PROPERTY TAX LAW
IN FLORIDA

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BIOGRAPHY

Daniel A. Weiss is an attorney in Miami, principal of the firm of Tannebaum, Planas & Weiss, LLP. Mr. Weiss represented Miami-Dade County in property tax, land use and other administrative matters, litigation and appeals between 1981 and 1995 as an Assistant Miami-Dade County Attorney, served as Legal Special Master to the Miami-Dade County Value Adjustment Board in 1999 and has represented municipalities and taxpayers in tax assessment, classification, exemption and collection matters since 1997. Mr. Weiss received his B.A. degree and his M.S.M. degree in public administration from Florida International University and his J. D. degree from University of Miami Law School. He is a co-author of Chapter 64, Florida Tax Service 2d, "Agricultural and Other Classified Properties," published by Matthew Bender. Mr. Weiss is a member of The Florida Bar, the Dade County Bar Association and the Miami Beach Bar Association. Mr. Weiss has more than 70 published property tax opinions to his credit. Mr. Weiss is admitted to practice before the United States Supreme Court, U. S. Court of Appeals for the Fifth and Eleventh Federal Circuits, U. S. District Courts for the Middle and Southern Districts of Florida, and the State courts of Florida. He is a Regular member of the International Association of Assessing Officers and the Florida Chapter of the I.A.A.O. In the July 2004 issue of Florida Trend, Mr. Weiss was selected by his peers as one of Florida's "Legal Elite" in the area of government law.

Gaylord A. Wood, Jr. is a shareholder in the Fort Lauderdale and New Smyrna Beach firm of Wood & Stuart, P.A. The firm represents Property Appraisers in Florida and Assessors elsewhere in the United States. He was graduated from Duke University in 1959 with an A.B. degree and from Duke Law School with a Ll.B. degree in 1962. Mr. Wood served on active duty in the United States Marine Corps (Reserve) from 1962-66. Mr. Wood is a member of The Florida Bar and The American Bar Association. Mr. Wood is a frequent author and lecturer at appraisers' and attorneys' programs on matters of ad valorem taxation. Mr. Wood is admitted to practice before the United States Supreme Court, U. S. Court of Appeals for the Fifth, Eleventh and Federal Circuits, U. S. District Courts for the Northern, Middle and Southern Districts of Florida, the U. S. Tax Court, and the State courts of Florida. He is a Regular member of the International Association of Assessing Officers and the Florida Chapter of the I.A.A.O.

PREFACE

> --- Taxation is the art of so plucking the goose as to obtain a maximum amount of feathers with a minimum amount of hissing.[1]

We have prepared a practical manual which we trust will be useful to you in understanding the seemingly esoteric field of ad valorem taxation. (Ad Valorem means "according to value".) The basic reference materials with which any practitioner in the field should become familiar are Chapters 192 - 197 and 200 of the Florida Statutes, Chapter 12D of the Florida Administrative Code, technical opinions of the Florida Department of Revenue, and decisions of the circuit courts, District Courts of Appeal and the Florida Supreme Court. In addition, good ad valorem tax practice is usually also good fee appraisal practice. Intimate familiarity with appraisal principles is invaluable to the practitioner. The library should include such texts as The Appraisal of Real Estate, 12th. Edition (Chicago, The Appraisal Institute 2001), and Property Appraisal and Assessment Administration (Chicago, International Association of Assessing Officers 1990). An excellent soft cover text written for Professor Oliver Oldman's classes in state and local taxation at Harvard Law School is Youngman, Joan, Legal Issues in Property Valuation and Taxation: Cases and Materials (Chicago, IAAO, 1994.) Florida Tax Service 2d is an excellent resource. Helpful periodicals are the Assessment Journal published monthly by IAAO, and a quarterly publication, Journal of Property Tax Management (Aspen Publishers.)

Both of us have contributed to all portions of the text in this outline. This presentation is a joint effort, so the credit or blame for the materials belongs to both of us. We welcome your constructive comments for later editions of these materials.

Miami, Florida
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[1] Colbert, finance minister to King Louis XIV, whose job was to raise sufficient revenues to finance the court at Versailles.

I. APPLICATION OF THE TAX

There is a difference between an ad valorem property tax and a non-ad valorem assessment, even though the two types of charges may appear on the same bill. Generally, an ad valorem tax is measured by the value of property. There is no cost/benefit relationship between the amount of the tax and the services provided by a taxing body. (Example -- While they owned property in Miami-Dade County, Madonna and Sylvester Stallone had no children in the Miami-Dade County schools, but their estates were assessed school board taxes anyway.)

Mostly in an attempt to defeat the assessment increase limitations of the "Save Our Homes" amendment to the Florida Constitution, local government aggressively turned to non-ad valorem assessments to support activities such as fire protection that were previously paid by property taxes. These charges are not measured by the value of the property, but rather the body imposing them apportions the benefit of the assessment among the properties served. The Supreme Court decided *City of North Lauderdale v. SMM Properties, Inc*., 825 So.2d 343 (Fla. 2002). That case struck down as an impermissible ad valorem tax, a levy to provide emergency medical services. The City of North Lauderdale had made legislative findings that providing EMS was of benefit to property. The Supreme Court ruled that this finding was arbitrary and without factual support and struck the assessment because it "has the indicia of a tax because it is proposed to support many of the general sovereign functions contemplated within the definition of a tax."[2]

A. Property Subject to Tax

1. Real Estate. Before we discuss the fine points of appraising property, we should first define what we mean by "property". The late Professor Emeritus William Kinnard of the University of Connecticut sagely observed that the first inquiry in an appraisal should always be to identify market value: of what and to whom. Too many decisions focus on the issue of

[2] Fortunately for the taxpayers of North Lauderdale, the SMM case was not brought as a class action, unlike the case of a pro-se litigant, Phil McConaghey, where the trial court had ordered the City to refund all of the EMS special assessments. The same Fourth District reversed that order, *City of Pembroke Pines v. McConaghe*y, 728 So.2d 347 (Fla. 4th DCA 1999).

market value without scrutiny and definition of what is being valued. If that question is answered correctly, the market value determination is often anticlimactic.

Question: Which of the following are "property"?

A house and lot?
A diamond ring?
Water or mineral rights?
A shopping center?
All of the above?
None of the above?[3]

The term "real property" is well defined in the Dictionary of Real Estate Appraisal:[4]

> All interests, benefits, and rights inherent in the ownership of physical real estate; the bundle of rights with which the ownership of the real estate is endowed. In some states, real property is defined by statute and is synonymous with real estate. See also "personal property…",

which the text defines as:

> …every kind of property that is not real property…"

The Appraisal Institute defines "real estate" as sticks and bricks:

> Physical land and appurtenances attached to the land, e.g., structures. An identified parcel or tract of land, including improvements, if any. See also "real property."

The Florida statutes blur the definition somewhat. Section 192.001, "Definitions", defines real property as follows:

> (12) "Real property" means land, buildings, fixtures, and all other improvements to land. The terms "land," "real estate," "realty," and "real property" may be used interchangeably.

[3] Example by Michael Goodwin, CAE, at IAAO 59th Conference on Assessment Administration, Washington, D.C., September, 1993.

[4] *The Dictionary of Real Estate Appraisal*. Chicago, The Appraisal Institute (4th ed. 2002).

A time share estate is a good example of "property". It and forty-nine other time share estates are co-located within the same physical space. The Fourth District Court of Appeal correctly defined a time share estate in terms of rights and not a physical object:

> The interval owner at Spanish River has all of the "sticks" which constitute the "bundle of rights" that is fee ownership of real estate: the complete right to use (or not to use) the property during the period of ownership; the right to exclude others during that period, and the right to mortgage, lease, sell, bequeath or give away the time share estate. Every time share estate is a unique ownership, even if it is located in part within the same physical space as the other time share estates in the same apartment. In short, it is a parcel of real estate.[5]

Of the list on the preceding pages, the only items that are "property" are water and mineral rights. They are not physical assets, they are rights flowing from physical assets which can even belong to others. Your cases will be much easier to decide by applying Rule 1:

> RULE 1: PROPERTY IS NOT SOMETHING THAT YOU CAN SENSE, IT IS THE RIGHTS FLOWING FROM OWNERSHIP OR POSSESSION OF LAND, IMPROVEMENTS TO LAND, TANGIBLES OR INTANGIBLES.

Many people misuse the term "property" to describe the object and not the rights flowing from its possession or ownership. Seemingly paradoxical appraisal problems can be solved simply by identifying the holders of various rights flowing from objects, properly describing, then valuing, their respective interests.[6]

Multiple Interests in Property. Any time a property owner claims to be suffering a value loss, determine whether at the same time, someone else is enjoying an economic benefit. If this is so, then we are looking at multiple interests in the same property rather than a value loss.

> RULE 2. THE PROPERTY APPRAISER IS REQUIRED TO VALUE ALL RIGHTS IN PROPERTY TOGETHER.[7]

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[5] *Spanish River Resort Corp. v. Walker*, 497 So.2d 1299 (Fla. 4th DCA 1986), affirmed, 526 So.2d 677 (Fla. 1988). The case is discussed in Youngman, *supra*, at 104.

[6] See Wood Jr., Gaylord, Market Value and the Bundle of Rights. *J.Prop.Tax Mgmt.*, Summer 1993, reprinted in Business Valuation (Appraisal Institute, 2002).

[7] *Department of Revenue v. Morganwoods Greentree, Inc*., 341 So.2d 756 (Fla. 1977).

Any time property is subject to a lease, the tenant has a leasehold interest and the landlord has a leased fee. The leased fee is the right to receive the contracted-for rent over the term of the lease, plus the right to physical possession of the realty at termination of the lease. When the owner of a shopping center talks about the value of "my property," he or she is talking about a leased fee. Whether the tenant's leasehold interest has value depends on whether there is a spread between market rent (what the space should rent for) and contract rent (the actual lease.) A simple example: A shopping center owner leased a 20,000 square foot space some years ago at $1.00 per square foot per year. Market rent today is $7.00 per square foot. The tenant thus enjoys a rent advantage of $6.00 per square foot, times 20,000 square feet, or $120,000 per year. The value of the tenant's leasehold estate depends on the length of the lease plus options.

Conversely, if a lease in a downtown area were made at $10.00 per square foot to a "AAA" tenant, and market rent is now $5.00 per square foot, the tenant should pay the landlord the capitalized value of the lease to cancel it.[8]

In a "contract rent state" such as Wisconsin, the shopping center would be appraised by capitalizing only the contract rent. As a result, the tenants' leasehold interests are not taxed.

Florida is a "market rent state," as opposed to a "contract rent state." *Valencia Center, Inc. v. Bystrom*, 543 So.2d 214 (Fla. 1989), established the principle that when a shopping center is encumbered with a long-term lease that is no longer economic, the Property Appraiser is required to ignore the lease and value all of the interests in the property together. Accord *Century Village v. Walke*r, 449 So.2d 378 (Fla. 4th DCA 1984).

The last word on the subject of using market or contract rent from the Florida Supreme Court is *Schultz v. TM-Florida/Ohio Lt*d., 577 So.2d 573 (Fla. 1991). The Supreme Court made it abundantly clear that the Property Appraiser is required to value property using market, not contract rent.

[8] See section III-B regarding the income approach to value. The formula is I (income) ÷ R (rate) = V (value).

Another case which was decided on bundle-of-rights analysis is *Robbins v. Summit Apartments*, 586 So.2d 1068 (Fla. 3d DCA 1991). This was an apartment project subject to HUD rent restrictions. The Property Appraiser argued that these restrictions gave rise to valuable leasehold interests in the tenants who were paying less than market rent. The property owner argued that the value of "the property" was impacted by the HUD restrictions. The Court held that the Property Appraiser had to value the property in fee simple, as if unencumbered by the HUD restrictions.

A statute which is later than *Summit Apartments* is §193.017, Florida Statutes (2004):

> Low income housing tax credit. – Property used for affordable housing which has received a low-income housing tax credit from the Florida Housing Finance Corporation, as authorized by s. 420.5099, shall be assessed under s. 193.011 and consistent with 420.5099(5) and (6), pursuant to this section. The tax credits granted and the financing generated by the tax credits may not be considered as income to the property. The actual rental income from rent-restricted units in such a property shall be recognized by the property appraiser. Any costs paid for by tax credits and costs paid for by additional financing proceeds received under chapter 420 may not be included in the valuation of the property.[9]

A case which was decided on "bundle of rights" analysis was a tangible personal property case involving Southern Bell. The telephone company argued that because the F.C.C. and Florida's Public Service Commission limit its earnings, property bought with deferred federal income taxes supplied by the ratepayers had no market value to the company. The Broward County Property Appraiser demonstrated that Southern Bell was able to buy tangible personal property using the ratepayer-supplied funds, and that their telephone rates were lower than they would have been had Southern Bell been required to obtain funds from the debt and equity markets.10 In that same case, the Property Appraiser also proved that the company's "income shortfall method" of attempting to measure external obsolescence in the cost approach was mathematically the same as the income approach! Southern Bell's response to the third case it lost in the trial court was a legislative effort resulting in more than 90 members of the Florida

[9] Query: Does "recognized" have the same meaning as in the Internal Revenue Code, e.g., recognition of income, or does it mean "yes, I see it right there!"?

House of Representatives signing on as sponsors to a bill to change the Property Appraiser's presumption of correctness to the test now found in §194.301, Florida Statutes.[10]

"Value of What and To Whom," again: When the owner of 800 lots argued that they should be valued using a discounted cash flow (DCF) methodology, the Palm Beach County Property Appraiser successfully argued that this of necessity values the aggregate of the lots at a wholesale level rather than arriving at the value of any individual lot, and involves too much speculation and conjecture to be used for tax assessments.[11]

The Property Appraiser in Marion County appraised platted land that was subject to unrecorded agreements for deed. He listed all of the lots in each section of land as one tax roll entry. His assessment was stricken because the methodology he used necessarily valued a lot owned by the developer at a different value than a physically identical lot owned by a retail purchaser.[12] The same attorney/appraiser team came to Jackson County to attack the assessments of similar agreement for deed land in a subdivision called Compass Lake Estates.

However, at the office's attorneys' recommendation, and over the Property Appraiser's objection about the massive amount of work involved to create separate tax roll entries for 20,000 lots, the existence of separate entries for each lot precluded the taxpayer from an en-masse value. By stating the appraisals in such a manner, the Property Appraiser precluded use of DCF analysis. Two cases involved condominium property on opposite coasts of Florida. Both sets of taxpayers argued that the Property Appraiser erred in not assuming that the units could be rented and applying an income approach to value. While the Pinellas County property was subject to a declaration of condominium, one owner owned all the units.

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[10] *Southern Bell Telephone & Telegraph Company v. Markha*m, 632 So.2d 272 (Fla. 4th DCA 1994), rev. den., 640 So.2d 1107 (Fla. 1994). Resort to legislation where litigation is unsuccessful is sometimes the last bastion of the pecuniarily and politically powerful. During the course of the Valencia Center litigation, the late James Sottile, principal of the taxpayer, observed off-the-record: "There's more than one way to skin a cat."

[11] *Palm Beach Development and Sales Corp. v. Walke*r, 478 So.2d 1122 (Fla. 4th DCA 1985).

[12] *Muckenfuss v. Mille*r, 421 So.2d 170 (Fla. 5th DCA 1982).

In the first case, the Third District Court of Appeal upheld assessments of condominium property made giving 100% weight to the direct sales comparison (market) approach to value:

> This court has previously held that where an appraisal is based on sales of comparable properties the Appraiser "necessarily considers all and uses some of the factors set forth in section 193.011."[13]

In the second, the Property Appraiser of Pinellas County made individual valuations of condominium parcels, just as Mr. Bystrom did in Dade County. Florida law requires such individual valuations, §718.121, Florida Statutes. Yet, the District Court of Appeal looked at the appraisal as "one property":

> Schultz, the property appraiser, acknowledged that in his assessment he did not take into account the income of the property, one of the statutory factors to be considered in arriving at a correct assessment. Sec. 193.011(7), Fla. Stat. (1981). Instead, he concluded that his assessment was governed by section 718.120, Florida Statutes (1981), which concerns assessment of condominium parcels on a separate basis.
>
> The court determined that the property appraiser erred in not considering the income derived from the plaintiff's property required by section 193.011(7). Moreover, after hearing the evidence, the trial court found no basis for the property appraiser's determination that $1,700,000 represented a just value of the subject property. Even the testimony of the property appraiser's expert appraisal witness, the trial judge observed, was "ultimately reconciled with and supportive of the taxpayer's evaluation of the subject property."
>
> The court directed the property appraiser to set the value of the property at $1,100,000, to be apportioned among the individual parcels as set out in the final judgment. ...We also note that section 718.120, while requiring separate assessments for condominiums, does not obviate the requirement that the property appraiser consider all the factors in section 193.011.[14]

It is difficult to reconcile the holdings of the two cases. *Bal Harbour 101* is clearly the law in Miami-Dade County; what the law in Broward and Palm Beach County is depends on whether the circuit court likes *Bal Harbour* better than *Luri*e.

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[13] *Bystrom v. Bal Harbour 101 Condominium Association, Inc*., 502 So.2d 1312, 1313 (Fla. 3d DCA 1987), quoting *Bystrom v. Valencia Center, Inc.*, 432 So.2d 108, 110 (Fla. 3d DCA 1983), review denied, 444 So.2d 418 (Fla. 1984).

[14] *Schultz v. Luri*e, 512 So.2d 1003 (Fla. 2d DCA 1987).

Finally on the subject of bundle of rights analysis, two cases involve residential real estate. John's Island subdivision in Vero Beach is a gated community with a golf club. One must own property in the subdivision to join the golf club. There are fewer golf memberships (1,125) than there are homes. There are two ways to join the golf club: first, buy a home at John's Island, sign the waiting list and be prepared to wait, say 20 years. The second is to buy a home from someone who is a member of the golf club. At closing, the seller resigns from the golf club and the buyer has the right to apply for the seller's membership, paying $85,000 to the Club, and the seller is refunded his or her $85,000. Sales of "membership houses" and "non membership houses" in John's Island demonstrate a 40% difference in selling price. The subdivision documents provide that a membership cannot be transferred except in connection with a transfer of the member's real estate. A member may retire his or her membership in the Club while retaining ownership of a house.

"A" owns a home and is a Club member and wants to sell his home and membership. "B" owns a home but is not a Club member but would like to become one, and "C" wants to buy A's home but is already a member of the Club. "A" conveys his house plus membership to "B" and "B" conveys house minus membership to "C". After the transaction, "A" is paid and moves out of the community. "B" still has his home but is now able to assume "A's" Club membership, and "C" has bought "A's" home, still owns his other home, and is still a member.[15] Is the membership right something that flows from the ownership of real estate; or is it some intangible right?

Another case: Central Avenue Corporation purchased a condominium unit at Sailfish Point in Martin County for $440,000. The same type of golf membership situation exists. It argued that about $85,000 of the purchase price was attributable to the "intangible" right to pay $50,000 to join the Sailfish Point Golf Club. While a person wishing to join the golf club must own a condominium parcel at Sailfish Point, the contrary is not true; there are approximately twice as

[15] Presumably "C" could decide to which property he would affix his membership should he desire to sell both houses and move from the subdivision. Or, he could sell both houses without memberships and retain this membership. Query its value in that instance, unless "C" buys a property without a membership and then sells both to "D".

many residents as there are members of the golf club. The taxpayer argued that double taxation took place, since the golf club's property was also assessed. Laurel Kelly, the Martin County Property Appraiser, testified:

> We separately assess each condominium parcel as a separate parcel on the tax rolls. What we are assessing is the market value of the "bundle of rights" flowing from ownership of a condominium parcel, rather than the value of the "sticks and bricks". This is what is appraised in any appraisal of real estate …. Like the ocean view and the sunshine, these rights are things that give value to real property. The assessment of a condominium parcel includes the unit, common elements, and all rights flowing from ownership and enjoyment of the real estate.

In the John's Island case, the Fourth District Court of Appeal ruled that these "membership certificates" in the golf club constituted intangible personal property, and that the assessments were improper because the Property Appraiser valued membership properties partially on the value of the real property and partially on evidence of ownership in a corporation, which is intangible personal property.[16] The court pointed out that the record showed that Club membership was held both by residents and non-residents of John's Island; members could retire their memberships without selling their property, and that persons buying non-golf units could nevertheless acquire a membership if one was available and the applicant was approved. The same court upheld the assessment of the Sailfish Point property.[17]

Sometimes whether something is or is not real property will decide the case. A tenant in a high rise office building had returned its "leasehold improvements" to the Property Appraiser's office as tangible personal property. It then sued, claiming that in reality, its leasehold improvements were real estate that should have been assessed to the owner of the building. The District Court of Appeal agreed.[18]

2. Personal Property. Section 192.001, Florida Statutes, defines personal property as constituting four categories:

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[16] *Appleby v. Nolt*e, 682 So.2d 1140 (Fla. 4th DCA 1996).

[17] *Central Avenue Corp. v. Phillip*s, 19th Judicial Circuit Case 90-1086, Judgment of August 30, 1990, affirmed without opinion, 582 So.2d 630 (Fla. 4th DCA 1991).

[18] *Houdaille Industries, Inc. v. Markha*m, 440 So.2d 59 (Fla. 4th DCA 1983).

(11) "Personal property," for the purposes of ad valorem taxation, shall be divided into four categories as follows:

(a) "Household goods" means wearing apparel, furniture, appliances, and other items ordinarily found in the home and used for the comfort of the owner and his family. Household goods are not held for commercial purposes or resale.

(b) "Intangible personal property" means money, all evidences of debt owed to the taxpayer, all evidences of ownership in a corporation or other business organization having multiple owners, and all other forms of property where value is based upon that which the property represents rather than its own intrinsic value.

(c) "Inventory" means only those chattels consisting of items commonly referred to as goods, wares, and merchandise (as well as inventory) which are held for sale or lease to customers in the ordinary course of business. Supplies and raw materials shall be considered to be inventory only to the extent that they are acquired for sale or lease to customers in the ordinary course of business or will physically become a part of merchandise intended for sale or lease to customers in the ordinary course of business. Partially finished products which when completed will be held for sale or lease to customers in the ordinary course of business shall be deemed items of inventory. All livestock shall be considered inventory. Items of inventory held for lease to customers in the ordinary course of business, rather than for sale, shall be deemed inventory only prior to the initial lease of such items. For the purposes of this section, fuels used in the production of electricity shall be considered inventory.

(d) "Tangible personal property" means all goods, chattels, and other articles of value (but does not include the vehicular items enumerated in s. 1(b), Art. VII of the State Constitution and elsewhere defined) capable of manual possession and whose chief value is intrinsic to the article itself. "Construction work in progress" consists of those items of tangible personal property commonly known as fixtures, machinery, and equipment when in the process of being installed in new or expanded improvements to real property and whose value is materially enhanced upon connection or use with a preexisting, taxable, operational system or facility. Construction work in progress shall be deemed substantially completed when connected with the preexisting, taxable, operational system or facility. Inventory and household goods are expressly excluded from this definition.

Note that the same object can constitute more than one category of personal property at the same time. Example: A bathtub in the showroom at Home Depot is inventory/stock in trade. The same bathtub set up in the back yard of an agricultural property in the Palm Beach County Agricultural Reserve or the Eight Square Mile area in Miami-Dade County and used to provide

water to the kids' 4-H cows would arguably be household goods. The same bathtub moved to a commercial cattle ranch and used to water the herd would be commercial personal property. And, the same bathtub installed in a home would be a "fixture" and taxable as real estate.

An example of property that could lie in multiple categories is the 1933 "double eagle" $20 gold piece that Sotheby's sold at auction for more than $7,000,000. This is the only 1933 coin of its type in the world that is legal tender. Applying the above definitions, the coin is intangible property because it is worth either a sawbuck or two ten spots, i.e., money. It is also tangible personal property having a value of the gold that makes it up of say $400. Later we will discuss what the rest of the $6,999,980 is -- is it a separate "intangible" value, or is it part of the property?

Classifying property was important in the case of *Crane Rental of Orlando v. Hausma*n.[19] The company owned large self-propelled cranes. Each of these bears a $35 license tag. The taxpayer claimed that these were motor vehicles which the Constitution exempts from property tax. The Supreme Court held that they were not vehicles but tools, and therefore taxable.

Another personal property classification case was *Adams Construction Equipment Co. v. Hausma*n, 472 So.2d 467 (Fla. 5th DCA 1985). The taxpayer both leased and sold heavy equipment. It unsuccessfully claimed that the equipment in its rental pool was "inventory" because even though it was being leased out, the company's intent was to sell it to the lessee. The Fifth District didn't buy it.

Southeast Bank had a large collection of original works of art. Once the Comptroller placed the bank into insolvency, the bankruptcy trustee decided he would sell these valuable works of art on the fine-art market. The Dade County Property Appraiser attempted to assess them as it had

[19] 532 So.2d 1057 (Fla. 1988). It didn't hurt that a self-propelled crane like the ones at issue in this case were at work repairing the Supreme Court building during oral argument in the case! A similar case is *Warren Jones & Warren, Inc. v. Property Appraisal Adjustment Board of Metropolitan Dade County*, 532 So.2d 87 (Fla. 3d DCA 1988). In that case, the Dade County Property Appraiser had separated the value of a concrete pumper into a truck, which was exempted, and the concrete pumper, which was not. The same concept applies to two-way radios installed in motor vehicles.

in the past; the Bankruptcy Court held that their status had changed to stock in trade/inventory.[20] The most practical advice you can give your business clients who own valuable artwork is to have cheap reproductions made for display on the premises, otherwise they should return and pay tax every year on these valuable works of art. The First District Court of Appeal has recently ruled unconstitutional *in toto* section 193.116, Florida Statutes, on the ground that the just value clause, art. VII. §4, Fla. Const., prohibits adoption of a property valuation methodology not uniformly applicable to all types of property. *Fla. Dept. of Revenue v. Howard*, __ So.2d __, 2003 WL 22799000 (Fla. 1st DCA November 26, 2003).

3. Business value and intangible personal property.

A. Business value. The father of the concept of business value lurking in property is Stephen Rushmore, MAI. In his watershed monograph on the valuation of hotel properties,[21] Mr. Rushmore stated:

> A lodging facility is a labor-intensive, retail-type business that depends on customer acceptance and highly specialized management skills. In an apartment or office building tenants sign leases for one or more years, but a hostelry experiences a complete turnover of patronage every two to four days. A bad reputation spreads rapidly and can have an immediate effect on occupancy. Separating the value of a hotel's business from the value of its real estate is a controversial topic. It is difficult to determine exactly where income attributed to the business stops and income from the real estate begins. In an appraisal assignment in which the market value encompasses the entire property, the business is part of the "going concern" value and is not separated from the real estate. However, some insurance laws, condemnation proceedings, and property tax assessments require a "pure" real estate value, which necessitates treating business value as a separate entity. *Id*. at 104-05.

The Michigan and Georgia Courts of Appeal rejected the idea that there is an intangible, good will value to be deducted resulting from the capitalization of income of a hotel.[22]

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[20] *In Re Southeast Banking Cor*p., 178 BR 291 (S.D. Fla. 1995), reversed, 97 F.3d 476 (11th Cir. 1996).

[21] Hotels, Motels and Restaurants. Valuations and Market Studies. Rushmore, Stephen MAI, (Chicago, The Appraisal Institute 1993). See also www.hvsinternational.com.

[22] *Southfield Western, Inc. v. City of Southfiel*d, 382 N.W.2d 187, 189 (Mich. App. 1985): "We find that the tribunal properly considered petitioner's hotel business in evaluating the true cash value of the underlying property since the business increased the market value of the property."

Industry has tried to float the balloon that a non-taxable business value may exist within some properties. Witness the recent attempt by The Simon Company to "brand" its malls as "Simon Malls." The thread that runs through the "business value" cases is that there is a separate business value if you can sever the business from the property; otherwise, there is not. Example:

The Oregon Supreme Court recognized the difficulty of separating the Mt. Bachelor ski resort business from the mountain itself, and approved valuation of the land by a capitalization process of the income stream beginning with so many lift tickets times so many dollars a ticket minus expenses of running the operation.[23]

A landfill operator argued that its land could not be valued by capitalizing the "tipping fees" it receives from its customers less expenses, arguing that this income is attributable to its valuable landfill license. "Wrong," said the Wisconsin Supreme Court, noting that the business was inseparable from the land and that the license simply enhanced the value of the land.[24]

Idaho recognizes that original cost is not reflective of a property's value; the investor is interested in the profits the property will generate which must certainly exceed its cost. Idaho assesses billboards in an amount approximately eight times the cost of the steel supports and sign materials.[25]

Iowa and New Jersey disagree about whether percentage rents are income to the real estate, or to some sort of business value. The Supreme Court of Iowa approved an income valuation of

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See also *Coastal Equities, Inc. v. Chatham County Board of Tax Assesso*rs, 411 S.E.2d 540 (Ga.App. 1991).

[23] *Mt. Bachelor, Inc. v. Department of Revenu*e, 539 P.2d 653 (Ore. 1975).

[24] *Waste Management, Inc. of Wisconsin v. Kenosha County Board of Review*, 184 Wis.2d 541, 516 N.W.2d 695 (Wis. 1994)

[25] See Wallace, Steve L., Market Value and Outdoor Advertising Structures. IAAO Assessment Digest, May/June 1993, p.7.

property occupied by fast food businesses, even though the landlord received percentage rent based on the income from hamburgers.[26] "Rent is rent," said the Court.[27]

The business value concept was invented by Dr. Kinnard and Dr. Jeffrey Fisher. They wrote numerous articles, most of which were Dr. Kinnard approvingly quoting Dr. Fisher and vice versa. The courts have uniformly rejected the business value concept. One of the most biting rejections was by the Minnesota tax court.[28] The definitive appraisal journal article debunking the business value theory is by Professor George Karvel.[29]

A hotel management company handles off-site condominium rentals for property adjoining the hotel. ABKA argued that the management income is not income to the hotel real estate. "We are unpersuaded."[30] However, the assessment of the Innisbrook condo hotel is contrary.

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[26] The taxing authorities like to hold "the lettuce" themselves, and not leave it in the hands of the taxpayers.

[27] *Riso v. Pottawattamie Board of Revie*w, 362 N.W.2d 513 (Iowa 1985); see *New Brunswick v. Division of Tax Appeal*s, 39 N.J. 537, 189 A.2d 702 (N.J. 1963); *Aetna Life Insurance Co. v. Newar*k, 10 N.J. 99, 89 A.2d 385 (N.J. 1952); *McCrory Stores v. City of Asbury Par*k, 89 N.J. Sup. 234, 214 A.2d 526 (N.J. 1965).

[28] *Equitable Life Assurance Society of the United States v. County of Hennepin*, 1995 WL 702527 (Minn.Tax 1995):

> "Dr. [William N.] Kinnard based his research on a comparison of super-regional and community shopping centers. He concluded that there is an increment to shopping center sales attributable to anchors that attract greater than normal numbers of shoppers. The presence of such above normal anchors results in the center owners receiving higher rents which ultimately results in a higher value for the center. Dr. Kinnard was not asked to quantify the increment of value at Southdale which would result because of the presence of Dayton's – an above average anchor. He was asked only to report on the methodology which he is developing. Dr. Kinnard was reluctant to describe this increment of value as business enterprise value or to give it any name. He is sure it exists and he is confident that it can be measured. We are not so sure." (e.s.)

[29] Karvel, George, and Patchin, Peter, The Business Value of Super-Regional Shopping Centers and Malls. The Appraisal Journal, October, 1992.

[30] *ABKA Limited Partnership v. Board of Review of the Village of Fontana-on-Geneva-Lak*e, 591 N.W.2d 879 (Wisc.App.), affirmed, 603 N.W.2d (Wis. 1999).

One writer suggests a four-part test to determine whether a separate business value exists:

1. What is the business that is claimed to be part of the property?
2. Is the owner of this business the same as the owner of the real estate?
3. Can the business be transferred to another location separately from the real estate where it is being carried out?
4. Can the real estate be transferred without the business?
5. How does the net income stream to the owner of the business differ from the fair rental value of the real estate?[31]

B. Intangible Property

Joan Youngman points out at page 7 of her text that there are actually two types of intangible property—representative intangibles and non-representative intangibles. Representative intangibles represent value that exists elsewhere. Good examples are money (claim on the U. S. Treasury), corporate stock and bonds (claim on the assets of the corporation), accounts receivable (claims in favor of a business), bank accounts and the like. Non-representative intangibles are valuable in their own right, such as patents, trademarks and copyrights, and franchises. The Florida definition of intangible personal property appears to refer only to representative intangibles.

It is of the utmost importance to distinguish intangible influences on value from intangible property. Dr. A. James Ifflander refers to "tangible intangibles" and "intangible intangibles"; the former are property in their own right, the latter are only influences on value. He notes that two accounts receivable for $100,000 may have widely different market values depending on such "intangible intangibles" as the identity and solvency of the debtor, the debtor's past payment history and the like. How would one classify the development expenses which have resulted in a valid patent for a new drug?

How do you determine whether you are looking at a "tangible intangible" or an "intangible intangible"?

1. The intangible asset must be identifiable, i.e., legally recognized.
2. It must be capable of private ownership.

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[31] Wood, What Business Value?, 1993 IAAO Proceedings, p. 544.21

> 3. It must be marketable, i.e., capable of being financed and/or sold separate and apart from the tangible property.
> 4. Practically, it must possess value, i.e., have the potential to earn income, or its existence is of no consequence.[32]

Cable television property. Here, the courts cannot fathom the concept that one cannot sell the property and keep what the Court called "intangibles". See, e.g., *Havill v. Scripps-Howard Cable Compan*y, 742 So.2d 210 (Fla.1998). On rehearing, the Supreme Court held that the income approach to value of cable television property is contrary to the Florida Constitution "to the extent that" such an income approach captures the value of intangible *propert*y.

Consider, value of what and to whom? Scripps-Howard claimed that the Lake County Property Appraiser assessed the value of its franchises from the City of Tavares, City of Leesburg and Lake County.

> Example (a): The assessor capitalizes the net operating income of a cable television company and includes as income the franchise fees paid by the customers and does not deduct the amounts of those payments to the city or county. Has the assessor included the value of the franchise in the assessment?
>
> Example (b): The assessor neither includes the franchise fees in gross income nor deducts payments to the franchising authority as an expense. Has the assessor included the value of the franchise in the assessment?
>
> Example (c): If the cities are permitted by law to receive income of 6% of gross revenues of a cable TV company, what is the value of that income stream to the City?
>
> Question 1: By the federal Telecommunications Act, all franchises are non-exclusive. Thus, any qualified applicant must be granted a franchise on the same basis as other applicants. Because it lacks scarcity, does the franchise have a higher market value than, say, an occupational license?
>
> Question 2: Is there a difference between the value of Scripps-Howard's franchise, and the newly-obtained franchise?

[32] "Rights and interests in nonphysical matters that meet the above criteria can safely be described as intangible assets." William P. Jackson, Removing Intangible Assets from the Selling Price of a Going Concern, Wichita 17th Annual Program, Appraisal of Utilities and Railroad Property, July 27-30, 1987.

> Question 3: The Zapruder film. A panel of arbitrators awarded the Zapruder family $16,000,000 for the original Super-8 film of the Kennedy assassination. Note that the family continued ownership of the copyright to the film, and every time someone uses the image, they get paid. Query: (a) What is the value of the film stock, without the content? (b) Can you separate the content from the film stock?

See *Michael Todd Company v. County of Los Angele*s, 57 Cal.2d 684, 21 Cal.Rptr. 604, 371 P.2d 340 (Cal. 1962). Note that the California Assembly changed the law to tax only film stock as tangible personal property.

> Question 4: The Kennedy Rocker. Sale price, $420,000. Is there an "intangible" value lurking, or is this simply a question of inelastic supply?

The "last word" as to whether an assembled work force is intangible "property" is from Judge Carl Byers of the Oregon Tax Court in *Boise Cascade Corporation v. Department of Revenu*e, 1991 WL 434542, 12 Or. Tax 263 (Ore.Tax 1991), holding that "management" and "work force in place" are simply external influences or forces which affect the value of property, but they are not intangible *property* because they are not capable of ownership. The logic of the case is compelling.

Software is a special case. The ultimate software is a book, containing a binding, paper, ink, and intellectual content. Naturally, you purchase the book for the intellectual content. The Florida Supreme Court rejected a claim that the books of a real estate abstract company were taxable only to the extent of the binder, ink and paper. *Schleman v. Guaranty Title Co*., 15 So.2d 754 (Fla. 1943); *Brooksville Abstract Co. v. Kirk*, 133 So. 629 (Fla. 1931). In *Comshare, Inc. v. United State*s, 27 F.3d 1142 (6th Cir. 1994), the Court of Appeals held that master source code tapes and disks acquired by a computer software company were "tangible property", entitling the taxpayer to investment tax credits and accelerated depreciation:

> At the most basic level, it is indisputable that the computer tapes and discs purchased by Comshare were tangible. When Comshare's Mr. Wrathall picked up the System W master tapes in London, he was not acquiring information that someone whispered in his ear, he was acquiring a physical artifact that could be touched by the human hand. The tape was every bit as tangible as the famous stone kicked by Dr. Johnson in refuting Bishop Berkeley. The tape purchased by Comshare was far more valuable than a blank tape would have been, however, thanks to the magnetic source code developed over many months by

> the team of people working at their computer terminals in England. And not even the sensitive fingers of a safecracker or reader of Braille could distinguish between the encoded tapes - the value of which was measured in the millions - and a blank tape worth no more than one or two hundred dollars. *Id.* at 1145.

Some of the cases find a distinction in whether the software is "custom" or "canned". This is a distinction without a difference, as every canned program begins as a custom program. The best discussion of the issue is in *South Central Bell Telephone Co. v. Barthelem*y, 643 So.2d 1240, 36 A.L.R.5th 689 (La. 1994):

> South Central Bell argues that the software is merely "knowledge" or "intelligence," and as such is not corporeal and thus not taxable. We disagree with South Central Bell's characterization. The software at issue is not merely knowledge, but rather is knowledge recorded in a physical form which has physical existence, takes up space on the tape, disk or hard drive, makes physical things happen, and can be perceived by the senses. See, e.g., Crockett, supra, at 869-72; Cowdrey, supra at 189-90. As the dissenting judge at the court of appeal pointed out, "in defining tangible, 'seen' is not limited to the unaided eye, 'weighed' is not limited to the butcher or bathroom scale, and 'measured' is not limited to a yardstick. ...That we use a read/write head to read the magnetic or unmagnetic spaces is no different than any other machine that humans use to perceive those corporeal things which our naked senses cannot perceive.
>
> The software itself, i.e., the physical copy, is not merely a right or an idea to be comprehended by the understanding. The purchaser of computer software neither desires nor receives mere knowledge, but rather receives a certain arrangement of matter that will make his or her computer perform a desired function. This arrangement of matter, physically recorded on some tangible medium, constitutes a corporeal body.
>
> ...That the software can be transferred to various media, i.e., from tape to disk, or tape to hard drive, or even that it can be transferred over the telephone lines, does not take away from the fact that the software was ultimately recorded and stored in physical form upon a physical object.

The Florida Legislature generously enacted a statute holding software to be not even property, let alone intangible personal property. See §192.001(19), Florida Statutes (1998). In *Gilreath v. General Electric Compan*y, 751 So.2d 705 (Fla. 5th DCA 2000), the Fifth District Court of Appeal held that software is intangible personal property. Query whether taxpayers are returning their software to the Department of Revenue as intangible personal property. Pending litigation in Broward County brought by Primeco seeks a determination that the software component of a 5ESS Lucent telephone switch is covered by that statute.

The most recent case addressing whether an assessment improperly included "intangibles" is *Schultz v. Time Warner Entertainment Co., L.P.*, 861So.2d 466 (Fla. 5th DCA November 14, 2003). There, the Fifth District ruled that exterior cable drops consisting of coaxial cable or fiber optic lines are not intangibles, but tangible personal property.

In *GTE Florida, Inc. v. Todora*, 854 So.2d 731 (Fla. 2d DCA 2003), the Second District rejected as constitutionally infirm the unit assessment of the tangible personal property of a telephone company. The Court ruled that sales of telephone lines for widely-divergent prices were inadequate to sustain an assessment based on an income methodology which erroneously failed to ascertain the values of certain intangibles.

B. To Whom Taxed:

All property is taxed *in rem*. Tax is against the property, not against the person, and the property shall be subject to taxation in whomsoever's hands or possession it may be found.

1. Real Estate

a. Assessed in name of titleholder of record.

b. If owner unknown, property appraiser must assess and place property on roll and describe it with adequate specificity so that owner can find property on tax roll and pay taxes due.

c. Unpaid taxes are sold in the form of tax certificates. Ultimately, property may be auctioned at tax deed sale after certificate matures.

2. Tangible Personal Property

a. Assessed to person or other legal entity who (or which) files return or, if no return filed, based on best information available to property appraiser.

b. Unpaid taxes are subject of petition for issuance of warrants. Ultimately, property may be seized and auctioned.

C. Taxable Situs (Place of Taxation) - § 192.032, Fla. Stat. ("Situs of property for assessment purposes.")

1. Real Estate - "in that county in which it is located and in that taxing jurisdiction in which it may be located."

2. Tangible Personal Property - "in that county and taxing jurisdiction in which it is physically present on January 1 of each year"

exceptions: "unless such property has been physically present in another county of this state at any time during the preceding 12-month period," in which case it is assessable where it is "habitually located or typically present," as defined by statute unless property is located in the county on a "temporary or transitory basis," as described by statute "All items of inventory are exempt from ad valorem taxation." § 196.185 "goods-in-transit" manufactured or produced outside this state marine cargo containers temporarily halted or stored within the state for a period not exceeding 180 days property used in traveling shows (except railroad property thereof, which is centrally assessed by the Department of Revenue) shall be deemed to be physically present or habitually located or typically present only in proportion to the number of days such property is present in Florida during the taxable year.

D. Taxable Date: All property shall be assessed according to its just value, as follows:

1. Real property, on January 1 of each year. Improvements or portions not substantially completed on January 1 shall have no value placed thereon. "Substantially completed" shall mean that the improvement or some self-sufficient unit within it can be used for the purpose for which it was constructed.[33]

[33] *See Sunset Harbor North Condominium Ass'n v. Robbins*, 837 So.2d 1181 (Fla. 3d DCA 2003) (review pending in the Supreme Court) finding the substantial completion statute unconstitutional, following the reasoning of *Fuchs v. Robbins*, 738 So.2d 338, 341-48 (Fla. 3d DCA 1999) (en banc), reversed for lack of standing, 818 So.2d 460 (Fla. 2002). But see *Markham v. Yankee Clipper Hotel, Inc.*, 427 So.2d 383 (Fla. 4th DCA), petition for review denied, 434 So.2d 888 (Fla.1983).

2. Tangible personal property, on January 1, except construction work in progress shall have no value placed thereon until substantially completed as defined in § 192.001.

3. Intangible personal property, according to the rules laid down in chapter 199.

II. ASSESSMENT PROCEDURES

A. Listing of all property

The property appraiser shall ensure that all real property within his or her county is listed and valued on the real property assessment roll. Streets, roads, and highways which have been dedicated to or otherwise acquired by a municipality, county, or state agency need not, but may, be listed. Section 193.085(1), Florida Statutes. Note that some very real forms of "property" are not subject to assessment as they are intangible in nature. An example would be transferable development rights (TDR's) which have been severed from the donor property and have not yet been affixed to a target property. See *Wilkinson v. St. Jude Harbors, Inc.*, 570 So.2d 1332 (Fla. 2d DCA 1990), rev. den., 576 So. 2d 295 (Fla. 1990).

B. Assessment Procedure

The property appraiser shall complete assessing value of all property by July 1 of each year (absent good cause). Section 193.023, Florida Statutes. The Property Appraiser must physically inspect property every three years. Note that the statute does not provide a penalty or declare the assessment illegal if the Property Appraiser fails to do so.

Each assessment roll shall be submitted to the Department of Revenue for review. Such review by the Department shall be made to determine if the rolls meet all the appropriate requirements of law relating to form and just value. The department shall disapprove all or part of any assessment roll of any county not in full compliance with the administrative orders and shall otherwise disapprove all or any part of any roll not assessed in substantial compliance with law. Section 193.1142, Florida Statutes. The Department of Revenue is presently proposing a rule in the Florida Administrative Code which would require the Property Appraiser to declare market areas within the County.

The Department of Revenue shall have authority to bring and maintain such actions at law to enforce the performance of any duties of any officer or official performing duties with relation to the execution of the tax laws of the state, or to enforce obedience to any lawful order, rule, regulation, or decision of the Department of Revenue lawfully made under the authority of these tax laws. Section 195.092, Florida Statutes.

If the property appraiser has been granted extension of time or all or part of an assessment roll is disapproved, local taxing authority may bring suit to utilize the last approved roll (adjusted to extent practicable to reflect additions, deletions and changes in ownership) provided the court finds "a substantial delay in the determination of assessments, which delay will substantially impair the ability of the authority to finance its activities". Section 193.1145, Florida Statutes. If there occurs within any 4-year period the final disapproval of all or any part of a county roll, the Governor shall appoint a three member performance review committee for further action. Section 193.092, Florida Statutes.

C. Commitment and Payment Dates

All taxes shall be due and payable on November 1 of the tax year in question and become delinquent April 1 of the following year. Section 197.333, Florida Statutes. There are discounts of taxes if paid before April of the following year. Discounts for early payment are:

If paid in November, 4% discount
If paid in December, 3% discount
If paid in January, 2% discount
If paid in February, 1% discount

Note that special assessments (which are not taxes) collected under the "uniform non ad valorem method" bear the same discounts as taxes. Non ad valorem assessments may not be liens as of January 1 as are ad valorem taxes.

D. Interest

If taxes become delinquent, then interest on the delinquency is 18% per year from the date of the delinquency until tax certificates are sold. Section 197.172, Florida Statutes. Tax certificates are sold to those willing to pay the taxes and to whom demand the lowest rate of interest. Section 197.432, Florida Statutes. A certificate holder is not allowed to initiate contact with the owner of the property until two years has elapsed since April 1 of the year the tax certificate is sold. Section 197.502, Florida Statutes. A certificate holder may apply for a tax deed after 2 years have elapsed since April 1 of the year of issuance of the tax certificate and before the expiration of 7 years from the date of issuance. Section 197.502 Then the property is auctioned with an opening bid which shall be the sum of the value of all

outstanding certificates against the land, plus omitted years' taxes, delinquent taxes, interest, and all costs and fees paid by the county and the amount required to redeem the applicant's tax certificate and all other costs and fees paid by the applicant. Section 197.502, Florida Statutes.

If an assessment is challenged in Court, and the taxpayer ultimately has to pay more taxes (as his "good faith" payment was insufficient to satisfy his full tax obligation) then interest on the amount of delinquency is charged at a rate of 12% per year from the date the taxes become delinquent. Section 194.192, Florida Statutes. Many Tax Collectors take the position that this interest may not be the subject of negotiation between a taxpayer and the Tax Collector.

If the Court finds the taxpayer's "good faith payment" is grossly disproportionate to the actual amount of taxes due, an additional penalty of 10% per year shall be added. Section 194.192, Florida Statutes. Note that a taxpayer is not penalized by way of admission for paying the full amount of taxes found to be due. The taxpayer's attorney should attempt to figure the most likely outcome of the case when making a good-faith payment, so as not to suffer imposition of the penalty.

E. Supplemental Assessments

When it shall appear that any ad valorem tax might have been lawfully assessed upon any property in the state, but that such tax was not lawfully assessed, then the property appraiser shall make the assessment of taxes upon such property in addition to the assessment of such property for the current year, and shall assess the same separately for such property as may have escaped taxation at and upon the basis of valuation applied to such property for the year or years in which it escaped taxation. But no property shall be assessed for more than 3 years' arrears of taxation, and all property so escaping taxation shall be subject to such taxation. Section 193.092, Florida Statutes. Note that this statute does not permit the property appraiser to change his or her mind as to the just (market) value of a property. Note that if there is a bona-fide sale between the tax roll sought to be corrected and the back-assessment, the back assessment may not be made but the Property Appraiser may file a lien against the former owner which has the effect of a judgment. Section 193.092, F.S.

There was some controversy as to whether the Property Appraiser could change the assessed (capped) value of Homestead property upon discovery of a material mistake of fact in an assessment. The Legislature amended Section 193.155(8), F.S., to make it clear that the property appraiser has the power to make such changes. See *Robbins v. Kornfeld*, 834 So.2d 955 (Fla. 3d DCA 2003).

F. Minimum Assessment Ratio

As discussed above, the Property Appraiser's assessment rolls are subject to review by the Department of Revenue. Once every 2 years, the Department shall conduct an "in-depth review" of the assessment rolls of each county. Section 195.096, Florida Statutes. As a part of this review, the Department conducts an "assessment-to-sales-ratio study" on those properties which there are adequate market sales.

G. Taypayers' Bill of Rights

In 2000, the Florida Legislature passed the Taxpayer's Bill of Rights (Section 192.0105, Florida Statutes) which provides for property taxes and assessments to guarantee that the rights, privacy, and property of the taxpayers of this state are adequately safeguarded and protected during tax levy, assessment, collection, and enforcement processes administered under the revenue laws of this state. The Taxpayer's Bill of Rights compiles, in one document, brief but comprehensive statements that summarize the rights and obligations of the property appraisers, tax collectors, clerks of the court, local governing boards, the Department of Revenue, and taxpayers. Specific safeguards include:

1. The right to know

(a) The right to be mailed notice of proposed property taxes and proposed or adopted non-ad valorem assessments.
(b) The right to notification of a public hearing on each taxing authority's tentative budget and proposed millage rate and advertisement of a public hearing to finalize the budget and adopt a millage rate.
(c) The right to advertised notice of the amount by which the tentatively adopted millage rate results in taxes that exceed the previous year's taxes.

(d) The right that the adopted millage rate will not exceed the tentatively adopted millage rate. If the tentative rate exceeds the proposed rate, each taxpayer shall be mailed notice comparing his or her taxes under the tentatively adopted millage rate to the taxes under the previously proposed rate, before a hearing to finalize the budget and adopt millage.

2. The right to notice

(a) The right to be sent notice by first-class mail of a non-ad valorem assessment hearing at least 10 days before the hearing with pertinent information, including the total amount to be levied against each parcel.

(b) The right of an exemption recipient to be sent a renewal application for that exemption, the right to a receipt for homestead exemption claim when filed, and the right to notice of denial of the exemption.

(c) The right, on property determined not to have been entitled to homestead exemption in a prior year, to notice of intent from the property appraiser to record notice of tax lien and the right to pay tax, penalty, and interest before a tax lien is recorded for any prior year.

(d) The right to be informed during the tax collection process, including: notice of tax due; notice of back taxes; notice of late taxes and assessments and consequences of nonpayment; opportunity to pay estimated taxes and non-ad valorem assessments when the tax roll will not be certified in time; notice when interest begins to accrue on delinquent provisional taxes; notice of the right to prepay estimated taxes by installment; a statement of the taxpayer's estimated tax liability for use in making installment payments; and notice of right to defer taxes and non-ad valorem assessments on homestead property.

(e) The right to an advertisement in a newspaper listing names of taxpayers who are delinquent in paying tangible personal property taxes, with amounts due, and giving notice that interest is accruing at 18 percent and that, unless taxes are paid, warrants will be issued, prior to petition made with the circuit court for an order to seize and sell property.

(f) The right to be mailed notice when a petition has been filed with the court for an order to seize and sell property and the right to be mailed notice, and to be served notice by the sheriff,

before the date of sale, that application for tax deed has been made and property will be sold unless back taxes are paid.

3. The right to due process

(a) The right to an informal conference with the property appraiser to present facts the taxpayer considers to support changing the assessment and to have the property appraiser present facts supportive of the assessment upon proper request of any taxpayer who objects to the assessment placed on his or her property.

(b) The right to petition the value adjustment board over objections to assessments, denial of exemption, denial of agricultural classification, denial of historic classification, denial of high-water recharge classification, disapproval of tax deferral, and any penalties on deferred taxes imposed for incorrect information willfully filed. Payment of estimated taxes does not preclude the right of the taxpayer to challenge his or her assessment.

(c) The right to file a petition for exemption or agricultural classification with the value adjustment board when an application deadline is missed, upon demonstration of particular extenuating circumstances for filing late.

(d) The right to the hearing within 4 hours of scheduled time.

(e) The right to file a petition with the Value Adjustment Board to petition the denial of an exemption or an agricultural classification.

(f) The right to prior notice of the value adjustment board's hearing date and
The right to notice of date of certification of tax rolls and receipt of property record card.

(g) The right, in value adjustment board proceedings, to have all evidence presented and considered at a public hearing at the scheduled time, to be represented by an attorney or agent, to have witnesses sworn and cross- examined, and to examine property appraisers or evaluators employed by the board who present testimony. (Note that the Florida courts have not declared representation of taxpayers before the V.A.B. to constitute the unauthorized practice of law.

The courts of other states have so declared. See 767 A.2d 1144 (Pennsylvania), 38 N.E.2d 149 (Illinois), 770 N.E.2d 328 (Indiana), 642 N.E.2d 71 (Ohio).

(h) The right to be mailed a timely written decision by the value adjustment board containing findings of fact and conclusions of law and reasons for upholding or overturning the determination of the property appraiser, and the right to advertised notice of all board actions, including appropriate narrative and column descriptions, in brief and nontechnical language. The taxpayer's 60 days in which to file a lawsuit never began to run where the Board's decision did not meet these standards. *Palm Beach Community Hospital v. Nikolits*, 754 So.2d 729 (Fla. 4th DCA 1999).

(i) Regarding special assessments, to provide written objections and to provide testimony to the local governing board.

(i) The right to bring an action in circuit court to challenge value adjustment board decisions relating to value, disapproval of an exemption or denial of a tax deferral.

4. The right to redress

(a) The right to early discounts for payment of taxes and non-ad valorem assessments collected by the tax collector, the right to pay installment payments with discounts, and the right to pay delinquent personal property taxes under an installment payment program when implemented by the county tax collector.

(b) The right upon filing of a challenge in circuit court and paying taxes admitted in good faith to be owing, to be issued a receipt and have suspended all procedures for the collection of taxes until the final disposition of the action.

(c) The right to have penalties reduced or waived upon a showing of good cause when a return is not intentionally filed late, and the right to pay interest at a reduced rate if the court finds that the amount of tax owed by the taxpayer is greater than the amount the taxpayer has in good faith admitted and paid.

(d) The right to a refund of taxes upon making proper and timely request.

(e) The right to extension to file a tangible personal property tax return upon making a proper and timely request.

(f) The right to redeem tax certificates at any time before a tax deed is issued, and the right to have tax certificates canceled if sold where taxes had been paid or if other error makes it void or correctable. Property owners have the right to be free from contact by certificate holders for two years.

(g) The right of the taxpayer, property appraiser, tax collector, or the department as the prevailing party in a judicial or administrative action brought or maintained without the support of justiciable issues of fact or law, to recover all costs of the administrative or judicial action, including reasonable attorney's fees, and of the department and the taxpayer to settle such claims through negotiations.

5. The right to confidentiality

(a) The right to have information kept confidential, including federal tax information, ad valorem tax returns, social security numbers, all financial records produced by the taxpayer, Form DR-219 returns for documentary stamp tax information, and sworn statements of gross income, copies of federal income tax returns for the prior year, wage and earnings statements (W-2 forms), and other documents. (Note that confidentiality probably does not continue to exist in those cases where the taxpayer administratively or judicially challenges the assessment and the Property Appraiser seeks to use the otherwise-confidential information to meet that challenge. An analogous situation is that medical records which would otherwise be within the doctor-patient privilege become discoverable when the patient sues for personal injuries or malpractice.)

(b) The right to limiting access to a taxpayer's records by a property appraiser, the Department of Revenue, and the Auditor General only to those instances in which it is determined that such records are necessary to determine either the classification or the value of taxable nonhomestead property.

III. VALUATION AND ASSESSMENT OF PROPERTY

A. Constitutional Principles

1. Definition of "Just Value" Prior to 1965, it was said that the term "just value" meant that an assessment was just what the Tax Assessor wanted it to be -- usually far less than market value. In an action funded by the schoolteachers' union, the Supreme Court held that the terms "fair market value" and "just valuation" are legally synonymous and "fair market value" may be established by classic formula that it is the amount a purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell. The Florida Statutes do not define the term, "just value." Instead, the Department of Revenue has promulgated the definition in Rule 12D-1.002(2):

The price at which the property, if offered for sale in the open market, with a reasonable time for the seller to find a purchaser, would transfer for cash or its equivalent, under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other.

This is very similar to the definition of market value promulgated by The Appraisal Institute. The Legislature's reaction in 1967 to the 1965 decision in *Walter v. Schuler* 176 So.2d 81 (Fla. 1965), was to introduce legislation to attempt to temper the Supreme Court's decision. This legislation was subsection (8) of Section 193.011, F.S., requiring the Property Appraiser to consider the costs and expenses of sale in setting assessments. In case after case after 1967, however, the Supreme Court has reiterated that the willing buyer/willing seller test is still the test of market value. See, e.g., *Department of Revenue v. Johnson*, 442 So.2d 950 (Fla. 1983); *District School Board of Lee County v. Askew*, 278 So.2d 272 (Fla. 1973); *ITT Community Dev. Corp. v. Seay*, 347 So.2d 1024 (Fla. 1977); *Schultz v. TM Florida - Ohio Realty Ltd.*, 577 So.2d 573 (Fla. 1991). But see *Oyster Pointe Condominium Association v. Nolte*, 524 So.2d 415 (Fla. 1988), a case involving time share property. See also *City of Miami v. Stegemann*, 158 So.2d 583, 584 (Fla. 3d DCA 1963), for the proposition that "no decision is authority on any question not raised and considered, although it may be involved in the facts of the case."

Since 1965, the courts have generally held that if literal application of a statute indicates a value less than the willing buyer/willing seller amount, the statute is either unconstitutional or is not being properly applied.

2. Equality of Assessment (Uniformity)

The leading case on the right to relief based on a claimed denial of equal protection is *The Deltona Corporation v. Bailey*, 336 So.2d 1163 (Fla. 1976), where the Supreme Court announced the test whereby a taxpayer may obtain relief based on a claimed denial of equal protection:

As to the equal protection issue raised by Count II of the amended complaint, we agree with the appellees that the allegations were insufficient to state a cause of action. It is fundamental that property in Florida is legally required to be assessed at 100% of its actual fair market value and a court may not reduce a taxpayer's assessment below 100% on a mere showing that parcels of some other taxpayers are assessed at a lesser amount. See Walter v. Schuler, 176 So.2d 81 (Fla. 1965)... It is only in very limited circumstances in which an exception to the general rule can be successfully maintained. Normally one whose property is not assessed at greater than 100% of its fair market value may not be permitted to complain even though other and even similar properties are assessed at less than 100%. ... The gravamen of its action is found in Paragraph 21 of the amended Complaint:

Defendant tax assessor's reassessment of Plaintiff's property and systematic underassessment of other property on a county wide basis resulted in Plaintiff's property being assessed in a manner contrary to law at a value higher than its lawful value and at a level higher than the general level of assessment for similar properties in Volusia County, Florida, thereby requiring Plaintiff to bear a disproportionate and unequal share of the Volusia County tax burden and thereby violating Plaintiff's right to equal protection under the United States Constitution.

Although the quoted allegations appear to contain the elements required by *Dade County v. Salter* and *Southern Bell Tel. & Tel. Co*., supra, a reading of Count II in its entirety indicates that an essential element is missing. Deltona fails to allege that all (or even substantially all) other property in the county is systematically assessed at a value less than the assessment of

Deltona's property. When speaking of the general level of assessments in the county the amended complaint avers that Deltona's property is assessed at a level higher than the general level of assessment for similar properties in Volusia County. Since Deltona failed to plead that it is being singled out and discriminated against vis-a-vis the other taxpayers generally in Volusia County, it has no standing to challenge its assessment on equal protection grounds, for that is the essential ingredient in Salter and Southern Bell. *Id*. at 1167-1168, italics in original, underlining supplied.

That case was followed by *Adams v. Reid*, 396 So.2d 1182 (Fla. 4th DCA 1981):

> "Appellants have taken the lesson of Deltona, filled in the missing ingredients, and thus met their pleading burden to state a cause of action. Thus, taking the allegations of the complaint as true, as we must on a motion to dismiss, the Property Appraiser's actions constitute discriminatory assessment, when one compares appellants with substantially all other taxpayers in the county, and thus the assessments are void. [citation omitted] Given a void assessment the appellants are entitled to seek relief in the circuit court without complying with the doctrine of primary jurisdiction by exhaustion of available administrative remedies."

Prior to *Deltona v. Bailey*, several cases had held that it was proper for a court to grant relief based on claimed discrimination relative to less than "all or substantially all" property in the County. The earliest "singling out" case is *Camp Phosphate Company v. Allen*, 77 Fla. 341, 81 So. 503 (Fla. 1919). In *Banks v. Schooley*, 290 So.2d 134 (Fla. 2d DCA 1974), the Plaintiff owned 4,000 acres on Little Pine Island in Lee County and was assessed for $346,400 in 1970; in 1971, his assessment was increased to $2,000,000, which the Value Adjustment Board reduced to $1,500,000. The trial Court held that Mr. Banks' claims of discrimination were not proven. The Second District Court of Appeal reversed, holding that there was no evidence in the record that "all lands are assessed at just value" and that Mr. Banks' lands were subjected to discriminatory treatment.

The decision does not really give us sufficient information; it would seem obvious that the real question before the Court was whether Mr. Banks' property was valued at its market value in 1970; if not, then the Property Appraiser was perfectly justified in increasing the assessment for 1971. If the other properties in Lee County were assessed at just value in 1970 and there

were no change in the market, then the Property Appraiser would have been wrong had he increased the assessments of those properties.

In *Southern Bell Telephone & Telegraph Company v. County of Dade*, 275 So.2d 4 (Fla. 1973), the Property Appraiser judicially admitted that Southern Bell's property was assessed at 100% of market value. This made Southern Bell's task easy - simply to prove that everything else was assessed at something less. In *Southern Bell v. Broward County*, 4th DCA 1994), rev.den. 640 So.2d 1107, (Fla. 1994), the Fourth District Court of Appeal correctly held at page 276 that a sales assessment ratio study recognized as a valid means of determining assessment levels. The Court further held that whether the study is properly constructed and reliable is a question of fact for the trial Court. The trial Court in Volusia County and in the Fifth District Court of Appeal found that Southern Bell failed to meet its burden of proof on the equal protection issue, recognizing the correctness of the studies performed by the Department of Revenue.

Ozier v. Suber, 585 So.2d 357 (Fla. 5th DCA 1991), held that a Complaint alleging that old property was assessed at a relatively higher level of assessment than new property stated a cause of action, justifying summary judgment.

The case of *Allegheny Pittsburgh Coal Company v. County Commissioner*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989), cited in *Ozier*, was seriously undercut by *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), which upheld the State of California's Proposition 13, whereby different taxpayers are assessed at different levels depending on how long they have owned their property.

This is now the law in Florida under the "Save Our Homes" amendment to the Florida Constitution. An acquisition based tax system was held constitutional in Nordlinger because a rational basis was articulated for its result, which was not present in *Allegheny*. See the discussion in *Youngman*, supra.

Because the Property Appraiser is forbidden by the Constitution to value "all or substantially all" property in the County at "just value", it is seriously questioned whether *Deltona v. Bailey*

is still good law. The practitioner should not overlook §194.034(5), F.S., which states, "For the purposes of review of a petition, the board may consider assessments among comparable properties within homogeneous areas or neighborhoods." No appellate decision has applied or interpreted this statute.

B. Methods of Valuation

The Supreme Court of Florida holds that the Property Appraiser's methodology is not even the subject of judicial scrutiny. The most important case is *Bystrom v. Whitman,* 488 So.2d 520 (Fla. 1986):

We begin our analysis by noting the general proposition that the core issue in any action challenging a tax assessment is the amount of the assessment, not the methodology utilized in arriving at the valuation. *Homer v. Connecticut General Life Insurance Company*, 213 So.2d 490 (Fla. 3d DCA 1968). An appraiser may reach a correct result for the wrong reason. *City National Bank v. Blake*, 257 So.2d 264 (Fla. 3d DCA 1972).

In *Blake v. Xerox Corp*., the taxpayer was contending that the assessment should be calculated by the income approach, while the Property Appraiser used the sales comparison (market) approach. The Supreme Court held:

> The district court found that the income capitalization method put forward by Xerox was a better method of determining market value than the list-price less depreciation method used by the property appraiser. ...Although the trial court appears to have grounded its judgment on the finding that Xerox had failed to prove that its method was superior, this finding was unnecessary to the judgment. Regardless of which method was theoretically superior, the trial court was bound to uphold the appraiser's determination if it was lawfully arrived at and within the range of reasonable appraisals, that is, if it was supported by any reasonable hypothesis of legality. (e.s.)

Unit Appraisal. "Unit appraisal" is simply valuing a group of related assets as one thing. It would certainly be possible to identify each of the items assembled into a house and to place a value on each of those components, then adding the sum of the individual values for a total value of the house. It seems that it would be much easier to simply look at what similar aggregations of components sell for, then apply those indications to the subject property. The

Supreme Court held in *Havill v. Scripps-Howard Cable Company* that because the Property Appraiser valued the tangible personal property of a cable television company by the income approach, that this was necessarily a unit appraisal and was unlawful to the extent that it included intangible personal property. A unit appraisal is not the same thing as a valuation by the income approach; all three approaches to value can be utilized in calculating a unit appraisal.

1. Cost less Depreciation

The cost approach to value is based on the appraisal "principle of substitution" -- that is, when several similar or commensurate commodities, goods or services are available, the one with the lowest price attracts the greatest demand and widest distribution. There are various types of cost -- replacement cost, (The estimated cost to construct a building with utility equivalent to the building being appraised, using modern materials and current standards, design and layout) reproduction cost, (The estimated cost to construct an exact duplicate or replica of the building being appraised, using the same materials, and embodying all of the deficiencies, superadequacies and obsolescence of the subject building), and original or historical cost -- each of which has its proponents. Often original or historical cost is trended to an estimate of cost as of the appraisal date using trending tables.

Cost means "all" costs; the Supreme Court recently overturned a decision of the Fifth District Court of Appeal which held that sales tax was not a proper component of the cost approach. *Mazourek v. Wal-Mart Stores, Inc.*, 831 So.2d 85 (Fla. 2002). The cost approach is typically utilized where there is no established market, for tangible personal property, and for specialty properties for which there is no ready market such as churches and the like.

There are three crucial components of the cost approach -- direct or "hard" costs, indirect or "soft" costs and the often overlooked component of entrepreneurial profit.

HARD COSTS
(costs directly related to the construction of the physical improvements.)
Building permits
Materials, products and equipment
Labor used in construction
Equipment used in construction

Security during construction
Contractor's shack and temporary fencing
Material storage facilities
Power line installation and utility costs
Contractor's overhead and profit, including job supervision, worker's compensation; fire, liability & unemployment insurance
Performance bonds

SOFT COSTS
(capital costs that are indirectly related to the construction of the improvements.)
Architectural and engineering fees for plans, plan checks, surveys, environmental studies
Appraisal, consulting, accounting and legal fees
Cost of carrying the investment in land and contract payments during construction.
Points, fees, service charges, interest on construction loans
All-risk insurance and property taxes during construction
Cost of carrying the investment in the property after construction is complete but before stabilized occupancy is achieved
Supplemental capital investment in tenant improvements or leasing commissions
Marketing, sales commissions, or title transfers
Administrative expenses of the developer
Costs of title changes

ENTREPRENEURIAL PROFIT
The difference between the cost of development and the value of a property after completion. Entrepreneurial profit can take the form of profit on a sale, additional return on an investment in an operating property, or use value to an entrepreneur. Entrepreneurial loss represents a form of external obsolescence. The Supreme Court approves of the appraisal of tangible personal property by use of the cost approach because it does not capture what the Court loosely calls "intangibles" in so doing. *Havill v. Scripps-Howard Cable Co.*, supra. *GTE Florida, Inc. v. Todora*, 854 So.2d 731 (Fla. 2d DCA), rev. den., 861 So.2d 433 (Fla. 2003). While the Court couched its decision in terms of not including intangible personal property in the assessment, the Courts do not demonstrate an appreciation that there is a difference between intangible influences on value (such as the value an ocean view or location such as downtown New York City) brings to a condominium apartment, and intangible property. Property must be capable of being bought and sold separate and apart from the asset to which it relates or it is not "property", let alone "intangible property." The practitioner and his or her appraiser should be familiar with The Appraisal Institute's recent book of readings on business value (A Business Enterprise Value Anthology. Chicago, The Appraisal Institute (2001), and Institute Course 800, "removing intangibles [sic] from property value."

In *Dade County v. Miami Herald Publishing Company*, 285 So.2d 671 (Fla. 1973), and in *Town of Bay Harbour v. Lancelot Associates*, 243 So.2d 437 (3d DCA 1971), assessments were approved which gave 100% weight to the cost approach because there were no sales of similar properties. *Daniel v. Canterbury Towers, Inc.*, 462 So.2d 497 (Fla. 2d DCA 1985), is an important case. The property being assessed in that case was a continuing care center. The Property Appraiser valued it using the cost approach and the District Court of Appeal affirmed.

"When the appellant (property appraiser) valued (the taxpayer's) property in 1979 through 1981, he used the cost approach to make the valuation. The building was treated as a "special purpose" property, and the entire parcel appraised solely by use of the cost approach. A "special purpose" property is one that cannot easily be converted to another use and that has no ready market value, rental value or income stream. While appellee experiences somewhat of an income stream, the appellant in this case felt the income approach was too complicated to apply because of the complications and imbalance caused by the entrance and monthly fee charges. ... Because of the dual nature of the facility and the complications caused by attempting to accurately predict any stability in the income approach over the years, appellant concluded that appellee's property was "special purpose" type property for which a cost approach for assessment purposes would be more realistic and accurate than an income approach."

The trial court concluded that appellant's assessments were invalid for his failure to properly consider and utilize the income approach; the district court of appeal reversed. A similar case is *Havill v. Lake Port Properties, Inc.*, 729 So.2d 467 (Fla. 5th DCA 1999) which discusses the Property Appraiser's discretion in selecting the method of assessment. This case also involved a continuing care facility and upheld an assessment which gave 100% weight to the cost approach.

2. *Direct Sales Comparison (Market Data) Approach*

An appraisal which gives 100% weight to the Direct Sales Comparison approach is a lawful approach in Florida. In *Bystrom v. Bal Harbour 101 Condominium Ass'n, Inc.,* 502 So.2d 1312 (Fla. 3d DCA 1987), all of the condominium units in a building were valued giving 100%

weight to the direct sales comparison approach. The taxpayers appealed, claiming that the Property Appraiser had failed to consider some of the criteria in §193.011, Florida Statutes. The Third District Court of Appeal reversed:

> "This court has previously held that where an appraisal is based on sales of comparable properties the Appraiser "necessarily considers all, and uses some, of the factors set forth in section 193.011."

Bystrom v. Valencia Center, Inc., 432 So.2d 108, 110(Fla. 3d DCA 1983), review denied, 444 So.2d 418 (Fla.1984); accord *Nolte*, 467 So.2d at 1042-43. Valencia Center is even more to the point:

> The guidelines set forth in Section 193.011, Florida Statute (1979), are of use especially to Property Appraisers where there is a lack of, or where there is inadequate market evidence. (This "market" evidence could be sales or income data.) Where there are sales, however, of comparable properties, the Appraiser must perform a standard appraisal using normal techniques. By doing this, he necessarily considers all, and uses some, of the factors set forth in Section 193.011, Florida Statutes, (1979)."

Cases have revolved around whether there is in fact a market for the property under review. In *Turner v. Tokai*, 767 So.2d 494 (Fla. 2nd DCA 2000), the trial Court reduced a cost approach assessment when presented with evidence as to the market value of some 500 items of tangible personal property. The taxpayer contended that it was entitled to an additional 20% reduction under §193.011(8), F.S., as "costs of sale." The District Court of Appeal disagreed. In significant language, the Court found that nothing in §193.011, F.S. requires the Property Appraiser to apply any of the factors in the statute, only that he "consider" them.

The Circuit Court in Hillsborough County set aside the assessment of the Ice Palace, finding that the Property Appraiser did not consider sales of arenas from around the country. The assessment was set at approximately 19% of original cost.

3. Income Approach to Value

Every year, most Property Appraisers send forms to taxpayers owning income-producing properties asking for rent rolls, profit and loss statements and other income information. These innocuous requests, if ignored, can lead to serious consequences for the taxpayer. In *Higgs v.*

Good, 813 So.2d 178 (Fla. 3d DCA), rev. den., 835 So.2d 266 (Fla. 2002), the Monroe County Property Appraiser requested that the taxpayer's income and expense information be submitted prior to April 30. He didn't, so the Property Appraiser used general income data to value Mr. Good's motel. Held, although Mr. Good did not have to submit the information, after he ignored the Property Appraiser's request for information, he could not use the income either before the Value Adjustment Board or in court to attempt to obtain a lower reduction. All practitioners in the field should carefully review the Higgs decision and advise their clients accordingly.

The income approach to value essentially attempts to convert an income stream into an expression of value. The basic formula for "direct capitalization" is I (income) divided by R (rate) equals V (Value). Note that if the appraiser knows any two of the three elements, the unknown element can be calculated. Thus, if an income producing property sold for $1,000,000 and the net operating income in the year of sale was $100,000, the capitalization rate can be calculated by dividing the income by the sales price; 100,000 ÷ 1,000,000 = .10 or 10% overall rate from the market. One has to be very careful to be certain that the components of the income stream of the sale property match the income stream of the subject property. For example, if the net operating income (NOI) of the property that sold did not include a reserve for replacements, it would create a rate mismatch to deduct a reserve for replacements from the income stream of the subject property.

The other general category of capitalization of income is yield capitalization. The general formula for yield capitalization is Cash Flow (period 1) ÷ [1 + Y (yield rate)] + CF2/(1+Y)2 + CF3/(1+Y)3 ... + CFn/(1+Y)n. It can readily be seen that the appraiser must make numerous assumptions in creating a cash flow model -- at least seven assumptions for each year of the forecast. Needless to say, huge variations in the conclusion arise from even tiny changes in the assumptions. For this reason, the courts have found yield capitalization (discounted cash flow) to be too speculative to form a basis for ad valorem taxation. (See, e.g., *Palm Beach Development and Sales Corp. v. Walker*, 478 So. 2d 1122 (4th DCA 1985); *St. Joe Paper Co. v. Adkinson*, 400 So. 2d 983 (Fla. 1st DCA 1981); *Muckenfuss v. Miller*, 421 So.2d 170 (5th DCA 1982).)

You will find that typically, Property Appraisers' offices collect and apply income and expense data on a mass basis instead of performing individual income approaches to value to particular properties. Remember from earlier in these materials that the income approach to value in Florida is predicated on use of market rent and typical expenses rather than the actual income and expenses from the subject property. This automatically avoids valuing only the leased fee/leasehold interest problem previously mentioned.

4. Correlation

This is more important to a fee appraiser than to a property appraiser's office. Most property appraisers' offices use a computer-assisted mass appraisal (CAMA) system which includes elements of all three approaches to value, but are probably most weighted towards market data. In a fee appraisal, the fee appraiser analyzes alternative conclusions to arrive at a final value estimate. The standard texts admit that a correlation is based on the appraiser's experience, expertise and judgment. Very few cases around the country have commented on the correlation process, because it is the one area where subjectivity seems to be tolerated. An appraiser who gives 100% weight to one of the approaches to value will certainly not be accused of subjective weighting.

5. Contaminated properties

As we have stated throughout these proceedings, there is a big difference between the market value of property and the market value of the owner's title to the property. An example: The owner of a property with a market value of $1,000,000 has entered into a mortgage to a lender for $2,000,000. What is the market value of the property? $1,000,000. What is the market value of the owner's title to the property? A negative $1,000,000.

The primary environmental laws affecting real property are CERCLA and RCRA. The way these work is that once contamination has been discovered, unless the owner of the land can show that he made good faith inquiry as to contamination before acquiring the property, the owner is on the hook for the cost of the cleanup. However, the owner has the ability to recover those costs from all of the potentially responsible parties ("PRP's") whose waste caused the

problem. The PRP's share unlimited joint and several liability for the cost of the cleanup and there is no statute of limitations.

An article in A Business Enterprise Value Anthology published by The Appraisal Institute makes this point at page 348:

> Halfacre, a lot in the Town of Sunshine, Florida, has a market value of $10,000. Sunshine has a lot clearing ordinance requiring property owners to keep their properties free of noxious weeds. Halfacre is loaded with such plants, and the city has sent the new owner a notice that he must do one of two things:
>
> (1) Have the weeds cut down, or
> (2) the city will do it for him and place a lien on his property if he doesn't.
> The lien is against the property owner and any other PRW's (potentially responsible weedgrowers) who had anything to do with the lot's condition. Assume it would cost the owner $500 to cut the weeds, but that if the city did it, the cost would be $1,000. Assume that the lot would have a market value of $10,000 based on the sale of comparable weedless properties.

Four options are open to a prospective buyer.

> Option A: The seller agrees to cut the weeds and will get $10,000 at closing. The seller pays the lot clearing bill and nets $9,500 from the sale. The market value of the property in this instance is still $10,000.
> Option B: The buyer agrees to take a deed to the property with the weeds and to undertake the cost of cutting the weeds himself. He pays the seller $9,500 ($10,000 - $500 withheld for cutting the weeds.) The market value of the property is still $10,000.
> Option C: The owner does nothing. The city cuts the weeds and forecloses on its lien. The buyer bids at the judicial sale, pays market value, $10,000 and obtains title to a weedless lot.
> Option D: The city cuts the weeds, takes title to the lot hen no one bids at the sale, and resells it to the buyer for $10,000.

Let's look at the same hypothetical, but now assume the owner's cost of mowing the weeds is $11,000 and the city would charge $22,000 to do it. What is the market value of the property in this case? Is it the $10,000 market value/weedless minus $the 11,000 cost of deweeding? The same analysis prevails as in the first example. The market value is still $10,000. Only the seller is different -- and remember that the willing buyer/willing seller test utilizes a hypothetical seller, rather than the actual seller, since the actual seller may have no desire or ability to sell.

What relevance does this example have to the assessment of contaminated properties? The law requires contaminated properties to be cleaned up; the only discussion is who is to pay for it. It is submitted that property can never have a negative value in fee simple, but an owner's title can.

Too many appraisers confuse the effect of contamination as a diminution of value of the property in fee simple.

An example will demonstrate this point. Assume contamination has been discovered on a warehouse property and the Government has ordered the owner to conduct a cleanup. Here are the owner's revenues and expenses over the cleanup period:

CONTAMINATED WAREHOUSE PROPERTY
Assumptions: Income would increase 5% per year. Oil Contamination discovered at end of year 1. Cleanup commences Year 3, completed at end of Year 4. Cost of the cleanup: $1,000,000. Discount rate 12%. Necessary to vacate 1/2 the property during cleanup.

DIRECT CAPITALIZATION - FIRST YEAR INCOME
$375,000 ÷ .10 = $3,750,000.

DISCOUNTED CASH FLOW ANALYSIS
Assume discount rate of 12%: X .567427 .635518 .797194 .771780 .892857
316,907 (68,953) 282,605 184,706 334,821 Present Value Sale - Year 6. Assume price is 10 x gross income: 4,585,000 x .567427 = 2,601,653 Add all cash flows for total present value: $3,651,738

Thus, if the collections that could be made from the PRP's is considered, the existence of contamination may have a minimal value on the fee simple value of property.

The Supreme Court decided an important case, Finkelstein v. Department of Transportation, 656 So.2d 921 (Fla. 1995). This is an eminent domain case. The DOT condemned the Finkelstein property and sought to deduct from the amount it was willing to pay, the $750-800,000 cleanup costs to remove petroleum from the property. The trial proceeded as if the property were not contaminated. The Supreme Court held that testimony as to the remediation

costs was not relevant to the value of the property -- particularly when a tax funded program existed to reimburse owners of properties contaminated by petroleum for cleanup costs. The court went on to opine, however, that evidence of "stigma" caused by contamination was admissible in an eminent domain action, just as relevant as fear of proximity to power lines was in another case. The Supreme Court did hold that evidence of contamination is relevant to market valuation.

An ad valorem case is *Gulf Coast Recycling, Inc. v. Turner*, 753 So.2d 712 (Fla. 2000). The property had previously been used for the burial of dead battery cases. Its present use was as a rental apartment complex. The circuit court agreed with the Property Appraiser that the contamination did not impair the value of the property. The District Court of Appeal overturned the decision, finding that no one would purchase "the property" because the cost of cleanup exceeded the value of "the property." The Court cited Finkelstein for the proposition that evidence of contamination was admissible.

Appeal of Great Lakes Container Corporation, 126 NH 167 (Board of Tax and Land Appeals, 1985) was a similar case. The taxpayer's appraiser found that the property had no market value, but conceded that it would once the cleanup was completed. The Court held:

On this record, nothing prevented GLCC from agreeing to sell the land with transfer of title deferred until after completion of any court ordered cleanup, thus freeing the buyer from any possible liability for contamination. It was therefore reasonable for the board to conclude that the property had some sale value.

6. Unresolved or interdistrict conflict

Unresolved by the courts-or the subject of interdistrict conflict--is whether the Florida constitution authorizes assessment at less than just value of property not "substantially complete" as of January 1. Compare *Fuchs v. Robbins*, 818 So.2d 460 (Fla. 2002), with *Markham v. Yankee Clipper*, 427 So.2d 383 (Fla. 4th DCA), pet. for rev. denied, 434 So.2d 888 (Fla. 1983). Although Yankee Clipper found the "substantially complete" statute constitutional, the Third District disagreed in Fuchs. The Third District certified the conflict, but the Supreme Court ruled that the Miami-Dade County Property Appraiser lacked standing

to raise the issue. Accordingly, the Court left for another day resolution of the express and direct conflict on the constitutionality of § 192.042(1). The Dade Circuit Court has again held the statute unconstitutional in the Sunset Harbor case, and the Third District affirmed. *Sunset Harbour Condominium Association v. Robbins*, 837 So.2d 1101 (Fla. 3d DCA 2003), review pending in the Supreme Court.

IV. EXEMPTIONS AND EXCEPTIONS

A. Difference between immunity and exemption.

1. *Immunity* is the lack of government's power to tax property, while *exemption* connotes that the property is subject to taxation, but may be freed from taxation under certain circumstances, such as use for exempt purposes. *Orlando Utilities Authority v. Milligan*, 229 So.2d 262 (Fla. 4th DCA 1969), held that property of the City of Orlando's utility authority used only for employee recreation is only exempt from taxation and lost that exemption by its use for a non-municipal purpose. No provision of the Florida Constitution confers immunity on property of the State or its agencies. Nevertheless, property of the State and its agencies is held to be immune from taxation. *Markham v. Broward County*, 825 So.2d 472 (Fla. 4th DCA 2002). This case involved taxation of property at Port Everglades occupied by profit-making businesses competing with nearby taxpaying properties. Previous litigation by the Port Everglades Authority found that property to be taxable. *Port Everglades Authority v. Markham*, 709 So.2d 545 (Fla. 4th DCA 1998). While that case was pending, the Legislature dissolved the Port Everglades Authority and gave its property to Broward County. The Special Act retained the authority to tax the property of the City of Fort Lauderdale and City of Hollywood. The Property Appraiser's attorney argued in that case that the real inquiry in an immunity case is whether the burden of the tax falls upon the public, or whether pass-through tax clauses place the burden on the tenants. If the public must pay the tax, then sovereign immunity is invoked. The Property Appraiser's attorney also argued that the Legislature has waived sovereign immunity by Section 196.199, F.S. and that as a charter county, Broward County is the equivalent of a

municipality for determining exemption from taxation. (See *Broward County v. BellSouth Telecommunications, Inc.*, 820 So.2d 1001 (Fla. 4th DCA 2002), holding:

> Broward County argues that because it is a charter county, it is vested with municipal powers. It thus has authority to charge telecommunications companies for use of their rights of way and such authority was not preempted by state law. We agree.

Port Everglades is home to such diverse tenants as Burt & Jack's Restaurant, an office building, a dry stack marina, warehouses in the Foreign Trade Zone, and a "festival marketplace" on S.E. 17th. Street that is even outside the Port's fence line. The Fourth District Court of Appeal held, "All counties are political subdivisions of the State, and under the Constitution are immune." Also immune is property held in trust by the United States for recognized Indian tribes.

2. Sometimes lack of a locus within the State of Florida will determine whether property is subject to taxation here. For example, *St. Joe Paper Co. v. Ray*, 172 So.2d 646 (Fla. 1st.DCA 1965) held movable tangible personal property not physically located within the county not taxable. *Overstreet v. Ty-Tan, Inc.*, 48 So.2d 158 (Fla. 1950) held tangible personal property not brought into Dade County until after the January 1 assessment date was not subject to taxation for that year. *Hansen v. Port Everglades Steel Corporation*, 155 So.2d 387 (Fla. 2d.DCA 1963) held that imported steel was "immune" from taxation under the now-discredited "original package doctrine". Query: Would property imported into a foreign trade zone (which has technically not been imported into the United States) and not held for resale as inventory be located without the State of Florida so that it could not be taxed? See *Miami Free Zone Corp. v. Robbins*, 542 So.2d 1007 (Fla. 3d DCA 1989), holding that land owned by this corporation and used as a foreign trade zone did not share the Federal Government's immunity from taxation.

B. Exemption defined. An exemption is the reduction in taxable value of a property below just (market) value, no matter by what mechanism this is accomplished. *Archer v.*

Marshall, 355 So.2d 781 (Fla. 1978), *Am Fi Inv. Corp. v. Kinney*, 360 So.2d 415 (Fla. 1978). *Archer* was one of numerous cases involving taxation of leaseholds on Santa Rosa Island in Escambia County. The Legislature, which seems to be largely amenable to granting tax breaks of one kind or another, enacted a statute providing that the leaseholders could deduct from their rent an amount equal to the ad valorem taxes paid on their leasehold interests for the prior year. The Supreme Court held:

> The Legislature is without authority to grant an exemption from taxes where the exemption has no constitutional basis. [citation omitted] Regardless of the term used to describe the set-off, the reduction in rent afforded the leaseholders has the effect of a tax exemption and as such is unconstitutional since such exemption is not within the provisions of our present state constitution. *Williams v. Jones*, 326 So.2d 425 (Fla. 1975). It is fundamentally unfair for the Legislature to statutorily manipulate assessment standards and criteria to favor certain taxpayers over others. *Interlachen Lakes Estates v. Snyder*, 304 So.2d 433 (Fla. 1974).

Some exemptions are explicitly provided for in the Constitution, and some of the more subtle ones are implicit-- or worse, unauthorized by the Constitution.

1. Explicit Exemptions. So, then, let us look at the 1968 Florida Constitution, the source from which all explicit exemptions flow. Prior to 1968, the Legislature was free to enact any sort of tax preference it desired, so long as there was a rational relationship between the tax break and the desired end. *Interlachen*, *supra*, held that the Legislature's party is over; the 1968 Constitution is a grant of authority rather than a limitation of authority. To put it another way, the Constitution took away the Legislature's authority to create exemptions or to direct classes of property to be assessed at less than just value except for those cases specifically authorized in the Constitution. These are found in Article VII, Section 3 of the Constitution:

> ə Property owned by a municipality and used exclusively by it for municipal or public purposes.

This is a self-executing provision, meaning that the Legislature may not add to nor subtract from its terms. *City of Sarasota v. Mikos*, 374 So.2d 458 (Fla. 1979). Thus, privately owned property used for, say, a City park may not be exempted, *Service Metro Corp. v. Bell*, 786 So.2d 1216 (Fla. 1st DCA 2001), and City property leased out or even occupied by a "manager" for a proprietary purpose will not be exempt. *Greater Orlando Airport Authority v. Crotty*, 775 So.3d 978 (Fla. 5th. DCA 2000). (Hyatt hotel at Orlando International Airport not even arguably for the benefit of the residents of Orlando). Compare *Islamorada, Village of Islands v. Higgs*, 2003 WL 22715633 (Fla. 3d DCA 2003) (affirming trial court decision that the Village is entitled to exemption for marina owned and operated by the municipality) with dissent on motion for rehearing en banc (denied by 6-4 margin), 2004 WL 1778922 (Fla. 3d DCA August 11, 2004). Stay tuned; this case appears destined for the Supreme Court.

- Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law.

Note that this does not require, but only permits such exemptions. The Legislature implemented this provision with Section 196.012(1), providing that an exempt use of property means predominant or exclusive use of property *owned by an exempt entity* for educational, literary, scientific, religious, charitable or governmental purposes. Property must be at least "predominantly" used for exempt purpose to receive any exemption at all. Between predominant and exclusive use, the exemption is prorated according to the percentage of exempt to non-exempt uses. Privately owned tangible personal property which is made available to an exempt entity without consideration for public display or exhibition on a recurrent schedule is not taxable. (Sec. 196.192(3), F.S.)

The term "exempt entity" is not defined in Chapter 196, F.S., although it arguably means an entity exempt from Federal income taxes. Because Section 196.195(5) does not

mention "education" as an entity required to be found to be nonprofit, most property appraisers have taken the position that property of for-profit educational institutions is exempt.

"Use" typically means an active use of property. A case presently before the District Court of Appeal, Fourth District, challenges the Broward circuit court's order that vacant apartments were being "used" to provide affordable housing for low and very low income persons under Sec. 196.1978, F.S. *Markham v. Pier Club Apartments, Inc.*, Case No. 4D03-2458. Compare *Episcopal School, Inc. v. Robbins*, 605 So.2d 880 (Fla. 3d DCA 1992) (granting educational exemption to undeveloped property used only for educational purposes), rev. den., 617 So. 2d 320 (Fla. 1993); and *Grady v. Hausman* 509 So.2d 1316 (Fla. 5th DCA 1987) (17 acres of unimproved church land exempt where court found absence of physical improvements did not constitute legal basis to deny exemption).

ə Household goods and personal effects of at least $1,000.

The Legislature increased this permitted exemption to 100%. Section 196.196.181, F.S. The Second District Court of Appeal struck the language, "residing and making his or her permanent home in this state" in *Herzog v. Colding*, 437 So.2d 226 (Fla. 1983), approved 467 So.2d 980. Tax tip: If your clients have valuable artwork hung in their offices, advise them to run to the nearest high-grade copy shop and run off a color photocopy which should be nicely framed and hung in the office. Keep the original artworks at home. That way, the artwork is not taxable as commercial personal property and the office's insurance bill is lowered.

* Exemption of not less than $500 to every widow, widower, or person who is blind or totally or permanently disabled.

Note that these exemptions may be "stacked" so that one person may receive exemptions of up to $1,500.

ə Economic development tax exemptions to new businesses and expansions of existing businesses.

See □196.1995, F.S.

ə Renewable energy source device exemption for a period of time not to exceed 10 years.

See □196.012(14), F.S.; this exemption is no longer available.

ə Historic property tax exemption

See Section 196.1997, F.S. This requires a vote of the County Commission to implement. The Broward County Commission is currently considering implementing this exemption. Note that the value of a historical property may be higher than if it were not; see the controversy between the Mas family and Miami-Dade County over the value of the Freedom Tower. Michael Cannon is publicly reported as valuing the property at approximately $25,000,000, while Mr. Blazejack valued it for Miami-Dade County at $16,000,000 if the owner is a taxable entity and $13,000,000 if it is a non-taxable entity.

ə Homestead Exemption

Entitlement requires that the owner of real property or a co-operative apartment be a Florida resident, and as of January 1 reside on the property and make it his or her permanent home or the permanent home of one "legally or naturally" dependent on the owner and file an application. The property may be held in trust, so long as it is not an "Illinois" land trust which provides that the beneficiary's interest is personal property. Note that adult children who own the property may be out-of-state residents so long as their dependent parents who reside on the property are Florida permanent residents. Similarly, adult parents who own property may be out-of-state residents so long as their “naturally or legally” dependent children who reside on the property qualify as Florida permanent residents. Rule 12D-7.007(4), Fla. Admin. Code.

The landowner need not be a U. S. Citizen. Even a "person residing under color of law" such as an asylum seeker may qualify for Homestead Exemption, see *Lisboa v. Dade County Property Appraiser*, 705 So.2d 704 (Fla. 3d DCA 2001), rev. den., 819 So.2d 134, provided the taxpayer is legally capable (under applicable federal statute and case law) of formulating the intent to remain permanently in this country. Compare *Alcime v. Bystrom*, 451 So. 2d 1037 (Fla. 3d DCA 1984), cited with approval in PCA, *Liphete v Stierheim*, 455 So. 2d 1348 (Fla. 3d DCA), pet. for rev. dism., 458 So. 2d 273 (Fla. 1984), Solicitor General invited to file brief, 105 S. Ct. 2355 (1985), cert. denied, 106 S. Ct. 829 (1986)

2. Classifications. The Constitution permits the classification and assessment of certain classes of property at other than market value. These provisions are not exemptions, but they have the same effect. The permissible classifications are found in Article VII, Section 4:

- Agricultural land

  See Section 193.461, Florida Statutes.

- Land producing high water recharge to Florida's aquifer

- Land used exclusively for non-commercial recreation purposes

- Tangible personal property held for sale as stock in trade and livestock.

  The Legislature exempted inventory completely; 196.185, F.S.

- Homestead property assessment increases are limited to not more than 3% or the consumer price increase percentage over the prior year's assessment

The Fourth District Court of Appeal held that to be "entitled" to this benefit, the landowner did not have to be granted Homestead Exemption! The decision is under review by the Supreme Court *Powell v. Markham*, 847 So.2d 1105 (Fla. 4th DCA), rev. granted by *Zingale v Powell*, 860 So. 2d 980 (Fla. 2003). Notably, the Broward County Property Appraiser did not appeal this decision. It was appealed by the Department of Revenue.

One of the greatest challenges for the Bar in coming years will be to attempt to structure property transfers in a way that will not trigger loss of the "save our homes" tax cap limitation. While a Qualified Personal Residence Trust (QPRT) qualifies for Homestead exemption because the transferor remains the beneficiary for a set number of years, a transfer from the children would trigger a re-assessment. The only transfers which will not trigger loss of the cap are found in Section 193.155(3)(a):

- Transfer to correct an error.
- Transfer between legal and equitable title. (I.e., property owner transfers property to a revocable inter vivos trust of which the owner is the beneficiary.)
- Transfer between husband and wife, including transfer to a surviving spouse or a transfer due to dissolution of marriage.
- Transfer occurs by operation of law under s.732.4015, F.S., which deals with Article X Homestead property
- Upon the death of the owner, the transfer is between the owner and another who is a permanent resident and is legally or naturally dependent upon the owner.

<u>EVERY OTHER TRANSFER WILL TRIGGER A RE-ASSESSMENT TO MARKET VALUE!</u>

3. Implicit or contractual exemptions. Some exemptions don't look like exemptions.

i. The City of Plant City entered into a lease of its property to Lykes Brothers. The lease contained a "tax clause", common in commercial leases, that if the property were found to be taxable, Lykes Brothers could take a set-off from its rent in the amount of the taxes. The Supreme Court held this to be "ultra vires", i.e., that the City did not have the power to contractually grant a tax exemption to property. *Lykes Brothers, Inc. v. City of Plant City*, 354 So.2d 878 (Fla. 1978). Those lawyers representing property owners leasing property to public bodies, or public attorneys whose clients are contemplating leasing property to private entities should carefully read this case. The City

of Hollywood entered into a franchise agreement with Florida Power & Light Company which provided that FP&L's customers would pay a certain percentage of their utility bills to be collected by FP&L and remitted to the City, and that FP&L would deduct from that the amount of property taxes paid on its property within the City. The City sued for declaratory relief, and the Circuit Court dismissed the Complaint. The District Court of Appeal held that this complaint stated a cause of action for declaratory relief under *Lykes Brothers*; *City of Hollywood v. Florida Power & Light Co.*, 624 So.2d 285 (Fla. 4th DCA 1993). After remand, FP&L and the City settled their differences on a basis advantageous to the City.

ii. If a public body owns land, say an airport, and leases land to a tenant who will build a hangar, if the lease provides that the tenant shall own the hangar until the end of the lease, the hangar is taxable. *Marathon Air Service, Inc. v. Higgs*, 575 So.2d 1340 (Fla. 3d DCA 1991). The canny lease drafter will provide for immediate ownership by the lessor of the tenant's improvements. *Bell v. Bryan*, 505 So.2d 690 (Fla. 1st DCA 1987).

iii. The "Daytona Beach Speedway and Eastern Airlines Relief Act of 1980", Ch. 80-368, Laws of Florida, was a brilliant stroke to overcome the line of cases that held that only leasehold interests used for "governmental-governmental" as opposed to "governmental-proprietary" purposes were entitled to tax exemption. (*Williams v. Jones, supra*.) State Senator Myers of Dade County introduced this legislation which, instead of trying to lower the assessed value, lowered the tax rate. Instead of a tax rate of $25 per $1,000 of assessed value (25 mills), the law declared leasehold interests in public property to be taxable by the State as intangible personal property at 1 mill with the taxes being paid to the local school board, thereby achieving a stunning 95% reduction in taxes. This provision was upheld against a challenge by the Property Appraiser of Monroe County, *Miller v. Higgs*, 468 So.2d 371 (Fla. 1st DCA 1985), rev. den., 479 So.2d 117.

iv. Computer Software. At the urging of industry, the Legislature defined "computer software" out of the category of taxable property by □192.001(19), F.S.

Misreading the plain language of the statute, the District Court of Appeal, Fifth District, held that the statute was constitutional and that software was intangible personal property. *Gilreath v. General Electric Corp.*, 751 So.2d 705 (Fla. 5th DCA 2000), rev. den., 837 So.2d 409. Since that time, various taxpayers owning complex and expensive machinery such as telephone switching equipment, MRI machines, gas pumps, etc. with microprocessor elements, have sought to exempt a portion of the machine's value, declaring that it is non-taxable software. A panel of arbitrators recently held in a non-binding decision that a mobile switching center is not a "series of computers" as the company had contended, and that therefore the millions of dollars' of software used with it is not exempt computer software.

v. Substantial Completion Law. Section 192.042, F.S., provides that no value shall be placed on improvements that are not "substantially completed" as of the January 1 valuation date. This statute was held unconstitutional by the Third District Court of Appeal in *Fuchs v. Robbins*, 738 So.2d 338 (Fla. 3d DCA 1998), as violating the constitutional mandate that all property be assessed at just value unless it is one of the classes which the Legislature is permitted to direct be assessed at less than market value. The Supreme Court reversed on the theory that the Property Appraiser, as plaintiff seeking to overturn a decision of the Value Adjustment Board, lacked standing to bring the action. 818 So.2d 460 (Fla. 2002). In that case, the Supreme Court made it clear that the Property Appraiser had standing to defensively challenge the constitutionality of the statute:

> The appraiser may also raise such a constitutional defense in an action initiated by the taxpayer challenging a property assessment. See *Department of Educ. v. Lewis*, 416 So.2d 455, 458 (Fla. 1982) (observing that while state officers "must presume legislation affecting their duties to be valid, and do not have standing to initiate litigation for the purpose of determining otherwise," because, in such case, they do not "have a sufficiently substantial interest or special injury to allow the court to hear the challenge," if "the operation of a statute is brought into issue in litigation brought by another against a [state officer, the officer] may defensively raise the question of the law's constitutionality"). *Id.* at 464.

The District Court of Appeal, Second District, had held that the Property Appraiser lacked standing to challenge the constitutionality of a statute even defensively. The case was consolidated with *Fuchs v. Robbins* for Supreme Court review. In the next case before the Court where the Property Appraiser was the Defendant in the trial court, the Third District again declared the substantial completion law to be unconstitutional. *Sunset Harbour North Condominium Association, Inc. v. Robbins*, 837 So.2d 1181 (Fla. 3d DCA 2003), rev. granted, *Klein v. Robbins*, 873 So.2d 593 (Fla. 3d DCA 2004). Oral argument was held in May, and the Supreme Court has certainly had sufficient time in which to issue a decision, "Per Curiam Affirmed", should it have denied to do so. For the moment, the statutorily-created Department of Revenue, Miami-Dade County; and all 66 other counties, appeared bound to apply the substantial completion statute as written.

vi. Section 192.042(2), the Construction Work in Progress Statute, has been held unconstitutional in *Qwest Communications Corp. v. Skinner*, 10 Fla. L. Weekly Supp. 37a (20th. Cir. Ct. 2002). The decision involved a fiber optic cable passing through Collier County. Construction was completed, but only one pair of fiber optic strands was "lit"; the rest had not been tested or incorporated into the system as of the January 1 assessment date. The Collier County Circuit Court held the statute unconstitutional on the same basis as *Sunset Harbour*.

vii. Pollution Control Devices. Section 193.621, F.S., provides that pollution control devices will be assessed at their "...market value as salvage." *Sartori v. Department of Revenue*, 714 So. 2d 1136, 1141 (Fla. 5th DCA 1998) held that section 193.621, F.S. creates a Special Class of Property. Two separate Circuit Judges of the Fifth Judicial Circuit held this statute to be unconstitutional in *Florida Power Corporation v. Schultz*, Case No. 97-3383 (Fla. 5th Cir. Ct. 1998) and in *Lake Cogen, Ltd. v. Havill*, Case No. 99-3204 (Fla. 5th. Cir. Ct. 2003). The Circuit Court of Duval County had previously ruled that the Property Appraiser lacked standing to defensively challenge the

constitutionality of the statute *Florida Power & Light Co. v. Mastroianni, Florida Power & Light Co. v. Putnam* (CC Duval, St. Lucie Counties).

viii. Intangible property is lurking everywhere. The Supreme Court struck the assessment of cable television property based on its concept that an appraisal of that property by one of the three standard approaches to value necessarily included a value of intangible personal property, the taxation of which is reserved to the State. *Havill v. Scripps-Howard Cable Co.*, 742 So.2d 210 (Fla. 1999); *GTE Florida v. Todora*, 854 So.2d 731 (Fla. 2d DCA 2003). The Appraisal Institute has a course, Course 800, on removing (non-existent) "intangibles" from a valuation. However, before something can be an "intangible", it musts first be "property", i.e., capable of ownership separate and apart from the property being appraised.

4. Timing is everything. The developer of a condominium or time share property should hold the declaration of condominium or time share amendment off record as long as possible in order to keep the property from being assessed at the higher value. *Gilreath v. Westgate Daytona, Ltd.*, 871 So.2d 961 (Fla. 5th DCA 2004). January 1 is the all-important date as of which exempt status is determined; whatever happens after that date will be taken into consideration in the next year.

5. Grants of property to not-for-profit agencies, retaining rights in that property, e.g., estate owners on the Hudson River who deed that portion of their property which constitutes their view to The Nature Conservancy, retaining rights to use what they did before.

D. In 1971, the Legislature repealed all previously existing exemptions in special or local laws by enacting Ch. 71-133, □14, Law of Fla., which states:

> All special and local acts or general acts of local application granting specific exemption from property taxation are hereby repealed to the extent that such exemption is granted. . . .

E. A strong presumption exists in favor of taxability and that claims for exemption are to be strictly construed against the exemption and in favor of taxability. E.g., *Volusia County v. Daytona Beach Racing & Recreational Facilities District*, 341 So.2d 498 (Fla. 1975), appeal dismissed, 434 U.S. 804; *Markham v. PPI, Inc.*, 843 So.2d 922 (Fla. 4th DCA 2003).

V. APPEALS AND JUDICIAL REMEDIES

A. Doctrine of Exhaustion of Administrative Remedies

1. The Florida Statutes provide for administrative review of the Property Appraiser's decisions in Chapter 194, Part I. The Value Adjustment Board is an administrative body consisting of three members of the County Commission and two members of the School Board.

Strictly speaking, in Florida it is no longer necessary to exhaust administrative remedies before filing suit to challenge an assessment. However, a taxpayer with a deserving case is far more likely to convince the VAB of the correctness of his or her position than a busy circuit judge who knows little or nothing about appraisal.

B. Application for Reduced Assessment.

1. The Property Appraiser's office sends a Notice of Proposed Assessment to every taxpayer after the tax rolls have been approved by the Florida Department of Revenue, usually in August of the year. The deadline to file a petition with the Value Adjustment Board is twenty-five days after the date shown on the notice. The Florida Administrative Code provides that a late filed petition may be entertained by the Board if the taxpayer shows "good cause" why the petition was not timely filed. Petitions dealing with denials of exemption must be filed no later than thirty days following the Property Appraiser's denial of the exemption.

2. The taxpayer actually has a substantial advantage over the Property Appraiser, as he or she has all year to be preparing a case. The Property Appraiser will not know there is a case until the petition is filed.

3. The Clerk of the V.A.B. is required to give the Petitioner at least 25 days' notice of the date of the hearing. This is sure to cause problems in "one certification counties", because of the tight timetables involved. Assume that the Property Appraiser sends the TRIM notices on August 16; the taxpayer has until September 10 to file a petition. Assuming the Clerk hands the petitioner a notice the same day, the earliest the petition could be heard would be October 5. In a one-certification county, the roll is usually certified around October 15 so the tax bills can go out on November 1. This leaves a 10 - day window in which V.A.B. hearings can be scheduled. We predict that most counties will go to the two-certification procedure as a result of the lengthened notice provisions. The petitioner has the right to reschedule the hearing by a written request to the Clerk submitted no less than five calendar days before the day of the originally scheduled hearing.

4. The 2004 Legislature has also changed the deadlines for exchange of information, effective January 1, 2005. At least 15 days before the hearing, the taxpayer is required to provide the Property Appraiser with a list of evidence to be presented at the hearing, together with copies of all documentation to be considered by the V.A.B., and a summary of evidence to be presented by witnesses. Not later than seven days before the hearing, if the petitioner has provided its information, and if requested in writing by the petitioner, the Property Appraiser is required to provide the same information, together with the property record card if provided by the Clerk of the V.A.B. The Property Appraiser's failure to provide this information shall result in a rescheduling of the hearing.

C. Hearing before Value Adjustment Board.

1. No more Special Masters this year! Actually, the Legislature changed the name from "Special Master" to "Special Magistrate". The duties and qualifications of the Special Magistrate remain as they previously were.

2. To prevail, Property Appraisers prefer that the practitioner be prepared to present an expert opinion as to the market value of the property. The burden imposed on the taxpayer by law, however, is the one set forth in section 194.301, F.S. See E. 6., infra. Moreover, the Attorney General has expressly opined "that section 194.034 (1), (a), Florida Statutes, does not require that an agent appearing before the value adjustment board be a licensed or qualified professional." Op. Atty Gen. Fla. 02-58 (2002).

3. Particularly in Broward County, claims of overassessment relative to other parcels are not favorably received by the Special Magistrates.

D. Claim for Refund.

1. If the taxpayer's action seeks a refund past the sixty-day statute of nonclaim, the suit may be allowable if the action only challenges the classification of the property and not its assessed value. See *Sartori v. Department of Revenue,* 714 So.2d 1136 (Fla. 5th DCA 1998). In that case, the taxpayer claimed that the Property Appraiser had erroneously failed to classify its pollution control devices as such and assess them as salvage. Mr. Sartori filed suit within the four year statute of limitations found in □197.182(1)(c), but not within the sixty day statute of nonclaim period. The District Court of Appeal concluded that the suit was timely because Mr. Sartori did not challenge the County's valuation of his property, i.e., contest a tax assessment.

2. In *Bankunited Financial Corp. v. Markham,* 763 So.2d 1072 (Fla. 4th DCA 1999), the Fourth District followed *Sartori* and permitted an action to proceed that claimed that the Property Appraiser had mis-classified real property that should have not been assessed as it was claimed to be common elements of a planned unit development. BankUnited had bought tax certificates on worthless land and sought to recover its investment. *BankUnited* is subject to severe criticism because it is based on an earlier Supreme Court case which relied on a distinction between a void and a voidable assessment, which was later overruled on that point.

Department of Revenue and Tedder v. Pepperidge Farms, Inc., 847 So.2d 575 (Fla. 2d DCA 2003) was a class action seeking to recover taxes paid on computer software. The Second District followed *Sartori* and allowed the suit, even though the sixty day statute of nonclaim had run.

In another case arising from Santa Rosa Island, the First District Court of Appeal found an action to declare that the leaseholders' interests were intangible rather than real property barred by the sixty - day statute of nonclaim. *Ward v. Brown*, 2003 WL 1088219, 2003 Fla.App. LEXIS 3245 (Fla. 1st DCA 2003), rev. granted, 848 So.2d 1157 (Fla. 2003). The Property Appraiser pointed out that the statute of limitations involving a refund did not apply since none of the taxpayers in this class action had paid the taxes demanded. Oral argument was held in 2003 and the case is still awaiting decision by the Supreme Court.

E. Statutory Ad Valorem Tax Challenge.

1. There is a short statute of nonclaim in property tax cases. In a one certification county, the taxpayer has sixty days from the date of certification of the rolls in which to file suit. This assumes that the decision of the Value Adjustment Board is sent out before the rolls are certified. In a two certification county such as Broward and Miami-Dade, if the taxpayer does not petition the V.A.B. for relief, the sixty-day period begins with the first certification of the rolls. If requested in writing, the Property Appraiser must advise of the date of this certification. If the taxpayer does petition the V.A.B., then the sixty days begins with the date the decision of the Board is mailed. This does not mean the decision of the Special Magistrate. The second certification of the Property Appraiser, which is made after all hearings have been completed, does not relate to the statute of nonclaim in any way. Do not fall into the trap of requesting the date of the second certification, as the Property Appraiser's office will mechanically send it to you.

2. Timely payment of at least the portion of taxes the taxpayer admits in good faith to be due and owing is a condition precedent to *filing* suit. Section 194.171(3), F.S. Notably, good faith payment prior to delinquency of subsequent years' taxes is also a

jurisdictional condition to *maintaining* the suit. Sec. 194.171(5) & (6). The court irrevocably loses jurisdiction over the suit when a subsequent year's tax becomes delinquent. *Bystrom v. Diaz,* 514 So.2d 1072 (Fla. 1987). If the court finds that the amount of tax which the taxpayer has admitted to be owing is grossly disproportionate to the amount of tax found to be due and that the taxpayer's admission was not made in good faith, the court shall also assess a penalty at the rate of 10 percent of the deficiency per year from the date the tax became delinquent. *Hotelerama Associates, Ltd. v. Bystrom,* 24 Fla. Supp. 2d 76, 83 (Fla. 11th Cir. Ct. 1987), app. dism., 518 So.2d 277 (Fla. 3d DCA 1988).

3. Prior to 2004, a tenant could not be the plaintiff in an action to challenge an assessment. *Todora v. Venice Golf Association,* 847 So.2d 577 (Fla. 2d DCA), rev. den., 860 So. 2d 980 (Fla. 2003). The Legislature amended the statute to provide that a person responsible for the entire tax payment pursuant to contract may be a party plaintiff with the written consent of the property owner. Tip: The astute lease-drafter will include that written consent in the lease. A condominium or co-operative association may represent the owners of units within the project.

4. If the taxpayer received relief at the Value Adjustment Board in excess of the percentages stated in Section 194.036, F.S., the Property Appraiser is permitted to file suit to overturn the decision of the Board. In that case, the taxpayer is the defendant. The statute provides that the Property Appraiser has the burden of proof in such a case.

5. The Defendant in a challenge brought by the taxpayer is ordinarily the property appraiser and if the collection of the tax is involved, the tax collector. In Miami-Dade County, both the offices of tax collector and property appraiser are appointed officials of metropolitan government. In Broward County, the Revenue Collector, currently Judith Fink, is an appointee within the Department of Finance, so Broward County should be made the Defendant rather than the Revenue Collector. Compare section 194.181 (3), F.S. If the

assessment is challenged based on a contention that the assessment is contrary to the Florida Constitution, the State Department of Revenue in the person of its Executive Director, currently Dr. James Zingale, is the appropriate official to be named. Ordinarily, the Property Appraiser's attorney represents the interests of the Department of Revenue in such cases, unless a novel issue is involve, such as the question of constitutionality of a statute.

6. The property appraiser's assessment is presumed to be correct, and the taxpayer has the burden of proof set forth in □194.301, Florida Statutes. The taxpayer may overcome the presumption by showing either (1) that the property appraiser's assessment is arbitrarily based on appraisal practices which are different from the appraisal practices generally applied by the property appraiser to comparable property within the same class and within the same county or (2) that the property appraiser has failed to consider properly the criteria in s. 193.011.

7. This statute came into the law as the result of a lobbying effort by industry. The previous presumption of correctness, made by the Supreme Court, was that to prevail, the property owner needed to demonstrate the assessment to be unlawful to the exclusion of every reasonable hypothesis of a lawful assessment. Section 194.301, F.S. now provides that if the taxpayer is unsuccessful in overcoming the presumption of correctness, the taxpayer must prove the market value of the property by clear and convincing evidence, and if it is lost, by a preponderance of the evidence.

8. The fact of use of a different method of assessment on one property than other does not raise an equal protection claim. As the Supreme Court stated in *Allegheny Pittsburgh Coal Co. v. Webster County Commission*, 488 U.S. 336 (1989),

> That two methods are used to assess property in the same class is, without more, of constitutional moment. The Equal Protection Clause "applies only to taxation which in fact bears unequally on persons or property of the same class." *Charleston Federal Savings & Loan Association v. Alderson*, 324 U. S. 182, 190, 65 S.Ct. 624, 629, 89 L.Ed. 857 (1945).