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Property Taxation in Virginia

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NOTE

PROPERTY TAXATION IN VIRGINIA

I. INTRODUCTION*

The Virginia Constitution mandates that all property within the state, except exempt property, must be taxed.[1] In light of the constitution's directive, this note examines the present Virginia property taxation structure in order to provide the practitioner with a guide to its application and operation.

Such a discussion necessarily involves an analysis of the constitutional parameters of uniformity of taxation, assessment at fair market value and the specific exemptions provisions. Proceeding from these constitutional foundations, the note concentrates on the application of the Virginia tax structure to real property, tangible personal property and intangible personal property, distinguishing the variations in the taxation of each. In addition, statutory provisions for special land use assessments and the procedures employed to remedy erroneous assessments are considered.

Realizing the existence of ambiguities and inconsistencies within the Virginia property taxation system, and the confusion resulting therefrom, this note endeavors to identify the types of property taxable in Virginia and outline the procedures involved in that taxation.

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1. VA. CONST. art X, § 1.

II. SEGREGATION, CLASSIFICATION AND UNIFORMITY

The power of property taxation is inherently enjoyed by the Virginia General Assembly.[1] Since in its pristine form this legislative prerogative is unlimited,[2] both the Constitution of the United States[3] and the Virginia Constitution[4] impose restrictions on its exercise. Article X, section 1 of the Virginia Constitution[5] is one such restriction,[6] embracing within its several significant limitations[7] on the state's exercise of the taxing power.

Specifically, section 1 encompasses the requirement that all property must be equally and uniformly taxed. This section also establishes the power of the General Assembly to segregate subjects of property for either state or local taxation and to classify subjects of property for taxation at either level. In the following discussion, to the extent possible, each provision of section 1 will be examined independently. It must be kept in mind, however, that in many situations these provisions are interrelated.

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1. State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527 (1931). "The power of taxation is fundamental to the very existence of the government of the States." *Id.* at 537, *quoted in* Southern Ry. v. Commonwealth, 211 Va. 210, 220, 176 S.E.2d 578, 584 (1970). The power of the Commonwealth of Virginia to impose taxes is inherent, arising independently of the Constitution of the United States. *See* Colonial Pipeline Co. v. Commonwealth, 206 Va. 517, 145 S.E.2d 227 (1965), *appeal dismissed,* 384 U.S. 268 (1966); City of Richmond v. Commonwealth, 188 Va. 600, 50 S.E.2d 654 (1948); II A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1036 (1974) [hereinafter cited as HOWARD].

2. Colonial Pipeline Co. v. Commonwealth, 206 Va. 517, 145 S.E.2d 227 (1965), *appeal dismissed,* 384 U.S. 268 (1966). The state's power of taxation is unlimited unless restrained by the state or federal constitutions. *Id.* at 523, 145 S.E.2d at 232.

3. U.S. CONST. amend. XIV. The equal protection clause is the most significant restriction imposed on the exercise of the state's power of property taxation by the Constitution of the United States. It is especially important in relation to the state's power to classify property for taxation. See notes 43-46 *infra.*

4. VA. CONST. art. X, §§ 1-11.

5. Present article X, § 1 was derived from §§ 168 and 169 of the 1902 constitution. The only substantial difference between § 1 and §§ 168 and 169 concerns uniformity of taxation after annexation, discussed in section II D(1) *infra.* Therefore, for purposes of this section, the uniformity provisions of §§ 168 and 169 and § 1 are identical.

6. City of Norfolk v. Chamberlain, 89 Va. 196, 16 S.E. 730 (1892). In discussing, *inter alia,* the uniformity limitations of the 1870 constitution, the Virginia Supreme Court noted that such provisions are mandatory, imposing "specific limitations and restrictions upon the taxing power, and they must be observed and obeyed by the legislative department of the government, unless that department, the mere creature of the Constitution, has . . . been invested with authority paramount to that of the Constitution itself . . . ." *Id.* at 204, 16 S.E. at 732.

7. The limitations are significant in the sense that adherence to them is necessary for the imposition of a constitutionally valid tax, not in the sense that they form an insurmountable barrier to the creation of a flexible tax structure.

A. SEGREGATION

The General Assembly's power of property segregation[8] enables it to classify taxable subjects for taxation at either the state or local level.[9] However, another section of the constitution[10] restricts that power by constitutionally segregating certain classes of property for local taxation only,[11] thereby prohibiting the state from taxing those classes.[12] Limited only therefore by the constitution's preclusion of state taxation upon the property enumerated in section 4, the General Assembly is free to segregate all other classes of taxable property.[13]

Because the segregation provisions of the constitution are not self-effectuating,[14] legislative action was necessary to implement them.[15] Thus in sections 58-9[16] and 58-10[17] of the Code, the General Assembly codified the constitutional provision for segregation of certain classes of property to the localities for taxation[18] and exercised its own power of segregation.[19] Specifically, section 58-9 of the Code segregates to the localities for taxation the classes of property found in section 4, including all taxable real

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8. VA. CONST. art. X, § 1.

9. Segregation has the effect of allocating certain sources of tax revenue to either the state or to the localities. Holt, *Constitutional Revision in Virginia, 1902 and 1928: Some Lessons on Roadblocks to Institutional Reform,* 54 VA. L. REV. 903 (1968) [hereinafter cited as Holt].

10. VA. CONST. art. X, § 4.

VA. CONST. §§ 171, 172 (1928) are the progenitors of present section 4. Section 4 does not differ significantly from these prior provisions. Constitutional segregation was proposed and ratified as a solution to state-wide assessment inequities. *See generally* Holt, *supra* note 9, at 920-21.

11. Section 4 does not impliedly segregate any subject of property for state taxation alone. Chesapeake & Potomac Tel. Co. v. City of Newport News, 196 Va. 627, 85 S.E.2d 345 (1955); Fallon Florist, Inc. v. City of Roanoke, 190 Va. 564, 58 S.E.2d 316 (1950). Section 1 does, however, provide the mechanism by which the General Assembly may segregate property, not segregated constitutionally, through legislation. See notes 32-41 *infra* and accompanying text.

12. Chesapeake & Potomac Tel. Co. v. City of Newport News, 196 Va. 627, 85 S.E.2d 345 (1955); Fallon Florist, Inc. v. City of Roanoke, 190 Va. 564, 58 S.E.2d 316 (1950); 1976 OP. VA. ATT'Y GEN. 371.

13. Section 4 does reserve to the General Assembly the power to prescribe in what manner and at what time the subjects of property segregated to the localities shall be assessed for local taxation. See VA. CODE ANN. §§ 58-847 to -851.8 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976). See notes 26-31 *infra* and accompanying text.

14. County of Prince William v. Thomason Park, Inc., 197 Va. 861, 91 S.E.2d 441 (1956).

15. *Id.*

16. VA. CODE ANN. § 58-9 (Repl. Vol. 1974).

17. *Id.* § 58-10.

18. VA. CONST. art. X, § 4.

19. See VA. CONST. art. X, § 1.

estate,[20] coal and other mineral lands[21] and tangible personal property,[22] except the rolling stock of public service corporations.[23] In addition, pursuant to its power of segregation,[24] the General Assembly has segregated merchant's capital[25] solely for local taxation under Code section 58-9, thereby precluding state taxation of merchant's capital.

Although forbidden from taxing the locally segregated property, the General Assembly has not been divested of all power or control over this property. The constitution expressly gives to the legislature the right to prescribe the time and manner of assessment of the locally segregated property.[26] Pursuant to article X, section 4, the legislature has statutorily delineated,[27] *inter alia,* the power of localities to collect taxes in installments,[28] the power to set penalties for failure to comply with local tax ordinances,[29] the local officials' power to distrain[30] and the power to impose different rates upon the classes of property segregated for local taxation by

20. See VA. CODE ANN. §§ 58-758 to -828 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976).

21. See *id.* §§ 58-774 to -774.2. *See generally* 1976 OP. VA. ATT'Y GEN. 370-72.

22. *See id.* §§ 58-829 to -838. Although tangible personal property and real estate are both segregated for local taxation, it occasionally becomes necessary, due to different tax rates and modes of assessment between personalty and realty, to determine whether personalty has become realty by virtue of annexation. A threefold test is employed in which (1) the property's annexation and (2) its adaptation are (3) examined in light of the annexor's intention toward the property. Each case turns on its own particular fact situation. Transcontinental Gas Pipe Line Corp. v. County of Prince William, 210 Va. 550, 172 S.E.2d 257 (1970); 1972 OP. VA. ATT'Y GEN. 412.

23. Section 4's exception of rolling stock from solely local taxation does not by implication make it taxable exclusively by the state. The rolling stock of public service corporations is not the subject of any *constitutional* segregation. East Coast Freight Lines v. City of Richmond, 194 Va. 517, 74 S.E.2d 283 (1953).

24. VA. CONST. art. X, § 1.

25. *See* VA. CODE ANN. §§ 58-830, -832, -833, -833.1 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976). Merchant's capital is intangible personal property and thus a tax levied thereon is a property tax. City of Richmond v. Drewry-Hughes Co., 122 Va. 178, 90 S.E. 635 (1916). Although intangible personal property is segregated for state taxation under § 58-10, the General Assembly has exercised its § 1 power of property classification and segregation to segregate merchant's capital, as a separate class of intangible personal property, for local taxation. City of Roanoke v. James W. Michael's Bakery Corp., 180 Va. 132, 21 S.E.2d 788 (1942); 1975 OP. VA. ATT'Y GEN. 474.

Other than as defined in VA. CODE ANN. § 58-833 (Repl. Vol. 1974), or unless exempt from taxation, all other forms of the capital of merchants are deemed as intangible personal property and, therefore, are segregated to the state for taxation. *Id.* § 58-410.

26. VA. CONST. art. X, § 4.

27. VA. CODE ANN. §§ 58-847 to -851.8 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976).

28. *Id.* § 58-847 (Cum. Supp. 1976).

29. *Id.*

30. *Id.* § 58-850 (Repl. Vol. 1974).

the constitution.[31] The state has therefore retained procedural control of the local taxing power, notwithstanding the denial of the power to tax.

Unlike Code section 58-9,[32] the classes of property in Code section 59-10 are segregated for state taxation exclusively under the General Assembly's constitutional power of segregation.[33] The classes made amenable to state taxation alone under section 58-10 are insurance taxes,[34] licenses on insurance companies,[35] intangible personal property,[36] the rolling stock of all corporations operating railroads by steam[37] and all other classes of property not specifically segregated for local taxation under Code section 58-9. And again, merchant's capital is segregated to the localities for taxation.[38]

The segregation to the state of all other classes of property not previously segregated in Code section 58-9 limits the property taxing power of localities to the classes of property enumerated within section 58-9. However, since Code section 58-10's segregation of "all other *classes of property*"[39] is not synonymous with allocating "all other *subjects of taxation*"[40] to the

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31. *Id.* § 58-851 (Cum. Supp. 1976).

32. With the exception of merchant's capital, all of the classes of property enumerated in § 58-9 are constitutionally mandated for local taxation.

33. VA. CONST. art. X, § 1.

34. *See* VA. CODE ANN. §§ 58-486 to -502.10 (Repl. Vol. 1974).

35. *See id.*

36. *See id.* §§ 58-405 to -441.52 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976).

37. *See id.* §§ 58-515 to -539.

38. The provisions for merchant's capital in § 58-9 ("The capital of merchants . . . [*is*] . . . subject to local taxation only.") (emphasis added) and § 58-10 ("The capital of merchants . . . *may* be taxed . . .") (emphasis added) are not inconsistent. In light of article X, § 1 of the constitution which requires that all property be taxed unless exempt, the provision for merchant's capital in § 58-10 evinces no legislative attempt to delegate to localities the power to exempt merchant's capital from taxation. Rather, § 58-10 provides localities with the choice of either taxing merchant's capital under § 58-9 or imposing a license tax on merchants in lieu thereof, under VA. CODE ANN. § 58-266.1(5) (Cum. Supp. 1976). 1975 OP. VA. ATT'Y GEN. 474-75.

Localities also have the power to lower the tax rate on merchant's capital relative to the rates on tangible personal property and real estate if the tax on merchants is too burdensome. VA. CODE ANN. § 58-851 (Cum. Supp. 1976); 1971 OP. VA. ATT'Y GEN. 420.

39. Chesapeake & Potomac Tel. Co. v. City of Newport News, 196 Va. 627, 635, 85 S.E.2d 345, 349 (1955); Fallon Florist, Inc. v. City of Roanoke, 190 Va. 564, 583, 58 S.E.2d 316, 325 (1950).

40. Fallon Florist, Inc. v. City of Roanoke, 190 Va. 564, 584, 58 S.E.2d 316, 325 (1950). The appellants, complaining of a local nonproperty tax, contended that the effect of §§ 58-9 and 58-10 was to allocate to the localities for taxation only those subjects of property found in § 58-9, and that § 58-10 allocated *all other subjects of taxation* to the state. The Supreme Court disagreed and, in holding that *subjects of taxation* was a broader term than *classes of property*, concluded that the operation of §§ 58-9 and 58-10 did not preclude localities from levying *nonproperty* taxes since only property, just one subject of taxation, had been classified and segregated between the state and the localities.

state, localities are not denied the power to levy excise, license, privilege or other forms of nonproperty taxes.[41]

Thus, Code sections 58-9 and 58-10 delineate upon what classes of property local and state taxes shall be levied; they do not preclude the imposition of taxes by either level of government on other subjects of taxation. Segregation is not, however, the sole power conferred on the General Assembly by article X, section 1 of the Virginia Constitution. The power of property classification is similarly delegated and indeed operates concomitantly[42] with the power of segregation.

B. CLASSIFICATION

Article X, section 1 specifically gives the General Assembly the power to classify property for taxation at either the state or local level.[43] The exercise of this power, however, is limited by the equal protection clause of the fourteenth amendment.[44] But since the requirement of equal protection demands only that a classification be "reasonable,"[45] the United States Constitution does not significantly inhibit the General Assembly's power of property classification.[46] As employed in the Virginia tax struc-

41. Chesapeake & Potomac Tel. Co. v. City of Newport News, 196 Va. 627, 85 S.E.2d 345 (1955); Fallon Florist, Inc. v. City of Roanoke, 190 Va. 564, 58 S.E.2d 316 (1950); 1976 OP. VA. ATT'Y GEN. 571-72.

42. Sections 58-9 and 58-10 dictate what body of government taxes the particular classes of property found in each statute. The power of classification determines into which class a particular item of property will be placed—hence *how* that item will be taxed.

43. VA. CONST. art. X, § 1. The power of the state to classify subjects of property for taxation is not questioned. City of Richmond v. Commonwealth, 188 Va. 600, 50 S.E.2d 654 (1948); Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941). *See, e.g.*, Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970); Town of Ashland v. Board of Supv'rs, 202 Va. 409, 117 S.E.2d 679 (1961); East Coast Freight Lines v. City of Richmond, 194 Va. 517, 74 S.E.2d 283 (1953); Virginia Elec. & Power Co. v. Commonwealth, 169 Va. 688, 194 S.E. 775 (1938).

44. U.S. CONST. amend. XIV.

"The States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment." Allied Stores, Inc. v. Bowers, 358 U.S. 522, 526 (1959).

45. Allied Stores, Inc. v. Bowers, 358 U.S. 522 (1959); State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527 (1931). "[T]he Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation." Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890); Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970); Washington County Nat'l Bank v. Washington County, 176 Va. 216, 10 S.E.2d 515 (1940).

In City of Richmond v. Fary, 210 Va. 338, 171 S.E.2d 257 (1969), the supreme court noted that three requirements are necessary to sustain a classification against allegations that it violated the equal protection clause. A classification must (1) rest on "real and not feigned differences," (2) have "relevance to the purpose for which the classification is made" and (3) not be "wholly arbitrary." *Id.* at 344, 171 S.E.2d at 262.

46. HOWARD, *supra* note 1, at 1044-45. However, when a classification is patently arbitrary,

ture, classification "is a word of art with special import, connoting a division into separate classes."[47] It is not used in the definitional sense.[48]

The significance of the power to classify is revealed by the flexible tax structure which results when items of taxable property are classified. This flexibility occurs because the equal tax treatment mandated by the constitution[49] is required only among the several members of a class, not among the several classes.[50] Thus, when the General Assembly classified tangible personal property,[51] the tax treatment accorded that class could vary from that accorded another class without violating the constitutional directive.[52]

The General Assembly has selectively exercised the power of classification upon items of property, including, but not limited to, tangible personal property.[53] The legislative purpose in classifying such property has varied from authorizing lower rates of taxation[54] or exemptions from taxation for certain subclassifications of property within a given classification[55] to providing tax incentives for special uses of land.[56] In short, the rationale behind the exercise of the classification power reflects the need in the administration of the tax system for the continuing ability to adapt to changing circumstances.

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capricious and does not rest on any substantial basis, it cannot be upheld in light of the fourteenth amendment. Williams v. City of Richmond, 177 Va. 477, 14 S.E.2d 287 (1941).

47. R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113, 115 (1976). In this case, the Supreme Court rejected the appellant's contention that VA. CODE ANN. § 58-829 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976) was merely "an inventory or grouping of taxable subjects within a single class." 217 Va. at 204, 228 S.E.2d at 115.

48. 217 Va. at 204, 228 S.E.2d at 115.

49. VA. CONST. art. X, § 1.

50. R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976); City of Richmond v. Commonwealth, 188 Va. 600, 50 S.E.2d 654 (1948); 1973 OP. VA. ATT'Y GEN. 410.

51. *See* VA. CODE ANN. § 58-829 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976).

52. R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976).

53. Tangible personal property is classified in VA. CODE ANN. §§ 58-829 to -829.3 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976). *See* also *id.* § 58-16.3 (Repl. Vol. 1974)(pollution control devices and facilities, whether realty or personalty).

Real estate, with the exception of land devoted to special uses [see *id.* 58-769.4 to -769.16 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976)], has not been further classified to allow for varying tax treatment. Therefore, the tax treatment accorded real estate must be equal upon all such property within the confines of the taxing jurisdiction. 1972 OP. VA. ATT'Y GEN. 422.

54. *See* VA. CODE ANN. § 58-851 (Cum. Supp. 1976).

55. *See id.* § 58-829.1 (Repl. Vol. 1974)(optional exemption of household goods); *id.* § 58-829.1:1 (Cum. Supp. 1976)(optional exemption of farming necessities).

56. *See id.* §§ 58-769.4 to -769.16 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976). See the discussion of these sections in section IV(C) *infra.*

The various classification provisions for locally segregated tangible personal property[57] allow for especially diverse tax treatment at the local level. Since equal tax treatment is required only within a particular classification (subclassification or otherwise)[58] and only within the territorial limits of the taxing jurisdiction,[59] each local authority has the power to adjust its local tax structure to reflect its fiscal needs.[60] The power of classification is thus an integral element in the Virginia scheme of taxation, providing flexibility by allowing taxing authorities to take cognizance of current needs and demands and by providing the mechanism whereby future needs and demands can be met. But, however easily the equal protection requirement[61] on the exercise of the power of classification is satisfied,[62] the tax treatment accorded the various members of a class is subject to a further limitation found in article X, section 1 of the Virginia Constitution. This is the requirement of uniformity.

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57. *Id.* § 58-820 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976). *See, e.g., id.* § 58-829.1 (Repl. Vol. 1974); *id.* § 58-829.9:1 (Cum. Supp. 1976); *id.* § 58-851.

In addition to tangible personal property, real estate and merchants' capital are locally segregated. Real estate, like tangible personal property, has been further classified. *See id.* § 58-16.3 (Repl. Vol. 1974) (pollution control devices); *id.* §§ 58-769.4 to -769.16 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976) (land devoted to special uses); § 58-512.1 (Cum. Supp. 1976) (unequalized public service corporation real estate). Merchants' capital has not been further classified. Section 58-851 allows localities to impose different tax rates upon realty, merchants' capital and tangible personal property, or to impose the same rate upon two or all three of these classes. However, § 58-851 must now be read in light of R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976), wherein the supreme court held that § 58-829 was classific, thereby allowing differing tax treatment for the various classes of tangible personal property enumerated therein. The conclusion seems inescapable that the decision in *Cross* incorporated § 58-829's classification of tangible personal property into the provision for similar property in § 58-851. Construed in this fashion, § 58-851 allows for differing or identical tax rates by a locality on real estate, merchants' capital, tangible personal property, and, due to the *Cross* decision, on the various classes of tangible personal property enumerated in § 58-829. Moreover, § 58-851 would now seem to allow differing rates on subclassifications of real estate or merchant's capital that exist now or may exist in the future.

58. R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976). The taxpayer will not be heard to complain of unequal tax treatment between classes, since "[t]he Constitution does not require uniformity among separate tax classes." *Id.* at 206, 228 S.E.2d at 116.

VA. CODE ANN. §§ 58-829 to -829.3 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976), divides all tangible personal property into numerous subclasses. R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976).

59. VA. CONST. art. X, § 1.

60. Many of the classification sections providing for differing tax treatment within classes are optional for the locales. See note 55 *supra* and accompanying text.

61. See notes 44-46 *supra* and cases cited therein.

62. *Cf.* Williams v. City of Richmond, 177 Va. 477, 14 S.E.2d 287 (1941). See note 46 *supra.*

C. UNIFORMITY

The equality and uniformity rule mandated by the Virginia Constitution[63] requires uniform tax treatment within each class of property[64] within each particular taxing jurisdiction, so as to ratably apportion the tax burdens of government.[65] Uniform tax treatment is, however, a generic phrase encompassing several distinct requirements. First, uniformity requires that the *rate of tax* be the same upon all property within a class.[66] Second, the *mode of assessment* of the taxable property within a given class must be uniform.[67] And third, the uniformity must be *coextensive* with the geographic area of the taxing authority.[68] A tax adhering to these basic propositions cannot be successfully challenged as violating the uniformity requirement.

Challenges to taxing schemes alleging a lack of uniformity in the mode of assessment have been by far the most frequently litigated aspect of the uniformity requirement.[69] In the typical situation the requirement of uni-

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63. VA. CONST. art. X, §1.

64. *Id.* The rule of uniformity applies only to a direct tax on property. *See, e.g.*, Town of Ashland v. Board of Supv'rs, 202 Va. 409, 117 S.E.2d 679 (1961); Commonwealth v. Whiting Oil Co., 167 Va. 73, 187 S.E. 498 (1936).

65. Equality, as employed in § 1, concerns the equitable distribution of the tax burden among the taxpayers subject to the tax. Equal taxation therefore "apportion[s] the contribution of each person towards the expense of government so that he shall feel neither more nor less inconvenience from his share of the payment than every other person experiences." City of Hampton v. Insurance Co. of N. America, 177 Va. 494, 499, 14 S.E.2d 396, 398 (1941), *quoting* Adams v. Mississippi State Bank, 75 Miss. 701, 23 So. 395, 397 (1898). *See, e.g.*, Skyline Swannanoa, Inc. v. Nelson County, 186 Va. 878, 44 S.E.2d 437 (1947); Washington County Nat'l Bank v. Washington County, 176 Va. 216, 10 S.E.2d 515 (1940).

66. Day v. Roberts, 101 Va. 248, 43 S.E. 362 (1903). *See, e.g.*, Moss v. County of Tazewell, 112 Va. 878, 72 S.E. 945 (1911).

67. Day v. Roberts, 101 Va. 248, 43 S.E. 362 (1903). *See, e.g.*, R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976); Norfolk & W. Ry. v. Commonwealth, 211 Va. 692, 179 S.E.2d 623 (1971); Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970).

Mode of assessment should not be confused with the procedures employed to determine the value of property. Uniformity in the mode of assessment requires a just valuation of property. So long as a just valuation is achieved, the use of various procedures or methods to arrive at that valuation is not precluded. If, however, a just valuation is not reached and uniformity is violated, the methods used in the valuation process may themselves be the cause of the violation. *See* R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113, n.2, 117 n.6 (1976). See notes 79-82 *infra* and accompanying text.

68. Day v. Roberts, 101 Va. 248, 43 S.E. 362 (1903). *See, e.g.*, Norfolk & W. Ry. v. Commonwealth, 211 Va. 692, 179 S.E.2d 623 (1971); Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970).

69. *See, e.g.*, Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970); Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 101 S.E.2d 571 (1958); Skyline Swannanoa, Inc. v. Nelson County, 186 Va. 878, 44 S.E.2d 437 (1947).

formity is incompatable with the constitutional mandate of assessment at "fair market value."[70] When such is the case, the courts are agreed that uniformity is the end to be desired.[71] This conflict no longer exists in relation to real estate since after January 1, 1977, all assessments are to be at 100% of fair market value,[72] as the constitution has long required.[73] However, in relation to tangible personal property, the conflict still exists, and the courts will still insist upon uniformity as the end to be attained.[74] But the new requirement of 100% assessment for realty notwithstanding, still lingering is the difficulty in actually determining what is the fair market value of the property.[75] A lack of uniformity can exist if it is shown that the *assessed* fair market value exceeds the *actual* fair market value.[76]

"Mode of assessment" is, however, a broad phrase, encompassing more than just the determination of the property's value. Thus, the piecemeal reassessment of similarly situated real estate over a period of time will

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70. VA. CONST. art. X, § 2. See discussion of this requirement in section III *infra*.

In Lehigh Portland Cement Co. v. Commonwealth, 146 Va. 146, 135 S.E. 669 (1926), appellant's real estate was assessed at 100% of fair market value, while other real estate within the taxing jurisdiction was assessed at 50% of fair market value. Uniformity was violated because of nonuniform modes of assessment, but to lower appellant's assessed value to 50% to satisfy uniformity would violate the requirement of 100% fair market value assessments [art. X, § 2]. The Supreme Court of Virginia lowered the assessed value to conform with the uniformity mandate. *See* R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976); Skyline Swannanoa, Inc. v. Nelson County 186 Va. 878, 44 S.E.2d 437 (1947).

71. Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976).

> The two sections [§ 1 (uniformity), § 2 (assessment at fair market value)] must be construed together. The dominant purpose of these provisions is to distribute the burden of taxation, so far as is practical, evenly and equitably. If it is impractical or impossible to enforce both the standard of true value and the standard of uniformity and equality, the latter provision is to be preferred as the just and ultimate end to be attained. [citations omitted].

217 Va. at 207, 228 S.E.2d at 117, *quoting* Skyline Swannanoa, Inc. v. Nelson County, 186 Va. 878, 881, 44 S.E.2d 437, 439 (1947).

72. VA. CODE ANN. § 58-760 (Cum. Supp. 1976).

73. The 100% fair market value assessment requirement of article X, § 2, has long been circumvented by allowing assessments at a percentage of fair market value. *See, e.g.*, R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976); Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 101 S.E.2d 571 (1958). See discussion in section III *infra*.

74. R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976). See note 71 *supra*.

75. It is much more difficult to ascertain the true value of real estate than the traditional "willing buyer-willing seller" concept would seem to indicate. See section III A *infra* for a compilation of the evidence considered when trying to determine the fair market value of property.

76. *See* Smith v. City of Covington, 205 Va. 104, 135 S.E.2d 220 (1964).

create unequal tax burdens in derogation of uniformity.[77] But the selective reassessment of parcels of similarly situated real estate when their value has changed dramatically in relation to the other property will be upheld as promoting uniformity.[78] A uniform mode of assessment is, therefore, any procedure whereby a "just valuation"[79] of the property in question is achieved. For real estate this "just valuation" is 100% of its fair market value;[80] for tangible personal property it is a fixed percentage of appraised value.[81] Thus, if the tax rate is uniform, the principles required by the constitution, that is, uniformity and assessment at fair market value, are satisfied.[82]

Uniformity in the mode of assessment and in the tax rate is only required within the territorial limits of the taxing authority.[83] Generally, the territorial limits of the taxing authority correspond with the area lawfully prescribed to enjoy the benefits of the tax.[84] Therefore, if a county levies a property tax, any towns located therein are subject to the tax if the benefits from that tax will be enjoyed by the whole county.[85] The same applies to district taxes levied within the various magisterial districts.[86] But there is no violation of uniformity if, for example, the tax rate on a class of property located in one county is greater than that on the same property located in

77. Perkins v. County of Albemarle, 214 Va. 240, 198 S.E.2d 626, *modified and aff'd on rehearing*, 214 Va. 416, 200 S.E.2d 566 (1973).

78. *Id.* 1974 OP. VA. ATT'Y GEN. 394-95; *1973-1974 Annual Survey of Developments in Virginia Law—Taxation*, 60 VA. L. REV. 1607 (1974).

79. R. Cross, Inc. v. City of Newport News, 217 Va. 202, 207, 228 S.E.2d 113, 116 (1976), *quoting* Iverson Brown's Case, 91 Va. 762, 767, 21 S.E. 357, 358-59 (1895).

80. VA. CODE ANN. § 58-760 (Cum. Supp. 1976). Prior to 1977, real estate was commonly assessed at a certain percentage of fair market value, depending on the particular locality's practice. See note 73 *supra* and cases cited therein.

81. Since uniformity is required only within the territorial limits of the taxing authority, each locality is free to assess tangible personal property by any method which produces a just valuation. *E.g.*, R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976).

82. *Id.*

83. VA. CONST. art. X, § 1. *See, e.g.*, Norfolk & W. Ry. v. Commonwealth, 211 Va. 692, 179 S.E.2d 623 (1971); Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970).

84. Watkins v. Barrow, 121 Va. 236, 92 S.E. 908 (1917). The territorial limits of the taxing authority are the actual boundaries of each political subdivision, be it the state, a county or a magisterial district. *Id. See* 1975 OP. VA. ATT'Y GEN. 498.

85. Campbell v. Bryant, 104 Va. 509, 52 S.E. 638 (1905). In Woolfolk v. Driver, 186 Va. 174, 41 S.E.2d 463 (1947), the exemption of the town of Bowling Green from county levies by the Act of Assembly incorporating the town was held to violate the uniformity requirement. 1972 OP. VA. ATT'Y GEN. 96; 1971 OP. VA. ATT'Y GEN. 386.

86. Watkins v. Barrow, 121 Va. 236, 92 S.E. 908 (1917); 1974 OP. VA. ATT'Y GEN. 389 (to avoid violating uniformity, a tax levied within a magisterial district must be for a purpose particular to that district, such as school or road taxes); 1972 OP. VA. ATT'Y GEN. 96 (a town is a special district for school taxes).

another or adjacent county.[87] Taxes are required to be uniform only within each taxing jurisdiction. However, since uniformity applies only to a direct tax on property,[88] statutes allowing municipalities to levy nonproperty taxes applicable only within their limits do not violate the requirement.[89] Such statutes also exempt the municipalities from nonproperty county levies.[90]

The requirement of uniformity, although a significant and necessary[91] limitation on the state's taxing power, is not as formidable as it sometimes appears. First, it is applicable only within each taxing jurisdiction,[92] and secondly, it is required only among the members of a particular class of property, not between classes.[93] In several instances, the further subclassification of property by the legislature has reduced uniformity's applicability even within classes.[94] Thus, the flexibility of the tax structure occasioned by the General Assembly's exercise of its segregation and classification powers is not seriously restricted by the mandate of uniformity, nor by the requirements of the equal protection clause.[95]

D. All Property Must Be Taxed

1. *Introduction*

The Virginia Constitution requires that all property must be taxed and taxed uniformly.[96] The constitution also provides for exceptions from that mandate in article X, sections 1 and 6. Article X, section 1[97] is not an exemption from taxation, but a provision which allows a town or city bringing property within its borders[98] to impose a lower tax rate on the real

87. Tresnon v. Board of Supv'rs, 120 Va. 203, 90 S.E. 615 (1916).

88. *E.g.*, Town of Ashland v. Board of Supv'rs, 202 Va. 409, 117 S.E.2d 679 (1961); Commonwealth v. Whiting Oil Co., 167 Va. 73, 187 S.E. 498 (1936).

89. Va. Code Ann. §§ 58-587.1, -617.2 (Cum. Supp. 1976).

90. *Id.*

91. The requirement of uniformity is significant in that it insures an equal tax burden upon all affected by tax levies, and it is necessary in order to stay within the confines of equal protection.

92. See notes 83-84 *supra.*

93. Va. Const. art. X, § 1. *See* R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976).

94. See notes 53-59 *supra.*

95. U.S. Const. amend. XIV. See notes 44-46 *supra.*

96. Va. Const. art. X, § 1.

97. *See* the discussion of this section in Roanoke v. Hill, 193 Va. 643, 70 S.E.2d 270 (1953); *1970-1971 Survey of Developments in Virginia Law—Taxation*, 57 Va. L. Rev. 1618, 1624, 1625 (1971).

98. The provision applies not only to annexed territory but also to the consolidation of cities or areas. *See* 18 Michie's Jur. *Taxation* § 13 n.19 (Repl. Vol. 1974).

estate located in the new territory than on the real estate located in the original territory of the city or town. A lower tax rate is permitted, however, only if it bears "a reasonable relationship" to the difference in the level of services furnished the two areas.[99] The General Assembly in its enabling legislation limited the duration of this tax reduction to five years from the date of consolidation.[100]

All other exemptions from the requirement that all property be taxed and taxed uniformly are found in article X, section 6. Paragraphs (a), (c) and (f) of section 6 provide the basic boundaries within which this section must be construed. Section 6(a) provides that the only property exempt from taxation is that delineated within that section, and section 6(c) provides that the General Assembly can restrict but not extend the listed exemptions. These provisions have been construed as preventing the General Assembly or any political subdivision of the Commonwealth from exempting property other than that afforded constitutional protection.[101] They have also been construed as preventing a local government from contracting away its right to tax[102] or contracting for the payment of taxes in advance.[103]

Section 6(f) provides for the strict construction of section 6 exemptions. This provision is the constitutional incorporation of a generally accepted principle that taxes are to be construed in favor of the taxpayer and exemptions are to be construed against the taxpayer.[104] It is also in accord with the statement found in *Rivercomb v. Dillard*[105] which requires that the taxpayer bear the burden of showing that his property falls within an exemption. This strict construction requirement is tempered, however, by two other provisions of article X, section 6. The first establishes a "grandfather clause."[106] It states, "all property exempted from taxation on

99. VA. CONST. art. X, § 1. Services mean city water, light, fire protection, police protection, schools or street lights. HOWARD, *supra* note 1, at 1045.

100. VA. CODE ANN. § 15.1-1047.1 (Repl. Vol. 1973).

101. Hollywood Cemetery Co. v. Commonwealth, 123 Va. 106, 96 S.E. 207 (1918); 1973 OP. VA. ATT'Y GEN. 409.

102. City of Bristol v. Dominion Nat'l Bank, 153 Va. 71, 149 S.E. 632 (1929); City of Richmond v. Virginia Ry. & Power Co., 124 Va. 529, 98 S.E. 691 (1919).

Contracts in which a party provides service to a governmental entity for the price of their property taxes are not considered as violating this rule provided the compensation (no taxes) is reasonable in relation to the services provided. 153 Va. 71, 149 S.E. 632 (1929).

103. City of Bristol v. Dominion Nat'l Bank, 153 Va. 71, 149 S.E. 632 (1929).

104. Commonwealth v. Lynchburg Y.M.C.A., 115 Va. 745, 80 S.E. 589 (1914); City of Petersburg v. Petersburg Benevolent Mechanics Ass'n, 78 Va. 431 (1884).

105. 186 Va. 547, 42 S.E.2d 844 (1947). *See also* Memorial Hosp. Ass'n v. County of Wise, 203 Va. 303, 124 S.E.2d 216 (1962).

106. *See* 1972 OP. VA. ATT'Y GEN. 439.

the effective date of this section shall continue to be exempt . . . ."[107] This provision has an ameliorative effect on the strict construction requirement because the exemptions preserved by the "grandfather clause" have historically been liberally interpreted.[108]

The "grandfather clause" preserves the exemptions founded in section 183 of the former constitution;[109] and although the opening language of that section has been interpreted as calling for a rule of strict construction,[110] the Virginia Supreme Court has, since 1914, liberally interpreted the exemptions set out therein.[111] The court in finding a liberal interpretation applicable looked at the history of the exemptions provided for in section 183 and determined that their language was intended to limit the power of the General Assembly to further exempt property and was not intended to limit the exemptions already set out in the section.[112]

The second ameliorative factor in article X, section 6 allows the General Assembly to classify or designate as exempt "property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes."[113] This section gives the legislature the flexibility to explicitly exempt property which might otherwise fall outside the bounds of one of the other exemptions when given a strict construction. It must be noted, however, that any General Assembly action pursuant to this provision must be strictly construed in line with article X, section 6(f).[114]

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107. VA. CONST. art. X, § 6(f). The effective date of this section was the effective date of the Virginia Constitution of 1971, July 1, 1971.

108. Commonwealth v. Lynchburg Y.M.C.A., 115 Va. 745, 80 S.E. 589 (1914). The term "liberal construction" implies that the meaning of a statute will be broadly interpreted and that all doubts will be resolved in favor of the applicability of the provision. The term "strict construction" requires that a statute be followed to the letter. BLACK'S LAW DICTIONARY 386 (4th ed. 1968).

109. VA. CONST. § 183 (1902).

110. Commonwealth v. Trustees Evergreen Burial Park, 176 Va. 9, 10 S.E.2d 495 (1940).

111. *See* Commonwealth v. Lynchburg Y.M.C.A., 115 Va. 745, 80 S.E. 589 (1914). *See also* Cudlipp v. City of Richmond, 211 Va. 712, 180 S.E.2d 525 (1971); Washington Cty. v. Sullins College Corp., 211 Va. 591, 179 S.E.2d 630 (1971); City of Richmond v. Southside Day Nursery Ass'n, 207 Va. 561, 151 S.E.2d 370 (1966); City of Richmond v. United Givers Fund, Inc., 205 Va. 432, 137 S.E.2d 876 (1964); Board of Supv'rs v. Medical Group Foundation, 204 Va. 807, 134 S.E.2d 258 (1964); County of Hanover v. Trustees of Randolph-Macon College, 203 Va. 613, 125 S.E.2d 812 (1962); City of Norfolk v. Board of Supv'rs, 168 Va. 606, 192 S.E. 588 (1937); Board of Supv'rs v. City of Norfolk, 153 Va. 768, 151 S.E. 143 (1930); Commonwealth v. Smallwood Memorial Inst., 124 Va. 142, 97 S.E. 805 (1919); Horsley, *Taxation, 1960-1961 Annual Survey of Virginia Law*, 47 VA. L. REV. 1311, 1312 (1961).

112. Commonwealth v. Lynchburg Y.M.C.A., 115 Va. 745, 80 S.E. 589 (1914).

113. VA. CONST. art. X, § 6(a)(6).

114. Commonwealth v. Progressive Community Club, 215 Va. 732, 213 S.E.2d 759 (1975); 1975 OP. VA. ATT'Y GEN. 484, 505.

Thus, the present state of property tax exemptions under article X, section 6 is a synthesis of the old and the new. The old being those exemptions which existed prior to the adoption of the new constitution and which are preserved by article X, section 6(f) (the "grandfather clause") and codified in section 58-12 of the Code[115] and which have historically been given a liberal interpretation.[116] The new being the explicit exemptions of the new constitution and the code sections promulgated thereunder, both of which must be given a strict construction.[117]

Because of this synthesis the process of determining whether a piece of property is exempt requires two steps. First an examination of section 58-12 of the Code is necessary to see if the property was traditionally exempted by the liberally-interpreted provisions of the former constitution. If not, the explicit exemptions of the new constitution must be examined, while being mindful that they will be strictly construed.[118]

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115. VA. CODE ANN. § 58-12 (Repl. Vol. 1974).

116. *See* cases cited note 111 *supra.*

117. VA. CONST. art. X, § 6.

118. The "grandfather clause" and its interaction with the other provisions of the new constitution has and still does raise a number of questions. The most pressing of these is what does the "grandfather clause" exempt: does it work only to continue the exemptions accorded specific items of property under the former constitution or does it continue the exemption accorded classes of property under the former constitution. By way of illustration, if property was acquired after the effective date of the new constitution, could the "grandfather clause" exemptions and their liberal interpretation be applied or must one rest his claim for the exemption of the property on the new constitution. The Attorney General has given his opinion that the "grandfather clause" works to continue the exemption of the classes of property (not specific items of property) exempt under the former constitution. 1972 OP. VA. ATT'Y GEN. 438-40; *1971-1972 Survey of Developments in Virginia Law—Taxation*, 58 VA. L. REV. 1338, 1344 (1972).

The second question is how do the "grandfather clause" exemptions as embodied in VA. CODE ANN. § 58-12 (Repl. Vol. 1974), *as amended* (1976 Cum. Supp.) and the exemptions set out in the new constitution interact. Section 58-12(1)-(4) and article X, § 6(a)(1)-(4) are essentially similar provisions. Therefore, do they have independent existence or does one operate to expand or restrict the other?

It was held in Commonwealth v. City of Richmond, 116 Va. 69, 81 S.E. 69 (1914), that section 183(a) of the former constitution, which exempted property of the Commonwealth and its political subdivisions, was self-operative and, hence, did not require any legislation to make it effective. If this is also true of the provisions in the new constitution, then these provisions should form a basis for exemptions independent of § 58-12. The Attorney General in discussing article X, § 6(a)(4), has said that it is self-operative and stands as a separate exemption. Thus article X, § 6(a)(4) and section 58-12(4) stand as two separate exemptions. 1972 OP. VA. ATT'Y GEN. 438-40. The question arose in response to these particular provisions because one, the constitution, does not require educational institutions to be incorporated while the other does.

2. *Traditional Exemptions*

a. Property of the Commonwealth and Its Political Subdivisions

Property owned directly or indirectly by the Commonwealth or any of its political subdivisions is exempt from taxation.[119] The exemption includes not only property owned by the state, but also property held for the benefit of the state.[120] The General Assembly has the power to create political subdivisions within the state, and the property of these entities is also exempt: *i.e.*, housing authorities,[121] port authorities,[122] turnpike authorities.[123] The exemption provisions make no reference to the exemption of federal property lying in Virginia, but it has been held to be exempt unless Congress consents to its taxation.[124]

b. Property of Churches or Religious Bodies

The objective of this exemption[125] is to relieve from the burden of taxation those properties actively being used for religious purposes or as the residence of ministers and the lands adjacent and necessary to their operation. If the property is not essential to the convenient operation of the church or is held for some reason other than religious worship, it is not exempt.[126] However, the intent of this restriction is not to remove the

119. "Property owned directly or indirectly by the Commonwealth, or any political subdivision thereof, and obligations of the Commonwealth . . ." is exempt. VA. CODE ANN. § 58-12(1) (Repl. Vol. 1974). VA. CONST. art. X, § 6(a)(1), contains similar language but also exempts the obligations of any political subdivision of the Commonwealth.

120. Citizen's Foundation v. City of Richmond, 207 Va. 174, 148 S.E.2d 811 (1966). For example, an automobile leased to the Commonwealth is taxable since it is held for the benefit of the owner and not the state. 1974 OP. VA. ATT'Y GEN. 384.

121. Mumpower v. Housing Authority, 176 Va. 426, 11 S.E.2d 732 (1940).

122. Harrison v. Day, 202 Va. 967, 121 S.E.2d 615 (1961).

123. City of Richmond v. Petersburg Tpk. Authority, 204 Va. 596, 132 S.E.2d 733 (1963).

124. Board of Supv'rs v. Stanley Bender & Associates, Inc., 201 F. Supp. 839 (E.D. Va. 1961). *See* HOWARD, *supra* note 1, at 1075 n.13.

When determining the vulnerability of property to Virginia property taxation, cognizance must be taken of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. App. § 574 (1968), which exempts the personal property of servicemen assigned in one state and domiciled in another. 1973 OP. VA. ATT'Y GEN. 406.

The question has also arisen whether property located in Virginia and owned by a foreign country is exempt. It has been opined as taxable unless a treaty of the United States exempts it. 1974 OP. VA. ATT'Y GEN. 402-03.

125. VA. CODE ANN. § 58-12(2)(Repl. Vol. 1974). Article X, § 6(a)(2), provides essentially the same exemption.

Pursuant to article X, § 6(a)(6), the General Assembly has enacted VA. CODE ANN. § 58-12.24 (Cum. Supp. 1976) which provides for the exemption of any church property when "used exclusively on a nonprofit basis for charitable, religious or educational purposes . . . ." *Id.*

126. Under VA. CODE ANN. § 58-12.24 (Cum. Supp. 1976), church-owned property can be

exemption if the church is put to some other use not in conflict with the objective of the exemption. This objective finds its definition in the terms of the exemption and the interpretations of those terms.

The exemption requires that the property be occupied, "owned and held by churches," and be "wholly and exclusively used" for religious worship or for the minister's residence.[127] These terms have been defined to a large extent by determinations as to what they do not cover. Property is not occupied or held exclusively for religious services if it is lying vacant or covered by trees which are eventually to be harvested for the benefit of the church.[128] A private property owner on whose land a church is built cannot claim an exemption because the property is not church-owned.[129] The Attorney General has given numerous opinions on the exemption of church-owned property, and in finding many kinds of property not within the exemption, he has often relied on the requirement that the property be occupied and used for religious worship.[130]

The exemption also requires that the property be used exclusively for religious worship.[131] However, the exclusive requirement has been one area where the liberal interpretation accorded "grandfather clause" exemptions has been most striking. The court has said that the word exclusively "has never been considered an absolute term in construing property tax exemption provisions."[132] This construction allows a church to host other activities incident to its primary activity of religious services without having to be concerned with forfeiting the exemption.[133]

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used for certain other charitable activities and still be exempt. *See* note 125 *supra.*

127. VA. CODE ANN. § 58-12(2) (Repl. Vol. 1974). The meaning of the phrase "the minister's residence," found in this section has been a point of some dispute. The phrase has been interpreted to cover the residence of a Bishop Coadjuter who did not have his own church (Cudlipp v. City of Richmond, 211 Va. 712, 180 S.E.2d 525 (1971)) and the church-owned residence of assistant ministers. 1975 OP. VA. ATT'Y GEN. 487; *1970-1971 Survey of Developments in Virginia Law—Taxation*, 57 VA. L. REV. 1618, 1632-35 (1971).

128. 1975 OP. VA. ATT'Y GEN. 494-95, 504-06; 1974 OP. VA. ATT'Y GEN. 356-57, 391.

If the property is not presently being used for exempt purposes, but there are plans to devote it to exempt purposes within a reasonable period of time in the future the property is exempt. City of Richmond v. Richmond Memorial Hosp., 202 Va. 86, 116 S.E.2d 79 (1960). *See* 54 A.L.R.3d 9 (1974) for a general discussion of land held prospectively for charitable uses.

129. 1972 OP. VA. ATT'Y GEN. 403.

130. The following property is taxable: motor vehicles used by churches to transport members to and from church (1974 OP. VA. ATT'Y GEN. 384); church-owned property used as a residence by a member of the custodial staff (1974 OP. VA. ATT'Y GEN. 359); a church-owned gas station which did not show a profit (1974 OP. VA. ATT'Y GEN. 358).

131. VA. CODE ANN. § 58-12(2) (Repl. Vol. 1974).

132. City of Richmond v. Richmond Memorial Hosp., 202 Va. 86, 91, 116 S.E.2d 79, 82 (1960).

133. Church property is exempt even though incidentally used as nursery school, 1974 OP.

The above comments refer to the exemption of religious property as it stood under the former constitution. Article X, section 6(a)(6) of the new constitution gives the General Assembly the power to designate and classify certain property as exempt. Pursuant to this power the General Assembly has extended the exemption of church-owned property beyond the church and the minister's residence to all church-owned property used for "charitable, religious or educational purposes."[134]

c. Cemeteries and Private Burial Grounds

Cemeteries and private burial grounds and endowment funds for their care are exempt if not operated for profit.[135] Cemeteries which are operated for profit may not set up a fund or trust devoted to the general maintenance and care of the cemetery and thereby escape the taxation of those funds.[136]

d. Institutions of Learning

The test for determining whether an institution's property is exempted by this classification[137] is found in the requirement that the property be owned[138] by an "institution of learning"[139] and be "primarily used for liter-

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VA. ATT'Y GEN. 358; or for art and music lessons, 1975 OP. VA. ATT'Y GEN. 452.

134. See notes 125 & 126 *supra. See also* 1974 OP.VA. ATT'Y GEN. 398-99, which describes the practical operation of this statute.

135. VA. CODE ANN. § 58-12(3) (Repl. Vol. 1974).

Article X, § 6(a)(3) of the new constitution uses almost identical language, except it makes no reference to endowment funds. This omission does not, however, reflect the intent of the legislature to subject them to taxation. HOWARD, *supra* note 1, at 1078.

136. Commonwealth v. Trustees of Evergreen Burial Park, 176 Va. 9, 10 S.E.2d 495 (1940).

137. VA. CODE ANN. § 58-12(4) (Cum. Supp. 1976). Besides institutions of learning, this section also exempts:

> Property owned by public libraries, law libraries of local bar associations when the same are used or available for use by a State court or courts or the judge or judges thereof, medical libraries of local medical associations when the same are used or available for use by State health officials, . . .

The major difference between Code § 58-12(4) and its companion constitutional section, article X, § 6(a)(4) as noted in note 118 *supra,* is that the new constitution does not require that the institution be incorporated.

The General Assembly has expanded the general area of this exemption by enacting VA. CODE ANN. § 58-12.25 (Cum. Supp. 1976). This section exempts the property of nonprofit incorporated alumni associations and nonprofit incorporated charitable foundations when the total income derived from their operation is used for library, scientific or educational purposes.

138. So long as the property is owned by the institution claiming the exemption and meets the other requisites for exemption, the exemption is not lost because the property was used and maintained by another charitable organization. Saint Andrew's Ass'n v. City of Richmond, 203 Va. 630, 125 S.E.2d 864 (1962).

139. VA. CODE ANN. § 58-12(4)(Cum. Supp. 1976).

ary, scientific or educational purposes or purposes incidental thereto."[140] The Attorney General has opined that an educational institution "must be something like a college, and have a faculty, a student body, and a prescribed course of study."[141] The qualification of "primarily" has been interpreted as requiring that the "dominant purpose" of the institution be the pursuit of exempt activities.[142] When making such a determination of purpose, the court has examined, in detail, the objectives, activities, program of instruction, facilities and staff of the institution.[143]

Once an institution has qualified as an educational institution, the court has been very liberal in interpreting the term "incidental thereto."[144] The court has determined that the recruitment of students,[145] the retention of faculty[146] and the planned expansion of the school[147] are activities incidental to the primary purpose of an educational institution. The court has indicated the liberality with which it will examine educational exemption claims by indicating that it would follow a good faith determination by an institution's officers as to whether or not a piece of property is incidental to educational purposes.[148]

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140. *Id.*

141. 1974 OP. VA. ATT'Y GEN. 364; 1972 OP. VA. ATT'Y GEN. 81; 1969 OP. VA. ATT'Y GEN. 228.

142. County of Hanover v. Trustees of Randolph-Macon College, 203 Va. 613, 616, 125 S.E.2d 812, 815 (1962). *See 1971-1972 Survey of Developments in Virginia Law—Taxation*, 57 VA. L. REV. 1618, 1633-35 (1971).

143. City of Richmond v. Southside Day Nursery Ass'n, 207 Va. 561, 151 S.E.2d 370 (1966). *See* Harris & Russell, *Taxation, 1966-1967 Annual Survey of Virginia Law*, 53 VA. L. REV. 1844, 1845-46 (1967). *Contra*, Commonwealth v. Progressive Community Club, 215 Va. 732, 213 S.E.2d 759 (1975). The court held that a day-care center was not an educational institution for sales tax exemption purposes. The court distinguished the case from *Southside Day Nursery*, by pointing out the strict construction requirement of article X, § 6(f) and the sales tax context.

144. VA. CODE ANN. § 58-12(4)(Cum. Supp. 1976).

145. Washington County v. Sullins College Corp., 211 Va. 591, 179 S.E.2d 630 (1971) (college-owned property used as a girls' summer camp to promote the recruitment of students was held to be incidental to the primary purposes of the school even though revenue was produced). *See 1970-1971 Survey of Developments in Virginia Law—Taxation*, 57 VA. L. REV. 1618, 1633-35 (1971).

146. Washington County v. Sullins College Corp., 211 Va. 591, 179 S.E.2d 630 (1971); County of Hanover v. Trustees of Randolph-Macon College, 203 Va. 613, 125 S.E.2d 812 (1962)(property bought by the college for future expansion and for resale to faculty members for housing construction in an attempt to tie the faculty to the school was a use incidental to the primary purpose of the school). See 1972 OP. VA. ATT'Y GEN. 392-93.

147. County of Hanover v. Trustees of Randolph-Macon College, 203 Va. 613, 125 S.E.2d 812 (1962).

148. *Id.* The broad reading given the educational exemption is also shown in an Attorney General opinion exempting school-owned motor vehicles. 1974 OP. VA. ATT'Y GEN. 361.

e. Religious Associations and Hospitals Conducted as Charities

This section[149] is designed to cover a number of charitable activities which are not conducted for profit. The term "charitable" as used in this provision has been defined by the court as "liberal in benefactions to the poor, beneficient," "organized and conducted to perform some service of public good or welfare."[150] As noted previously, the term "exclusively" has never been construed as an absolute with reference to exemptions.[151] In place of the phrase "exclusively for charity," the court has adopted a primary purpose or primary objective test.[152] This test calls for a review of the institution's reason for being, and if its objective as found in its corporate charter propounds a principle consonant with the court's definition of charitable and the institution is not operated for profit the exemption obtains.[153] For example, if the objective of a hospital is to operate on a nonprofit basis and to serve the needy, it does not lose its exemption under this provision because a majority of its patients are paying patrons[154] or because it obtains operating funds from a nonexempt source,[155] provided that all of the funds received go to the maintenance of the institution.

f. Benevolent or Charitable Associations

Pertinent to an analysis of this provision[156] are many of the principles already enumerated: charitable,[157] exclusive[158] and occupied.[159] The major

149. VA. CODE ANN. § 58-12(5) (Cum. Supp. 1976). This section does not have a direct equivalent in the new constitution. However, under article X, § 6(a)(6) the General Assembly can exempt similar types of activities.

150. City of Richmond v. United Givers Fund, 205 Va. 432, 436, 137 S.E.2d 876, 879 (1964) *quoting* 84 C.J.S. *Taxation* § 282 (1954).

151. *See* note 132 *supra* and accompanying text.

152. City of Richmond v. Richmond Memorial Hosp., 202 Va. 86, 116 S.E.2d 79 (1960). *See* Horsley, *Taxation, 1960-1961 Annual Survey of Virginia Law*, 47 VA. L. REV. 1311, 1313 (1961). *See also* 1975 OP. VA. ATT'Y GEN. 454-55 and 1974 OP. VA. ATT'Y GEN. 365, which applied the primary purpose test to a rescue mission and a religious retreat.

The primary objective of a property owner claiming an exemption under article X, § 6 is also used to determine the susceptibility of the owner to taxes when the property is used as a source of profit or revenue. *See* note 191 *infra*.

153. City of Richmond v. Richmond Memorial Hosp., 202 Va. 86, 116 S.E.2d 79 (1960).

154. *Id.* Annot., 37 A.L.R.3d 1191 (1971).

155. Memorial Hosp. Ass'n v. County of Wise, 203 Va. 303, 124 S.E.2d 216 (1962).

156. VA. CODE ANN. § 58-12(6) (Repl. Vol. 1974). This section does not have a direct equivalent in the new constitution. However, under article X, § 6(a)(6) the General Assembly can exempt similar types of activities.

The section is restricted by VA. CODE ANN. § 58-13 (Repl. Vol. 1974) which prevents any association or corporation which promises to pay money on account of death or sickness from taking advantage of this provision or any of the other exemptions in § 58-12.

157. *See* note 150 *supra* and accompanying text.

158. *See* notes 130 and 152 *supra* and accompanying text.

159. *See* note 128 *supra* and accompanying text.

interpretational problems center on the meaning of "benevolent or charitable association" and "used . . . for lodge purposes or meeting rooms."[160] Prior to *City of Richmond v. United Givers Fund*,[161] this exemption had not been discussed by the court in detail, and there was dictum that this exemption only applied to fraternal orders.[162] However, the court in *United Givers Fund*[163] applied a liberal interpretation to the exemption and concluded that the exemption was for the benefit of an association whose primary purpose was charity even though it extended its charitable services indirectly.[164] The court also concluded that if the primary activity of an association is charitable, the association does not forfeit its exemption if its property is used for offices in support of its charitable activities or if the property is used by other charitable groups.[165]

The Attorney General, in determining whether an organization's primary purpose is charitable, will examine its activities, charter and bylaws.[166] The most notable groups excluded by the primary purpose test are organizations whose primary purpose has been deemed social rather than benevolent or charitable, such as social fraternities, recreation associations and social clubs.[167] It should be noted that an association whose primary activity is charitable does not lose its exempt status by promoting some social functions.[168]

9. Miscellaneous Exemptions

The remaining paragraphs of Code section 58-12 provide for the exemption of the property of a variety of specific organizations exempted under

160. VA. CODE ANN. § 58-12(6)(Repl. Vol. 1974).

161. 205 Va. 432, 137 S.E.2d 876 (1964).

162. *Id.*

163. The United Givers Fund (UGF) challenged the taxation of their building. The city in arguing for the tax claimed that UGF did not directly engage in charitable activities and argued that the property was not used exclusively for lodge purposes or meeting rooms. The court gave the statute a liberal interpretation and said that charitable service could be indirect (through other agencies) as well as direct and that once this primary purpose test was met the other activities were incidental.

164. 205 Va. at 436, 137 S.E.2d at 879.

165. *Id.* The Attorney General relied on *United Givers Fund* in opining that the property of a national association dedicated to the improvement of secondary education was exempt. 1975 OP. VA. ATT'Y GEN. 483.

166. 1974 OP. VA. ATT'Y GEN. 361.

167. 1974 OP. VA. ATT'Y GEN. 359 (recreation associations or community clubs); 1972 OP. VA. ATT'Y GEN. 415 (fraternities); 1970 OP. VA. ATT'Y GEN. 261 (social clubs).

The General Assembly has the power to exempt community and recreation association property under VA. CONST. art. X, § 6(a)(6) (1974 OP. VA. ATT'Y GEN. 359) and has done so. *See* VA. CODE ANN. §§ 58-12.16 to .58 (Cum. Supp. 1976).

168. 1974 OP. VA. ATT'Y GEN. 361.

the former constitution.[169] Also provided for is the exemption of property of nonprofit corporations organized for the establishment and maintenance of a museum or library.[170]

3. *New Exemptions*[171]

a. Intangible Personal Property

The exemption of intangible personal property[172] is not new to the Commonwealth, but it is new to its constitution.[173] The exemption of intangible personal property had been described as "a practice already existing by legislation without clear constitutional authority."[174] Consequently, this constitutional provision served merely a house cleaning function by giving the practice constitutional mandate.

b. Property Used for Religious, Charitable, Patriotic, Historical, Benevolent, Cultural, or Public Park and Playground Purposes

This subparagraph allows the General Assembly by a three-fourths vote of each house to exempt property used by its owner for one of the purposes stated above.[175] Although this exemption does not have a direct ancestor in section 183 of the former constitution, the exemption is not entirely new. Many of the types of activities which can be exempted pursuant to this constitutional power were exempted by section 183 and still have life in

169. VA. CODE ANN. § 58-12(7), (8), (10), (12), (13), (15)-(17) (Repl. Vol. 1974).

VA. CODE ANN. § 58-12 (Repl. Vol. 1974) includes all of the exemptions recognized by the General Assembly as having a foundation in section 183 of the former constitution and in effect on the effective day of the new constitution. However, some of these exemptions were found to be constitutionally infirm by the Attorney General and, therefore, were not recognized as legitimate in his opinions. 1974 OP. VA. ATT'Y GEN. 366 (community clubs); 1972 OP. VA. ATT'Y GEN. 413 (property of the Boy Scouts); and several others. *See also* Horsley, *Taxation, 1964-1965 Annual Survey of Virginia Law,* 51 VA. L. REV. 1444, 1464 (1965).

The General Assembly subsequently acted and the offending exemptions were removed. VA. CODE ANN. § 58-12 (Cum. Supp. 1976). Most of these exemptions were not lost, however, because the General Assembly pursuant to VA. CONST. art. X, § 6(a)(6) gave them a new foundation. See VA. CODE ANN. § 58-12.20 to .34 (Cum. Supp. 1976).

170. VA. CODE ANN. § 58-12(7) (Cum. Supp. 1976).

171. This means either exemptions not contemplated in the former constitution or exemptions carried over from the former constitution in a substantially different form.

172. VA. CONST. art. X, § 6(a)(5). The General Assembly has acted pursuant to this provision to provide for the exemption of the intangible personal property or money of professions regulated by law, farmers and nurserymen (VA. CODE ANN. § 58-413 (Repl. Vol. 1974)); railway companies (*id.* § 58-516.1); telegraph and telephone companies (*id.* § 58-578); pipeline transmission companies (*id.* § 58-593); water, heat, light and power companies (*id.* § 58-603 (Cum. Supp. 1976)).

173. HOWARD, *supra* note 1, at 1080.

174. *Id.*

175. VA. CONST. art. X § 6(a)(6).

section 58-12 of the Code. As a result, many of the cases and opinions interpreting the meaning of these terms can serve as a guide for defining the limits of legislative action under this provision.[176]

This exemption is the key to obtaining an exemption for property which falls outside the limits of the other exemptions. The General Assembly has acted pursuant to this provision to exempt the property of fifty-five different organizations or classes of property.[177]

c. Real Property of the Elderly

This provision empowers the General Assembly to pass enabling legislation that gives to local governments the right to exempt or defer the real property taxes of persons over sixty-five years of age and of limited means.[178] The provision has safeguards to prevent its use by persons capable of paying: the taxpayer claiming the exemption must own and occupy the property; it must be his sole dwelling; and he must be bearing a substantial tax burden.[179] The General Assembly in its enabling legislation[180] prescribed a detailed formula for determining whether the taxpayer is bearing a substantial tax burden.[181] This exemption has not been the subject of litigation, but the Attorney General has given a number of opinions affecting its application.[182]

d. Pollution Control Equipment and Household Goods and Personal Effects

The remaining two exemptions in article X, section 6, allow the General Assembly by general law either to exempt directly or to give to localities the right to exempt pollution control equipment[183] and household goods

176. Although the case law and Attorney General Opinions can aid one in interpreting the meaning of such terms as charitable or religious, it must be remembered that the terms of this provision must be strictly interpreted in line with the requirement of VA. CONST. art. X, § 6(f).

177. See VA. CODE ANN. §§ 58-12.2 to .58 (Cum. Supp. 1976). Several of these exemptions have already been discussed. *See* notes 125 and 137 *supra* and accompanying text.

178. VA. CONST. art. X, § 6.

179. *Id.*

180. VA. CODE ANN. § 58-760.1 (Cum. Supp. 1976). *See 1970-1971 Survey of Developments in Virginia Law—Taxation*, 57 VA. L. REV. 1618, 1622, 1623 (1971).

181. 1976 OP. VA. ATT'Y GEN. 347 (discussion of net worth criteria); 1976 OP. VA. ATT'Y GEN. 397 (discussion of the applicability of net worth tests to relatives living within the household). *See* VA. CODE ANN. § 58-760.1 (Cum. Supp. 1976).

182. 1975 OP. VA. ATT'Y GEN. 493 (house trailers which qualify as real estate fall within this provision); 1975 OP. VA. ATT'Y GEN. 468 (the provision cannot serve as rent relief enabling legislation); 1974 OP. VA. ATT'Y GEN. 401 (discusses the definitions of income as prescribed in the statute).

183. VA. CONST. art. X, § 6(d). *See 1971-1972 Survey of Developments in Virginia Law—Taxation*, 58 VA. L. REV. 1338, 1344 (1972).

and personal effects.[184] The General Assembly has acted pursuant to both exemptions and has given localities the option of providing for these exemptions.[185]

4. *Loss of Exemption*

Article X, section 6, gives the General Assembly two tools with which to lessen the impact of exemptions. The more restricted of the tools is a constitutional provision allowing the General Assembly to authorize local governments to impose a service charge on the owners of exempt property being supplied services by the locality.[186] The General Assembly has passed enabling legislation pursuant to this section allowing the imposition of service charges on all classes of exempt property except churches and the residences of ministers "and property used or operated exclusively for private educational or charitable purposes and not for profit other than faculty and staff housing of any such educational institution."[187]

The second and much broader tool is the power of the General Assembly to restrict or condition exemptions.[188] The most significant restriction enacted pursuant to this power[189] provides for the taxation of otherwise exempt property, not belonging to the Commonwealth, which is used as a source of income or revenue.[190]

A concise statement of the test for determining whether a piece of property is used as a source of income or profit is presented in *County of Hanover v. Trustees of Randolph-Macon College:*[191]

184. VA. CONST. art. X, § 6(e). A provision allowing the exemption of household goods and personal effects was in the former constitution (1902) but it was not listed with the other exemptions. VA. CONST. § 169 (1902).

185. VA. CODE ANN. § 58-16.3 (Repl. Vol. 1974) gives to localities the option to exempt or partially exempt pollution control equipment. *Id.* § 58-829.1 gives localities the option to exempt all or some of the classes of personal effects and household goods listed therein.

186. VA. CONST. art. X, § 6(g). *See 1971-1972 Survey of Developments in Virginia Law—Taxation*, 58 VA. L. REV. 1338, 1343 (1972); *1970-1971 Survey of Developments in Virginia Law—Taxation*, 57 VA. L. REV. 1618, 1623 (1971).

187. VA. CODE ANN. § 58-16.2 (Cum. Supp. 1976). *See* 1973 OP. VA. ATT'Y GEN. 444.

188. VA. CONST. art. X, § 6(c).

189. VA. CODE ANN. § 58-14 (Repl. Vol. 1974).

190. *Id.* This section allows for the partial exemption of a building if part of it is used for revenue generating purposes and part for purposes exempt under *id.* § 58-12 (Cum. Supp. 1976). *Id.* § 58-16 (Repl. Vol. 1974) specifies the manner in which the building is to be assessed if the building is used for both revenue producing purposes and exempt purposes.

191. 203 Va. 613, 617, 125 S.E.2d 812, 815 (1962). Questions concerning the applicability of § 58-14 have arisen in response to all of the different classes of exemptions.

Commonwealth Property: "Only property not belonging to the state, which is otherwise exempt, loses its exempt status when it is leased or becomes a source of revenue or profit

> [I]f the use . . . of the property has direct reference to the purposes for which the institution was created, and tends immediately and directly to promote these purposes, it is then within the exemption provisions of the Constitution although revenue or profit is derived therefrom as an incident to its use.

The test is best discussed within a factual frame of reference. In *Commonwealth v. Lynchburg Y.M.C.A.*,[192] it was contended that the Y.M.C.A.'s property should be taxed because the rental of rooms for a fee made the property a source of revenue. The court said that if the primary objective of the Y.M.C.A. in having the rooms and renting them was to receive income or revenue, the property was taxable, and it would be taxable even though the revenue went to finance the Y.M.C.A.'s charitable projects.[193] However, if the dominant purpose for the rooms was not to

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. . . ." Citizens Foundation v. City of Richmond, 207 Va. 174, 181, 148 S.E.2d 811, 816 (1966).

Political Subdivisions of the Commonwealth:

> [A]ll property lawfully owned and held by cities and towns for governmental purposes, though a source of revenue, . . . used for municipal purposes by the city, the dominant purpose in the use having direct references to the purposes for which the property is authorized by law to be owned and held, and tends immediately and directly to promote those purposes, is exempt . . . .

Commonwealth v. City of Richmond, 116 Va. 69, 80-81, 81 S.E. 69, 73 (1914). In Board of Supv'rs v. City of Norfolk, 153 Va. 768, 151 S.E. 143 (1930), the court determined that city owned land surrounding the city's reservoir served primarily as a buffer zone against pollution and the revenue derived from the lease of the land to farmers was only incidental to the main purpose of protecting the reservoir.

With reference to public utilities owned by one political subdivision and located in another, see VA. CODE ANN. § 58-19 (Repl. Vol. 1974). This section provides for the manner in which the property is to be taxed if it is determined that the revenue generated by the facility is not incidental to its primary purpose but is in fact substantial. *See also* 1974 OP.VA. ATT'Y GEN. 399-400; 1972 OP. VA. ATT'Y GEN. 422-24.

The taxation of government property used as a source of revenue is also discussed in City of Norfolk v. Board of Supv'rs, 168 Va. 606, 192 S.E. 588 (1937); City of Newport News v. Warwick County, 159 Va. 571, 166 S.E. 570 (1932); 1972 OP. VA. ATT'Y GEN. 415.

Religious Exemptions: *see* the Attorney General Opinions cited in note 130 *supra.*

Educational Exemptions: Washington Cty. v. Sullins College, 211 Va. 591, 179 S.E.2d 630 (1971); County of Hanover v. Trustees of Randolph-Macon College, 203 Va. 613, 125 S.E.2d 812 (1962); Commonwealth v. Smallwood Memorial Inst., 124 Va. 142, 97 S.E. 805 (1919); Commonwealth v. Trustees of Hampton Inst., 106 Va. 614, 56 S.E. 594 (1907); 1972 OP. VA. ATT'Y GEN. 392.

Charitable Property: Board of Supv'rs v. Medical Group Foundation, Inc., 204 Va. 807, 134 S.E.2d 258 (1964); Memorial Hosp. Ass'n v. County of Wise, 203 Va. 303, 124 S.E.2d 216 (1962); City of Richmond v. Richmond Memorial Hosp., 202 Va. 86, 116 S.E.2d 79 (1960); Commonwealth v. Lynchburg Y.M.C.A., 115 Va. 745, 80 S.E. 589 (1913); 1974 OP. VA. ATT'Y GEN. 363, 364, 390, 391.

192. 115 Va. 745, 80 S.E. 589 (1913).

193. *Id.*

provide a source of income but was a method of promoting the charitable objectives of the organization, in this instance surrounding young men and boys with "Christian influence,"[194] the property was exempt even though some revenue was produced.[195]

An alternative definition of this test is: if the property is principally used for an exempt purpose, and the income is not substantial after deducting from gross income all applicable expenses, the property is exempt.[196] However, if the property is not used for the purpose for which the exempt organization was created but is used with a profit motive in mind, the property is taxable.[197]

The General Assembly in another effort to tax all property not used for exempt purposes has provided for the taxation of a leaseholder's interest in property otherwise exempt from taxation.[198] Usually when a piece of property is leased it is a source of revenue or profit not incident to an exempt purpose and thus taxable under section 58-12. But there are two instances when property can be leased and remain tax exempt for its owner. The first instance is the lease of Commonwealth property, which is specifically excluded from the operation of section 58-14. Thus, state-owned property leased for a fair consideration is not taxable to the Commonwealth, but the leasehold interest of the lessee not engaged in an exempt activity is taxable.[199] The other situation arises when an organization whose property is tax exempt leases its property, but the income generated by the lease is so small as to be only incidental to the main purpose of the organization. This allows the owner of the property to escape taxation of the property and makes the holder of the lease liable to taxation provided his activities are not otherwise exempt.[200]

The General Assembly has enacted several other statutes applicable to tax exemptions. One of these provides that tax exempt property becomes

194. *Id.* at 755, 80 S.E. at 592.

195. *Id.* at 752, 80 S.E. at 591.

196. 1974 Op. Va. Att'y Gen. 390-91. The Attorney General opined that a parking garage owned and operated by a hospital which charged a fee for parking might be exempt if the purpose of the garage was to further the purposes of the charitable hospital and no "substantial profit" was derived. *Id.*

197. Commonwealth v. Trustees of Hampton Inst., 106 Va. 614, 56 S.E. 594 (1907).

198. Va. Code Ann. § 58-758 (Repl. Vol. 1974); *id.* § 58-758.1 (Cum. Supp. 1976).

199. Shaia v. City of Richmond, 207 Va. 885, 153 S.E.2d 257 (1967). Shaia operated a restaurant in space leased from the Commonwealth. The court held it was not an indirect tax on the Commonwealth but a tax on Shaia's leasehold interest. *See* Industrial Dev. Auth. v. Suthers, 208 Va. 51, 155 S.E.2d 326 (1967); 1975 Op. Va. Att'y Gen. 475; Harris & Russell, *Taxation, 1966-1967 Annual Survey of Virginia Law,* 53 Va. L. Rev. 1844, 1845 (1967).

200. 1974 Op. Va. Att'y Gen. 370.

taxable immediately upon its sale to any person not having tax exempt status.[201] The General Assembly has also provided that localities may require owners of tax exempt property to file on a yearly basis a request for continued tax-exempt status, showing the use and ownership of the property.[202]

III. FAIR MARKET VALUE REQUIREMENT

A. DEFINITION

Article X, section 2, of the Virginia Constitution[1] requires that all assessments for tax purposes be made at fair market value.[2] The fair market value requirement applies to local as well as state taxation and to assessments of both real estate and tangible personal property.[3] The constitution authorizes the General Assembly to prescribe how assessments are to be determined.[4]

The fair market value requirement is the only rule provided by law for the assessment of real estate and tangible personal property in Virginia.[5] Determining the fair market value of property is, however, a perpetual problem. The value of land, buildings and tangible personal property is dependent upon many factors which cannot be prescribed by any general rule,[6] and although directed by the constitution to do so, the General Assembly has failed to prescribe any guidelines or methods by which as-

201. VA. CODE ANN. § 58-16.1 (Repl. Vol. 1974).

202. *Id.* § 58-14.2 (Cum. Supp. 1976). The General Assembly has mandated that each locality maintain an inventory and assessment of all tax exempt property. *Id.* § 58-14.1.

1. Formerly VA. CONST. § 169 (1902), this section is unchanged in the 1971 constitution.

2. The constitution allows one possible exception to the fair market value rule. The General Assembly may define and classify land devoted to one of several uses—agriculture, horticulture, forest or open space—provided such classification is in the public interest. The separate classification allows such land to be subjected to lower taxes. See section IV C *infra* for further discussion.

3. Real property is "construed to include lands, tenements, and hereditaments, and all rights and appurtenances thereto and interests therein, other than a chattel interest." VA. CODE ANN. § 1-13.12 (Repl. Vol. 1973). The value of a leasehold interest may also be taxed. See discussion in section II D(4) *supra.*

Tangible personal property is classified but not defined in VA. CODE ANN. § 58-829 to 829.3 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976). *See* R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976). For further discussion of the General Assembly's power to classify see section II B *supra.*

4. VA. CONST. art. X, § 2.

5. Lehigh Portland Cement Co. v. Commonwealth, 146 Va. 146, 135 S.E. 669 (1926).

6. Norfolk & W. Ry. v. Commonwealth, 211 Va. 692, 179 S.E.2d 623 (1971); Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 278 (1970).

sessments are to be made.[7] Because determination of fair market value involves so many factors, the Virginia court in reviewing appeals from assessments tries to ascertain what the true value of the property in question is on the open market,[8] at the present time[9] and taking into consideration the property's present condition.[10]

The factors in evaluating assessments which most significantly affect the true value of each particular type of property are stressed. For example, in assessing commercial property, the character of improvements to the property and the income return of the property might be stressed, while in assessing residential property, design, style and appearance would be the most important factors affecting the property's fair market value[11] as

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7. Nothing in VA. CODE ANN. § 58-864 (Repl. Vol. 1974), which directs local commissioners of the revenue to assess the fair market value of all personal property and other subjects of taxation within his district, on January 1 of each year, or any other code section, prescribes the procedure to be followed by commissioners of the revenue in determining taxable values or prohibits the use of multiple methods. And there is no constitutional requirement that such methods be identical. R. Cross, Inc. v. City of Newport News, 217 Va. at 206, 228 S.E.2d at 113. *See* Commonwealth v. Brown, 91 Va. 762, 21 S.E. 357 (1895).

8. Fair market value has most often been defined by the court in terms of the "willing buyer" and "willing seller," as ". . . the price [property] will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it." Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 737, 101 S.E.2d 571, 574 (1958); Seaboard Airline Ry. v. Chamblin, 108 Va. 42, 46, 60 S.E. 727, 729 (1908). *See* 1976 OP. VA. ATT'Y GEN. 440; 1970 OP. VA. ATT'Y GEN. 249.

The court has also recognized that the fair market value of property is its actual value in the market, the price it brings, and not merely its appraised value, the theoretical price, as it was termed in Fruit Growers Express Co. v. City of Alexandria, 216 Va. 602, 609, 221 S.E. 2d 157, 162 (1976). This allows for the lowering of any assessment even if based on normally reliable data when it is shown not to be in conformity with the actual value. Norfolk & W. Ry. Co. v. Commonwealth, 211 Va. 692, 179 S.E.2d 623 (1971); Commonwealth v. Brown, 91 Va. 762 (1895).

9. *See* Fruit Growers Express v. City of Alexandria, 216 Va. 602, 221 S.E.2d 157 (1976); Appalachian Power Co. v. Anderson, 212 Va. 705, 187 S.E.2d 148 (1972).

10. *See* Fruit Growers Express Co. v. City of Alexandria, 216 Va. 602, 221 S.E.2d 157 (1976); Appalachian Power Co. v. Anderson, 212 Va. 705, 187 S.E.2d 148 (1972); Skyline Swannanoa, Inc. v. Nelson Cty., 186 Va. 878, 44 S.E.2d 437 (1947).

Fruit Growers Express is the latest and most detailed pronouncement by the court on the definition of fair market value. The case involved the assessment of a tract of underdeveloped land zoned for heavy industrial use. The land was situated near a main highway and had spur lines connecting it with a main railroad track. The court, analogizing between assessment requirements of article X, section 2 for taxation and condemnation purposes, rejected the land owner's evidence of the value of the land. This valuation was based on first determining the value of the land when the most valuable improvements had been made thereon, and then working backwards to the true value of the land by subtracting the cost of the improvements to be made and expected profit. The court said that this was not an acceptable method of assessing value because

> fair market value is not the theoretical price . . . that a particular purchaser might

residential property. In assessing all tangible properties, and certain forms of real property, the property in question must be assessed according to its highest and best use.[12] None of these factors or any other factor which affects the fair market value of the property in question is conclusive evidence of the property's fair market value; therefore, all such factors must be considered.[13]

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be willing to pay. Rather, fair market value 'is the *present actual value of the land* with all its adaptations to general and special uses, and not its prospective, speculative, or possible value, based on future expenditures and improvements, that is to be considered.' Appalachian Power Co. v. Anderson, 212 Va. 705, 708, 187 S.E.2d 148, 152 (1972).

216 Va. at 609, 221 S.E.2d at 162 (emphasis on original).

11. Certain factors will be useful in determining the fair market value of more than one type of property. These factors would include location and comparable sales date of other like real property within the taxing district, and depreciated reproduction cost for assessing buildings and tangible properties.

12. *See* Norfolk & W. Ry. v. Commonwealth, 211 Va. 692, 179 S.E.2d 623 (1971), where the court rejected the petitioner's argument that the assessment of its track properties and its signal properties should be based on their salvage value. The court held that the highest and best use of the various components — rails, ties, switches and signal equipment — was to an operable railroad and not as scrap or salvage materials. *Accord*, Railway Express Agency, Inc. v. Commonwealth, 199 Va. 589, 100 S.E.2d 785 (1957), *aff'd*, 358 U.S. 434 (1959).

The "highest and best use" factor may be utilized in assessing real property not often bought and sold, since no comparable sales figures would exist for such property. Appalachian Power Co. v. Anderson, 212 Va. 705, 187 S.E.2d 148 (1972) (trailer park); First and Merchants Nat'l Bank v. County of Amherst, 204 Va. 584, 132 S.E.2d 721 (1963) (dam); Richmond, Fredericksburg & Potomac R.R. v. Commonwealth, 203 Va. 294, 124 S.E.2d 206 (1962) (railroad yard).

13. In assessing commercial property, the court has used the following factors as indicia of fair market value: (a) character of improvements, City of Norfolk v. Penn Mut. Life Ins. Co., 162 Va. 101, 173 S.E. 533 (1934); (b) income return or capitalization of income, Appalachian Power Co. v. Anderson, 212 Va. 705, 187 S.E.2d 148 (1972); City of Richmond v. Chesterfield Apt. Co., 206 Va. 22, 141 S.E.2d 703 (1965); Washington County Nat'l Bank v. Washington County, 176 Va. 216, 10 S.E.2d 515 (1940); (c) recent sales of like property in the taxing district, City of Richmond v. Chesterfield Apt. Co., 206 Va. 22, 141 S.E.2d 703 (1965); American Viscose Corp. v. City of Roanoke, 205 Va. 192, 135 S.E.2d 795 (1964); Washington Cty. Nat'l Bank v. Washington County, 176 Va. 216, 10 S.E.2d 515 (1940); (d) depreciated reproduction cost, City of Richmond v. Chesterfield Apt. Co., 206 Va. 22, 141 S.E.2d 703 (1965); American Viscose Corp. v. City of Roanoke, 205 Va. 192, 135 S.E.2d 795 (1964). *But see* Lehigh Portland Cement Co. v. Commonwealth, 146 Va. 146, 135 S.E. 669 (1926).

In assessing residential property the following factors have been relied on by the court: (a) relative values of adjacent lands, Griffin v. Norfolk, 170 Va. 370, 196 S.E. 698 (1938); (b) appraised value of similar properties within the taxing district, and also size, cost, design, style, appearance, availability of use and the economic situation prevailing in the area, Smith v. City of Covington, 205 Va. 104, 135 S.E.2d 220 (1964).

In assessing tangible properties: (a) depreciated reproduction cost, Southern Ry. Co. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970); and (b) original cost less depreciation, Norfolk & W. Ry. v. Commonwealth, 211 Va. 692, 179 S.E.2d 623 (1971) have been utilized by the court in evaluating assessed values.

B. Breach Of The Requirement

Because of the large number of variables that must be considered, assessing the value of property cannot be an exact science.[14] The value of property is a matter of opinion and the court has realized that equally qualified persons use different methods and stress different factors when assessing property. Until a single method of assessing property is devised, assessments will remain matters of opinion and will necessarily vary.[15] Variation in assessments makes absolute equality of taxation an impossibility, and so the court has construed the fair market value requirement of article X, section 2 in a manner that will avoid any conflict with the article X, section 1 uniformity requirement. As a result, while all assessments should ideally be made at fair market value, any system of assessments that distributes the burden of taxation equally among the properties to be taxed within a single classification will satisfy the requirements of the constitution.[16] If the enforcement of both the standard of fair market value assessments and the standard of uniformity is either impractical or impossible, the standard of uniformity will be preferred as the ultimate end to be obtained.[17] As a consequence, property has generally been under-

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For a more detailed survey of assessment factors utilized by the court, including factors which the author describes as appropriate in assessing special use properties, see Horsley, *Taxation, 1964-1965 Annual Survey of Virginia Law*, 51 VA. L. REV. 1444, 1465-67 (1965).

Certain factors and methods of assessment have been specifically rejected by the court because they do not follow the fair market value requirement. The value of property to the present owner was rejected as an indication of fair market value in Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 101 S.E.2d 571 (1958). This case also rejected the practice of assessing property based on the value of a particular use to which the property was put. *Accord*, City of Waynesboro v. Keiser, 213 Va. 229, 191 S.E.2d 196 (1972); 1970 OP. VA. ATT'Y GEN. 249. Others rejected have been the straight line depreciation method, Lehigh Portland Cement Co. v. Commonwealth, 146 Va. 146, 135 S.E. 669 (1926), and the unit, or Connecticut, method of assessing railroad properties, Norfolk & W. Ry. v. Commonwealth, 211 Va. 692, 179 S.E.2d 623 (1971).

14. Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970).

15. "The estimates of witnesses as to the value of [the property in question] vary, as might have been expected, for after all they are but estimates, and mathematical exactness is an impossible standard." City of Roanoke v. Williams, 161 Va. 351, 354, 170 S.E. 726, 727 (1933). *Accord*, City of Norfolk v. Holland, 163 Va. 342, 175 S.E. 737 (1934); City of Roanoke v. Gibson, 161 Va. 342, 170 S.E. 723 (1933); City of Norfolk v. Snyder, 161 Va. 288, 170 S.E. 721 (1933).

16. [Article X, section 2] of the State Constitution provides that real estate shall be assessed at its fair market value. But this provision is to be read in connection with [article X, section 1], which declares that all taxes on property of the same class shall be uniform. Any system of assessments which taxes all citizens ratably and alike meets the test of our Constitution and of the 14th Amendment to the Federal Constitution. City of Roanoke v. Gibson, 161 Va. 342, 347, 170 S.E. 723, 725 (1933). *Accord*, Skyline Swannanoa, Inc. v. Nelson County, 186 Va. 878, 44 S.E.2d 434 (1947).

17. Skyline Swannanoa, Inc. v. Nelson County, 186 Va. 878, 44 S.E.2d 434 (1947); City of

valued, and the tax rate advanced correspondingly so as to meet the revenue needs of the localities.[18] Usually, a fixed multiple or a certain percentage of fair market value had been taken to reach the assessed value.[19] Undervaluing property did violate the fair market value requirement, and would not have been permissible but for the fact that the court stressed the importance of the article X, section 1 uniformity requirement.[20] Use of a fixed multiple or a percentage of fair market value had the effect of making assessments determined by this method uniform. If every item in a given classification was taxed at 50% or 70%, or even 30% of its fair market value, the tax burden was spread uniformly over the entire class. The fair market value standard was not completely abandoned, however. Assessments, if not made at fair market value, had to at least have been made in relation to the fair market value of the property being taxed.[21]

Norfolk v. Snyder, 161 Va. 288, 170 S.E. 721 (1933); Lehigh Portland Cement Co. v. Commonwealth, 146 Va. 146, 135 S.E. 669 (1926). See Section IIC and note 70 *supra* for further discussion.

18. *See* City of Roanoke v. Gibson, 161 Va. 342, 170 S.E. 723 (1933), in which the court said:

> A municipality cannot function unless it can meet its necessary expenses, and that it can do only through taxation. If in its [equal] distribution it be fair that a certain lot should pay $100, it makes little difference to the owner if the lot be assessed at $5,000 with a two per cent rate or at $10,000 with a one per cent rate.

Id. at 348, 170 S.E. at 725.

19. *See* Fray v. Culpeper County, 212 Va. 148, 183 S.E.2d 175 (1971). *Accord,* Washington County Nat'l Bank v. Washington County, 176 Va. 216, 10 S.E.2d 515 (1940). "[The fair market value] mandate has been so honored in the breach that no assessors feel called upon to apply it in practice." *Id.* at 218, 10 S.E.2d at 516.

The 1869 Constitution read in part, "Taxation . . . shall be *equal and uniform,* and all property, both real and personal, shall be taxed *in proportion to its value,* to be ascertained as prescribed by law." VA. CONST. art. X, § 1 (1869) (emphasis added). Fair market value assessments were the exception and not the rule in 1902 when the constitution was revised, but the legislators felt that assessments based on fair market value were necessary to equally distribute the burden of taxation. Therefore, the 1902 constitution (§ 169) dropped the provision requiring that assessments be proportional to the fair market value and substituted the requirement that assessments be made at fair market value. This provision remained unchanged in the 1971 constitution. *See* II A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1047-52 (1974); Horsley, *Taxation, 1964-1965 Annual Survey of Virginia Law,* 51 VA. L. REV. 1444 (1965).

20. *See* Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 101 S.E.2d 571 (1958); notes 16 and 17 *supra.*

21. *See* Fray v. Culpeper County, 212 Va. 148, 183 S.E.2d 175 (1971). In *Fray* petitioner's land had been assessed at $9,260. County policy was to assess at 25% of fair market value, and so according to the county's estimate the land in question had a fair market value of $37,440. Evidence presented by the petitioner established the value of the land to be between $16,500 and $17,500. Evidence presented by the county placed the value of the land in the neighborhood of $25,000. The court, quoting Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 738, 101 S.E.2d 571, 574 (1958), said that although uniformity is to be preferred

Assessments for both real estate and tangible personal property had been commonly set at approximately 40% of fair market value.[22]

IV. REAL ESTATE

A. General

In 1975, the General Assembly, in a move to end the practice of assessing real estate at less than fair market value, passed legislation requiring all assessments beginning with those effective January 1, 1977, to be made at 100% of fair market value.[1] The action was taken to have real estate assessment practices conform with the article X, section 2 fair market value rule. All real estate need not, however, be assessed at 100% fair market value on January 1, 1977. The General Assembly, by making this requirement applicable only for assessments or reassessments effective after January 1, 1977,[2] provided for the gradual implementation of the 100% fair market value assessment of real estate through the normal machinery of assessments and general reassessments. At present, cities are required to make general reassessments every two years and counties every four years.[3] Local

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when both uniformity and fair market value cannot be obtained, "that does not mean that property in any taxing jurisdiction may be assessed . . . without relation to its fair market value as required by the Constitution." 212 Va. at 149, 183 S.E.2d at 177. The court held that even though the assessed value of $9,260 was less than any other estimate of fair market value presented as evidence, when viewed in relation to the normal 25% assessment ratio, the assessed value was greatly in excess of the property's fair market value, and, therefore, incorrect.

22. *See* Letter from State Tax Commissioner to Commerce Clearing House, Inc., Nov. 9, 1962, 1 CCH STATE TAX REP., VA. 91, ¶ 20-301.20 (1966). The 40% figure represented the average assessment ratio used. Historically assessment percentages had been lowest in rural counties (13-20%) and highest in cities (75-80%). This fixed-percentage method is no longer permissible as to real property. See Section IV *infra*.

1. VA. CODE ANN. § 58-760 (Cum. Supp. 1976).

2. Under the general reassessment system, the levy (the actual tax levied on real estate), which is made as of January 1 of every year pursuant to *id.* § 58-796 (Repl. Vol. 1974), is based on the assessed value of the real estate as determined by the last general reassessment. *See id.* § 58-759. The assessed value remains the same for each tax year until the next general reassessment. The requirement of 100% assessments applies only to assessments and reassessments that become effective after January 1, 1977. *Id.* § 58-760 (Cum. Supp. 1976).

3. Specifically, *id.* § 58-776 (Cum. Supp. 1976), requires that all cities having a population of not more than 12,000 conduct a general reassessment in 1977 and every second year thereafter. Cities with a population in excess of 12,000 are to reassess in 1978 and every second year thereafter.

Id. § 58-778 prescribes a similar system for counties, as illustrated below:

taxing districts may, however, reassess annually if they so choose.[4] Accordingly, if the locality is not required to reassess until after January 1, 1977, this shift to 100% assessment of real estate need not take place.

While ordering conversion to 100% fair market value assessments, the General Assembly sought to prevent the localities which had previously

Population	Year of General Reassessment
not more than 14,000	1977 and every fourth year thereafter
more than 14,000 but not more than 24,000	1978 and every fourth year thereafter
more than 24,000 but not more than 39,000	1979 and every fourth year thereafter
more than 39,000	1980 and every fourth year thereafter

Population figures in each statute are determined from the 1970 census. Sections 58-776 and 58-778 apply only to real estate. Nothing in either statute precludes any city or county from using a system of annual assessments in lieu of the general reassessment system. See note 4 *infra*.

Sections 58-776 and -778 allow the implementation of 100% fair market value assessments to be delayed even longer if a city or county generally reassesses (according to the old system of rotation amended by §§ 58-776 and -778—see *id.* §§ 58-776, -778, -780 (Repl. Vol. 1974) for the statutes prior to the amendments), the year before the year designated within §§ 58-776 and -778. In this instance, such a city or county may wait until the next year designated within the statutes to begin assessing at 100% fair market value. For example, if a county with a population in excess of 39,000 reassesses in 1979 at the old percentage of fair market value it need not generally reassess at 100% fair market value until 1954.

This delay has repercussions on the taxation of public service corporation real property. See section IV B *infra* for further discussion.

4. See VA. CODE ANN. § 58-769.27 (Repl. Vol. 1974) which provides for annual assessments of real estate in lieu of the general reassessment method. Under an annual assessment system, the Commissioner of the Revenue makes an administrative review of all the real estate within the taxing district and may *reappraise* the value of any parcel of real estate whose value has increased out of proportion to the increase in value of other real estate. These appraisals are to be made as of January 1 of each year pursuant to *id.* § 58-796 unless the locality opts for a taxation plan based on the fiscal year, in which case levies, assessments, any appraisals and reappraisals will be made as of July 1 of that year. *See id.* § 58-851.6 (Cum. Supp. 1976); 1974 OP. VA. ATT'Y GEN. 398.

Reappraisals can be based on certain acknowledged "tools" (methods such as "hotspotting" and "continuous maintenance") of the appraisal trade, but such "tools" must be applied throughout the taxing district and not only in certain areas. The real estate may then be reassessed on the basis of the reappraisal and taxed on the basis of the reassessed value. Real estate not reappraised in any year is to be assessed on the basis of its last assessed value as determined by its most current appraised value. With the passage of § 58-760, the language in this section differentiating *reappraisal* from *reassessment* is now mere surplusage, since the appraised value is its fair market value which is the value at which the property must be assessed, when assessed under § 58-760.

The annual assessment system has been held to conform to the uniformity requirement of article X, section 1. However, the court has invalidated particular methods utilized to make annual assessments if the methods work to promote nonuniformity. Perkins v. County of Albemarle, 214 Va. 240, 245, 198 S.E.2d 626, 629, *aff'd on rehearing*, 214 Va. 416, 200 S.E. 2d 566 (1973). *See* 1974 OP. VA. ATT'Y GEN. 394; *1973-1974 Survey of Developments in Virginia Law—Taxation*, 60 VA. L. REV. 1607 (1974).

assessed at less than 100% fair market value from receiving windfall revenues when raising assessment values. It directed that localities, all of which had previously applied a fixed multiple or percentage to fair market value, lower the tax rate accordingly so that the aggregate of real estate tax revenues generated after converting to 100% fair market value assessments would equal the amount of tax generated before conversion.[5]

B. Public Service Corporations

Article X, section 2 requires a central state agency to assess the real estate and tangible personal property of any public service corporation[6] upon which the state levies a franchise, license or similar tax.[7] The State Corporation Commission (SCC) has been designated to make assessments of public service corporation property.[8] Public service corporation property, as all other property, was usually undervalued for tax purposes by generally being assessed at 40% of fair market value.[9] Most localities,

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5. Va. Code Ann. § 58-760 (Cum. Supp. 1976).

6. The words "public service corporation" or "public service company" shall include gas, pipeline, electric, light, heat, power, and water supply companies, sewer companies, telephone companies, telegraph companies, and all persons authorized to transport passengers or property as a common carrier, and shall exclude all municipal corporations, other political subdivisions, and public institutions owned or controlled by the State. Va. Code Ann. § 56-1 (Repl. Vol. 1974).

The real test for a public service corporation lies in the corporation's charter. Public service corporations are chartered for public use and benefit and not solely for the benefit of the individuals owning the corporations. The status of a company as a public service corporation must be determined not by what it actually does, or intends to do, but by what its charter prescribes it must do in the way of public duty. Norfolk Cty. Water Co. v. Wood, 116 Va. 142, 149, 81 S.E. 19, 21 (1914). *Accord*, Fallsburg Cty. v. Alexander, 101 Va. 98, 43 S.E. 194 (1903).

7. Va. Const. art. X, § 2. Determination of whether a tax falls within this provision is difficult. *See* East Coast Freight Lines v. City of Richmond, 194 Va. 517, 74 S.E.2d 283 (1953), where a road tax on gross receipts paid by a motor carrier did not fall within the meaning of the section.

8. Va. Code Ann. § 58-503.1 (Repl. Vol. 1974).

9. The practice of undervaluing public service corporation property was upheld in City of Richmond v. Commonwealth, 188 Va. 600, 50 S.E.2d 654 (1948). Richmond was one of the few localities that taxed real estate and tangible personal property at percentages greater than the 40% figure used by the SCC to assess public service corporation property, and, therefore, stood to lose considerable income if all assessments had to be equal. The court held that in light of the general custom of undervaluation, the 40% figure was acceptable, and that property of a public service corporation was a reasonable and natural classification for tax purposes and could be assessed at lower values than other property without violating uniformity. *Accord*, Richmond, Fredericksburg & Potomac R.R. v. Commonwealth, 203 Va. 294, 124 S.E.2d 206 (1962); 1973 Op. Va. Att'y Gen. 377.

The SCC, however, was not bound by the 40% figure. The Commission could have assessed at any percentage or fixed multiple of fair market value, but adhered to the 40% figure

however, assessed real estate at values less than 40% of fair market value.[10] By assessing real estate and tangible personal property at less than 40% of fair market value, the localities shifted a disproportionate share of the tax burden to public service corporations. In 1966, the General Assembly passed legislation designed to equalize the assessment ratios (percentages of fair market value) used by the SCC and the localities and thereby redress the inequities to which public service corporations had been subjected.[11] Under this legislation, all real estate acquired by public service corporations after January 1, 1966, was to be assessed at the local assessment ratio used to assess non-public service corporation real estate. In addition, beginning on January 1, 1967, one-twentieth of the assessed value of the real estate of public service corporations, as of January 1, 1966, was to be assessed at the local real estate ratio each year so that in twenty years —by 1986—all public service corporation property would be assessed at the local real estate ratio.[12] The General Assembly also passed legislation in 1966 to equalize tax rates. This was to be accomplished in the same manner as assessment ratios were to be equalized.[13]

The 1975 legislation requiring that all real estate assessments be made at 100% fair market value[14] had a great effect on the earlier changes the General Assembly had made regarding the local taxation of public service corporation property. So as not to disrupt the programs initiated in 1966, the 1975 legislation, and further amendments in 1976, amended the 1966 legislation to conform to 100% fair market value assessments.[15] To allow

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probably because it most closely met the percentages used by the localities for assessing property. *See* Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970). *See also* Section III B & note 22 *supra*.

10. See Section III B & note 22 *supra*.

11. *See* Va. Acts of Assembly 1966 ch. 541. This statute is also known as the Bemiss Bill. *See* Norfolk & W. Ry. v. Commonwealth, 211 Va. 692, 179 S.E.2d 623 (1971); Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970); 1975 OP. VA. ATT'Y GEN. 442.

12. Specifically 1966 Va. Acts of Assembly, ch. 541, called for the appraised value of public service corporation property as of January 1, 1966 to be frozen. All additions to public service corporation property acquired after January 1, 1966 were to be assessed at the local assessment ratio for real estate. Each year one-twentieth of the 1966 frozen valuation was to be converted or equalized by assessing it at the local real estate assessment ratio. The remainder—the unequalized portion—was to be assessed at 40% as it was before 1966. The local real estate ratio was to be determined by the most recently published Department of Taxation findings. It is helpful to remember that § 58-512.1 dealt only with assessment *ratios*. *See* Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970); 1975 VA. OP. ATT'Y GEN. 442; 1974 OP. VA. ATT'Y GEN. 388; 1976 OP. VA. ATT'Y GEN. 274.

13. 1966 Va. Acts of Assembly, ch. 539. This section mainly affected tangible personal property of public service corporations. See section V B(4) *infra*.

14. VA. CODE ANN. § 58-760 (Cum. Supp. 1976).

15. *See* 1975 Va. Acts of Assembly, ch. 620 and 1976 Va. Acts of Assembly, ch. 686 & 687

the equalization program to continue, the amendments classified unequalized public service corporation property as a separate classification for tax purposes, to be assessed at the 40% assessment ratio previously in effect.[16] The tax rate on unequalized real property is to be the real property tax rate in force in the locality the year before the locality begins assessing at 100% fair market value.[17] To prevent loss of revenue by the localities on the unequalized property, the tax rate may be adjusted upward so that the effective tax rate on unequalized property will equal the effective rate of tax on non-public service corporation real property.[18]

Because public service corporation property is assessed every year, the value of equalized property will be certified to the localities by the SCC at 100% of fair market value. Localities, however, are not required to reassess property every year.[19] As a result, public service corporations will again be bearing a disproportionate share of the tax levy if assessed at the full current fair market value.[20] To mitigate this problem, the General Assembly has provided that the SCC must certify assessments of equalized property at the true local assessment ratio[21] in any locality that assesses at 100% of fair market value.[22]

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for the text of these amendments. They are codified in VA. CODE ANN. § 58-512.1 (Cum. Supp. 1976).

16. VA. CODE ANN. §§ 58-512.1, -514.2 (Cum. Supp. 1976). The separate classification was necessary to meet the article X, section 1 uniformity requirement. This classification has been held to be constitutional by the Attorney General of Virginia. 1975 OP. VA. ATT'Y GEN. 442.

17. VA. CODE ANN. § 58-514.2 (Cum. Supp. 1976). The rate is frozen until 1986.

18. VA. CODE ANN. § 58-514.2 (Cum. Supp. 1976). See notes 50 & 52 of section V B(4) *infra* for a discussion of nominal and effective tax rates.

19. *See* note 3 *supra* and accompanying text. Public service corporation property is to be assessed as of January 1 of each year regardless of what date the localities assess. *See* VA. CODE ANN. § 58-851.7 (Cum. Supp. 1976); 1976 OP. VA. ATT'Y GEN. 357, 398.

20. This is because property values have a tendency to increase each year and unless reassessed every year, the value taxed will be less than the full current fair market value.

21. VA. CODE ANN. § 58-760 (Cum. Supp. 1976).

22. VA. CODE ANN. § 58-512.1 (Cum. Supp. 1976). True local assessment ratios are determined by the Department of Taxation. Section 58-760 provides that every year before the locality assesses at 100% fair market value, the SCC will assess and certify equalized public service corporation property at the local assessment ratio. After the locality assesses at 100% fair market value, the SCC will assess equalized property at 100% fair market value, and in any subsequent year when the locality does not reassess, § 58-760 provides for the adjustment of taxes on equalized property based on the difference between using 100% assessments and the true local ratio (assessed value/real fair market value). This adjustment is to be applied with interest to the following year's taxes. Interest rates are to be equal to the rate established pursuant to § 6621 of the Internal Revenue Code of 1954, *as amended*. VA. CODE ANN. § 58-760 (Cum. Supp. 1976).

As a result of the legislative changes in 1966, 1975 and 1976, all public service corporation real property will be assessed at 100% fair market value by 1986 and taxed at the local real estate rate.[23] Until 1986, all equalized property, new property and any increase in value since 1966 will be assessed, in essence, at the local assessment ratio and taxed at the local rate. Unequalized real property is to be assessed at 40% of fair market value and taxed at a rate no higher than the effective rate applicable to other real property and no lower than the nominal rate in effect during the taxable year immediately preceding the shift to 100% valuation.[24]

C. Special Land Use Assessments

1. Background

The Virginia constitutional revisions of 1971 permit, for the first time, use value assessment taxation of certain real estate.[25] More specifically, this constitutional amendment allows the General Assembly to define and classify real estate devoted to agricultural, horticultural, forest and open space uses and to authorize relief[26] from the taxes that would otherwise be payable on this real estate. Implementation of this constitutional amendment was contingent upon three things.[27] First, the General Assembly had to determine that it was in the public interest to classify real estate for such purposes.[28] Second, if the General Assembly made this determination, it had to prescribe the limits, conditions and extent of the tax relief.[29] Finally, no such relief could be granted in any locality except by adoption of a concurring local ordinance.[30]

The amendment as codified[31] permits a locality to adopt an ordinance

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23. Va. Code Ann. § 58-514.2 (Cum. Supp. 1976).

24. For a discussion of the taxation of public service corporation tangible personal property see section V B(4) *infra*.

25. Va. Const. art. X, § 2. This provision for use value assessment and taxation is the only constitutionally sanctioned exception to the mandate for fair market value assessment of real estate. As to this need for a constitutional amendment under Virginia's *ad valorem* taxing scheme *see* Howard, *State Constitutions and the Environment*, 58 Va. L. Rev. 193, 204 (1972). *See generally* II A. Howard, Commentaries on the Constitution of Virginia 1054 (1972) (hereinafter cited as Howard).

26. The constitutional provision would seem to imply that relief could come in the way of a total deferral of taxes. As a practical matter, the General Assembly did not grant total deferral, but left it up to the discretion of the localities, within the guidelines of the State Land Evaluation Advisory Committee.

27. Howard, *supra* note 25, at 1055.

28. Va. Const. art. X, §2.

29. *Id.*

30. *Id.*

31. Va. Code Ann. §§ 58-769.4 to -769.16 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976). For a critique of Virginia's preferential land assessment statutes and a comparison with other

for the special assessment of real estate, when such real estate is devoted to a qualifying use.[32] For use-value assessment and taxation purposes, the General Assembly has classified and defined four qualifying uses for real estate—agricultural, horticultural, forest or open space use.[33]

2. *Adoption of the Local Ordinance*

The adoption of a concurring use value assessment ordinance by a locality is completely optional.[34] However, there is one requirement that must be satisfied if such an ordinance is desired: prior to the adoption of such an ordinance, the locality must have enacted a land-use plan.[35] The Land Use Assessment Law, as amended, gives the locality the additional option of adopting "any or all of the four classes of real estate . . ." for use value assessment and taxation purposes.[36]

Once a locality has adopted such an ordinance "property owners"[37] may submit an application[38] for use value assessment taxation to the local assessing officer. The application must be made by November 1 preceding the tax year for which such taxation is sought.[39] Upon application and

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state statutes, see Adamson, *Preferential Land Assessment in Virginia,* 10 U. RICH. L. REV. 111 (1975).

32. VA. CODE ANN. § 58-769.6 (Cum. Supp. 1976).

33. *Id.* § 58-769.5 (Repl. Vol. 1974).

34. *Id.* § 58-769.6 (Cum. Supp. 1976).

35. *Id.* In addition, it would seem that a locality must have adopted a complete land-use plan pursuant to *id.* § 15.1-446. *See* 1974 OP. VA. ATT'Y GEN. 383 (partial land-use plan is not sufficient to fulfill this requirement); 1973 OP. VA. ATT'Y GEN. 417 (zoning plan is not sufficient to fulfill the requirement for a land-use plan). *But see* VA. CODE ANN. § 58-769.6:1 (Cum. Supp. 1976) (a city has the authority to provide for use value assessment in a newly-annexed area while excluding all other areas).

36. VA. CODE ANN. § 58-769.6 (Cum. Supp. 1976).

37. "Property owners" include an individual who is the owner of an undivided interest in a parcel. Such an individual may apply on behalf of himself and the other owners, provided he submits an affidavit attesting that such owners are minors or cannot be located. *Id.* § 58-769.8. In addition, a person who has contracted to buy a parcel of land may submit a timely application on his behalf for use value assessment and taxation, provided that he becomes an owner by January 1 of the following year. *See* 1975 OP. VA. ATT'Y GEN. 527.

38. Application forms are to be supplied by the State Tax Commissioner. Applications are to be submitted on these forms and the locality may require an application fee to accompany all applications. VA. CODE ANN. § 58-769.8 (Cum. Supp. 1976). An application also must be submitted whenever the use or acreage of previously approved land changes. *Id.* A locality may require a property owner to verify annually by affidavit that no change in use has occurred. *Id.*

A person owning several contiguous parcels of real estate may make one application for use-value assessment if the parcels are jointly assessed on the land book. If not, a separate application is required for each parcel. *See* 1975 OP. VA. ATT'Y GEN. 456. *See also* 1976 OP. VA. ATT'Y GEN. 341 (definition of "parcel").

39. VA. CODE ANN. § 58-769.8 (Cum. Supp. 1976). In any year in which a general reassess-

prior to the use value assessment of any real estate under the ordinance, the local assessing officer must determine: 1) that the real estate qualifies by meeting the criteria set forth in the statute[40] and 2) that the minimum acreage requirement is met.[41]

After preparing a list of all the applications filed and approved, the local assessing officer must transmit the list to the clerk.[42] The clerk is to file the applications and index the names in a "Land Use Tax Assessment Book."[43] In the event of a material misstatement of fact in the application or a material change in fact prior to the date of assessment, the application is void and the property will be assessed on the basis of its fair market value.[44]

3. Operation Under the Ordinance

In valuing real estate for use value assessment and taxation purposes, the local commissioner of the revenue is to consider only those indicia of value which the property has for agricultural, horticultural, forest or open space use.[45] In addition to his personal knowledge and judgment, the commissioner is to consider the recommendations on land values set forth by the State Land Evaluation Advisory Committee (SLEAC).[46] The "recommended ranges of suggested values"[47] for agricultural, horticultural, and forest use are based on a soil capability classification and estab-

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ment is being conducted, the property owner may submit an application within thirty days after receiving a notice of increase in assessment. *Id.* These deadlines are not flexible. *See generally* 1973 OP. VA. ATT'Y GEN. 421; 1976 OP. VA. ATT'Y GEN. 360.

40. VA. CODE ANN. § 58-769.5 (Repl. Vol. 1974).

41. *Id.* § 58-769.7. Real estate utilized for agricultural, horticultural, or open space use must consist, at a minimum, of five acres; forest use, at a minimum, of twenty acres.

42. *Id.* § 58-769.8 (Cum. Supp. 1976). For details of what to include in the list filed with the clerk see 1974 OP. VA. ATT'Y GEN. 347.

43. VA. CODE ANN. § 58-769.8 (Cum. Supp. 1976).

44. *Id.* Qualifying real estate is also required to be evaluated on the basis of fair market value and land books must be maintained so as to show both use value and fair market value. *Id.* § 58-769.9 (Repl. Vol. 1974).

45. *Id.* § 58-769.9 (Repl. Vol. 1974).

46. *Id.* VA. CODE ANN. § 58-769.11 (Cum. Supp. 1976) created the committee. In addition to the state agency officials mentioned in § 58-769.5, the committee consists of the State Tax Commissioner, the Dean of the College of Agriculture of V.P.I. & S.U., and the Director of the Division of State Planning and Community Affairs.

By virtue of the authority granted in § 58-769.5 SLEAC is to prescribe mandatory uniform standards of qualification for the various land uses. SLEAC also is to set use-values for assessment, but these are only advisory in nature. However, as a practical matter all localities have accepted these recommended values in applying use value assessment and taxation. Adamson, *Preferential Land Assessment in Virginia*, 10 U. RICH. L. REV. 111, 117 n.32 (1974).

47. VA. CODE ANN. § 58-769.11 (Cum. Supp. 1976).

lishment of a rate of capitalization of net incomes derived through budgeting.[48] For open space use, the suggested values are not based on production capabilities, but on past sales figures adjusted by the consumer price index.[49]

The land use assessment statute attempts to discourage changes to a nonqualifying use by means of a "roll-back" tax.[50] If a qualifying parcel of real estate changes to a nonqualifying use, roll-back taxes are assessed in an amount equal to the amount of tax deferred under the ordinance.[51] The roll-back tax is assessed for the year in which the change to a nonqualifying use occurs and for the preceding five years.[52] If the parcel was assessed at the use-value rate for less than five years, the roll-back tax is assessed for as many years as the parcel was assessed at use value.[53] In either case, the roll-back tax is the difference between the use value assessment and the fair market value assessment.[54] Roll-back taxes are assessed with six percent annual interest.[55]

A person who fails to report a change in use is liable for the roll-back taxes and such penalties and interest as provided for in the local ordinance.[56] If a person had made a material misstatement of fact in applying for the use value assessment, he becomes liable for the roll-back tax plus penalties and interest under the ordinance and an additional penalty of 100% of the unpaid taxes.[57]

Separation of a part of the qualifying real estate, either by conveyance or other action of the owner, for a nonqualifying use will subject the severed parcel to the roll-back tax.[58] However, such action will not impair the right of the remaining parcel to continue to be assessed at its use value, provided that the minimum acreage and other prerequisites are satisfied.[59]

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48. STATE LAND EVALUATION ADVISORY COMMITTEE, PROCEDURES FOR DETERMINING RANGES OF USE VALUES FOR AGRICULTURE, HORTICULTURE, FOREST AND OPEN SPACE LAND IN VIRGINIA WITH SUGGESTED USE VALUES 2 (1976).

49. *Id.* at 33.

50. VA. CODE ANN. § 58-769.10 (Cum. Supp. 1976).

51. *Id. See* 1976 OP. VA. ATT'Y GEN. 342.

52. VA. CODE ANN. § 58-769.10 (Cum. Supp. 1976).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* § 58-769.10:1 (Repl. Vol. 1974).

57. *Id.*

58. *Id.* § 58-769.13.

59. *Id.* Use-value assessment depends on the continuance of the real estate in the qualifying use and not upon continuation of the title in the same owner. *Id.* § 58-769.8 (Cum. Supp. 1976). However, the taking of real estate assessed at use-value by right of eminent domain does not subject the real estate so taken to the roll-back tax. *Id.* § 58-769.14 (Repl. Vol. 1974).

V. PERSONAL PROPERTY

A. INTRODUCTION

Personal property is everything, excluding real estate, that is subject to ownership and can be exchanged for value.[1] For taxation purposes, Virginia distinguishes between tangible and intangible personal property.[2] The former is segregated by the Virginia Constitution for local taxation only;[3] the latter, not mentioned in the constitution, is subject to taxation by the state.[4] Underlying the taxation of both tangible and intangible personal property is the constitutional mandate of uniformity. Accordingly, the mode of assessment and rate of taxation must be the same in any given class within the territorial limits of the authority levying the tax.[5]

B. TANGIBLE PERSONAL PROPERTY

1. *General*

Tangible personal property is not defined in the Code. Rather, the Virginia legislature has chosen to specify various classifications of tangible personal property.[6] The enumeration of taxable classes runs from the very specific (automobiles)[7] to the very broad ("all other tangible personal property not herein specifically enumerated . . .").[8] Because of this desig-

1. Austin v. Housing Auth., 143 Conn. 338, 122 A.2d 399, 403 (1956).

2. What constitutes tangible or intangible property is usually determined by general principles of property law. This determination, however, is subject to the power granted to the legislature by article X, § 1 to define and classify taxable subjects. Lay conceptions of what a tangible or intangible item is are, at times, decidedly unhelpful. For example, in the landmark case of City of Roanoke v. James W. Michael's Bakery Corp., 180 Va. 132, 21 S.E.2d 788 (1942), the court held that delivery trucks, furniture and fixtures had been properly assessed as intangible personal property pursuant to §§ 68 and 73 of the Tax Code then in effect (1928 Va. Acts of Assembly ch. 45, *as amended id.*, ch. 232).

3. VA. CONST. art. X, § 4; VA. CODE ANN. § 58-9 (Repl. Vol. 1974); *id.* § 58-829 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976). See section II A *supra* for further discussion of the power to segregate for taxable purposes.

4. VA. CODE ANN. §§ 58-10, -405 (Repl. Vol. 1974).

5. VA. CONST. art. X, § 1. See section II C *supra* for further discussion of uniformity.

6. VA. CODE ANN. §§ 58-829 to -829.3 (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976).

7. *Id.* § 58-829 (5).

8. *Id.* § 58-829 (15) (Repl. Vol. 1974). The question of whether § 58-829 is a definitional or a classific statute was litigated in R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976). The court rejected a taxpayer's argument that § 58-829 defines tangible personal property by listing examples, and that the mode of assessment applied to taxpayer's property must thus be the same as that applied to other types of tangible personal property as they are all within one class of property. The court emphasized the legislature's specific use of the word "classification" in the Code section and the consistent construction of the statute as a classification statute by the State Tax Commissioner and the Attorney General.

nation of classes, the General Assembly is able to prescribe specific tax treatments for a particular class without violating uniformity. Boats under five tons, for example, are assessed and taxed as the locality desires.[9] Other classes may be exempted in whole or in part from taxation.[10] Mobile homes, another separate class for taxation, are to be assessed and taxed as real property[11] if they meet the statutory definition.[12] Prior to January 1, 1977, they were taxed as real or personal property according to their characteristics. Single-wide mobile homes were taxed as personal property at a rate not to exceed the local tangible personal property rate; double-wide mobile homes were usually classified as real estate and taxed accordingly.[13]

Although the General Assembly may determine by statute what does or does not constitute tangible personal property or what may be taxed as such, local governments are left with the power to tax certain tangible personal property at a different rate from other tangible personal property.[14] The effect of granting such a power to the local authorities is to enable them to give a "tax break" to the owners of the specified items by imposing a tax rate lower than that imposed on other tangible property.[15]

Thus, automobiles (§ 58-829(5)) may be assessed and taxed differently from bicycles (§ 58-829(6)) or other classes of tangible personal property. *See also* section II B & C *supra*.

9. VA. CODE ANN. § 58-829.2 (Repl. Vol. 1974).

10. *Id.* § 58-829.1 provides that certain household goods and personal effects such as furniture, appliances, musical instruments, jewelry and clothing may be exempted from taxation by ordinance of the governing body.

11. *Id.* § 58-829.3 (Cum. Supp. 1976). Under *id.* § 58-760 which went into effect on January 1, 1977, all real estate is to be assessed at full fair market value unless otherwise exempted. See section IV A *supra* for further discussion.

12. A "mobile home" is

> an industrialized building unit constructed on a chassis for towing to the point of use and designed to be used, without a permanent foundation for continuous year round occupancy as a dwelling; or two or more such units separately towable, but designed to be joined together at the point of use to form a single dwelling, and which is designed for removal to, and installation or erection on other sites.

VA. CODE ANN. § 36.71(4) (Repl. Vol. 1974).

13. 1975 OP. VA. ATT'Y GEN. 494.

14. The governing body of any county, city or town may in its discretion classify certain farm machinery and livestock, aircraft, antique cars or tangible personal property used in research and development businesses separately from other tangible personal property. VA. CODE ANN. § 58-851 (Cum. Supp. 1976). This power is not now, in all probability, limited solely to these delineated classes of property. R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976), held that uniformity requires the same tax rate only within a class, and, therefore, automobiles may be taxed at a different rate than the other classes found in § 58-829. On this basis, § 58-851 appears to allow the variance of rates among any of the classes found in §§ 58-829 to -829.3.

15. R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976).

The local government is given no power, however, to exempt totally such property from taxation.[16]

Finally, it should be noted that some property is taxed as though tangible personal property, although conceptually or generally by statute it is not tangible personal property. Merchants' capital, for example, is intangible personal property within the meaning of the tax laws.[17] However, it is not taxed by the state as is intangible personal property, but rather it is segregated for local taxation,[18] assessed by the local commissioner at fair market value[19] and taxed at local rates.[20] Machinery and tools used in certain businesses are not subject to the state intangible personal property tax on capital but are reserved for local taxation at rates no higher than those imposed on tangible personal property.[21] Motor vehicles used in these same businesses are also not subject to the state tax on capital and are instead taxed as tangible personal property.[22] The same is true for personal property of businesses taxable on capital which is tangible in fact. Such property is not held to be capital but is taxed as tangible personal property.[23]

2. *Assessment*

Article X, section 2 of the constitution specifically provides that tangible personal property shall be assessed at fair market value. According to the Code "each commissioner of the revenue shall ascertain and assess, at fair market value, all the personal property not exempt from taxation . . . in his county or city . . . ."[24] Despite the constitutional mandate that tangible personal property be assessed at full value[25] most of it is not.[26] The Virginia Supreme Court has honored the breach of this mandate and has acknowledged that most local taxing authorities apply a fixed multiple or percentage to fair market value in order to arrive at assessed value.[27] The

16. 1973 OP. VA. ATT'Y GEN. 410.

17. City of Richmond v. Drewry-Hughes Co., 122 Va. 178, 186, 94 S.E. 989 (1916). Merchants' capital is discussed in more detail in section V C(1)(b) *infra.*

18. VA. CODE ANN. §§ 58-9, -10, -833, -834 (Repl. Vol. 1974).

19. *Id.* § 58-864.

20. *Id.* § 58-832.

21. *Id.* § 58-412 (Cum. Supp. 1976). This is discussed in more detail in section V C(1)(b) *infra.*

22. VA. CODE ANN. § 58-412 (Cum. Supp. 1976).

23. *Id.*

24. *Id.* § 58-864 (Repl. Vol. 1974).

25. For a discussion of the definition of fair market value see section III A *supra.*

26. *See* Southern Ry. v. Commonwealth, 211 Va. 210, 214, 176 S.E.2d 578 (1970). See section III B *supra* for the historical development of this breach.

27. Fray v. County of Culpeper, 212 Va. 148, 183 S.E.2d 175 (1971). *Accord,* 1972 OP. VA. ATT'Y GEN. 411.

court's main concern, instead, has been the uniformity of the mode of assessment and rate of taxation within the particular class.[28] Still, if the taxpayer can show that the assessed value is greater than the actual fair market value, the assessment must be lowered, since it is no longer related to fair market value.[29]

3. *Situs*

It is the duty of every taxpayer to report property owned or leased by him for taxation on January first of every year.[30] The situs for the assessment and taxation of tangible personal property, merchants' capital and machinery and tools shall "in all cases be the county, district, town or city in which such property may be physically located on the first day of the tax year . . . ."[31] Thus, the locus of the property rather than the domicile of the owner is determinative of situs.[32] "Physically located" within the context of the Code does not mean that property casually located in a given taxing district may be taxed by that locality. In order to be taxed, the property must be "used" in such a way as to be fairly regarded as part of the property of the taxing authority.[33]

Because of their mobility, motor vehicles, boats and travel trailers, as well as airplanes, are taxed where the vehicle is normally garaged, docked or parked.[34] The fact that the vehicle is not actually present on January 1

28. See sections II C, III B *supra.*

29. Fray v. County of Culpeper, 212 Va. 148, 183 S.E.2d 175 (1971).

30. According to VA. CODE ANN. § 58-835 (Repl. Vol. 1974), tangible personal property, machinery and tools, and merchants' capital are to be reported for taxation as of January 1 of each year and the value of all such property is to be taken as of that date. Where the fiscal tax year of a county, city or town begins on July 1 and ends on June 30, the governing body may provide that all personal property and machinery and tools shall be assessed as of July 1 of each year. Public service corporation property in such localities would, however, continue to be assessed as of January 1. *Id.* § 58-851.7 (Cum. Supp. 1976).

31. *Id.* § 58-834 (Cum. Supp. 1976).

32. This statement is true only with regard to property physically located within Virginia. The common law doctrine of *mobilia sequuntur personam* (movables follow the law of the person) applies to property located outside of the Commonwealth but owned by a Virginia domiciliary. Thus, a serviceman domiciled in Virginia but stationed in Missouri was deemed amenable to a Henrico County personal property tax on his car even though the car was located in Missouri on January 1. 1973 OP. VA. ATT'Y GEN. 411.

33. Hogan v. County of Norfolk, 198 Va. 733, 96 S.E.2d 744 (1957). In this case, the taxpayer, a resident of Portsmouth, Virginia, operated taxicabs in Norfolk County on January 1 of the year. Taxpayer argued that the cabs were only temporarily in the county and that they did not belong there. The court held the taxpayer liable for the county tax levied because he failed to show that the cabs were not kept and maintained in Norfolk County in the ordinary course of his business.

34. VA. CODE ANN. § 58-834 (Cum. Supp. 1976). Where something is normally parked or docked appears to be a function of time. A boat physically present in Franklin County from

is inconclusive.[35] Floating property which does not achieve any attachment to any waters or any political subdivision is taxed according to the common law doctrine of *mobilia sequuntur personam* - movables follow the person. In such a case, the domicile of the owner of the vessel is the controlling factor in determining the situs for taxation.[36]

4. *Public Service Corporations*

The tangible personal property of public service corporations is a separate class of property[37] and is segregated for local taxation.[38] Prior to 1966, the SCC assessed the tangible personal property of public service corporations at forty percent of its fair market value.[39] A certified copy of the assessment was sent to the local commissioner of the revenue who then proceeded to impose the local levy.

With the enactment of section 58-512.1 in 1966,[40] an attempt was made to resolve some of the inequities which had existed in some localities between the taxation of public service corporation property and other property of like nature which did not belong to public service corporations.[41] The new section required that the assessed value of tangible personal property be frozen as of January 1, 1966. Any increase in value over this amount was to be assessed at the real estate ratio used by the taxing authority.[42] One-twentieth of the fixed value was to be "equalized" every year by being assessed at the current real estate ratio. The steadily decreasing remainder of the fixed value ("unequalized" property) was to continue to be assessed at forty percent.[43] The final goal to be achieved by this section was that in

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March to November and in Roanoke County for the rest of the year was taxable by Franklin County. 1974 OP. VA. ATT'Y GEN. 384. *See also* 1976 OP. VA. ATT'Y GEN. 338, 366, 367.

35. 1975 OP. VA. ATT'Y GEN. 480. *See* 1974 OP. VA. ATT'Y GEN. 385-86 where a car operated by a student during the full school year within a jurisdiction wherein the student resided while attending school was held reportable for personal property taxes to that jurisdiction. It was considered immaterial that the vehicle was physically present in another taxing jurisdiction within or without the Commonwealth on January 1.

36. City of Newport News v. Commonwealth, 165 Va. 635, 183 S.E. 514 (1936). *Accord,* Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 298 (1944). *See also* 1976 OP. VA. ATT'Y GEN. 375.

37. City of Richmond v. Commonwealth, 188 Va. 600, 50 S.E.2d 654 (1948).

38. VA. CODE ANN. §§ 58-518, -522, -578, -596, -602 (Repl. Vol. 1974). Note, however, that the rolling stock of public service corporations is specifically segregated for taxation by the state. *Id.* § 58-10.

39. Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970).

40. 1966 Va. Acts of Assembly, ch. 541.

41. 1973 OP. VA. ATT'Y GEN. 378.

42. See section IV B *supra* for a discussion of the effect of this section on public service corporation real property.

43. This section was upheld in Southern Ry. v. Commonwealth, 211 Va. 210, 176 S.E.2d 578 (1970).

twenty years—by 1986—all public service corporation tangible personal propery would be assessed at the current real estate ratio.

Companion section 58-514.2[44] required that the rate of tax on public service corporation tangible personal property be the same as that applied to real estate in the locality. However, this requirement was not mandatory for those localities which had been applying a higher tax rate to tangible personal property than real property as of January 1, 1966. These localities were allowed to continue to tax the assessed value of public service corporation tangible personal property as of January 1, 1966, at any rate desired, but it could be no higher than the tangible personal property rate applied as of January 1, 1966.[45] This option was allowed as long as each year one-twentieth of the remaining assessed valuation as of January 1, 1966 (the unequalized property) would be taxed at the real estate rate.

Amendments to these two sections in 1975 and 1976[46] were necessary to make these sections conform to the new requirement of 100% fair market value assessments for real property.[47] Section 58-512.1 remained virtually unchanged, except that unequalized property is now designated as a separate classification. This change was necessary to avoid uniformity problems, as new and equalized tangible personal property will now be assessed at the same ratio as real property. This ratio will be, at some point after January 1, 1977, 100%[48] or reasonably close thereto in all localities.[49] Section 58-514.2 basically is also unchanged. The locality still has the option as to whether to tax *unequalized* tangible personal property at the tangible personal property rate applicable on January 1, 1966 or at the current real estate rate. However, the real estate rate, if used, now becomes frozen at the nominal rate[50] applicable in the year prior to the shift to 100% assess-

44. 1966 Va. Acts of Assembly, ch. 539. Note that all automobiles and trucks of public service corporations were excluded from this provision. They were to be taxed at the same rate applicable to other automobiles and trucks in the taxing locality.

45. 1973 Op. Va. Att'y Gen. 420.

46. 1975 Va. Acts of Assembly, ch. 620; 1976 Va. Acts of Assembly, chs. 686, 687. For the current status of these sections see Va. Code Ann. §§ 58-512.1, -514.2 (Cum. Supp. 1976).

47. Va. Code Ann. § 58-760 (Cum. Supp. 1976). See section IV A *supra* for a discussion of the effects of this section on public and nonpublic service corporation real property.

48. *Id.* This section provides for an adjustment if public service corporation property is assessed at a higher ratio than nonpublic service corporation realty. *See also* 1976 Op. Va. Att'y Gen. 375.

49. *See id.* § 58-512.1 which requires the SCC to certify property at the current assessment ratio, which for years after a reassessment will be less than 100%, since actual fair market values rise almost every year.

50. The nominal rate is the tax rate that is applied to the assessed value (the assessed value being the assessed fair market value times the assessment ratio—i.e. 40%).

ment of real estate.[51] This rate must be changed, however, if the effective rate[52] that results from the application of this nominal rate to the unequalized property is less than the effective rate on real estate. The change must be an upward adjustment of the nominal rate so as to equalize the effective rates.[53]

C. Intangible Personal Property

1. *General*

Intangible personal property is subject to taxation by the state[54] unless it has been specifically exempted therefrom in whole or in part.[55] The Code includes in its definition of intangible personal property: bonds, notes, and other evidences of debt,[56] money,[57] shares of stock,[58] the capital of a trade or business[59] and moneyed capital coming into competition with the busi-

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51. 1966 Va. Acts of Assembly, ch. 539 simply taxed all real property, unequalized or not, at the current real estate rate.

52. The effective rate is the tax rate that must be applied to the assessed fair market value to give a tax liability that is equal to the assessed value times the nominal rate. For example: property X has a fair market value of $100; the assessment ratio is 40% which gives an assessed value of $40; and the nominal rate is 5% (five cents on the dollar of assessed value). The tax liability would equal two dollars ($100 x 40% x 5%). The effective rate equals two percent, since a rate of 2% with a fair market value of $100 would give a tax liability of $2.

53. The effective rate on unequalized tangible personal property will be less than the effective rate on real estate for one or both of two reasons. Prior to the locality assessing at 100%, the tax rates will be equal, for the current rate will be the applicable rate. However, the assessment ratios may differ causing the effective rates to differ. Once a locality begins to assess at 100%, the tax rate on unequalized property is frozen and will differ from the current rate and the assessment ratios will continue to differ.

54. Va. Code Ann. §§ 58-10, -405 (Repl. Vol. 1974).

55. Va. Const. art. X, § 6(a)(5). See section II D(3)(a) *supra* for further discussion.

56. Va. Code Ann. § 58-406 (Repl. Vol. 1974) provides that bonds (other than those of the United States, Virginia and its political subdivisions), notes and other evidences of debt are intangible personal property upon which an income tax is levied in place of a specific property tax. This section does not apply to bonds, notes and evidences of debt which may be included in capital under § 58-410, moneyed capital under § 58-420 or merchants' capital. The bonds of counties, cities, towns and other political subdivisions of Virginia are also considered intangible personal property but are likewise not subject to a specific property tax. Va. Code Ann. § 58-407 (Repl. Vol. 1974).

57. *Id.* § 58-408 (Repl. Vol. 1974) states that money, although classified as intangible personal property, is not subject to a specific intangible personal property tax. The section does not apply to money includible in taxable capital or in merchants' capital. Property under this section is distinguished from that in § 58-406 in that the former taxes money held on demand whereas the latter deals with securities. Commonwealth v. Stringfellow, 173 Va. 284, 289, 4 S.E.2d 357 (1939).

58. Va. Code Ann. § 58-409 (Repl. Vol. 1974). Although considered intangible personal property, shares, too, are not subject to the intangible personal property tax as they are otherwise taxed. This section does not apply to bank stock otherwise taxed. Bank stock is

ness of national banks.[60] However, since franchise taxes,[61] licenses imposed by state law and income taxes are held to be in lieu of the ad valorem tax on much intangible personal property,[62] only moneyed capital coming into competition with national banks and the capital of a trade or business not otherwise taxed or exempted are subject to a specific intangible personal property tax.[63]

a. Moneyed Capital

Capital which is "readily convertible into money" and has a "quotable market value"[64] when coming into business competition with national banks[65] is taxed as intangible personal property.[66] Individuals not engaged in a banking or investment business who make personal investments but do not intend to compete with national banks are not taxed under this section.[67] Moneyed capital is computed insofar as possible according to the rules governing the computation of bank stock[68] and taxed at the rate of one dollar per $100 of value.[69] If a business is taxed for any year on moneyed capital competing with business of national banks it is not subject to income tax for that year.[70]

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otherwise taxed since stockholders are assessed and taxed on their shares of stock in the bank (*id.* § 58-466 (Repl. Vol. 1974)) in accordance with VA. CODE ANN. § 58-471 (Cum. Supp. 1976); *id.* §§ 58-473, -475 (Repl. Vol. 1974).

59. *Id.* § 58-410 (Repl. Vol. 1974).

60. *Id.* § 58-420.

61. VA. CONST. art. X, § 5 provides that where a franchise tax is imposed upon a corporation doing business in the state, the shares of stock issued by such corporation shall not be taxed further. A franchise tax is also the sole tax imposed on the intangible personal property of certain public service corporations. VA. CODE ANN. §§ 58-516.1, -602 (Repl. Vol. 1974).

62. VA. CODE ANN. §§ 58-406, -407, -408, -409 (Repl. Vol. 1974).

63. One author has included bank shares and stock held by stockholders as property subject to the intangible personal property tax. Sager, *Property Classification for Taxation,* 43 VA. L. REV. 1325, 1326 (1957). However, § 58-473 specifies that the tax imposed by that section on bank stock shall be in lieu of all other taxes and § 58-409 deems all stock to be intangible property except stock of banks, banking associations and trust companies and insurance companies which is otherwise taxed. Therefore, bank stock does not appear to be intangible personal property.

64. First Nat'l Bank v. City of Richmond, 39 F. Supp. 309, 310 (C.C.E.D. Va. 1889).

65. National banks are those which operate under the laws of the United States as compared to state banks which derive their authority from the state. BLACK'S LAW DICTIONARY 1175 (rev. 4th ed. 1968). Savings and loan associations, finance corporations and mutual savings associations are not national banks.

66. VA. CODE ANN. § 58-420 (Repl. Vol. 1974).

67. *Id.*

68. *See id.* § 58-471 (Cum. Supp. 1976). The value of capital, surplus and undivided profits is added and from this sum the assessed value of real estate and the book value of tangible personal property otherwise taxed in the state is deducted.

69. *Id.* § 58-420 (Repl. Vol. 1974).

70. Seaboard Finance Corp. v. Commonwealth, 185 Va. 280, 38 S.E.2d 770 (1946); VA.

b. Capital

"Capital" within the context of intangible personal property taxation is defined as the inventory of stock on hand (including all materials for use in the business), the excess of all bills and accounts receivable over bills and accounts payable[71] and all other taxable personal property including choses in action and demands and claims.[72] All capital of any trade or business is taxed as intangible personal property at the rate of thirty cents on every $100 of actual value[73] unless otherwise taxed or exempt from taxation.[74]

What constitutes a "business" or "trade" for capital tax purposes is not elaborated on in the Code. "Business," as one court suggested, is undoubtedly a word of "broad meaning".[75] Basically, the courts appear to accept the decisions of administrative officials as to what is a business. The state capital tax has been levied, for example, on corporations and partnerships engaged in the "business" of operating apartment houses.[76] State administrative officials were not, however, of the opinion that individuals operating apartment houses were conducting a business within the meaning of the capital tax statute and the tax was correspondingly not levied.[77]

The Code is as specific as to what the term "capital" excludes as it is to that which it includes. Real estate, for example, is not capital.[78] The machinery and tools used in manufacturing as well as in certain other enumerated businesses also are not taxable as capital but are made a separate class for local taxation only.[79] The local commissioner of the revenue is to assess the machinery and tools at the fair market value[80] and tax them at a rate not to exceed the rate imposed upon tangible personal property in his city, town, county or district.[81] Even though by statute such machinery

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CODE ANN. § 58-420 (Repl. Vol. 1974).

71. Taxes owing by the taxpayer to the federal government are not bills or accounts payable. West Virginia Pulp & Paper Co. v. Commissioner of the Revenue, 137 Va. 714, 721, 120 S.E. 321, 322 (1923).

72. VA. CODE ANN. § 58-411 (Repl. Vol. 1974).

73. *Id.* § 58-418.

74. *Id.* § 58-410.

75. Bott v. Commonwealth, 187 Va. 745, 749, 48 S.E.2d 235, 237 (1948).

76. Colway Realty Corp. v. Commonwealth, 198 Va. 1, 92 S.E.2d 271 (1956).

77. Bott v. Commonwealth, 187 Va. 745, 48 S.E.2d 235 (1948).

78. VA. CODE ANN. § 58-412 (Cum. Supp. 1976).

79. *Id.* § 58-412. This section specifies that machinery and tools used in manufacturing, mining, processing or reprocessing, radio or television broadcasting, dairy, dry cleaning or laundry businesses are not taxable as capital.

80. *Id.* § 58-864 (Repl. Vol. 1974).

81. *Id.* § 58-412 (Cum. Supp. 1976).

and tools may not be assessed as real estate, the law of fixtures may cause machinery to be classified as real estate and thus assessed as real estate.[82]

No precise Virginia authority is available as to what constitutes a machine or tool.[83] The former has been defined in other jurisdictions as a combination of devices by means of which energy can be utilized to achieve a certain result;[84] the latter appears to be generally limited to instruments of manual operation.[85] Whether a particular machine is "used" in a business or trade as required by the statute is a question of apparent flexibility.[86] Machinery and tools not in actual use on January 1 of the tax year[87] may still be taxable. Machinery and tools are not precluded from taxation simply because the owner has ceased to operate a plant. Only when the machinery has been dismantled and the facility has lost its physical integrity may taxation be avoided.[88]

As indicated above, machinery and tools are not subject to the capital tax if they are used in certain enumerated businesses. Again, definitional problems are encountered when attempting to discern what some of the enumerated businesses encompass. The manufacturing business is specified as one business in which tools and machinery are not subject to a capital tax. In Virginia, a manufacturing business is generally one in which some transformation has occurred in the raw materials being used.[89] The Virginia Supreme Court has determined that three essential elements are involved: raw materials, a process whereby the raw materials are changed and a resulting product.[90]

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82. Carolina Cotton and Woolen Mills Co. v. Commonwealth, 138 Va. 71, 121 S.E. 65 (1924); Buchanan Cty v. W.M. Ritter Lumber Co., 125 Va. 616, 100 S.E. 546 (1919).

83. Note, *Taxation of Machinery and Tools Used in a Manufacturing or Mining Business: An Analysis*, 39 VA. L. REV. 249 (1953).

84. State v. Taylor, 262 Ala. 622, 80 So. 2d 618, 622 (1954), *citing* BLACK'S LAW DICTIONARY 1101 (4th ed. 1951).

85. State v. Green, 245 Ore. 319, 422 P.2d 272 (1966).

86. *See* 1972 OP. VA. ATT'Y GEN. 84.

87. Machinery and tools are returned for taxation as of January 1 of each year. VA. CODE ANN. § 58-835 (Repl. Vol. 1974).

88. 1973 OP. VA. ATT'Y GEN. 405.

89. City of Richmond v. Richmond Dairy Co., 156 Va. 63, 75, 157 S.E. 728, 732 (1931). Note that under VA. CODE ANN. § 58-416 (Repl. Vol. 1974), the General Assembly specifically designated dairies as manufacturers to the extent that they pasteurize and sell milk, produce buttermilk and make butter, ice cream and cheese.

90. Prentice v. Richmond, 197 Va. 724, 90 S.E.2d 839 (1956). The court determined that a poultry dealer whose operation consisted of buying, killing, cleaning, chilling and delivering poultry to wholesalers was not a manufacturer for the purpose of the applicable tax ordinance because there was no change or transformation of the live poultry into a product or article of substantially different character. Bakeries (Caffee v. City of Portsmouth, 203 Va. 928, 128 S.E.2d 421 (1962)), a dental lab not operated by a dentist in connection with his own dental

The supreme court has not decided what constitutes a processing or reprocessing business for purposes of the capital tax exemption, although it has dealt with the definition of processing for other purposes.[91] The Attorney General has issued an opinion that processing or reprocessing involves a conversion of material or things into a different form than that in which they originally existed.[92]

Other items not subject to the tax on capital include motor vehicles and delivery equipment used in certain enumerated businesses.[93] These items are taxed instead as tangible personal property.[94] Personal property tangible in fact (other than stock inventory) used in a business taxable on capital is also not subject to the capital tax but is taxed as tangible personal property.[95]

The capital of merchants is, as was previously mentioned, a class unto itself and is also not subject to the state tax on capital.[96] Rather, it is subject to local taxation only,[97] assessed at fair market value[98] and taxed at a rate of levy equal to or different from that imposed on real estate or tangible personal property.[99] While defining merchants' capital as the inventory of stock on hand, the excess of bills and accounts receivable over bills and accounts payable[100] and all other taxable personal property except

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practice (1972 OP. VA. ATT'Y GEN. 403) and sausage makers (Commonwealth v. Meyer, 180 Va. 466, 23 S.E.2d 353 (1942)), have, however, been considered manufacturers for tax purposes. For a complete overview as to what has been held to be manufacturing and who is a manufacturer see Annot., 17 A.L.R.3d 7 (1968).

91. Golden Skillet Corp. v. Commonwealth, 214 Va. 276, 199 S.E.2d 511 (1973). In this sales tax case, the preparation and frying of chicken for human consumption was held not to be processing in an industrial sense.

92. 1975 OP. VA. ATT'Y GEN. 482.

93. The enumeration is the same as that for machinery and tools. VA. CODE. ANN. § 58-412 (Cum. Supp. 1976).

94. *Id.*

95. *Id.* This exclusion from capital tax applies to all businesses taxable on capital other than the manufacturing, mining, radio, television broadcasting, dairy, dry cleaning or laundry businesses. The absence of the words "processing" or "reprocessing" from the list is not considered intentional and, therefore, they can be construed to be within this exemption. 1975 OP. VA. ATT'Y GEN. 464. Such businesses would also include certain poultry and livestock producers (VA. CODE ANN. § 58-412.1 (Repl. Vol. 1974)), suppliers of pulpwood, veneer logs and railroad crossties (*id.* § 58-417) and certain poultry processors (*id.* § 58-412.2). Personal property tangible in fact used in one of the foregoing businesses is includible in capital, with the obvious exceptions of machinery and tools, motor vehicles and delivery equipment which are specifically dealt with by § 58-412.

96. City of Richmond v. Drewry-Hughes Co., 122 Va. 178, 94 S.E. 989 (1918).

97. VA. CODE ANN. §§ 58-9, -10, -832 (Repl. Vol. 1974).

98. *Id.* § 58-864.

99. *Id.* § 58-851 (Cum. Supp. 1976).

100. The amount of indebtedness may not be deducted from the value of the inventory.

money and tangible personal property not offered for sale as merchandise,[101] the Code neglects to clarify who exactly is a "merchant."[102] If the local tax on merchants' capital is too burdensome, the taxing authority may either lower the rate of levy[103] or adopt a license tax in lieu thereof.[104]

Certain businesses are not subject to the state tax on capital because they are otherwise taxed. These businesses include wholesale merchandise brokers dealing in food products and other commodities,[105] cotton factors,[106] wholesale cotton buyers,[107] grain dealers,[108] cotton and peanut dealers,[109] small business investment companies organized under the Federal Small Business Investment Act of 1958,[110] banks and insurance companies.[112]

Finally, several state regulated professions[113] are exempted from the capital tax.[114] Also exempted are industrial development corporations organized under the Code[115] and farmers and growers. Public service corporations are not required to pay the state tax on capital.[116]

2. *Situs*

The situs for the taxation of intangible personal property is the domicile

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1975 OP. VA. ATT'Y GEN. 479. However, the local governing authority may, at its discretion, exempt the excess of bills and accounts receivable over bills and accounts payable from taxation as merchants' capital. VA. CODE ANN. § 58-833.1 (Cum. Supp. 1976).

101. VA. CODE ANN. § 58-833 (Repl. Vol. 1974).

102. The word "merchant" for purposes of the Virginia tax statutes has been defined by the courts as a "dealer in goods, wares, and merchandise, who has the same on hand for sale and present delivery." White v. Commonwealth, 78 Va. 484, 485 (1884). The term has also been defined as "one who is engaged in the business of buying commercial commodities and selling them again for the sake of profit." Commonwealth v. Meyer, 180 Va. 466, 472-73, 23 S.E.2d 353, 356 (1942). Cooperative associations are taxable as merchants by the state but remain subject to the local merchants' license tax. VA. CODE ANN. § 13.1-311 (Repl. Vol. 1973).

103. VA. CODE ANN. § 58-851 (Cum. Supp. 1976).

104. *Id.* § 58-266.1(5).

105. *Id.* § 58-292 (Repl. Vol. 1974).

106. *Id.* § 58-294.

107. *Id.* § 58-295.

108. *Id.* § 58-295.1.

109. *Id.* § 58-296.

110. *Id.* § 58-399.1.

111. *Id.* § 58-466.

112. *Id.* § 58-500. A complete list of businesses exempt from the capital tax is printed on the back of Virginia form 761, "Return of Capital Not Otherwise Taxed."

113. *Id.* § 54-897.

114. *Id.* § 58-413. Professionals affected by this exemption include architects, engineers, land surveyors, certified public accountants, dentists, optometrists, physicians, surgeons, veterinarians and lawyers. 1 CCH STATE TAX REP., VA. ¶ 20-132B (1966).

115. VA. CODE ANN. § 13.1-14 *et seq.* (Repl. Vol. 1973).

116. *Id.* §§ 58-578, -593, -602 (Repl. Vol. 1974).

of the owner.[117] Where the capital of a Virginia business has acquired a "business situs" at an out-of-state branch of the business, such capital is exempted from the Virginia capital tax.[118] Conversely, the capital of a foreign corporation which has acquired a business situs in the state is subject to the Virginia tax on capital.[119] Intangible personal property is returned for taxation as of January 1 of every year and the value of the property is taken as of that date.[120]

VI. PROCEDURES TO REMEDY ERRONEOUS TAX ASSESSMENTS

A. Introduction

Article X, section 1 of the Virginia Constitution provides that the General Assembly may define and classify taxable subjects. In doing so, certain classes of property are expressly segregated either for state or local taxation. In addition, article X, section 2 provides for a "central State Agency" to assess the taxable property of a public service corporation. Therefore, in viewing appeal procedures for erroneous assessments and levies, it is necessary to look at the procedures for the three types of assessments: state, local and State Corporation Commission (SCC).[1]

B. State Taxes

The Virginia Code[2] has four provisions for the correction of erroneous assessments or levies of state taxes. Two methods are administrative in nature: an application to the State Tax Commissioner[3] or filing an

117. 1 CCH State Tax Rep., Va. ¶ 20-702 (1966). The situs for taxation of the intangible personal property of a ward is the domicile of the ward. Taylor v. Commonwealth, 124 Va. 445, 451, 98 S.E. 5, 7 (1919).

118. Va. Code Ann. § 58-415 (Repl. Vol. 1974).

119. *Id.* § 58-414.

120. *Id.* § 58-423.

1. Generally, the provisions establishing these procedures are viewed as remedial in nature and, consequently, the courts have given them a liberal interpretation. *See, e.g.*, Commonwealth v. Cross, 196 Va. 375, 83 S.E.2d 722 (1954); Chesapeake & Potomac Tel Co. v. City of Newport News, 194 Va. 409, 73 S.E.2d 394 (1952).

"Assessment" as used in this section encompasses the valuation of taxable property (its usual meaning), the application of the tax rate to this value or the billing of the taxpayer for a specific amount of tax.

2. In addition to statutory provisions, the taxpayer should be aware of his right to bring a common law action of assumpsit for taxes erroneously paid under compulsion. *See* City of Charlottesville v. Marks' Shows, Inc., 179 Va. 321, 18 S.E.2d 890 (1942).

3. Va. Code Ann. § 58-1118 (Repl. Vol. 1974).

amended tax return.[4] The other two methods are judicial: an application to court by the taxpayer;[5] or an application to court by the assessing officer.[6]

1. *Administrative Remedies*

Any taxpayer assessed with a tax "administered by the Department of Taxation"[7] may appeal the assessment by applying to the State Tax Commissioner.[8] The application for relief must be filed within ninety days of the date of mailing the assessment to the taxpayer.[9] After expiration of this ninety-day period, the Commissioner is bound by statute[10] and can grant relief only on an offer of compromise.[11]

The taxpayer's application for relief should set forth the grounds upon which he relies and all facts relevant to his contention.[12] The Commissioner has the authority to request any additional information, testimony or documentary evidence that he feels is necessary.[13] Failure to comply with the Commissioner's request for additional information could jeopardize any subsequent appeal to a court.[14]

The other administrative remedy is the filing of an amended tax return.[15]

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4. *Id.* § 58-1118.1.

5. *Id.* § 58-1130 (Cum. Supp. 1976).

6. *Id.* §§ 58-1153 to -1158 (Repl. Vol. 1974). These sections allow the officer, state or local, charged by law to levy a tax or make an assessment, to apply within one year to any court of record, if he believes that such tax or assessment was erroneous due to his mistake. The court may find relief for the taxpayer or assess additional taxes. In certain cases, the State Tax Commissioner is allowed a hearing. In any case, where the decision is adverse to the taxing authority, an appeal may be had to the supreme court.

However, as one commentator has noted, these sections will be invoked only in highly unusual circumstances and, therefore, merit little discussion. Davis, *Procedural Aspects of Relief from Taxes Administered by the Virginia Department of Taxation,* 9 U. RICH. L. REV. 121, 122 (1974) [hereinafter cited as Davis]. *But see* 1975 OP. VA. ATT'Y GEN. 497.

7. VA. CODE ANN. § 58-1118 (Repl. Vol. 1974). This phrase is undefined by the Code. For purposes of this discussion, it includes any tax on property segregated to the state for taxation. See section II A *supra.* For an exhaustive list of taxes included in this category see Davis, *supra* note 6, at 123 n.16.

8. VA. CODE ANN. § 58-1118 (Repl. Vol. 1974).

9. *Id.*

10. *Id.* § 58-45.

11. Davis, *supra* note 6, at 125.

12. VA. CODE ANN. § 58-1118 (Repl. Vol. 1974).

13. *Id.*

14. *See* § 58-1134 (Repl. Vol. 1974). A judicial remedy for erroneous assessment is possible *provided* "the erroneous assessment was not caused by the wilful failure or refusal of the applicant upon request to furnish a list of his property or other relevant information . . . ." *Id.*

15. *Id.* § 58-1118.1.

There is a three-year statute of limitations for the filing of such an amended return.[16] If the State Tax Commissioner is satisfied that the applicant was assessed erroneously, he may order that the assessment be corrected.[17] Correction of the assessment would include the right to assess the taxpayer more if necessary, as well as to refund any over-payment.[18]

2. *Judicial Remedies*

The Virginia Code provides for a judicial remedy for erroneous assessments.[19] Under this statute the taxpayer may file an application in the circuit court of the locality in which the assessing officer qualified and posted bond,[20] or in the court to which his bond was returned.[21] Additionally, the taxpayer may file the application in any court of record of the locality in which he resides.[22]

Because the State Commissioner of Taxation and a Commonwealth's attorney are not originally parties to the action[23] the application is instituted on an *ex parte* basis and the initial pleadings should be so drafted.[24] However, the taxpayer must serve a copy of the application on the State Tax Commissioner at least twenty-one days before the hearing.[25] Also, the applicant may request interest on the refund, as it is now permitted by law.[26] The applicant should not request costs, however, because the taxing of costs against the Commonwealth is prohibited.[27] As some consolation, however, no costs are taxed against the applicant provided the relief sought is granted.[28]

Of utmost concern in the judicial application is the date the action is commenced for the purposes of the two-year statute of limitations. The

16. *Id.*
17. *Id.*
18. *Id.* §§ 58.1118.1, -1119.
19. *Id.* § 58-1130 (Cum. Supp. 1976).
20. *Id.*
21. *Id.*
22. *Id.* See also *id.* § 58-435.
23. School Bd. v. Shockley, 160 Va. 405, 168 S.E. 419 (1933) [the court interpreting the then applicable § 58-1145 (local assessment) found it equivalent to § 58-1130].
24. Davis, *supra* note 6, at 130.
25. VA. CODE ANN. § 58-1130 (Cum. Supp. 1976). The Attorney General will usually answer the application for the purposes of clarifying the issues in controversy. Davis, *supra* note 6, at 130. Additionally, the Commonwealth can enter into binding agreements to waive the technicalities of the statute. *See* Commonwealth v. Columbian Paper Co., 143 Va. 332, 130 S.E. 421 (1925).
26. VA. CODE ANN. § 58-1140.1 (Cum. Supp. 1976).
27. *Id.*
28. *Id.*

Virginia Code provision which had provided for the tolling of the statute between the filing of the application with the clerk and the hearing was repealed in 1972.[29] The repeal of this section has led one writer to observe: "The implication of this repeal is that the case must actually be heard within the two year statutory period, and that filing of the application no longer tolls the statute of limitations."[30] Upon application for relief to the court, the court is clothed with all the powers and duties of the assessing authority.[31] In this capacity, the court is authorized to correct the assessment by increasing or decreasing it.[32]

In pleading and presenting evidence, the taxpayer should be aware of the fact that assessments are presumed to be correct.[33] The courts have generally viewed assessments as a question of fact fairly arrived at by the assessor and they will not disturb them unless the applicant clearly carries the burden of showing that the assessment is erroneous.[34] The effect of this presumption is that even if the *assessor* is unable to come forward with evidence to prove the correctness of the assessment, this does not impeach the validity of the assessment since the taxpayer has the burden of proving the assessment erroneous.[35]

If the court is satisfied that the applicant has been erroneously overassessed, it may order that the assessment be corrected.[36] The court will order that the taxpayer be exonerated from the payment of the excessive amount.[37] In most situations, the Department of Taxation will have already collected the contested amount.[38] If that is the situation, the order entitles the applicant to a warrant on the state treasury for that amount.[39] Note, however, that the taxpayer has only one year from the date of the order to apply to the Comptroller for the excessive amount. After expiration of the year he is barred from the recovery of his tax.[40] The duty of the court is to determine the correctness of the assessment.[41] Consequently, the court may determine that the applicant was under-assessed. In this situation the court has broad discretionary power and is clothed with all the

29. VA. CODE ANN. § 58-1131, *repealed by* 1972 Va. Acts of Assembly, ch. 721.
30. Davis, *supra* note 6, at 126.
31. VA. CODE ANN. § 58-1134 (Repl. Vol. 1974).
32. *Id.*
33. *See* Union Tanning Co. v. Commonwealth, 123 Va. 610, 96 S.E.780 (1918).
34. *See* City of Waynesboro v. Keiser, 213 Va. 229, 191 S.E.2d 196 (1972).
35. *See* R. Cross, Inc. v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976).
36. VA. CODE ANN. § 58-1134 (Repl. Vol. 1974).
37. *Id.*
38. Davis, *supra* note 6, at 132.
39. VA. CODE ANN.§ 58-1136 (Repl. Vol. 1974).
40. *Id.*
41. *See id.* § 58-1134.

powers and duties of the assessing authority to see to the collection of the additional assessment.[42]

If the taxpayer loses, he may appeal to the Supreme Court of Virginia by requesting a supersedeas.[43] If the taxpayer wins, the State Tax Commissioner has the right to request a rehearing provided that he does so within six months from the date that the order is certified to him by the clerk.[44] The State Tax Commissioner also has the right to request a supersedeas from the supreme court regardless of whether a rehearing was requested or granted.[45]

C. Local Levies

1. *Administrative Remedies*

A taxpayer attempting to correct an erroneous local assessment has available several administrative channels. Initially the taxpayer should be aware of the fact that the local board of equalization[46] is authorized to correct assessments in order to accomplish the goal of equal taxation.[47] The board can, either on its own motion or by taxpayer's petition, increase, decrease or affirm an assessment.[48] An appeal to the proper court may be taken either by the taxpayer or the locality.[49]

Also, any taxpayer assessed with an erroneous assessment[50] by a local commissioner of the revenue may make an application to the commissioner of the revenue for a correction of the assessment.[51] The application for relief must be filed within the five-year statute of limitations period.[52] By analogy, to the equivalent state tax section, the application should set forth the taxpayer's grounds of contention and all facts relevant thereto. The applicant may request interest on the refund, provided the locality has

42. Commonwealth v. Schmelz, 114 Va. 364, 76 S.E. 905 (1913).

43. Va. Code Ann. § 58-1138 (Repl. Vol. 1974).

44. *Id.* § 58-1137.

45. *Id.* § 58-1138. A supersedeas may be granted in the case of appeal by either party as in the manner prescribed for cases other than appeals of right.

46. *Id.* § 58-895 *et seq.* (Repl. Vol. 1974), *as amended* (Cum. Supp. 1976).

47. *Id.* §§ 58-904, -905.

48. *Id.* § 58-906.

49. *Id.* § 58-907. See note 63 *infra* and accompanying text.

50. Erroneous assessments on the local level may include, *inter alia*, erroneous assessments of real estate, tangible personal property, machinery and tools or merchant's capital. See Va. Code Ann. § 58-1141 (Repl. Vol. 1974).

51. *Id.*

52. *Id.* The beginning of the period is measured from December 31 of the year in which the erroneous assessment was made.

adopted an ordinance pursuant to statutory authority authorizing the payment of such interest.[53]

Upon application to the local commissioner of the revenue, if the commissioner is satisfied that he has made an erroneous assessment, he is authorized to correct it.[54] In most cases, the applicant has already paid the assessment. In this situation, the commissioner of the revenue is to certify the over-assessment to the governing body of the locality and they in turn direct the local treasurer to refund the tax.[55] Note, however, that no refund may be given after two years has elapsed[56] from the date of the assessment.[57] If a locality is aggrieved by the action of the commissioner of the revenue under these proceedings, it may appeal to a court of record.[58]

Additionally, the governing body of the locality may provide by ordinance for the refund of any local levies that have been erroneously assessed.[59] If the commissioner of the revenue is satisfied that the assessment was erroneous, he is to certify the excessive amount to the local tax collecting officer for a refund.[60] There is a seven year statute of limitations on this type of refund.[61]

2. *Judicial Remedies*

Within the two-year statute of limitations period,[62] a taxpayer may make an application seeking correction of a local assessment to the court of

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53. *Id.* § 58-1152.2 (Cum. Supp. 1976).

54. *Id.* § 58-1142. Correction of the assessment includes assessing more if the taxpayer had been underassessed, as well as exonerating or reimbursing the taxpayer if he had been overassessed. *See also id.* § 58-769.2 (Repl. Vol. 1974).

55. *Id.* § 58-1142 (Cum. Supp. 1976).

56. *Id.*

57. The period begins on December 31 of the year in which the erroneous assessment was made. *Id.*

58. *Id.* § 58-1143 (Repl. Vol. 1974). The appeal must be filed within six months from the date that the correction was certified by the commissioner to the local treasurer. *Id.*

59. *Id.* § 58-1152.1 (Cum. Supp. 1976).

60. *Id.*

61. 1976 OP. VA. ATT'Y GEN. 393, 394. A problem may exist, however, due to this holding that there is a seven-year statute of limitations period. The language of VA. CODE ANN. § 58-1152.1 explicitly states that "no refund shall be made in any case when more than two years have elapsed since payment of the amount erroneously assessed." This conflict suggests there is an unresolved question as to the applicable statute of limitations period.

It is agreed that the period is measured from the date of payment of the erroneous assessment. VA. CODE ANN. § 58-1152.1 (Cum. Supp. 1976). *See also* 1972 OP. VA. ATT'Y GEN. 397.

62. VA. CODE ANN. § 58-1145 (Cum. Supp. 1976). This two-year period is measured from the thirty-first of December of the year in which the erroneous assessment was made. *Id.* There is no statute of limitations for the correction of double assessments. *Id.* § 58-1147 (Repl. Vol. 1974). *See also* 1974 OP. VA. ATT'Y GEN. 397.

record of the locality wherein an erroneous assessment was made.[63] In addition, the commissioner of the revenue can apply to the court for the correction of an assessment[64] when the assessment is based on such an "obvious error" that "justice requires a correction."[65] This is a highly unusual situation and it is not likely to occur very often.[66]

The statute of limitations for an appeal of local assessments, unlike the statute of limitations on state assessments,[67] is tolled by the filing of the application for relief in the clerk's office.[68] Additionally, for statute of limitations purposes, the use of the words "assessment" and "assessed" in this code section has presented some difficulty.[69] The supreme court has held that "assessment" as used in the first sentence can only apply to the amount of tax (the money itself) the taxpayer is supposed to pay.[70] In the second sentence, however, "assessment" applies to the value of the property.[71] Likewise, the word "assessed" as used in the first sentence means the imposition of the tax itself, and in the second sentence it refers to the determination of the value of the property.[72] The court has concluded that

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63. VA. CODE ANN. § 58-1145 (Cum. Supp. 1976). Such an application to the proper court may be made whether or not the applicant had previously applied to the commissioner of the revenue pursuant to *id.* § 58-1141 (Repl. Vol. 1974). *Id.* § 58-1144. This remedy is not available for correction of assessments for local improvements. *Id.* § 58-1145.1. However, this judicial remedy is available to taxpayers aggrieved by the reassessment of subdivided or rezoned lots pursuant to *id.* §§ 58-772.1-773. Id. § 58-772.

A remedy is available under *id.* § 58-841, -842, whereby if a group (six or more) of freeholders requests a Commonwealth attorney to appeal an order for a levy made by the governing body of the locality, the Commonwealth attorney must do so within thirty days of the order. *See also id.* § 58-774.1, 58-769.12.

64. *Id.* § 58-1145 (Cum. Supp. 1976). This application may be on behalf of several taxpayers. *Id.* This provision is very similar to §§ 58-1153 to -1157. See note 6 *supra.*

65. VA. CODE ANN. § 58-1145 (Cum. Supp. 1976). *See also* 1975 OP. VA. ATT'Y GEN. 507 (discussion of this procedure and "clerical error").

66. *See generally* 1974 OP. VA. ATT'Y GEN. 300 (commissioner may represent the taxpayer only if the assessment is obviously erroneous and unjust).

67. *See* note 30 *supra.*

68. VA. CODE ANN. § 58-1146 (Repl. Vol. 1974).

69. *Id.* § 58-1145 (Cum. Supp. 1976). This section provides in pertinent part:

> Any person assessed with county or city levies . . . aggrieved by any such assessment may, . . . within two years from the thirty-first day of December of the year in which any such assessment is made, apply for relief . . . . In such proceeding the burden of proof shall be upon the taxpayer to show that the property in question is assessed at more than its fair market value or that the assessment is not uniform . . . or that the assessment is otherwise invalid or illegal. . . .

70. Hoffman v. County of Augusta, 206 Va. 799, 146 S.E.2d 249 (1966).

71. *Id. See also* 1973 OP. VA. ATT'Y GEN. 83.

72. Transcontinental Gas Pipe Line Corp. v. Prince William Cty., 210 Va. 550, 172 S.E. 2d 757 (1970).

the second sentence does not limit the right conferred by the first.[73] This conclusion, coupled with section 58-1151,[74] which construes section 58-1145 to include general reassessments, logically results in a taxpayer having two years from the thirty-first of December to apply for correction of a general reassessment (the determination of fair market value) made that year, and also, two years from the thirty-first of December to apply for correction of an annual assessment (tax) based on the general reassessment.[75]

Under this judicial application, the same presumption of validity of the assessment and burden of proof on the taxpayer as in a state assessment judicial application are present.[76] Also, the power of the court to reduce, increase or affirm the assessment is the same,[77] as well as the court's role in ensuring the proper refund of an over-assessment or proper collection of additional money in the case of an under-assessment.[78]

While there is no specific Code provision for appeal to the supreme court from local assessments, that court has held that where the taxpayer prevails, the locality may appeal.[79] It would therefore seem appropriate to permit the taxpayer to appeal if the order was rendered against him. Such an appeal would occur in the same manner as in a state assessment judicial application.[80]

D. State Corporation Commission Assessments

The SCC is the central state agency designated to assess the taxation for real estate and tangible personal property of all public service corporations.[81] Any company or corporation, the state or any town, city or county, aggrieved by any SCC assessment of public service corporation property may apply to the SCC for review of that assessment, provided that they do so within three months of receipt of the certified copy of the assessment.[82] The application must set forth with reasonable certainty what is

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73. *Id.*

74. Va. Code Ann. § 58-1151 (Repl. Vol. 1974). *See also id.* § 58-795 (Cum. Supp. 1976).

75. *See* Hoffman v. County of Augusta, 206 Va. 799, 146 S.E.2d 249 (1966).

76. *See* notes 33-35 *supra* and accompanying text. *See also* American Viscose Corp. v. City of Roanoke, 205 Va. 192, 135 S.E.2d 795 (1964).

77. *See* note 41-42 *supra* and accompanying text. *See also* Va. Code Ann. § 58-1148 (Cum. Supp. 1976).

78. Va. Code Ann. § 58-1148 (Cum. Supp. 1976).

79. Commonwealth v. Schmelz, 116 Va. 62, 81 S.E. 45 (1914).

80. *See* note 45 *supra.*

81. Va. Code Ann. § 58-503.1 (Repl. Vol. 1974).

82. *Id.* § 58-672 (Cum. Supp. 1976). Section 58-674 allows the SCC on its own motion to review and correct any assessment. This review must be accomplished within three months from the date that the company or corporation received notice by certified copy of the assessment and only after ten days notice to the affected company and taxing authority.

being contested and the grounds of the complaint.[83] The SCC upon receiving such an application is to set a date for a hearing.[84] Upon final determination, the SCC may reduce, increase or affirm the assessment.[85]

An appeal of right will lie to the Virginia Supreme Court by any party in interest who feels aggrieved by the determination of the SCC.[86] If the supreme court decides the assessment was excessive, it may reduce it with interest and costs.[87] If the taxpayer loses, he must pay the assessment and interest thereon.[88]

VII. CONCLUSION

The objective of this note has been to provide the practitioner with a convenient starting point for the resolution of a Virginia property tax issue. However, it is incumbent upon the practitioner in his roles as citizen, advisor, advocate and law maker to look beyond the solution of specific issues and to look at the property tax with an eye toward the future.

Taxation has come to serve two important ends in our society: the raising of revenue and the effectuation of social policy. Article X of the Virginia Constitution reflects these two ends. The foundation upon which Virginia's system of property taxation is built is the requirement that taxes be universal and uniform. This foundation is not the broad level base that one would suppose, however. Uniformity and universality have been tempered by the concepts of definition, classification and exception. It is within the latitude created by these concepts that the realities of social concerns have been able to effect the tax structure.

The ever increasing demand for public services has placed greater revenue requirements on all levels of government. Virginia's local governments, which must rely on the property tax as the prime generator of revenue, have felt the pressure. This pressure has lead to higher taxes and this in turn appears to have lead to greater pressure for particularized tax treatment. This particularized tax treatment has come through the exemption of certain classes of property and certain specific parcels of property, through the classification of property by use and through the specialized taxation of certain kinds of property.

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83. *Id.* § 58-672.

84. *Id.* § 58-673. (Repl. Vol. 1974).

85. *Id.* § 58-675.

86. *Id.* § 58-679. Appeal must be taken in the time and manner prescribed for appeals generally from the SCC. See *id.* §§ 8-462 to -464 (Repl. Vol. 1957); *id.* § 8-489 (Cum. Supp. 1976).

87. *Id.* § 58-680 (Repl. Vol. 1974).

88. *Id.*

The effect of this specialization on the Virginia practitioner is greater client pressure. The more latitude there is in the tax structure the greater the pressure on the practitioner to expand or confine the scope of the special tax treatment in the furtherance of one's client's interests. The way in which practitioners meet this pressure will determine the future of property taxes in Virginia.