 also permits local governing bodies to establish classifications for the purpose of setting different tax rates on different types of personal property. Such rate classifications permit the local governing body to set different tax rates for certain types of personal property, but in most cases, such rates must not be higher than the tax rate established for the general class of tangible personal property. In some instances, local governing bodies have set lower rates that have a practical effect very similar to a property tax exemption, but such lower rates are legally distinguishable from property tax exemptions. In the case of a property tax exemption, a person claiming the exemption generally will have to meet the strict construction standard established by Article X, section 6(f), but a person claiming the benefit of a favorable tax classification would not be required to meet that standard. Such favorable tax classifications are authorized by Article X, section 6(i).

9-5.02(b) Situs

The situs of tangible personal property for assessment and tax purposes is the locality in which the property is physically located on tax day, either January 1 or July 1, except that the situs of motor vehicles, travel trailers, boats, and airplanes is the locality in which the vehicle is “normally” garaged, docked, or parked. See 2003 Op. Va. Att’y Gen. 179 (to be “normally” garaged, docked, or parked, a boat must be in the jurisdiction six months or more). The exceptions to the vehicle situs rule are that (i) the situs for vehicles weighing less than 10,000 pounds normally garaged, docked, or parked in another state is the Virginia locality in which the vehicle is registered, and (ii) the situs for business vehicles is the locality

in which the use of the vehicles is directed and in which the owner has a definite place of business, but only if there is proof of tax paid to that locality. Va. Code § 58.1-3511. The Attorney General opined that the locality may collect the tax on such a vehicle even if the owner has to pay a tax in another state. Moreover, while § 58.1-3511(A) provides that the taxpayer may seek a refund from double taxation, no statute obligates the locality to provide it. 2002 Op. Va. Att’y Gen. 330. Citing a long line of precedent, the Attorney General confirmed that a town may levy a tangible personal property tax on the same property that the county does. 2014 Op. Va. Att’y Gen. 100. The alternative situs for business vehicles is mandatory; the taxpayer may not elect the situs. 2009 Op. Va. Att’y Gen. 174.

Merchants’ capital removed temporarily from a county before the “tax day” of January 1 is not subject to taxation by that county under Va. Code § 58.1-3511(A). *Shelor Motor Co. v. Miller*, 261 Va. 473, 544 S.E.2d 345 (2001). Thus, a car dealership was allowed to temporarily remove its inventory from the county just prior to tax day, return it just after, and avoid assessment. Although *Shelor Motor Co.* involved merchant’s capital, the Supreme Court’s reasoning seems equally applicable to tangible personal property (except for personal motor vehicles, etc.) and machinery and tools. The Attorney General opined that a locality could not tax cars at the personal property tax rate rather than the merchants’ capital tax rate when a car dealer moves the cars off the dealership site to avoid merchants’ capital tax and relocates the cars titled to the dealership to private property. 2006 Op. Va. Att’y Gen. 204.

In *City of Virginia Beach v. International Family Entertainment, Inc.*, 263 Va. 501, 561 S.E.2d 696 (2002), the Virginia Supreme Court held that satellite transponders classified as machinery and tools could not be taxed because they were never physically located in the locality. Va. Code § 58.1-3511 modifies the common law rule of *mobilia sequuntur personam* (movables follow the person). *Id.*; *Hogan v. Cnty. of Norfolk*, 198 Va. 733, 96 S.E.2d 744 (1957). In determining where a vehicle is “normally garaged, docked, or parked,” the elements of location, time, purpose, and use are relevant. *See Cnty. Bd. of Arlington Cnty. v. Stull*, 217 Va. 238, 227 S.E.2d 698 (1976). The Servicemembers Civil Relief Act (previously The Soldiers’ and Sailors’ Civil Relief Act of 1940), 50 U.S.C. App. § 501 et seq., provides that the personal property of a member of the armed forces “shall not be deemed to be located or present in, or to have a situs for taxation in,” any state or locality other than the member’s legal domicile. The Attorney General has opined, however, that with regard to vehicles owned by members of the armed forces domiciled in Virginia, the rules of Va. Code § 58.1-3511 apply in conjunction with The Servicemembers Civil Relief Act and thus the situs is where the vehicle is normally garaged or parked. 2001 Op. Va. Att’y Gen. 083 (overruling 1972–73 Op. Va. Att’y Gen. 410). Accordingly, vehicles of members of the armed forces domiciled in Virginia but stationed outside of the Commonwealth whose vehicles are with them (and are not registered in Virginia) are not subject to the tangible personal property tax. *Id.* Special situs rules apply in the case of imports, and vehicles and containers used in interstate and foreign commerce. *See* Va. Code §§ 58.1-3512 to 58.1-3514.

If the motor vehicle is used by a full-time college student, the situs of the vehicle for tangible personal property taxation is the domicile of the motor vehicle’s owner. The owner, however, must provide sufficient evidence of payment of the tax in the place of domicile if so requested by the locality where the student attends college. Va. Code § 58.1-3511. Registering to vote in the locality in which a student attends college is evidence, but not conclusive evidence, that the locality is the student’s domicile. 1995 Op. Va. Att’y Gen. 271. It is generally presumed that a student does not intend to establish domicile in the locality in which he is attending school. A student domiciled in a Virginia locality who attends an out-of-state college is subject to personal property taxation on his vehicle in the Virginia locality. If the parent instead of the student owns the car, the tax situs is the locality where the vehicle is normally parked or garaged. 1997 Op. Va. Att’y Gen. 210; 1995 Op. Va. Att’y Gen. 268.

In *Ryder Truck Rental v. County of Chesterfield*, 248 Va. 575, 449 S.E.2d 813 (1994), Ryder sought assessment of its vehicles which were registered or physically located in the county on January 1 of the tax year based on the ratio of miles traveled in Virginia to the overall yearly mileage of the vehicle. The county assessed taxes based on the full value of the reported vehicles. The Virginia Supreme Court upheld the county's assessment method, finding that Ryder had failed to demonstrate that it would be subject to taxation on the vehicles in another jurisdiction. Thus apportionment, as provided for in Va. Code § 58.1-3511, was not required.

In *McLane Co. v. Stafford County*, 45 Va. Cir. 180 (Stafford Cnty. 1998), the court held that apportionment was required when the company showed its vehicles traveled regular established routes outside Virginia. The taxpayer was required to show that the outside jurisdictions had legislation imposing taxation on interstate carriers, but was not required to show the actual assessment or payment of such taxes. See 1998 Op. Va. Att'y Gen. 135 for an opinion on the proof necessary to demonstrate that the taxpayer was "subject to taxation" in another jurisdiction.

9-5.02(c) Proration of Personal Property Tax

Under Va. Code § 58.1-3516, localities may provide by ordinance for the levy and collection of personal property tax on motor vehicles, trailers, semi-trailers, and boats that have acquired a situs within the locality after the tax day for the balance of the tax year on a prorated basis. Refunds or credits may be required when the property is moved from a non-prorating locality to a prorating locality; however, no refund need be made if the property acquires a new situs in a non-prorating locality.

The Attorney General has opined that in a locality that prorates taxes, a tax exemption for certain vehicles that became effective on July 1, 2016, did not apply for any portion of 2016 to such vehicles that were sited in the locality as of January 1, 2016. It did apply, beginning on July 1, to any such vehicles which acquired a situs in the locality after January 1, 2016. He concluded that property sited in the locality on January 1 is not eligible for the tax exemption for any portion of the year pursuant to the operation of Va. Code § 58.1-3515, which makes the property taxable for the entire year. However, Va. Code § 58.1-3516 applies to personal property acquired after January 1 and, as it requires proration on a monthly basis, the exemption must apply to qualifying property beginning on the effective date of the exemption. The Attorney General also opined that this did not violate Virginia's constitutional requirement for uniformity of taxation. 2016 Op. Va. Att'y Gen. 247.

9-5.02(d) Local Vehicle Licenses

Localities are also empowered to require owners of vehicles to obtain vehicular licenses. The sheriff is required to enforce a county ordinance requiring such licenses. 2001 Op. Va. Att'y Gen. 40. The issuance of a vehicular license by a locality may be conditioned upon satisfactory evidence by the applicant that all personal property taxes on the motor vehicle have been paid. The governing body may choose to issue these licenses free of charge to a specified list of vehicles or "all vehicles" having a situs for imposition of the vehicle decal licenses within the locality. Va. Code § 46.2-752. Localities are not authorized to impose a license fee on boats. 2016 Op. Va. Att'y Gen. 235.

A locality may exempt vehicles leased or owned by specified volunteer or auxiliary members of public safety entities, and disabled veterans, non-disabled veterans, and surviving spouses of veterans from local vehicle license fees and taxes. Va. Code §§ 46.2-743 and 46.2-752. A locality may refuse to issue new vehicle licenses to any person or entity that is delinquent in the payment of property taxes on that vehicle. Va. Code § 46.2-752.

A physical decal need not be issued if the treasurer enters into an agreement pursuant to Va. Code § 46.2-752(J) with the Commissioner of the Department of Motor Vehicles whereby the Commissioner refuses to issue or renew the vehicle registration of any applicant who owes the locality any delinquent tangible personal property tax or vehicle license fees. 2002 Op. Va. Att’y Gen. 227. A locality so eliminating the physical decal may carry forward an unpaid decal fee and collect it from the locality’s residents in subsequent years subject to a limitation of five years from December 31 of the tax year for which the assessment is made. 2005 Op. Va. Att’y Gen. 137.

9-5.03 Machinery and Tools

Machinery and tools used in a manufacturing, mining, processing or reprocessing, radio or television broadcasting, dairy, dry-cleaning, or laundry business have been segregated for local taxation only and are assessed for tax purposes as of January 1 of each year, Va. Code § 58.1-3515, unless the local governing body has adopted an ordinance providing for assessment as of July 1. Va. Code §§ 58.1-3010 and 58.1-3011. The tax rate on machinery and tools must not be higher than the rate imposed on the general class of tangible personal property. Va. Code §§ 58.1-3507(A). Except for energy conversion equipment of manufacturers, machinery and tools must be valued by means of depreciated cost or as a percentage of original total capitalized cost² excluding capitalized interest. The method of valuing machinery and tools may not be changed unless notice of such change is published in a newspaper thirty days before the change would take effect and an opportunity for written comments is provided. *Id.* The situs for the assessment and taxation of machinery and tools is the county, district, town, or city in which the property is physically located on tax day. See Va. Code § 58.1-3511. In valuing machinery and tools, the local assessing official is required to take into account the condition of the machinery and tools, including any technical obsolescence. Va. Code § 15.2-3503(B). The assessing officer also must, upon the written request of the taxpayer, consider any bona fide, independent appraisal presented by the taxpayer. Va. Code § 58.1-3507(B). The commissioner is not, however, required to accept or rely upon such appraisal. See *W. Refining Yorktown v. Cnty. of York*, 292 Va. 804, 793 S.E.2d 777 (2016). In *Western Refining*, the Virginia Supreme Court upheld a local assessing official’s decision to reject an appraisal where the appraiser relied on a blended approach to valuation. The appraiser consulted the cost approach and the sales comparison approach, and formulated an opinion as to the overall value of machinery and tools that were part of an oil refinery. The appraiser then “backed out” values he assigned to other components of the overall value (land, improvements, furniture and equipment, etc.).

In *Virginia International Gateway, Inc. v. City of Portsmouth*, 298 Va. 43, 834 S.E.2d 234 (2019), the Supreme Court left open the possibility that in certain circumstances where there the only feasible market is abroad, transportation and related costs (such as retrofitting) may be deducted from property’s fair market value. The Court found, however, that the taxpayer’s evidence was too speculative to be considered.

Machinery and tools used in certain specified businesses are separately classified for local taxation and may be subject to different rates of taxation from the other classifications of machinery and tools. See Va. Code §§ 58.1-3508 to 58.1-3508.6.

The Attorney General has opined that machinery and tools that are simply stored in a warehouse within the locality for distribution are intangible personal property, not

² “Original cost” and “original total capitalized cost” is the cost paid by the original purchaser of the property from the manufacturer or dealer and not the price paid by the current owner. *Bear Island Paper WB, LLC v. Cnty. of Hanover*, No. CL15001621-00 (Cnty. of Hanover Cir. Ct. May 25, 2016) (ruling from bench), *pet. for app. denied*, Rec. No. 170539 (Va. Sept. 13, 2017); 2009 Op. Va. Att’y Gen. 177; 2014 Op. Va. Att’y Gen. 103.

"machinery and tools used in a manufacturing business," 1993 Op. Va. Att'y Gen. 226, and that the tax was not discriminatorily imposed on two different taxpayers reporting a different cost basis on the same type of equipment, as long as the assessment methodology was uniform. 1992 Op. Va. Att'y Gen. 188.

The Virginia Supreme Court has ruled that a company in the business of renting its inventory of table linens to customers was not in a "processing" business. *Palace Laundry, Inc. v. Cnty. of Chesterfield*, 276 Va. 494, 666 S.E.2d 371 (2008). The company periodically picked up its soiled linens from customers and replaced them with other rented linens that it had laundered and finished. The company did not clean linens owned by anyone else. The Court held that the term "processing" requires that a product undergo a treatment rendering it more marketable or useful, and that the term did not include the company's act of cleaning and maintaining its own linens, which the Court deemed to be merely ancillary to the company's linen supply business.

9-5.04 Merchants' Capital

The capital of merchants has been segregated for local taxation only. Va. Code §§ 58.1-100 and 58.1-3000. Merchants' capital is defined for purposes of local taxation to include inventory of stock on hand, daily rental passenger cars as defined in § 58.1-1735, and all other taxable personal property of any kind whatsoever, except money on hand and on deposit and tangible personal property not offered for sale as merchandise. Va. Code § 58.1-3510. Short-term rental property is a separate classification of merchant's capital, and may be taxed via a specialized tax scheme set forth in §§ 58.1-3510.4 through 58.1-3510.7, or pursuant to § 58.1-3509. Large scale wholesalers may also constitute a separate classification. Va. Code § 58.1-2510.02. The absence of a local ordinance imposing a tax on either merchant's capital or short-term rental property represents a choice by the locality's governing body to decline to tax such property. 2013 Op. Va. Att'y Gen. 306. The situs for merchants' capital is the county, district, town, or city in which such property may be physically located on tax day. Va. Code § 58.1-3511; see also section [9-5.02\(b\)](#) for a discussion of the *Shelor Motor Co.* case. As with most other categories of property and capital, merchants' capital is assessed for tax purposes on January 1 each year, Va. Code § 58.1-3515, unless the local governing body has adopted an ordinance providing for assessment as of July 1, Va. Code §§ 58.1-3010 and 58.1-3011.

Setting the assessment ratio for computing the merchants' capital tax under Va. Code § 58.1-3509 is a legislative function reserved to the local governing body and not to the commissioner of the revenue. *Wise Cnty. Bd. of Sup'rs v. Wilson*, 250 Va. 482, 463 S.E.2d 650 (1995).

The Attorney General has opined that the tax is levied on "merchants" such that it cannot be imposed on peddlers. 1992 Op. Va. Att'y Gen. 161. Note also that there can be no merchants' capital tax where there is a license tax on merchants. Va. Code § 58.1-3704.

As authorized by a 1998 amendment adding § 6(j) of Article X to the Virginia Constitution, a locality may exempt merchants from the merchants' capital tax. Va. Code § 58.1-3509.

9-5.05 Daily Rental Property

The governing body of a locality may levy a tax in an amount not to exceed 1 percent of the gross proceeds of any person engaged in the short-term rental business as defined by Va. Code § 58.1-3510.4. The rental tax is collected from the lessee of short-term rental property at the time of the rental. Va. Code § 58.1-3510.6.

9-5.06 Intangible Personal Property

Virginia Code § 58.1-1100 provides that intangible personal property, including capital of a trade or business of any person, firm or corporation (except for merchants' capital which is

subject to local taxation), is segregated for state taxation only. Virginia Code § 58.1-1101(A) defines the property deemed to be intangible. Intangible property generally includes capital which is the inventory of a business (except certain wine and agricultural products) or personal property used in manufacturing, mining, radio or television broadcasting, dairy, dry cleaning, or laundry businesses. In 1996, codifying the opinion in *City of Winchester v. American Woodmark Corp.*, 250 Va. 451, 464 S.E.2d 148 (1995), the General Assembly expanded the definition of intangible property to include such tangible personal property as office furniture, fixtures, and the like used in the corporate headquarters of a manufacturer. Va. Code § 58.1-1101(A)(2). Machinery and tools, motor vehicles, and delivery equipment of such businesses are taxable locally as are the machines and tools, motor vehicles, delivery equipment, trunk and feeder cables, studio equipment, antennae, office equipment, and furniture of cable television businesses. Va. Code § 58.1-1101(A)(2a). However, cable set-top boxes are not cable television business machines and thus are not subject to local taxation. *Verizon Online v. Horbal*, 293 Va. 176, 796 S.E.2d 409 (2017). Idle machinery and tools, as defined by Va. Code § 58.1-3507(D), are taxable as capital under 58.1-1101. Va. Code § 58.1-3507(A).

Intangible personal property also includes computer application software, which is functionally different from operational software and is defined as “computer instructions, in any form, which are designed to be read by a computer and to enable it to perform specific operations with data or information stored by the computer.” Va. Code § 58.1-1101(A)(8).

Energy from geothermal resources, unlike coal and gas, is intangible property and not subject to local taxation. 2014 Op. Va. Att’y Gen. 81.

Pursuant to Va. Const. art X, § 6(a)(5), “intangible personal property, or any class or classes thereof,” may be exempted from taxation “in whole or in part by general law.” The General Assembly has exercised this prerogative with Va. Code § 58.1-1101(C), where the objects of property described in § 58.1-1101(A) are exempted from tax.

9-6 EXEMPT PROPERTY

9-6.01 In General

Article X, section 1 of the Virginia Constitution requires that all property shall be taxed except as expressly exempted by later provisions of the Virginia Constitution. Article X, section 1 also permits the General Assembly to “define and classify taxable subjects.” Article X, section 6 in turn is the source of authority for the exemption of property from taxation. It includes four self-executing provisions relating to the taxation of property and various other provisions authorizing and/or limiting the establishment of other exemptions from property taxation.

Article X, section 2 of the Virginia Constitution requires assessments of real and tangible personal property to be at their fair market value, but also gives the General Assembly authority to enact statutes defining how fair market value is to be determined. In some cases, such statutes may have attributes of a tax exemption. For example, Va. Code § 58.1-3202 specifies that assessments of multifamily residential real estate must be determined without regard to its potential for conversion to a condominium or cooperative ownership, while Va. Code § 58.1-3284.1 provides that the value of open or common space in certain planned development subdivisions must be assessed as if valueless itself but merely contributing to the value of the other properties in the development that enjoy the benefits of the space. Advisory opinions of the Virginia Attorney General support the constitutionality of both of these statutes. 1981–82 Op. Va. Att’y Gen. 186 and 1982–83 Op. Va. Att’y Gen. 583 (concerning the statutory predecessor of Va. Code § 58.1-3202) and 1985–86 Op. Va. Att’y Gen. 302 (concerning Va. Code § 58.1-3284.1).

Localities do not have the authority to tax a non-exempt entity for an exempt entity’s ownership interest in property owned by the two entities as tenants in common. *City of*

Richmond v. SunTrust Bank, 283 Va. 439, 722 S.E.2d 268 (2012) (bank and housing authority had specific ownership interests and agreement for bank to have sole operation and management of property; city sought to tax housing authority's ownership portion in addition to bank's ownership portion).

9-6.01(a) Federal Limitations on the Power to Tax or to Exempt from Taxation

Various provisions of the federal Constitution, as well as federal laws and treaties, affect the ability of states and localities to impose taxes and craft tax exemption laws. Among other things, the Supremacy Clause of the United States Constitution, discussed in section 9-3.06, prohibits local or state taxation of federal property and also affects the ability to tax other property in a manner inconsistent with certain federal laws or treaties. Thus, care generally must be taken in determining whether a property might be covered by federal statute or treaty and the nature and ownership of the property in question. *See, e.g., United States v. Arlington Cnty.*, 669 F.2d 925 (4th Cir. 1982); *United States v. Arlington Cnty.*, 702 F.2d 485 (4th Cir. 1983) (apartment building owned by foreign government and used to house embassy staff and their families exempt from local taxation because United States is a signatory to the Vienna Convention on Diplomatic Relations of 1961); 1975-76 Op. Va. Att'y Gen. 379 (property repossessed by federal Farmers Home Administration exempt from property taxes while owned by federal government); 10 U.S.C. § 2667(e) (certain leasehold property interests on federal property are taxable); 28 U.S.C. § 2878 and 2004 Op. Va. Att'y Gen. 205 (certain leasehold property interests involving military housing on federal property are not taxable).

The Commerce Clause, discussed in section 9-3.01, generally prohibits discrimination adversely affecting interstate commerce. Thus, in *Camps Newfound / Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 117 S. Ct. 1590 (1997), the Supreme Court held that a state statute that singled out institutions that served mostly state residents for beneficial tax treatment and penalized those that principally did interstate business violated the Commerce Clause. Also, the First Amendment, discussed in section 9-3.04, does not permit tax exemptions based on the content of speech. Thus, any local tax exemption classifications or exemptions with residency- or content-based distinctions should be examined carefully to determine whether such distinctions present federal Constitutional problems.

9-6.01(b) Taxation of Certain Leasehold Interests

Leasehold interests in real property that are owned by the state or any of its political subdivisions, or used by churches or religious bodies for worship or their minister's residence, or exempt by designation per Article X, section 6(a)(6) Constitution, are exempt provided the lessee is an exempt I.R.S. Code § 501(c) organization or entitled to federal rehabilitation tax credits and the use is primarily for charitable, literary, scientific, cultural, or educational purposes. Va. Code § 58.1-3203. For an example of a loss of exemption when real property is a source of revenue or profit, including revenue from leasing, see section 9-6.05(e), Va. Code § 58.1-3603, and *Mariner's Museum v. City of Newport News*, 255 Va. 40, 495 S.E.2d 251 (1998). When real property acquired or used by a land bank is exempt from taxation, the leasehold interest in the property is also exempt. Va. Code §§ 15.2-7510, 58.1-3203(C).

9-6.02 Self-Executing Exemptions

There are four classes of property exempted by Article X, section 6 of the Virginia Constitution that require no enabling legislation. These are called "self-executing" exemptions. 1984-85 Op. Va. Att'y Gen. 336; *see City of Newport News v. Woodward*, 104 Va. 58, 51 S.E. 193 (1905) (discussing self-executing constitutional provisions). Those four classes are (1) government property, (2) church property used for worship or the minister's residence, (3) nonprofit cemeteries, and (4) property of public libraries and nonprofit educational institutions.

9-6.02(a) Property of the Commonwealth or Its Political Subdivisions

Article X, section 6(a)(1) of the Virginia Constitution exempts property owned directly or indirectly by the Commonwealth or any of its political subdivisions. Included in this category is property held for the benefit of the Commonwealth. *Citizens' Found. of R.P.L., Inc. v. City of Richmond*, 207 Va. 174, 148 S.E.2d 811 (1966). Such political subdivisions include housing authorities, *Mumpower v. Housing Auth. of Bristol*, 176 Va. 426, 11 S.E.2d 732 (1940), port authorities, *Harrison v. Day*, 202 Va. 967, 121 S.E.2d 615 (1961), and turnpike authorities, *City of Richmond v. Richmond-Petersburg Turnpike Auth.*, 204 Va. 596, 132 S.E.2d 733 (1963). Often, but not always, the enabling legislation for a governmental entity will explicitly state whether it is a political subdivision of the Commonwealth. However, an entity may be considered a political subdivision even without such a specific statutory statement to that effect. *See, e.g., Cnty. of York v. Peninsula Airport Comm'n*, 235 Va. 477, 369 S.E.2d 665 (1988) (discussing characteristics of a political subdivision and holding that airport commission at issue was one).

9-6.02(b) Church Property for Worship and Minister's Residence

Article X, section 6(a)(2) of the Virginia Constitution exempts property owned and exclusively occupied or used by churches or religious bodies for worship or for the residences of their ministers. With respect to a different tax exemption provision and property subject to the pre-1971 rule of liberal construction (see section 9-6.05(a)(1)), the Virginia Supreme Court has broadly construed the word "exclusively" more than its literal meaning might suggest. *See, e.g., City of Richmond v. United Givers Fund*, 205 Va. 432, 137 S.E.2d 876 (1964) (broadly interpreting "exclusively" as used in the predecessor of Va. Const. art. X, § 6(a)(6) regarding property used by charitable and benevolent organizations); *see also* 2002 Op. Va. Att'y Gen. 64 (church property in the process of being developed for its intended use may in certain circumstances be tax exempt, although the question is one of fact for the local assessor's determination); Va. Code § 58.1-3617 (concerning exemption of certain vehicles owned by churches and used for church purposes). However, for property subject to the post-1971 strict rule of construction (see section 9-6.05(a)(2)), "exclusively" arguably should be determined in a more restrictive manner. *See generally* section 9-6.05(a). *But see Va. Baptist Homes, Inc. v. Botetourt Cnty.*, 276 Va. 656, 668 S.E.2d 119 (2008), discussed in section 9-6.05(e).

In implementing this constitutional provision, the General Assembly has prescribed that exempt church property includes property used for outdoor worship activities; property used for ancillary and accessory purposes as allowed under the local zoning ordinance, the dominant purpose of which is to support or augment the principal religious worship use; and property used as required by federal, state, or local law. Va. Code § 58.1-3606(A)(2); *Emmanuel Worship Ctr. v. City of Petersburg*, 300 Va. 393, 867 S.E.2d 291 (2022) (remanding for circuit court to determine whether church's "learning annex" qualified for exemption). An enactment clause states that the dominant purpose of the use of property is intended to follow the Supreme Court of Virginia's interpretation of Article X, section 6 of the Virginia Constitution and Va. Code § 58.1-3606 in *Virginia Baptist Homes*. 2014 Va. Acts ch. 555, cl. 2.

With respect to the minister's residence exemption, the church or religious order, not the minister, must be the owner of the residence. 1983-84 Op. Va. Att'y Gen. 347. The Supreme Court of Virginia has concluded that a "minister" must be the head or the leader of a religious congregation, society, or order, and a person who has been set apart as its leader. *Cramer v. Commonwealth*, 214 Va. 561, 202 S.E.2d 911 (1974). In *Trustees of the New Life in Christ Church v. City of Fredericksburg*, the circuit court agreed with the city that a married couple who served, part-time, as Directors of College Outreach near the University of Mary Washington did not qualify as "ministers" for purposes of the tax exemption. No. 19-395 (Va. Cir. Ct. Feb. 18, 2020). The city noted that the couple were described by the church as "Adjunct Staff Members," performed no religious services within the church, and were not ordained as required by the Presbyterian Book of Church Order.

While a religious order may have more than one minister and more than one tax-exempt residence, *Cudlipp v. City of Richmond*, 211 Va. 712, 180 S.E.2d 525 (1971), the evidence indicated these particular church employees were not held out as leaders within the church and, therefore, the parsonage exemption did not apply. After the Virginia Supreme Court denied an appeal, (No. 201156, Mar. 3, 2021), the United States Supreme Court denied the petition for review, finding no reversible error. *Trs. of the New Life in Christ Church*, Rec. No. 21-164 (Jan. 18, 2022) (rare written opinion against denial of certiorari filed by Justice Gorsuch).

There are many other opinions of the Attorney General concerning various aspects of this tax exemption. See, e.g., 2002 Op. Va. Att’y Gen. 334 (whether property of Young Life may be exempt); 2002 Op. Va. Att’y Gen. 331 (whether property of the Christian Aid Mission may be exempt); 1989 Op. Va. Att’y Gen. 342 (whether the property of Massanetta Springs may be exempt); 1984–85 Op. Va. Att’y Gen. 372 (whether two church-owned parcels may be exempt); 1984–85 Op. Va. Att’y Gen. 324 (whether 150-acre farm owned by church may be exempt); 1984–85 Op. Va. Att’y Gen. 329 (whether several properties used differently by a religious association would be exempt); 1973–74 Op. Va. Att’y Gen. 391 (whether 139-acre property owned by a church and used as a religious camp may be exempt); 1973–74 Op. Va. Att’y Gen. 365 (whether property of Christian Retreats, Inc., may be exempt). All require or rely on specific fact determinations.

9-6.03 Nonprofit Cemeteries

Article X, § 6(a)(3) of the Virginia Constitution exempts private or public burying grounds or cemeteries, provided they are not operated for profit. 2004 Op. Va. Att’y Gen. 44.

9-6.04 Property of Public Libraries and Nonprofit Educational Institutions

The Virginia Constitution Article X, section 6(a)(4) exempts property owned by public libraries or by institutions of learning not conducted for profit, so long as such property is primarily used for literary, scientific, or educational purposes or purposes incidental thereto. In one case, the Virginia Supreme Court found that residential subdivision lots purchased by a college for resale to faculty members for the dominant purpose of anchoring the faculty to the college, and thereby promoting efficient administration, were primarily used for educational purposes or purposes incidental thereto and therefore exempt. *Hanover Cnty. v. Trs. of Randolph-Macon Coll.*, 203 Va. 613, 125 S.E.2d 812 (1962). In another case, a preschool day care center was exempted as educational property because of its contribution to the intellectual and emotional development of children. *City of Richmond v. Southside Day Nursery Ass’n*, 207 Va. 561, 151 S.E.2d 370 (1966). A camp owned by a college and used for a girls’ summer program, including swimming, sailing, horseback riding, tennis, archery, riflery, golf, drama, drawing, painting, composition, design, music appreciation, ballet, and literature, was exempted as educational property. *Washington Cnty. v. Sullins Coll. Corp.* 211 Va. 591, 179 S.E.2d 630 (1971). However, each of those cases was decided under the old “liberal rule” of construction, and later case law suggests that a court should take a more critical look at requests for exemptions under the strict standard imposed by the Virginia Constitution after 1971. See, e.g., *Close Up Found. v. Arlington Cnty. Bd. of Sup’rs*, 39 Va. Cir. 490 (Arlington Cnty. 1996) (organization that conducts educational seminars for students and teachers not an institution of learning); 2019 Op. Va. Att’y Gen. 67 (consistent with strict construction of exemptions, property owned by single member limited liability company not exempted as educational property even if sole owner is a non-profit corporation operating as institution of learning if the property does not independently qualify as “institution of learning not conducted for profit”); see generally sections [9-6.05\(a\)\(1\)](#) and [9-6.05\(a\)\(2\)](#).

9-6.05 Other Exemptions

Other exemptions provided for in Virginia Constitution Article X, section 6 are not self-executing and depend on enactment of suitable enabling legislation. For example, intangible

personal property, or any class or classes thereof, may be exempted in whole or in part by general law. Va. Const. art. X, § 6(a)(5); see Va. Code §§ 58.1-1101(C), 58.1-1103. Note that in the past the General Assembly has designated property, which is tangible in fact, as intangible property, and such designations have been upheld by the Virginia Supreme Court. See Va. Code §§ 58.1-1101 and 58.1-1103; *City of Roanoke v. Michael's Bakery Corp.*, 180 Va. 132, 21 S.E.2d 788 (1942). Such a designation by the General Assembly has the practical effect of exempting the affected tangible personal property from local taxation.

As will be discussed in greater detail below, Article X, section 6(a)(6) of the Virginia Constitution generally provides that certain property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes may be exempted by designation or by classification. Prior to 2003, the General Assembly enacted various general laws establishing a number of tax-exempt classifications, and also over a thousand special laws that designated particular organizations as exempt from property taxation. Va. Code §§ 58.1-3606 through 58.1-3650.1001. The organizations that received such designations engage in a wide range of activities, from more common community activities such as parks, charitable services, and historic sites, to a nonprofit that was formed to provide oil spill clean-up services.

However, in November 2002, Virginia voters approved a constitutional amendment giving the power to create new classifications and designations to local governing bodies. That amendment became effective January 1, 2003, but the old classifications and designations previously established remain in place unless amended by the General Assembly. Va. Code § 58.1-3651. Thus, for example, if an exempt local church group purchases a new church bus, that vehicle would be exempt pursuant to Va. Code §§ 58.1-3609 and 58.1-3618. See Va. Code § 58.1-3651(E) (nothing in this section shall affect the validity of either a classification or designation exemption granted by the General Assembly prior to January 1, 2003); *Rapidan Baptist Camp and Conference Ctr. v. Madison Cnty.*, 70 Va. Cir. 309 (2006); 2003 Op. Va. Att'y Gen. 32 (Aug. 5, 2003) (neither amendments to § 6(a)(6) nor Va. Code § 58.1-3651 repeal property tax exemptions granted by General Assembly prior to Jan. 1, 2003).

An important point to remember is that some of the special acts that conferred property tax exemption by designation contained rather specific conditions and limitations. Thus, if an organization seeks exemption pursuant to a special act, it is important to review the specific language of the act to determine whether it has any special limitations or conditions related to the exemption.

9-6.05(a) Property Exempted by Classification

Virginia Code §§ 58.1-3606 and 58.1-3622 provide several exemptions by classification. Section 58.1-3606 provides for the exemption of eight classes of property. With some differences in phrasing that relate to Section 183 of the pre-1971 Virginia Constitution, Va. Code § 58.1-3606 restates the four self-executing exemptions found in Virginia Constitution Article X, sections 6(a)(1) through (4). It generally is agreed that because these classifications are self-executing, they retain their property tax exemption automatically without any local action. The self-executing constitutional provisions apply both to existing properties and to any new properties that may fall within the scope of those provisions.

Virginia Code § 58.1-3606(A)(5) exempts property belonging to and used by a YMCA, a similar religious association, and not-for-profit orphanages, reformatories, and hospitals. Although the statute refers to religious "associations," the term encompasses religious corporations. 2002 Op. Va. Att'y Gen. 331 (applying the same analysis to the term "religious association" as used in Va. Code § 58.1-3617; the opinion expressly overrules three prior opinions); see also 2002 Op. Va. Att'y Gen. 338 (Young Life is an exempt religious association). The sixth through eighth classes of § 58.1-3606 include parks and playgrounds held by trustees for use by the general public (this would not include

community recreational associations if the membership is restricted), property of any benevolent or charitable group used for lodge or meeting purposes, and property of any not-for-profit museum. Virginia Code § 58.1-3609 exempts by classification additional groups as specified in Va. Code §§ 58.1-3610 to 58.1-3622. Property that was exempt pursuant to Va. Code § 58.1-3606 prior to July 1, 1971, remains exempt under liberal rules of statutory construction. The exemption of property that met the conditions of Va. Code §§ 58.1-3606 or 58.1-3609 after July 1, 1971, should be strictly construed. See sections [9-6.05\(a\)\(1\)](#) and [9-6.05\(a\)\(2\)](#).

Virginia Code § 58.1-3651(E) provides a grandfather clause. It states that “[n]othing in this section or in any ordinance adopted pursuant to this section shall affect the validity of either a classification exemption or a designation exemption granted by the General Assembly prior to January 1, 2003, pursuant to Article 2 (§ 58.1-3606 et seq.), 3 (§ 58.1-3609 et seq.) or 4 (§ 58.1-3650 et seq.) of this chapter. An exemption granted pursuant to Article 4 (§ 58.1-3650 et seq.) of this chapter may be revoked in accordance with the provisions of § 58.1-3605.”

Thus, no local action is necessary to extend the tax exemption to any entity that received an exemption by classification prior to January 1, 2003, so long as that entity uses the property in accordance with the terms of the exemption. The Attorney General has opined that the grandfather provision (as written prior to the 2004 amendments) is constitutional and valid. 2003 Op. Va. Att’y Gen. 32. Moreover, any new organization that fits within an existing tax exemption classification, e.g., a new church, would be exempt from local property taxation pursuant to Virginia Constitution Article X, section 6(a)(2) and Va. Code § 58.1-3606(A)(2), and a new volunteer fire department also would be exempt from local property taxation pursuant to Va. Code §§ 58.1-3609 and 58.1-3610.

Under the constitutional provisions and Va. Code § 58.1-3651, a local governing body may exempt property by classification or by designation after a public hearing. Notice of the hearing must be published once in a newspaper of general circulation in the locality. *Id.* The hearing cannot be held until at least five days after such publication if the exemption is by classification (§ 58.1-3651(C)); the hearing cannot be held until at least seven days after publication if the exemption is by designation (§ 58.1-3651(B)).³ Any such local classification or designation must be within the scope of the authority granted by Virginia Constitution Article X, section 6(a)(6), and any such exemption must be strictly construed. Va. Code § 58.1-3651(D).

9-6.05(a)(1) Liberal Construction—Property Exempt Before July 1, 1971

Virginia Code § 58.1-3606(B) provides that property in one of the eight classes of property that was exempt on July 1, 1971 (the effective date of the present Virginia Constitution), continues to be exempt using the rules of construction applicable to the property prior to that date, which was a liberal rule of construction. *See, e.g., City of Richmond v. United Givers Fund, Inc.*, 205 Va. 432, 137 S.E.2d 876 (1964). Using a liberal construction, words like “charitable” and “exclusively” were given relatively broad meanings and disputes generally were resolved in favor of exemption. *See, e.g., Manassas Lodge No. 1380, Loyal Order of Moose, Inc. v. Cnty. of Prince William*, 218 Va. 220, 237 S.E.2d 102 (1977) (applying liberal construction to conclude that a fraternal lodge was exempt as a charitable organization); 2011 Op. Va. Att’y Gen. 197 (if non-profit hunting and fishing club activities predominantly promote wildlife preservation and the teaching of soil conservation techniques, club could be entitled to tax exempt status). In order to be eligible for this liberal standard, the specific property in question must have been in existence and considered

³ The time frame in § 58.1-3651(B) (exemption by designation) was increased from five to seven days in 2023, but the time frame in § 58.1-3651(C) (exemption by classification) remains five days; it is not clear whether the discrepancy was intentional or inadvertent.

exempt prior to July 1, 1971. *Children, Inc. v. City of Richmond*, 251 Va. 62, 466 S.E.2d 99 (1996) (liberal construction did not apply because specific personal property at issue did not exist prior to July 1, 1971; but property nevertheless found to be exempt under rule of strict construction).

However, even under a liberal construction, the general rule in Virginia is that it is the duty and obligation of every owner to pay taxes on his property, and if a property owner claims an exemption, then the burden is on him or her to prove that the property comes within the scope of the exemption. *Revercomb v. Dillard*, 186 Va. 547, 42 S.E.2d 844 (1947). For example, even under the liberal standard of construction, exemption was denied to a non-profit continuing care facility that claimed exemption as an asylum under Va. Code § 58.1-3606(A)(5). Using the dictionary definition of asylum as "protection or relief of some class of destitute, afflicted, or otherwise unfortunate persons," the Court held that although the facility did under certain circumstances provide care for those whose funds had become depleted, it was not an asylum because its stated purpose was to care for aging persons and it did not include any special regard for the destitute, afflicted, or otherwise unfortunate person. *City of Richmond v. Va. United Methodist Homes, Inc.*, 257 Va. 146, 509 S.E.2d 504 (1999).

9-6.05(a)(2) Strict Construction—Property Not Exempt Before July 1, 1971

Property acquired by its owner on or after July 1, 1971, can qualify for exemption under one of the classes set forth in Va. Code §§ 58.1-3606 through 58.1-3622, but eligibility for such an exemption will be strictly construed. This rule of strict classification is expressly provided for in Va. Code § 58.1-3609, and it implements Virginia Constitution Article X, section 6(f). Under the rule of strict construction, constitutional and statutory exemptions are to be strictly construed against a taxpayer claiming an exemption. When there is any doubt, it should be resolved against the claim for exemption. *DKM Richmond Assocs., LP v. City of Richmond*, 249 Va. 401, 457 S.E.2d 76 (1995); *Commonwealth v. Progressive Cmty. Club, Inc.*, 215 Va. 732, 213 S.E.2d 759 (1975) (citing *Golden Skillet Corp. v. Commonwealth*, 214 Va. 276, 199 S.E.2d 511 (1973)).

For example, in *Westminster-Canterbury, Inc. v. City of Virginia Beach*, 238 Va. 493, 385 S.E.2d 561 (1989), the Court reviewed a denial of exemption for a not-for-profit housing and health-care facility for the elderly constructed about 1982 and operated by a church. Because it was not clearly shown that the facility "exclusively" operated as a charity, the denial of exempt status was upheld. Key to the decision was the fact that although entry into the home was not denied specifically because of an applicant's wealth, no resident had been allowed a reduction in the founder's fee for "a number of years." Furthermore, the median net worth of residents was \$110,000; five were millionaires and only twenty had no assets. The case also is notable for the deference given to the locality's conclusions on the application of the law. Thus, *Westminster-Canterbury* clearly shows how, when applying a strict construction, doubts are resolved in favor of taxation, in contrast to the very broad definition given to "charity" in the *United Givers Fund* case, decided under the liberal construction rule, discussed in section 9-6.05(a)(1).

9-6.05(a)(3) Dominant Purpose Test

In determining exempt status under either a liberal or strict construction, the courts use the "dominant purpose test." That test, generally speaking, is whether the property in question promotes the purpose of the institution seeking the tax exemption. It is applied in two different contexts. The first is when the qualifying status of the property owner is challenged. The second is when the qualifying status of the property *itself* is challenged.

An example of the first context would be a challenge to a hospital's charitable status if some of the hospital's property is used for revenue-generating purposes, such as office rental space or sales at a pharmacy. If the dominant purpose of the revenue-generating activity is not to obtain revenue or profit, but to promote the purposes for which the charity

was established, then the hospital should retain its charitable status and its property tax exemption. *Smyth Cnty. Cmty. Hosp. v. Town of Marion*, 259 Va. 328, 527 S.E.2d 401 (2000); see also *Wythe Cnty. Bd. of Sup'rs v. Med. Grp. Found., Inc.*, 204 Va. 807, 134 S.E.2d 258 (1964); *Mem'l Hosp. Ass'n v. Cnty. of Wise*, 203 Va. 303, 124 S.E.2d 216 (1962).

In the second context, the qualifying status of the property owner is clear, but the issue is whether particular property of that qualified owner is entitled to an exemption. In that circumstance, the property is entitled to exemption regardless of any revenue it produces incident to its use, if the property has direct reference to the purposes for which the institution was created and tends immediately and directly to promote those purposes. *Smyth Cnty. Cmty. Hosp. v. Town of Marion*, 259 Va. 328, 527 S.E.2d 401 (2000) (profitability of off-site nursing home promotes functions of non-profit hospital). However, a charitable organization may forfeit its property tax exemption with regard to property that it leases to another entity, even another charitable entity, if the lease is a source of substantial profit to the lessor. *Mariner's Museum v. City of Newport News*, 255 Va. 40, 495 S.E.2d 251 (1998) (use to which property was put, not use to which profits realized from the property are put, determines exemption eligibility); see also *Richmond Mem'l Hosp. v. City of Richmond*, 55 Va. Cir. 308 (City of Richmond 2001) (exempt because property used as hospital even though leased to a service corporation), *vacated as moot*, 59 Va. Cir. 367 (City of Richmond 2002); 2002 Op. Va. Att'y Gen. 331 (discussing dominant purpose test).

9-6.05(b) Property Exempt by Specific Designation of Locality

As discussed above in section 9-6.05, localities have had the constitutional authority to specifically designate certain property as exempt. Va. Const. art. X, § 6(a)(6). Pursuant to Va. Code § 58.1-3651(A), localities may, by ordinance, exempt from real or personal property taxes property owned by a nonprofit organization that uses such property for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes. Notice and a public hearing are required before such an ordinance can be adopted. The General Assembly also has specified the requirements that an entity must meet for its property to be exempt. Va. Code § 58.1-3651(B); see 2003 Op. Va. Att'y Gen. 28. Any such exemption is to be strictly construed. Va. Code § 58.1-3651(D). Exemptions previously granted by the General Assembly are grandfathered, but may be revoked by the General Assembly per Va. Code §§ 58.1-3605 and 58.1-3651(E). Exemptions by designation granted by a locality may be revoked pursuant to Va. Code § 15.2-1427(D) in the same manner by which the ordinance granting the exemption was adopted. 2004 Op. Va. Att'y Gen. 224.

9-6.05(c) Exemption for Inundated Land Easement

Land subject to a perpetual easement permitting inundation by water may be exempted in whole or in part by the General Assembly. Va. Const. art. X, § 6(a)(7). See Va. Code § 58.1-3620 for enabling legislation.

9-6.05(d) Exemption for Elderly or Disabled

Virginia Const. art. X, § 6(b) gives the General Assembly broad authority to provide local governments with tools to implement tax relief measures for elderly or disabled persons and provides that a local governing body is authorized but not required to establish either income or financial worth limitations, or both, in order to qualify for such relief. The enabling legislation is found at Va. Code §§ 58.1-3210 to 58.1-3217. The statutes were amended to cover real property held in trust in response to an Attorney General opinion that the exemption did not extend to a person who has placed title to the real property in any form of trust, but did extend to a person who otherwise qualifies for the exemption and who holds a life estate in the real property. See 2013 Op. Va. Att'y Gen. 287.

Although a county may grant real property tax exemptions to the elderly or disabled under Va. Code § 58.1-3210(A), their property still is subject to the imposition of special

service district taxation under Va. Code §§ 15.5-2400 to 15.2-2403. The county has the option, however, of extending the elderly and disabled exemption to special service district levies. 1994 Op. Va. Att’y Gen. 117. The mere placement of the property for sale is not a change in circumstance under Va. Code § 58.1-3215 that would serve to nullify any exemption or deferral of taxes on property owned by elderly or handicapped persons. 1998 Op. Va. Att’y Gen. 127.

9-6.05(e) Limits and Conditions on Exemptions

Article X, section 6(c) of the Virginia Constitution gives the General Assembly the power to “restrict or condition, in whole or in part, but not extend” any or all of the exemptions provided for in Article X, sections 6(a) and 6(b), excepting only the exemption for property owned by the Commonwealth. For an example of the exercise of this power, see Va. Code § 58.1-3603 (making taxable certain otherwise exempt property that is “a source of revenue or profit”). See *Richmond Mem’l Hosp. v. City of Richmond*, 55 Va. Cir. 308 (City of Richmond 2001) (depreciation may be considered to determine whether lease is profitable so as to lose exemption pursuant to § 58.1-3603), *vacated as moot*, 59 Va. Cir. 367 (City of Richmond 2002); 2001 Op. Va. Att’y Gen. 202 (property loses its tax-exempt status only if the owner derives a substantial net profit from a lease after deducting all expenses). The taxpayer has the burden of proving that he or she comes within an exemption, *Revercomb v. Dillard*, 186 Va. 547, 42 S.E.2d 844 (1947), and for those situations where the strict rule is applicable, if there is any doubt as to the application of the exemption, the doubt should be resolved by denying the exemption. *Commonwealth v. Progressive Cmty. Club, Inc.*, 215 Va. 732, 213 S.E.2d 759 (1975); *Golden Skillet Corp. v. Commonwealth*, 214 Va. 276, 199 S.E.2d 511 (1973); see also 2010 Op. Va. Att’y Gen. 203 (medical certification of permanent and total disability is prima facie evidence of eligibility for tax exemption but is insufficient to establish eligibility in light of evidence of applicant’s substantial gainful employment); 2010 Op. Va. Att’y Gen. 197 (locality’s criteria for determining whether applicant for exemption is “permanently and totally disabled” must be set forth in text of ordinance).

Virginia Baptist Homes, Inc. v. Botetourt County, 276 Va. 656, 668 S.E.2d 119 (2008), concerned a claimed tax exemption for a property called “the Glebe,” owned and operated as a continuing care facility for the elderly through a wholly owned subsidiary of the appellant. The appellant (VBH) had been legislatively designated a “religious and benevolent organization within the context of Section 6(a)(6) of Article X of the Constitution of Virginia” and the statute further provided that property owned by VBH “and used by it exclusively for religious or benevolent purposes on a nonprofit basis” was tax-exempt. *Id.* (quoting Va. Code. § 58.1-3650.33). The trial court, stating that the question was “whether an organization that has been specifically designated by the legislature as tax exempt is using its property in accordance with the statutorily mandated conditions that entitle the property itself to exemption from local real estate taxes,” *Botetourt County v. Va. Baptist Homes, Inc.*, No. CL06000061 (Botetourt Cnty. Cir. Ct. June 6, 2007), held that the Glebe was not tax exempt because it was not being used exclusively for religious or benevolent purposes on a nonprofit basis as required by the statute. Among other things, the trial court observed that the Glebe was open to all potential residents regardless of their religion, did not require staff to adhere to any particular religious beliefs, held only occasional religious services which were led by visiting clergy of various denominations, and (unlike at other VBH facilities) all residents of the facility paid 100 percent of the cost of their care.

However, the Virginia Supreme Court reversed, holding that because at the time the General Assembly enacted VBH’s designation statute “VBH’s sole purpose was to operate retirement homes for the elderly . . . [therefore] it follows that the General Assembly considered VBH’s operation of retirement communities for the elderly, its only purpose, to be both religious and benevolent.” *Id.* Two justices dissented, arguing that if the mere designation of VBH as a religious and benevolent organization had been intended by the General Assembly as blanket authority to exempt all its property from taxation, then there

would have been no reason to include the second part of the statute specifying that VBH property was tax exempt only if used exclusively for religious or benevolent purposes.

9-6.05(f) Pollution Control Exemption

Virginia Const. art. X, § 6(d) allows the General Assembly to provide encouragement for pollution control and alternative energy measures through the use of state or local tax exemptions. See, e.g., Va. Code § 58.1-3661 (solar energy equipment, facilities or devices); Va. Code §§ 58.1-3664 (property subject to voluntary remediation); 58.1-3665 (property on which certain erosion control improvements have been made); 58.1-3666 (wetlands, living shorelines, and riparian buffers). Virginia Constitution art. X, § 6(i) similarly deals with cogeneration equipment. See Va. Code § 58.1-3662; see also Va. Code § 58.1-3852 (authorizing incentives for so-called “green” roofs, including reduction in gross receipts tax on contractors installing such roofs).

As defined by Va. Code § 58.1-3660, certified pollution control equipment and facilities are exempt from state and local taxation. This includes certain energy storage systems, defined as equipment, facilities, or devices that are capable of absorbing energy, storing it for a period of time, and redelivering that energy after it has been stored. Va. Code § 58.1-3660(B). The exemption applies only to projects with alternating current storage capacity of more than five but less than 150 megawatts (and all solar projects, including those of five megawatts or less), Va. Code §§ 58.1-3660(G) and 58.1-2606.1. The exemption is in the amount of 80 percent of the assessed value in the first five years of service, 70 percent of the assessed value in the second five years of service, and 60 percent of the assessed value thereafter. *Id.*

Localities may also assess a revenue share of up to \$1,400 per megawatt on energy storage systems. Va. Code § 58.1-2636(A)(1). On July 1, 2026, and every five years thereafter, the maximum amount of the revenue share that a locality may impose on energy storage systems and certain solar energy projects shall be increased by 10 percent. Va. Code § 58.1-2636(A)(2). No increase may be made to any revenue share imposed by a locality on a solar energy project or energy storage system for which an application has been filed with the locality prior to January 1, 2021. Va. Code § 58.1-2636(A)(3). The energy storage systems are considered electric suppliers whose property is to be assessed by the State Corporation Commission. Va. Code §§ 58.1-2600(A) (defining “electric supplier”), 58.1-2633 (directing the SCC to assess the value of electric suppliers).

9-6.05(g) Household Goods Exemptions

Virginia Constitution article X, section 6(e), provides for exemption of household goods, personal effects, and tangible farm property by general law. See Va. Code §§ 58.1-3504 and 58.1-3505. “Exotic” animals are not within the exempt classification for farm animals specified in Va. Code § 58.1-3505, 1995 Op. Va. Att’y Gen. 264, but Va. Code § 58.1-3506(A)(23) provides a separate classification for wild and exotic animals.

9-6.05(h) Partial Exemption for Certain Rehabilitated Real Estate

Virginia Constitution article X, section 6(h) authorizes a partial exemption for real estate “whose improvements, by virtue of age and use, have undergone substantial renovation, rehabilitation or replacement.” See Va. Code §§ 58.1-3220 to 58.1-3227. However, whether such a partial abatement applies not only to a locality’s general real property tax but also to a special district tax assessed on such real estate depends on the intention of the locality’s governing body in adopting the ordinance establishing the district tax. Thus, even though a special district tax is a type of real estate tax, it is not subject to abatement unless the locality’s district tax ordinance expresses that intent. *Miller & Rhoads Bldg. L.L.C. v. City of Richmond*, 292 Va. 537, 790 S.E.2d 484 (2016) (ruling that a Richmond ordinance providing for a special district tax did not contemplate abatement of that tax).

These abatements can be useful in a locality attempting to encourage preservation of existing structures for historical purposes or for preserving low- and moderate-income housing. The age for structures that are improved and for which real estate taxation may be exempted or abated is fifteen years for residential property, twenty years for commercial and industrial property or fifteen years if within a state-designated enterprise zone, and thirty-five years for hotel and motel properties. The period for which the partial exemption can be granted is ten to fifteen years for the first two categories and twenty-five years for hotel and motel properties. For residential structures, written notice of the amount and period of the exemption must be provided to the property owner. The exemption is a covenant that runs with the land for the period of the exemption and may not be reduced by the local governing body during the period of the exemption, unless the property owner was advised in writing at the initial time of approval of the exemption that the exempt amount may be decreased during the period of the exemption. Va. Code § 58.1-3220(C). Virginia Code §§ 58.1-3220(F) (residential) and 58.1-3221(E) (commercial) provide that where rehabilitation is achieved through demolition and replacement of an existing structure, the exemption does not apply when any structure demolished is a registered Virginia landmark or is determined by the Department of Historic Resources to contribute to the significance of a registered historic landmark. This limitation on the exemption does not apply to a subsequent owner who was not responsible for the demolition. 2003 Op. Va. Att’y Gen. 169; *see also Kroger Ltd. P’ship v. City of Richmond*, 69 Va. Cir. 62 (Richmond City 2005) (city not estopped from denying tax abatement when it discovered that § 58.1-3221(E) applied, even though store construction was induced with promise of tax abatement).

In *DKM Richmond Associates v. City of Richmond*, 249 Va. 401, 457 S.E.2d 76 (1995), the taxpayer had been receiving a tax credit against real estate taxes for the portion of the value of the property attributable to rehabilitation. The taxpayer then requested and received a reduction in the total assessed value of the property. The city also reduced the value attributable to the rehabilitation. The taxpayer asserted that the tax credit for the rehabilitation value could not be reduced. No reduction in the rehabilitation value would result in a tax credit greater than the tax due on the total reassessed value of the property. The Virginia Supreme Court held that to make the entire property exempt from taxation was contrary to the purposes of the constitutional and statutory provisions that authorized partial exemptions for qualifying rehabilitated property. A tax credit may only apply to the assessed value of the rehabilitation, and that value may be lowered from the original assessment.

In *Riverside Owner, L.L.C. v. City of Richmond*, 282 Va. 62, 711 S.E.2d 533 (2011), the Court held that the city’s assessor erred by failing to use the methodology for calculating the value of the rehabilitation credit that was specified in the city’s ordinance. The ordinance provided that the tax credit is the amount equal to the difference in taxes as computed upon the base value and the initial rehabilitated assessed value (i.e., value attributable to rehabilitation), but the assessor, ostensibly to avoid having the credit reflect market appreciation as well as rehabilitation, used a hypothetical value based on backdating to the date of the exemption application. While recognizing that market appreciation theoretically could create a problem under the ordinance’s approach, the Court found that it was not an issue in this case because the credit was based on the actual cost of rehabilitation and not on the sale price of the property.

9-6.05(i) Service Charges Allowed

Virginia Constitution article X, section 6(g) authorizes the General Assembly to allow local governments to impose a service charge on exempt property, and the General Assembly has enacted enabling legislation in the form of Va. Code §§ 58.1-3400 to 58.1-3407. The right to an exclusion from a service charge under § 58.1-3402 is a factual determination to be made on a case-by-case basis by the locality’s assessing officer. 1997 Op. Va. Att’y Gen. 191. There is no statutory mechanism that permits a locality to relieve a for-profit

commercial entity from local property and other tax obligations in exchange for payment of a continuous stream of service fees or any other charges payable to the locality. 2005 Op. Va. Att’y Gen. 159.

9-6.05(j) Disabled Veterans or Surviving Military or First Responder Spouses

The principal place of residence of a veteran with a “100 percent service-connected, permanent and total disability” as determined by the federal Department of Veteran Affairs is exempt from real property taxation, and the surviving spouse of such a veteran also is entitled to the exemption as long as he or she does not remarry.⁴ Va. Const. art. X, § 6-A. The implementing statutes, Va. Code §§ 58.1-3219.5 and 58.1-3219.6, limit the amount of land subject to an exemption to one acre. However, if the locality exempts more than one acre under its tax relief program for the elderly and disabled, then the real estate tax exemption for the disabled veteran would apply to the same number of acres as the program for the elderly. A garage or storage shed that is not used for business purposes is also exempt. A manufactured home is exempt even if the veteran does not own the land on which it is located. As the statute on its face provides that the exemption is retroactive to 2011, the three-year limitation for administrative corrections, Va. Code § 58.1-3980, does not apply to limit the period for refunds. 2017 Op. Va. Att’y Gen. 201.

The Attorney General opined that because the statute is tied to VA ratings, localities must grant the exemption to veterans that meet the VA definition of “a 100 percent service-connected, permanent and total disability.” The VA regulations provide that even if the service-connected disability rating is not 100 percent, VA benefits nonetheless may be available to compensate the veteran at the 100 percent level if the veteran is unable to work because of a service-connected disability. 2011 Op. Va. Att’y Gen. 171.

The Attorney General further opined that the exemption was not applicable if the real property is held in trust and that the surviving spouse may not relocate and still be eligible for the exemption. *Id.* In response to the latter part of this opinion, the General Assembly clarified that the property can qualify even if it is held in trust, although the Attorney General subsequently hinted that the Constitution’s authorizing provision may not allow such a construction of the statute. See 2013 Op. Va. Att’y Gen. 287. However, the exemption does extend to a person who otherwise qualifies for the exemption and who holds a life estate in the real property. *Id.* The statute also provides for a pro rata exemption if the property is owned jointly by persons qualified for the exemption and persons not qualified. Va. Code § 58.1-3219.5; see also 2012 Op. Va. Att’y Gen. 134 (exemption does not apply in favor of a veteran who is a proprietary lessee in a real estate cooperative).

Article X, section 6-A of the Virginia Constitution and Va. Code §§ 58.1-3219.9 to 58.1-3219.12 provide that the spouse of any member of the armed forces who was killed in action also qualifies for a property tax exemption for his or her principal place of residence for tax years on or after January 1, 2015. The land under the dwelling does not have to be owned by the surviving spouse. As with the disabled veterans’ exemption described above, the surviving spouse loses eligibility for the exemption if he or she remarries. A garage or storage shed that is not used for business purposes also is exempt. See 2015 Op. Va. Att’y Gen. 166 (even though it is only applicable for tax years on or after 2015, the exemption is applicable to the surviving spouses of members of the armed forces who are killed in action, at any time prior to, on, or after January 1, 2015). The locality may also, by ordinance, classify as a separate class of property, with a different tax rate than the tax imposed upon

⁴ The veteran or surviving spouse may claim the exemption prior to purchasing the qualifying dwelling by filing the required documentation. Va. Code § 58.1-3219.6(B). However, the exemption shall become effective only after the veteran becomes the owner of the property. *Id.*

other real property, the real property owned by a surviving spouse of any member of the armed forces who died in the line of duty. Va. Code § 58.1-3228.2.

Article X, section 6-B of the Virginia Constitution and Va. Code §§ 58.1-3219.13 to 58.1-3219.16 allow, as a local option, for a similar exemption for the surviving spouse of first responder personnel killed in the line of duty. If adopted, the exemption applies regardless of whether the spouse was killed in the line of duty prior to the effective date, July 1, 2017, but the exemption is not applicable for any time prior to then. Unlike the exemption for disabled veterans and military spouses, the exemption only applies to the amount of property tax due that is equal to or less than what would be due on the average assessed value of single-family residential homes in the locality (except for towns, in which case the average assessed value of such homes in the county is used).

9-6.06 Some Practical Considerations

9-6.06(a) Timing

When tax exemptions begin and end are questions that usually involve ownership and use considerations. If an entity that normally would be eligible for a tax exemption acquires property, then that exemption ordinarily would go into effect the next tax day, usually the following January 1. *George Washington Univ. v. Cnty. of Loudoun*, 32 Va. Cir. 291 (Loudoun Cnty. 1993); 1982–83 Op. Va. Att’y Gen. 529. However, Va. Code § 58.1-3360 provides that when property is acquired by a government, a religious body, or by a disabled veteran or a surviving spouse of a veteran, the exemption begins from the date the property is acquired.

In the case of a nongovernmental entity, it must be using the property in accordance with an exempt purpose. For example, if a religious body acquired vacant land for a new sanctuary, when would the exemption of Va. Const. art. X, § 6(a)(2) for property used for religious worship begin? Some local assessors grant the exemption from the date the religious body acquires title to the property, but the better rule would seem to be to wait until some tangible religious use of that property takes place. The Attorney General has opined that a local assessor could conclude that such use is taking place if the religious body has begun the development process by engaging consultants and producing development plans. 2002 Op. Va. Att’y Gen. 64 (Nov. 19, 2002); *see also City of Richmond v. Richmond Mem’l Hosp.*, 202 Va. 86, 116 S.E.2d 79 (1960) (applying pre-1971 liberal rule of construction, stated that physical use of property for exempt purpose must begin within reasonable time).

9-6.06(b) Termination

A property tax exemption granted by a local governing body may be repealed or modified by adopting a subsequent ordinance. See 2004 Op. Va. Att’y Gen. 224 (local governing bodies may repeal ordinance previously granting tax-exempt status using the procedures set forth in Va. Code § 15.2-1427). Also, any tax exemption should be terminated immediately upon the sale of the property to a person or entity not having tax-exempt status or when the owner receives substantial revenues from the property. Va. Code § 58.1-3601.

9-6.06(c) Income

If property is owned by an entity that is eligible for tax exemption and the property is generating income, then there are several issues to consider. Tax exemptions granted by Va. Code §§ 58.1-3650 and 58.1-3651 are limited by Va. Code § 58.1-3603, which provides that if tax-exempt property becomes a source of significant revenue or profits, then that property should be taxed. *Mariner’s Museum v. City of Newport News*, 255 Va. 40, 495 S.E.2d 251 (1998) (property owned by tax-exempt entity lost its exempt status when it was leased for substantial revenue or profit, even though lease was to another exempt entity). If the property belongs to the Commonwealth, then the leasehold interest will be taxable pursuant to Va. Code § 58.1-3203. 1988 Op. Va. Att’y Gen. 601; 1976 Op. Va. Att’y Gen.

339. However, if the owner receives rent from a nonprofit entity for the lease of property to reduce indebtedness of an outstanding loan held by a political subdivision of the Commonwealth, then such rent payments are not income. Va. Code § 58.1-3603(C). Thus, when there is a lease of tax-exempt property, the locality seeking to impose taxes will have to decide whether to tax the property or to tax the leasehold, and that decision should be made early in the process. *See Cnty. of York v. Peninsula Airport Comm'n*, 235 Va. 477, 369 S.E.2d 665 (1988) (county could not attempt to impose a tax on leased property at the time of trial).

9-6.06(d) Information

A locality should require any entity seeking tax-exempt status to provide information sufficient to fully describe the organization and its activities, including copies of articles of incorporation, bylaws, annual reports, and federal tax returns, *e.g.*, IRS Form 990 (requests descriptions of the organization's mission, management, and revenues). Also, Va. Code § 58.1-3605 permits a local governing body to adopt a local ordinance to require any nongovernmental tax-exempt entity to file a report on the ownership and usage of its property.

9-7 BPOL TAXES

9-7.01 In General

The authority of localities to impose the business, professional, and occupational license (BPOL) tax is found in Va. Code § 58.1-3700 et seq., which generally (i) provides that localities must adopt license tax provisions substantially similar to those of the uniform ordinance set forth in Va. Code § 58.1-3703.1 as part of any imposition of the BPOL tax, (ii) authorizes establishment of a license fee, and (iii) set thresholds for imposition of the BPOL tax based on population and amount of gross receipts.

Pursuant to Va. Code § 58.1-3702, a locality can choose to base its BPOL tax on a business's Virginia taxable income instead of gross receipts. Except for certain utility companies, the term "Virginia taxable income" may be substituted for "gross receipts" within the license taxes chapter of Title 58.1 (Va. Code §§ 58.1-3700 through 58.1-3735), if the locality chooses to use taxable income as the basis for its levy. Accordingly, the discussion of BPOL taxes within this chapter is also applicable to "taxable income" when referencing "gross receipts."

As localities only have authority to assess BPOL taxes against *businesses*, with the exception of motor vehicle sales as provided for in Va. Code § 58.1-3724, businesses may not recover from their customers by way of a surcharge the BPOL taxes attributable to the gross receipts generated by sales to those customers without the surcharge also being included in the gross receipts and subjected to the BPOL tax. 2010 Op. Va. Att'y Gen. 192.

9-7.02 Requirements for License

Virginia Code § 58.1-3700 includes a license fee provision as well as authority for the BPOL tax and provides that both the BPOL tax and fee are imposed by local ordinance. The statute makes it unlawful for a business to operate without obtaining a required license. A locality's ordinance may provide that no business license shall be issued until the applicant has produced satisfactory evidence that all delinquent business license, real estate, business personal property, meals, transient occupancy, severance, and admissions taxes properly owed to the locality have been paid. A locality with a population greater than 50,000 may

waive the license requirements for businesses grossing \$200,000 or less. Va. Code § 58.1-3703.1(A)(1).⁵

9-7.03 Definitions

Virginia Code § 58.1-3700.1 sets forth various definitions. Among them, the definition of “affiliated group” includes limited liability partnerships and companies. “Base year” and “license year” are defined such that in general the tax is paid early in one calendar year (license year) based on gross receipts for the preceding calendar year (base year). The terms “business” and “definite place of business” also are defined, incorporating the standards set forth in *Commonwealth v. Manzer*, 207 Va. 996, 154 S.E.2d 185 (1967). See also 2002 Op. Va. Att’y Gen. 297 (discussing “definite place of business”). The definition of “gross receipts” tracks the definition of that term in *Savage v. Commonwealth*, 186 Va. 1012, 45 S.E.2d 313 (1947) (gross receipts must be measured on the “whole, entire, total receipts”). See also *City of Alexandria v. Morrison-Williams Assocs.*, 223 Va. 349, 288 S.E.2d 482 (1982) (advertising agency taxpayer held subject to city’s local license tax on total payments received from taxpayer’s client without any deduction for costs, including media charges).

The Virginia Supreme Court held that Charlottesville City could not tax a limited liability company with one owner/member, a freelance writer of legal fiction, as a business providing a “service” as defined by the City’s Code. *City of Charlottesville v. Regulus Books, LLC*, 301 Va. 170, 873 S.E.2d 81 (2022). The City had classified the LLC under the Code’s catch-all provision covering “[a]ny other repair, personal or business service not specifically included in any other subclassification under this section” and imposed an annual license tax of thirty-six cents per one hundred dollars of gross receipts. The Code further defined “services” as “services purchased by a customer which do not have physical characteristics, or which are not goods, wares, or merchandise.” The Virginia Supreme Court held the LLC’s commercial activity of licensing literary works to publishers did not fit this definition or the commonly understood meaning of “service.” Therefore, it could not be a “business service” under the City’s catch-all provision.

The Attorney General has opined that only goods shipped or delivered to customers from a warehouse or distribution center in the locality constitute “purchases” included in wholesale merchants’ gross receipts. Goods sold in the locality but shipped from outside its jurisdiction are not included. However, a locality may include all goods shipped from a distribution center if the sales were generated outside the locality but within the Commonwealth. Whether goods shipped from the locality as a result of sales generated outside the Commonwealth can be included depends on whether *Complete Auto* concerns are met (see section 9-3.01). 1997 Op. Va. Att’y Gen. 176; see also 2002 Op. Va. Att’y Gen. 292 (compensation received by a standing trustee in a Chapter 13 bankruptcy is subject to local business license taxation); 1999 Op. Va. Att’y Gen. 187 (travel agency funds received and disbursed on behalf of client not gross receipts; funds received for purchase of travel package bought at lower price are gross receipts); 1997 Op. Va. Att’y Gen. 121 (fees received by commissioners of accounts are gross receipts).

9-7.04 Authority for License Fee; Uniform Ordinance Provisions Mandated

Subject to certain limitations, Va. Code § 58.1-3703 empowers localities to impose a BPOL tax or levy a license fee ranging from thirty to fifty dollars based on the population of the locality. In addition, this section requires localities imposing the BPOL tax to adopt an ordinance including the provisions of the model ordinance. Va. Code § 58.1-3703(A).

⁵ Note that pursuant to Va. Code § 15.2-110, a locality cannot require the approval of a common interest community association prior to issuing a business license.

9-7.05 Exemptions

Virginia Code § 58.1-3703(B) permits but does not require a locality to exempt from the license tax in whole or part (i) the design, development, or other creation of computer software for lease, sale, or license and (ii) a private entity agreeing to establish, install, renovate, remodel, or construct satellite classrooms for kindergarten through third grade on a site owned by the entity and leased to the school board at no cost.

Virginia Code § 58.1-3703(C) prohibits imposition of the license tax on a number of taxpayers and activities. For example, § 58.1-3703(C)(1) exempts, among others, certain public service corporations and common carriers. However, the public service corporation exemption does not apply to charter party carriers. 1995 Op. Va. Att’y Gen. 276. Virginia Code § 58.1-3703(C)(18) prohibits license fees and taxes on nonprofit organizations. A distinction is drawn between charities exempt from federal income tax under I.R.C. 501(c)(3) (e.g., churches, schools) to which tax-deductible contributions can be made and other § 501 nonprofits (e.g., social clubs, business and trade organizations). The former are subject to the fee and BPOL tax only if they engage in activities that would subject them to federal income tax as unrelated business taxable income. The latter are subject to the fee and tax on activities conducted for consideration similar to activities of for-profit businesses, but not on membership dues and gifts. For example, a social club that occasionally organizes a trip for its members would not be taxable but a club that regularly advertises trips to the general public is probably taxable because it is most likely engaged in a business activity that competes with a licensable travel agency. The Attorney General has opined that a wholly owned for-profit subsidiary of an exempt nonprofit organization would not be entitled to a blanket BPOL exemption, although it might be entitled to some exemptions depending on how it is “affiliated” with the parent organization. 2009 Op. Va. Att’y Gen. 150. *Cf.* 2009 Op. Va. Att’y Gen. 178 (nonprofit property holding company that is organized for religious purposes retains same property tax exemption as its sole member incorporated church).

Section 58.1-3703(C) exempts venture capital funds and other investment funds from the BPOL tax and fee, but not commissions and fees earned by investment managers of such funds. Real estate rental businesses are subject to the BPOL tax on rental income even if owned by such a fund, provided that the real estate is located in a jurisdiction that taxed such businesses before January 1, 1974. Va. Code § 58.1-3703(C)(7) and (19). Total assessments paid by condominium unit owners for common expenses are exempt. Va. Code § 58.1-3703(C)(20).

Prior to 2007, a recurring issue was the scope of the exemption for a radio or television “broadcasting station or service” provided by Va. Code § 58.1-3703(C)(3). *See, e.g., Winchester TV Cable v. State Tax Comm’r*, 216 Va. 286, 217 S.E.2d 885 (1975) (cable television service was not engaged in “broadcasting,” citing *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 88 S. Ct. 2084 (1968)); *WTAR Radio-TV v. Commonwealth*, 217 Va. 877, 234 S.E.2d 245 (1977); *Chesterfield Cablevision, Inc. v. Cnty. of Chesterfield*, 241 Va. 252, 401 S.E.2d 678 (1991) (exemption did not apply to cable operator; there is a rational basis for the legislative decision to tax cable operators and “broadcasters” differently).

But in 2007, the General Assembly completely revised the taxation of communication services in Virginia. In place of various taxes and fees on such services that were authorized previously, including local BPOL taxes, the law imposes a statewide 5 percent communications sales and use tax, as explained in more detail in section [9-8.02\(b\)](#); see Va. Code §§ 58.1-645 to 58.1-662. “Communications services” now is defined to include cable service. Va. Code § 58.1-647. However, the law exempts from the tax “over-the-air radio and television service broadcast without charge by an entity licensed for such purposes by the Federal Communications Commission.” Va. Code § 58.1-648(C)(ix). Accordingly, a difference in tax treatment between cable and broadcast services remains in effect in Virginia, albeit with a different statutory basis than prior to 2007.

The manufacturing exemption set out in Va. Code § 58.1-3703(C)(4) applies if the raw material is changed or transformed into a new and substantially different article. Thus, the pasteurization, homogenization, vitamin fortification, and flavoring of milk are not manufacturing, nor is adding water to orange juice concentrate. However, the transformation of water to fruit drink by adding flavored powders is manufacturing. 1995 Op. Va. Att’y Gen. 257.

A complex assembly process whereby numerous component parts are turned into a product (e.g., computer assembly, automobile seat assembly) is manufacturing under Va. Code § 58.1-3703(C)(4). 1999 Op. Va. Att’y Gen. 188. This is a difficult area. Under the rule of strict construction of exemptions, the exemption has been construed to apply only to raw materials being transformed. *Prentice v. City of Richmond*, 197 Va. 724, 90 S.E.2d 839 (1956). See also *Va. Dep’t of Tax’n v. R.J. Reynolds Tobacco Co.*, 300 Va. 446, 868 S.E.2d 429 (2022) (holding that tobacco leaves stored in warehouse in Virginia and later shipped to North Carolina for processing did not constitute property being “used” in Virginia for purposes of corporate tax statute). Subsequently, the Court held that the definition of manufacturing should be applied liberally because the policy of the Commonwealth is to encourage manufacturing. *Cnty. of Chesterfield v. BBC Brown Boveri, Inc.*, 238 Va. 64, 380 S.E.2d 890 (1989); see also 1996 Op. Va. Att’y Gen. 214. In *City of Roanoke v. Moody Graphic Color Service*, 70 Va. Cir. 165 (City of Roanoke 2006), the circuit court held that a company engaged in the business of creating and selling specialized printing, products for printing, and prepress components was exempt as a manufacturer. In doing so, the court took judicial notice under Va. Code § 58.1-205(3) of Tax Commissioner rulings, including the Commissioner’s finding that exemptions under the sales and use tax are persuasive authority for BPOL taxes.

A locality may exempt merchants from a license tax. It may do so even if it also exempts them from the merchants’ capital tax. Va. Code § 58.1-3704.

Electric suppliers, gas utilities and suppliers, and pipeline distribution companies are not subject to a local license tax (but the Attorney General opined in 2003 Op. Va. Att’y Gen. 158 that an electric cooperative was required to pay the local gross receipts tax in 2001 based on the gross receipts received by the cooperative in 2000). In its place, consumers pay an electric utility consumption tax per Va. Code §§ 58.1-2900 to 58.1-2903. A locality can receive the revenue generated by the consumption tax even though it did not impose a local license tax on such utility companies as of December 31, 2000. Such a locality is entitled to the maximum amount as if the locality had imposed the license tax provided the locality adopts an ordinance electing to receive such amounts. Va. Code § 58.1-2901(F). The service provider or a provider of billing services collects and remits the local portion of the tax to the locality. Municipally owned electric suppliers have certain other options. Va. Code § 58.1-2900(5); see also Va. Code § 58.1-3814(F).

A locality may provide by ordinance for the exemption, partial exemption, or deferral of BPOL taxes for up to two years for qualifying new businesses. Va. Code § 58.1-3703(D). It may also provide by ordinance for the exemption of BPOL taxes or fees for a taxpayer that provides proof that it had no after-tax profit. Va. Code § 58.1-3703(E).

9-7.06 Threshold for Imposition of Tax and Rate Limitations

Virginia Code § 58.1-3706 establishes thresholds for imposition of the BPOL tax at \$100,000 of gross receipts in any locality with a population greater than 50,000, or \$50,000 in a locality with a population of between 25,000 and 50,000. The threshold applies to all license taxes authorized by Chapter 37 of Title 58.1 (§ 58.1-3700 et seq.) except for the license fee authorized by § 58.1-3703 and the coal, gas, and oil severance and road improvement taxes authorized by §§ 58.1-3712 and 58.1-3713. The threshold also applies to all license taxes authorized by any charter or other provision of Title 58.1. Thus, license taxes are eliminated below these thresholds in such jurisdictions, but the license fee of § 58.1-3703

applies to the businesses below and above the threshold. In jurisdictions with a population under 25,000, there is no threshold amount. Henrico County is exempt from the provisions relating to threshold amounts in Va. Code § 58.1-3706. 1996 Va. Acts ch. 720, § 6. The Attorney General has opined that a locality may raise the threshold amount of gross receipts above the statutory minimum. Furthermore, the locality may create a sub-classification of a BPOL business classification and apply a different threshold of gross receipts, provided that a reasonable municipal policy exists to justify the classifications. 2005 Op. Va. Att'y Gen. 152.

This general threshold provision arguably is overridden by the more specific provision of Va. Code § 58.1-3715 for taxation of contractors by localities in which a contractor has no definite place of business but in which receipts exceed \$25,000 in any year. There may be a future legislative clarification on the threshold's application to contractors and other businesses to which the § 58.1-3706 rate limitations do not apply (e.g., circuses, peddlers and direct sellers). Rate limitations are discussed in section [9-7.11](#).

9-7.07 Situs Provisions

Virginia Code § 58.1-3708 sets forth general situs rules. Those rules, and the situs and apportionment rules of the uniform ordinance (see section [9-7.09\(e\)](#)) apply to both professions and other businesses. The situs of gross receipts generally is the county, city, or town in which the person so engaged has a definite place of business. The situs of gross receipts for four classifications of business are specified in the uniform ordinance. Va. Code § 58.1-3703.1(A)(3)(a)(I) to (4). For example, the situs for contractors, one of these classes, is the definite place of business where services are performed or, if none, the place of business from which the services are directed or controlled, subject to Va. Code § 58.1-3715, which authorizes a locality in which a contractor has no place of business to require a contractor to pay a license tax if the gross receipts therein exceed \$25,000 in any year. The locality in which the contractor has a definite place of business may not tax the receipts taxed elsewhere. A locality must require separate licenses for each business activity and each definite place(s) of business located in the locality, except in limited circumstances. See Va. Code §§ 58.1-5 and 58.1-3703.1(A)(1).

Virginia Code § 58.1-3708(B) ensures that a locality taxes only receipts attributable to a definite place of business in that locality, without regard to whether some other locality taxes the business (the "throwback" of untaxed gross receipts attributable to a definite place of business in another locality or state is not permitted except as to contractors as provided in Va. Code § 58.1-3715). See Va. Code §§ 58.1-3703.1(A)(3)(a)(1) and 58.1-3715 (if a contractor has a definite place of business elsewhere in the state, a locality in which he or she does business may tax gross receipts on only the amount of that business if it exceeds \$25,000 per year in that locality, regardless of whether the locality in which he has his definite place of business imposes a license tax). These statutory provisions overturn the result in *City of Richmond v. Pollok*, 218 Va. 693, 239 S.E.2d 915 (1978) (city allowed to tax attorney's total gross receipts, including those attributable to his branch office in a county which did not tax same).

In interpreting situs requirements for a BPOL tax, the Virginia Supreme Court affirmed that a locality has the power to tax the gross receipts of a contractor for business done outside of the locality only if the contractor has no definite place of business where the work was done, even if the other locality where the work was done does not itself impose a BPOL tax on those receipts. *City of Lynchburg v. English Constr. Co.*, 277 Va. 574, 675 S.E.2d 197 (2009). The Court summarized the statutory scheme as follows:

[A] locality may tax a contractor's gross receipts from services performed in that locality if the contractor has a definite place of business there, and no other locality has authority to tax those receipts. If the contractor's services are performed in a locality in which he has no definite place of business, gross

receipts therefrom are attributed to the definite place of business from which the services were directed or controlled. If, however, the contractor received gross receipts in excess of \$25,000 in any year from services performed in a locality in which he has no definite place of business, that locality may tax those receipts despite the lack of a definite place of business there, and the contractor may deduct those receipts from those reported to the locality from which the services were directed or controlled.

Id.

9-7.08 Exclusions and Deductions From Gross Receipts

Virginia Code § 58.1-3732 is divided into two subsections, distinguishing between (i) exclusions from receipts that are not received in the ordinary course of the business, profession, or occupation licensed (subsection A), and (ii) deductions from otherwise taxable receipts (subsection B). Examples of exclusions are provided, including certain taxes collected from customers and paid to the United States, the Commonwealth, or local government, certain loan proceeds, withdrawals from inventory not for purpose of sale or distribution, and occasional sale or exchange of assets.

Subsection B incorporates a deduction for the amount government contractors originally paid for computer hardware and software obligated at the time of purchase to be resold to a federal or state entity at the time of such resale. There is no deduction for a government contractor's reimbursables (e.g., no deduction for a prime contractor's payments to its subcontractor).

Subsection (B)(2) contains a deduction for receipts attributable to business conducted in another state or foreign country where the taxpayer or a related entity is liable for a tax based on income. In *Nielsen Co. v. County Board of Arlington County*, 289 Va. 79, 767 S.E.2d 1 (2015), the Virginia Supreme Court concluded that subsection (B)(2) does not mandate a particular methodology for determining the deduction. The Court concluded that the Tax Commissioner's use of payroll percentage apportionment to calculate the income tax liability deduction from gross receipts was neither contrary to law nor arbitrary, especially as payroll percentage was used by the county per Va. Code § 58.1-3703.1(A)(3)(b) to assign taxable gross receipts to the county (see section [9-7.09\(e\)](#)). However, the taxpayer has the burden to prove that it can satisfy each step of the approved methodology. The Department of Taxation has promulgated regulations purportedly consistent with the ruling of the Tax Commissioner and the *Nielsen* decision. 2017 Va. Acts ch. 50. See 23 VAC 10-500-210; see also *Ford Motor Credit Co. v. Chesterfield Cnty.*, 281 Va. 321, 707 S.E.2d 311 (2011); 2004 Op. Va. Att'y Gen. 187. On remand in *Ford Motor Credit*, the circuit court held that a taxpayer must be able to directly attribute receipts to an out-of-state return to be entitled to the (B)(2) deduction. *Ford Motor Credit Co. v. Chesterfield Cnty.*, 90 Va. Cir. 457 (Chesterfield Cnty. 2015). Note that neither *Nielsen* nor the methodology it endorsed affects the apportionment of receipts from business conducted in Virginia.

Other statutes specify what is not to be included in gross receipts with regard to specific businesses. See, e.g., Va. Code § 58.1-3732.1 (horse racing); Va. Code § 58.1-3732.2 (real estate brokers); see also 2003 Op. Va. Att'y Gen. 166; Va. Code § 58.1-3732.3 (funeral providers); Va. Code § 58.1-3732.4 (temporary employment agencies).

The State Tax Commissioner has ruled that a BPOL tax on the gross receipts from internet access services is barred by the Internet Tax Freedom Act, 47 U.S.C. § 151, unless the tax was grandfathered under the Act. [Rulings of the Tax Commissioner, 17-94 \(June 19, 2017\)](#). Note that the grandfather clause of the Act expired on June 30, 2020, such that the Act now prohibits all state and local taxes on internet access. In *Coxcom, LLC v. Fairfax County*, 301 Va. 201, 875 S.E.2d 75 (2022), the Virginia Supreme Court first concluded that

the Act applied to the County's BPOL taxes levied on Coxcom from 2013 to 2016 and then held that the County's ordinance did not meet the requirements of the grandfather clause. Therefore, it was unlawful for the County to impose the disputed taxes.

9-7.09 Uniform Ordinance

The uniform BPOL ordinance provisions outlined below are found in Va. Code § 58.1-3703.1. They provide for uniformity in the administration of the BPOL tax, such as due dates, assessment, penalties, interest, and review of assessments.

9-7.09(a) Adoption Mandated

Every ordinance imposing a license tax pursuant to Chapter 37 of Title 58.1 (Va. Code §§ 58.1-3700 et seq.) must include provisions substantially similar to the first through sixth paragraphs of Va. Code § 58.1-3703.1(A). These required provisions override any conflicting limitations or requirements in Chapter 39 of the same title (Va. Code § 58.1-3900 et seq.).

9-7.09(b) License Requirement

Virginia Code § 58.1-3703.1(A)(1) specifies what triggers the requirement to apply for a license and that a license is required for each definite place of business and for each business activity in the jurisdiction, except that a single license may be obtained where a person is engaged in two or more businesses or professions carried on at the same place if the listed criteria are met.

9-7.09(c) Application; Payment Due Dates and Extensions

Every locality must adopt a fixed due date for license applications between March 1 and May 1, inclusive, no later than the 2007 license year. Va. Code § 58.1-3703.1(B)(3). New businesses or professions (those not licensed in the preceding year) must apply for a license prior to beginning business. Virginia Code § 58.1-3703.1, read together with Va. Code § 58.1-3700.1, requires every locality to adopt a calendar year for license tax purposes.

Payment of the license fee is due with the application. Otherwise, payment is due on or before March 1 or, at the option of the locality, a later date including installment payment dates, or thirty or more days after beginning business. However, the treasurer may not demand payment of BPOL taxes that have not been assessed by the commissioner of revenue or other assessing officer. 2002 Op. Va. Att'y Gen. 306.

The assessing official may grant application filing extensions for reasonable cause. The extension may require payment of an estimated amount of tax with interest due from due date until paid for any underpayment. A 10 percent penalty on tax unpaid at the due date is authorized for estimates found to be unreasonable. Va. Code § 58.1-3703.1(A)(2)(c).

9-7.09(d) Penalties and Interest

Only one penalty of 10 percent of the tax may be imposed for failure timely to file an application or pay the tax under the uniform ordinance revisions, absent a noncompliance history. Thus, no locality may levy separate penalties for failure to file and failure to pay, except for those with a history of noncompliance events. Va. Code § 58.1-3703.1(A)(2)(d). The rules for waiving penalties were standardized and liberalized by the uniform ordinance, with a distinction between waiver related to (i) assessments by the assessing officer of additional tax (penalty waiver if no fraud in understatement of tax) versus (ii) nonpayment after thirty days (no penalty if no fault of taxpayer standard as defined).

Interest must be charged on all late payments and paid on all refunds, regardless of the reason therefor, but a thirty-day grace period is provided wherein no interest is due on a late payment or refund if an error is made and corrected within thirty days of the applicable

payment date. Va. Code § 58.1-3703.1(A)(2)(e). The penalty and interest provisions apply to license fees as well as license taxes. 1997 Op. Va. Att’y Gen. 173.

Any bill issued by the treasurer or other collecting official that includes, and any communication from the assessing official that imposes, a penalty pursuant to subdivision (c) or (d) or interest pursuant to subdivision (e) shall separately state the total amount of tax owed, the amount of any interest assessed, and the amount of the penalty imposed. Va. Code § 58.1-3703.1(A)(2)(f).

Disagreeing with the Tax Commissioner, the Attorney General has opined that a taxpayer’s request for a refund is not an assessment under Va. Code § 58.1-3703.1(B)(2) and thus no interest on the refund is due for license years prior to 1997. 1999 Op. Va. Att’y Gen. 188.

9-7.09(e) Situs and Apportionment

The situs and apportionment rules in the uniform ordinance at Va. Code § 58.1-3703.1(A)(3) should be read together with the situs rules of Va. Code § 58.1-3708. The general rule is that gross receipts are taxable only at the definite place of business that generated them, although separate situs provisions are given for different business classifications. Gross receipts from activities outside of a definite place of business are attributable to the definite place of business controlling same.

Apportionment rules are provided for situations where gross receipts are attributable to two or more definite places of business. In such event, the receipts are to be apportioned based on payroll. Va. Code § 58.1-3703.1(A)(3)(a)(4). *See generally, Nielsen Co. v. Bd. of Arlington Cnty.*, 289 Va. 79, 767 S.E.2d 1 (2015). In *Ford Motor Credit Co. v. Chesterfield County*, 281 Va. 321, 707 S.E.2d 311 (2011), the Court rejected an argument that all gross receipts for a financial services firm are “generated” at the branch where the loan is originated. Instead, it found that the capitalization and servicing of such loans, which took place in other localities, contributed to the generation of gross receipts. The Court further found that attribution of the gross receipts to the different places that dealt with financing was impracticable, and thus the Court held that the payroll method must be used. *See Ford Motor Credit Co. v. Chesterfield Cnty.*, 90 Va. Cir. 457 (Chesterfield Cnty. 2014), for payroll apportionment formula used by the circuit court.

If the place of business doesn’t participate in the activity producing the receipts, no apportionment is applicable. For example, a research facility might fall into this category. “Throwback” of receipts because a BPOL tax is not levied in another jurisdiction is not permitted, except for contractors subject to Va. Code § 58.1-3715. *See* Va. Code § 58.1-3703.1(A)(3)(a)(1) and (b).

Agreements between localities are permitted regarding how to apportion gross receipts among definite places of business, with appeals to the Tax Commissioner for an advisory opinion if no agreement can be reached and authorization for temporary court action to prevent multiple payments by the taxpayer.

9-7.09(f) Limitations Period and Extensions

Before expiration of the three-year period for assessment of additional taxes specified by Va. Code § 58.1-3903, the taxpayer and local assessing officer may enter agreements to extend the period for assessment. Va. Code § 58.1-3703.1(A)(4). Because Va. Code § 58.1-3940 limits the period for collecting local taxes (other than real estate) to five years, the collection period is extended when the assessment time is extended. There is a six-year assessment limitations period for fraud or failure to file an application (or return). Va. Code § 58.1-3703(A)(4).

9-7.09(g) Administrative Appeals; Recordkeeping

The uniform license tax ordinance establishes a comprehensive administrative appeals procedure to contest the assessment of a local license tax. An appealable event is defined as an increase in the assessment of a local license tax payable by a taxpayer, the denial of a refund, the assessment of a local license tax where none previously was assessed, and the classification applied to the business. After an appealable event, the taxpayer may file an administrative appeal with the commissioner of the revenue or other local assessing officer within one year from the last day of the tax year for which such assessment is made, or within one year from the date of the appealable event (as defined in the statute), whichever is later. The assessment at issue is deemed prima facie correct and the assessor must issue a written decision explaining the facts and arguments in support of the decision. Tax collections generally are suspended while appeals are pending, with some exceptions. See Va. Code § 58.1-3703.1(A)(5)(d).

That official's decision may be appealed to the State Tax Commissioner within ninety days after the decision. Any taxpayer whose administrative appeal has been pending for more than one year with the commissioner of the revenue without the issuance of a final determination may, after thirty days' written notice to the assessor, elect to treat the application as denied and appeal the assessment to the Tax Commissioner. Tax collections are still suspended as described above, except that the suspension ceases if an appeal is not properly filed and served within thirty days of the service of notice of intent to file an appeal. Depending on the Tax Commissioner's determination, a tax bill or refund must be issued within thirty days of the date of determination, or a reassessment undertaken within sixty days of that date or the date on which any additional taxpayer information is received.

Either party may contest the Tax Commissioner's determination in circuit court, but the Tax Commissioner is not a party to the litigation merely because of the ruling. A taxpayer has one year from the date of the State Tax Commissioner's final determination to file suit in circuit court, if such period is later than three years from the last day of the tax year for which an assessment is made or one year from the date of the assessment. Va. Code § 58.1-3984. The burden of proof is on the challenging party to show that the Commissioner's ruling was erroneous. Collection is similarly suspended during judicial review with the additional proviso that a locality may show the court that suspension of collection will cause the locality substantial economic hardship. Interest accrues on any portion of the assessment withheld.

In *Nielsen Co. v. County Board of Arlington County*, 289 Va. 79, 767 S.E.2d 1 (2015), the Virginia Supreme Court distinguished between "deference" and "weight," stating that "deference" refers to a court's acquiescence to an agency's position without stringent, independent evaluation of the issue, while "weight" refers to the degree of consideration a court will give an agency's position in the course of a court's wholly independent assessment of an issue. A Tax Commissioner's determination is never entitled to deference and his interpretation of a statute is entitled to great weight only if the statute is ambiguous. If it is not, then little weight is given to the Commissioner's interpretation. Furthermore, unless a Tax Commissioner's prior rulings are expressed in regulations, they are entitled to no deference or weight.

Virginia Code § 58.1-3703.1(A)(8) provides that any taxpayer or authorized representative may request a written ruling from the commissioner of the revenue or other assessing official regarding the application of a local license tax to a specific situation. Virginia Code § 58.1-3703.1(A)(9) specifies procedures for taxpayer recordkeeping and availability of records for audit by the assessor.

9-7.10 Uniformity Requirements

Although the basis for any license tax must be uniform for all persons engaged in the same business, trade, occupation, or calling, Va. Code § 58.1-3705, localities maintain authority

to establish separate sub-classifications for businesses and can tax the sub-classifications at different rates. See *Langston v. City of Danville*, 189 Va. 603, 54 S.E.2d 101 (1949); *Rogers v. Miller*, 401 F. Supp. 826 (E.D. Va. 1975). Note that the uniformity requirement of Virginia Constitution article X, section 1 does not apply to license taxes, as discussed in section 9-4.01(a)(2)(ii).

A business need not be taxed at a single rate if the firm is carrying on two or more separate lines of businesses that could be performed independently of each other. See Va. Code § 58.1-5. However, if the business activities are integrated so as to comprise a single business, the firm should be taxed at a single rate, based on the activity that is more substantial. If professional services are merely ancillary and subordinate to other nonprofessional business services that are substantial, the locality should tax the entire gross receipts at the lower rate. 1994 Op. Va. Att’y Gen. 99. That opinion reiterates that the ultimate determination regarding the application of tax statutes to the property or business of the taxpayer is a factual one to be made by the local assessing official on a case-by-case basis.

Other business activity of a public service corporation is merely ancillary to the provision of its utility service and thus all gross receipts should be taxed at the single rate specified in Va. Code § 58.1-3731. 1995 Op. Va. Att’y Gen. 276.

In *Hampton Nissan Limited Partnership v. City of Hampton*, 251 Va. 100, 466 S.E.2d 95 (1996), the Court held that a city cannot collect more tax than it is expressly authorized by statute to collect. Thus, the amount a motor vehicle dealer charged its customers in excess of the imposed license tax rate could not be collected as a tax on the retailer by the city without express statutory authorization.

9-7.11 Rate Limitation

Subject to the gross receipts threshold amounts of \$100,000 and \$50,000 discussed in section 9-7.06, Va. Code § 58.1-3706 limits the rates of local license taxes on four categories of business to the following “not to exceed” amounts: (1) sixteen cents per \$100 of gross receipts for contracting, and persons constructing for their own account for sale; (2) twenty cents per \$100 of gross receipts for retail sales; (3) fifty-eight cents per \$100 of gross receipts for financial, real estate, and professional services; and (4) thirty-six cents per \$100 of gross receipts for repair, personal, and business services, and all other businesses and occupations not specifically listed or excepted. The rate limitation of Va. Code § 58.1-3706(D) for federal research and development contracts applies to the three broad Federal Acquisition Regulation System categories of “applied research,” “basic research,” and “development,” not just to the more limited category of “independent research and development.” 1994 Op. Va. Att’y Gen. 109.

The Attorney General has opined that, with respect to category “(1)” in the paragraph above, the Department of Taxation did not exceed its regulatory authority in defining “contractor” to include persons constructing for their own account for sale. Moreover, it is not relevant for local BPOL tax purposes whether a business is required to obtain a state contractor’s license for regulatory purposes. 2002 Op. Va. Att’y Gen. 293.

9-7.12 Rollback of Rates

Virginia Code § 58.1-3706(B) provides for a gradual reduction of rates in those localities where higher rates are maintained than those prescribed by Va. Code §§ 58.1-3706(A)(1) through (4).

9-7.13 Wholesale Merchants

Pursuant to Va. Code § 58.1-3716, no locality may impose a license tax on wholesale merchants in excess of five cents per \$100 of gross purchases except in those localities

where the local rate in effect on January 1, 1964, was in excess of such rates, in which case such localities are prohibited from increasing such rates.

9-7.14 Divestiture of County Authority Within Town

A county's authority to levy a license tax may be divested within the limits of any town located within the county if the town elects to levy its own license tax and does not expressly allow the county to continue its license within town limits. Va. Code § 58.1-3711. The provisions of Va. Code §§ 58.1-3714 and 58.1-3715 related to contractors override the general limitations of § 58.1-3711 and allow a county to impose a license tax on a contractor whose place of business is in the town and whose receipts for work done in the county outside the town's boundaries exceed \$25,000 per year. 1995 Op. Va. Att'y Gen. 249.

9-7.15 Legal Presence in United States

In 2006, the Attorney General opined that a commissioner of the revenue may only issue a local business license to an applicant who is legally present in the United States. 2006 Op. Va. Att'y Gen. 32. However, that Opinion was overruled in 2020. 2020 Op. Va. Att'y Gen. 40. Although the federal Immigration Reform and Control Act permits states to prohibit the issuance of business licenses to employers who knowingly hire unauthorized aliens, Virginia has not done so, and there is no state law imposing such a duty on commissioners of the revenue or comparable local officials. *Id.*

9-8 MISCELLANEOUS TAXES

9-8.01 Transient Occupancy Tax

Virginia Code §§ 58.1-3819 through 58.1-3827 authorize any county to impose a transient occupancy tax on hotels and other spaces suitable or intended for dwelling, lodging, or sleeping for use or possession of fewer than thirty consecutive days. Effective May 1, 2021, any revenue attributable to a rate over 2 percent but not exceeding 5 percent must be dedicated to tourism marketing. Va. Code § 58.1-3819(A)(2). Unless otherwise specifically provided, there are no spending restrictions on revenue attributable to a rate of more than 5 percent. *Id.* Effective September 1, 2021, the tax is calculated based on the total price paid by the customer for the use or possession of the room or space occupied. Va. Code § 58.1-3819. Virginia Code §§ 58.1-3823, 58.1-3825.2, and 58.1-3825.3 also authorize certain counties to impose such a tax or an additional transient occupancy tax, again to be designated for the promotion of tourism and business travel. *See generally* 2013 Op. Va. Att'y Gen. 284. Cities and towns having general taxing powers established by charter, consistent with Va. Code § 15.2-1104, may also impose such a tax. *See also R & B Tysons Corner Venture v. Fairfax Cnty.*, 39 Va. Cir. 328 (Fairfax Cnty. 1996) (county may tax rents on occupancies of greater than thirty days if it had been statutorily authorized to do so prior to the enactment of the thirty-day limit); 1999 Op. Va. Att'y Gen. 200 (revenues may be used to purchase open space if locality determines open space will promote tourism); 1995 Op. Va. Att'y Gen. 260 (§ 58.1-3840 does not authorize transient room rental tax on apartment facility rented for fewer than thirty-one days because under strict construction apartment complex lacks characteristic of providing nightly accommodation for transients); 2004 Op. Va. Att'y Gen. 195 (county may not levy transient tax on the amount a hotel charges for the rental of banquet or meeting facilities to accommodate events of limited duration).

An accommodations intermediary (such as Airbnb or VRBO) of a short-term rental must collect the transient occupancy tax and remit it directly to the locality. Va. Code § 58.1-3826(C). If there are two or more accommodations intermediaries involved in any transaction, the intermediaries may agree that one of them shall be responsible for remitting the tax. Va. Code § 58.1-612.2. Accommodations intermediaries must submit to each relevant locality a monthly report of the property addresses and gross receipts for all accommodations facilitated by the intermediary in the locality. Va. Code § 58.1-3827(C).

The Department of Taxation has developed guidelines⁶ to govern the taxation of accommodations, and posted on its website the transient occupancy tax imposed by every county, city, and town in Virginia. Va. Code § 58.1-210.1. Every locality that imposes a transient occupancy tax must notify the Tax Commissioner of any change to the tax rate with at least thirty days' notice prior to the effective date of the change. *Id.* Failure to provide notice pursuant to this section shall require the county, city, or town to apply the preceding effective tax rate until thirty days after notification of such change is provided to the Department. *Id.* If any such tax-assessing officer fails, without good cause, to furnish the same to the Department on demand, he is guilty of nonfeasance in office. *Id.*

In *Delta Air Lines, Inc. v. County Board of Arlington County*, 242 Va. 209, 409 S.E.2d 130 (1991), the Court ruled that the county's ordinance could hold the hotel or the transient occupant liable for the tax; and that the ordinance defined corporations as "persons" entitled to exemption for occupancies over thirty days. The case was remanded for a determination of whether the taxpayer was entitled to the exemption for having "obtain[ed] lodging . . . for which a charge [was] made" for more than thirty days.

Virginia Code § 58.1-3819(E) provides that the transient occupancy tax is deemed to be held in trust by the person collecting the tax until remitted to the locality, which aids collection in bankruptcy.

9-8.02 Consumer Utility and Telecommunication Taxes

9-8.02(a) Consumer Utility Taxes

Virginia Code § 58.1-3814 authorizes any county, city, or town to impose a tax on the consumers of utility services provided by water, heat, light, or power companies. Until a consumer pays the utility tax, it constitutes a debt to the locality. The service provider holds the tax in trust until remitted to the locality. Va. Code § 58.1-3814(G). Some localities have imposed this tax on commercial but not residential consumers. Emphasizing the broad powers a locality has to classify for taxation purposes and the presumptive validity of such classification, the Court upheld a city's practice of basing its differing residential and commercial utility tax classifications on a public utility's rate classifications. *Bd. of Dirs. of Tuckahoe Ass'n v. City of Richmond*, 257 Va. 110, 510 S.E.2d 238 (1999). The Court also held that the "consumers of the utility service" referred to in § 58.1-3814 are the purchasers of the service, not the ultimate end users. However, a locality may not impose a utility tax on natural gas consumed for the sole purpose of generating electricity. *City of Richmond v. VEPCO*, 292 Va. 70, 787 S.E.2d 161 (2016).

A locality may exempt property classified or designated as exempt from real property taxes (see sections [9-6.05\(a\)](#) and [9-6.05\(b\)](#)) from the consumer utility tax. Va. Code § 58.1-3816.2. After January 1, 2001, new rate restrictions were made applicable to residential and commercial consumers of electricity. Va. Code § 58.1-3814(F); see also Va. Code § 58.1-2901. The consumption tax on electricity may not be collected from tribal Indians living on reservations. 2003 Op. Va. Att'y Gen. 156.

9-8.02(b) Virginia Communications Sales and Use Tax

Prior to 2007, localities were permitted to impose a tax on consumers of local telecommunication services per former Va. Code § 58.1-3812 and a tax on consumers of telephone services for enhanced 9-1-1 service per former Va. Code § 58.1-3813.1. In addition, in lieu of BPOL taxes and the consumer utility tax on telecommunication services, a locality instead could have imposed an excise tax on the gross receipts of video programming providers per former Va. Code §§ 58.1-3818.1 to 58.1-3818.7.

⁶ The guidelines are available [here](#) and the most recent locality rates are available on this [webpage](#).

However, all the statutes mentioned in the paragraph above were repealed effective January 1, 2007, by 2006 Va. Acts ch. 780, which completely revised the taxation of communication services in Virginia. The new tax provisions are Va. Code §§ 58.1-645 to 58.1-662. Instead of the local taxes described above (and certain other taxes and fees), the new law applies a statewide communications sales and use tax to retail communication and video services on what is intended to be a competitively neutral basis. A number of communication services are exempted from the statewide sales and use tax, including, inter alia, Internet access and e-mail service and over-the-air broadcast television and radio service by a provider licensed by the Federal Communications Commission. Va. Code § 58.1-648(C).

Under the new law, the communications sales and use tax is 5 percent on the following telecommunication services: local exchange, paging, inter-exchange, cable television, satellite television, wireless, and voice over Internet protocol ("VoIP"). In addition, a "911 Tax" of seventy-five cents is applied to each local exchange landline and the previously existing seventy-five-cent "911 Fee" on each wireless number will continue. Lastly, a statewide right-of-way fee is applied to all cable TV service lines as is already applied to all local exchange telephone lines.

All these taxes and fees are remitted to the Virginia Department of Taxation. Thereafter they are to be redistributed in what is intended to be a revenue neutral manner to localities (and to the state's Wireless 911 Board to cover the cost of the Virginia Relay Center).

Note that under previous law, in *Cox Cable Hampton Roads, Inc. v. City of Norfolk* 242 Va. 394, 410 S.E.2d 652 (1991), the Court considered challenges to the city's taxing power and the constitutionality of its utility tax on cable television service. Among other things, the Court found that under *Arkansas Writers* (discussed in section 9-3.04) and *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438 (1991), the ordinance did not abridge the taxpayer's free speech and press rights under the state and federal constitutions. The Court remanded the case for consideration of the taxpayer's equal protection claim that the ordinance applied to its cable system but not to a satellite-antenna television system with similar programming. After remand, the Court affirmed the trial court's rejection of the cable company's equal protection claim, finding that different transmission methods between satellite and cable television services provided a rational basis for different tax treatments. *Cox Cable Hampton Roads v. City of Norfolk*, 247 Va. 64, 439 S.E.2d 366 (1994). While all authority to impose a local utility tax on franchised cable television service was repealed by the 2006 Act, the case may be generally instructive on challenges to the constitutionality of other types of taxation.

9-8.03 Recordation

Cities and counties are authorized to impose a recordation tax in an amount equal to one-third of the amount of the state recordation tax, unless the state recordation tax is fifty cents. Va. Code §§ 58.1-814 and 58.1-3800. Virginia Code § 58.1-3803 provides that these taxes are to be deposited in the local treasury and the local court clerk compensated for collecting them. A court clerk has no statutory authority to enforce the collection of state or local taxes. *Small v. Fannie Mae*, 286 Va. 119, 747 S.E.2d 817 (2013) (court clerk sought to enforce the collection of real estate transfer taxes against Fannie Mae and Freddie Mac).

The Virginia Supreme Court has ruled that the similar state recordation tax is not a property tax, but a tax on the privilege of availing oneself of the benefits and advantages of the State's registration laws. *Pocahontas Consol. Collieries Co. v. Commonwealth*, 113 Va. 108, 73 S.E. 446 (1912); see also 2011 Op. Va. Att'y Gen. 192 (when the amount secured by a deed of trust is known, the recordation tax is based on the amount of indebtedness rather than the fair market value of the encumbered property, and state regulation stating otherwise is invalid).

No tax is imposed if the grantor is a locality at a judicial sale of tax delinquent property. Va. Code § 58.1-802(A). A deed of trust or mortgage that is given by a local government entity to secure a debt payable to another local government entity is exempt from the recordation tax. Va. Code § 58.1-811(B)(4). Deeds of gift, whether the grantors or grantees are individuals or not, are exempt from recordation taxes, provided the deed states that it is a deed of gift. Va. Code § 58.1-811(D). Pursuant to federal statutes, Fannie Mae, Freddie Mac, and federal credit unions are exempt from recordation taxes. *Montgomery Cnty. v. Fannie Mae*, 740 F.3d 914 (4th Cir. 2014); 2014 Op. Va. Att’y Gen. 33; 2012 Op. Va. Att’y Gen. 137. Section 2098 of the Farm Credit Act, 12 U.S.C. § 2098, also exempts federal land credit associations from the recordation tax. 2003 Op. Va. Att’y Gen. 177. Other exemptions are listed in § 58.1-811. *But see* 2016 Op. Va. Att’y Gen. 290 (the grantor's tax exemption contained in § 58.1-811(C)(4) does not apply to a trustee's deed on the basis that the creditor is a government agency and is named along with the trustee as a grantor for indexing purposes only).

A land trust agreement established pursuant to Va. Code § 55.1-117 that has no named beneficiaries except those who are grantors in the deed in trust is exempt from recordation taxation under Va. Code § 58.1-811(A)(12). 1994 Op. Va. Att’y Gen. 96. Note that this opinion is distinguished from the opinion reported at 1993 Op. Va. Att’y Gen. 258, which concluded that a deed conveying property to a living trust having contingent beneficiaries in addition to the grantor as the initial beneficiary was not exempt. That 1993 opinion was effectively negated by a 1995 amendment to § 58.1-811(A)(12) providing that the recordation exemption applies if other beneficiaries are named besides the grantor, if no consideration has passed between the grantor and the other beneficiaries. 1995 Va. Acts ch. 127.

9-8.04 Wills and Administrations

Cities and counties may impose a local tax on the probate of every will or grant of administration in an amount equal to one-third of the amount of the state tax on those transactions. Va. Code §§ 58.1-3805 to 58.1-3808.

9-8.05 Severance Tax

Virginia Code § 58.1-3712 allows counties and cities to levy a license tax on “every person engaging in the business of severing gases from the earth,” at a tax rate not to exceed 1 percent of the gross receipts from the sale of gas severed within the jurisdiction. For a discussion on issues related to this tax, see 2011 Op. Va. Att’y Gen. 166. Levy of the tax precludes enactment of a gross receipts tax on the same activity under Va. Code § 58.1-3286. Taxpayer agreements regarding the calculation of FMV of gasses are authorized.

Virginia Code § 58.1-3713 authorizes counties and cities to adopt a license tax, in addition to that permitted under § 58.1-3712, on the gross receipts from the severance of gas, at a rate not to exceed 1 percent. The revenue must be paid into a special fund for the improvement of public roads and, as to localities in the Virginia Coalfield Economic Development Authority, a portion is to be paid into the Virginia Coalfield Economic Development Fund, and a portion may be allocated to certain water projects.

Virginia Code § 58.1-3741 authorizes counties and cities to levy a license tax “on every coal producer that sells or utilizes coal severed from the earth within its jurisdiction” at a rate not to exceed three-fourths of 1 percent of gross receipts for small mines and 1 percent for all others. At the same rate structure, counties and cities may impose a local coal road improvement severance license tax, with revenues distributed in the same manner as for the road improvement gas severance tax.

Taxes imposed under Va. Code §§ 58.1-3712, 58.1-3713, and 58.1-3741 must be imposed pursuant to the uniform ordinance provisions of § 58.1-3703.1. Va. Code § 58.1-3713.3.

Because geothermal resources have been declared by statute to be “sui generis, being neither mineral resources nor water resources,” Va. Code § 45.1-179.5,⁷ and because of the substantive difference between physically removing a tangible resource and extracting energy, which is an intangible resource, the Attorney General has opined that extracting energy from geothermal heat does not constitute “severing” it from the land so that extracting heat from a geothermal resource is not governed by the common law principle that severing a resource from land converts it from real property to personal property. 2014 Op. Va. Att’y Gen. 81.

9-8.06 Carnivals, Circuses, and Speedways

Virginia Code § 58.1-3728 permits counties, cities, and towns to levy and collect a license tax for each performance within the jurisdiction given “by or upon carnivals, circuses or speedways.” Fines are also authorized, and the tax is specifically made applicable to performances for charitable or benevolent purposes. The threshold limits on imposition of the BPOL tax of Va. Code § 58.1-3706(A) appear to apply, such that the license fee may be imposed and the uniform ordinance provisions apply. However, it might be argued that the specific provisions of Va. Code § 58.1-3728 override the general threshold limitations of § 58.1-3706(A). *See, e.g.,* 1995 Op. Va. Att’y Gen. 249 (specific proration provisions on contractors in §§ 58.1-3714 and 58.1-3715 override general limitation on authority of county to tax a business in a town within a county).

9-8.07 Contractors

Virginia Code § 58.1-3714 authorizes counties, cities, and towns to levy a license tax on and require bonds of contractors. The term “contractor” is defined broadly to include, for example, electricians, excavators, and masons, as well as general builders and pavers. Class A contractors, while exempt from local regulatory licensing under Va. Code § 54.1-1117, are not exempt from the BPOL tax. A locality may require a bond under § 58.1-3714 only for the purpose of obtaining a reasonable financial guarantee of the payment of the license tax. Bonds under § 54.1-1117, however, may be conditioned on compliance with the Uniform State Building Code, although such bonds may not be required of Class A contractors. 1994 Op. Va. Att’y Gen. 114.

A contractor conducting business in a locality for less than thirty days without a definite place of business anywhere in the state is subject to the license fee or tax when the amount of business in the locality exceeds \$25,000 for the license year. That portion of gross receipts subject to such tax may not be subject to tax in another locality. Va. Code § 58.1-3715(B). The license fee may be imposed as an alternative to the tax, threshold limits on imposition of the BPOL tax apply, and the uniform ordinance provisions apply, except to the extent they may be overridden by § 58.1-3715, i.e., it might be argued that the general threshold limitations of § 58.1-3706 are overridden by the specific authorization in § 58.1-3715 for a locality to tax gross receipts of a contractor having no definite place of business therein but receipts in excess of \$25,000 in that locality for any license year.

Localities may not issue or reissue a business license to any contractor who is required to have workers’ compensation coverage at the time of the license application but who has not obtained such coverage. The contractor must also provide written certification of compliance with the Workers’ Compensation Act. The Workers’ Compensation Commission will conduct periodic audits of contractors to ensure compliance with the law. Va. Code § 58.1-3714(B).

⁷ The statute was recodified at § 45.2-2003, effective October 1, 2021.

9-8.08 Peddlers, Itinerant Merchants, and Wholesalers

Virginia Code §§ 58.1-3716 to 58.1-3719 authorize counties, cities, and towns to impose license taxes on wholesalers, peddlers, and itinerant merchants. Arlington County's local ordinance was upheld against Equal Protection and Commerce Clause challenges in *Thompson's Dairy, Inc. v. County Board of Arlington*, 197 Va. 623, 90 S.E.2d 810 (1956). The Attorney General has suggested that a flat tax may violate the Commerce Clause as impermissibly discriminating between fixed retail merchants and out-of-state itinerant merchants, unless a court would find that genuine administrative burdens caused by the nature of an out-of-state itinerant business justify the different impact of the tax. 2002 Op. Va. Att'y Gen. 302. A circuit court has ruled in favor of a locality on this issue, *Homier Distributing Co. v. City of Hopewell*, No. CL02000124-00 (City of Hopewell Cir. Ct. Apr. 28, 2004), *aff'd*, Rec. No. 041766 (Va. Mar. 25, 2005). See also section [9-3.01](#).

A locality has no authority to impose a merchants' capital tax on a peddler because a peddler is, by definition, not a merchant. 1992 Op. Va. Att'y Gen. 161.

9-8.09 Fortune-Tellers

Virginia Code § 58.1-3726 (which deems fortune-tellers to be those who "pretend to tell fortunes, assume to act as a clairvoyant, or to practice palmistry or phrenology") permits counties, cities, and towns to levy on such fortune-tellers an annual license tax not to exceed \$1,000.

9-8.10 Admissions

Six categories of events for which admissions are charged are established by Va. Code § 58.1-3817. The final category is "all other admissions." The Attorney General has opined that while a county is not required to tax all types of events which fall under "all other admissions, it must uniformly tax any events under that category on which it elects to impose an admissions tax. 2021 Op. Va. Att'y Gen. 60.

Virginia Code § 58.1-3818 authorizes a tax on admissions not to exceed 10 percent of the admission charge by any county except those imposing a sales and use tax at a rate of 1 percent or more, a portion of which is dedicated to the promotion of tourism, may not levy an admissions tax. Va. Code § 58.1-3818(C). Classification and imposition of different rates on different classes was upheld in *City of Portsmouth v. Portsmouth Catholic Elementary School PTA*, 217 Va. 199, 227 S.E.2d 691 (1976). The Attorney General has opined that an ordinance purporting to impose a duty on the Commonwealth or its instrumentalities to collect an admission tax is ultra vires. 2001 Op. Va. Att'y Gen. 184.

Virginia Code § 58.1-3818 was amended to legislatively overrule 1998 Op. Va. Att'y Gen. 125, which opined that to be exempt from an admissions tax, all proceeds from admissions must go toward the charitable purpose without regard to expenses. Thus, localities may elect not to levy an admissions tax if the purpose of the event is solely to raise money for charitable purposes and the net proceeds will be transferred to an entity exempt from sales and use taxes.

9-8.11 Banks and Trust Companies

Under the Virginia Bank Franchise Tax Act, Va. Code §§ 58.1-1200 through 58.1-1217, counties, cities, and towns are authorized to impose a tax not to exceed 80 percent of the state rate of tax on each \$100 of the net capital of any "bank," as defined in § 58.1-1201, located within the jurisdiction.

9-8.12 Sales and Use Tax

The Virginia Retail Sales and Use Tax Act, Va. Code §§ 58.1-600 through 58.1-639, permits cities and counties to levy local sales taxes, § 58.1-605, and local use taxes, § 58.1-606. Both sections provide for disbursement of revenues to incorporated towns. See 2009 Op. Va. Att'y Gen. 170 (addressing recoupment of erroneous payment amounts from county to

town). Exemptions are governed by §§ 58.1-609.1 through 58.1-609.13, although some code sections within that range have been repealed and the substance consolidated in others. See *Carr v. Forst*, 249 Va. 66, 453 S.E.2d 274 (1995) (certain magazines are exempt from the State's imposition of retail sales and use taxes). The local government exclusion from the sales and use tax does not apply to personal property purchased by a political subdivision and transferred to a private business for use in a private facility or for non-governmental purposes. Va. Code § 58.1-609.1(4). If local sales tax revenues are erroneously distributed to a locality by the Commonwealth, the locality must repay the revenues, but the Commonwealth may not assess interest on the erroneously distributed amount. 2019 Op. Va. Att'y Gen 56.

Sales taxes from remote sellers are governed by Va. Code §§ 58.1-601, 58.1-602, 58.1-605, 58.1-612, and 58.1-613.

For transportation project funding, the Northern Virginia and Hampton Roads Planning Districts impose an additional 0.7 percent sales tax. Va. Code § 58.1-603.1.

With regard to sales and use tax exemptions, see *Chesapeake Hosp. Auth. v. Commonwealth*, 262 Va. 551, 554 S.E.2d 55 (2001) (political subdivision exclusion (§ 58.1-609.1(4)) and nonprofit hospital exclusion (§ 58.1-609.7(4) (repealed effective July 1, 2004)) do not require that the provision of food be in connection with the provision of medical services; Court noted that under Va. Code § 58.1-205, the Tax Commissioner's prior rulings and policies are not entitled to great weight, unless expressed in regulations); 1999 Op. Va. Att'y Gen. 67 (Va. Code § 15.2-4905 does not authorize IDA to act as general contractor for construction of private facility so as to avoid the sales and use tax).

Certain tax refunds are authorized by § 58.1-608.1 for tangible personal property taxes paid on property used to erect, repair, or rehabilitate low-income housing.

Virginia Code § 58.1-611.2 provides for a sales tax exemption for school-related items for a three-day period each August.

9-8.13 Motor Vehicle Rental Tax

A tax of 4 percent of the gross proceeds levied on the rental of any daily rental vehicle and collected by the state is distributed on a quarterly basis to the locality in which the vehicle was delivered to the rentee. Va. Code §§ 58.1-1736(A)(2) and 58.1-1741(A)(i).

9-8.14 Cigarette Tax

Any county, city, or town may levy taxes on the sale or use of cigarettes, subject to a cap. Va. Code § 58.1-3830(A). If the locality had in effect, on January 1, 2020, a tax rate of less than two cents per cigarette, the maximum rate is two cents per cigarette; if the locality had a tax of two cents or more per cigarette in place, then the rate that was in effect on January 1, 2020, is the maximum rate the locality may levy. Va. Code § 58.1-3830(C); see also Va. Code § 58.1-3832.1 (regarding establishment of regional cigarette tax boards).

9-8.15 Food and Beverage Tax

Counties are authorized by Va. Code § 58.1-3833 (subject to exemptions set out in the statute) to impose a meals tax on food and beverages sold for human consumption by a "restaurant," as defined in Va. Code § 35.1-1. The tax, when added to the state and local sales and use tax, cannot exceed 4 percent. The 4 percent limit became effective September 1, 2004, but does not affect any earlier authority granted to a county to levy a meals tax. The tax generally may be levied if approved in a referendum, but the referendum is solely to approve the imposition of the tax; only the governing body can set the amount and terms. 2010 Op. Va. Att'y Gen. 195 (locality could impose lower tax rate even though referendum stated tax would be 4 percent). If a referendum is defeated, the county may not initiate another for three years.

Certain counties are permitted to levy a meals tax without a referendum provided a meals tax ordinance is adopted unanimously by the governing body. Towns and cities whose charters grant them taxing powers pursuant to or consistent with those described in Va. Code § 15.2-1104 are authorized to impose a meals tax under Va. Code § 58.1-3840 and are not subject to the limitations imposed on counties by Va. Code § 58.1-3833. 1992 Op. Va. Att’y Gen. 168.

The tax also applies to prepared foods ready for human consumption sold by a grocery store or convenience store from a delicatessen counter. The tax does not apply to alcoholic beverages sold in factory-sealed containers for off-premises consumption, or food purchased for human consumption as “food” is defined in the federal Food Stamp Act and related regulations, except for sandwiches, certain salad items, and non-factory-sealed beverages. Va. Code § 58.1-3833(E); see *also* 2000 Op. Va. Att’y Gen. 202 and 1997 Op. Va. Att’y Gen. 186. Likewise, the tax does not apply to food or beverage sales at local farmers’ markets and roadside stands when the seller’s annual income from such sales is \$2,500 or less. Va. Code §§ 58.1-3833 and 58.1-3840. Gratuities and service charges up to 20 percent of the price of a meal are excluded from the calculation of any meals tax. Va. Code §§ 58.1-602, 58.1-3833(E), and 58.1-3840(A).

State law does not specify any particular type of system in connection with the administration of a local meals tax. 1997 Op. Va. Att’y Gen. 186. As the duty is not a statutorily prescribed one, a locality may not compel a commissioner of the revenue to administer the tax, although the commissioner may voluntarily assume such duty. 2000 Op. Va. Att’y Gen. 204. A restaurant is not entitled to a refund of the local meals tax it erroneously collected from its customers. 2001 Op. Va. Att’y Gen. 187.

If the assets of a business owing meals tax are sold to another business entity in a bona fide arm’s length transaction, the new entity is not liable for incurred taxes. However, officers or employees may be individually liable under Va. Code § 58.1-3906.

Virginia Code § 58.1-3834 specifies how the meals tax is to be apportioned if the boundary line of different localities passes through the place of business.

Given the circumstance of an instate caterer delivering meals to be consumed out of state, the Attorney General recommends that a locality review the exemptions under the Retail Sales and Use Tax Act for guidance and apply any analogous exemption to its meal tax to avoid any possibility of a Commerce Clause violation. 1994 Op. Va. Att’y Gen. 124.

9-8.16 Excise Tax

Cities and towns with general taxing powers granted by charter may impose excise taxes on cigarettes, admissions, transient room rentals, meals, and travel campgrounds, pursuant to § 58.1-3840.

9-8.17 Professional Bondsmen

Virginia Code § 58.1-3724 authorizes revenue licenses for professional bondsmen, including agents and attorneys-in-fact of guaranty, indemnity, fidelity, and security companies who provide bonds for criminal case matters. See *Roberts v. Roanoke Cnty. Bd. of Sup’rs*, 249 Va. 2, 453 S.E.2d 258 (1995). Virginia Code § 58.1-3724 also requires new bondsmen to obtain a license from the Department of Criminal Justice Services as a prerequisite to the issuance of a business license. See *also* 2000 Op. Va. Att’y Gen. 187 (§ 58.1-3703(C)(11) exempts a surety insurance company serving in the capacity of bail bondsman from the local business license tax imposed pursuant to § 58.1-3724).

9-8.18 Plastic Bag Tax

Counties and cities are authorized to impose, by ordinance, a tax of five cents for each disposable plastic bag provided to a consumer by a grocery store, convenience store, or

drugstore. Va. Code § 58.1-1745(A). Revenue generated by the tax must be used for environmental cleanup activities, educational programs designed to reduce environmental waste, mitigating pollution and litter, or providing reusable bags to low-income residents. Va. Code § 58.1-1745(B). For the first two years of the program (January 1, 2021 through January 1, 2023), retailers retained two cents from the tax collected on each plastic bag; thereafter, they may keep one cent from the tax collected on each bag. Va. Code § 58.1-1747.

9-9 CORRECTIONS, REMEDIES, AND REFUNDS

9-9.01 Compromise

9-9.01(a) Commissioner of Revenue

The commissioner of revenue is authorized to compromise and settle the disputed assessment of BPOL, local business taxes, and, effective January 1, 2005, local mobile property taxes prior to the expiration of the time for administrative or judicial review, if he or she determines that there is substantial doubt as to the taxpayer's liability for such taxes. Va. Code § 58.1-3994(A). By law applicable to certain localities, the powers of a commissioner of revenue may be exercised by another official, *e.g.*, Va. Code § 58.1-828 (by director of department of finance in counties having urban county executive form of government).

9-9.01(b) Treasurer

The treasurer is authorized to compromise and settle any disputed local tax only with the consent of the governing body after determining that the collection of the entire amount due and owing is in substantial doubt and the best interests of the locality will be served by such compromise. Va. Code § 58.1-3994(B). By law applicable to certain localities, the powers of a treasurer may be exercised by another official, *e.g.*, Va. Code § 58.1-828 (by director of department of finance in counties having urban county executive form of government).

9-9.02 Administrative Appeal

Any person may petition the assessing official for a correction of an assessment of any local tax within the later of three years of the last day of the year in which the assessment was made or one year from the date of the assessment. Va. Code § 58.1-3980. See 2014 Op. Va. Att'y Gen. 10 (no authority to refund erroneous assessed tax beyond three years). The Attorney General opined that the "date of assessment" is the date when written notice of the amount levied is delivered or mailed to the taxpayer. 2004 Op. Va. Att'y Gen. 218. A taxpayer may request correction of a real estate assessment only if the error was made by the assessing official or was due to a factual error made by others in conducting the general reassessment. Va. Code § 58.1-3980. No tax may be deemed delinquent during the pendency of an administrative appeal under § 58.1-3980 and for thirty days after a final determination of the appeal, so long as the appeal is filed within ninety days of the assessment. Va. Code §§ 58.1-3916 and 58.1-3958. Even if the taxpayer does not petition, an assessing official may correct erroneous assessments caused by clerical or calculation errors, as well as such errors or factual errors made by those conducting general reassessments. Va. Code §§ 58.1-3981(B) and (C).

Upon application by a taxpayer, the assessing official must correct assessments that he is satisfied are erroneous. If such assessment is unpaid, the assessing official must exonerate the applicant for so much of the tax as was erroneously charged. If paid, the governing body of the locality, upon the certificate of the assessing official and with the consent of the attorney for the locality, must direct the treasurer to refund so much of the assessment as was erroneously charged and paid. Va. Code § 58.1-3981(A). The Attorney General has opined that the statute places upon the attorney for a locality a duty either to consent to or to disagree with a commissioner of the revenue's determination that a local tax assessment was erroneous, but there is no need for the local attorney to consent to an

assessment reduction ordered by the BOE in order for the resulting refund to be paid. 2010 Op. Va. Att’y Gen. 189. The locality may authorize the treasurer to approve any refunds up to \$10,000 without specific action of the governing body. Va. Code § 58.1-3981(A). If the assessment is less than the proper amount, the applicant shall be assessed the proper amount. Va. Code § 58.1-3981. If requested by the applicant, the assessing official must state in writing the facts and law supporting the action taken. Va. Code § 58.1-3981(F).

A locality that provides for the payment of interest on delinquent taxes pursuant to Va. Code § 58.1-3916 is required by that same statute to pay interest at the same rate on overpayments due to erroneously assessed taxes, unless the refund is less than ten dollars or results from a proration of personal property taxes. If a locality has not provided for interest on taxes pursuant to § 58.1-3916, interest on both delinquencies and overpayments is at the rate of 10 percent. Va. Code § 58.1-3918. Payment of such interest is mandatory even if the erroneous assessment resulted from the taxpayer’s mistake. 2000 Op. Va. Att’y Gen. 218; 2021 Op. Va. Att’y Gen. 55. Moreover, any imposed penalty may not exceed the amount of the assessed tax. Va. Code § 58.1-3916.

Virginia Code § 58.1-3983.1 provides an alternative administrative appeal process specifically for local business taxes (machinery and tools tax, business tangible personal property tax, consumer utility taxes over \$2,500 except taxes on mobile telecommunications services, and merchant’s capital tax) and local mobile property taxes (tangible personal property tax on airplanes, boats, campers, recreational vehicles, and trailers). Similar to the provision for BPOL taxes (see section 9-7.09(g)), it provides for:

- i. the initial taxpayer appeal to the local assessing officer within one year from the last day of the tax year for which such assessment is made, or within one year from the date of such assessment, whichever is later;
- ii. an appeal of that official’s decision to the Tax Commissioner within ninety days of such decision (Tax Commissioner first has thirty days to determine if he or she has jurisdiction over the appeal; if so, he or she must issue a decision within ninety days of the taxpayer’s application, unless an explanation is provided to the parties why an extension of up to sixty days is needed, and, if an affected party fails to provide needed information during the extension period, the Tax Commissioner certifies in writing what is needed and has sixty days from the date the needed information is received to issue a decision; and
- iii. a stay of tax collection while appeals are pending.

For local business taxes, the Tax Commissioner is authorized to issue an advisory written opinion prior to the filing of an appeal. Either party may contest the Tax Commissioner’s determination in circuit court but the Tax Commissioner is not a party to the litigation merely by virtue of having rendered an opinion. Interest continues to accrue on any portion of the assessment withheld.

In *Verizon Online v. Horbal*, 293 Va. 176, 796 S.E.2d 409 (2017), the Virginia Supreme Court held that the principles of procedural default apply to judicial challenges of a determination of the Tax Commissioner. Therefore, an issue not raised before the Commissioner may not be raised for the first time in the proceedings for judicial review by the circuit court. The Court also held that the time period for filing a local appeal is not a matter of subject matter jurisdiction and thus is subject to waiver if not properly raised.

A locality does not have the authority to review administrative appeal determinations or correct erroneous assessments. 1995 Op. Va. Att’y Gen. 47; *ITT Teves Am. Auto. v. Culpeper Cnty. Bd. of Sup’rs*, 45 Va. Cir. 39 (Culpeper Cnty. 1997). Nor does a locality have

the authority to refund to taxpayers an excess of real estate taxes collected because of the unintentional imposition of a rate increase in an earlier tax year. 2000 Op. Va. Att’y Gen. 194.

The administrative appeal process is in addition to the right to seek judicial relief. Va. Code § 58.1-3983.

9-9.03 Board of Equalization Appeal

With respect to real estate tax assessment appeals, see section 9-5.01(d) regarding the powers and duties of a board of equalization.

9-9.04 Judicial Appeal

9-9.04(a) General Provisions

Virginia Code § 58.1-3984 provides that “[a]ny person assessed with local taxes, aggrieved by any such assessment, may, unless otherwise specially provided by law,” petition the circuit court for correction of the assessment (i) within three years from the last day of the tax year for which any such assessment is made, (ii) within one year from the date of the assessment, (iii) within one year from the date of the Tax Commissioner’s final determination under Va. Code § 58.1-3703.1(A)(6) or § 58.1-3983.1(D), or (iv) within one year from the date of a final determination under § 58.1-3981, whichever is later.⁸ Although some localities have a one-year statute of limitations by charter or special law, those provisions are being phased out. See Va. Code §§ 15.2-717 and 58.1-3984. The taxpayer filing the application and the locality shall be necessary parties to the proceedings in the circuit court. Va. Code § 58.1-3984(A). The locality must be named as the “City of _____,” “Town of _____,” or “_____ County.” *Id.*

The Tax Commissioner may also seek judicial relief pursuant to § 58.1-3984 to correct a tax that is “improper or is based on obvious error and should be corrected in order that the ends of justice may be served.” Va. Code § 58.1-3984(D). Although typically used in property tax cases, judicial review may be used to correct an assessment of any tax, according to one circuit court decision. *Comm’r of the Revenue for the City of Norfolk v. Cox Commc’ns Hampton Roads, LLC*, 111 Va. Cir. 134 (Norfolk City 2023). This mechanism may only be used if the Commissioner is not able to correct the mistake through the administrative appeal process. Va. Code § 58.1-3984(D). Moreover, courts apply the “ends of justice” test strictly and “only under very limited circumstances” to correct a “manifest” or “grave” injustice and when there is no alternative avenue of relief. *Cox Commc’ns Hampton Roads, LLC*. Even when the Tax Commissioner, understandably, waited for a court ruling in a related proceeding before applying for relief under § 58.1-3984, during which time the period for seeking administrative appeal had expired, the unavailability of relief was due to her failure to act and therefore was not a sufficient basis for invoking § 58.1-3984(D). *Id.* The court advised that the Commissioner should have issued an additional assessment under § 58.1-3903 or requested a stay of the statute of limitations while the related litigation was ongoing. *Id.*

⁸ Note that Va. Code § 58.1-3940(B) provides localities twenty years to enforce real property taxes by sale. The Virginia Supreme Court reversed a circuit court’s holding that the three-year statute of limitations barred a church from raising, in its bill of review, the religious uses defense when the locality attempted to sell the church’s property to collect delinquent real estate taxes more than three years after the assessments were due. To hold otherwise “would clearly lead to absurd results, since localities can bring these suits for up to twenty years.” *Emmanuel Worship Ctr. v. City of Petersburg*, 300 Va. 393, 867 S.E.2d 291 (2022).

9-9.04(b) “Aggrieved”

Judicial relief from an erroneous assessment is only available to a person “aggrieved” by the assessment. The term “aggrieved” as used in the context of a statutory grant of standing to sue has been defined by the Virginia Supreme Court, as seen below.

The term “aggrieved” has a settled meaning in Virginia when it becomes necessary to determine who is a proper party to seek court relief from an adverse decision. In order for a petitioner to be “aggrieved,” it must affirmatively appear that such person had such direct interest in the subject matter of the proceeding that he seeks to attack. *Nicholas v. Lawrence*, 161 Va. 589, 171 S.E. 673 (1933). The petitioner “must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest.” *Id.* The word “aggrieved” in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally. *Insurance Ass’n v. Commonwealth*, 201 Va. 249, 110 S.E.2d 223 (1959).

Virginia Beach Beautification Comm’n v. Bd. of Zoning Appeals of the City of Va. Beach, 231 Va. 415, 344 S.E.2d 899 (1986) (involving statutory right of person “aggrieved” by a board of zoning appeals decision to appeal it to circuit court).

The Virginia Supreme Court has made it clear that the right to challenge a local tax assessment in court is not necessarily limited to the owner of legal title. For example, *Commonwealth v. Smallwood Memorial Institute*, 124 Va. 142, 97 S.E. 805 (1919), concerned the predecessor statute to § 58.1-3984. The plaintiff, as beneficiary of a charitable trust, held equitable title to the property, but legal title was in the name of the trustees and the property was assessed in the name of the trustees. The Court held that the plaintiff, as equitable title holder, was “aggrieved” by an assessment of the property, observing that taxes properly assessed constituted a lien on an equitable title holder’s property and must be paid out of his funds, and that taxes improperly assessed constituted a cloud upon his title which he has the right to have removed.

Reynolds Metals Co. v. County of Henrico, 237 Va. 646, 378 S.E.2d 833 (1989), concerned a challenge by a lessee to personal property taxes on equipment it leased. Although not expressly stated in the Court’s opinion, the record of the appeal indicates that Reynolds filed the personal property tax returns in its own name on behalf of the lessors. Reynolds was billed the taxes by the county and paid the taxes directly to the county in response to the bills, all in accordance with the terms of its lease. The county argued that Reynolds did not have standing to bring the case. But the Court ruled otherwise, citing *Smallwood* and also noting that Reynolds had paid the taxes and, if it had not, then the county could have seized the property, adversely impacting Reynolds’ business. Accordingly, the Court ruled that Reynolds’ interest in the assessment was sufficient to make it a party “aggrieved.”

Arguably, the basis for the finding that Reynolds had standing was not merely that it was a lessee, but also the fact that Reynolds had been billed for the taxes by the locality and had paid the taxes directly to the locality pursuant to a legal obligation to do so (i.e., the terms of its lease). In other words, Reynolds was not a stranger to the assessment. A number of post-*Reynolds* circuit court rulings are consistent with this analysis. For example:

- a. In *Airline Pilots Ass’n v. Board of Supervisors of Fairfax County*, No. 133943 (Fairfax Cnty. Cir. Ct. Aug. 18, 1995) (order on respondents’ motion to dismiss regarding issues of standing), the issue was whether personal property lessees who had not filed personal property returns, were not billed by the county for the taxes, and had not paid any taxes directly to the county had standing to bring a case under § 58.1-3984. The plaintiff-lessees claimed to be obligated under the terms of their leases to reimburse

their lessors for property taxes billed to and paid by the lessors. Some of the lessees also contended that their lessors had assigned the lessors' causes of action under § 58.1-3984 to their lessees. However, the trial court ruled that in either case, the lessees had no standing to appeal the assessments. It held that in order to be an "aggrieved" party a lessee would have had to have filed the property tax return and paid the resulting tax directly to the county. It also held that standing could not be conferred by an assignment of the cause of action from an entity having standing to one that does not.

- b. In *America Online, Inc. v. Board of Supervisors of Fairfax County*, No. 137660 (Fairfax Cnty. Cir. Ct. Sept. 4, 1996) (order sustaining pleas in bar and dismissing case with prejudice), a purchaser of real property sought refunds of taxes it did not pay pursuant to assessments made before it had any interest in the property. AOL bought the property in July 1993. It had no connection to the property in 1991 or 1992, and did not pay any of the 1991-92 taxes. Nevertheless, it claimed that it was entitled to bring an action to reduce the 1991-92 assessments and recover resulting refunds because it was the current record title owner of the property and the successor and assign in interest to the entity which was assessed and which actually paid the real estate taxes. But this claim was rejected by the trial court and the Virginia Supreme Court did not grant an appeal.
- c. *PRC, Inc. v. Arlington County Board of Supervisors*, No. 94-1707 (Arlington Cnty. Cir. Ct. Aug. 19, 1996) (final order), concerned a circumstance similar to that in *Airline Pilots Association*, but with the additional fact that the petitioner-lessee, while claiming that it reimbursed its lessor for taxes paid, admitted that it subleased the property to third parties and that it made its sublessees reimburse it in full for all reimbursements it made to the property owner. The trial judge agreed with the judge in *Airline Pilots Association* and ruled that PRC had no standing to bring a claim under § 58.1-3984, and the Virginia Supreme Court again refused to grant an appeal.
- d. In *Avalon Chase Heritage, Inc. v. Loudoun County*, No. 15175 (Loudoun Cnty. Cir. Ct. Nov. 5, 1996) (order on motion to dismiss), a plaintiff who did not acquire a property until November 1993 was held not to be "aggrieved" by tax year 1990-92 assessments of the property, the court ruling that such standing could not be conferred by an assignment from an entity having such standing.

These circuit court decisions appear to be consistent with Virginia law in general on the assignment of causes of action. Virginia Code § 8.01-26 provides as follows:

Only those causes of action for damage to real or personal property, whether such damage be direct or indirect, and causes of action ex contractu are assignable. The provisions of this section shall not prohibit any injured party or his estate from making a voluntary assignment of the proceeds or anticipated proceeds of any court award or settlement as security for new value given in consideration of such voluntary assignment.

A claim under Va. Code § 58.1-3984, while not a tort claim, also does not appear to be a cause of action ex contractu, because the statute creates a right unknown at common law, not one arising from a contract. Thus, such a claim should not be assignable.

Note two pre-*Reynolds* circuit court decisions that allowed a title purchaser and an assignee, respectively, to remain as plaintiffs in tax assessment appeals, although each involved unusual circumstances and arguably are inconsistent with *Reynolds*. In *Quad Corp. v. City of Hopewell*, 11 Va. Cir. 6 (City of Hopewell 1986), a party was permitted to remain as a plaintiff for tax years before it became the titleholder when the previous titleholder was added as a co-plaintiff. The court found that, with the addition of the previous owner, “titleholders for all years in question are parties plaintiff” and so the issue of “whether or not a tax claim under [the predecessor to § 58.1-3984] is assignable becomes moot.” The court appeared to ignore the fact that in two Virginia Supreme Court cases it cited in support of its ruling, where grantees had been “held to be successors in title and maintained actions under this statute for erroneous assessment,” the taxes at issue apparently had been paid by the grantee-petitioners, plus there was no indication that the issue of standing was even raised in either case. In *Fiorucci Foods Corp. v. Chesterfield County*, 12 Va. Cir. 219 (Chesterfield Cnty. 1988), an assignee of the titleholder was permitted to join a lawsuit challenging personal property taxes because it was assigned the right by contract to claim any abatement or refund of the taxes assessed to its assignor and the pleadings alleged that the assignee had paid the tax. See also *State of Montana v. Crow Tribe*, 523 U.S. 696, 713, 118 S. Ct. 1650 (1998) (“As a rule, a nontaxpayer may not sue for a refund of taxes paid by another”).

9-9.04(c) Carrying the Burden of Proof

For appeals of any kind of local assessment of taxes for tax years beginning prior to January 1, 2012, and for appeals of local assessments *other than of real property*, the taxpayer’s burden of proof remains what it has been: “[T]he burden of proof shall be upon the taxpayer to show that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal, but it shall not be necessary for the taxpayer to show that intentional, systematic and willful discrimination has been made.” Va. Code § 58.1-3984(A). The tax authority has no affirmative obligation to demonstrate that an assessment is correct. See, e.g., *Shaia v. City of Richmond*, 207 Va. 885, 153 S.E.2d 257 (1967) (“the inability of the [taxing authority] to come forward with evidence to prove the correctness of the assessments does not impeach the assessments, because the [plaintiffs] had the burden of proving they were erroneous”). A miscalculation, or a proper calculation using incorrect values, is a methodological error that can prove manifest error. *PHF II Norfolk LLC v. City of Norfolk*, 94 Va. Cir. 454 (City of Norfolk 2016).

However, as a result of legislation enacted in 2011, there is a different statutory formulation for the burden of proof in appeals of real property tax assessments for tax years beginning on or after January 1, 2012. For such appeals, the valuation determined by the assessor or as adjusted by the BOE is presumed 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 (GAAP), 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.⁹ See *Portsmouth 2175 Elmhurst, LLC v. City of Portsmouth*, 298 Va. 310, 837 S.E.2d 504 (2020); *McKee Foods Corp. v. Cnty. of Augusta*, 297 Va. 482, 830 S.E.2d 25 (2019). Mistakes of fact, including computation, that affect the assessment are deemed not to be in accordance with generally accepted appraisal practice. Va. Code § 58.1-3984(B).

⁹ Note that a trial court may qualify a person as an expert witness to testify regarding the value of real estate without regard to Virginia licensure status, although that status is relevant in assessing the prospective expert’s qualifications. *Va. Int’l Gateway, Inc. v. City of Portsmouth*, 298 Va. 43, 834 S.E.2d 234 (2019).

See *PHF II Norfolk LLC v. City of Norfolk*, No. CL 15-6886 (City of Norfolk Cir. Ct. Nov. 14, 2016) (finding statute “puzzling” but finding that assessments complied with GAAP).

Furthermore, if a taxpayer who owns less than four residential units has made a written request for valuation records as provided in § 58.1-3331 (see section 9-5.01(e)(2)(ix)) and the assessor failed to provide those records within fifteen days, then the locality must introduce the following evidence before the presumption described above comes into effect:

- i. copies of the assessment records maintained by the assessing officer;
- 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 regarding the valuation of property.

Accordingly, this recently modified statutory standard for real property assessment appeals should be kept in mind when considering the following discussion of cases.

The Virginia Supreme Court has emphasized that because fixing property values is a matter of opinion, a court must be hesitant to set aside tax assessments, in order to avoid arrogating to itself the function of the duly constituted tax authorities by substituting the court’s judgment regarding the value of property for that of the tax authorities, and thus, there is a clear presumption in favor of the validity of tax assessments. See, e.g., *City of Richmond v. Gordon*, 224 Va. 103, 294 S.E.2d 846 (1982); *City of Norfolk v. Snyder*, 161 Va. 288, 170 S.E. 721 (1933).

According to *West Creek Associates, LLC v. County of Goochland*, 276 Va. 393, 665 S.E.2d 834 (2008), there are three ways to overcome this presumption of correctness. The first two ways are that a person challenging a tax assessment may prove that the assessor committed manifest error in the manner in which the estimate of value was made, or that the assessors totally disregarded evidence which should have been controlling. See *Arlington Cnty. Bd. v. Ginsberg*, 228 Va. 633, 325 S.E.2d 348 (1985); *Gordon, supra*. An assessor does not “disregard” evidence if he or she relies on the information made available by the taxpayer at the time of the assessment, even if the taxpayer later produces other information. *Gordon, supra*. The word “manifest” has been defined in a case not involving taxation as “obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident.” *Hoover v. Smith*, 248 Va. 6, 444 S.E.2d 546 (1994) (quoting *Black’s Law Dictionary* 962 (6th ed. 1990)).

The third way was described in *West Creek, supra*, as follows:

When a taxpayer attempts to prove manifest error solely by showing a significant disparity between fair market value and assessed value without showing that the taxing authority employed an improper methodology in arriving at the property’s assessed value, the taxpayer cannot prevail “so long as the assessment comes within the range of a reasonable difference of opinion, . . . when considered in the light of the presumption in its favor.” *Snyder, supra*; accord *Gordon, supra*.

Prior to *West Creek*, it seemed clear that evidence that merely presents a difference of opinion regarding value is insufficient to overcome the presumption. *Snyder, supra* (cited

in *Gordon, supra*). However, the taxpayers in *West Creek* argued that the holding in *Board of Supervisors of Fairfax County v. Telecommunications Industries, Inc.*, 246 Va. 472, 436 S.E.2d 442 (1993) (which did not involve any difference of opinion because the assessments of the two computers at issue in that case were based on a uniformity schedule and not on an opinion of the fair market value of either individual computer) should be extended such that virtually any difference of opinion regarding value would be sufficient to overcome the presumption. But the Court in *West Creek* declined to accept this argument.

Harmonizing *Snyder*, *Gordon*, and *West Creek*, something more than a mere difference in opinion of value is needed to overcome the presumption of correctness, i.e., additional evidence proving that the assessed value is outside the range of a reasonable difference of opinion when considered in light of the presumption in its favor. See, e.g., *PHF II Norfolk LLC v. City of Norfolk*, 94 Va. Cir. 454 (City of Norfolk 2016) (a “challenge based upon significant disparity should be evaluated by indexing the size of the disparity against both the complexities involved in reaching the valuations and the degree to which the court finds the competing valuations persuasive”); *IPROC Norfolk v. City of Norfolk*, 86 Va. Cir. 435 (City of Norfolk 2013) (absent clear error, more than a difference in expert opinions or formulas is required to overcome the presumption of correctness). However, what additional evidentiary showing might be sufficient to prove that an assessed value is outside that range is a matter still to be clarified. The Court in *West Creek* did not need to address the question because it found that, even assuming that manifest error had been proved, the taxpayers’ evidence did not support their claim that the assessment at issue exceeded fair market value. In one court case, a disparity between an assessment of property, and testimony at trial of the locality’s expert appraiser as to fair market value did not establish that the assessment was outside the range of a reasonable difference of opinion; there was no evidence that the locality used a flawed methodology in making the assessment, or that it disregarded controlling evidence in arriving at its valuation. *Vienna Metro LLC v. Bd. of Sup’rs of Fairfax Cnty.*, 86 Va. Cir. 421 (Fairfax Cnty. 2013).

Mere proof of manifest error in the manner of making an assessment in itself is insufficient to establish that an assessment should be reduced. *West Creek, supra* (“[i]n order to satisfy the statutory requirement of showing that real property is assessed at more than its fair market value . . . a taxpayer must necessarily establish the property’s fair market value”); see also Va. Code § 58.1-3987 (even after a court “is satisfied from the evidence that the assessment is erroneous,” it can only base a reduction of the assessment on “evidence [of what] is the fair market value of the property involved”); *Snyder, supra* (an assessment “should not be disturbed by the court unless the applicant has carried the burden of showing clearly that the assessment is excessive”); *Skyline Swannanoa Inc. v. Nelson Cnty.*, 186 Va. 878, 44 S.E.2d 437 (1947) (“the taxpayer must carry the burden of proving that the property in question is assessed at more than its fair market value”).

Moreover, as stated in *Portsmouth 2175 Elmhurst, LLC v. City of Portsmouth*, 298 Va. 310, 837 S.E.2d 504 (2020) and *McKee Foods Corp. v. County of Augusta*, 297 Va. 482, 830 S.E.2d 25 (2019), the change in the statutory language since *West Creek* makes clear that not only must the taxpayer overcome the presumption of correctness in the making of the assessment itself, it must also prove that the assessment “was not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards” and “applicable Virginia law relating to valuation of property.” Va. Code § 58.1-3984(B). In *Portsmouth 2175 Elmhurst*, while the taxpayer proved that the mass appraisal method used by the city overvalued the property, it failed to prove that the appraisal was not in accordance with accepted standards. Although the taxpayer introduced into evidence a written expert report asserting violations of acceptable standards, the Court made clear its preference for oral testimony: “[s]ubmitting a written report, without additional clarifying testimony from the expert at the trial, may not be sufficient to persuade the factfinder that the assessment is deficient.”

Furthermore, a person challenging a tax assessment, like any other plaintiff in a civil suit, always retains the ultimate burden of persuasion. *E.g., Redford v. Booker*, 166 Va. 561, 185 S.E. 879 (1936) ("the necessity of proving his case always rests upon the plaintiff and never shifts"). Even if the presumption of correctness is overcome, a person challenging a tax assessment still must satisfy its ultimate burden of persuasion by proving that taxes were overcharged in some discernible amount. *See, e.g., Tidewater Psychiatric Inst., Inc. v. City of Va. Beach*, 256 Va. 136, 501 S.E.2d 761 (1998) ("the taxpayer must show by a clear preponderance of the evidence that his property is assessed at more than fair market value"); *see also Hechinger Co. v. Bd. of Sup'rs of Fairfax Cnty.*, No. 133802 (Fairfax Cnty. Cir. Ct. Dec. 15, 1995), *petition for appeal refused*, Rec. No. 960566 (Va. Aug. 9, 1996), and *Seaone v. Fairfax Cnty. Bd. of Sup'rs*, 35 Va. Cir. 351 (Fairfax Cnty. 1995) (assessments affirmed in each case despite findings of manifest error; evidence failed to prove that fair market value was less than assessed values); *Orchard Glen East, Inc. v. Bd. of Sup'rs of Prince William Cnty.*, 254 Va. 307, 492 S.E.2d 150 (1997) (conflict in expert evidence alone is insufficient to overcome presumption); *City of Martinsville v. Commonwealth Boulevard Assocs.*, 268 Va. 697, 604 S.E.2d 69 (2004) (taxpayer entitled to relief if he carries burden of proving that in either the general assessment or in the annual levy the property is valued at more than its fair market value); *ITT Teves Am. Auto. v. Culpeper Cnty. Bd. of Sup'rs*, 45 Va. Cir. 39 (Culpeper Cnty. 1997) (county's failure to institute proper accounting procedures made its erroneous assessment willful). *But see Bd. of Sup'rs of Fairfax Cnty. v. Telecommc'ns Industries, Inc.*, 246 Va. 472, 436 S.E.2d 442 (1993) (substantial disparity between taxpayer's expert's opinion of value and assessments overcame presumption of correctness, but in context of personal property assessments that admittedly did not try to value each item of property at its individual fair market value, in order to try to achieve uniformity).

9-9.04(d) Available Relief

Virginia Code § 58.1-3987 provides that "[i]f the court is satisfied from the evidence that the assessment is erroneous and that the erroneous assessment was not caused by the wilful failure or refusal of the applicant to furnish the tax-assessing authority with the necessary information, as required by law, the court may order that the assessment be corrected and that the applicant be exonerated from the payment of so much as is erroneously charged, if not already paid. If the tax has been paid, the court shall order that it be refunded to the taxpayer, with [the appropriate rate of] interest."

If the court concludes that the property is valued at more than fair market value, "it may reduce the assessment to what in its opinion based on the evidence is the fair market value." *Id.* But if the court concludes that the property is actually assessed below fair market value, "the court *shall* order it increased to what in its opinion is the fair market value . . . and shall order the applicant to pay the proper taxes." *Id.* (emphasis added).

Furthermore, once the court concludes that an assessment is erroneous, it is "not bound by the values argued by the parties or those fixed by witnesses" but may "weigh the evidence and establish a value accordingly." *Arlington Cnty. Bd. v. Ginsberg*, 228 Va. 633, 325 S.E.2d 348 (1985).

9-9.04(e) Other Issues

A locality may appeal any administrative correction pursuant to Va. Code § 58.1-3981 to the circuit court within six months of the assessing official's decision. Va. Code § 58.1-3982. Note that in an unpublished opinion, the Virginia Supreme Court held that a locality is not an "aggrieved" party when it asserts in a counterclaim to a suit alleging erroneous assessments that the property was legally assessed, and thus lacked standing to bring the counterclaim. Accordingly, there was no impediment to a taxpayer's nonsuit. *West Creek Assocs. II v. Goochland Cnty.*, Rec. No. 032308 (Va. July 9, 2004).

In most cases, there is no federal court jurisdiction to challenge a local tax assessment in Virginia. The Tax Anti-Injunction Act, 28 U.S.C. § 1341, provides that federal “district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” See *Gwozdz v. Healthport Techs., LLC*, 846 F.3d 738 (4th Cir. 2017) (Act bars challenge to collection of sales tax). The remedy afforded by Va. Code § 58.1-3984 satisfies the requirement of 28 U.S.C. § 1341. *Hutcherson v. Bd. of Sup’rs of Franklin Cnty.*, 742 F.2d 142 (4th Cir. 1984). There are some judicially recognized exceptions to the reach of the Tax Anti-Injunction Act. See, e.g., *Direct Mktg. Ass’n v. Brohl*, 575 U.S. 1, 135 S. Ct. 1124 (2015) (notice and reporting requirements imposed on non-tax collecting retailers does not implicate Act); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566 (2012) (although individual mandate requirement of the Affordable Care Act was upheld as a constitutional tax, Tax Anti-Injunction Act did not prohibit suit as Congress labeled the consequences for failing to meet the mandate a penalty); *Hibbs v. Winn*, 542 U.S. 88, 124 S. Ct. 2276 (2004) (Tax Anti-Injunction Act does not bar action challenging Arizona statute permitting tax credits for contributions to parochial schools); *GenOn Mid-Atlantic, LLC v. Montgomery Cnty.*, 650 F.3d 1021 (4th Cir. 2011) (challenge to locality’s “carbon charge” tax not barred by Tax Anti-Injunction Act because legislative purpose made it a “punitive and regulatory fee”). Accordingly, applicable case law should be researched if the issue arises.

9-10 CONCLUSION

The administration of local taxation in Virginia is governed by federal and state constitutional mandates, prevailing tax policy as determined by the General Assembly, and the interpretation of those mandates and policies as developed by the courts of Virginia. The twin constitutional principles of fair market value and uniformity remain the cornerstones of local property tax assessment and collection practices and procedures.

While the well-established doctrines of the presumption of correctness of tax assessments and the rule of strict construction against tax exemptions are still good law, in practice these principles can prove difficult to apply properly, particularly in an evolving statutory and judicial environment. Thus, in advising public bodies, local government attorneys should scrutinize all the facts underlying taxpayer challenges to an assessment and analyze taxpayer claims considering the historical doctrines governing burden of proof, in order to accurately evaluate the strength of such a challenge.

Finally, a prudent local government attorney must be vigilant regarding the annual tax policymaking of the General Assembly through legislation and study resolutions. Taxpayers seek and often obtain legislation directly exempting them from local taxation or effecting a change in the powers of localities regarding taxation. Such proposals, as well as resulting legislatively-mandated studies, need to be routinely monitored and carefully analyzed, as they may lead to legislation having significant negative revenue impacts on localities.