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The New Burdens of Proof in Ad Valorem Tax Valuation Cases

Kent Wetherell
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THE NEW BURDENS OF PROOF IN AD VALOREM TAX VALUATION CASES

Kent Wetherell

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THE NEW BURDENS OF PROOF IN AD VALOREM TAX VALUATION CASES

KENT WETHERELL*

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I. INTRODUCTION

The Florida Constitution expressly preempts all forms of taxation to the state except ad valorem taxation of real property and tangible personal property.¹ The authority to levy those taxes is reserved to the various counties, municipalities, local school districts, and spe-

* Associate, Hopping Green Sams & Smith, P.A., Tallahassee, Fla. B.S., Florida State University, 1992; J.D., Florida State University, 1995.

1. See FLA. CONST. art. VII, § 1(a).

cial districts in the state.² These governmental entities rely heavily on the revenue generated through ad valorem taxation to carry out their constitutional and statutory mandates.³ In fact, more than \$11.6 billion was raised through ad valorem taxes in fiscal year 1995-96.⁴ The Florida Constitution also establishes the parameters for valuing property subject to ad valorem taxation. Specifically, article VII, section 4 directs the Legislature to prescribe regulations "which shall secure a just valuation of all property for ad valorem taxation."⁵ Pursuant to this mandate, the Legislature has established the process by which county property appraisers are to assess all property subject to ad valorem taxation.⁶ An important component of this valuation process is the procedure that enables taxpayers to seek administrative and judicial review of the property appraiser's assessment of their property.⁷ The purpose of this review is to ensure that the property appraiser's assessment accurately reflects a "just valuation" of the taxpayer's property.

Taxpayers have argued that this ability to seek review of the assessment is meaningless because of the deference which is afforded to the property appraiser's assessment. The scope of this deference is best illustrated by the burden of proof that taxpayers must overcome when challenging the property appraiser's assessment. To prevail,

2. See *id.* § 9; see also FLA. STAT. §§ 125.01(1)(r), (5)(c), 166.211(1), 190.011(13), 236.25, 373.503 (1997).

3. The percentage of total county revenue generated by ad valorem taxes is 29.5%. See FLA. JT. LEGIS. COMM. ON INTERGOVTL. REL., FEATURES OF FLORIDA'S LOCAL GOVERNMENT FINANCES 3-11 (Table 3.1) (1997) (available at Fla. Dep't of Revenue (DOR), Tallahassee, Fla.) (fiscal year 1994-95) [hereinafter LOCAL GOVERNMENT FINANCES REPORT]. For water management districts, ad valorem taxes make up 58.2% of total revenue. See *id.* For school districts, ad valorem taxes make up 43.1% of total revenues. See FLA. JT. ADVIS. COUNCIL ON INTERGOVTL. REL., LOCAL GOVERNMENT REVENUES IN FLORIDA: SUMMARY 21 (1996) (available at Fla. DOR, Tallahassee, Fla.) (fiscal year 1994-95) [hereinafter LOCAL GOVERNMENT REVENUE SUMMARY]. Ad valorem taxes also constitute a significant portion of the revenues of municipalities and special districts. See LOCAL GOVERNMENT FINANCES REPORT, *supra*, at 3-11 (Table 3.1) (listing 16.1% for municipalities and 15.3% for special districts); see also FLA. JT. ADVIS. COUNCIL ON INTERGOVTL. REL., AD VALOREM PARTIAL YEAR ASSESSMENTS: RELEVANT ISSUES AND INFORMATION 5-6, Fig. I-IV (1995) (available at Fla. DOR, Tallahassee, Fla.) (fiscal year 1992-93 data) [hereinafter PARTIAL YEAR ASSESSMENT REPORT].

4. See FLA. LEGIS., 1996 FLORIDA TAX HANDBOOK 125 (1996) (available at Fla. Jt. Legis. Mgmt. Comm., Div. of Legis. Library Servs., Tallahassee, Fla.) [hereinafter 1996 FLORIDA TAX HANDBOOK]. This figure has grown significantly over the last 20 years. See *id.*

5. FLA. CONST. art. VII, § 4 (emphasis added). The aggregate taxable value of all property in Florida subject to ad valorem taxation was over \$650 billion as of January 1, 1996. See LOCAL GOVERNMENT REVENUE SUMMARY, *supra* note 3, at 8 (Fig. A). Real property comprised just under \$500 billion of this figure. See *id.*

6. See generally FLA. STAT. ch. 193, 195, 196 (1997); see also discussion *infra* Part II.A.

7. See generally FLA. STAT. ch. 194 (1997); see also discussion *infra* Part II.B.; Steve Pajcic et al., Truth or Consequences: Florida Opts for Truth in Millage in Response to the Proposition 13 Syndrome, 8 FLA. ST. U. L. REV. 593, 608, 618-21 (1980).

the taxpayer must disprove "every reasonable hypothesis of a legal assessment."⁸ The perceived inequity of this standard led some taxpayers to call for its repeal.⁹

Representative Bob Starks¹⁰ and Senator Jim Horne¹¹ responded to these concerns by introducing bills in 1996¹² and again in 1997¹³ that would ease the burden that taxpayers must overcome when challenging the property appraiser's assessment. During the 1997 Regular Session, the Legislature approved legislation that accomplished this goal by reducing the taxpayer's burden of proof to "preponderance of the evidence" or "clear and convincing evidence" depending upon the circumstances surrounding the property appraiser's assessment.¹⁴

This Article describes the history of this legislation and discusses the potential impact of these new burdens of proof. Part II provides the backdrop for the 1997 legislation. Part III traces the history of the 1997 legislation. Part IV discusses the new standard implemented by the 1997 legislation. Finally, in Part V, the author concludes that if the new section 194.301 is implemented equitably, the statute will satisfy the constitutional mandate to assess "just valuation." At the same time, the statute will ameliorate perceived inequities in the former system.

II. OVERVIEW OF AD VALOREM TAXATION IN FLORIDA AND BACKGROUND OF THE 1997 LEGISLATION

For the most part, ad valorem taxation in Florida¹⁵ is carried out on the local level,¹⁶ and the county property appraisers play a central

8. This standard can be traced to the Florida Supreme Court's decision in *Folsom v. Bank of Greenwood*, 97 Fla. 426, 430, 120 So. 317, 318 (1929); see also discussion *infra* Part II.C.

9. This issue is not unique to Florida. In 1982, the Texas Legislature reduced the burden that taxpayers must overcome when challenging the property appraiser's assessment to a preponderance of the evidence. See TEX. TAX CODE ANN. § 42.26 (West 1997); see also FLA. JT. ADVIS. COUNCIL ON INTERGOVTL. REL., COMPARISON OF AD VALOREM TAX SYSTEMS OF FLORIDA, CALIFORNIA, GEORGIA, ILLINOIS & TEXAS, 4 n.2 (1996) (available at Fla. DOR, Tallahassee, Fla.) (presented to Florida Ad Valorem Tax Task Force on Sept. 12, 1996) [hereinafter COMPARISON OF TAX SYSTEMS]. Prior to this legislative action, taxpayers in Texas were required to demonstrate that the assessment was "grossly excessive" or that it "shock[ed] a correct mind." COMPARISON OF TAX SYSTEMS, *supra*, at 5 (citing *Hayes Consol. Indep. Sch. Dist. v. Valero Transmission Co.*, 645 S.W.2d 542, 547 n.1 (Tex. Ct. App. 1983)).

10. Repub., Casselberry.

11. Repub., Orange Park.

12. See Fla. HB 557 (1996); Fla. SB 740 (1996).

13. See Fla. HB 445 (1997); Fla. SB 134 (1997).

14. Act effective May 23, 1997, ch. 97-85, 1997 Fla. Laws 503, 504 (codified at FLA. STAT. § 194.301 (1997)).

15. The intent of Part II is to acquaint the reader with those issues that are relevant to the development of the 1997 "burden of proof" legislation. It is not the intent of this Part to provide a detailed or comprehensive discussion of Florida's ad valorem tax process.

role in this process.¹⁷ In this regard, the property appraiser is “charged with determining the value of all property within the county [and] with maintaining certain records connected therewith.”¹⁸ The primary records that the property appraiser is required to maintain are the assessment rolls.¹⁹ These rolls contain a list of all property in the county subject to ad valorem taxation and the taxable value²⁰ of that property.²¹ A separate roll must be maintained for real property and for tangible personal property.²² The Department of Revenue (DOR) has adopted rules that prescribe the form of, and information to be contained in, the assessment rolls.²³ Each roll must be submitted to DOR for review and approval.²⁴

For a more comprehensive overview of ad valorem taxation in Florida, see generally 2 FLORIDA BAR, TAX SECTION, FLORIDA STATE AND LOCAL TAXES (1998) [hereinafter FLORIDA STATE AND LOCAL TAXES].

16. As discussed in Part II, the property subject to ad valorem taxation is appraised, or valued, by the county property appraiser. Millage rates are determined and the taxes are levied by the various local taxing authorities within the county. There is, however, state oversight of this ad valorem tax process. See *infra* notes 23-24 and accompanying text.

17. The property appraiser is a “constitutional officer.” FLA. CONST. art. VIII, § 1(d); see *District Sch. Bd. v. Askew*, 278 So. 2d 272, 276 (Fla. 1973). This fact limits the Legislature’s ability to interfere with the exercise of the property appraiser’s discretion. See *id.* at 277. But see *infra* notes 115-18 and accompanying text.

18. FLA. STAT. § 192.001(3) (1997). The property appraiser is not responsible for the collection of ad valorem taxes. That function is performed by the county tax collector. See *id.* § 192.001(4).

19. See FLA. STAT. §§ 193.085(1), .114(1) (1997); see also FLA. ADMIN. CODE ANN. r. 12D-1.002(1) (1997) (defining “assessment roll”).

20. “Taxable value” is defined as the assessed value less the amount of any exemptions applicable to the property. See FLA. STAT. § 192.001(16) (1997).

21. See *id.* § 193.085(1). Interestingly, the property appraiser is only required to ensure that all real property is included on the tax rolls. See *id.* This duty does not extend to tangible personal property because, unlike real property, the taxpayer has the obligation of filing an annual return listing his or her tangible personal property. See *id.* § 193.052(1)(a). There are significant penalties for the failure to file a return or for the filing of an erroneous return. See *id.* §§ 193.072-.073. As a general rule, the only required taxpayer filings related to real property are those that demonstrate entitlement to an exemption or classified use status. See, e.g., *id.* §§ 193.461(3)(a), 196.011(1)(a); see also FLA. ADMIN. CODE ANN. r. 12D-1.004, -7.001 (1997).

22. See FLA. STAT. § 193.114(1)(a)-(b) (1997); FLA. ADMIN. CODE ANN. r. 12D-8.007(1)(a)-(b) (1997). A separate roll must also be maintained for “centrally assessed property,” such as railroad property. See *id.* at r. 12D-8.007(1)(c); FLA. STAT. § 193.085(4) (1997); FLA. ADMIN. CODE ANN. ch. 12D-2 (1997). DOR is charged with valuing railroad property and notifying each county of the taxable value of such property located within the county. See FLA. STAT. § 193.085(4) (1997).

23. See FLA. STAT. § 193.114(2)-(3) (1997); FLA. ADMIN. CODE ANN. ch. 12D-8 (1997). DOR has general supervision over the assessment and valuation of all property subject to ad valorem taxation. See FLA. STAT. § 195.002(1) (1997).

24. See FLA. STAT. § 193.1142(1) (1997). The purpose of DOR’s review is to determine whether the rolls “meet all the appropriate requirements of law as to form and just value.” *Id.* DOR may disapprove an assessment roll in whole or in part. See *id.* § 193.1142(2)(a). The assessment roll will be deemed approved if DOR does not disapprove the roll within 50 days after its receipt. See *id.* § 193.1142(3). If DOR issues notice of its disapproval of the rolls, or a part thereof, the TRIM Notice, see *infra* note 29, cannot be issued unless the

The assessment rolls are used by each taxing authority within the property appraiser's jurisdiction in its budgeting process.²⁵ The budget adopted by each taxing authority includes the amount of revenue to be raised through ad valorem taxes and the millage rate²⁶ necessary to achieve that revenue level.²⁷ Each taxing authority forwards its proposed millage rate to the property appraiser.²⁸ The property appraiser uses that information to prepare the notice of proposed property taxes that is sent to each taxpayer. This notice, commonly referred to as the TRIM Notice,²⁹ contains the market value, assessed value, and taxable value of the property, and also includes the estimated ad valorem taxes owed on the property.³⁰ The mailing of the TRIM Notice triggers the taxpayer's right to seek administrative review of the property appraiser's assessment.³¹

A. Process for Determining the "Just Value" of Property Subject to Ad Valorem Taxation

In preparing the assessment rolls, the property appraiser is not required to perform an individual appraisal of all of the property within the county each year.³² Instead, the property appraiser may rely on "mass appraisal" techniques.³³

"Mass appraisal" has been described as the "systematic appraisal of groups of properties as of a given date using standardized procedures and statistical testing."³⁴ Stated another way, "mass appraisal"

taxing authority utilizes the interim assessment procedure in section 193.1145, Florida Statutes, pending a legal challenge to DOR's disapproval. See FLA. STAT. §§ 193.1142(4)(b), .1145(1) (1997). Only once since 1980 has DOR formally disapproved a county's assessment rolls. See Fla. Ad Valorem Tax Task Force, tape recordings of proceedings (July 25, 1996) (available at Fla. DOR, Tallahassee, Fla.) [hereinafter July Tapes].

25. See generally FLA. STAT. § 200.065 (1997).

26. The millage rate is the measure of the tax rate for ad valorem tax purposes. Each mil represents a tax rate of .1%, or one one-thousandth of a dollar. See id. § 192.001(10). Stated another way, an ad valorem tax of one mil would generate \$1 on each \$1000 of taxable value.

27. See id. § 200.065(2)(a)1.

28. See id. § 200.065(2)(b).

29. TRIM is an acronym for "Truth in Millage." FLA. ADMIN. CODE ANN. r. 12D-17.002(2)(q) (1997). DOR prescribes the form of the TRIM Notice. See id. ch. 12D-17; see also FLA. STAT. § 200.069 (1997). The TRIM Notice informs the property owner of the potential increase in his ad valorem taxes that would result from the local government's proposed budget. See id. § 200.069(1), (2), (9); see also id. § 200.065(1) (describing the operation of the "rolled-back rate").

30. See FLA. STAT. § 200.069 (1997). For a discussion of the background and operation of the TRIM process, see Pajcic et al., *supra* note 7, at 609-18.

31. See FLA. STAT. §§ 194.011, .036(1)(a) (1997).

32. See id. § 193.023(2) (requiring the property appraiser to physically inspect property every three years, or upon the request of the property owner).

33. See id. § 193.023(3).

34. INTERNATIONAL ASS'N OF ASSESSING OFFICERS, PROPERTY APPRAISAL AND ASSESSMENT ADMINISTRATION 303 (1990) (available at Fla. DOR, Tallahassee, Fla.) (excerpt presented to Florida Ad Valorem Tax Task Force on July 24, 1996).

is a procedure by which appraisal-related data gathered from the entire market is utilized to determine the assessment of a particular parcel.³⁵ An important component of the “mass appraisal” process is periodic reinspection, or reappraisal, of each property within the taxing jurisdiction.³⁶ Reappraisal is necessary to ensure the reliability of the information in the “mass appraisal” data base.³⁷ In this regard, section 193.023(2), Florida Statutes, requires the property appraiser to physically inspect each property every three years “to ensure that the tax roll meets all the requirements of law.”³⁸

1. Section 193.011, Florida Statutes

As a general rule, all property subject to ad valorem taxation must be assessed at “just value,” or fair market value, whether that assessment is derived from a “mass appraisal” or an individual appraisal.³⁹ In arriving at this “just value,” the property appraiser is required to consider the following factors, which are commonly referred to as the “eight criteria”:

1. The present cash value of the property . . . ;
2. The highest and best use to which the property can be expected to be put in the immediate future and the present use of the property . . . ;
3. The location of said property;
4. The quantity or size of said property;
5. The cost of said property and the present replacement value of any improvements thereon;
6. The condition of said property;
7. The income from said property; and
8. The net proceeds of the sale of the property⁴⁰

It is important to note that the property appraiser is not required to utilize each of these factors in reaching the appraisal. Instead, the

35. See *id.* at 305-08. A “mass appraisal” system utilizes models and complex formulas to simulate supply and demand forces (and thus market value) within a particular jurisdiction. See *id.* at 310. These models can then be applied to individual parcels based upon the characteristics of the parcel. See *id.* at 310-11.

36. See *id.* at 309-10. This reappraisal should occur at least once every six years. See *id.* at 309.

37. See *id.* at 309-10.

38. FLA. STAT. § 193.023(2) (1997).

39. See FLA. CONST. art. VII, § 4. The phrase “just value” is a short-hand reference to the constitutional mandate that ad valorem taxes are to be based upon “a just valuation of all property” subject to ad valorem taxation. See FLA. ADMIN. CODE ANN. r. 12D-1.002(2) (1997) (equating “just value” with “just valuation” and “market value”); *Walter v. Schuler*, 176 So. 2d 81, 85-86 (Fla. 1965) (finding “just valuation” legally synonymous with “fair market value,” meaning that which a “purchaser willing but not obliged to buy[] would pay to one willing but not obliged to sell”) (quoting *Root v. Wood*, 155 Fla. 613, 622, 21 So. 2d 133, 137-38 (Fla. 1945) (citations omitted)). This article uses the phrases “just value,” “just valuation,” and “market value” interchangeably.

40. FLA. STAT. 193.011 (1997).

property appraiser must only consider each factor and give it the weight that the facts justify.⁴¹

Section 193.011, Florida Statutes, reflects each of the recognized methods of appraisal—cost, income, and market. Under the “cost approach,” the value of the property is measured by the cost of the materials and labor necessary to construct the property, adjusted for depreciation based upon the age of the property.⁴² Under the “income approach,” the value of the property is measured by its income-producing capacity.⁴³ Under the “market approach,” the value of the property is derived from a comparative analysis of transactions within the same market involving properties of similar size and condition to the subject property.⁴⁴

For any given property, the assessed value will likely vary depending on the approach utilized.⁴⁵ In this regard, the property appraiser must rely on his experience and expertise in determining which approach more accurately reflects a “just valuation” of a particular parcel.⁴⁶ To assist in these determinations, DOR has adopted guidelines and standards for valuing certain property.⁴⁷

2. Classified Use Property and Exemptions

An exception to the general rule that all property must be assessed at fair market value is “classified use property,” which is re-

41. See, e.g., *Lanier v. Walt Disney World Co.*, 316 So. 2d 59, 62 (Fla. 4th DCA 1975).

42. See 12 THOMPSON ON REAL PROPERTY § 97.07(f)(1) (David A. Thomas ed., 1994) (“The cost approach assumes that no one would pay more for a building than what it would cost to build a new one.”).

43. See *id.* The “income approach” is most commonly used in the valuation of commercial or industrial real property. Such property is typically valued on an income-per-square-foot basis. See, e.g., *Mastroianni v. Barnett Banks, Inc.*, 664 So. 2d 284, 285 (Fla. 1st DCA 1995) (determining valuation of a high-rise office building).

44. See 12 THOMPSON ON REAL PROPERTY, *supra* note 42, § 97.07(f)(1) (“In the direct sales or market comparison approach, the appraiser assumes no one would pay more for a property than they would for an equally desirable one.”). The “market approach” is commonly used for valuing residential real property because of the significant availability of comparative sales data. See *id.*

45. See, e.g., *Walker v. Smathers*, 507 So. 2d 1207, 1208 (Fla. 4th DCA 1987) (describing the permissible variation as a “reasonable range of values”).

46. See, e.g., *Daniel v. Canterbury Towers, Inc.*, 462 So. 2d 497, 502 (Fla. 2d DCA 1984) (“It is because there are so many well recognized approaches and techniques for arriving at an appraisal decision that the property appraiser’s decision may be overturned only if there is no reasonable hypothesis to support it.”).

47. See FLORIDA DEPT. OF REV., CLASSIFIED USE REAL PROPERTY GUIDELINES, STANDARD ASSESSMENT PROCEDURES AND MEASURES OF VALUE, AGRICULTURAL GUIDELINES (1982) (incorporated by reference in FLA. ADMIN. CODE ANN. r. 12D-51.001 (1997)) (on file with Fla. DOR, Tallahassee, Fla.) [hereinafter AGRICULTURAL GUIDELINES]; see also 23 Fla. Admin. W. 3497, 3498 (July 18, 1997) (proposing to adopt Standard Measures of Value: Tangible Personal Property Appraisal Guidelines in FLA. ADMIN. CODE ANN. r. 12D-51.002) (copy of proposed guideline available at Fla. DOR, Tallahassee, Fla.).

quired to be assessed based upon the character of its use.⁴⁸ The most common type of "classified use property" is that used for agricultural purposes.⁴⁹ Additionally, some types of property are exempt from ad valorem taxation in whole or in part.⁵⁰ The most prevalent type of exempt property is homestead property.⁵¹ The appraisal and assessment of homestead property is further restricted by article VII, section 4 of the Florida Constitution. That provision was adopted in 1992 as a citizen's initiative, and is known as the "Save Our Homes Amendment."⁵² In essence, the "Save Our Homes Amendment" caps the annual increase in the assessed value of homestead property at three percent.⁵³ It has been estimated that this cap on assessments resulted in a loss of over \$165 million in potential ad valorem tax revenue for fiscal year 1996-97.⁵⁴

B. Administrative and Judicial Review of the Property Appraiser's Assessment

If a taxpayer objects to the valuation of his property contained in the TRIM Notice, he may request an "informal conference" with the property appraiser.⁵⁵ Upon receipt of such a request, the property appraiser, or a member of his staff, is required to confer with the

48. See FLA. CONST. art VII, § 4(a)-(b); FLA. STAT. § 193.441 (1997); see also *id.* § 193.461(5) (listing various types of agricultural uses); AGRICULTURAL GUIDELINES, *supra* note 47.

49. In 1995, there were over 221,000 agricultural parcels in Florida. See FLA. DOR, AD VALOREM TAX TASK FORCE: AUGUST 27, 1996, MEETING DATA PRESENTATION 5 (1996) (on file at Fla. DOR, Tallahassee, Fla.) (presented to Florida Ad Valorem Tax Task Force on August 27, 1996) [hereinafter DOR DATA PRESENTATION]. The differential between the market value and taxable value of these parcels was over \$27 billion, which resulted in a loss of potential ad valorem tax revenue of \$595 million. See 1996 FLORIDA TAX HANDBOOK, *supra* note 4, at 129 (fiscal year 1995-96 data).

50. See, e.g., FLA. ADMIN. CODE ANN. r. 12D-7.006 to -7.014 (homestead property), -7.015 (property used for educational purposes), -7.016 (government-owned property) (1997); see generally FLA. STAT. ch. 196 (1997).

51. See DOR DATA PRESENTATION, *supra* note 49, at 5. For tax year 1995, homestead parcels accounted for approximately 43% of all of the parcels subject to ad valorem taxation. See *id.* (accounting for over 3.3 million parcels). Only the first \$25,000 of the assessed value of homestead property is exempt from ad valorem taxation. See FLA. CONST. art. VII, § 6(d); FLA. STAT. § 196.031(3)(d)-(e) (1997). Other types of property, such as that owned by governmental entities or religious institutions, are immune or fully exempt from ad valorem taxation. See FLA. CONST. art. VII, § 3(a); FLA. STAT. §§ 196.012(1), .192, .196, .199 (1997).

52. FLA. CONST. art. VII, § 4(c); see also PARTIAL YEAR ASSESSMENT REPORT, note 3, at 31.

53. See FLA. CONST. art. VII, § 4(c)(1)(A). The increase in the assessment may not exceed 3% of the assessment for the prior year or the percent change in the Consumer Price Index, whichever is lower. See *id.* § 4(c)(1); see also FLA. STAT. § 193.155 (1997) (implementing legislation).

54. See 1996 FLORIDA TAX HANDBOOK, *supra* note 4, at 129.

55. See FLA. STAT. § 194.011(2) (1997).

taxpayer regarding the correctness of the assessment.⁵⁶ At this meeting, the taxpayer must be given an opportunity to present any facts that may support a change in the assessment by the property appraiser.⁵⁷ If the taxpayer is not satisfied with the resolution of his complaint by the property appraiser, the taxpayer may petition the county's Value Adjustment Board (VAB)⁵⁸ for review of the assessment.⁵⁹

The petition for review must be filed⁶⁰ with the VAB within twenty-five days after the mailing of the TRIM Notice if the petition relates to valuation issues, or within thirty days after the mailing of the TRIM Notice if the petition involves the denial of an exemption, an agricultural classification, or a deferral.⁶¹ The petition must be accompanied by the filing fee prescribed by the VAB.⁶²

The VAB is required to meet within forty-five days after the mailing of the TRIM Notice to consider any timely-filed petitions for review.⁶³ Alternatively, the VAB may appoint one or more special masters to hear the petitions and to make recommendations to the VAB.⁶⁴ The hearings on the petitions, whether conducted by the VAB

56. See *id.*

57. See *id.*

58. The VAB is composed of five members: three members of the board of county commissioners and two members of the local school board. See *id.* § 194.015.

59. Neither the "informal conference" nor the VAB process is a prerequisite to filing an action challenging the assessment in circuit court. See *id.* §§ 194.011(2), .034(1)(b). If the taxpayer does not seek review of the assessment by the VAB, the challenge must be filed in circuit court within 60 days after the assessment is certified for collection. See *id.* § 194.171(2).

60. Filing occurs upon receipt of the petition by the VAB. See 81-43 Fla. Op. Att'y Gen. 130, 131 (1981); cf. FLA. STAT. § 192.047(1) (1997) (stating that the application for exemption is deemed filed on the date of mailing).

61. See FLA. STAT. § 194.011(3)(d) (1997). The VAB, for good cause shown, may consider late-filed petitions if consideration would not "be prejudicial to [the VAB's] functions in the taxing process." FLA. ADMIN. CODE ANN. r. 12D-10.003(8) (1997). It was suggested to the Task force that the 25-day filing period be expanded so that the property appraiser would be given more time to resolve the taxpayer's concerns outside of the "formal" VAB process. See Fla. Ad Valorem Tax Task Force, tape recordings of proceedings (Aug. 27, 1996) (available at Fla. DOR, Tallahassee, Fla.) (comments of Ron Schultz, Citrus County Property Appraiser) [hereinafter August Tapes].

62. See FLA. STAT. § 194.013(3) (1997). The filing fee may not exceed \$15. See *id.* § 194.013(1). The fee is refundable to the taxpayer if he prevails before the VAB. See *id.* § 194.013(4). A bill introduced in the 1997 Regular Session would have increased the maximum allowable filing fee to \$30. See Fla. SB 1556 (1997) (sponsored by Senator William Turner, Dem., Miami Shores). The bill was never heard by a committee and was ultimately withdrawn from consideration. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF SENATE BILLS at 126, SB 1556.

63. See FLA. STAT. § 194.032(1)(a) (1997).

64. See *id.* § 194.035(1); FLA. ADMIN. CODE ANN. r. 12D-10.002 (1997). Each special master must be either an attorney knowledgeable in the area of ad valorem taxation or a professional real estate appraiser with no less than five years of experience. See FLA. STAT. § 194.035(1) (1997); see also 81-37 Fla. Op. Att'y Gen. 5 (1981) (discussing the necessary qualifications for real estate appraisers).

or a special master, are quasi-judicial in nature and must be conducted in accordance with the rules adopted by DOR.⁶⁵

The taxpayer has the right to be represented by an attorney and to present testimony or other evidence at the hearing.⁶⁶ Upon the request of either the taxpayer or the property appraiser, witnesses can be required to testify under oath.⁶⁷ Each party has the right to cross-examine witnesses.⁶⁸ The VAB's written decision must be issued within twenty days of adjournment of the board and must contain findings of fact, conclusions of law, and the reasons for upholding or overturning the property appraiser's assessment.⁶⁹

The VAB's decision can be "appealed" to the circuit court in the county where the property is located.⁷⁰ The taxpayer has an unconditional right to "appeal" the VAB's decision.⁷¹ The property appraiser may only "appeal" if the VAB's decision violates the constitution, a statute, or administrative rule, or if the VAB reduces the property appraiser's assessment by certain percentages.⁷² The circuit court proceeding is *de novo* and the burden of proof is on the party initiating the action.⁷³

65. See FLA. ADMIN. CODE ANN. r. 12D-10.003 (1997); see also FLA. STAT. § 194.034 (1997).

66. See FLA. STAT. § 194.034(1)(a) (1997).

67. See *id.*

68. See *id.*

69. See *id.* § 194.034(2); FLA. ADMIN. CODE ANN. r. 12D-10.003(5) (1997).

70. See FLA. STAT. § 194.171(1) (1997). Venue for suits involving railroad property assessments is in Leon County. See *id.* § 193.085(4)(e). The complaint must be filed in circuit court within 60 days after the final certification of the assessment rolls. See *id.* § 194.171(2).

71. See *id.* § 194.036(2).

72. See *id.* § 194.036(1)(b). The property appraiser may only "appeal" if the variance from his assessment falls within the following range:

Assessment:	Variance:
less than \$50,000	15%
\$50,001 - 500,000	10%
\$500,001 - 1 million	7.5%
greater than \$1 million	5%

See *id.* The property appraiser may also file suit against the VAB if he alleges (and DOR concurs) that the VAB's decisions consistently and continuously violate the intent of the law or administrative rules. See *id.* § 194.036(2)(c).

73. See *id.* § 194.036(3). The party initiating the "appeal" is designated "plaintiff," and the other party, the party that prevailed before the VAB, is designated "defendant." See *id.* § 194.181(1)-(2). Where the property appraiser initiates the proceeding, his burden is to demonstrate the correctness of his assessment. See *Bystrom v. Equitable Life Assurance Soc'y of the U.S.*, 416 So. 2d 1133, 1146 (Fla. 3d DCA 1982) (Pearson, J., concurring in part). This burden can be satisfied by demonstrating the assessment was made "in substantial compliance with Section 193.011." *Id.* If the taxpayer initiates the action, his burden is to disprove "every reasonable hypothesis of a lawful assessment." See discussion *infra* Part II.C.

The intricacies of this *de novo* appeal were discussed in *Bystrom v. Equitable Life Assurance Society of the United States*.⁷⁴ In that case, the court held that the VAB's decision is not entitled to any presumption of correctness.⁷⁵ However, where the taxpayer appeals the decision—thereby seeking a further reduction in the valuation of the property—the VAB's valuation establishes “the benchmark above which the Circuit Court cannot go.”⁷⁶ Stated another way, the proceeding in circuit court will not jeopardize the reduction in value that the taxpayer obtained at the VAB unless the property appraiser has also “appealed” the VAB's determination.⁷⁷ To obtain a further reduction in the assessment, however, the taxpayer must demonstrate that the property appraiser's valuation⁷⁸ was unsupported by “excluding every reasonable hypothesis of a legal assessment.”⁷⁹

If the taxpayer “appeals” the VAB decision, or if the taxpayer challenges the assessment in circuit court without first going through the VAB process, the taxpayer is required to pay the portion of the tax that the taxpayer admits in good faith is owed.⁸⁰ Moreover, the taxpayer may not maintain an action in circuit court unless the taxes on the property for subsequent years continue to be paid.⁸¹ These requirements are jurisdictional in nature, and the failure to comply with these requirements will result in dismissal of the challenge.⁸²

74. 416 So. 2d 1133 (Fla. 3d DCA 1982); see also *FLORIDA STATE AND LOCAL TAXES*, supra note 15, § 8.03 at 356-62.

75. See *Bystrom*, 416 So. 2d at 1146 (Pearson, J., concurring). Judge Pearson's concurring opinion, joined by Judge Hubbard, is actually the majority opinion with respect to the portion of the decision relating to the taxpayer's burden of proof in an “appeal” of the VAB's decision. See *id.* at 1145.

76. *Id.* at 1147. This principle does not apply, however, where both the taxpayer and the property appraiser appeal the VAB's decision. See *id.*

77. See *id.*

78. Judge Nesbitt suggested that the proceeding in circuit court was to review the VAB's valuation. See *id.* at 1143. The remainder of the panel disagreed and noted that Judge Nesbitt's view “would change the nature of the Circuit Court proceedings from *de novo* to classic certiorari.” *Id.* at 1146 n.15 (Pearson, J., concurring).

79. *Id.* If, however, the county property appraiser's assessment was not entitled to a presumption of correctness because the property appraiser failed to consider each criterion in section 193.011, Florida Statutes, the taxpayer would only be required to overcome the VAB's determination by a “preponderance of the evidence.” *Id.* at 1145. This was the case in *Bystrom*. See *id.*

80. See *FLA. STAT. § 194.171(3)* (1997). Payment of the tax owed prior to bringing an action in circuit court is not an admission that the tax was due and does not prejudice the taxpayer's right to challenge the tax or to seek a refund. See *id.* § 194.171(4). This provision, along with the interest and penalties that are assessed against the taxpayer if the challenge is unsuccessful, encourages full payment of the assessed tax. See *id.* § 194.192(2).

81. See *id.* § 194.171(5).

82. See *id.* § 191.171(6).

C. The "Problem": Judicially Created Burdens of Proof in Ad Valorem Tax Challenge Cases

As noted above, critics have argued that the VAB process and the circuit court review of assessments provide no meaningful relief because of the difficult standard that taxpayers must meet in order to prevail. This standard was not adopted by the Legislature nor is it codified by statute;⁸³ instead, the standard was created by the Florida Supreme Court in 1929.⁸⁴

1. Florida Case Law

The first case that defined the taxpayer's burden of proof to overcome the property appraiser's presumption of correctness appears to be *Folsom v. Bank of Greenwood*.⁸⁵ In that case, the taxpayer challenged the property appraiser's assessment of its bank stock, surplus, and undivided profits.⁸⁶ The trial court invalidated the assessment because the property appraiser failed to also assess similar property of other businesses.⁸⁷ The Florida Supreme Court affirmed.⁸⁸

83. Interestingly, this standard is "codified" in DOR's rules governing the VAB. See FLA. ADMIN. CODE ANN. r. 12D-10.003(3) (1997) (citing *Homer v. Dadeland Shopping Center, Inc.*, 229 So. 2d 834 (Fla. 1969)); see also *infra* notes 311-15 and accompanying text (discussing proposed amendments to FLA. ADMIN. CODE ANN. r. 12D-10.003(3)).

84. See *Folsom v. Bank of Greenwood*, 97 Fla. 426, 429-30, 120 So. 317, 318 (1929). At the outset, it is important to recognize that courts are generally reluctant to involve themselves in ad valorem tax matters. As one commentator noted:

This reluctance stems from two policy considerations. First, revenues required to fund essential governmental services require stability. Courts have always lived in fear that their intervention in the process would upset the stability of this essential revenue raising mechanism and cause turmoil in the provision of essential governmental services. Thus the courts have always felt that, barring peculiar circumstances, they should not be called upon to mediate between taxpayers and tax users. Secondly, the courts recognize the technical nature of the determination of the tax and all of its components (value, assessment, equalization factors, levy rates, etc.). They are also mindful of the elaborate administrative systems established by most legislatures to give taxpayers notice of these components and an opportunity to be heard by technically proficient administrative bodies before these components are finalized. Courts have felt that technically competent tax administrators are always better equipped to mediate disputes than are courts which probably are not technically proficient in the area and do not possess the resources to become proficient.

GREGORY J. LAFAKIS, *BURDENS OF PROOF AND PRESUMPTIONS*, 4-5 (1995) (available at Fla. DOR, Tallahassee, Fla.) (provided to the Florida Ad Valorem Tax Task Force at its meeting on November 13, 1996).

85. 97 Fla. 426, 120 So. 317 (1929).

86. See *id.* at 429, 120 So. at 318. These items are intangible personal property and are no longer subject to ad valorem taxation on the local level. See FLA. CONST. art. VII, §§ 1(a), 2. Currently, DOR administers the tax on intangible personal property. See FLA. STAT. ch. 199 (1997).

87. See *Folsom*, 97 Fla. at 429, 120 So. at 318.

88. See *id.* at 432, 120 So. at 319.

The court held that a taxpayer challenging the validity of the property appraiser's assessment must overcome the "prima facie correctness"⁸⁹ of the assessment "by appropriate and sufficient allegations and proofs excluding every reasonable hypothesis of a legal assessment."⁹⁰ Since Folsom, Florida courts have applied the "every reasonable hypothesis" standard⁹¹ in cases where an assessment is challenged, whether based upon the property appraiser's determination of value or denial of classified status.⁹²

The First District Court of Appeal applied this standard in *Mastroianni v. Barnett Banks, Inc.*⁹³ At issue in *Mastroianni* was the 1992 and 1993 valuations of the Barnett Center, a high-rise office

89. *Id.* at 429-30, 120 So. at 318. The court previously referred to this presumption of correctness in *City of Tampa v. Palmer*, 89 Fla. 514, 105 So. 115 (1925), stating that "[t]he good faith of tax officers and the validity of their official actions are presumed, and when assailed the burden of proof is upon the complaining party." *Id.* at 520, 105 So. at 117 (emphasis added) (citing *Camp Phosphate Co. v. Allen*, 77 Fla. 341, 353, 81 So. 503, 507 (1919)).

90. *Folsom*, 97 Fla. 430, 120 So. at 318 (emphasis added). In support of this standard, the court cited a number of United States and Florida Supreme Court decisions, including *German-American Lumber Co. v. Barbee*, 59 Fla. 493, 52 So. 292 (1910). In that case, the court described the appropriate standard in cases where a taxpayer is challenging the validity of an assessment as follows:

The law contemplates that a wide discretion be accorded to the tax assessor in the valuation of property for the purposes of taxation. In the absence of a clear and positive showing of fraud or of an illegal act or of an abuse of discretion rendering an assessment authorized by law so arbitrary and discriminating as to amount to a fraud upon a taxpayer or to a denial of the equal protection of the laws, the courts will not in general control the discretion of the tax assessor in making valuations for taxing purposes.

Id. at 498-99, 52 So. at 294.

91. Some courts have couched the standard in slightly different terms. See, e.g., *Blake v. Xerox Corp.*, 447 So. 2d 1348, 1350 (Fla. 1984) (stating that the issue is "whether the appraiser . . . could conceivably and reasonably have arrived at the appraisal value being challenged"); *Walker v. Trump*, 549 So. 2d 1098, 1104 (Fla. 4th DCA 1989) (holding that a taxpayer must demonstrate that there is "no reasonable basis whatsoever" for the challenged assessment).

92. See, e.g., *Blake*, 447 So. 2d at 1351 (valuation of tangible personal property); *Powell v. Kelly*, 223 So. 2d 305, 307 (Fla. 1969) (valuation of timberland property); *Davis v. St. Joe Paper Co.*, 652 So. 2d 907, 908-09 (Fla. 1st DCA), rev. denied, 661 So. 2d 825 (Fla. 1995) (denying classified status); *St. Petersburg Kennel Club, Inc. v. Smith*, 662 So. 2d 1270, 1271 (Fla. 2d DCA 1995) (denying classified status). It does not appear that the "every reasonable hypothesis" standard, as such, has been applied in cases where the taxpayer challenges the denial of an exemption. In this regard, courts appear more willing to second-guess the property appraiser's determination with respect to exemptions. See, e.g., *Robbins v. Florida Conference Assoc. of Seventh Day Adventists*, 641 So. 2d 893, 894 (Fla. 3d DCA 1994) (reversing the property appraiser's determination that a vacant lot owned by a church was not entitled to religious exemption). However, the taxpayer has the burden to prove his entitlement to the exemption. See, e.g., *Jar Corp. v. Culbertson*, 246 So. 2d 144, 145 (Fla. 3d DCA 1971).

93. 664 So. 2d 284 (Fla. 1st DCA 1995). Arguably, this decision triggered the subsequent legislative actions that resulted in the repeal of the "any reasonable hypothesis" standard. Senator Horne, one of the primary sponsors of the 1997 legislation that accomplished this goal, is from the Jacksonville area, and the unsuccessful taxpayer/plaintiff in *Mastroianni* was Barnett Bank, a Jacksonville-based corporation.

building in downtown Jacksonville.⁹⁴ The county property appraiser assessed the property at approximately \$70 million for 1992 and approximately \$65 million for 1993.⁹⁵ Barnett's appraiser assessed the property at \$55 million for 1992 and \$60 million for 1993.⁹⁶ The trial court determined that the county property appraiser failed to "legally consider" each criterion in section 193.011, Florida Statutes, and therefore his assessments did not enjoy a presumption of correctness.⁹⁷ The trial court then determined that Barnett's assessments were a more reasonable reflection of the property's "just value" and substituted Barnett's assessments in lieu of the county property appraiser's assessments.⁹⁸

On appeal, the First District Court of Appeal reversed and directed the trial court to "reinstate the original assessments made by the county property appraiser."⁹⁹ The First District Court held that the trial court erred because the record demonstrated that the county property appraiser did, in fact, consider all of the criteria in section 193.011, Florida Statutes, and that the appraiser "followed the policy and directives from the Department of Revenue in making the appraisal."¹⁰⁰ Because the record demonstrated that the county property appraiser's assessments were supported by a reasonable hypothesis of legality, the court reasoned that they should not have been rejected.

One component of Barnett's challenge was that the property appraiser did not correctly apply the income method upon which his assessment was purportedly based.¹⁰¹ Specifically, Barnett argued that the property appraiser improperly applied a rate of occupancy for the Barnett Center of eighty percent even though the actual rate of occupancy of the building was only sixty-one percent.¹⁰² The First District specifically rejected this argument and stated that "[a]s long as available actual figures are considered, the decision whether it is

94. See *id.* at 285.

95. See *id.* The VAB affirmed the county property appraiser's assessment for 1992, but reduced the assessment for 1993 to \$60 million. See *id.* Barnett appealed the former decision and the property appraiser appealed the latter. See *id.* The cases were consolidated for trial and the appeal. See *id.*

96. See *id.* at 286.

97. See *id.* at 287.

98. See *id.* at 287-88.

99. *Id.* at 288.

100. *Id.* The county property appraiser considered, but rejected, the market value and cost approach to valuation of the property. See *id.* at 285. Instead, the appraiser relied upon the income approach. See *id.* at 286.

101. See *id.* at 286-87.

102. See *id.* at 286. The 80% rate reflected the average occupancy rate for downtown Jacksonville office buildings. See *id.* at 288.

reasonable to use them falls within the administrative discretion of the property appraiser.”¹⁰³

This holding is consistent with *Blake v. Xerox Corporation*,¹⁰⁴ where the Florida Supreme Court chided the lower courts for determining which appraisal method was “better.”¹⁰⁵ The court stated that “the only questions presented by the instant case are whether the appraiser considered all factors mandated by the law and whether his methods and conclusion are supported by any reasonable hypothesis of a legal assessment.”¹⁰⁶ Stated another way, because the property appraiser relied upon one of the available methods for valuing the property, his assessment would be upheld, even if another method more accurately reflected “just value.”

The *Blake* and *Mastroianni* decisions epitomize the length to which courts are willing to go to uphold the property appraiser’s determinations. In this regard, the court will not substitute its judgment for that of the property appraiser regarding which appraisal method to use or whether the methodology used was properly applied based upon the facts available to the property appraiser. From the taxpayer’s standpoint, these decisions illustrated the need for change to the ad valorem tax challenge process.

2. Other States

The “every reasonable hypothesis” burden of proof is unique to Florida.¹⁰⁷ While most other states afford the local property appraiser’s assessment a presumption of correctness,¹⁰⁸ the taxpayer’s burden in overcoming the presumption is generally less onerous. In fact, one recent study identified eighteen states in which the taxpayer’s burden of proof is “preponderance of the evidence” or lower.¹⁰⁹

103. *Id.* at 288 (citations omitted and emphasis added); accord *Florida East Coast Ry. Co. v. Department of Rev.*, 620 So. 2d 1051, 1060-61 (Fla. 1st DCA 1983) (upholding the property appraiser’s valuation which considered, but did not use, actual income figures). But see *Bystrom v. Hotelarama Assoc. Ltd.*, 431 So. 2d 176, 177 (Fla. 3d DCA 1983) (finding that it was error not to consider actual income figures).

104. 447 So. 2d 1348 (Fla. 1984).

105. *Id.* at 1350-51. The property appraiser relied upon the list-price-less-depreciation method for valuing Xerox’s property in Dade County. See *id.* at 1350. Xerox argued that the property should be valued based upon the income capitalization method. See *id.* The trial court determined that the method used by the appraiser was “better,” but the district court reached the opposite conclusion. See *id.*

106. *Id.* at 1351.

107. See Adolph Koepfel & Saul R. Fenchel, *Challenging Ad Valorem Real Property Assessments in Florida*, FLA. B.J., Oct. 1983, at 540, 542 n.14.

108. See *COMPARISON OF TAX SYSTEMS*, supra note 9, at 4 n.2.

109. See *id.* at 5-6, Table 2.

D. The 1996 Legislature's "Fix": House Bill 557

Representative Starks and Senator Horne introduced bills in the 1996 Regular Session that would have legislatively overruled Mastroianni. Those bills, House Bill 557 and Senate Bill 740, received significant bi-partisan support¹¹⁰ and were placed on committee agendas early in the session.¹¹¹ The bills proposed to add a new subsection (7) to section 194.171, Florida Statutes, to provide:

In any administrative or judicial action in which a taxpayer challenges an ad valorem tax assessment, the denial of an exemption, or the denial of classified status, the property appraiser's assessment or determination shall be presumed correct if the property appraiser has complied with the requirements of law and followed recognized professional standards of appraisal practice. The taxpayer shall have the burden of overcoming the presumption by a preponderance of the evidence, but shall not have the burden of presenting proof which excludes every reasonable hypothesis of a legal assessment.¹¹²

This proposed reduction in the taxpayer's burden of proof generated significant controversy. The primary opponents of House Bill 557 and Senate Bill 740 were the county property appraisers and local governments.

The opponents of the bills argued that the reduction in the burden of proof would have a significant negative fiscal impact on local governments¹¹³ and, therefore, would constitute an unfunded mandate.¹¹⁴ The opponents further argued that any change to the exist-

110. Ninety-three members were listed as co-sponsors of House Bill 557, and 32 members co-sponsored Senate Bill 740. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 266, HB 557; *id.* HISTORY OF SENATE BILLS at 83, SB 740.

111. House Bill 557 was heard by the House Judiciary Committee during the second week of the session. See *id.*, HISTORY OF HOUSE BILLS at 266, HB 557. Senate Bill 740 was heard by the Senate Judiciary Committee during the first week of the session. See *id.*, HISTORY OF SENATE BILLS at 83, SB 740.

112. Fla. HB 557 (1996); Fla. SB 740 (1996) (emphasis added).

113. See Fla. H.R. Comm. on Judiciary, HB 557 (1996) Staff Analysis 1, 4-5 (final June 3, 1996) (on file with comm.) [hereinafter HB 557 Staff Analysis]. This argument is apparently based upon the assumption that more taxpayers would prevail in challenges to the property appraiser's assessment of their property under this lower standard. To prevail, however, the taxpayer must demonstrate that the assessment is in excess of "just value." See *id.* at 5. Therefore, a necessary assumption of the opponents' argument regarding the fiscal impact of the bill is that the property of many taxpayers is currently assessed in excess of "just value." See *id.* In this regard, the comments of Justice Terrell in *City of Tampa v. Palmer*, 89 Fla. 514, 105 So. 115 (1925), seem particularly applicable: "I am convinced that a very large proportion of our taxpayers are burdened with [excessive assessments], . . . but [they] must be shown to have been made under circumstances amounting to fraud, before equity can relieve against them." *Id.* at 536, 105 So. at 122 (Terrell, J., concurring).

114. The Speaker of the House determined that House Bill 557 implicated the mandate provisions of article VII, section 18 of the Florida Constitution. See HB 557 Staff

ing burden of proof would be unconstitutional. This latter argument was based upon two separate, but related, grounds. First, the opponents argued that the existing burden of proof is a logical and necessary component of the presumption of correctness to which property appraisers, as constitutional officers, are entitled.¹¹⁵ Second, the opponents argued that the Legislature's attempts to weaken this judicially created burden of proof would violate the separation of powers provision of the Florida Constitution.¹¹⁶ Neither of these arguments are overly persuasive.

The "constitutional officer" argument assumes that the "every reasonable hypothesis" standard is, in fact, inextricably linked to the presumption of correctness.¹¹⁷ While courts have discussed these issues together, a close reading of these cases suggests that the primary basis for the "every reasonable hypothesis" standard is the complex nature of the appraisal process rather than the stature of the individual conducting the appraisal.¹¹⁸ Similarly, the "separation of powers" argument is based upon the erroneous assumption that only courts may establish burdens of proof. To the contrary, burdens of proof are generally not procedural in nature and, therefore, the Legislature is free to establish burdens of proof without infringing upon the judiciary's control of the court system.¹¹⁹

Analysis, *supra* note 113, at 5-6; see also Fla. S. Comm. on Ways and Means, CS for SB 740 (1996) Staff Analysis 4-5 (Apr. 25, 1996) (on file with comm.). Specifically, the bill would reduce the authority of local governments to raise revenues. See Fla. HB 557 Staff Analysis, *supra* note 113, at 4-6. As a result, the bill must be passed by two-thirds of the membership of both houses of the Legislature. See FLA. CONST. art. VII, § 18(b). As discussed below, the Legislature approved House Bill 557 by the necessary vote. See *infra* notes 124-25 and accompanying text.

115. See HB 557 Staff Analysis, *supra* note 113, at 2, 6.

116. See *id.* at 6.

117. See *id.* at 2; see also THOMAS W. LOGUE, THE PROPERTY APPRAISER'S PRESUMPTION OF CORRECTNESS: ANSWERS TO COMMON QUESTIONS 3-5 (available at Fla. DOR, Tallahassee, Fla.) (presented to Florida Ad Valorem Tax Task Force on Oct. 24, 1996).

118. For example, in *Daniel v. Canterbury Towers, Inc.*, 462 So. 2d 497 (Fla. 2d DCA 1984), the court opined: "The reason for the 'no reasonable hypothesis' doctrine with respect to the judicial review of property appraiser decisions, is that there are numerous, and sometimes conflicting, appraisal theories or techniques for establishing an opinion as to real estate value." *Id.* at 502. Accord *Powell v. Kelly*, 223 So. 2d 305, 309 (Fla. 1969) ("The appraisal of real estate is an art, not a science."); *Schleman v. Connecticut Gen. Life Ins. Co.*, 151 Fla. 96, 104-05, 9 So. 2d 197, 200 (1942). But see *Straughn v. Tuck*, 354 So. 2d 368, 371 (Fla. 1977) ("Tax assessors are constitutional officers and as such their actions are clothed with the presumption of correctness.").

119. See generally 16 C.J.S. Constitutional Law § 129 (1984) ("The Legislature may also regulate the burden of proof, and the extent thereof required.") (citations omitted); 10 FLA. JUR. 2D Constitutional Law §§ 183-84 (1979 & Supp. 1997) (discussing the boundaries of legislative infringement on judicial powers); see also CHARLES EHRHARDT, FLORIDA EVIDENCE § 303.1 (1997) (distinguishing the procedural "bubble bursting" presumption from those presumptions based upon public policy). The presumption of correctness afforded to the property appraiser's assessment is based upon public policy considerations, see *infra* notes 303-07 and accompanying text, and, therefore, is not a "bubble bursting"

The opponents' arguments were not addressed by the first committees that heard House Bill 557 and Senate Bill 740. However, the bills were subsequently amended in an attempt to appease opponents and avoid a gubernatorial veto of the bill. In this regard, the Senate Ways and Means Committee adopted a Committee Substitute for Senate Bill 740 that limited the applicability of the "preponderance of the evidence" burden of proof contained in the bill to the 1997, 1998, and 1999 tax rolls.¹²⁰ After 1999, the existing "every reasonable hypothesis" burden of proof would apply unless the Legislature subsequently extended the applicability of the lower burden of proof.¹²¹ The Committee Substitute for Senate Bill 740 also required the Office of Programs, Policy, and Governmental Accountability (OPPAGA) to "study the current procedure for challenging ad valorem assessments and determine whether changes are necessary."¹²² A similar amendment to House Bill 557 was adopted in the House Finance and Tax Committee.¹²³

On the House Floor, House Bill 557 was conformed to the Committee Substitute for Senate Bill 740 and then approved by a vote of 108 to 6.¹²⁴ The Senate then approved House Bill 557 by a vote of 35 to 4 and sent the bill to the Governor.¹²⁵ Notwithstanding the over-

presumption. As such, the presumption, and the related burden of proof, are not exclusively procedural in nature. In this regard, Professor Ehrhardt noted:

The burden of persuasion that must be met to disprove the presumed fact is defined by the applicable substantive law and is not the same for all section 90.304 presumptions. For example, a presumption may require a preponderance of the evidence or clear and convincing evidence to disprove the presumed fact. Another presumption may require proof of fraud to overcome the burden. Usually, the stronger the social policy underlying the presumption, the greater quantum of proof required to overcome the presumption.

EHRHARDT, *supra*, § 304.1 (footnotes omitted) (emphasis added).

120. See FLA. CS for SB 740, § 1 (1996).

121. See *id.*

122. *Id.* § 3. The committee substitute also required OPPAGA to study the fiscal impacts of the reduction in the burden of proof and report its findings to the Legislature prior to the 1999 Session. See *id.* § 2. It was expected that the OPPAGA report would be used by the Legislature to determine whether to extend the applicability of the "preponderance of the evidence" burden of proof beyond 1999.

123. See FLA. H.R. Comm. on Fin. & Tax'n, Amendment 1 to Fla. HB 557 (1996) (on file with comm.) (proposed FLA. STAT. § 194.171) (Starks amendment). The amendment to House Bill 557 did not include the OPPAGA study of the fiscal impacts of the lower burden of proof. See *id.* An amendment that would have created a study commission in lieu of any reductions to the burden of proof was defeated in the House Finance and Tax Committee. See H.R. Comm. on Fin & Tax'n, Amendment 2 to HB 557 (1996) (on file with comm.) (proposed FLA. STAT. § 194.171) (Geller amendment). The study commission would have served from July 1, 1996, through June 30, 1998, and was directed to "study the current procedure for challenging ad valorem assessments and determine whether changes are necessary." *Id.*

124. See FLA. H.R. JOUR. 1574-75 (Reg. Sess. 1996).

125. See FLA. S. JOUR. 838-39, 906 (Reg. Sess. 1996); see also FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 266, HB 557.

whelming legislative approval of House Bill 557, opponents of the bill continued to lobby against it and urged the Governor to veto the bill.¹²⁶

E. The Governor's "Response": Veto of House Bill 557

Governor Chiles vetoed House Bill 557.¹²⁷ In his veto message, the Governor acknowledged that the fairness of the system for challenging ad valorem tax assessments is "a legitimate concern."¹²⁸ However, the Governor suggested that the reduction of the burden of proof in House Bill 557 "may create as many inequities as it attempts to correct and will seriously affect local government revenues."¹²⁹

The Governor did support the studies provided for in House Bill 557, at least in concept. In this regard, the Governor stated:

The studies proposed by HB 557 are a good idea, but it is more rational, in my view, to identify the potential impact of this issue before it is implemented. By instituting a study first, the state can then move forward with recommended changes, without unnecessarily risking substantial damage to local government and school district finances.¹³⁰

These comments foreshadowed the Governor's issuance of Executive Order 96-172. The Executive Order was issued the same day that the Governor vetoed House Bill 557 and created the Florida Ad Valorem Task Force.¹³¹ The Governor charged the Task Force with studying the following issues:

126. See Exec. Office of the Gov., Office of Legis. Aff., Legislative Bill Analysis, HB 557, 2-3 (May 22, 1996) (on file with Exec. Office of the Gov., Office of Legis. Aff.) (listing opponents of House Bill 557); see also Letter from Bruce Host, Chairman, Leon County Board of County Commissioners to The Honorable Lawton Chiles, Governor of Florida (May 15, 1996) (available at Exec. Office of the Governor, Office of Legis. Aff.) ("We urge you to reject HB 557 . . ."); Letter from Jim Naugle, Mayor, City of Ft. Lauderdale, to The Honorable Lawton Chiles, Governor of Florida (May 20, 1996) (available at Exec. Office of the Gov., Office of Legis. Aff.) ("We respectfully request that you VETO [House Bill 557].").

127. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1996 REGULAR SESSION, HISTORY OF HOUSE BILLS at 266, HB 557.

128. Veto of Fla. HB 557 (1996) (letter from Gov. Chiles to Sec'y of State Sandra B. Mortham, May 31, 1996) (on file with Sec. of State, The Capital, Tallahassee, Fla.) [hereinafter Veto Message].

129. *Id.* at 1. The Governor noted that estimates of the fiscal impacts to local governments of House Bill 557 ranged from \$70 million to over \$480 million. See *id.* at 2; see also HB 557 Staff Analysis, *supra* note 113, at 1, 4-5 (estimating an annual negative fiscal impact to local governments of \$69.5 to \$160.3 million).

130. Veto Message, *supra* note 128, at 2 (emphasis added).

131. See Fla. Exec. Order No. 96-172 (May 31, 1996).

- a. An evaluation of the statutory procedures for valuing property as utilized by county property appraisers for purposes of Florida's ad valorem tax.
- b. An evaluation of the role of the Florida Department of Revenue as it relates to the approval of the county ad valorem tax rolls in the State of Florida.
- c. An evaluation of the process for correcting error as that process relates to the determination of values, the granting of exemptions, and the classifications of lands by county property appraisers.
- d. An evaluation of the Value Adjustment Board (VAB) proceedings and appeals to the courts as prescribed in Chapter 194, Florida Statutes, to specifically include the burden of proof currently required in such appeals.
- e. An evaluation of the feasibility of imposing ad valorem taxes on a partial year basis.
- f. An evaluation of any fiscal ramifications to the State or local governments that may result from any proposed changes recommended by the Florida Ad Valorem Task Force.¹³²

The Task Force's findings and recommendations were to be submitted to the Governor and the Legislature no later than February 15, 1997.¹³³

The study contemplated by the Executive Order was significantly broader than those provided for in House Bill 557. Whereas the studies in House Bill 557 focused primarily on the procedures for challenging ad valorem tax assessments, the Executive Order required a review of the entire ad valorem tax process, including the underlying valuation process and DOR's review and approval of the ad valorem tax rolls.¹³⁴ The burden of proof issue was to be considered by the Task Force, but it was not intended to be the focus of the Task Force's study.¹³⁵

III. LEGISLATIVE HISTORY OF THE NEW BURDENS OF PROOF

A. The "Forum for Resolution": The Florida Ad Valorem Task Force

Governor Chiles' appointments to the Task Force represented a broad range of interests and experience. The Task Force's seventeen members included county property appraisers, local government officials, the Executive Director of DOR, the Governor's Chief of Staff, as well as individuals representing business interests.¹³⁶ Senator

132. *Id.* § 2.

133. *See id.*

134. Compare *id.* § 2(a)-(f), with Fla. HB 557, §§ 2-3 (1996) (enrolled version).

135. *See* Fla. Exec. Order No. 96-172, § 2(d) (May 31, 1996). However, as discussed in Part III.A.1., the burden of proof issue became the focus of the Task Force.

136. *See* Press Release from the Executive Office of the Gov., Gov. Lawton Chiles (June 21, 1996) (announcing appointments to the Florida Ad Valorem Task Force) (on file with author) [hereinafter Press Release].

Horne, Representative Starks, and two other legislators—Representative Lori Edwards¹³⁷ and Senator William Turner¹³⁸—were also appointed to the Task Force.¹³⁹ Steve Pajcic, an attorney from Jacksonville and a former Democratic candidate for Governor, was appointed chairman of the Task Force.¹⁴⁰

1. The “Deliberation”: The Task Force’s Meetings

The organizational meeting of the Task Force was held in Tallahassee on July 25, 1996.¹⁴¹ At that meeting, the Task Force reviewed its charge from the Governor and attempted to formulate a strategy for addressing each of the issues set forth in the Executive Order. It was clear, however, that the primary focus of Senator Horne and many of the other Task Force members was on the “burden of proof” issue.¹⁴² In this regard, the Task Force members requested the DOR staff to compile data regarding the taxpayer’s success rate under the current tax appeal process and several representative cases in which the “every reasonable hypothesis” standard played a role in the outcome.¹⁴³ These requests set the stage for the next several Task Force meetings.

(a) August 1996: Tallahassee

The Task Force received historical and background information on the ad valorem tax process during its August meeting.¹⁴⁴ The staff of the Advisory Council on Intergovernmental Relations (ACIR) presented a report to the Task Force regarding millage rates,¹⁴⁵ and DOR staff presented the Task Force with ad valorem tax data collected by DOR for the 1994 and 1995 tax years.¹⁴⁶ The purpose of these presentations was to provide the Task Force with an understanding of the relative importance of ad valorem tax revenue to local governments, and to provide a statistical gauge of the existing ad valorem tax challenge process.

The Task Force’s discussion regarding millage rates focused primarily on the caps contained in article VII, section 9(b) of the Florida Constitution. That provision limits ad valorem taxes for county pur-

137. Dem., Auburndale.

138. Dem., Miami Shores.

139. See Press Release, *supra* note 136, at 2.

140. See *id.* at 1.

141. See FLA. AD VALOREM TAX TASK FORCE, REPORT TO THE GOVERNOR AND THE LEGISLATURE 2, 13 (March 1997) (available at Fla. DOR, Tallahassee, Fla.) (summarizing the Task Force’s July 25, 1996, meeting) [hereinafter TASK FORCE REPORT].

142. See *id.* at 13-14 (summarizing comments of Senator Jim Horne).

143. See *id.* at 15.

144. See *id.* at 16-17 (summarizing the Task Force’s August 27, 1996, meeting).

145. See LOCAL GOVERNMENT REVENUE SUMMARY, *supra* note 3.

146. See DOR DATA PRESENTATION, *supra* note 49.

poses, municipal purposes, and school purposes to ten mils each.¹⁴⁷ The millage cap for water management purposes was between .05 mils and one mil for all water management districts.¹⁴⁸ The ACIR report noted that fourteen counties levied ad valorem taxes at the ten mil cap.¹⁴⁹ Seven other counties levied between nine and ten mils.¹⁵⁰ Only one municipality, Greenville, was at its ten mil cap.¹⁵¹ Forty-seven of the sixty-seven local school districts had tax rates in excess of nine mils.¹⁵²

It was suggested that any change to the current ad valorem tax challenge process that made it easier to overturn the property appraiser's assessment would have a direct adverse impact on these local governments at or near their cap. These entities could not increase millage rates to off-set any reductions in aggregate taxable value resulting from successful challenges to the property appraiser's assessment. This impact would be primarily borne by "small counties"¹⁵³ because nineteen of the twenty-one counties at or near the ten mil cap have populations less than 75,000.¹⁵⁴ Therefore, the local government representatives on the Task Force urged the Task Force to proceed cautiously in its review of the burden of proof issue.

The Task Force spent much of the August meeting discussing the meaning and significance of the ad valorem tax data gathered by DOR for the 1994 and 1995 tax years. This data provided a percentage breakdown of the taxable value of each class of property subject to ad valorem taxation.¹⁵⁵ In this regard, real property accounted for almost 87.4% of the taxable value of all property subject to ad valo-

147. See FLA. CONST. art. VII, § 9(b).

148. See *id.* The total millage rates of the water management districts are capped at:

Rate:	District:
.05 mils	Northwest Florida Water Management District
.075 mils	Suwannee River Water Management District
.6 mils	St. Johns River Water Management District
1.0 mils	Southwest Florida Water management District
.80 mils	South Florida Water Management District

See FLA. STAT. § 373.503(3)(a) (1997).

149. See August Tapes, *supra* note 61 (comments of Marsha Hosack, ACIR); see also FLORIDA JT. ADVIS. COUNCIL ON INTERGOVTL REL., LOCAL GOVERNMENT REVENUES IN FLORIDA: FOLLOW-UP INFORMATION Fig. 1 (1996) (available at Fla. DOR, Tallahassee, Fla.) (presented at Sept. 12, 1996, meeting of the Florida Ad Valorem Tax Task Force) [hereinafter LOCAL GOVERNMENT REVENUES FOLLOW-UP].

150. See August Tapes, *supra* note 61 (comments of Marsha Hosack, ACIR).

151. See *id.*; LOCAL GOVERNMENT REVENUES FOLLOW-UP, *supra* note 149, at Table 3.

152. See August Tapes, *supra* note 61 (comments of Marsha Hosack, ACIR).

153. FLA. STAT. § 120.52(17) (1997) (defining "small county" as a county with a population less than 75,000).

154. See LOCAL GOVERNMENT REVENUES FOLLOW-UP, *supra* note 149, at Fig. 1. Of the listed counties, only Alachua and Pasco have populations in excess of 75,000. See *id.*

155. See DOR DATA PRESENTATION, *supra* note 49, at 1-8.

rem taxation in 1995.¹⁵⁶ Tangible personal property accounted for 12.5%, and centrally assessed property accounted for the remaining .1%.¹⁵⁷ These percentages were consistent with the 1994 data,¹⁵⁸ and reflected the reliance on real property for the ad valorem tax base.

The DOR data also contained a breakdown of the number and “success rate” of petitions filed with the VABs contesting the property appraiser’s determination of value.¹⁵⁹ In 1995, taxpayers filed over 30,000 such petitions and prevailed in 29.7% of those cases.¹⁶⁰ In 1994, over 64,000 petitions were filed, and the taxpayer prevailed in 39.1% of those cases.¹⁶¹ The estimated fiscal impact of the cases in which taxpayers prevailed and their assessments were reduced was over \$59 million in 1994 and \$19 million in 1995, excluding Dade County.¹⁶² All but seven counties had at least one valuation petition filed with their VABs in 1995, and all but six counties had one valuation petition filed in 1994.¹⁶³ In this regard, one speaker suggested that the Task Force should be concerned with those counties where few petitions were filed because it may indicate a county-wide undervaluation of the property subject to ad valorem taxation.¹⁶⁴

156. See *id.* at 1. This amounts to almost \$469 billion of taxable value statewide. See *id.* (1995 data). On a parcel basis, improved residential real property accounted for almost 67% of the real property. See *id.* at 5 (43% homestead and 23.7% non-homestead). Commercial and industrial real property made up only 2.7% of the parcels, but represented 21% of the taxable value of all property subject to ad valorem taxation. See *id.* at 2, 3 (1995 data). These figures were consistent with the 1994 data. See *id.* at 4, 6.

157. See *id.*

158. See *id.* at 2. In 1994, real property made up 87.6% of the taxable value of all property subject to ad valorem taxation. See *id.* Tangible personal property accounted for 12.2%, and centrally assessed property made up the remaining .1%. See *id.*

159. See *id.* at 9-10. The data also contained the number and percentage of petitions for exemptions that were filed and granted. See *id.* In this regard, the VABs granted 48.8% of the exemption petitions filed in 1995 (excluding Dade County) and 50.2% of the exemption petitions filed in 1994. See *id.*

160. See *id.* at 9. The 1995 data does not include petitions filed in Dade County. As of the date the DOR data was presented to the Task Force, the 1995 Dade County VAB proceedings were still underway. See *id.* In 1994, nearly 31,000 valuation petitions were filed in Dade County alone, and taxpayers prevailed in 42.9% of those cases. See *id.* at 10. Therefore, the 29.7% “success” rate likely underestimates the actual figure for 1995 once Dade County is factored in.

161. See *id.*

162. See *id.* at 9-10. The 1995 figure does not include data from Dade County because its VAB proceedings had not been completed as of the Task Force’s August meeting. See *supra* note 159. In 1994, Dade County accounted for almost \$33.5 million of the estimated fiscal impact of the reduction in value by the VAB. See DOR DATA PRESENTATION, *supra* note 49, at 10. If a similar reduction occurred in Dade County in 1995, the total negative fiscal impact in 1995 would have been approximately \$52.5 million. See *id.*

163. See DOR DATA PRESENTATION, *supra* note 49, at 9-10. Of those counties, only Lafayette, Taylor, and Union counties had no valuation petitions filed with their VAB in either 1994 or 1995. See *id.*

164. See August Tapes, *supra* note 61 (comments of Stan Beck). Task Force member Senator William Turner agreed that the issue of under-valuation should be addressed by the Task Force. See *id.* (comments of Sen. William Turner). However, this issue never received any serious consideration by the Task Force. Any under-valuation of the county’s

Local government representatives on the Task Force suggested that these percentages demonstrated that it is not impossible, as suggested by proponents of House Bill 557, for taxpayers to satisfy the “every reasonable hypothesis standard” in existing law. Other Task Force members, including Representative Starks, suggested that the 29.7% and 39.1% “success rates” in valuation challenges would be higher but for the existing burden of proof.¹⁶⁵ In sum, the Task Force members seemed to agree that the DOR data is inconclusive, at best, in determining whether the existing burden of proof should be changed.

The Task Force also heard presentations from several local government officials regarding the operation of the VAB process within their jurisdictions.¹⁶⁶ One official noted that the most important element of the VAB process was consistency.¹⁶⁷ He noted that the process generally worked well where the membership of the VAB, and thus its decisions, remained consistent from year to year.¹⁶⁸ Without this consistency, he noted, the public would lose faith in the VAB process.¹⁶⁹ On this issue, Task Force member Representative Lori Edwards suggested that the Task Force consider changes to the composition of the VAB to include a taxpayer representative.¹⁷⁰ Local

assessment rolls should be caught by DOR in its review of the rolls pursuant to Rule 12D-8, Florida Administrative Code. DOR requires a level of assessment—fair market value to assessed value—of at least 85% for roll approval. See July Tapes, *supra* note 24 (comments of Steve Keller). DOR reported that the statewide average is 97.6%. See *id.* Whether this 85% standard satisfies the “just valuation” requirements of the Florida Constitution is beyond the scope of this Article. Compare 1996 FLORIDA TAX HANDBOOK, *supra* note 4, at 134 (suggesting that the elimination of subsections (1) and (8) of section 193.011, Florida Statutes, would essentially require 100% assessments), with DOR, PRESENTATION TO THE GOVERNOR’S TASK FORCE ON AD VALOREM TAX - DECEMBER 17, 1996 - JACKSONVILLE, FLORIDA 8-12 (1996) (on file with Fla. DOR, Tallahassee, Fla.) (discussing the basis of the 85% standard) [hereinafter DOR DECEMBER PRESENTATION].

165. On this issue, DOR staff conceded that these percentages may overstate the taxpayers’ “success rate” in overcoming the “every reasonable hypothesis” standard because some of the cases in which the VAB granted the petition resulted from a stipulation by the property appraiser that an adjustment should be made. See August Tapes, *supra* note 61 (comments of Lance Larson). But see DOR DATA PRESENTATION, *supra* note 49, at 12-13 (listing value reductions by property appraiser). The property appraisers suggested that “success” should be defined as a circumstance where the taxpayer obtained a reduction in his assessment, whether that reduction was the result of a VAB decision (stipulated or unstipulated) or a “counter change” after the informal conference with the property appraiser. See August Tapes, *supra* note 61. Under this definition of “success,” the 29.7% and 39.1% rates may understate the taxpayer’s “success rate” in contesting the assessment of his property.

166. See TASK FORCE REPORT, *supra* note 141, at 16-17 (summarizing the Task Force’s August 27, 1996, meeting).

167. See *id.*; see also August Tapes, *supra* note 61 (comments of Ron Schultz, Citrus County Property Appraiser).

168. See August Tapes, *supra* note 61.

169. See *id.*

170. See Memorandum from Brian H. Bibeau and T. Kent Wetherell, II, attorneys with Hopping Green Sams & Smith, P.A., to file 3 (Aug. 28, 1996) (on file with author)

government representatives on the Task Force suggested that such a change was not necessary because most counties utilized independent special masters to hear taxpayers' petitions and make recommendations to the VAB.¹⁷¹ Interestingly, Task Force member Jimmy Alvarez¹⁷² indicated that he would support a mandatory use of special masters.¹⁷³ Neither of these issues ever received any serious consideration by the Task Force.

(b) September 1996: Tallahassee

The Task Force continued to focus on the VAB process at its September meeting, and also discussed the development of the "every reasonable hypothesis" standard in the courts.¹⁷⁴ In this regard, the Task Force received information from the staff of the Legislative Committee on Intergovernmental Relations (LCIR)¹⁷⁵ regarding the ad valorem tax challenge process in other states. Additionally, DOR staff reported on the use of special masters in the VAB process.¹⁷⁶ This report indicated that twenty-seven counties utilized special masters,¹⁷⁷ and that the costs of the special masters ranged from \$40 to \$150 per hour.¹⁷⁸ The report also indicated that the number of petitions filed with the VAB was relatively small in light of the number of properties subject to ad valorem taxation.¹⁷⁹ The average number of petitions filed as a percentage of the total number of taxable properties within each county was .83% state-wide.¹⁸⁰ Only six counties

(summarizing the Task Force's August 27, 1996, meeting) [hereinafter Hopping Green Memorandum].

171. See *id.*

172. Bradford County Prop. Appraiser. See Press Release, *supra* note 136, at 1.

173. See Hopping Green Memorandum, *supra* note 170, at 3.

174. See TASK FORCE REPORT, *supra* note 141, at 18-19 (summarizing the Task Force's September 12, 1996, meeting).

175. LCIR was formerly known as the Advisory Council on Intergovernmental Relations (ACIR). The 1996 Legislature reorganized the committee and changed its name. See Act effective Nov. 5, 1996, ch. 96-311, §§ 1, 9, 1996 Fla. Laws 1403, 1413 (repealing FLA. STAT. §§ 163.701-.708 (1995) and creating FLA. STAT. § 11.70 (Supp. 1996)).

176. See FLA. DOR, ANALYSIS OF VALUE ADJUSTMENT BOARDS AND SPECIAL MASTERS: 1994 ASSESSMENTS (1996) (on file with Fla. DOR, Tallahassee, Fla.) [hereinafter VAB/SPECIAL MASTER REPORT].

177. See *id.* at 3. The counties that utilized special masters are primarily the larger counties. See *id.* at 2-3. For example, Broward County employed 44 special masters, and Dade County employed 29 special masters. These counties generally have the greatest number of petitions filed with their VABs. See DOR DATA PRESENTATION, *supra* note 49, at 9-10. Therefore, a vast majority of the petitions filed statewide are currently most likely heard by a special master. See VAB/SPECIAL MASTER REPORT, *supra* note 176; see also DOR DATA PRESENTATION, *supra* note 49, at 9-10.

178. See VAB/SPECIAL MASTER REPORT, *supra* note 176, at 2-3.

179. See *id.*

180. See *id.*

exceeded 1%.¹⁸¹ Stated another way, less than nine taxpayers in every 1000 file petitions with the VAB challenging the property appraiser's assessment of their real or tangible personal property.

These statistics suggested that the burden of proof issue affected very few taxpayers statewide. The Task Force members disagreed, however, with whether a reduction of the burden of proof would result in an increase in the number of petitions filed with the VAB. It was clear that these issues would continue to shape the direction of the Task Force's debate.

DOR staff presented an overview of the cases in which the courts developed and discussed the "every reasonable hypothesis" standard.¹⁸² In particular, the Task Force discussed *Blake v. Xerox Corporation*,¹⁸³ *Camp Phosphate Co. v. Allen*,¹⁸⁴ *Walter v. Schuler*,¹⁸⁵ *Walker v. Trump*,¹⁸⁶ *Mastroianni v. Barnett Banks, Inc.*,¹⁸⁷ and *Scripps Howard Cable Co. v. Havill*.¹⁸⁸ The purpose of this presentation was to acquaint the Task Force with the various aspects of the burden of proof issue. These aspects included the trial and appellate courts' roles in establishing value and the factors that may, and the factors that must, be used by property appraisers when establishing assessments.¹⁸⁹

The Task Force engaged in very little debate during its September meeting. However, the Task Force requested additional information from DOR regarding these cases that proceeded beyond the VAB stage.¹⁹⁰ DOR agreed to compile this information for the Octo-

181. The counties were Dade (4.31%), Glades (2.46%), Broward (1.57%), Palm Beach (1.35%), Duval (1.15%), and Hillsborough (1.06%). See *id.*

182. See TASK FORCE REPORT, *supra* note 141, at 19 (summarizing the Task Force's September 12, 1996, meeting). For a discussion of this standard, see *supra* Part II.C.

183. 447 So. 2d 1348 (Fla. 1984).

184. 77 Fla. 341, 81 So. 503 (1919).

185. 176 So. 2d 81 (Fla. 1965).

186. 549 So. 2d 1098 (Fla. 4th DCA 1989).

187. 664 So. 2d 284 (Fla. 1st DCA 1995).

188. 665 So. 2d 1071 (Fla. 5th DCA 1995). This case was cited as an example in which the taxpayer overcame the "every reasonable hypothesis" burden of proof. See Fla. Ad Valorem Tax Task Force, tape recordings of proceedings (Sept. 12, 1996) (available at Fla. DOR, Tallahassee, Fla.); see also TASK FORCE REPORT, *supra* note 141, at 19 (listing cases discussed at the Task Force's September 12, 1996, meeting). However, the case does not stand for that proposition; the property appraiser's presumption of correctness was lost in this case because he failed to consider each criterion in section 193.011, Florida Statutes (1991). See *Havill*, 665 So. 2d at 1076-77, 1079.

189. See TASK FORCE REPORT, *supra* note 141, at 19 (summarizing the Task Force's September 12, 1996, meeting). The Task Force also heard a presentation by Florida State University College of Law Professor Charles Ehrhardt regarding the various burdens of proof in Florida law. See *id.* Professor Ehrhardt also commented on the "hybrid" nature of the "de novo appeal" to circuit court. See *id.*; see also *supra* notes 74-79 and accompanying text.

190. See TASK FORCE REPORT, *supra* note 141, at 18 (summarizing the Task Force's September 12, 1996, meeting).

ber Task Force meeting.¹⁹¹ At the conclusion of the meeting, Chairman Pajcic reminded the Task Force members that the Governor directed the Task Force to consider several issues in addition to the burden of proof issue.¹⁹² In particular, Chairman Pajcic referred to the partial-year taxation issue¹⁹³ and the ad valorem taxation of computer software.¹⁹⁴ Notwithstanding the chairman's reminder, the Task Force did not consider the partial-year taxation issue until its November meeting.

(c) October 1996: Miami

The Task Force continued to focus on the burden of proof issue at its October meeting.¹⁹⁵ Several Dade County employees expressed their opposition to any changes to the existing burden of proof. In this regard, the Assistant County Manager suggested that, to the extent a reduction in the burden of proof would enable more taxpayers to successfully challenge the property appraiser's assessment, the effect of such a reduction would merely be a reallocation of taxes.¹⁹⁶ Another county employee suggested that the "problem" in the area of ad valorem tax litigation is not the burden of proof itself but that the VAB members do not always properly understand or apply the bur-

191. See *id.*

192. See *id.* at 19.

193. See discussion *infra* Part III.A.1.d.

194. See discussion *infra* Part III.A.1.d. The computer software issue relates to the proper measure of value to be given to computer programs and other software for ad valorem tax purposes. Legislation was introduced in the 1996 Regular Session to define "computer software" for purposes of ad valorem taxation to include only the value of the uninstalled medium on which the software is stored, for example disk or tape. See Fla. SB 2226 (1996) (proposed FLA. STAT. § 192.001(19)); Fla. HB 2273 (1996) (same). The increased value to the computer system resulting from the installation or operation of the software is not to be included in the software's value for ad valorem tax purposes. See Fla. SB 2226 (1996); Fla. HB 2273 (1996). The Task Force never addressed the computer software issue. The Legislature approved a bill during the 1997 Regular Session that was identical to those considered in 1996. See Act effective June 1, 1997, ch. 97-294, § 1, 1997 Fla. Laws 5333, 5334 (codified at FLA. STAT. § 192.001(19) (1997)).

195. See TASK FORCE REPORT, *supra* note 141, at 20-21 (summarizing the Task Force's October 24, 1996, meeting). Perhaps the most interesting information brought to the attention of the Task Force during the course of its deliberations was presented at the October meeting. Excerpts from the Dade County real property tax rolls were provided to the Task Force to demonstrate the range of assessments contained therein. More interesting than the range of assessments (from \$24,000 to \$7.3 million) were the identities of the property owners. Included in the excerpts were Madonna (assessed value \$2.1 million), Sylvester Stallone (assessed value \$7.3 million), Miami Heat Coach Pat Riley (assessed value \$4.8 million), and Leona Helmsley (assessed value \$4.6 million). See DADE COUNTY, EXCERPT OF 1996 REAL PROPERTY TAX ROLLS (1996) (available at Fla. DOR, Tallahassee, Fla.) (presented to the Florida Ad Valorem Tax Task Force on Oct. 24, 1996).

196. See TASK FORCE REPORT, *supra* note 141, at 20 (summarizing the comments of Dr. David Morris at the Task Force's October 24, 1996, meeting).

den of proof.¹⁹⁷ The Task Force also heard testimony from individuals who represented taxpayers before the VABs or the courts. These individuals uniformly supported a reduction in the existing burden of proof.¹⁹⁸

DOR staff provided the Task Force with the requested data regarding the outcome of cases "appealed" to circuit court during the 1994 and 1995 tax years.¹⁹⁹ Although a significant number of cases were still pending, the data demonstrated that a settlement is reached between the property appraiser and the taxpayer in most cases that proceed beyond the VAB stage.²⁰⁰ For the 1994 tax year, when a settlement was not reached, the taxpayer prevailed in only two of the twelve cases (16.7%) in which a final judgment had been entered.²⁰¹ Although it is unclear whether or how the "every reasonable hypothesis" standard impacted this "success rate," this data added fuel to the argument that taxpayers rarely prevailed in ad valorem tax challenge cases in circuit court.²⁰²

Task Force member Thomas Logue²⁰³ offered the first formal written proposal to the Task Force regarding the burden of proof issue.²⁰⁴ Under this proposal, the property appraiser's assessment would be entitled to a presumption of correctness if it were within a "range of

197. See *id.* at 21 (summarizing comments of Steve Schultz, attorney for Dade County's VAB).

198. See *id.* at 20-21. One speaker noted that the "every reasonable hypothesis standard" is tantamount to a fraud standard. See *id.* at 21 (summarizing comments of Jeff Manling); see also *German-American Lumber Co. v. Barbee*, 59 Fla. 493, 498, 52 So. 292, 294 (1910) (suggesting that fraud must be demonstrated to overturn the property appraiser's assessment).

199. See FLORIDA DOR, RESULTS OF LITIGATION SURVEYS 1994-1995 (on file with Fla. DOR, Tallahassee, Fla.) (presented to the Florida Ad Valorem Tax Task Force on October 24, 1996).

200. See *id.* For example, 28 of the 36 cases filed in Pinellas County in 1994 were settled. See *id.* at 7.

201. One case was in Palm Beach County, the other in Seminole County. See *id.* at 7, 8. In the Palm Beach County case, the property appraiser and the VAB determined the taxable value of the property to be \$304,920. See *id.* at 7. The court reduced this value to \$150,000. See *id.* In the Seminole County case, the property appraiser and the VAB determined the taxable value of the property to be \$1,000,000. See *id.* at 8. The court reduced this value to \$363,200. See *id.* The 1995 data do not identify any case in which the property appraiser prevailed in the circuit court; however, the data are relatively incomplete. See *id.* at 10-16.

202. It is interesting to note that the taxpayer's "success" rate is lower in circuit court than it is before the VAB. See *supra* notes 159-61 and accompanying text (describing taxpayers' "success rate" before the VAB). This difference is not surprising, however, since one would expect the courts to be more deferential to the challenged assessment (even in the absence of the "every reasonable hypothesis" standard), especially where the assessment has already been "upheld" by the VAB.

203. Assistant Dade County Att'y.

204. See THOMAS W. LOGUE, ALTERNATIVE PROPOSAL TO CHANGING THE PRESUMPTION OF CORRECTNESS TO PREPONDERANCE OF THE EVIDENCE 1 (1996) (available at Fla. DOR, Tallahassee, Fla.) (presented at the Florida Ad Valorem Tax Task Force meeting on October 24, 1996) [hereinafter LOGUE PROPOSAL].

reasonableness.”²⁰⁵ This approach recognized that the various appraisal methodologies often produced several different values and any one of these values could reflect the true market value of the property.²⁰⁶ Under the Logue Proposal, so long as the value chosen by the property appraiser was one of these values, it would fall within the “range of reasonableness” and would be presumed correct.²⁰⁷

The Logue Proposal would have authorized the VAB or the court to establish the value in the event the taxpayer overcame the property appraiser’s presumption of correctness.²⁰⁸ In support of this aspect of the proposal, it was noted that:

Some cases have held that a court can set the assessment at either the Property Appraiser’s value or the taxpayer’s value. If neither number is acceptable, the court must remand for a new assessment. This can be a cumbersome and time-consuming process that would be subject to a new round of appeals. When the Value Adjustment Board or court has sufficient information to establish an assessment based upon the eight criteria [in section 193.011, Florida Statutes (1996)], it should have the authority to do so.²⁰⁹

The Logue Proposal contained several other components, including a requirement that the VABs use special masters,²¹⁰ further limitations on the property appraiser’s right to appeal the VAB’s decision,²¹¹ and additional disclosure requirements for taxpayers.²¹²

The Logue Proposal was not discussed in any detail at the October meeting.²¹³ As described below, however, the Task Force debated the “range of reasonableness” concept at its December meeting.²¹⁴

205. *Id.* at 1-2. This standard would replace the “every reasonable hypothesis” standard, which, according to Mr. Logue, is “confusing and contentious.” *Id.* at 2. To this end, the proposal did not lower the existing standard, it merely renamed it. See GAYLORD A. WOOD, JR. & B. JORDAN STUART, *THE PRESUMPTION OF CORRECTNESS IN PROPERTY TAX LITIGATION* 4 (1995) (available at Fla. DOR, Tallahassee, Fla.) (presented at the Florida Ad Valorem Tax Task Force meeting on October 24, 1996); Letter from Steven A. Schultz, attorney, to Steve Pajcic, Chair of the Florida Ad Valorem Tax Task Force 2-3 (Nov. 4, 1996) (available at Fla. DOR, Tallahassee, Fla.) (summarizing Mr. Schultz’ presentation to the Task Force on October 24, 1996) [hereinafter Schultz Letter].

206. See *supra* Part II.A.1; see also Schultz Letter, *supra* note 205, at 2 (“Reasonable men may differ regarding the valuation of property, but ordinarily there is an acceptable ‘range of values’ within which most appraisals will fall.”).

207. See LOGUE PROPOSAL, *supra* note 204, at 1-2.

208. See *id.* at 2.

209. *Id.* (emphasis added).

210. See *id.* (“The use of knowledgeable special masters ensures a process that is more professional and efficient.”); see also *supra* notes 170-73 and accompanying text.

211. See LOGUE PROPOSAL, *supra* note 204, at 2-3 (proposing modifications to the percentages in FLA. STAT. § 194.036(1)(b) (Supp. 1996)).

212. See *id.* at 3 (proposing a requirement that taxpayers file all supporting documents within 45 days of filing a petition with the VAB to avoid “trial by ambush” before the VAB).

213. See TASK FORCE REPORT, *supra* note 141 (summarizing the Task Force’s October 24, 1996, meeting).

214. See discussion *supra* Part III.A.1.e.

(d) November 1996: Tallahassee

The Task Force focused on the partial-year taxation issue for the first time at its November meeting.²¹⁵ In this regard, the Task Force heard a presentation from a representative of the Property Appraisers Association of Florida (PAAF) regarding the history of the “substantially complete” language in section 192.042, Florida Statutes,²¹⁶ and its relationship to the partial-year taxation concept.²¹⁷ Additionally, LCIR staff outlined some of the legal issues implicated by partial-year taxation.²¹⁸

In a nutshell, partial-year taxation is an effort to more fairly apportion ad valorem taxes on improvements to taxable property that are completed during the tax-year.²¹⁹ Currently, property is assessed for ad valorem tax purposes only on January 1 of each year.²²⁰ Improvements to taxable property that are not “substantially complete”²²¹ on January 1, but that are completed during the tax-year, are not subject to ad valorem taxes until the following year.²²² Critics argue that the current system results in a significant loss of potential ad valorem tax revenue each year.²²³ To this end, partial-year taxation is seen by many as a source of much-needed local govern-

215. See TASK FORCE REPORT, *supra* note 141 at 22-23 (summarizing the Task Force’s November 21, 1996, meeting).

216. FLA. STAT. § 192.042 (1997).

217. See TASK FORCE REPORT, *supra* note 141, at 22 (summarizing the comments of Larry Levy, who represents PAAF, at the Task Force’s November 21, 1996, meeting); see also Letter from Larry E. Levy to Representative Bo Johnson, Speaker of the House of Representatives 2-3 (Mar. 19, 1993) (available at Fla. DOR, Tallahassee, Fla.) (provided to the Florida Ad Valorem Tax Task Force at its meeting on November 12, 1996) [hereinafter 1993 Levy Letter].

218. See TASK FORCE REPORT, *supra* note 141, at 22 (summarizing comments of Dick Drennen and Janet Bowman at Task Force’s November 21, 1996, meeting).

219. See PARTIAL YEAR ASSESSMENT REPORT, *supra* note 3, at 5.

220. See FLA. STAT. § 192.042 (1997).

221. An improvement is deemed “substantially complete[]” if “the improvement or some self-sufficient unit within it can be used for the purpose for which it was constructed.” FLA. STAT. § 192.042(1) (1997). In the context of real property, improvements are not generally considered “substantially complete” until a certificate of occupancy is issued. See, e.g., *Markam v. Yankee Clipper Hotel, Inc.*, 427 So. 2d 383, 385 (Fla. 4th DCA 1983) (affirming the finding that the building was not substantially complete where evidence included the fact that the certificate of occupancy was not issued until after January 1); *John Henry Jones, Inc. v. Lanier*, 376 So. 2d 450, 451 (Fla. 5th DCA 1979) (reasoning that whether the building was eligible to receive a certificate of occupancy on January 1 is evidence of substantial completion).

222. See PARTIAL YEAR ASSESSMENT REPORT, *supra* note 3, at 5.

223. See, e.g., *The Partial Year Solution*, MIAMI HERALD, Feb. 3, 1997, at A12; *Getting a Free Ride*, JACKSONVILLE TIMES-UNION, Feb 8, 1997, at A16. One source estimates that partial-year taxation could yield as much as \$197 million in revenue. See 1996 FLORIDA TAX HANDBOOK, *supra* note 4; see also PARTIAL YEAR ASSESSMENT REPORT, *supra* note 3, at Table 1 (estimating potential county, school district, and municipal revenue for partial-year taxation at approximately \$80 million).

ment revenue.²²⁴ The issue had been subject to considerable legislative debate during the past several sessions, but the Legislature failed to approve any legislation on the subject.²²⁵

If partial-year taxation were implemented, ad valorem taxes would be collected on improvements to taxable property on a pro rata basis based upon the number of months during the tax year that the improvement was complete.²²⁶ An assessment must be done at the time the improvement is completed and separate "interim" assessment rolls must be maintained.²²⁷ Because of the administrative burdens involved with partial-year taxation, county property appraisers have traditionally opposed its implementation.²²⁸

An example is helpful in understanding the operation of partial-year taxation. Assume that the construction of a single-family residential home commenced on October 1, 1996, and was completed on July 1, 1997. Further, assume that on January 1, 1997, the home was only thirty percent complete and thus uninhabitable. Finally, assume that upon completion the home would have a taxable value of \$100,000 (excluding the value of the land), and the combined millage rate applicable to the property is twenty mils.²²⁹

Under the current system, because the home was not substantially complete on January 1, 1997, the taxpayer would not owe any ad valorem taxes on the home. The home would be assessed for the first time on the 1998 tax rolls. If partial-year taxation was implemented, the taxpayer would be assessed a pro rata share of the 1997 ad valorem taxes. Because the home was complete for six months during 1997—July 1 through December 31—the taxpayer would owe six-twelfths of the ad valorem taxes that would have been owed had the property been assessed on January 1, 1997. In this regard, the

224. See, e.g., Dina Nelson, *State Tax Law Costing Counties Millions*, PALM BCH. POST, Feb. 9, 1997, at B1; Craig Sikes, *Valuable Property*, ORLANDO SENT., Apr. 10, 1997, at A22; see also LOCAL GOVERNMENT FINANCES REPORT, supra note 3, at 5-13.

225. See Fla. HB 1693 (1995) (died in committee); Fla. HB 809 (1996) (died in committee); Fla. SB 402 (1996) (died on calendar); Fla. HJR 1449 (1997) (proposing an amendment to FLA. CONST. art. VII, § 2) (carried over to 1998 session); Fla. SJR 1236 (1997) (proposing an amendment to FLA. CONST. art. VII, § 4) (died in committee).

226. See PARTIAL YEAR ASSESSMENT REPORT, supra note 3, at 5.

227. See, e.g., Fla. SB 402, §§ 3, 6 (1996).

228. See, e.g., 1993 Levy Letter, supra note 217, at 4 ("A partial-year assessment roll simply is not administratively feasible."); see also PARTIAL YEAR ASSESSMENT REPORT, supra note 3, at 40-43 (discussing administrative costs from instituting partial year assessment).

229. The average aggregate millage rate imposed on property within Florida is 22.26 mils. See LOCAL GOVERNMENT FINANCES REPORT, supra note 3, at A-2-A-3. This rate reflects the millage imposed by each taxing authority with jurisdiction over a parcel, excluding the applicable municipality. See id.

taxpayer would owe \$1000 in ad valorem taxes on the property.²³⁰ These taxes would be imposed at the time the improvements were completed on July 1, 1997.²³¹

There are several constitutional concerns implicated by the partial-year taxation concept.²³² Specifically, the Florida Supreme Court has interpreted article VII, section 4 of the Florida Constitution to prohibit different treatment of real and tangible personal property.²³³ Therefore, to the extent that partial-year taxation proposals considered by the Legislature in recent years would have applied only to improvements to real property, these proposals may have been unconstitutional.²³⁴ Moreover, in light of the Save Our Homes Amendment,²³⁵ it is uncertain whether improvements to homestead property could be assessed on any date other than January 1.²³⁶

Closely related to the issue of partial-year taxation is section 192.042, Florida Statutes.²³⁷ This statute contains the restriction on assessing property that is not "substantially complete."²³⁸ The predecessor of this statute was adopted by the Legislature in 1961 at the request of the home-building industry.²³⁹ A related provision was added in 1980 at the request of the electric utility industry to benefit incomplete tangible personal property.²⁴⁰

The PAAF representative suggested to the Task Force that the repeal of the "substantially complete" language would address many

230. The taxes are computed by multiplying the taxable value by the millage rate and by the ratio that reflects the number of months that the improvements were completed during 1997— $\$100,000 \times (.001 \times 20) \times 6/12 = \1000 .

231. See, e.g., Fla. HB 809 (1996) (providing for partial year assessment).

232. See 1993 Levy Letter, supra note 217, at 3; Memorandum from Larry E. Levy, General Counsel, Property Appraiser's Association of Florida, to The Honorable Marjorie Turnbull, The Honorable Stephen B. Feren, & The Honorable Ken Pruitt, Members of the Florida Legislature 1, 3 (Mar. 25, 1996) (available at Fla. DOR, Tallahassee, Fla.) (arguing that the proposed 1996 partial-year taxation legislation unconstitutionally distinguished between real and personal property) [hereinafter 1996 Levy Memorandum].

233. See *Interlachen Lakes Estates, Inc. v. Snyder*, 304 So. 2d 433, 435 (Fla. 1974). But see *Colding v. Herzog*, 467 So. 2d 980, 983 (Fla. 1985) (suggesting that the Legislature could classify or exclude certain property from ad valorem taxation where the costs associated with collection of the tax would exceed the revenue generated).

234. See PARTIAL YEAR ASSESSMENT REPORT, supra note 3, at 27-29; 1996 Levy Memorandum, supra note 232, at 2-3.

235. See FLA. CONST. art. VII, § 4(c); see also supra notes 52-54 and accompanying text.

236. See PARTIAL YEAR ASSESSMENT REPORT, supra note 3, at 31-32.

237. FLA. STAT. § 192.042 (1997).

238. *Id.*

239. See Act effective June 12, 1961, ch. 61-240, § 1, 1961 Fla. Laws 422, 423 (codified at FLA. STAT. § 193.11(4) (1961)). The current language in section 192.042, Florida Statutes (1997), was added in 1970. See Act effective January 1, 1971, ch. 70-243, § 4, 1970 Fla. Laws 709, 712; see also 1993 Levy Letter, supra note 217, at 2; 1996 Levy Memorandum, supra note 232, at 2.

240. See FLA. STAT. § 192.001(11)(d) (1997) (defining "construction work in process"); see also 1993 Levy Letter, supra note 217, at 2; 1996 Levy Memorandum, supra note 232, at 2.

of the concerns raised by the proponents of the partial-year taxation without the administrative burdens of implementing partial-year taxation.²⁴¹ Moreover, the constitutional issues implicated by partial-year taxation would not be affected by the repeal of the “substantially complete” language.²⁴² In this regard, the property appraiser would assess all improvements to property on January 1, even if such improvements were still “under construction” on that date.²⁴³

Chairman Pajcic polled the members to determine whether the Task Force’s recommendations to the Governor should advocate a repeal of the “substantially complete” language.²⁴⁴ Although a number of the Task Force members seemed to support the repeal of the “substantially complete” language, the consensus of the Task Force was to request additional information on the issue from DOR staff prior to taking any formal action.²⁴⁵

The Task Force also discussed the burden of proof issue at its November meeting. In this regard, the Task Force focused on an outline prepared by Task Force member Vicki Weber²⁴⁶ that contained several “principles to be used in guiding any revisions of the assessment challenge process.”²⁴⁷ The Task Force also reviewed a proposal from Task Force member Linda Loomis Shelley²⁴⁸ regarding possible revisions to House Bill 557.²⁴⁹

241. See TASK FORCE REPORT, supra note 141, at 22 (summarizing comments of Larry Levy at the Task Force’s November 21, 1996, meeting).

242. See 1993 Levy Letter, supra note 217, at 2; 1996 Levy Memorandum, supra note 232, at 2. But see PARTIAL YEAR ASSESSMENT REPORT, supra note 3, at 20-21 (suggesting that a percentage of completion assessment would contravene the constitutional requirement that property be assessed at “just value,” not a percentage thereof).

243. See PARTIAL YEAR ASSESSMENT REPORT, supra note 3, at 20.

244. See TASK FORCE REPORT, supra note 141, at 23 (summarizing the Task Force’s November 21, 1996, meeting).

245. See id. at 22.

246. Attorney, Steel Hector & Davis, Tallahassee, Fla. Ms. Weber previously served as General Counsel of DOR.

247. TASK FORCE REPORT, supra note 141, at 23 (summarizing the Task Force’s November 21, 1996, meeting).

248. Chief of Staff, Exec. Office of the Gov.

249. See TASK FORCE REPORT, supra note 141, at 23 (summarizing the Task Force’s November 21, 1996, meeting). Ms. Shelley proposed the following revisions to House Bill 557 as vetoed by the Governor:

In any administrative or judicial action in which a taxpayer challenges an ad valorem tax assessment, ~~the denial of an exemption, or the denial of classified status,~~ the property appraiser’s assessment ~~or determination~~ shall be presumed correct if the property appraiser has complied with the requirements of law ~~and followed recognized professional standards of appraisal practice~~ shall be upheld unless the taxpayer proves by clear and convincing evidence that the value is not within the reasonable range of value The taxpayer ~~shall have the burden of overcoming the presumption by a preponderance of the evidence,~~ but shall not have the burden of presenting proof which excludes every reasonable hypothesis of a legal assessment.

Each of these proposals acknowledged that the property appraiser was entitled to a presumption of correctness, especially as to matters “within [the] appraiser’s professional judgment.”²⁵⁰ The proposals also contained reference to a “range of reasonableness” concept raised by Task Force member Thomas Logue at the October meeting.²⁵¹ However, the proposals differed as to the degree of proof necessary to overcome the appraiser’s presumption of correctness. Weber’s “principles” referred to a preponderance of the evidence standard²⁵² while the Shelley proposal would use a clear and convincing evidence standard.²⁵³ Neither proposal directly addressed the issue of the ability of the VAB or the court to establish the assessment without remanding the case to the property appraiser.²⁵⁴ It was clear, however, that these proposals would play a key role in shaping the Task Force’s ultimate recommendation on the burden of proof issue.

(e) December 1996: Jacksonville

At its December meeting in Jacksonville, the Task Force again focused primarily on partial-year taxation and the repeal of the “substantially complete” standard.²⁵⁵ The Task Force also briefly discussed another alternative concept, the “proprietary fee.”²⁵⁶ To this

LINDA LOOMIS SHELLEY, ALTERNATIVE LANGUAGE FOR HB 557 (available at Fla. DOR, Tallahassee, Fla.) (strike-through and underscore in original) (presented at the Florida Ad Valorem Tax Task Force meeting on November 12, 1996) [hereinafter SHELLEY PROPOSAL].

250. VICKI WEBER, CURRENT CONDITIONS AND PRINCIPLES GUIDING REVISION OF ASSESSMENT CHALLENGE PROCESS 2 (1996) (available at Fla. DOR, Tallahassee, Fla.) (presented at the Florida Ad Valorem Tax Task Force meeting on November 12, 1996) [hereinafter WEBER PROPOSAL I]. In both proposals, the appraiser’s determination as to matters involving questions of law, such as entitlement to an exemption or classified use status, would not be entitled to a presumption of correctness. See *id.*; accord SHELLEY PROPOSAL, *supra* note 249 (stricken language); see also discussion *infra* Part IV.A.

251. See SHELLEY PROPOSAL, *supra* note 249; WEBER PROPOSAL I, *supra* note 250, at 2 (“principle” no. 5).

252. See WEBER PROPOSAL I, *supra* note 250, at 2 (“principle” nos. 4, 5).

253. See SHELLEY PROPOSAL, *supra* note 249, at 1 (“[T]he property appraiser’s assessment . . . shall be upheld unless the taxpayer proves by clear and convincing evidence that the value is not within the reasonable range of value.”). The Shelley Proposal limited the applicability of this lower burden of proof to valuation cases. See *id.*

254. Cf. WEBER PROPOSAL I, *supra* note 250, at 3 (“Care should be taken to ensure that any revisions to the assessment appeals process do not render it too costly and burdensome a process for both taxpayers and government.”); SHELLEY PROPOSAL, *supra* note 249, at 1 (noting that a potential refinement to her proposal is “[a]uthorization for the VAB or court to prescribe a new value given sufficient evidence in the record”).

255. See TASK FORCE REPORT, *supra* note 141, at 24-25 (summarizing the Task Force’s December 17, 1996, meeting).

256. See *id.* This proposal, discussed briefly at the November meeting, would authorize local governments to impose a fee on developers as a condition for the receipt of a certificate of occupancy for new construction. See *id.* at 25 (summarizing the comments of Ken Wilkinson at the Task Force’s November 21, 1996, meeting); PARTIAL YEAR ASSESSMENT REPORT, *supra* note 3, at 17-18. This fee is similar to the traditional “impact fee” and, therefore, must be based upon the cost of providing public services to the prop-

end, DOR staff presented a report to the Task Force regarding the relative costs and benefits of each of these alternatives.²⁵⁷

In sum, this report indicated that the most “equitable” of these alternatives was partial-year taxation.²⁵⁸ Partial-year taxation would require the highest start-up costs, but low annual administrative costs.²⁵⁹ Conversely, the repeal of the “substantially complete” doctrine would require low start-up costs, but higher annual administrative costs than partial-year taxation.²⁶⁰ Interestingly, the DOR report referred to the equity of the repeal of “substantially complete” as “poor.”²⁶¹ Notwithstanding this comparison, the Task Force continued to favor the repeal of “substantially complete” over partial-year taxation.²⁶² Accordingly, the Task Force turned its attention to issues associated with implementation of the repeal of “substantially complete.” Specifically, the Task Force considered the appropriate method for valuing the improvements.

One alternative discussed was the valuation of the improvement based upon its value as an incomplete structure. This approach would likely focus on the value of the materials and labor that had been put into the improvements to date. Because of the obvious difficulties in arriving at such a valuation, the Task Force moved away from this alternative.²⁶³ Instead, the Task Force focused on valuation of improvements based upon their “percentage of completion” on January 1.²⁶⁴ Under this approach, the taxable value of the incomplete improvement would reflect a percentage of the estimated value of the completed improvement. In this regard, the taxpayer in the above example would owe \$600 in ad valorem taxes on his incomplete home for the 1997 tax year.²⁶⁵

erty for the remainder of the tax year; in other words, the property’s proportionate share of the cost of these public services. In this regard, the “proprietary fee” is distinguishable from partial-year taxation in that the fee is not tied to the value of the improvements. See DOR DECEMBER PRESENTATION, *supra* note 164, at 7. Local government representatives on the Task Force supported the concept of the “proprietary fee” but objected to the need for any enabling legislation; instead, they argued that the “home rule” authority of local governments currently authorize such fees. See Fla. Ad Valorem Tax Task Force, tape recordings of proceedings (Dec. 17, 1996) (available at Fla. DOR, Tallahassee, Fla.) [hereinafter December Tapes]. In fact, Lee County currently imposes “proprietary fees.” See *id.*; DOR DECEMBER PRESENTATION, *supra* note 164, at 6.

257. See DOR DECEMBER PRESENTATION, *supra* note 164, at 7.

258. See *id.*

259. See *id.*

260. See *id.*

261. *Id.* The report noted that improvements started after January 1 but completed within 12 months (before December 31 of the same year) would still avoid taxation for the period that the improvements were completed during that year. See *id.*

262. See December Tapes, *supra* note 256.

263. See *id.*

264. See *id.*

265. This figure is computed as follows: $\$100,000 \times 30\% \times (.001 \times 20) = \600 .

Task Force member Leveda Brown²⁶⁶ suggested that the Task Force recommend a repeal of “substantially complete” as a compromise to the partial-year taxation concept.²⁶⁷ The Task Force never formally voted on her suggestion, and Chairman Pajcic directed the Task Force staff to prepare a formal proposal on the issue for the Task Force’s consideration at its next meeting.²⁶⁸ Ultimately, the Task Force was unable to reach a consensus on the repeal of “substantially complete” or the partial-year taxation issues.²⁶⁹ Instead, the Task Force recommended to the Governor and the Legislature that the issue should be referred to the Local Government Finance Study Commission II for further study.²⁷⁰

The Task Force also briefly discussed the “burden of proof” issue at its December meeting.²⁷¹ This discussion continued to focus on the “range of reasonableness” concept raised at prior meetings;²⁷² however, the Task Force was never able to quantify this range.²⁷³ As a

266. County Commissioner, Alachua County.

267. See TASK FORCE REPORT, *supra* note 141, at 24 (summarizing the Task Force’s December 17, 1996, meeting).

268. See *id.*

269. See *id.* at 3. The partial-year taxation issue received no significant legislative attention during the 1997 Regular Session. Joint resolutions were introduced to amend the Florida Constitution to authorize taxation of improvements to real property on a partial-year basis. See Fla. HJR 1449 (1997) (proposing an amendment to FLA. CONST. art VII, § 2); Fla. SJR 1236 (1997) (proposing an amendment to FLA. CONST. art VII, § 4). In the Senate, the joint resolution was considered by only one of its three committees of reference. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF SENATE BILLS at 108, SJR 1236. In the House, the joint resolution was never referred to committee. See *id.*, HISTORY OF HOUSE BILLS at 293, HJR 1449. The partial year taxation issue was debated in various forums after the 1997 Regular Session. A conceptual proposal to authorize partial-year taxation is before the Constitution Revision Commission. See COMMISSIONER ANTHONY, PROPOSAL NO. 51, CRC 2-77A-pr (visited Nov. 13, 1997) <<http://www.law.fsu.edu/crc/pdf/0051fp.pdf>> (proposing a revision to article VII, section 4 of the Florida Constitution). The Funding Committee of the Governor’s Commission on Education recommended that local school districts be authorized “to impose property taxes on a partial-year basis.” COMMISSION ON EDUC., EXEC. OFFICE OF THE GOV., UNMET EDUCATION FACILITIES NEEDS: REPORT OF THE FUNDING COMMITTEE 4 (1997) (Recommendation 2C).

270. See TASK FORCE REPORT, *supra* note 141, at 3. The 1996 Legislature established the Commission on Local Government II to review the constitutional and statutory provisions relating to the “creation, organization, structure, powers, duties, financing, and service delivery capacity of local governments.” Act effective May 29, 1996, ch. 96-266, § 1(1), 1996 Fla. Laws 1041, 1042 (emphasis added). The Commission was to provide its recommendations to the Governor and Legislature prior to the 1997 and 1998 Regular Sessions. See *id.* § 1(3).

271. See TASK FORCE REPORT, *supra* note 141, at 24 (summarizing the Task Force’s December 17, 1996, meeting). Jacksonville Mayor John Delaney spoke to the Task Force regarding the burden of proof issue. See *id.* Mayor Delaney suggested that a reduction in the burden of proof would not benefit the average Florida property owner. See *id.* Instead, he suggested that such a reduction would primarily benefit big business. See December Tapes, *supra* note 256.

272. See December Tapes, *supra* note 256.

273. The Task Force considered defining this range as a percentage of variation between the property appraiser’s assessment and the value urged by the taxpayer. See *id.*

result, many Task Force members, including Senator Horne and Representative Starks, were skeptical about the benefits of the “range of reasonableness” approach. Moreover, to the extent that the “range of reasonableness” was considered a statutory codification of the existing “every reasonable hypothesis standard,” it would not address the fundamental concerns that resulted in the passage of House Bill 557 in 1996. In this regard, it was clear that if the Task Force’s recommendations were to be embraced by Senator Horne and Representative Starks, they would need to incorporate a change—that is, a reduction—in the current burden of proof. A majority of members of the Task Force appeared to support such a reduction; however, the extent of this reduction—preponderance of the evidence or clear and convincing evidence—had not yet been determined.²⁷⁴

(f) February 1997: Tallahassee

The Task Force met twice in February in an effort to finalize its recommendations.²⁷⁵ An ad hoc “drafting committee” of the Task Force met on February 20 to consider several proposals offered by Task Force members.²⁷⁶

One of these proposals, submitted by Task Force member Thomas Logue, included the “range of reasonableness” concept.²⁷⁷ Under this proposal, the property appraiser’s presumption of correctness would not be lost unless the taxpayer demonstrated, by clear and convincing evidence, that the property appraiser’s assessment was outside of the “range.”²⁷⁸ To this end, the presumption of correctness was linked to the value reached by the property appraiser. Another proposal, offered by Task Force member Vicki Weber, essentially linked the property appraiser’s presumption of correctness to the methodol-

Under this proposal, the VAB or the court would uphold the property appraiser’s assessment unless the taxpayer demonstrated that the assessment was more than a specified percentage, for example, 10% greater than the taxpayer’s valuation of the property. See *id.*

274. See *id.*

275. See TASK FORCE REPORT, *supra* note 141, at 2 (listing seven Task Force members as present at this meeting).

276. See *id.*

277. See THOMAS W. LOGUE, COMPROMISE PROPOSAL—STEP DOWN THE STANDARD 2 (1997) (available at Fla. DOR, Tallahassee, Fla.) (presented at the February 20, 1997, meeting) [hereinafter LOGUE PROPOSAL II]. This range was defined as follows:

“Reasonable range of values,” shall mean the permissible variation in estimates of fair market value that result[s] when professionals, with expertise in appraising and assessing property, exercise professional judgment without material error in applying legal, appraising, and assessing principles to determine fair market value. The reasonable range of values will differ from case to case and from property to property Under no circumstances does the “reasonable range of values” include values that exceed just value.

Id. at 1.

278. See *id.* at 1. A similar proposal was offered by Task Force member Bill Suber.

ogy used by the appraiser in reaching the assessment.²⁷⁹ Both of these proposals would have required the use of special masters by the VAB, and would have authorized the VAB or the court to establish the assessment in the event the property appraiser's assessment is overturned and there was sufficient evidence in the record to support another assessment.²⁸⁰

The full Task Force debated these proposals at length at its final meeting on February 21.²⁸¹ Ultimately, the Task Force settled on a fine-tuned version of the Weber proposal, except for the suggestion to require the use of special masters by the VAB.²⁸² The Task Force also considered but rejected a suggestion that the recommended standard apply to pending actions in which a final judgment had not been entered.²⁸³ Instead, the Task Force recommended that the new standard apply prospectively only.²⁸⁴

2. The "Compromise": The Task Force's Recommendations

The Task Force recommended that the following language be added as subsection (7) of section 194.171, Florida Statutes:

279. See VICKI WEBER, REVISED WORKING PROPOSAL (1997) (available at Fla. DOR, Tallahassee, Fla.) (presented at the February 20, 1997 "drafting committee" meeting) [hereinafter WEBER PROPOSAL II]. Under this proposal, the property appraiser's presumption of correctness is lost if the taxpayer proves that

(a) the property appraiser's assessment is not based on reasonable appraisal practices applicable to the type of property at issue, or (b) the property appraiser's assessment is based on appraisal practices which are different from the appraisal practices generally applied by the property appraiser to similar property within the county.

Id. (emphasis added). Unless the presumption is lost, the taxpayer has the burden of overcoming the presumption with clear and convincing evidence "which proves that the appraiser's assessment is incorrect." Id. A similar proposal was offered by Task Force member Elliot Messer. See ELLIOT MESSER, ALTERNATIVE LANGUAGE IN HB 557 (1997) (available at Fla. DOR, Tallahassee, Fla.) (presented at the February 20, 1997 "drafting committee" meeting). The Messer Proposal retained the preponderance of the evidence standard to overcome the property appraiser's assessment; however, the proposal would have added the following language: "If the Court finds upon clear and convincing evidence that the contested assessment is in excess of just value, the taxpayer shall be entitled to judicial relief, including an ordered reduction in the just value." Id.

280. See WEBER PROPOSAL II, *supra* note 279, at 1-2; LOGUE PROPOSAL II, *supra* note 277, at 2.

281. See TASK FORCE REPORT, *supra* note 141, at 26.

282. Compare *id.* at 27 with WEBER PROPOSAL II, *supra* note 279.

283. A proposal discussed by the Task Force would have included an effective date as follows: "This act shall take effect upon becoming a law, and shall apply to actions pending as of the effective date of this act in which unnecessary final judgment has not been entered." FLORIDA AD VALOREM TAX TASK FORCE, PROPOSED REVISIONS TO HB 445 (available at Fla. DOR, Tallahassee, Fla.) (presented at the February 21, 1997 Florida Ad Valorem Tax Task Force meeting).

284. The Task Force recommended that the new standard apply to challenges arising out of the 1997 tax rolls. See TASK FORCE REPORT, *supra* note 141, at 2-3.

In any administrative or judicial action in which a taxpayer challenges an ad valorem tax assessment of value, the property appraiser's assessment shall be presumed correct. This presumption of correctness is lost if the taxpayer shows by a preponderance of the evidence that either the property appraiser has failed to consider properly the criteria in s. 193.011 or if the property appraiser's assessment is arbitrarily based on appraisal practices which are different from the appraisal practices generally applied by the property appraiser to comparable property within the same class and within the same county. If the presumption of correctness is lost, the taxpayer shall have the burden of proving by a preponderance of the evidence that the appraiser's assessment is in excess of just value. If the presumption of correctness is retained, the taxpayer shall have the burden of proving by clear and convincing evidence that the appraiser's assessment is in excess of just value. In no case shall the taxpayer have the burden of proving that the property appraiser's assessment is not supported by any reasonable hypothesis of a legal assessment. If the property appraiser's assessment is determined to be erroneous, the Value Adjustment Board or the Court can establish the assessment if there exists competent, substantial evidence in the record, which cumulatively meets the requirements of s. 193.011. If the record lacks competent, substantial evidence meeting the just value criteria of s. 193.011, the matter shall be remanded to the property appraiser with appropriate directions from the Value Adjustment Board or the Court.²⁸⁵

The Task Force's recommendation contained four interrelated components.²⁸⁶ First, it reaffirmed the long-standing proposition that the property appraiser's assessment is generally entitled to a presumption of correctness. Second, it recognized that this presumption of correctness may be lost in certain limited circumstances. Third, it affirmatively rejected the "every reasonable hypothesis" standard. Finally, it clarified that the VAB or the court has the authority to establish the assessment where the property appraiser's assessment is overturned and the record contains sufficient evidence to establish the assessment.

B. The "Rubber Stamp": House Bill 445

Representative Starks and Senator Horne each filed bills in the 1997 Regular Session on the burden of proof issue.²⁸⁷ House Bill 445

285. *Id.*

286. See discussion *infra* Part IV.

287. See Fla. HB 445 (1997); Fla. SB 134 (1997). The bills again had significant bipartisan support. Ninety members were listed as co-sponsors of House Bill 445, and twenty-two members were listed as co-sponsors of Senate Bill 134. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF HOUSE BILLS at 217, HB 445; *id.*, HISTORY OF SENATE BILLS at 35, SB 134.

and Senate Bill 134, were prefiled prior to the completion of the Task Force's work, and were identical to the initial versions of the 1996 legislation;²⁸⁸ however, it was expected that they were to be used as vehicles for implementing the Task Force's final recommendations.

1. House Bill 445 and Senate Bill 134 Move Through the Legislative Process

Both bills were placed on committee agendas early in the session.²⁸⁹ The House Community Affairs Committee unanimously approved House Bill 445 with one amendment on the second day of session, and the House Finance and Tax Committee unanimously approved it on the following day.²⁹⁰ The Senate Judiciary committee unanimously approved Senate Bill 134 as a committee substitute on the third day of the session.²⁹¹ Committee Substitute for Senate Bill 134 and House Bill 445, as amended, replaced the language in the original bills with the Task Force's "compromise" language.²⁹²

House Bill 445 was placed on a "fast-track" in the House. It was withdrawn from the General Government Appropriations Committee, its last committee of reference,²⁹³ ranked by the Governmental Responsibility Council²⁹⁴ and sent to the House Floor for a vote. On

288. House Bill 445 was prefiled on February 6, 1997. See *id.*, HISTORY OF HOUSE BILLS at 217, HB 445. Senate Bill 134 was prefiled on January 3, 1997. See *id.*, HISTORY OF SENATE BILLS at 35, SB 134.

289. Prior to the session, the House Finance and Tax Committee held a special workshop on House Bill 445 in Orlando. See *id.*, HISTORY OF HOUSE BILLS at 217, HB 445. The Task Force did not hold a meeting in the Orlando area, and the purpose of holding the workshop in that area was to solicit additional public comment on the burden of proof issue. See TASK FORCE REPORT, *supra* note 141, at 10-11 (listing locations of Task Force meetings). At the workshop, House Bill 445, as well as the Task Force's recommendation, were discussed.

290. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF HOUSE BILLS at 217, HB 445. The amendment adopted by the Committee on Community Affairs substituted the language in the original bill with the Task Force's "compromise" language. See Fla. H.R. Comm. on Comm'y Aff., Amendment 1 to HB 445 (1997) (on file with comm.).

291. See Fla. S. Comm. on Judiciary, SB 134 (1997) Vote Record (Mar. 6, 1997) (on file with comm.); see also FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF SENATE BILLS at 35, SB 134.

292. Compare CS for SB 134 (1997) and Fla. H.R. Comm. on Comm'y Aff., Amendment 1 to HB 445 (1997), with TASK FORCE REPORT, *supra* note 141, at 2-3.

293. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF HOUSE BILLS, at 217, HB 445.

294. See *id.* Once a bill is reported out of all of its committees of reference, it must be ranked by the "council" with substantive jurisdiction over the first committee of reference before the bill may be heard on the House Floor. See FLA. H.R. RULES 45, 46(a), 135 (1996-98). The ranking of bills by "councils" is one of the changes to the legislative process implemented by House Speaker Daniel Webster (Repub., Orlando) and the Republican majority in the House. The bill's ranking determines the order of its consideration on the House Floor. See *id.* FLA. HOUSE RULES 128, 134 (1996-98). House Bill 445 was ranked as the first bill on the Government Responsibility Council Calendar of March 27, 1997. See FLA. H.R. JOUR. 374 (Reg. Sess. 1997).

April 2, the House approved House Bill 445 by a vote of 114 to 0 and sent it to the Senate.²⁹⁵ House Bill 445 languished in the Senate while the Committee Substitute for Senate Bill 134 awaited a hearing by the Senate Ways and Means Committee, its final committee of reference.²⁹⁶

On April 23, the Senate Ways and Means Committee unanimously approved the Committee Substitute for Senate Bill 134, which was then sent to the Senate Floor for a vote.²⁹⁷ The Senate substituted House Bill 445 for the Committee Substitute for Senate Bill 134, and unanimously approved it.²⁹⁸

2. The Governor Signs House Bill 445 Into Law

House Bill 445 was presented to Governor Chiles on May 8, 1997.²⁹⁹ The Governor signed the bill on May 23, and it became effective on that date.³⁰⁰ The analysis of House Bill 445 prepared by the Governor's Office stated that "[t]he Governor supports this measure as a good compromise between fair and equitable taxation and taxpayers' rights."³⁰¹

IV. DISCUSSION OF THE NEW STANDARD IN SECTION 194.301, FLORIDA STATUTES

As noted above, new section 194.301, Florida Statutes, contained four interrelated parts. Together, these parts reflected a clear shift

295. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF HOUSE BILLS, at 217, HB 445. Prior to approving the bill, the House adopted a substitute amendment to the amendment adopted in the Committee on Community Affairs. The substitute amendment, offered by Representative Starks, relocated the proposed language from section 194.171(7), Florida Statutes, to a newly created Part III of chapter 194, Florida Statutes. See FLA. H.R. JOUR. 350 (Reg. Sess. Apr. 1, 1997) (creating FLA. STAT. § 194.301). This relocation was necessary because section 194.171, Florida Statutes, relates only to circuit court tax-challenge cases, while the proposed change to the burden of proof is intended to apply in cases before the VAB as well as those in circuit court. The substitute amendment made no substantive changes to the Task Force's "compromise" language.

296. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF HOUSE BILLS at 217, HB 445.

297. See *id.*, HISTORY OF SENATE BILLS, at 35, CS for SB 134. The committee approved the bill by a vote of 27 to 0. See Fla. S. Comm. on Ways and Means, CS for SB 134 (1997) Vote Record (Apr. 23, 1997) (on file with comm.).

298. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 REGULAR SESSION, HISTORY OF HOUSE BILLS at 217, HB 445. The bill was approved by a vote of 40 to 0. See FLA. S. JOUR. 698 (Reg. Sess. 1997).

299. See FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1997 HISTORY OF HOUSE BILLS at 217, HB 445.

300. See Act effective May 23, 1997, ch. 97-85, § 2, 1997 Fla. Laws 503, 504. Section 2 of the act provided that the new standards in section 194.301, Florida Statutes, applied to assessments included in the 1997 tax rolls. See *id.*

301. Executive Office of the Gov., Office of Legis. Aff., Legislative Bill Analysis, HB 445, 3 (Apr. 30, 1997) (on file with Exec. Office of the Gov., Office of Legis. Aff.).

in policy regarding the disposition of ad valorem tax challenge cases in Florida.

A. Presumption of Correctness

Section 194.301, Florida Statutes, reaffirmed the long-standing proposition that the property appraiser's assessment is presumed to be correct. To this end, the Legislature has reaffirmed the holdings of *Folsom* and its progeny to the extent that they recognized this presumption of correctness.

The presumption of correctness is rebuttable.³⁰² In this regard, two types of rebuttable presumptions are recognized in Florida: "bubble bursting" presumptions and "burden shifting" presumptions.³⁰³ A presumption established to implement public policy is a "burden shifting" presumption.³⁰⁴ The presumption of correctness afforded to the property appraiser's assessment is based upon policy considerations³⁰⁵ and, therefore, is a "burden shifting" presumption.³⁰⁶ Accordingly, the taxpayer has the burden to produce evidence to demonstrate the non-existence of the fact presumed—that is, that the property appraiser's assessment is not correct.³⁰⁷ The amount of evidence that the taxpayer must produce to rebut and overcome this presumption is discussed below.

It is important to note that this presumption of correctness applies only to the property appraiser's determination of value. Unlike House Bill 557 in 1996, section 194.301, Florida Statutes, does not statutorily recognize a presumption of correctness in the context of "the denial of an exemption or the denial of classified status."³⁰⁸ This distinction appears to be based upon a recognition by the Task Force that valuation determinations are matters within the "appraiser's professional judgment" while the other determinations are more ap-

302. Conclusive, or non-rebuttable, presumptions are not valid in Florida. See *Straughn v. K & K Land Mgmt., Inc.*, 326 So. 2d 421, 424 (Fla. 1979); EHRHARDT, *supra* note 119, § 302.1.

303. See FLA. STAT. § 90.302 (1997); see also EHRHARDT, *supra* note 119, § 301.1.

304. Cf. FLA. STAT. § 90.303 (1997).

305. See, e.g., *City of Tampa v. Palmer*, 89 Fla. 514, 520, 105 So. 115, 117 (1925) ("The good faith of tax officers and the validity of their official actions are presumed . . ."); *German-American Lumber Co. v. Barbee*, 59 Fla. 493, 498, 52 So. 292, 294 (1910) ("The law contemplates that a wide discretion be accorded to the tax assessor in the valuation of property for the purposes of taxation."); accord *Blake v. Xerox*, 447 So. 2d 1348, 1350 (Fla. 1984); see also EHRHARDT, *supra* note 119, § 304.1 n.10.

306. See *Bystrom v. Equitable Life Assurance Soc'y of the U.S.*, 416 So. 2d 1133, 1141 (Fla. 3d DCA 1982).

307. See *id.* at 1141; FLA. STAT. §§ 90.302(2), 304 (1997); see also EHRHARDT, *supra* note 119, §§ 302.2, 304.1.

308. Fla. HB 557 § 1 (1996) (enrolled version); compare *id.* with FLA. STAT. § 194.301 (1997).

appropriately characterized as legal determinations.³⁰⁹ In this regard, cases involving exemptions or classified status typically require a more objective analysis than cases in which the county property appraiser's subjective valuation of the property is being challenged.³¹⁰

In September 1997, DOR proposed an amendment to the rules governing the VAB process to delete the reference to the "every reasonable hypothesis" standard and to incorporate the new burdens of proof from section 194.301.³¹¹ DOR proposed to amend rule 12D-10.003(3), Florida Administrative Code, as follows:

A county property appraiser's determination is entitled to a presumption of correctness. The petitioning taxpayer has the burden to prove that the property appraiser's determination was incorrect. The presumption of correctness can be properly rebutted as described in section 194.301, Florida Statutes ~~only by evidence which excludes every reasonable hypothesis of a legal assesment. *Homer v. Dadeland Shopping Center, Inc.*, 229 So.2d 834 (Fla. 1969).~~³¹²

This proposed rule amendment is inconsistent with section 194.301 because it does not limit the property appraiser's presumption of correctness to determinations of value.³¹³ This inconsistency was brought to DOR's attention,³¹⁴ and DOR subsequently withdrew the proposed rule amendment.³¹⁵

309. See WEBER PROPOSAL I, *supra* note 250, at 2. This distinction is also supported by the fact that the policy underlying the rule of judicial restraint applied in the context of valuation cases is not implicated in non-valuation cases. See *supra* note 84.

310. This is not to say that such cases are "easier." Instead, they require little or no appraisal expertise. In fact, these cases generally turn on the legal interpretation given to the statutory provision granting the exemption or classified status. See, e.g., *St. Petersburg Kennel Club v. Smith*, 662 So. 2d 1270, 1272 (Fla. 2d DCA 1995) (determining whether "greyhound dogs" are "livestock" for purposes of qualifying for the agricultural classification); *Sebring Airport Auth. v. McIntyre*, 642 So. 2d 1072, 1073-74 (Fla. 1994) (determining whether a race track is a "public purpose" for purposes of qualifying for the government property exemption).

311. See Fla. Admin. W. 4879, 4879-80 (Sept. 12, 1997).

312. *Id.* at 4880 (strike through and underline original).

313. See *supra* text accompanying notes 308-10.

314. See Letter from Victoria L. Weber to Steve Keller, DOR Assistant General Counsel, (Aug. 13, 1997) (available at DOR, Tallahassee, Fla.). Ms. Weber commented that: I believe that the Task Force consciously altered the 1997 legislation to render the presumption/burden language applicable only to valuation issues wherein the argument can be made that the appraiser is exercising professional judgment in an arena that has been recognized by the courts as "an art, not a science."

Id. at 1; see also Memorandum from Benjamin K. Phipps, Attorney, to Sharon Gallops, DOR Tax Law Specialist (Aug. 1, 1997) (available at DOR, Tallahassee, Fla.). Mr. Phipps commented that "property appraisers are presumed correct in their assessments (determinations) of value. There is no presumption of correctness attached to the granting or denying of either exemptions or classifications." *Id.* at 1.

315. See 23 Fla. Admin. W. 6635, 6635 (Dec. 5, 1997) ("In response to timely written comments received, the Department of Revenue has determined that the proposed rule amendments require further review.").

B. Loss of the Presumption of Correctness

The presumption of correctness is lost if the taxpayer demonstrates that:

the property appraiser has failed to consider properly the criteria in s. 193.011 or if the property appraiser's assessment is arbitrarily based upon appraisal practices which are different from the appraisal practices generally applied by the property appraiser to comparable property within the same class and within the same county.³¹⁶

These grounds for abrogating the property appraiser's presumption of correctness are similar to, but slightly more expansive than, current law.

The first basis for abrogating the presumption of correctness was derived from *Mastroianni* and cases cited therein, which describe the property appraiser's obligation to consider, but not necessarily use, each criterion in section 193.011, Florida Statutes.³¹⁷ Interestingly, the language proposed by the Task Force and approved by the Legislature in section 194.301, Florida Statutes, qualified this obligation with the adverb "properly."

Therefore, a question arises as to the meaning of the phrase "fail to consider properly the criteria in s. 193.011."³¹⁸ The word "properly" has been defined as "completely" or "in a thorough manner."³¹⁹ Accordingly, the presumption of correctness will be lost if the appraiser fails to "completely" or "thoroughly" consider each of the eight criteria in section 193.011, Florida Statutes.³²⁰ In this regard, the property appraiser must be prepared to demonstrate the extent to which he considered each criterion; otherwise, the presumption of correctness afforded to his assessment may be lost.

The second basis for abrogating the presumption of correctness is when the appraiser utilizes a methodology different from that used to appraise similar property within the county.³²¹ In essence, this

316. FLA. STAT. § 194.301 (1997).

317. See *Valencia Center, Inc. v. Bystrom*, 543 So. 2d 214, 216 (Fla. 1989); *Blake v. Xerox Corp.*, 447 So. 2d 1348, 1350 (Fla. 1984); *Mastroianni v. Barnett Banks, Inc.*, 664 So. 2d 284, 288 (Fla. 1st DCA 1995) (citing *Schultz v. TM Florida-Ohio Realty Partnership*, 577 So. 2d 573 (Fla. 1991)).

318. FLA. STAT. § 194.301 (1997) (emphasis added).

319. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 943 (1983).

320. Cf. *Lanier v. Walt Disney World Co.*, 316 So. 2d 59, 62 (Fla. 4th DCA 1975) (noting that the property appraiser is not required to give each criterion equal weight "PROVIDED EACH FACTOR IS FIRST CAREFULLY CONSIDERED") (capitalization original and emphasis added).

321. See FLA. STAT. § 194.301 (1997). Because of the reference only to intra-county discrimination, see *id.*, this basis likely will not apply to challenges to the assessment of railroad property since such property is centrally assessed by DOR rather than the county property appraiser. See *id.* § 193.085(4) (1997); FLA. ADMIN. CODE ANN. ch. 12D-2 (1997).

basis requires the taxpayer to demonstrate that the appraiser has treated him differently in some manner. Interestingly, the taxpayer is not required to demonstrate that this different treatment resulted in an improper valuation of his property to overcome the property appraiser's presumption of correctness. However, the taxpayer would be required to demonstrate that the appraisal is in excess of "just value" to prevail in the challenge under section 194.301, Florida Statutes.³²²

In this regard, this basis for abrogating the property appraiser's presumption of correctness was loosely based upon the "relative equality and uniformity" theory announced in *Camp Phosphate Co. v. Allen*.³²³ Under that theory, a taxpayer could successfully challenge his assessment by demonstrating that the appraiser used an arbitrary method of valuing his property as compared to that used for other properties, even if the taxpayer's assessment was not in excess of fair market value.³²⁴ This theory sought to ensure that all similarly situated property was assessed through the same appraisal methods.³²⁵ Section 194.301, Florida Statutes, has that same goal. However, because the taxpayer is still required to demonstrate that the property appraiser's assessment is "in excess of just value,"³²⁶ section 194.301, Florida Statutes, revived the "spirit," but not the "body" of *Camp Phosphate*.³²⁷ Stated another way, section 194.301, Florida Statutes, incorporated the "relative equality and uniformity" concept from *Camp Phosphate* into the modern "over assessment" challenge.

However, railroad property valuations are subject to other protections under federal laws. See 49 U.S.C. § 11501 (1994).

322. See FLA. STAT. § 194.301 (1997). This is not to say that the taxpayer could not successfully raise an equal protection-like challenge without proving that the assessment is in excess of "just value." See *Southern Bell Tel. & Tel. Co. v. County of Dade*, 275 So. 2d 4, 10 (Fla. 1973). For a critical discussion of the *Southern Bell* decision, see FLORIDA STATE AND LOCAL TAXES, supra note 15, at 406-15.

323. 77 Fla. 341, 81 So. 503 (1919).

324. See *id.* at 349, 81 So. at 506; see also *Southern Bell*, 275 So. 2d at 10.

325. See *Southern Bell*, 275 So. 2d at 10. In this regard, the level of valuation—i.e., 10%, 50%, or 100% of just value—was immaterial. See *id.*; see also FLORIDA STATE AND LOCAL TAXES, supra note 15, § 8.05(2), at 368-71.

326. FLA. STAT. § 194.301 (1997).

327. The Florida Supreme Court receded from the *Camp Phosphate* holding in the 1940s. See *Cosen Inv. Co. v. Overstreet*, 154 Fla. 416, 416, 17 So. 2d 788, 788 (1944); *Schleman v. Connecticut Gen. Life Ins. Co.*, 151 Fla. 96, 105, 9 So. 2d 197, 200 (1942). Since then, the taxpayer has been required to demonstrate that his assessment exceeds fair market value, notwithstanding the valuation of other properties. See generally FLORIDA STATE AND LOCAL TAXES, supra note 15, § 8.05(2), at 372-76. But see *Southern Bell*, 275 So. 2d at 10 (applying the *Camp Phosphate* decision).

C. The New Burdens of Proof

Section 194.301, Florida Statutes, specifically rejected the “every reasonable hypothesis” standard from Folsom and its progeny.³²⁸ In this regard, taxpayers will no longer be required to disprove “every reasonable hypothesis of a legal assessment” to overturn the property appraiser’s assessment.³²⁹ Instead, the taxpayer must only demonstrate that the assessment is in excess of “just value.”³³⁰

The amount of evidence that the taxpayer must produce to convince the fact-finder that its appraisal should be adopted in lieu of the property appraiser’s depends upon the circumstances surrounding the appraisal. The taxpayer’s burden of proof is “clear and convincing evidence” unless the property appraiser’s presumption of correctness was lost.³³¹ Then, the taxpayer’s burden of proof is a “preponderance of the evidence.”³³²

As a general rule, the “preponderance of the evidence” standard is satisfied where evidence is presented that makes the truth of the fact sought to be proved more probable than not.³³³ The “clear and convincing evidence” standard is a more difficult standard of proof and is satisfied where evidence is presented that results in reasonable certainty of the truth of the fact sought to be proved.³³⁴ Therefore, to prevail in a challenge to the property appraiser’s assessment where the presumption of correctness has not been lost, the taxpayer must demonstrate that there is a “reasonable certainty” that his assessment is more reasonable—that is, more accurately reflects a “just valuation” of the property—than that arrived at by the property appraiser.

It is uncertain whether the burdens of proof in section 194.301, Florida Statutes, were intended to apply in non-valuation cases—cases where the taxpayer challenges the property appraiser’s denial of the taxpayer’s entitlement to an exemption or denial of classified

328. See FLA. STAT. § 194.301 (1997); *Folsom v. Bank of Greenwood*, 97 Fla. 426, 429-30, 120 So. 317, 319 (1925).

329. See FLA. STAT. § 194.301 (1997).

330. Section 194.304, Florida Statutes, reflects a dramatic policy shift for the disposition of tax challenge cases because under the procedure established in that law, those cases will likely focus on the methodology used by the property appraiser in arriving at the assessment. But see *Bystrom v. Whitman*, 488 So. 2d 520, 521 (Fla. 1986) (noting that the core issue in tax challenge cases is the amount of the assessment). If the taxpayer’s appraiser is able to convince the VAB or court that his methodology more accurately reflects a “just valuation” of the subject property than that utilized by the property appraiser, the property owner should prevail.

331. See FLA. STAT. § 194.301 (1997).

332. See *id.*

333. See BLACK’S LAW DICTIONARY 1182 (6th ed. 1990) (defining “preponderance of the evidence”).

334. See *id.* at 251. The “clear and convincing” standard will be met where the truth of the facts asserted is highly probable. See *id.*

status. As noted above, section 194.301, Florida Statutes, limits the presumption of correctness to the property appraiser's valuation determinations.³³⁵ Because that section defines the appropriate burden of proof based upon whether the presumption of correctness is retained or lost, it is logical to assume that the Legislature did not intend the new burdens of proof to apply in non-valuation cases.³³⁶ Accordingly, the existing standards applied in non-valuation cases should continue to apply subject to the caveat in section 194.301, Florida Statutes, which provides "[i]n no case shall the taxpayer have the burden of proving that the property appraiser's assessment is not supported by any reasonable hypothesis of a legal assessment."³³⁷

D. The Authority of the Court and the VAB to Establish the Assessment Is Confirmed

The last two sentences in section 194.301, Florida Statutes, established the procedure the VAB or the court is to follow if the property appraiser's assessment is "determined to be erroneous."³³⁸ If there is competent substantial evidence that "cumulatively meets the requirements of s. 193.011," the VAB or the court may establish the assessment.³³⁹ Otherwise, the VAB or the court must remand the matter to the property appraiser to establish the assessment.³⁴⁰

The circuit court's authority to establish the assessment has been presumed to exist by courts and commentators.³⁴¹ DOR's rules spe-

335. Compare FLA. STAT. § 194.301 (1997), with Fla. HB 557, § 1 (1996) (enrolled version).

336. See FLA. STAT. § 194.301 (1997). If, however, the issue is whether the property appraiser correctly valued the property subject to the exemption or classified status, the provisions of new section 194.301, Florida Statutes, should apply. Nothing in the Task Force's debate nor the legislative history of House Bill 445 suggests an intent to preclude the use of the new standards in circumstances where the taxpayer's challenge relates to the appraiser's valuation of classified or exempt property. See *Powell v. Kelly*, 223 So. 2d 205, 306 (Fla. 1969) (discussing the valuation of classified use property).

337. FLA. STAT. § 194.301 (1997). The general rule applicable in non-valuation cases, including those involving a denial of classified status, is that exemptions from taxation must be strictly construed against the taxpayer. See, e.g., *United States Gypsum Co. v. Green*, 110 So. 2d 409, 413 (Fla. 1959) ("While doubtful language in taxing statutes should be resolved in favor of the taxpayer, the reverse is applicable in the construction of exceptions and exemptions from taxation."); *Jar Corp. v. Culberston*, 246 So. 2d 144, 145 (Fla. 3d DCA 1971) ("[I]n order for a taxpayer to receive a benefit different in kind from other taxpayers it is necessary for him to strictly comply with all conditions which would be necessary to entitle him to the special treatment.") (emphasis added); see also *St. Petersburg Kennel Club v. Smith*, 662 So. 2d 1270, 1271 (Fla. 2d DCA 1995) (denying an agricultural classification).

338. FLA. STAT. § 194.301 (1997).

339. *Id.*

340. See *id.*

341. See *FLORIDA STATE AND LOCAL TAXES*, *supra* note 15, § 7.10, at 320f-g ("In the context of whether a court can determine a lawful assessment by striking the illegal pr-

cifically recognize the VAB's authority to establish the assessment.³⁴² Thus, it could be argued that these two sentences merely intended to clarify and codify the court's authority under existing law. It may be argued, however, that allowing the court to establish the assessment infringes upon the legislative powers delegated to county property appraisers.³⁴³ Viewed in this manner, the last two sentences in section 194.301, Florida Statutes, may be unconstitutional. Alternatively, this language may simply be viewed as direction to the court to enjoin the collection of that portion of the assessment that exceeds the "just value."³⁴⁴ To determine the amount to be enjoined, however, the court necessarily must determine the "just value" of the property. In this regard, the last two sentences in section 194.301, Florida Statutes, prescribed the circumstances in which the court may³⁴⁵ do so.³⁴⁶ If this language is viewed as an extension of existing law, this

tion without a statute expressly stating so, the current statutes would likely be construed as providing such authority, although the courts have not directly addressed the question."); see also *Simpson v. Merrill*, 234 So. 2d 350, 352 (Fla. 1970); *Cassady v. McKinney*, 343 So. 2d 955, 957 (Fla. 2d DCA 1977); *Palm Springs Dev. Corp. v. Dade County*, 229 So. 2d 629, 633 (Fla. 3d DCA 1969). But see *Walker v. Trump*, 549 So. 2d 1098, 1104 (Fla. 4th DCA 1989).

342. See FLA. ADMIN. CODE ANN. r. 12D-10.003(5)(b) (1997). But see *id.* r. 12D-10.003(1) ("The board has no power to fix the original valuation of property for ad valorem tax purposes . . .") (emphasis added).

343. It has been noted that:

[A court] has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise . . . is exclusively legislative.

A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one.

State Railroad Tax Cases, 92 U.S. 575, 614-15 (1875). Florida courts, for the most part, have ignored this prohibition. See, e.g., *Folsom v. Bank of Greenwood*, 97 Fla. 426, 431-32, 120 So. 317, 319 (1925) (holding that the court should enjoin the collection of that portion of an assessment found to be excessive but allow the collection of the portion that reflects what the court finds to be a proper valuation). But see *Cassady v. McKinney*, 343 So. 2d 955, 957 (Fla. 2d DCA 1977) (reversing a trial court adjustment of appraisal); see also FLA. ADMIN. CODE ANN. r. 12D-10.003(1) (1997).

344. Cf. FLA. STAT. § 196.01 (1967) (expressly authorizing the court to set aside all or any part of the assessment). This language was repealed in 1969. See Act effective June 25, 1969, ch. 69-140, § 6, 1969 Fla. Laws 668, 672. It has been suggested that current section 194.171(1), Florida Statutes, provides broader jurisdiction than section 196.01, Florida Statutes (1967). See FLORIDA STATE AND LOCAL TAXES, *supra* note 15, § 7.10, at 320f.

345. It is important to note that the language authorizing the VAB or the court to establish the assessment is permissive, not mandatory. See FLA. STAT. § 194.301 (1997).

346. The requirement in section 194.301, Florida Statutes, that there be sufficient evidence in the record upon which the VAB or court can determine "just value" is consistent with the following passage from *Cassady*:

In fixing tax assessments the trial court is required to have competent substantial evidence in the record as to the manner, extent or degree such factors bear upon the valuation. If there is competent evidence before the trial court in

latter interpretation is more consistent with the legislative history of section 194.301, Florida Statutes,³⁴⁷ and is supported by public policy considerations.³⁴⁸ Therefore, whether this component of section 194.301, Florida Statutes, is viewed as a codification or an extension of existing law, it should be constitutional.

V. CONCLUSION

Clearly, the Committee Substitute for House Bill 445 reflected a fundamental change in policy with respect to challenging ad valorem tax assessments. It was not the intent of the new section 194.301, Florida Statutes, to infringe upon the property appraiser's role in assessing property for ad valorem tax purposes. Nor was its intent to encourage ad valorem tax litigation. Instead, it was intended to further the constitutional mandate that property subject to taxation be assessed at no more than "just value."

More importantly, however, the new burdens of proof codified in section 194.301, Florida Statutes, were intended to address the perceived inequities in the current ad valorem tax challenge process that were brought to the forefront during the 1996 and 1997 Regular Sessions. Whether this provision will, in fact, restore taxpayers' confidence in the process depends upon how it is interpreted and applied by the VABs and the courts. If they fail to implement the new standards in an equitable manner, the legislative intent of section 194.301, Florida Statutes, will be frustrated, and the two years of work and study that went into the provision will have been for naught.

this regard it certainly is free to accept that [assessment] which is most believable or compromise between two extremes as it deems the facts and circumstances warrant. It may thereupon make the necessary calculations or adjustments. Otherwise there could not be a ready resolution of a tax assessment where the tax assessor consistently fails or declines to consider such requirements. In the absence of such evidence the trial court cannot substitute its own independent judgment, no matter how enlightened or realistic.

Cassady, 343 So. 2d at 957.

347. In developing the language that would become section 194.301, Florida Statutes, the Task Force recognized that requiring the VAB or the court to remand the matter to the property appraiser "can be a cumbersome and time-consuming process." LOGUE PROPOSAL, *supra* note 204, at 2.

348. See FLORIDA STATE AND LOCAL TAXES, *supra* note 15, § 7.10 at 320h-i ("Procedurally, the potential for unwarranted delay is a fundamental difficulty with the concept of remand to the property appraiser from both the [VAB] and circuit court.").