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## The Shifting Landscape of Property Taxation in Louisiana

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# The Shifting Landscape of Property Taxation in Louisiana

*Phyllis Sims\**

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## I. INTRODUCTION

Over the past 18 months, several monumental changes have occurred not only within the general property tax landscape in Louisiana, but specifically to the valuation of oil and gas properties, including a new constitutional amendment adopted by the voters in November 2020 allowing an additional valuation methodology to be used for those properties.<sup>1</sup> Additionally, the Louisiana Legislature recently passed legislation which substantially amended the statutory provisions for the administration, review, and appeal of *ad valorem* tax assessments.<sup>2</sup> This Article is intended to alert the reader to the impact of those changes on taxpayers challenging property tax assessments, as well as update the reader on recent case law and pending cases in the oil and gas arena. To set the stage and assist the reader with property tax terminology, this Article begins with a primer providing a general overview of property tax constitutional and statutory principles, the basics of Louisiana property tax administration, determining fair market value, and challenging property tax assessments.<sup>3</sup>

## II. PRINCIPLES FOR PROPERTY TAXATION IN LOUISIANA

The Louisiana Constitution empowers local and state governments to impose an *ad valorem*<sup>4</sup> tax on real and personal property,<sup>5</sup> generally referred to as a “property tax.”<sup>6</sup> The State of Louisiana, however, does not exercise its power to impose a property tax. *Ad valorem* taxes on property in Louisiana are imposed only at the parish level.

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1. See Act No. 368, 2020 La. Acts, amending article VII, section 4(B) of the Louisiana Constitution and approved by the voters in November 2020.

2. See Act No. 343, 2021 La. Acts, filed as House Bill 573 for the 2021 Regular Session.

3. The Article is not intended to be a comprehensive review of the complete property tax system in Louisiana, but it is intended to focus on the criteria most related to the valuation of oil and gas properties.

4. The Latin term *ad valorem* means “according to value.” All *ad valorem* taxes are levied based on the determined value of the item being taxed. Real property taxes are the most common type of *ad valorem* taxes, and in Louisiana, *ad valorem* taxes can also be imposed upon personal property. See *Ad Valorem Tax*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/ad\\_valorem\\_tax](https://www.law.cornell.edu/wex/ad_valorem_tax) (last visited Apr. 25, 2022).

5. LA. REV. STAT. § 47:2322 (2021); LA. ADMIN. CODE tit. 61, pt. 5, § 115 (2021) (defining of “real property”); *id.* § 117 (defining of “personal property”).

6. See LA. CONST. art. VII, §§ 18–19.

The constitutional principles that are the foundation of the property taxation powers are clarified in the Louisiana Revised Statutes.<sup>7</sup> These statutes are further implemented by rules and regulations promulgated by the Louisiana Tax Commission (“LTC”).<sup>8</sup> The LTC is a five-member body appointed by the Governor to supervise the parish tax assessors and oversee property valuation and assessment throughout the state.<sup>9</sup> The LTC is the entity empowered to “administer and enforce all laws related to state supervision of local property tax assessments.”<sup>10</sup> The LTC’s purpose and mission are as follows: (i) to achieve fair, accurate, and uniform *ad valorem* taxation through effective oversight of assessors; (ii) professional and unbiased administration of tax laws; (iii) to serve Louisiana taxpayers fairly and with integrity by administering property tax laws; (iv) to provide the general public with a centralized place to obtain property tax information; and (v) to provide confidence to the taxpayers in the state that their assessments are fair and equitable.<sup>11</sup>

Property subject to *ad valorem* taxation must be listed on the parish assessment rolls at its *assessed valuation*,<sup>12</sup> which is a percentage of its *fair market value* (“FMV”).<sup>13</sup> In the most common application of *ad valorem* taxes, the taxable property is annually assessed by the parish tax assessor to determine its current value.<sup>14</sup> The *assessed value*<sup>15</sup> of the property is used to compute a tax annually levied on the property. The

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7. See LA. REV. STAT. tit. 47, subtit. III. The Revised Statutes provide additional standards and principles concerning the methods and procedures for taxing property. The LTC must promulgate and adopt all rules and regulations pertaining to property taxation according to the Louisiana Administrative Procedure Act (LA. REV. STAT. §§ 49:951–49:968). These statutes outline the procedures for publicizing and ultimately enacting or changing the rules and regulations pertaining to the taxation of property. See LA. ADMIN. CODE tit. 61, pt. 5, § 107.

8. LA. ADMIN. CODE tit. 61, pt. 5.

9. LA. REV. STAT. §§ 47:1831–47:1838.

10. *Metrailler v. Granger*, 552 So. 2d 720, 722 (La. Ct. App. 1989) (quoting LA. REV. STAT. § 47:1837(A)).

11. LA. TAX COMM’N, [www.latax.state.la.us](http://www.latax.state.la.us) (last visited Apr. 25, 2022).

12. LA. CONST. art. VII, § 18(A); LA. REV. STAT. 47:1951.

13. *Williams v. Opportunity Homes Ltd. P’ship*, 240 So. 3d 161, 163 (La. 2018) (citing LA. CONST. art. VII, § 18(A)); see also LA. REV. STAT. § 47:1951(B).

14. See LA. CONST. art. VII, § 18; LA. REV. STAT. §§ 47:1951–47:1952, 47:1957.

15. See LA. REV. STAT. 47:1957(B); see also *Metrailler*, 552 So. 2d at 722.

assessment is derived from the application of the appropriate percentage to the fair market value.<sup>16</sup>

The basis for any property tax assessment is the determination of fair market value.<sup>17</sup> In Louisiana law, fair market value has only one definition for all property.<sup>18</sup> “Fair market value” is defined as “the price for property which would be agreed upon between a willing and informed buyer and a willing and informed seller under the usual and ordinary circumstances.”<sup>19</sup> FMV represents the highest price the property will bring if placed for sale on the open market, with reasonable time allowed to find a purchaser with knowledge of all the legal uses and purposes to which the property is best adapted.<sup>20</sup> The percentage of FMV must be uniform throughout the state upon the same class of property.<sup>21</sup> Uniformity requires that each property be assessed at the same percentage of market value.<sup>22</sup> Without uniformity, there is no property tax equity. Property subject to *ad valorem* taxation is divided into five classifications and assessed at certain percentages of FMV as follows:<sup>23</sup>

Classifications		Percentages
a.	Land	10%
b.	Improvements for Residential Purposes	10%
c.	Electric Cooperative Properties, excluding Land	15%
d.	Public Service Properties, excluding Land	25%
e.	Other Property (including Personal Property)	15%

Most oil and gas properties, commercial improvements, and general business assets are classified as “other property” and are therefore assessed at 15% of FMV.<sup>24</sup> Certain interstate natural gas pipelines are considered

16. See LA. REV. STAT. 47:1957(B); see also *Metrailler*, 552 So. 2d at 722.

17. See LA. CONST. art. VII, § 18; LA. REV. STAT. § 47:1957(B).

18. See LA. REV. STAT. § 47:2321.

19. *Id.*; see also LA. ADMIN. CODE tit. 61, pt. 5, §§ 109, 301 (2021) (defining fair market value).

20. LA. REV. STAT. § 47:2321; LA. ADMIN. CODE tit. 61, pt. 5, §§ 109, 301.

21. *Williams v. Opportunity Homes Ltd. P’ship*, 240 So. 3d 161, 163 (La. 2018) (citing LA. CONST. art. VII, § 18(A); LA. ADMIN. CODE tit. 61, pt. 5, § 101(A)).

22. See LA. CONST. art. VII, § 18.

23. *Id.* § 18(B); LA. ADMIN. CODE tit. 61, pt. 5, § 101(B).

24. See *Jones v. S. Nat. Gas Co.*, 63 So. 3d 1080, 1083 (La. Ct. App. 2011); LA. ADMIN. CODE tit. 61, pt. 5, § 304(B).

“public service properties”<sup>25</sup> and are therefore assessed at 25% of FMV.<sup>26</sup> The LTC has promulgated rules and regulations specific to ascertaining the FMV of oil and gas properties,<sup>27</sup> drilling rigs and related equipment,<sup>28</sup> and pipelines.<sup>29</sup>

The term “property” includes every form, character, and kind of property—real, personal, and mixed; tangible and intangible; corporeal and incorporeal; and every share, right, title, or interest in such property.<sup>30</sup> Both real property<sup>31</sup> and personal property<sup>32</sup> are subject to *ad valorem* taxation in Louisiana. Most oil and gas properties—such as well surface equipment, subsurface equipment, and pipelines—are considered “personal property” for *ad valorem* reporting and assessment purposes.<sup>33</sup>

Real property is reappraised every four years in accordance with the uniform valuation date and quadrennial reappraisal cycle as determined by the LTC,<sup>34</sup> and personal property is reappraised every year.<sup>35</sup> The next reappraisal year for real property is 2024, and all real property is to be valued as of January 1, 2023.<sup>36</sup>

In general, assessments are based on the condition of things existing as of January 1 of each year.<sup>37</sup> For all parishes, other than Orleans, assessments are made based on the condition of things existing as of January 1 for that same year’s property taxes, and the property taxes for that year are due by December 31.<sup>38</sup> However in Orleans Parish, new improvements and exemptions are based on the condition of things existing on August 1 of each year for the following year’s property taxes.<sup>39</sup> Orleans Parish taxes are paid in advance instead of arrears, as is the case in all other parishes.<sup>40</sup>

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25. See LA. REV. STAT. §§ 47:1851–47:1858.

26. *Jones*, 63 So. 3d 1083; LA. ADMIN. CODE tit. 61, pt. 5, § 304(B).

27. LA. ADMIN. CODE tit. 61, pt. 5, §§ 901–907.

28. *Id.* §§ 1101–1103.

29. *Id.* §§ 1301–1307.

30. See LA. REV. STAT. § 47:1702; LA. ADMIN. CODE tit. 61, pt. 5, § 114.

31. LA. REV. STAT. § 47:2322; LA. ADMIN. CODE tit. 61, pt. 5, § 115.

32. See LA. REV. STAT. § 47:2322; LA. ADMIN. CODE tit. 61, pt. 5, § 117.

33. LA. ADMIN. CODE tit. 61, pt. 5, §§ 304(B), 307.

34. LA. CONST. art. VII, § 18(F); LA. ADMIN. CODE tit. 61, pt. 5, § 121.

35. LA. CONST. art. VII, § 18(F); LA. ADMIN. CODE tit. 61, pt. 5, § 121.

36. LA. ADMIN. CODE tit. 61, pt. 5, § 303(D).

37. See LA. REV. STAT. § 47:1952(A).

38. See *id.* § 47:2127(A).

39. See LA. ADMIN. CODE tit. 61, pt. 5, §§ 113, 303(B).

40. See LA. REV. STAT. § 47:2127.

III. ADMINISTRATION OF *AD VALOREM* TAXES

Louisiana *ad valorem* taxes are administered at the parish level by the Parish tax assessor's office.<sup>41</sup> The office of tax assessor is an elected position, and each parish assessor is elected to serve for a four-year term.<sup>42</sup>

The parish tax assessor is responsible, under the supervision of the LTC, for listing and assessing all property within his/her respective parish.<sup>43</sup> Tax assessors are mandated by statute to "enumerate and list and assess property."<sup>44</sup> The assessment rolls are prepared from the assessment lists.<sup>45</sup> An "assessment roll" is a written record of taxable persons and property in a taxing jurisdiction, which are prepared by tax assessors and available for public inspection at a certain time each year. In Louisiana, the public inspection period is a 15-day period between August 15 and September 15 of each year, depending on the parish.<sup>46</sup> The LTC must approve the assessment rolls.<sup>47</sup>

Each assessor is required to gather all data necessary to properly determine FMV of all property subject to taxation within his respective parish.<sup>48</sup> In securing this data, the assessor may employ the use of self-reporting forms to be used by property owners.<sup>49</sup> The assessor may choose to use the self-reporting forms for real property; however, the personal property forms must be forwarded by the assessor to the taxpayer on or before February 15 of each year.<sup>50</sup> Each person is required to fill out a list of its property and affirm its accuracy under oath on the blank forms provided by the assessor prescribed for the listing and assessing of property.<sup>51</sup> Such forms and the rules and regulations necessary for their administration are applicable throughout the state and must be applied

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41. LA. REV. STAT. § 47:1957(A).

42. LA. CONST. art. VII, § 24.

43. LA. REV. STAT. § 47:1957(A). The Louisiana Supreme Court has recently reaffirmed that the LTC is the "supervisory state agency over parish tax assessors." *Williams v. Opportunity Homes Ltd. P'ship*, 240 So. 3d 161, 165 n.3 (La. 2018).

44. *Metrailler v. Granger*, 552 So. 2d 720, 721 (La. Ct. App. 1989) (quoting LA. REV. STAT. § 47:1903).

45. See LA. REV. STAT. § 47:1993(A); See also *id.* §§ 47: 1956, 47:1957, 47:1987, 47:1992 (the statutes for generally listing and assessing property).

46. LA. REV. STAT. § 47:1992(F) (providing an exception, however, for Orleans Parish which is for a period of 32 calendar days).

47. *Metrailler*, 552 So. 2d at 722 (citing LA. REV. STAT. § 47:1993(C)).

48. LA. REV. STAT. § 47:2324.

49. *Id.*; LA. ADMIN. CODE tit. 61, pt. 5, § 118 (2021).

50. LA. REV. STAT. § 47:2324; LA. ADMIN. CODE tit. 61, pt. 5, § 307.

51. LA. REV. STAT. § 47:2324; LA. ADMIN. CODE tit. 61, pt. 5, § 307.

uniformly on similar types of property.<sup>52</sup> The reporting forms are due April 1 of each year or within 45 days after receipt, whichever is later.<sup>53</sup> The assessor may grant an extension of time for filing.<sup>54</sup>

Specific forms, referred to as “LAT” forms,<sup>55</sup> have been developed for the annual reporting by taxpayers of property, including oil and gas wells, drilling rigs and related equipment, and pipeline properties.<sup>56</sup> The LAT 5 Form is used to report general business assets such as inventories, merchandise, furniture and fixtures, machinery and equipment, leasehold improvements, and miscellaneous property.<sup>57</sup> The LAT 5A Form is used to report tax-exempt properties.<sup>58</sup>

The penalties for failure to timely file the reporting form or failing to make an oath to its correctness include waiver of rights to appeal the assessment (specifically, no legal right or cause to question or contest the determination of FMV by the assessor) and may include a monetary penalty.<sup>59</sup>

The LAT reporting forms filed by a taxpayer are confidential and are used by the assessor, the governing authority, the Louisiana Tax Commission, and the Louisiana Department of Revenue, for the sole purpose of administering the *ad valorem* statutory provisions and verifying eligibility for the inventory tax credits claimed under Louisiana Revised Statutes section 47:6006.<sup>60</sup> The completed forms submitted to the tax assessor are confidential and are not subject to public disclosure provided, however, such forms are admissible in evidence and subject to discovery in judicial or administrative proceedings according to general evidentiary law relating to the production and discovery of evidence.<sup>61</sup>

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52. See LA. REV. STAT. § 47:2326; LA. ADMIN. CODE tit. 61, pt. 5, § 119(A)(1).

53. LA. REV. STAT. § 47:2324; LA. ADMIN. CODE tit. 61, pt. 5, §§ 118(A), 307(A).

54. LA. REV. STAT. § 47:2324.

55. “LAT” – Louisiana *Ad Valorem* Taxation.

56. LA. ADMIN. CODE tit. 61, pt. 5, §§ 307(A)(8), 903–905 (LAT-12 and LAT-5); *id.* §§ 307(A)(9), 1101 (LAT-13 and LAT-5); *id.* §§ 307(A)(10), 1301–1303 (LAT-14).

57. LA. ADMIN. CODE tit. 61, pt. 5, §§ 307(A)(1), 905, 1101.

58. *Id.* § 307(A)(2).

59. See LA. REV. STAT. §§ 47:1992, 47:2329–47:2330; *see also* LA. ADMIN. CODE tit. 61, pt. 5, §§ 118(B), 307(B)(2).

60. LA. REV. STAT. § 47:2327.

61. *Id.*; *see also* LA. ADMIN. CODE tit. 61, pt. 5, § 119(A)(2) (“Forms filed by a taxpayer with an assessor to assist in his determination of fair market value are confidential.”).



## IV. DETERMINING FAIR MARKET VALUE

Each assessor is required by article VII, section 18(D) of the Louisiana Constitution to “determine the fair market value of all property subject to taxation within his respective parish or district except public service properties,” which are valued at fair market value by the LTC.<sup>62</sup> Public service properties are centrally assessed by the LTC, not the local parish tax assessor.<sup>63</sup>

The criteria for determining FMV must be uniformly applied throughout the state.<sup>64</sup> To implement the criteria for determining FMV, the LTC is responsible for adopting uniform guidelines, procedures, and rules and regulations pursuant to the Louisiana Administrative Procedure Act (“LAPA”).<sup>65</sup> Each assessor must follow those uniform criteria in determining FMV of all property subject to taxation within his/her parish, and any manual or manuals used by an assessor are subject to approval by the LTC.<sup>66</sup>

The Louisiana First Circuit Court of Appeal discussed the interrelated duties and powers of the Office of Tax Assessor vis-a-vis those of the LTC in the *Metrailer v. Granger* case.<sup>67</sup> In that case, the court emphasized that assessors “shall be responsible, *under the supervision of the Tax Commission*, for listing and assessing all property” within their respective parishes.<sup>68</sup> The court further stated: “The assessor is to make a valuation pursuant to uniform criteria, and the Tax Commission is empowered to adopt ‘guidelines, procedures and rules and regulations’ to implement such criteria.”<sup>69</sup>

The FMV of real and personal property is determined by using the following generally recognized appraisal procedures: the market approach, the cost approach, and the income approach.<sup>70</sup> “In utilizing the *market approach*, an assessor is required to ‘use an appraisal technique in

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62. *Williams v. Opportunity Homes Ltd. P’ship*, 240 So. 3d 161, 164 (La. 2018).

63. *Gisclair v. La. Tax Comm’n*, 16 So. 3d 1132, 1136 (La. 2009) (citing LA. CONST. art. VII, § 18(D); LA. REV. STAT. § 47:1854).

64. *See Williams*, 240 So. 3d at 164 (citing LA. REV. STAT. § 47:2323(A)).

65. LA. REV. STAT. §§ 49:951–49:968.

66. *See Williams*, 240 So. 3d at 164 (citing LA. REV. STAT. § 47:2323(A)–(B)); *see also* LA. ADMIN. CODE tit. 61, pt. 5, § 111(A)–(B).

67. *See Metrailer v. Granger*, 552 So. 2d 720 (La. Ct. App. 1989).

68. *Id.* at 721 (quoting LA. REV. STAT. § 47:1957(A)).

69. *Id.* at 722 (quoting LA. REV. STAT. § 47:2323(A)).

70. *See Williams*, 240 So. 3d at 164 (citing LA. REV. STAT. § 47:2323(C)); *see also* LA. ADMIN. CODE tit. 61, pt. 5, §§ 111(C), 303(A).

which the market value estimate is predicated upon prices paid in actual market transactions and current listings.”<sup>71</sup> “In utilizing the *cost approach*, an assessor is required to ‘use a method in which the value of a property is derived by estimating the replacement or reproduction cost of the improvements, deducting therefrom the estimated depreciation; and then adding the market value of the land, if any.’”<sup>72</sup> “In utilizing the *income approach*, an assessor is required to ‘use an appraisal technique in which the anticipated net income is capitalized to indicate the capital amount of the investment which produces the net income.’”<sup>73</sup>

The LTC rules require that in the analysis of fair market value of oil and gas properties, economic and functional obsolescence must be considered “as substantiated by the taxpayer in writing.”<sup>74</sup> That same language is also found in the LTC rules for valuing drilling rigs and pipelines.<sup>75</sup> Obsolescence is defined as “a decrease in the value of a property occasioned solely by shifts in demand from properties of this type to other types of property and/or to personal services.”<sup>76</sup> The principal causes of obsolescence are listed as: (1) changes in the esthetic arts; (2) changes in the industrial arts, such as new inventions and new processes; (3) legislative enactments; (4) change in consumer demand; and (5) migration of markets.<sup>77</sup> Economic (external) obsolescence is the loss of appraisal value resulting from causes outside the property.<sup>78</sup> Functional obsolescence is the loss in value due to lack of utility or desirability of a portion or all of the property.<sup>79</sup>

The taxpayer bears the burden of producing sufficient evidence to the assessor and the LTC to substantiate a request for obsolescence.<sup>80</sup> Case law in connection with this taxpayer burden is discussed more fully below.

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71. *Williams*, 240 So. 3d at 164 (emphasis added) (quoting LA. REV. STAT. § 47:2323(C)(1)).

72. *Id.* (emphasis added) (quoting LA. REV. STAT. § 47:2323(C)(2)).

73. *Id.* (emphasis added) (quoting LA. REV. STAT. § 47:2323(C)(3)).

74. LA. ADMIN. CODE tit. 61, pt. 5, § 907(A). This Article discusses in more detail the taxpayer’s burden of substantiating a request for obsolescence.

75. *See id.* §§ 1103, 1305.

76. *Id.* § 301.

77. *Id.*

78. *Id.*; *see also* *Regency Intrastate Gas, LLC v. La. Tax Comm’n*, 329 So. 3d 838, 846 (La. Ct. App. 2021), *writ denied*, 331 So. 3d 320 (La. 2022) (stating that the LTC defined economic obsolescence as a “diminution in value or usefulness from economic factors, such as decreased demand or changed governmental regulations.”).

79. LA. ADMIN. CODE tit. 61, pt. 5, § 301.

80. *See, e.g., Dow Chem. Co. v. Pitre*, 468 So. 2d 747 (La. Ct. App. 1985); *Bailey v. Enervest Operating Co.*, 43 So. 3d 1046 (La. Ct. App. 2010).

## V. NEW CONSTITUTIONAL AMENDMENT FOR VALUING OIL AND GAS WELLS

The oil and gas industry—through the Louisiana Oil and Gas Association (“LOGA”) and Louisiana Mid-Continent Oil and Gas Association (“LMOGA”)—and the Louisiana Assessors’ Association worked together to propose an amendment to article VII, section 4(B) of the Louisiana Constitution during the 2020 Regular Session allowing a more accurate approach to be used for the valuation of oil and gas properties.<sup>81</sup> The legislation passed both the House and Senate unanimously.<sup>82</sup> The proposed constitutional amendment was subsequently approved by Louisiana voters in November 2020.<sup>83</sup>

The methodology for valuing oil and gas properties for *ad valorem* tax purposes has been an issue for decades. As mentioned above, there are three approaches to valuation—the cost approach, the income approach, and the market approach.<sup>84</sup> Due to the limitations of the language in article VII, section 4(B) on imposing any tax other than a severance tax on oil, gas, or sulphur leases or rights, the assessors had historically been forced to use the cost approach, and sometimes the market approach if the data was available, to value oil and gas properties.<sup>85</sup> Leaders in the oil and gas industry and the assessors both agree that the income approach may offer a better alternative to valuing oil and gas properties. The income approach, by definition, allows the assessors to consider the potential revenue stream from the production of minerals as part of the formula for valuing the properties.<sup>86</sup> Leaders in the industry expect that this shift in valuation methodology, if used by the assessors, will result in a more fair and accurate determination of fair market value for oil and gas properties.

The amended language to the constitutional provision pursuant to Act 368 is underlined below. Note that the language is not mandatory but is permissive. An assessor is not required to use the income approach to determine FMV of oil and gas properties but *may* do so.

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81. Act No. 368, 2020 La. Acts.

82. See *2020 Regular Session: HB360 by Representative Mike Huval*, LA. STATE LEGIS., <https://legis.la.gov/Legis/BillInfo.aspx?s=20RS&b=HB360&sbi=y> (last visited Apr. 25, 2022).

83. See *id.*

84. LA. REV. STAT. § 47:2323(C) (2021).

85. LA. CONST. art. VII, § 4(B).

86. See LA. REV. STAT. § 47:2323(C)(1).

**§4. Income Tax; Severance Tax; Political Subdivisions 12**  
**Section 4. 13**

\* \* \*

(B) Severance Tax. (1) Taxes may be levied on natural resources severed from the soil or water, to be paid proportionately by the owners thereof at the time of severance. Natural resources may be classified for the purpose of taxation. Such taxes may be predicated upon either the quantity or value of the products at the time and place of severance. No further or additional tax or license shall be levied or imposed upon oil, gas, or sulphur leases or rights. No additional value shall be added to the assessment of land by reason of the presence of oil, gas, or sulphur therein or their production therefrom. However, sulphur in place shall be assessed for ad valorem taxation to the person, firm, or corporation having the right to mine or produce the same in the parish where located, at no more than twice the total assessed value of the physical property subject to taxation, excluding the assessed value of sulphur above ground, as is used in sulphur operations in such parish. Likewise, the severance tax shall be the only tax on timber; however, standing timber shall be liable equally with the land on which it stands for ad valorem taxes levied on the land.

(2) Notwithstanding the provisions of Subparagraph (1) of this Paragraph, the presence of oil or gas or the production thereof, may be included in the methodology to determine the fair market value of an oil or gas well for ad valorem taxes.<sup>87</sup>

The oil and gas industry property tax experts and the assessors are currently working on rules and regulations for the LTC to consider for implementing the new provision. The proposals are anticipated to be submitted to the LTC this summer during the LTCs annual review of its rules. The expectation is that at least some rule provisions will be adopted and become effective as of January 1, 2023. However, because the amendment was approved by voters in November 2020, the new language was effective for property tax years beginning January 1, 2021. Despite the lack of formal rules, a taxpayer wishing to explore valuation using the income approach for the 2021, 2022, and subsequent tax years should discuss such with the assessor. Information supporting a valuation of the properties using income information can be submitted with the appropriate

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87. Act No. 368, 2020 La. Acts.

LAT filing form or even through the ending date of the open rolls period, and such information will be considered confidential pursuant to Louisiana Revised Statutes section 47:2327.

#### VI. CHALLENGING AN ASSESSMENT: CORRECTNESS OR LEGALITY?

As explained by the Louisiana Supreme Court in the case of *Gisclair*, Louisiana constitutional and statutory law formulates a two-track procedure that must be adhered to in challenging property tax assessments.<sup>88</sup> One track encompasses challenges to the “correctness of assessments” by the assessor, while the other track covers challenges to the legality of the tax levied.<sup>89</sup> Accordingly, under our jurisprudence, challenges to *ad valorem* property tax assessments are categorized either as challenges to the “correctness of assessments” or challenges to the “legality of assessments.”<sup>90</sup>

The *Gisclair* Opinion quotes *Morgan’s Louisiana & T.R. & S.S. Co.*, in which the Court explained the distinction to be drawn between (1) suits to correct an assessment and (2) suits which go to the inherent validity of an assessment, and to the legality of the tax based thereon.<sup>91</sup> Suits challenging the correctness of an assessment are “suits in which an assessment is complained of, and attacked for over-valuation and misdescription of the property listed, involving merely the regularity or correctness of the assessment.”<sup>92</sup> Suits challenging the validity of the assessment or legality of the tax are those actions “attacking an assessment as void on account of radical defects, and drawing into question, not the correctness merely of an assessment, but the existence itself of any valid assessment.”<sup>93</sup> The Court explained, “In the first class of cases, the attack, if successful, results not in destroying, but in reducing or correcting, the assessment; whereas in the second class of cases the radical defects made the basis of attack, if found to exist, render the assessment null.”<sup>94</sup>

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88. *Gisclair v. La. Tax Comm’n*, 16 So. 3d 1132, 1135 (La. 2009) (citing *Triangle Marine, Inc. v. Savoie*, 681 So. 2d 937, 939 (La. 1996)).

89. *Id.* (quoting *Triangle*, 681 So. 2d at 939).

90. *See ANR Pipeline Co. v. La. Tax Comm’n*, 851 So. 2d 1145, 1148–49 (La. 2003).

91. *Gisclair*, 16 So. 3d 1136 (citing *Morgan’s Louisiana & T.R. & S.S. Co. v. Pecot*, 23 So. 948, 950–51 (La. 1898)).

92. *Id.* (quoting *Morgan’s Louisiana*, 23 So. at 950–51).

93. *Id.* (quoting *Morgan’s Louisiana*, 23 So. at 950–51).

94. *Id.* (quoting *Morgan’s Louisiana*, 23 So. at 950–51).

The *Gisclair* opinion also cites *Soniat v. Board of State Affairs*,<sup>95</sup> for the proposition that any challenge that seeks to correct some aspect of the assessment is a correctness challenge if that challenge does not seek to annul the assessment in toto.

The nature of the challenge—either correctness or legality—dictates the body in which our constitution grants jurisdiction to hear and resolve property tax disputes.<sup>96</sup> The LTC has original jurisdiction over challenges to the correctness of an assessment; the courts are granted appellate jurisdiction.<sup>97</sup> The district court has original jurisdiction over challenges to the legality of an assessment.<sup>98</sup> Note that Act No. 343 of the 2021 Regular Session of the Louisiana Legislature added the Louisiana Board of Tax Appeals as an additional venue for judicial review of decisions by the LTC.

The very large majority of property tax disputes in Louisiana are challenges to the correctness of an assessment; legality challenges occur much less frequently. This Article focuses on challenges to the correctness of an assessment.

## VII. CHALLENGING THE CORRECTNESS OF AN ASSESSMENT

The Louisiana Constitution requires layers of review for correctness challenges, stating: “The correctness of assessments by the assessor shall be subject to review first by the parish governing authority, then by the Louisiana Tax Commission or its successor, and finally by the courts, all in accordance with procedures established by law.”<sup>99</sup> This provision is the constitutional umbrella under which the LTC derives its power of review.

The local boards of review “consider [a taxpayer’s] written or oral complaint” concerning the correctness of an assessment;<sup>100</sup> the LTC considers the appeal of any taxpayer dissatisfied with the determination of the local board of review;<sup>101</sup> and the district and appellate courts review

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95. *Soniat v. Bd. of State Affs.*, 83 So. 760 (La. 1919).

96. *See id.* at 1135.

97. *Id.* at 1136 (citing *ANR Pipeline Co. v. La. Tax Comm'n*, 851 So. 2d 1145, 1149 (La. 2003); *Triangle Marine Inc. v. Savoie*, 681 So. 2d 937, 939 (La. 1996)).

98. *Id.*

99. *Id.* (quoting LA. CONST. art. VII, § 18(E)); LA. ADMIN. CODE tit. 61, pt. 5, § 101(E).

100. LA. REV. STAT. 47:1992(C) (2021).

101. *Id.* §§ 47:1992(D), 47:1989(A)–(D).

the decisions of the LTC.<sup>102</sup> The LTC has a constitutional and statutory mandate to review and correct erroneous assessments and is responsible for administering and enforcing all laws related to the state supervision of local property tax assessments.<sup>103</sup>

#### *A. Board of Review*

Generally, the parish governing authority sitting as the Board of Review (“BOR”) is the Parish Police Jury or Parish Council.<sup>104</sup> The BOR must conduct public hearings for all persons or their representatives desiring to be heard on the assessments of property.<sup>105</sup> The parish governing authority conducts the BOR “public hearing” during one of its regularly scheduled monthly meetings. The BOR portion of the meeting typically lasts only a few minutes and is very informal. No evidentiary hearing is required or offered. In practice, these “public hearings” are not evidentiary hearings. The BOR does not take sworn testimony or enter exhibits into evidence or issue written or oral findings of fact or conclusion of law. The BOR does not exercise an adjudicatory function. Notably, the LTC Rules provide: “The Board of Review does not transmit a record or evidence to the Tax Commission. Any evidence or information that was submitted to the Board of Review must be filed by the parties, to be considered by the Tax Commission.”<sup>106</sup>

The BOR may make a determination to increase or decrease the assessment of real or personal property made by the assessor.<sup>107</sup> The BOR almost always agrees with the assessor’s valuation. A timely appeal to the BOR is mandatory under the Louisiana Constitution, and failure to timely appeal to the BOR invalidates any effort by the taxpayer to contest the property value as determined by the assessor.<sup>108</sup> Any taxpayer, assessor,

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102. *Id.* § 47:1998(A)(1)(a), (b)(ii)(iii). Louisiana Revised Statutes § 47:1989, regarding judicial review of LTC decisions, was amended by Act No. 343, 2021 La. Acts 2021 (eff. 1/1/2022) adding the Board of Tax Appeals as an alternative venue to the district court for filing appeals of the LTC’s decisions.

103. *See* LA. CONST. art. VII, §18(E); LA. REV. STAT. §§ 47:1837, 47:1990; *Williams v. Opportunity Homes Ltd. P’ship*, 240 So. 3d 161, 165 n.3 (La. 2018).

104. LA. ADMIN CODE tit. 61, pt. 5, § 3101(F).

105. *Id.*

106. LA. ADMIN CODE tit. 61, pt. 5, § 3102(P), § 3103(G)(14). Similar language first appeared in the LTC Rules in 2002. LA. ADMIN CODE tit. 61, pt. 5, § 3103(L) (“Evidence offered at the Board of Review is not forwarded to the Tax Commission and must be submitted by the assessor/taxpayer in accordance with filing procedures for written appeals.”).

107. LA. REV. STAT. § 47:1992(C); LA. ADMIN CODE tit. 61, pt. 5, § 3101(G).

108. LA. ADMIN CODE tit. 61, pt. 5, § 3101(E)(1).

or bona fide representative of an affected tax recipient body may appeal the BOR determination to the LTC.<sup>109</sup> All determinations by the BOR are final unless timely appealed to the LTC.<sup>110</sup>

*B. Appeals to the Louisiana Tax Commission*<sup>111</sup>

Even though the LTC considers “appeals” from the local boards of review and “reviews” the determinations of the board of review and assessor, it acts in every way like a court of first resort. The law provides that LTC hearings “shall be conducted in accordance with” Louisiana Revised Statutes section 47:1989, the LAPA, and rules and regulations established by the LTC.<sup>112</sup> The LTC’s Rules and Regulations provide for an adjudicatory hearing in which the LTC serves as the trier of fact.<sup>113</sup> The hearing before the LTC is intended to be a full evidentiary hearing with sworn testimony and the orderly introduction of relevant documents.<sup>114</sup> The hearing entails: acceptance of evidence, allowance for pretrial conferences, deposition testimony, opportunity for an official reporter, witness testimony under oath, application of the Rules of Evidence, receipt of documentary evidence, and subpoena power.<sup>115</sup> Also, the LAPA contemplates that the LTC will judge the credibility of witnesses.<sup>116</sup>

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109. LA. REV. STAT. § 47:1989(B).

110. *Id.* § 47:1992(D); *see also* LA. ADMIN CODE tit. 61, pt. 5, § 3101(K) (“The determination of the Board of Review shall be final unless appealed, in writing, to the Tax Commission within 30 calendar days of the earlier of: (a) actual delivery of the Board of Review decision; or (b) written transmission of the Board of Review notice of determination.”). This LTC Rules amendment is effective for tax year 2022. The prior version provided for a deadline for filing appeals with the LTC of ten business days.

111. *See* LA. REV. STAT. § 47:1989.

112. *Id.* § 47:1989(C). This provision was amended in 2021. Act No. 343, 2021 La. Acts.

113. LA. ADMIN CODE tit. 61, pt. 5, §§ 3102–3103, 3105; *see also* *Gisclair v. Bunge Corp.*, 668 So. 2d 1179, 1183 (La. Ct. App. 1996) (“When an administrative agency as the Louisiana Tax Commission is the trier of fact . . .”); *Holiday Bossier Ltd. P’ship v. La. Tax Comm’n*, 574 So. 2d 1280, 1285 (La. Ct. App. 1991) (referring to the LTC as the trier-of-fact); *Broussard v. La. Tax Comm’n*, 614 So. 2d 1341, 1344 (La. Ct. App. 1993) (referring to the LTC as the trier of fact).

114. *See* LA. ADMIN CODE tit. 61, pt. 5, §§ 3102–3103, 3105; *see also* *D90 Energy, LLC v. Jefferson Davis Par. Bd. of Rev.*, No. 2020-C-00200, 2020 WL 6145158 (La. Oct. 20, 2020).

115. *D90 Energy*, 2020 WL 6145158, at \*4 n.7.

116. *See* LA. REV. STAT. § 49:964(G)(6).



Despite the language of Louisiana Revised Statutes section 47:1990 authorizing the LTC to *change or correct* assessments,<sup>117</sup> many parish assessors have unsuccessfully advanced an argument that the LTC is nothing more than an “intermediate” appellate body that merely has the authority to “review” but not “correct” an assessment. Those arguments have been squarely rejected by the Louisiana Supreme Court and by the courts of appeal.<sup>118</sup> The assessors have also attempted to disrupt the LTC’s ability to conduct a full evidentiary hearing by challenging the LTC’s “ability to receive and consider evidence not previously submitted to the Assessor” prior to the LTC hearing.<sup>119</sup> The Louisiana Supreme Court recently struck down that argument in the *D90 Energy* opinion stating, “If the Commission can only review and consider the evidence submitted to an assessor, a hearing is meaningless.”<sup>120</sup>

In response to the *D90 Energy* opinion, the assessors prodded the introduction of legislation during the 2021 Regular Legislative Session proposing sweeping changes to the language of Louisiana Revised Statutes section 47:1989, which governs the review of appeals by the LTC.<sup>121</sup> Although the taxpayer-onerous original language in the bill was somewhat tamed through the legislative process, the resulting provisions create a much more burdensome, and arguably unfair, appeals process for any person—business or individual—who challenges an assessment.<sup>122</sup>

Taxpayers wishing to challenge their assessments need to be aware that with some limited exceptions, the LTC hearing “shall be confined to review of evidence presented to the assessor prior to the close of the

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117. *Id.* § 47:1990 (“The tax commission may change or correct any and all assessments of property for the purpose of taxation, in order to make the assessments conform to the true and correct valuation, not to exceed its actual cash value.”).

118. *See, e.g., Williams v. Opportunity Homes Ltd. P’ship*, 240 So. 3d 161 (La. 2018); *see also Dow Chem. Co. v. Pitre*, 468 So. 2d 747, 754 (“[T]he Tax Commission may not usurp the constitutional authority of an assessor by utilizing factual data which was available to the taxpayer, yet withheld from the assessor. This is not to say, however, that the Tax Commission cannot review and correct an erroneous assessment.”); *see also Metrailler v. Granger*, 552 So. 2d 720, 723 (La. Ct. App. 1989) (citing LA. REV. STAT. §§ 47:1837, 47:1957) (holding that the LTC’s authority in acting as a reviewing body is not its only function).

119. *D90 Energy*, 2020 WL 6145158, at \*2, \*4.

120. *Id.* at \*7. The LTC has been conducting full evidentiary hearings since at least 1978 when the first Rules/Regulations of the LTC were promulgated regarding hearings.

121. *See Act No. 343, 2021 La. Acts* (introduced as House Bill No. 573).

122. *See LA. REV. STAT. § 47:1989(C)(2), as amended by Act No. 343, 2021 La. Acts.*

deadline for filing a complaint with the board of review.”<sup>123</sup> That deadline is normally within a few days of when the open rolls inspection period closes,<sup>124</sup> and the LTC hearing may not be set until several or even many months after that date. If a taxpayer wishes to introduce evidence that was not provided to the assessor by the stated deadline, the taxpayer must make application to the LTC to present the additional evidence prior to the hearing, *and* the LTC must find that the additional evidence is material and that there were good reasons for failure to timely present it to the assessor.<sup>125</sup> Meaning that there now could be severe restrictions on the introduction of evidence at the LTC hearing.<sup>126</sup>

Section 3 of Act No. 343 specifically states that the provisions of the Act amending Revised Statutes section 47:1989 “shall have prospective effect only and shall not be applicable to any case actually pending before the Louisiana Tax Commission or in any court on the effective date of the Act.”<sup>127</sup> Accordingly, the LTC was forced to amend and promulgate two sets of rules for its hearings—those for appeals filed before January 1, 2022 and those for appeals filed on or after January 1, 2022, which incorporate the new legislative modifications to Louisiana Revised Statutes section 47:1989.<sup>128</sup> Prior to the amendments enacted by Act No. 343, this statutory provision had not been amended since 2000, so the procedures for conducting hearings at the LTC were well-settled.<sup>129</sup>

In general, the Louisiana Rules of Evidence apply to LTC hearings.<sup>130</sup> Although the hearings are somewhat informal and the Rules of Evidence are liberally applied, this hearing is the only opportunity for the taxpayer to create a record of the dispute for further review by the courts.<sup>131</sup> The appellate courts will not conduct a new trial but will only review the administrative record created before the LTC.<sup>132</sup>

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123. LA. REV. STAT. § 47:1989(C)(2).

124. *See id.* § 47:1992.

125. *See id.* § 47:1989(C)(2).

126. *See id.*

127. Act No. 343, 2021 La. Acts.

128. LA. ADMIN CODE tit. 61, pt. 5, § 3102 (for appeals to the LTC filed before January 1, 2022); *id.* § 3103 (for appeals to the LTC filed on or after January 1, 2022).

129. For more information, see the historical notes to Louisiana Revised Statutes § 47:1989.

130. LA. ADMIN CODE tit. 61, pt. 5, §§ 3102–3103, 3105.

131. *Id.*

132. *See, e.g.,* Williams v. Opportunity Homes Ltd. P’ship, 240 So. 3d 161, 166 (La. 2018) (citing Panacon v. La Tax Comm’n, So. 2d 572, 574 (citing LA. REV. STAT. § 49:964(F)) (explaining that review is confined to the administrative record established before the LTC.)).

*C. Judicial Review by District and Appellate Courts*<sup>133</sup>

Any taxpayer or bona fide representative of an affected tax-recipient body dissatisfied with the final determination of the LTC has the right to institute suit for judicial review of the LTC's decision.<sup>134</sup> The petition for judicial review must be filed within 30 days of any final decision by the LTC either in (i) the district court of the parish where the LTC is domiciled (19th Judicial District Court in East Baton Rouge Parish), (ii) the Louisiana Board of Tax Appeals, or (iii) the district court of the parish where the property is located.<sup>135</sup>

Judicial review of the LTC's decision is authorized by Louisiana Revised Statutes section 47:1998 which provides that it is the LTC's "final determination" that is subject to review. The assessors' argument that their valuations are "entitled to deferential review" has been recently rejected by the Louisiana Supreme Court "as the law provides for judicial review of the administrative record established before the Commission and of the final determinations made by the Commission."<sup>136</sup> The standard of review for administrative bodies such as the LTC is set forth in LAPA.<sup>137</sup> The extent of the judicial review of decisions of the LTC is governed by Louisiana Revised Statutes section 49:964(F) and (G).<sup>138</sup> Section 964(F) defines the "scope of review" (i.e., generally confined to the record); and section 964(G) defines the "standard of review" (i.e., reversal or modification of the agency decision under six enumerated circumstances).<sup>139</sup> Judicial review of the LTC's decisions by the district court and appellate courts is confined to the administrative record established before the LTC.<sup>140</sup>

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133. LA. REV. STAT. § 47:1998.

134. *Id.*

135. *Id.* Note that in 2021, the Louisiana Legislature added the Louisiana Board of Tax Appeals as an additional venue for judicial review of decisions by the LTC. Act No. 343, 2021 La. Acts.

136. *D90 Energy, LLC v. Jefferson Davis Par. Bd. of Rev.*, No. 2020-C-00200, 2020 WL 6145158, at \*5 (La. Oct. 20, 2020).

137. LA. REV. STAT. § 49:964(F), (G); *D90 Energy*, 2020 WL 6145158, at \*5 n.9; *see also* ANR Pipeline Co. v. ANR Pipeline Co., 73 So. 3d 398, 402 (La. Ct. App. 2011).

138. *Williams v. Opportunity Homes Ltd. P'ship*, 240 So. 3d 161, 165–67 (La. 2018); *see also D90 Energy*, 2020 WL 6145158, at \*5.

139. *D90 Energy*, 2020 WL 6145158, at \*5; *Williams*, 240 So. 3d at 165.

140. LA. REV. STAT. § 49:964(F); *Williams*, 240 So. 3d at 166 (citing *Panacon v. La. Tax Comm'n*, 747 So. 2d at 574); *see also D90 Energy*, 2020 WL 6145158, at \*5.

A court's review of the evidence presented at LTC hearings is limited to the purpose of determining whether the hearing was conducted in accordance with authority and formalities of statute, whether the fact-finders of the LTC were supported by substantial evidence, and whether the LTC's conclusions from such findings were arbitrary or constituted an abuse of the hearing body's discretion.<sup>141</sup>

Review by both the District Court and the Court of Appeal is governed by Louisiana Revised Statutes section 49:964(G).<sup>142</sup> That statute provides that the courts may either affirm the decision of the agency, or remand the case for further proceedings, or reverse or modify the decision. To reverse or modify the decision, the substantial rights of the appellant must have been prejudiced because the agency's findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (6) not supported and sustainable by a preponderance of evidence.<sup>143</sup>

#### *D. Payment Under Protest*<sup>144</sup>

Any taxpayer in the state who challenges an assessment or has filed suit and whose taxes have become due must timely pay those taxes under protest and notify the sheriff (tax collector), the assessor, and the LTC of the protest and their intent to appeal any adverse rulings.<sup>145</sup> The sheriff is required to hold the payment under protest until the valuation dispute is resolved through settlement or after a court appeals process<sup>146</sup>. If the payment under protest is not timely, the taxpayer may forfeit their right to challenge the assessment—not before the LTC, but for judicial review of the LTC's decision.<sup>147</sup>

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141. See *Warren Energy Res., Inc. v. La. Tax Comm'n*, 825 So. 2d 572, 575 (La. Ct. App. 2002).

142. See, e.g., *TBM-WC Sabine, LLC v. Sabine Parish Bd. of Rev.*, 250 So. 3d 1075, 1081 (La. Ct. App. 2018); *ANR Pipeline Co. v. ANR Pipeline Co.*, 851 So. 2d 1145 (La. 2003); *Warren*, 825 So. 2d at 575–76; *Broussard v. La. Tax Comm'n*, 614 So. 2d 1341, 1344 (La. Ct. App. 1993).

143. LA. REV. STAT. §49:964(G)(1)–(6).

144. *Id.* § 47:2134.

145. *Id.*

146. *Id.*

147. *D90 Energy, LLC v. Jefferson Davis Par. Bd. of Rev.*, No. 2020-C-00200, 2020 WL 6145158, at \*7 (La. Oct. 20, 2020) (“[P]ayment under protest is required

A taxpayer challenging the correctness or legality of an assessment must timely pay the *disputed* amount of tax due under protest.<sup>148</sup> The portion of the taxes paid by the taxpayer that is neither in dispute nor the subject of a suit contesting the correctness or legality of the assessment will not be made subject to the protest.<sup>149</sup> The taxpayer is required to submit separate payments for the disputed amount of tax due and for the amount not in dispute and not subject to the protest.<sup>150</sup>

A suit challenging the “legality” of an assessment must be filed within 30 days of the date of the protested payment.<sup>151</sup> If at the time of payment of the protested tax, a suit challenging the “correctness” of an assessment is not already pending, then a suit seeking recovery of the protested payment need not be filed until 30 days from the date a final decision is rendered by the LTC.<sup>152</sup>

## VIII. JURISPRUDENCE

### A. Recent Cases for Oil & Gas and Other Mineral Properties

On October 20, 2020, the Louisiana Supreme Court issued a ruling on an oil and gas well property *ad valorem* tax case.<sup>153</sup> This decision is a key Louisiana tax case regarding the scope of authority possessed by tax assessors in *ad valorem* tax matters and the Louisiana Tax Commission as a reviewing body.<sup>154</sup>

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before institution of suit, not for taxpayers who are successful before the Commission . . . payment under protest is tethered to judicial review of the Commission’s decision, and there is no corresponding statute or commission rule requiring such payment to receive Board or Commission review.”).

148. LA. REV. STAT. § 47:2134. During the 2022 Regular Session, LOGA was very instrumental promoting the passage of SB 241, which adds language confirming that a taxpayer is not required to make a payment under protest while a correctness challenge is pending before the LTC. The bill also adds additional language to ease the burden of a taxpayer where a payment under protest is required and offers a taxpayer an alternative to payment under protest for both correctness and legality challenges. If signed by the Governor, the language will be effective immediately for the 2022 tax year.

149. *Id.*

150. *Id.*

151. *Id.* § 47:2134(C).

152. *Id.* § 47:2134(B).

153. See *D90 Energy, LLC v. Jefferson Davis Par. Bd. of Rev.*, No. 2020-C-00200, 2020 WL 6145158 (La. Oct. 20, 2020).

154. Notably, the Louisiana Oil and Gas Association (“LOGA”) filed an amicus curiae brief in support of the taxpayer, D90 Energy.

Under the facts of *D90 Energy*, in October 2012, D90 Energy, a multi-state, independent oil and gas operator, purchased two gas wells and one salt-water disposal well for \$100,000.<sup>155</sup> Facing a fair market valuation by the assessor of over \$3 million for the 2013 and 2014 tax years, D90 paid a total of approximately \$110,000 in disputed (under protest) and undisputed taxes for the first two tax years (2013 and 2014)—more than it paid for the property—and appealed the assessor’s decisions to the LTC.<sup>156</sup> D90 Energy did not pay the taxes under protest for the last two tax years—2015 and 2016—because the taxes were unaffordable and it had prevailed at the LTC for the previous years.<sup>157</sup>

D90 relied on the purchase price of \$100,000 as a measure of FMV for the three wells until 2016, where it sought the 90% reduction provided for shut-in wells under LTC Rules and Regulations.<sup>158</sup> The assessor determined FMV by using the tables in the LTC Rules and Regulations providing estimated “cost new” values for well properties, but the assessor refused to consider any adjustments for allowance of economic obsolescence based on the \$100,000 purchase price and the subsequent shut-in of the wells.<sup>159</sup>

D90 submitted the following to the Jefferson Davis Parish Assessor for each tax year 2013 through 2015:

(1) the Assignment, Conveyance and Bill of Sale executed October 17, 2012 and effective October 1, 2012, transferring the wells to D90 for ‘Ten and No/100 Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged’; (2) a copy of the front and back of D90’s \$100,000.00 check to the seller, Goldking Resources, LLC, dated the same day as the sale; and (3) emails between the broker for the sale and Daniel Silverman, the president of D90, documenting the negotiated \$100,000.00 purchase price.<sup>160</sup>

At the LTC hearing, D90 submitted testimony evidence "to support its claim that the wells were over-valued by the Assessor, including substantiation that: the sale price was \$100,000.00; the sale was arms-

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155. *D90 Energy*, 2020 WL 6145158, at \*1.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at \*1 n.2, \*3 n.5.

160. *Id.* at \*1.

length; the wells were 'marginal' and 'incapable of producing gas'; and the wells were 'shut-in' in 2016."<sup>161</sup>

The LTC ruled in favor of D90 Energy in three separate hearings covering the four tax years. In these rulings, the LTC assigned a value of \$235,000 for each of the 2013, 2014, and 2015 tax years, considering (1) the purchase price of \$100,000 and (2) the estimated plug and abandon liability costs of \$135,000 for the three wells.<sup>162</sup> For the 2016 tax year, the LTC calculated a value of \$145,000 based on a 90% shut-in reduction in the purchase price to \$10,000, and an additional \$135,000 for the plug and abandon liability costs.<sup>163</sup> For all of the tax years, the LTC reduced the FMV, heavily relying on a LTC regulation requiring valid, properly documented sales to be considered by an assessor as a measure of FMV.<sup>164</sup>

The assessor's suits for judicial review were consolidated by the District Court in Jefferson Davis Parish.<sup>165</sup> The district court affirmed the LTC decisions, finding no basis to overturn.<sup>166</sup> The assessor then appealed to the Louisiana Third Circuit Court of Appeal, which reversed the District Court and the LTC's decisions and reinstated the Board of Review's decisions to set FMV according to the Assessor's original valuations.<sup>167</sup> The Third Circuit reasoned that the LTC should have afforded the assessor's determination of value "much discretion."<sup>168</sup> Consequently, the Third Circuit overturned the LTC's finding that the arms-length sale price of \$100,000, together with future plugging and abandonment costs, should be the measure of FMV—as opposed to the ordinary tax tables—in this oil and gas property valuation matter.<sup>169</sup>

Additionally, for the 2015 and 2016 tax years, the Third Circuit found that D90 Energy had no right to appeal the FMV determination as no payment under protest was ever made for those specific years.<sup>170</sup> The

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161. *Id.* at \*5. D90's president testified under oath that he paid \$100,000 for the property, that the property had been listed on the open market, and that the sale was fairly negotiated, and the plug and abandon cost of \$45,000 per well was established by uncontroverted testimony. *Id.* at \*6.

162. *Id.* at \*1.

163. *Id.*

164. *Id.* at \*5 ("Sales, properly documented, should be considered by the assessor as fair market value, provided the sale meets all tests relative to it being a valid sale."); *see also* LA. ADMIN. CODE tit. 61, pt. 5, § 907(A)(6)(e) (2021).

165. *Id.* at \*2.

166. *Id.*

167. *Id.*

168. *See* D90 Energy, LLC v. Jefferson Davis Par. Bd. of Rev., 289 So. 3d 615, 633, (La. Ct. App. 2019), *rev'd*, D90 Energy, 2020 WL 6145158.

169. *Id.*

170. *Id.* at 636.

assessor filed an exception of no right of action asserting that because D90 failed to pay the disputed tax amounts under protest for the 2015 and 2016 tax years, it was barred from disputing the valuations and assessments for those years.<sup>171</sup>

D90 Energy's writ to the Louisiana Supreme Court was granted, and in a unanimous decision authored by Justice Crain, the Louisiana Supreme Court reversed the Third Circuit's decision and reinstated the LTC's decisions in favor of D90 Energy.<sup>172</sup> The Supreme Court found that the LTC properly corrected the assessor's FMV determination by considering the recent arm's-length sale from the seller to D90 Energy, that the LTC possessed the authority to correct the assessor's valuation, and the record supported the correction.<sup>173</sup> The recent sale, as opposed to regulatory tax tables, was a proper measure of value for D90 Energy's well properties under the facts.<sup>174</sup> The Court also found that the LTC was not limited to reviewing only the information provided to the assessor, but they could also take evidence, hear testimony, and consider the administrative record established before it in an appeal of an assessor's FMV determination. The assessor argued that "the Constitution grants him the exclusive right to determine fair market value," and that the LTC's valuations deserved no deference.<sup>175</sup> The Court found that the Louisiana Constitution clearly provided the LTC the right of review, and that the evidentiary hearing required by law in an appeal to the LTC indicated the LTC could hear new evidence as part of its responsibilities.<sup>176</sup> The Court noted, "If the Commission can only review and consider the evidence submitted to an assessor, a hearing is meaningless."<sup>177</sup>

The Court distinguished the facts of the *D90 Energy* case from the *Dow v. Pitre* case.<sup>178</sup> In *Dow*,<sup>179</sup> "the court warned against a taxpayer manipulating the system by withholding information from the assessor in order to seek a more favorable valuation from" the LTC.<sup>180</sup> However, nothing suggests D90 did this in the present case.<sup>181</sup> In fact for 2013 and 2014, the LTC found D90's "information adequately documenting the sale

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171. *Id.* at 619.

172. *See D90 Energy*, 2020 WL 6145158, at \*1.

173. *Id.*

174. *Id.* at \*6.

175. *Id.* at \*2.

176. *Id.* at \*4.

177. *Id.* at \*4.

178. *See id.* at \*4.

179. *Dow Chem. Co. v. Pitre*, 468 So. 2d 747, 754 (La. Ct. App. 1985).

180. *D90 Energy*, 2020 WL 6145158, at \*4.

181. *Id.*



was timely furnished to the Jefferson Davis Assessor's Office."<sup>182</sup> If that initial submission was lacking or needed clarification, the law allows the presentation of evidence before the LTC to "establish[] the fair market value of [the] property."<sup>183</sup> The Court stated, "This statutory scheme within the described constitutional framework for assessment and review guarantees the due process rights of the taxpayer by affording a meaningful opportunity to challenge the assessor's valuations."<sup>184</sup> Further, it explained, "There is no evidence that D90 attempted to usurp the assessor's authority"; rather, before the LTC, it "submit[ted] evidence that [it believed] established fair market value."<sup>185</sup>

Finally, the Supreme Court addressed the effect of a taxpayer's failure to pay under protest when it is successful at a LTC hearing, finding such payment under protest is not required to preserve a taxpayer's right to dispute a valuation and assessment when the taxpayer prevails before the LTC.<sup>186</sup>

Reading together Louisiana Revised Statutes sections 47:1998 and 47:2134(B)(1), the Court determined that these statutes provide that "payment under protest is required before institution of suit, not for taxpayers who are successful before the Commission."<sup>187</sup> In this case, the assessor, not D90, filed suit in district court challenging the LTC's decision.<sup>188</sup> Payment under protest is tethered to judicial review of the LTC's decision, and no corresponding statute or LTC rule requires such payment to receive LTC review.<sup>189</sup> The assessor's judicial challenge under Louisiana Revised Statutes section 47:1998 did not create an obligation for D90 to protest a tax with which it agreed.<sup>190</sup>

A matter strikingly similar to *D90 Energy*, but on a larger scale, is currently pending in the Louisiana First Circuit Court of Appeal. Perdido Energy Louisiana, LLC purchased a group of wells in five Parishes (Acadia, Beauregard, Evangeline, Rapides, Vernon) for approximately \$4,000,000, and the assessors placed a collective value on those properties

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182. *Id.*

183. *Id.*; LA. ADMIN. CODE tit. 61, pt. 5, § 3103(D)(4) (2021).

184. *D90 Energy*, 2020 WL 6145158, at \*4 (citing *Martin v. ANR Pipeline Co.*, 76 So. 3d 534, 541 (La. Ct. App. 2011)).

185. *D90 Energy*, 2020 WL 6145158, at \*4.

186. *Id.* at \*7.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

of nearly \$59,000,000.<sup>191</sup> A decision by the First Circuit is expected this summer.

Two decisions of the First Circuit involving brine mining wells and salt caverns recently became final. The matters of *Axiall*<sup>192</sup> and *Blue Cube*<sup>193</sup> were substantially similar disputes concerning the valuation and assessment of active brine mining wells and related salt caverns in Assumption Parish. In both cases, the brine mining wells were located over a salt deposit.<sup>194</sup> The brine produced from the wells was pumped by pipelines to each company's respective plant in Plaquemine, Louisiana, where the brine was used to make various products.<sup>195</sup> The caverns within the salt mass were created as a byproduct of the mining operations; the purpose of the mining was not to create the cavern.<sup>196</sup> The companies did not store, nor intend to store or have the legal right to store any hydrocarbons or other products in the salt caverns.<sup>197</sup> The benefit for the companies is the salt extracted, not the resulting cavern.<sup>198</sup> Further, the Department of Natural Resources has never permitted the caverns to be used for commercial storage; rather, it has exclusively permitted the brine mining wells and associated caverns for use in the mining of brine (solution mining only).<sup>199</sup>

The facts of the two cases diverge slightly in connection with the salt caverns. If Axiall sought to store hydrocarbons in the caverns, it would legally be unable to do so because the cavern walls were too close in proximity to meet the requirements of the Department of Natural Resources' regulations for hydrocarbon storage.<sup>200</sup> Blue Cube did not have the legal right to use the caverns for storage due to contractual restrictions with the owners of the land where the caverns are located.<sup>201</sup>

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191. State of Louisiana Court of Appeal, First Circuit Docket No. 2022-CA-0115 c/w 2022-CA-0116, c/w 2022-CA-0117, c/w 2022-CA-0118 c/w 2022-CA-0119; 19th Judicial District Court, Division 25, Parish of East Baton Rouge, State of Louisiana, Docket Number 693,700 c/w 693,701 c/w 693,702 c/w 693,703 c/w 693,704.

192. *Axiall, LLC v. Assumption Par. Bd. of Rev.*, 302 So. 3d 1136, (La. Ct. App. 2019), *writ denied*, 307 So. 3d 202 (La. 2020).

193. *Blue Cube Operations, LLC v. Assumption Par. Bd. of Rev.*, 315 So. 3d 887 (La. Ct. App. 2020).

194. *Id.* at 888; *Axiall, LLC*, 302 So. 3d at 1139.

195. *Blue Cube*, 315 So. 3d at 888; *Axiall, LLC*, 302 So. 3d at 1139.

196. *Blue Cube*, 315 So. 3d at 888; *Axiall, LLC*, 302 So. 3d at 1139.

197. *Blue Cube*, 315 So. 3d at 888; *Axiall, LLC*, 302 So. 3d at 1139.

198. *Blue Cube*, 315 So. 3d at 888; *Axiall, LLC*, 302 So. 3d at 1139.

199. *Blue Cube*, 315 So. 3d at 893; *Axiall, LLC*, 302 So. 3d at 1139.

200. *Axiall, LLC*, 302 So. 3d at 1139.

201. *Blue Cube*, 315 So. 3d at 893.

The *Axiall* and *Blue Cube* matters differ in the procedural paths for review by the First Circuit. *Axiall* appealed to the Tax Commission in 2014, 2015, and 2016, which ruled in *Axiall*'s favor.<sup>202</sup> The assessor filed for judicial review to the District Court of Assumption Parish, contesting the Commission's decisions.<sup>203</sup> For purposes of judicial review, the appeals were consolidated, and the district court held a hearing in November 2017.<sup>204</sup> The district court reversed and vacated the Commission's decisions, affirming the correctness of the assessments for the tax years by reinstating the Assumption Parish Board of Review's ruling.<sup>205</sup> *Axiall* appealed the district's court ruling to the First Circuit.<sup>206</sup>

*Blue Cube* disputed the 2016 tax year valuation and assessment of the brine wells and related salt caverns, and the LTC ruled in its favor.<sup>207</sup> The assessor appealed the LTC's decision to the Assumption Parish District Court.<sup>208</sup> Before the matter could proceed, *Blue Cube* was back before the LTC for a hearing regarding its 2017 tax year valuation and assessment.<sup>209</sup> Based on the exact same evidence as the 2016 tax year, the LTC "reversed course" in the 2017 tax appeal, finding for the assessor.<sup>210</sup> The LTC upheld the assessor's FMV determination of *Blue Cube*'s brine wells and caverns in a decision clearly not supported by the testimony or the preponderance of the evidence.<sup>211</sup> *Blue Cube* appealed the LTC's decision to the District Court of East Baton Rouge Parish, which upheld the LTC's decision.<sup>212</sup> *Blue Cube* then appealed the district court's ruling to the First Circuit.<sup>213</sup>

Regardless of the slight factual and procedural differences, the primary issues in these cases before the First Circuit were the same: whether the brine wells should be taxed under Chapter 25 (LTC Rules for general business assets), as argued by the assessor, or Chapter 9 (LTC Rules for oil, gas, and other wells), as argued by the taxpayer companies,

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202. *Axiall, LLC*, 302 So. 3d at 1138.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Blue Cube*, 315 So. 3d at 893–95 (discussing of the LTC's ruling in favor of *Blue Cube* for the 2016 tax year).

208. 23rd Judicial District Court, Parish of Assumption, Docket No. 36,610, Division C.

209. *Blue Cube*, 315 So. 3d at 891. The LTC heard the 2016 tax year dispute on December 13, 2017, and the 2017 tax year dispute on August 22, 2018.

210. *Id.* at 895.

211. *Id.*

212. *Id.* at 888.

213. *Id.*

and further, whether the caverns had any value at all and therefore subject to taxation.<sup>214</sup> Chapter 9 specifically includes service wells, including injection wells.<sup>215</sup> Within the LTC's classifications of property, a sub-class description includes injection wells, which are defined as "injection wells, service wells, saltwater disposal, brine wells, water wells."<sup>216</sup> The term "injection well" does not appear do not appear anywhere else in the LTC's rules.<sup>217</sup>

The First Circuit, quoting from the LTC's own decisions, noted that the LTC has consistently valued brine wells under Chapter 9 of the LTC's Rules and Regulations.<sup>218</sup> Additionally, the LTC has evaluated the correctness of the valuation and assessment of salt caverns by their actual and potential commercial use and determined that the caverns have no distinct commercial value apart from the brining operations, nor do they have any value distinct from the land.<sup>219</sup> The LTC has further determined that until the process to convert the caverns for the storage of hydrocarbons and other products is completed, the caverns are simply holes in the ground without any inherent additional commercial value.<sup>220</sup> The LTC Rules do not provide for valuation and taxation of caverns that are voids in the ground.<sup>221</sup> Accordingly, the LTC determined the caverns have no value separate from the land.<sup>222</sup>

In *Axiall*, the First Circuit reversed the district court and reinstated the LTC's decisions that the brine wells should be valued under Chapter 9 rather than Chapter 25, finding the caverns had no value.<sup>223</sup> In *Blue Cube*, the First Circuit relied heavily on its ruling in *Axiall* to reverse the district court's judgment affirming the LTC's decision in the 2017 tax year appeal

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214. *Blue Cube*, 315 So. 3d at 891; *Axiall, LLC*, 302 So. 3d at 1143.

215. *Blue Cube*, 315 So. 3d at 892; *Axiall, LLC*, 302 So. 3d at 1143; LA. ADMIN. CODE tit. 61, pt. 5, § 901 (2021).

216. *Blue Cube*, 315 So. 3d at 892; *Axiall, LLC*, 302 So. 3d at 1143–44; LA. ADMIN. CODE tit. 61, pt. 5, § 304(B).

217. *Blue Cube*, 315 So. 3d at 892; *Axiall, LLC*, 302 So. 3d at 1144.

218. *Blue Cube*, 315 So. 3d at 893.

219. *Id.* at 894.

220. *Id.* at 894–95.

221. *Id.* at 893; *Axiall, LLC*, 302 So. 3d at 1144. In contrast, the LTC Rules, in Chapter 25, do provide a procedure for the valuation of "Salt Dome Storage Wells and Caverns permitted at Class II Type 10, 11-L or 11-N" (hydrocarbon storage). See LA. ADMIN. CODE tit. 61, pt. 5, §§ 2501(H), 2503 (2021). The wells and caverns at issue in these matters have only ever been permitted for the mining of brine, which does not fall into the specific class designations above.

222. *Blue Cube*, 315 So. 3d at 895.

223. *Axiall, LLC*, 302 So. 3d at 1138, 1145.

and to reverse the determination of the LTC.<sup>224</sup> In its *Blue Cube* ruling, the First Circuit quoted much of its prior decision in *Axiall* and also further declared that the LTC “failed to articulate any basis for its reversal in interpretation of the rules and regulations with regard to valuing the brine wells.”<sup>225</sup>

The assessor filed a writ application to the Louisiana Supreme Court in *Axiall*, and it was denied in December 2020.<sup>226</sup> The assessor did not seek a writ to the Louisiana Supreme Court in *Blue Cube*.

The LTC has received proposals for several years from the LA Assessor’s Association suggesting that brine mining wells and salt cavern properties should be valued under Chapter 25 (general business assets), rather than Chapter 9 (Oil, Gas, and Other Wells), and the LTC has rejected those proposals to date.<sup>227</sup> However, the LTC has noted during the last several years of its annual rules meetings that brine mining wells may deserve a separate Chapter within the Louisiana Tax Commission Rules for valuation, and that addition may be forthcoming in the near future.

### *B. Burden of Proof of Obsolescence*

Louisiana courts have long held that the party seeking obsolescence bears the burden of producing sufficient evidence to the assessor.<sup>228</sup> Although Louisiana Revised Statutes section 47:2324 requires the assessor to gather all data necessary to properly determine the fair market value of property, it is the party seeking a fair market value reduction for its property based on obsolescence who has the burden of producing sufficient data and information to substantiate its claim.<sup>229</sup>

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224. *Blue Cube*, 315 So. 3d at 896.

225. *Id.*

226. *See Axiall, LLC v. Assumption Par. Bd. of Rev.*, 307 So. 3d 202 (La. 2020).

227. *Blue Cube*, 315 So. 3d 887 n.2; *Axiall, LLC*, 302 So. 3d 1136 n.5; *see also Commission Members: Proposals*, LA. TAX. COMM’N, [https://www.latax.state.la.us/Menu\\_RulesRegulations/RulesRegulations.aspx](https://www.latax.state.la.us/Menu_RulesRegulations/RulesRegulations.aspx) (last visited Apr. 25, 2022).

228. *Dow Chem. Co. v. Pitre*, 468 So. 2d 747 (La. Ct. App. 1985); *Bailey v. EnerVest Operating Co., LLC*, 43 So. 3d 1046 (La. Ct. App. 2010). Although both the *Dow* and *EnerVest* opinions confirm that the burden of proving obsolescence is on the taxpayer, the cases are distinguishable as the court in the *Dow* matter found that Dow intentionally withheld information from the assessor, whereas the court in *EnerVest* determined that the taxpayer provided sufficient data to the assessor in support of its obsolescence claim; *see also Jones v. S. Nat. Gas Co.*, 63 So. 3d 1080 (La. Ct. App. 2011); *Odom v. S. Nat. Gas Co.*, 72 So. 3d 437 (La. Ct. App. 2011).

229. *Regency Intrastate Gas, LLC v. La. Tax Comm'n*, 329 So. 3d 838, 845 (La. Ct. App. 2021), *writ denied*, 331 So. 3d 320 (La. 2022).

The most recent reported decision discussing obsolescence for pipeline property is *Regency Intrastate Gas, LLC v. Louisiana Tax Commission*.<sup>230</sup> In the *Regency* case, the Louisiana First Circuit Court of Appeal concluded that Regency Intrastate Gas ("RIG"), failed to carry its burden of proving entitlement to a FMV reduction for its pipeline property based on economic obsolescence for the 2018 tax year.<sup>231</sup> At the LTC hearing, RIG argued that the best evidence of FMV is the purchase price paid in a recent sale, and the 2018 purchase price of RIG's property showed that (i) its pipeline system's throughput was significantly below capacity, (ii) about 2/3 of the value of the property had been written off by its CPA firm, who also doubted RIG's viability as an ongoing concern, and (iii) RIG's transportation contracts would expire in the near future.<sup>232</sup> The LTC determined that RIG's economic obsolescence request was based almost entirely on the book value of the property, and the reliance place by RIG on the book value as a measure of FMV was flawed.<sup>233</sup> The First Circuit, after evaluating the record created at the LTC, concluded that the LTC "did not arbitrarily and capriciously disregard RIG's obsolescence evidence," nor did the LTC act arbitrarily or capriciously in "refusing to consider RIG's future revenue losses in the determination of its pipeline property's 2018 fair market value."<sup>234</sup> Finally, the court concluded that "the sale of an undefined partnership interest does not establish fair market value" as is defined in Louisiana Revised Statutes section 47:2321.<sup>235</sup> RIG sought a writ to the Louisiana Supreme Court for review of the First Circuit's ruling, and the writ application was denied in January 2022.<sup>236</sup>

In *Dow*, the Louisiana First Circuit Court of Appeal affirmed the trial court's finding that the LTC should not have considered Dow's independent appraisal in its review of the assessment of its machinery, equipment, and pipelines.<sup>237</sup> Under the facts of *Dow*, the taxpayer introduced evidence (an independent appraisal) at the LTC hearing to support its claim for obsolescence.<sup>238</sup> Dow had refused to provide a portion

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230. *See id.* at 838.

231. *Id.* at 847.

232. *Id.* at 845–46.

233. *Id.* at 846.

234. *Id.* at 846–47.

235. *Id.* at 847.

236. *See Regency Intrastate Gas, LLC v. La. Tax Comm'n*, 331 So. 3d 320 (La. 2022).

237. *Dow Chem. Co. v. Pitre*, 468 So. 2d 747, 754 (La. Ct. App. 1985).

238. *Id.* at 749.

of the appraisal report to the assessor.<sup>239</sup> Even when the assessor requested the missing information, Dow did not comply.<sup>240</sup> The LTC then modified the assessment based on the appraisal, even though the appraisal had been intentionally withheld from the assessor.<sup>241</sup>

The First Circuit agreed with the trial court that efforts by the assessor to obtain certain appraisal information from Dow were either resisted entirely or completely frustrated by making access to the information unreasonably onerous, and Dow had withheld information from the assessor without just cause.<sup>242</sup> Both the trial court and the appellate court found that the LTC erred in using the appraisal to modify the assessment.<sup>243</sup>

In *Bailey v. EnerVest Operating Co., LLC*, the Louisiana Second Circuit Court of Appeal found “that when an assessor changes a policy or procedure regarding the information to be provided by a taxpayer then the assessor should take steps to inform the taxpayer of what information is required before completing the determination of FMV and the assessment.”<sup>244</sup>

Under the facts of *EnerVest*, the company requested an obsolescence reduction to the fair market value of its pipelines and submitted detailed information in support of its request.<sup>245</sup> At the LTC hearing, the assessor testified that he denied the company’s request for obsolescence due to lack of supporting financial documentation.<sup>246</sup> The assessor also admitted that his office did not request the financial information from the company.<sup>247</sup>

Although the court noted that the assessor was correct in asserting that a taxpayer does not have an unqualified right to an obsolescence reduction in FMV, the court distinguished *EnerVest* from *Dow*:

Unlike the situation in *Dow, supra*, the record shows that EnerVest provided sufficient data in support of its claim to Assessor Bailey. In reviewing and correcting the assessment to grant a reduction for obsolescence, the LTC did not rely on data withheld from Assessor Bailey. Rather, the LTC found that

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239. *Id.* at 754.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Bailey v. EnerVest Operating Co., LLC*, 43 So. 3d 1046, 1057 (La. Ct. App. 2010).

245. *Id.* at 1048.

246. *Id.* at 1049.

247. *Id.*

Assessor Bailey did not take EnerVest's documentation of obsolescence into account in making the assessment. It appears that the LTC concluded that the denial of EnerVest's obsolescence request was part of a policy to deny obsolescence to all pipeline owners that year.<sup>248</sup>

The Second Circuit reinstated the ruling of the LTC regarding the valuations and assessments of EverVest's pipeline property.<sup>249</sup> In reaching its decision, the Second Circuit took into consideration that (i) the record showed EnerVest provided the assessor with sufficient documentation to support its claim of obsolescence, (ii) the LTC found the assessor had granted EnerVest's requests for obsolescence in prior years and then denied it in the 2007 tax year, and (iii) the assessor asserted that he was forced to change his policy and procedure regarding obsolescence following the *Crosstex*<sup>250</sup> decision in which he was a party.<sup>251</sup>

In the cases of *Jones v. Southern Natural Gas*<sup>252</sup> and *Odom v. Southern Natural Gas*,<sup>253</sup> the taxpayers, natural gas pipeline companies, argued the LTC and district courts erred in placing the burden of proof of obsolescence on the taxpayers. To support their argument, the taxpayers cited Louisiana Revised Statutes section 47:2324 which provides in pertinent part: "Each assessor shall gather all data necessary to properly determine the fair market value of property subject to taxation within his respective parish."<sup>254</sup> The taxpayers argued that this statute imposes a mandatory duty on the assessor, and if the assessor finds the information submitted by the taxpayer inadequate, the assessor is required to request additional supporting data.<sup>255</sup> Relying on *EnerVest*, the taxpayers argued that "an assessor has a mandatory duty to gather data to determine fair market value and to inform the taxpayer of the information required after a change in policy," so "the assessors should also have been required to inform the taxpayers of the applicable policies concerning obsolescence the first time they submitted their tax forms."<sup>256</sup> The taxpayers argued their

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248. *Id.* at 1056.

249. *Id.* at 1057.

250. *See Crosstex v. Bailey*, 936 So. 2d 886 (La. Ct. App. 2006).

251. *EnerVest*, 43 So. 3d 1056.

252. *Jones v. S. Nat. Gas Co.*, 63 So. 3d 1080 (La. Ct. App. 2011).

253. *Odom v. S. Nat. Gas Co.*, 72 So. 3d 437 (La. Ct. App. 2011).

254. LA. REV. STAT. § 47:2324 (2021).

255. *Jones*, 63 So. 3d at 1087.

256. *Odom*, 72 So. 3d at 442.



situations were analogous to *EnerVest* and thus warranted a finding that the assessors failed to meet their burden of proof.<sup>257</sup>

Both courts in *Odom* and *Jones* rejected the taxpayers' arguments and determined neither *EnerVest* nor any other case cited by the taxpayers imposes such a duty on the assessors.<sup>258</sup> Rather, the LTC guidelines require the taxpayers to substantiate in writing the evidence put forth to show obsolescence.<sup>259</sup> In concluding the taxpayers have the burden of proving obsolescence, the *Odom* court adopted the prior discussion of this same issue in *Jones*.<sup>260</sup>

Asserting the Louisiana Third Circuit Court of Appeal's decision in *TBM-WC Sabine*, the assessors have claimed "great discretion" whether to allow for reductions for obsolescence.<sup>261</sup> Nowhere in the Constitution, Revised Statutes, or LTC Rules and Regulations does the law give the assessor "discretion," let alone "great discretion" with respect to whether to allow a reduction for obsolescence. In fact, the LTC Rules use the words "should" or "shall" in almost every obsolescence provision.<sup>262</sup> The assessors have also unsuccessfully argued that "use of the word 'should' [in the LTC Regulations regarding the granting of obsolescence] denotes discretion and cannot be construed as 'shall.'"<sup>263</sup> Indeed, the words "shall" and "should" in the LTC Rules and Regulations are mandatory in connotation.<sup>264</sup>

The discretion argument of the assessors appears to have been brought about from a fluctuation in the language of the LTC Rules regarding the

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257. *Jones*, 63 So. 3d at 1087.

258. *Odom*, 72 So. 3d at 442.

259. *Id.*

260. *Id.*

261. *TBM-WC Sabine, LLC v. Sabine Par. Bd. of Rev.*, (La. App. 3 Cir. 7/18/18), 250 So. 3d 1075, 1082 (La. Ct. App. 2018) (finding that the taxpayer had not shown that the assessor abused her "great discretion").

262. *See, e.g.*, LA. ADMIN CODE tit. 61, pt. 5, § 907(A), (C)(5), (Oil, Gas, and Other Wells); *id.* § 1101(E)(1) (Drilling Rigs and Related Equipment); *id.* §§ 1301(A)(2) and 1305(F) (Pipelines) ("Functional and/or economic obsolescence shall be considered in the analysis of fair market value as substantiated by the taxpayer in writing"); *see also* LA. ADMIN CODE tit. 61, pt. 5, § 701(B)(3) (Watercraft) ("Upon a showing of evidence of such loss, substantiated by the taxpayer in writing, economic or functional obsolescence shall be given.").

263. *D90 Energy, LLC v. Jefferson Davis Par. Bd. of Rev.*, No. 2020-C-00200, 2020 WL 6145158, at \*5 (La. Oct. 20, 2020); *see also* LA. ADMIN CODE tit. 61, pt. 5, § 907(A)(6)(e), (C)(6) ("Sales, properly documented, should be considered by the assessor as fair market value, provided the sale meets all tests relative to it being a valid sale.").

264. LA. REV. STAT. § 1:3 ("The word 'shall' is mandatory.").

valuation of pipeline properties. The Louisiana Third Circuit Court of Appeal in *ANR Pipeline Co.* explained that through 1999, the LTC's guidelines relating to valuation of pipeline properties provided that "economic and functional obsolescence *shall be given*," and, "*should be recognized*."<sup>265</sup> In 1999, however, the regulations were amended to the more permissive "*may be recognized*."<sup>266</sup>

In *ANR*, the court reasoned that "[r]egardless of whether the assessor is mandated to recognize economic obsolescence, he still retained the discretion to determine whether the taxpayer has substantiated that obsolescence."<sup>267</sup> The court specifically limited its holding, however, to provide that "[t]he determination of whether the information provided is satisfactory rests within the *sound* discretion of the assessor *subject to review on several levels*."<sup>268</sup> Thus, the assessor must have engaged in

265. *ANR Pipeline Co. v. ANR Pipeline Co.*, 73 So. 3d 398, 405 (La. Ct. App. 2011) (emphasis added).

266. *ANR Pipeline* involved assessment for the year 1994 through 2003. *Id.* at 399. The challenge related to adjustments for economic obsolescence due to decreased throughput. *Id.* at 400. The court explained that through 1999, the LAC provided in title 61, part 5, § 1301 provided that "economic and functional obsolescence shall be given," and "should be recognized." *Id.* at 403. In 1999, the language was changed to the more permissive "may be recognized." *Id.* A review of the regulations relating to economic obsolescence for reductions in throughput, evidence that in 1991, LAC title 61, part 5, § 1305(F) provided that "[u]pon a showing of evidence of such loss, substantiated by the taxpayer in writing, economic or functional obsolescence shall be given." In 1998, LAC title 61, part 5, § 1305(G) was changed to provide that "[e]conomic obsolescence should be recognized." In 1999, LAC title 61, part 5, § 1305(F) and (G) were again amended, to provide that economic or functional obsolescence "may be given," "may be recognized," and "may be applied." That permissive language remained in the law until 2009. *See* LA. ADMIN. CODE tit. 61, pt. 5, § 1305.

267. *ANR Pipeline Co.*, 73 So. 3d at 403.

268. *Id.* at 405 (emphasis added). The assessors have argued that they are entitled to "great discretion" in determining whether a taxpayer has substantiated an obsolescence request. *See* *TBM-WC Sabine, LLC v. Sabine Par. Bd. of Rev.*, 250 So. 3d 1075, 1082 (La. Ct. App. 2018). In *TBM-WC Sabine*, the court found that the taxpayer in that case had not shown that the Assessor abused her "great discretion." *Id.* The court cited *ANR Pipeline Co.*, in which for most of the years at issue the regulations contained the permissive "may" language relating to consideration of obsolescence. *Id.* (citing *ANR Pipeline Co.*, 73 So. 3d at 403. Moreover, nowhere in *ANR Pipeline Co.* does the court use the term "great discretion." *See* *ANR Pipeline Co.*, 73 So. 3d 398. Research reveals one case in which the Louisiana Supreme Court used the term "great discretion." In *Transcontinental Gas Pipeline Corp. v. La. Tax Comm'n*, 32 So. 3d 199, 213 (La. 2010), the Court used the term in the context of the regulation relating to the

sound analysis, and his determination is subject to review on several levels.

#### IX. CONCLUSION

The most recent significant changes to the property tax arena are the 2020 Constitutional amendment allowing for an additional methodology for the valuation of oil and gas wells and the substantial legislative amendments related to the LTC's review of property tax appeals and consideration of the evidence submitted in connection with those appeals. In fact, the LTC rules for the additional oil and gas valuation methodology have not yet been promulgated and no matter has yet been heard before the LTC under the new appeal review criteria. Both of these vast changes are so new that the impact of these shifts have yet to be seen.

The changes are not over. Other revisions to the property tax statutes and the LTC rules upsetting the balance may be forthcoming. Several legislative instruments were introduced this 2022 Regular Legislative Session proposing to, once again, amend the language for the administration, review, and appeal of property tax assessments, payments under protest, and the LTC's rulemaking authority. Furthermore, there are several oil and gas property tax disputes pending in district and circuit courts on which rulings should be issued in the coming months. The intention is to update the readers with relevant information in the next publication of this journal.

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valuation of pipeline properties, in which the regulations, *at the time* [2005–2006], provided that “[e]conomic obsolescence *may be* recognized . . .” *Id.* at 213 n.14. In contrast, the regulation relating to valuation of wells states that “[f]unctional and/or economic obsolescence *shall be* considered.” LA. ADMIN. CODE tit. 61, pt. 5, § 907(A) (emphasis added).