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MEMORANDUM

To: Orange County Value Adjustment Board

From: Aaron Thalwitzer, Esq., VAB Counsel

Re: *Mercado v. Dept. of Rev.*, 2026 Fla. App. LEXIS 4430 (Fla. 1st DCA 2026)

Date: August 7, 2026

I. Introduction

On June 10, 2026, the First District Court of Appeal issued its opinion in *Mercado v. Department of Revenue*, a case arising from the Orange County Property Appraiser's ("PAO") challenge to the Florida Department of Revenue's ("DOR") handling of the PAO's 2024 assertion against the Orange County Value Adjustment Board ("VAB") pursuant to § 194.036(1)(c), Fla. Stat.[1]

The assertion at issue in *Mercado* arose from the PAO's July 6, 2023 allegation that the Orange County VAB improperly applied 15% cost-of-sale deductions in 154 cases from the 2022 tax cycle. In response to the assertion, on February 29, 2024, DOR issued a 28-page Probable Cause Review finding no probable cause that the VAB had engaged in a consistent and continuous violation of the law or administrative rules. The PAO appealed. On June 10, 2026, the First District set aside DOR's determination, holding that DOR must decide whether the alleged violations actually occurred, under a preponderance of the evidence standard, rather than merely whether probable cause exists.

II. Summary of the Decision

Section 194.036(1)(c), Fla. Stat., permits a property appraiser to submit an assertion to DOR alleging that a VAB has engaged in a "consistent and continuous violation of the intent of the law or administrative rules" in its decisions. Historically, DOR treated such assertions as requiring only a probable cause determination. The First District held that this approach is inconsistent with the statute's plain language.

The court held that DOR must investigate the assertion, determine which asserted facts are supported by the evidence, and decide, under a preponderance of the evidence standard, whether a consistent and continuous violation occurred. The court reasoned that the statutory phrases "find upon investigation" and

[1] The PAO's Amended Assertion dated July 6, 2023 is attached as **Exhibit A**. For sake of brevity, the assertion's 676 pages of exhibits are not included, but are available if needed.

"has occurred" require a substantive factual determination rather than a threshold probable-cause assessment.

The court therefore set aside DOR's decision and remanded the matter for reconsideration under the standard announced in the opinion.

The court also certified conflict with prior decisions of the Second and Third District Courts of Appeal that had characterized DOR's role as making a probable-cause determination.

III. The Underlying Assertion

The PAO's assertion alleges that, during the 2022 tax cycle, the VAB improperly applied a uniform 15% cost-of-sale ("COS") deduction after determining fair market value in 154 decisions involving residential, commercial, multifamily, retail, industrial, and office properties. According to the assertion, the resulting reductions to the PAO's assessments totaled approximately $250 million.

The PAO alleges that the practice resulted from a February 24, 2023 memorandum from VAB counsel recommending, based upon and prompted by then-recent DOR guidance, that special magistrates apply the 15% COS deduction in all just value cases.[2] The assertion further alleges that this recommendation departed from VAB counsel's position in prior tax years.

The PAO contends that this methodology was legally erroneous because just value and fair market value are legally synonymous and, therefore, an additional across-the-board deduction could not be made after fair market value was determined. The PAO maintains that the VAB's adoption of the resulting recommended decisions constituted a consistent and continuous violation within the meaning of § 194.036(1)(c), Fla. Stat.

The PAO's assertion should be considered in light of the guidance DOR provided to VABs and special magistrates concerning COS deductions. DOR's official VAB training, both in 2023 and at present, states that the professionally accepted appraisal practice is generally to select the COS percentage reported by the property appraiser on Form DR-493 and apply that percentage uniformly to property within the applicable use-code group. *See* DOR, *2026 Value Adjustment Board Training*, Module 6, at 169–70. The training further provides that, absent sufficiently reliable evidence establishing that a different COS deduction is typical, prevalent, and representative of the relevant property class, a VAB or special magistrate should apply the percentage reported on Form DR-493. *Id.* at 169–70.

DOR's training materials also explain that, because reliable market data concerning typical COS deductions is generally unavailable, property appraisers commonly select a COS deduction of 15% or less and apply it uniformly within property classes. According to DOR, this across-the-board practice has been used for decades and reflects a professionally accepted standard of care under § 193.011(8), Fla. Stat. *Id.* at 156–58. The training expressly states that when a VAB makes findings regarding the percentage reported by the property appraiser on Form DR-493 and uniformly applies that percentage where necessary, without double-counting the deduction, the VAB acts consistently with professionally accepted appraisal practices. *Id.* at 157.

DOR's training materials further explain that reliable market data concerning typical COS deductions is generally unavailable and that property appraisers have historically applied uniform COS deductions,

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[2] VAB counsel's November 1, 2023 memorandum is attached for reference as **Exhibit B**.

typically 15% or less, within property classes. According to DOR, this practice reflects professionally accepted appraisal practices under Florida law.

DOR's training further directs VABs and special magistrates to address COS deductions in each of the three recognized valuation approaches -- the market, cost, and income approaches. The preferred procedure identified by DOR is to determine a preliminary value, subtract the COS deduction reflected on Form DR-493, and identify the resulting amount as just value. *Id.* at 165–66. The training also recognizes multiplication of the preliminary value by a net-proceeds multiplier as an acceptable mathematical equivalent; for a 15% COS deduction, the applicable multiplier is 0.85. *Id.* at 166.

These materials are consistent with the VAB's position that its 2022 decisions reflected DOR's own interpretation of the governing valuation standards rather than a systemic disregard of Florida law. The alleged practice -- uniform application of the PAO's reported 15% COS deduction -- was consistent with the methodology DOR instructed VABs and special magistrates to use. Indeed, the assertion arose from the VAB's effort to implement DOR's guidance concerning uniformity and professionally accepted appraisal practices.

The training materials are not administrative rules and do not independently have the force and effect of law. DOR nevertheless describes them as its official training for VABs and special magistrates and as providing the actions DOR believes are necessary to comply with Florida law. *See* DOR, *2026 Value Adjustment Board Training*, Module 1, at 2–5; Rule 12D-9.012(5), F.A.C. Accordingly, although the training does not conclusively resolve the merits of the assertion, it is significant evidence that the VAB reasonably relied upon DOR's stated interpretation of §§ 193.011 and 194.301, Fla. Stat., when addressing COS deductions during the 2022 tax cycle.

The VAB has maintained that its decisions reflected then-existing DOR guidance concerning COS deductions and that the dispute concerns the proper interpretation of Florida valuation law rather than a systemic disregard of governing legal requirements. On remand, DOR must determine whether the alleged practice occurred and, if so, whether it constituted a consistent and continuous violation of the intent of the law or administrative rules.

IV. Potential Next Steps and Consequences for the VAB

On July 21, 2026, the First District denied the PAO's motion for rehearing and rehearing *en banc*.[3] Accordingly, the First District's opinion remains in effect, although the parties may still seek discretionary review in the Florida Supreme Court based upon the certified conflict.

Absent Florida Supreme Court review or a stay, the matter will return to DOR. On remand, DOR must investigate the PAO's allegations concerning the application of the uniform 15% COS deduction in 154 decisions and determine, under a preponderance of the evidence standard, whether the alleged practice constituted a consistent and continuous violation of the intent of the law or administrative rules. *Mercado v. Dep't of Rev.*, 2026 Fla. App. LEXIS 4430, at *8–9 (Fla. 1st DCA 2026).

If DOR concludes that the evidence does not establish a consistent and continuous violation, the PAO's available remedies remain uncertain. This lack of certainty was discussed in Judge Winokur's special concurrence, which questions whether a DOR determination under § 194.036(1)(c), Fla. Stat., constitutes

[3] As of the date of this memorandum, the PAO's motion for rehearing and rehearing *en banc* is not viewable. The order denying such motion is viewable but merely denies the motion without elaboration.

directly reviewable final agency action and suggests that the proper procedural mechanism for challenging an adverse DOR determination remains unsettled.

If DOR determines that the statutory standard has been met, § 194.036(1)(c), Fla. Stat., authorizes judicial proceedings to enforce the statute, including injunctive relief if requested by DOR. DOR's determination would not itself invalidate the VAB decisions or impose liability upon the VAB. Instead, it would satisfy the statutory prerequisite for judicial proceedings under § 194.036(1)(c), Fla. Stat., including injunctive relief if requested by DOR. The circuit court may enjoin continuation of the alleged practice and, where appropriate, issue a mandatory injunction restoring affected portions of the tax roll to their just value.. The circuit court, rather than DOR, would ultimately determine whether the statutory requirements for such relief have been established.

From the VAB's perspective, the principal practical effect of *Mercado* is that assertions under § 194.036(1)(c), Fla. Stat., have become substantially more consequential. Prior to *Mercado*, DOR viewed its role as limited to determining whether probable cause existed. Following *Mercado*, DOR must resolve disputed factual issues concerning the VAB's practices and determine whether those practices actually constituted a consistent and continuous violation under a preponderance of the evidence standard. As a result, future assertions alleging systemic VAB practices will require DOR to conduct a substantive factual review before any judicial proceedings authorized by § 194.036(1)(c), Fla. Stat., may occur.

However, *Mercado* does not expand the substantive grounds for an assertion. The PAO must still prove that the challenged conduct constitutes a consistent and continuous violation of the intent of the law or administrative rules. Nor does *Mercado* alter the separate statutory procedures governing appeals from individual VAB decisions under § 194.036(1)(a) and (b), Fla. Stat. Rather, the decision changes only the standard DOR must apply when evaluating whether the asserted systemic conduct satisfies § 194.036(1)(c).

V. Conclusion

The principal significance of *Mercado* is not that it resolves the legality of the VAB's use of the 15% COS deduction. Rather, it changes the manner in which DOR must evaluate the PAO's assertion challenging that practice. Instead of determining only whether probable cause exists, DOR must now investigate the asserted facts, resolve factual disputes concerning the challenged VAB practices, and determine under a preponderance of the evidence standard whether those practices constituted a consistent and continuous violation of the intent of the law or administrative rules.

Unless further appellate review intervenes, the matter will return to DOR for reconsideration under the framework established in *Mercado*. DOR's determination on remand will determine whether the statutory prerequisites for judicial proceedings under § 194.036(1)(c), Fla. Stat., have been satisfied.

LEVY LAW FIRM
PROPERTY TAX

Reply to:
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AMENDED TO INCLUDE REFERENCE TO VAB DECISIONS IDENTIFIED IN EXHIBIT #1

July 6, 2023

<u>VIA E-MAIL TO AGENCY CLERK</u>
Jim Zingale, Executive Director
Florida Department of Revenue
Southwood Office Complex – Building 1
2450 Shumard Oak Boulevard
Tallahassee, Florida 32399
E-mail: AgencyClerk@floridarevenue.com

RE: Assertion of Orange County Property Appraiser Pursuant to Section 194.036(1)(c), Florida Statutes (2022); Consistent and Continuous Violation of the Intent of the Law by the Orange County Value Adjustment Board

Dear Mr. Zingale:

This assertion, pursuant to section 194.036(1)(c), Florida Statutes (2022), is being submitted on behalf of the Honorable Amy Mercado, Orange County Property Appraiser (property appraiser), with regard to the above-referenced matter. The property appraiser asserts that there exists a consistent and continuous violation of the intent of the law or administrative rule by the Orange County Value Adjustment Board (VAB) in over 120 decisions for the 2022 tax year. (list of decisions attached as exhibit #1 and composite exhibits #5 and #6) The reductions to the property appraiser's assessments resulting from these decisions is approximately $250 million.

The petitions challenged the valuation of various types of properties for the 2022 tax year, including single-family residential homes, office buildings, apartment complexes, retail centers, and industrial warehouses. The VAB reviewed and adopted the special magistrates' recommendations in its final decisions rendered April 18, 2023 and May 26, 2023. The VAB issued its final certification on May 26, 2023. The property appraiser issued her second or final certification (recertification) of the tax rolls for the 2022 tax year on June 2, 2023. (DR-408 attached as exhibit #2)

The VAB's decisions delineated in exhibit #1 and composite exhibits #5 and #6 violated the constitutional mandate that all real and tangible personal property must be assessed at its just value, which is legally synonymous with fair market value. *See Smith v. Krosschell*, 937 So.2d 658 (Fla. 2006); *Darden Rests., Inc. v. Singh*, 266 So.3d 229 (Fla. 5th DCA 2019); *Singh v. Walt Disney Parks & Resorts US,* *Inc.*, 325 So.3d 124 (Fla. 5th DCA 2020). As the district court in *Walt Disney Parks & Resorts* most recently explained: "Just valuation has been determined by the Florida Supreme Court to be synonymous with fair market value, to-wit, the amount a purchaser willing but not obliged to buy, would pay a seller who is willing but not obliged to sell." *Id.* at 130.

Despite this well established and fundamental constitutional principle of Florida ad valorem tax law, the VAB attorney issued a memorandum to the special magistrates advising that any recommended decisions must make a "cost of sale" deduction equal to the 15 percent reported by the property appraiser on the DR-493. The memorandum was issued on February 24, 2023. (attached as exhibit #3) The VAB attorney advised that his memorandum was based on an Advisory Memorandum issued by an attorney with the Department of Revenue (department) on October 13, 2022. "Based upon this guidance, it is VAB counsel's opinion and recommendation that the VAB and its special magistrates ensure that a 15% COS [cost of sale] deduction is applied in all just value cases." The VAB attorney further advised the special magistrates that he would "review recommended decisions for compliance with the DOR memorandum, and will recommend rejecting recommended decision which do not comply."

The VAB attorney's memorandum to the special magistrates was a complete reversal of his opinions in previous tax years. For example, in hearings regarding the 2020 tax year, the VAB attorney denied a reconsideration request based upon the special magistrate's failure to apply a mandatory 15 percent reduction for "cost of sale." (property appraiser's response to PTAG Reconsideration Request attached as exhibit #4) The petitioner had argued that the property appraiser's assessment should be reduced because the 15 percent COS reduction had not been applied to the individual appraisals of the subject properties. The VAB attorney advised that it was not "proper or required for the VAB to apply a COS adjustment equal to the percentage found in the DR-493, as doing so would be arbitrary and unsupported by any evidence." (*Id.*, exh #1) During the 2021 tax year, the VAB attorney likewise had instructed special magistrates that just value should not include a deduction for reasonable fees and costs of purchase. (*Id.*, exh. #2)

As a result of the VAB attorney's memorandum to special magistrates, any recommended decision issued after the memorandum, and any decision issued prior thereto for which a reconsideration request was timely submitted, contained a 15 percent COS reduction from the indicator of value chosen by the special magistrate. Under such a decision-making process, just value is no longer legally synonymous with fair market value. Instead, the special magistrates determined the fair market value and then made a 15 percent COS reduction to calculate just value. If the resulting calculation was lower than the property appraiser's assessment, a reduction to that assessment was recommended. Only when the resulting calculation exceeded the assessment was it upheld.

The VAB attorney issued a series of opinions regarding reconsideration requests that addressed special magistrates' recommended decisions issued before the date of his February 24, 2023 memorandum that had upheld the property appraiser's assessments. (reconsideration decisions composite exhibit #5) The VAB attorney utilized the following framework in analyzing the reconsideration requests:

> Based upon the DOR Memo and in conformance with VAB counsel's COS memorandum, VAB counsel recommends that the timely-filed requests for reconsideration be granted *to the extent* the recommended decisions in those cases fail

> to apply 15% COS adjustments and such failure affects the outcome of such cases. In some cases, based upon the other findings in requests for reconsideration, applying a 15% COS adjustment does not change the outcome of the petition.

(composite exhibit #5, 4/18/23 letter re petition nos. 2022-01926, 01929, 01930, 01937, 1952, 01960-01962, 02005, 02006, 02007, 02021, 02022, 02023, 02024-02028, 02030, 02033-02036, 02040, 02041, 02044, 02045, 02049-002052, 2055, 002059, and 2064-02066)

The VAB attorney concluded that a 15 percent COS reduction was necessary to "the values the special magistrates otherwise found to be appropriate" when such a reduction resulted in a just value less than the property appraiser's assessment. (composite exhibit #5, 4/18/23 letter re petition nos. 2022-3111, 3112, and 3113) Only when the 15 percent COS reduction from the special magistrate's determination of value resulted in a just value greater than the property appraiser's assessment was the reconsideration request denied. Even when the special magistrate's recommended decision observed that the record included evidence as to the cost of sale that was significantly lower than 15 percent, the VAB attorney granted reconsideration requests and reduced the value determined by the special magistrate by the 15 percent COS reduction to arrive at a just value that was less than the property appraiser's assessment. (composite exhibit #5, 5/10/23 corrected letter re petition nos. 2022-00484 through 00486, 5/10/23 letter re petition no. 2022-1385, 5/10/22 letter re petition nos. 2022-1397-98, 5/10/23 letter re petition no. 2022-1399)

The VAB attorney also rejected the property appraiser's reconsideration requests regarding recommended decisions issued before his memorandum of February 24, 2023. (composite exhibit #6) Those decisions included a petition where the record included a closing statement reflecting that the actual closing costs for the property were 3.3 percent but the special magistrate's recommended decision reduced the assessment by making the 15 percent COS reduction from the unadjusted sales price of the property. (composite exhibit #6, 1/25/23 letter re petition no. 2022-1145)

In all of these letters addressing reconsideration requests, the VAB attorney made it clear that his position was based upon guidance from the department. As he stated:

> The DOR Memo emphasizes the importance of 'uniformity and consistency in handling COS deductions', even where there exists evidence reflecting actual costs of sale. In pursuit of such 'uniformity and consistency', precision may, in some cases, be compromised. However, DOR made their position clear, and VAB counsel adopted his current position based upon and subject to DOR's position as set forth in the DOR Memo. The DOR Memo provides clear guidance which VAB counsel cannot, in good faith, ignore. Doing so would place the VAB in the position of explicitly acting contrary to the guidance issued by state agency which provides oversight over the VAB. However, VAB counsel nonetheless recognizes that the DOR Memo (and, for that matter, the VAB Training), while persuasive, is not mandatory authority under *Turner v. Dep't of Revenue*, DOAH Case No. 11-1080RU (June 22, 2011) Consequently, if a mandatory authority, such as a case, rule, or statute, is released, promulgated, or enacted, and such authority contradicts the DOR Memo, VAB counsel will reevaluate his current position. Unless and until then, VAB counsel believes that the VAB's best interests are served by following the DOR's guidance.

(composite exhibit #6, 4/18/23 letter re petition nos. 2022-01926, 01929, 01930, 01937, 1952, 01960-01962, 02005, 02006, 02007, 02021, 02022, 02023, 02024-02028, 02030, 02033-02036, 02040, 02041, 02044, 02045, 02049-002052, 2055, 002059, and 2064-02066)

Although the VAB attorney recognized that the department's memo and VAB Training materials were not legally controlling, he observed that the department appeared to consider its guidance to be mandatory. As he stated:

> While titled 'Advisory Memorandum' the DOR Memo includes language suggesting that DOR considers at least some of its 'guidance' to be mandatory. *See, e.g.,* p. 3 ('each of the parts of sections 193.011, 194.301, and 194.3015, F.S. ***must*** now be interpreted and applied together'); p. 7 ('the standard of care for applying cost of sale deductions in the VAB process ***must*** be the same as in the appraisal development process'); p. 8 ('such deductions are a professionally accepted appraisal practice, which VABs and their special magistrates ***must*** apply as well') (all emphasis supplied).

(*Id.* at n. 1)

In many of the challenged VAB petitions, the special magistrates concluded that the property appraiser had, in fact, proved by a preponderance of the evidence that the assessment was arrived at by complying with section 193.011, Florida Statutes (2022), and professionally accepted appraisal practices, including mass appraisal standards. As a result, in many of the challenged decisions, the property appraiser's assessment was presumed correct. Despite these conclusions, the special magistrates determined that the assessment exceeded just value because, once the various indicators of value derived via performing a cost, sales comparison, or income approach were reduced by the 15 percent cost of sale adjustment, the resulting calculation was less than the assessment. The special magistrates' workpapers often reflected that they determined a fair market value for the property and then calculated a lower just value by reducing the fair market value by the 15 percent COS reduction. Such a reduction from fair market value to reach just value violates the Florida Constitution, section 193.011, and section 194.301, Florida Statutes (2022).

For example, the special magistrate's recommended decision on petition no. 2022-2905 involved an apartment complex. Although the special magistrate found that the property appraiser had lawfully considered the criteria of section 193.011 in her assessment and was entitled to the presumption of correctness, the assessment was determined to exceed just value after consideration of the 15 percent COS reduction. In the workpapers attached to the decision, the special magistrate utilized the income approach to conclude to an "indicated market value" of $99,171,033, which was only slightly below the property appraiser's assessment of $101,128,580. (attached as exhibit #7) After reducing that market value by the 15 percent COS adjustment, the special magistrate concluded an "indicated value as is" of $84,295,380. The special magistrate's recommendation, however, was $87,388,835 because that was the petitioner's requested value.

The recommended decision on petition no. 2022-2543 also involved an apartment complex with an assessment of $73,765,929. (attached as exhibit #8) The special magistrate found the property appraiser's evidence more relevant, persuasive, and credible than that presented by the petitioner. The property appraiser's work product supporting the assessment, which utilized both sales and income approaches, "was thorough, well-supported, and reasonable. In contrast, the petitioner's requested valuation lacked market support. However, after applying a cost of sale adjustment of 15% as per the DR-493 to the PAO's value indications, a reduction to the market value opinion appears warranted." The special magistrate made the following calculations:

Sales - $86,600,000 * .85 = $73,610,000
Income - $81,700,000 * .85 = $69,445,000

The special magistrate placed more weight upon the income approach to conclude that a reduction to $70,000,000 was warranted. Notably, both of the indicators of value as derived via the sales comparison and income approaches before the 15 percent COS reduction exceeded the assessment.

Another recommended decision involving an apartment complex derived an "indicated market value" via the income approach of $85,774,313, which exceeded the assessment of $79,799,022. (attached as exhibit #9) After deducting the 15 percent COS reduction from that "indicated market value," the special magistrate's recommended decision concluded to an "indicated value as is" of $72,908,170 thereby reducing the assessment to that value.

These are only a few examples of the consistent flaws in the special magistrate's recommended decisions, which were the result of the legal advice of its attorney and were adopted by the VAB. In all of these decisions, the special magistrate would determine the fair market value of the property utilizing the appropriate approach to value or combination of approaches and then deduct 15 percent for the COS reduction to arrive at just value as instructed by the VAB attorney. The resulting calculation of "just value" would then be compared to the assessment of the property. In all cases where the calculation of just value after the deduction for the 15 percent COS reduction was lower than the assessment, the special magistrate recommended a reduction to the assessment. Only when the calculation exceeded the assessment was the recommendation to uphold the assessment.

The property appraiser asserts that the special magistrates committed a consistent and continuous violation of the law in their recommended decisions. By adopting the special magistrates' recommendations, the VAB also has committed a consistent and continuous violation of the law in its decisions. The property appraiser requests that the Department of Revenue (department) exercise its jurisdiction authorized in section 194.036(1)(c), conduct an investigation into this matter, and determine that probable cause exists for the property appraiser to challenge the VAB's decisions in circuit court. *See Property Appraisal Adjust. Bd. of Sarasota County v. Dep't of Revenue*, 349 So.2d 804, 805 (Fla. 2d DCA 1977) ("In essence, by virtue of its general supervision over property assessments, the Department of Revenue is charged with deciding whether the property appraiser has probable cause to go to court."). After investigation, if the department "makes a probable cause determination that 'there exists a consistent and continuous violation of the intent of the law or administrative rules by' the VAB in its decisions . . . the property appraiser may bring suit to enjoin such future violations and to restore the tax roll to its just value in such amount as determined by judicial proceeding." *Higgs v. Property Appraisal Adjustment Bd. of Monroe Co.*, 411 So.2d 307, 307 (Fla. 3d DCA 1982). "It is, in this sense, a true probable cause determination." *Mikos v. Property Appraisal Adjustment Bd. of Sarasota Co.*, 365 So.2d 757, 759 (Fla. 2d DCA 1978).

The deficiencies in the VAB's decisions, based upon the VAB attorney's advice, are the same type of deficiencies considered in *Sowell v. Dep't of Revenue*, 168 So.3d 355 (Fla. 1st DCA 2015). There, the district court reversed the department's decision to deny the property appraiser's assertion, holding as follows:

> In its Assertion, Appellant contended that the special magistrates, by deducting from the market value of the properties at issue fifteen percent "for the 1st—8th criteria" or "for the 1st and 8th criteria" 1 to arrive at just value, violated the longstanding rule of law in Florida that fair market value and just value are legally synonymous. *See Smith v. Krosschell*, 937 So.2d 658, 662 (Fla.2006) (citing *Walter v. Schuler*, 176 So.2d 81 (Fla.1965)). *Given the parties' strong disagreement as to whether the Board's actions in this case violated the law and the complexities of the issues involved, we agree with Appellant that the Department erred in determining that there was no probable cause of a violation of the law.* We, therefore, reverse the Department's Probable Cause Review and remand for entry of an order finding the requisite probable cause so that Appellant may proceed to circuit court if he so chooses.

Sowell, 168 So.3d at 355 (emphasis added). In accord in *Sowell*, the department is respectfully requested to conclude that the property appraiser has demonstrated the requisite probable cause that a violation of the law has occurred in the VAB decisions attached in exhibit #1 and grant the assertion. In such a manner, the property appraiser will be permitted, but not required, to file suit against the VAB pursuant to section 194.036(1)(c), Florida Statutes (2022).

The ad valorem tax is based upon the assessed value of real and tangible personal property. *See* §§ 192.001(1), 194.042, Fla. Stat. (2022). The assessed value of property means "an annual determination of the *just or fair market value* of an item or property," or the value of the homestead property as limited pursuant to Article VII, Section 4(c), Florida Constitution or the classified use value or fractional value, pursuant to Article VII, Section 4(a) - (168 So.3d 355 (Fla. b), Florida Constitution. § 192.001(2), Fla. Stat. (2022) (emphasis added). Property appraisers are required by the Florida Constitution "to assess all property at a 100% valuation level." *Dist. Sch. Bd. of Lee Cnty. v. Askew*, 278 So.2d 272, 275 (Fla. 1973); *see Dep't of Revenue v. Markham*, 426 So.2d 555, 557 (Fla. 1982)(observing that fair market value and just value had been declared legally synonymous by the Court in 1934, and the principle had been followed ever since that time); *Burns v. Butscher*, 187 So.2d 594 (Fla. 1966) (observing that valuations at 100 percent of fair market value actually had been required since 1869); *Walter v. Schuler*, 176 So.2d 81 (Fla. 1965). Property appraisers must assess property at "just valuation, that is, one hundred percent of fair market value." *Dep't of Revenue v. Johnston*, 442 So.2d 950, 950 (Fla. 1983). "By the same token a systematic assessment at more than 100 would not accomplish 'just' valuation." *Walter*, 176 So.2d at 85.

Under the Florida Constitution, property is to be assessed at its just valuation. Art. VII, § 4, Fla. Const. It is well settled that the terms "just value" and "fair market value" are legally synonymous. *E.g. Sunset Harbour Condo. Ass'n v. Robbins*, 914 So.2d 925, 930 (Fla. 2005) (The "phrase 'just valuation' has been construed by this Court to mean 'fair market value."); *Mazourek v. Wal-Mart Stores, Inc.*, 831 So.2d 85, 88 (Fla. 2002) ("The phrase 'just valuation' has been construed to mean 'fair market value.'"); *Schultz v. T-M Fla.-Ohio Realty, Ltd.*, 577 So.2d 573 (Fla. 1991) (just valuation is synonymous with fair market value); *Valencia Center, Inc. v. Bystrom*, 543 So.2d 214, 216 (Fla. 1989) ("This Court has found that the just valuation at which property must be assessed under the constitution and section 193.011 is synonymous with fair market value, i.e., the amount a purchaser, willing but not obliged to buy, would pay a seller who is willing but not obliged to sell."); *Xerox Corp. v. Blake*, 415 So.2d 1308, 1309

(Fla. 1982) ("Article VII, section 4, of the Florida Constitution compels the just valuation of all property for ad valorem taxation. Courts have defined 'fair market value' and 'just valuation' as legally synonymous."); *ITT Cmty. Dev. Corp. v. Seay*, 347 So.2d 1024, 1026 (Fla. 1977) ("This Court has stated that 'just valuation' is legally synonymous with fair market value."); *Southern Bell Tel. & Tel. Co. v. Dade* County, 275 So.2d 4 (Fla. 1973) (same); *Powell v. Kelly*, 223 So.2d 305, 307 (Fla. 1969) (same).

The most recent decision from the Florida Supreme Court concluding that just value and fair market value are legally synonymous is *Smith v. Krosschell*, 937 So.2d 658 (Fla. 2006). In a case involving the correction of errors to homestead property, the Court again observed that "[w]e have previously held that "fair market value and just valuation should be declared **legally synonymous**," and that fair market value "is the amount a purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell." *Smith*, 937 So.2d at 662, *citing Walter*, 176 So.2d at 85-86 (emphasis in original).

Thus, the Florida Supreme Court has consistently concluded that the just valuation required under the constitution and section 193.011 is legally synonymous with fair market value. Since 1965, the Court has restated this bedrock principle of ad valorem tax law on 14 separate occasions. In accordance with these decisions, the department has promulgated an administrative rule defining "just value" as "the price at which a property, if offered for sale in the open market, with a reasonable time for the seller to find a purchaser, would transfer for cash or its equivalent, under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in the position to take advantage of the exigencies of the other." Fla. Admin. Code R. 12D-1.002(2) (2022).

The most recent case to discuss the "cost of sale" adjustment is *Turner v. Tokai Fin. Servs., Inc.*, 767 So.2d 494 (Fla. 2d DCA 2000). The issue in Turner involved "whether the trial court erred in ruling that costs of sale *must* be deducted from market value in order to arrive at just valuation for ad valorem tax purposes." *Id.* at 496 (emphasis added). Consistent with *Walter*, the district court concluded that "just valuation" is synonymous with "fair market value". "*Therefore, any deductions from 'fair market value' mean that the property is not being valued at 'just value.*" *Id.* (emphasis added). As a result, the trial court's ruling was reversed.

The decision in *Turner* reasoned that section 193.011(1) and (8) must be considered in pari materia. Section 193.011(1) requires the property appraiser to consider the willing buyer/willing seller transaction from the buyer's perspective, exclusive of reasonable costs of sale. Section 193.011(8) requires that same transaction to be considered from the seller's perspective, exclusive of reasonable costs of sale. As the court stated:

> In reading the statute as a whole, it becomes apparent that the legislature intended these subsections to require the property appraiser to consider two different values. Subsection (1) requires the property appraiser to consider '[t]he present cash value of the property, which is the amount a willing purchaser would pay a willing seller, exclusive of reasonable fees and costs of purchase....' § 193.011(1), Fla. Stat. (1997). *This subsection appears to consider the transaction from the buyer's perspective and excludes those reasonable fees and costs the buyer would incur over and above the present cash value.* Subsection (8), on the other hand, requires the property appraiser to consider '[t]he net proceeds of the sale of the property, as received by the seller, after deduction of all of the usual and reasonable fees and costs of the sale, including the costs and expenses of

> financing....' § 193.011(8), Fla. Stat. (1997). *This subsection appears to consider the transaction from the seller's perspective and excludes those reasonable fees and costs that the seller would pay out of the proceeds received from the buyer. When considered this way, it is clear that the 'values' derived from subsections (1) and (8) may be different. The statute requires the property appraiser to consider these values, along with those derived from subsections (2) through (7), when determining just value. We reject Tokai's position that the statute requires the property appraiser to select the value generated by the application of subsection (8) and apply it in a blanket fashion to all assessments of tangible personal property.*

Id. at 498 (emphasis added).

The challenged decisions make the same error by reducing the "market value" by a 15 percent COS reduction pursuant to section 193.011(8). The district court observed the fallacy of such a conclusion as follows:

> *Moreover, logic dictates that the "fair market value" of an item generally includes a component for costs of sale.* When the willing, but not obligated, seller determines what price he will accept for a certain item of property, he takes into account those costs that he will incur in making the sale. *These costs drive the seller's bottom line; i.e., the price below which he will not go. Therefore, the costs of sale have already been factored into the market value of the property when it is placed for sale.* To allow a blanket deduction for costs of sale gives a windfall to the seller who has already accounted for them in his sales price.

Id. at 499 (emphasis added).

In reaching its decision, the district court rejected the property appraiser's argument that "the legislature intended for subsections (1) and (8) to apply only to real property." *Id.* at 500. Thus, these criteria similarly apply to both real and personal property.

The department's VAB Training materials and its Advisory Memorandum relied upon by the VAB attorney extensively discusses property appraiser's submission of the DR-493 in the context of mass appraisal practices for tax roll approval and concludes the special magistrate should make the same adjustment to any indicator of value determined under the sales comparison, cost, or income approaches. The department explains that any conclusion to the contrary would result in an arbitrary appraisal practice under section 194.301(2)(a)3., Florida Statutes (2022). The department emphasizes that the 2009 amendment to the presumption of correctness statute set forth in section 194.301 has superseded prior case law to the extent it conflicts with the statute. *Id.* at 99. The department, however, incorrectly concludes that the law has changed so that fair market value no longer is legally synonymous with just value and that property appraisers defending against a challenge to the just valuation of a parcel derived in the mass appraisal context must use the identical assessment practice in providing evidence to support their position that the assessment does not exceed fair market value.

Section 194.301(2)(a) provides that:

> (2) In an administrative or judicial action in which an ad valorem tax assessment is challenged, the burden of proof is on the party initiating the challenge.

(a) If the challenge is to the assessed value of the property, the party initiating the challenge has the burden of proving by a preponderance of the evidence that the assessed value:

1. Does not represent the just value of the property after taking into account any applicable limits on annual increases in the value of the property;

2. Does not represent the classified use value or fractional value of the property if the property is required to be assessed based on its character or use; or

3. Is arbitrarily based on appraisal practices that are different from the appraisal practices generally applied by the property appraiser to comparable property within the same county.

(Emphasis added.) The language adopted in 2009 regarding arbitrary appraisal practices is almost identical to the pre-existing language that was adopted in 1997. At that time, section 194.301, Florida Statutes (1997), was amended to state in pertinent part that:

> 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.*

(Emphasis added.) Section 194.301 "essentially codified the existing common law presumption of correctness," except that the legislature changed the burden of proof to "clear and convincing evidence" when the presumption is retained. *Smith v. Royal & Sons, Ltd.*, 801 So.2d 255, 258 (Fla. 4th DCA 2001). Under the common law presumption of correctness, an arbitrary assessment was discussed as follows: "A situation might be presented for judicial interference where specific assessment is so obviously and flagrantly excessive as to impute clearly to the assessor an intention to discriminate arbitrarily against the taxpayer." *Powell*, 223 So.2d at 307.

The department's position essentially concludes that the 2009 amendment has converted the VAB into a Board of Equalization, where the taxpayer was provided a hearing on the question of the equality of his or her assessment with assessments against other property owners. *See Stiles v. Brown*, 182 So.2d 612 (Fla. 1966) (discussing equalization process). Although there was a point in history where the Board of County Commissioners would sit as a Board of Equalization, those provisions were repealed in 1970. Ch. 70-243, § 49, Laws of Fla. (1970). Under current law, the only time that the VAB may consider comparable assessments is within "homogenous areas or neighborhoods" in the county. § 194.034(5), Fla. Stat. (2022). The authority to consider comparable assessments in that limited context was enacted in 1980. Ch. 80-274, § 1 Laws of Fla. (1980).

The 2009 amendment did not set forth any new test to be applied with regard to arbitrary appraisal practices. There has been no change in the law, and the language of the 2009 amendment in this regard is virtually identical to the statute originally enacted in 1997. The change to the burden of proof required to overcome the property appraiser's assessment did not, and could not, change the constitutional requirement that all property be assessed at just value, i.e., fair market value.

Just as importantly, there has been no change in the law since the First District Court issued its decision in *Sowell* in 2015. Although an attorney with the department has continued to author advisory memoranda, the constitution remains the same. In fact, the only appellate case law regarding valuation challenges has continued to recognize that just value is legally synonymous with fair market value. *See Darden Rests*, 266 So.3d at 230; *Walt Disney Parks & Resorts*, 325 So.3d at 130. The state agency does not determine what the law should be; such responsibilities are the exclusive domain of the legislature subject to the limitations set forth in the constitution.

Conclusion

The property appraiser asserts that the VAB committed a consistent and continuous violation of the law in the decisions attached as exhibit #1 and composite exhibits #5 and #6. The property appraiser therefore requests that the department exercise its jurisdiction authorized in section 194.036(1)(c), conduct an investigation into this matter, and determine that probable cause exists for the property appraiser to challenge in circuit court those VAB's decisions.[1]

Very truly yours,

Loren E. Levy

LEL/gls

Attachments

cc: Honorable Amy Mercado

[1] As a separate exhibit, a copy of the VAB's final meeting agenda, consisting of over 6,000 pages, also is being forwarded along with this letter.

Exhibit "B"

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MEMORANDUM

TO: Orange County VAB Special Magistrates

FROM: Aaron Thalwitzer, Esq., Board Counsel

RE: Cost of Sale Deductions: Presumption of Correctness and Findings of Fact

DATE: November 1, 2023

I. Introduction.

Certain special magistrates have inquired about cost of sale deductions, specifically as they relate to the presumption of correctness and findings of fact in recommended decisions. This memorandum shares and expands upon my responses to those inquiries, discussing the legal requirements for cost of sale deductions, how cost of sale deductions affect the presumption or correctness, and how to address cost of sale deductions when preparing findings of fact.

II. Cost of Sale Deductions are Mandatory.

Per the Department of Revenue ("DOR"), the Property Appraiser's Office ("PAO") must apply the DR-493 deduction in all just value cases.[1] Likewise, the VAB must also apply the DR-493

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[1] See VAB Training Materials, p. 150 ("VABs and magistrates should generally apply the cost of sale percentage the property appraiser reported on Form DR-493 to achieve the overriding goal of uniformity.").

[2] See VAB Training Materials, p. 191 ("In establishing revised just values when required by law, Boards and special magistrates are bound by the same standards and practices as property appraisers. See Rule 12D-10.003(1), F.A.C., treated favorably in Bystrom v. Equitable Life Assurance Society, 416 So. 2d 1133 (Fla. 3d DCA 1982), and see Section 194.301, F.S., as amended by Chapter 2009-121, Laws of Florida (House Bill 521)."); see also Southern Bell Telephone and Telegraph Co. v. Broward County, 665 So. 2d 272, 275 (Fla. 4th DCA 1995) ("We find this 15% to be a figure the Department of Revenue recognizes and accepts without further evidence, through custom and usage. Pursuant to D.O.R. v. Markham, 426 So. 2d 555 (Fla. 4th DCA 1982), fair market value equals just value. For example: assume a piece of property to be sold has a selling price of $100,000. The Department would attribute 15% of the selling price as the cost of sale (i.e. brokerage commissions, advertising, etc.). Subtracting the $15,000 (cost of sale) from the $100,000 selling price leaves a net value of $85,000. We find no impropriety in using this approach to valuation.").

deduction in each case when establishing a revised just value.[2] For the 2023 tax cycle, the PAO's DR-493 deduction is 10%. The DOR considers this deduction to be a "widely accepted, across-the-board practice [which] has been the norm for decades and reflects the professionally accepted standard of care for making cost of sale deductions under section 193.011(8), F.S."[3]

III. Cost of Sale Deductions and the Presumption of Correctness.

To establish a presumption of correctness, the PAO must establish by admitted evidence that the PAO's assessed valuation methodology complies with the statutory criteria that apply to the assessed valuation. The statutory criteria, of course, include a cost of sale deduction.[4] In other words, if the evidence does not show that the PAO applied a DR-493 deduction when determining just value, the PAO has failed to comply with both Section 193.011, F.S. and professionally accepted appraisal standards.

Below is model findings of fact which special magistrates may use in cases in which the PAO does <u>not</u> show by a preponderance of the evidence that the PAO applied a DR-493 deduction when determining just value:[5]

> A presumption of correctness is not established unless the property appraiser proves by a preponderance of the evidence that the property appraiser's just valuation methodology complies with Section 193.011, F.S., and professionally accepted appraisal practices, including mass appraisal standards, if appropriate. See Rule 12D-9.027(2)(a), F.A.C. Section 193.011, F.S. requires the property appraiser to consider eight criteria in assessing real property, including the cost of sale, which is sometimes referred to as the "eighth criterion". Further, the Florida Department of Revenue considers application of the deduction reflected on the property appraiser's current DR-493 form to be a professionally accepted appraisal practice. Therefore, if the property appraiser fails to consider the eighth criteria or if there is not competent, substantial evidence that the property appraiser considered the eighth criteria, the property appraiser is not entitled to a presumption of correctness because, in either case, the property appraiser failed to comply with Section 193.011, F.S. and professionally accepted appraisal practices.

IV. Cost of Sale Deductions in the Three Categories of Just Valuation Evidence

Findings of fact should specifically address cost of sale deductions in each of the following three general categories of evidence for just value assessments:

- <u>Category 1</u>: PAO evidence presented at the beginning of the hearing showing the appraisal methodology used to make the just value assessment.
- <u>Category 2</u>: PAO comparative evidence assembled and presented to support the PAO's presented just value.
- <u>Category 3</u>: Petitioner's comparative evidence presented to support the petitioner's just value.

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[3] *Id.* at 152.The DOR explains that using the DR-493 deduction "avoid[s] the impracticable task of attempting to support the deductions in the absence of sufficiently reliable market data that demonstrates the typical, prevalent, and representative cost of sale deductions for each class of real property." *Id.* at 152.

[4] See Section 193.111(8), F.S.

[5] This language is *not* mandatory, but is accurate for the stated fact pattern.

First, the VAB or special magistrate must make a finding of fact on the cost of sale percentage applied in Category 1 based on the DR-493.[6] Then, for each valuation data set, analysis, or approach in Categories 2 and 3, the special magistrate must make a finding of fact on whether the data set, analysis, or approach already shows a cost of sale deduction.

V. Findings of Fact on Cost of Sale Deductions.

For consistency with Section 193.011(8), the DOR wants special magistrates to use the following terms in recommended decisions: "preliminary value", which denotes the number from which costs of sale are deducted, and "just value" which denotes the number resulting from applying the DR-493 deduction to the preliminary value.[7] Special magistrates should use these terms in recommended decisions in showing how preliminary value and just value are calculated for each approach to value used. The DOR's preferred method when preparing findings of fact is as follows:[8]

(1) Determine preliminary value (before cost of sale deduction),
(2) Subtract costs of sale consistent with DR-493, and
(3) Arrive at just value.

Findings of fact must clearly state: (i) the results of reviewing the evidence (or lack thereof) regarding cost of sale deductions; and (ii) the reasons why the special magistrate made or did not make a cost of sale deduction within each appraisal data set, analysis, or approach presented as evidence within the three categories of evidence described above.[9]

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[6] The DR-493 can be entered into evidence, but the special magistrate's knowledge of the DR-493 percentage as a professionally accepted appraisal practice is also acceptable, even if the DR-493 is not in evidence or even referenced.
[7] See VAB Training Materials, p. 160. Put differently, "preliminary value" is pre-10% deduction and "just value" is post-10% deduction.
[8] See *id.*, p. 158.
[9] See *id.*, p. 161.