THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
Committee on Condemnation and Tax Certiorari
<u>Response to Report of Joint Task Force</u>

I. Introduction

The Commissioners of the New York City Departments of Finance ("DOF") and Investigation ("DOI") formed a Joint Task Force ("JTF") charged with eliminating corruption in the Real Property Assessment Unit of the New York City Department of Finance. That JTF has issued a Preliminary Report (or "Report"), dated August 2002. The JTF and its Report were the City's primary response to the arrest of eighteen current and former New York City assessors on February 25, 2002. These assessors were charged with accepting bribes in exchange for lowering assessments on real property.

The Report sets forth 23 "short-term" recommendations relating to changing the system of assessing real property in New York City. It also contains 12 "Recommendations Requiring External Cooperation," which relate in large part to proposed changes in the assessment review process.

As noted at page 4 of the Report's introduction, the JTF was "charged with examining the property assessment function at DOF and developing recommendations to eliminate the potential for future corruption in this area." Consistent therewith, most of the Preliminary Report proposes changes in DOF's operations and its methods of assessing real property. We believe these recommendations to be generally useful responses; we have certain comments regarding a number of those recommendations, which are discussed in Parts III and IV.

The Preliminary Report ends by suggesting major changes in the administrative review of assessments by the New York City Tax Commission and the judicial review afforded by Article 7 of the Real Property Tax Law (discussed <u>infra</u>, Part V.) Unlike the JTF's other recommendations, these ill-advised changes would weaken the oversight of DOF by sharply narrowing the grounds for challenges of excessive and unequal valuations. Unfortunately, transparency and greater public awareness of the assessment process, goals emphasized elsewhere in the Preliminary Report, would be defeated at the review level, if these proposals were to be adopted.

To understand this Committee's response to the changes proposed in the Preliminary Report, a basic understanding of the system of assessing real estate in New York City for real property tax purposes is required.

II. New York City's Real Property Assessment System

A. Tax Classes

Each parcel of real estate in New York City is categorized by tax class. The four major tax classes are:

1) Tax Class 1. This tax class consists primarily of 1-3 family homes, certain condominiums and residentially zoned vacant land in Manhattan north of 110th Street and in the other four boroughs. According to the Preliminary Report, there are currently 691,348 tax class 1 properties in the City.

2) Tax Class 2. Tax class 2 consists of all residential buildings (not including hotels and motels) that are not in tax class 1. This class consists primarily of rental, cooperative and condominium apartment buildings with more than 10 units. According to the Preliminary Report, there are currently 183,392 tax class 2 properties in the City.

3) Tax Class 3. Tax class 3 consists of utility property such as telephone lines and poles, boilers and cables. According to the Preliminary Report, there are currently 5,110 tax class 3 properties in the City.

4) Tax Class 4. This tax class consists primarily of hotels, office buildings, stores, factories, warehouses, garages and certain vacant land. According to the Preliminary Report, there are currently 103,904 Tax Class 4 properties in the City.

New York City reassesses all real property annually. Thus, an assessor, an employee of the Department of Finance, must determine a proper assessed valuation for each such parcel. Under the current system in New York City, the District Assessor assigned to a defined geographic area values all of the properties (or all of the residential or commercial properties) within his or her assigned district.

B. Valuation Methodology

As the Preliminary Report notes, there are three generally accepted methods of valuing real estate for the purpose of real property taxation.[1] They are the sales approach, the cost approach (reproduction cost new less depreciation ("RCNLD")) and the income approach.[2]

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[1] See, e.g., 41 Kew Gardens Road Associates v. Tyburski ("Tyburski"), 70 N.Y.2d 325, 330, 520 N.Y.S.2d 544, 546 (1987).

[2] Id.

The sales approach, primarily of use in assessing Class One properties (generally speaking, one, two and three-family homes), is most valuable in determining the full market value of a property that has recently sold, or of properties comparable to a recently sold property. Computer Assisted Mass Appraisal (CAMA) systems using sales data have been in place in other jurisdictions for decades and successfully used in assessing small residential properties.

The second method of valuation is RCNLD. Case law in New York State has established that this approach to value is generally limited to the assessment of new construction or specialty properties.[3]

The third method of valuation is the income capitalization approach. This method is favored by Courts for use in the assessment of income-producing properties (such as office buildings and multiple dwelling residential properties).[4] Using this approach, an assessor determines the income generated by a parcel of real estate, deducts the reasonable costs of operation of the property and thereby derives a net operating income for the subject parcel. The assessor then divides the net operating income by a capitalization rate (the rate of return an investor would expect from the subject property) to determine the full market value of the property. A percentage of this full market value becomes the property's Actual assessed value (for example, the articulated policy of the City is to assess all properties in Tax Classes 2 and 4 at 45% of their full market value). Thus, property in tax class 4 worth one million dollars ($1,000,000) would be assessed at $450,000 (i.e., 45% of $1,000,000).

In assessing income-producing real estate, the assessor begins the analytic process by examining the most recent income and expense statements provided by the taxpayer, where available. Adjustments are made to the income and expenses based upon Departmental guidelines and policy and the assessor's own knowledge of the real estate market. The DOF issues assessment guidelines each year which provide the assessor with a set of capitalization rates that are to be used by the assessor in deriving the full market value and hence an assessed valuation for each parcel of real estate within his or her assigned district.

Non-income producing properties, such as, for example, owner-occupied properties, are valued by imputing a fair gross income, subtracting the reasonable expenses for the operation of the property and applying a capitalization rate to the resulting net operating income so as to derive a full market value and subsequently an Actual assessed valuation for the property.

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[3] See, e.g., In the Matter of Allied Corporation v. Town of Camillus, 80 N.Y.2d 351, 357, 590 N.Y.S.2d 417, 420 (1992).

[4] See, e.g., Tyburski, 70 N.Y.2d at 331, 520 N.Y.S.2d at 546; G.R.F. Inc. v. Bd. of Assessors, 41 N.Y.2d 512, 513, 393 N.Y.S.2d 965, 967 (1977).

III. The JTF's Recommendations to Abandon the Use of A Property's Actual Income and Expenses are Ill-Advised and Contrary to Law

A. The "Market Value" Standard Requires Analysis of a Property's Actual Income and Expenses

One of the most significant changes proposed in the Preliminary Report is to abandon the use of the actual income and expenses of a property in favor of general income, expense and capitalization rates based upon a property's classification (Class A office building, Class B office building, Class C office building, etc.) and, perhaps, location. The proposal calls for the DOF to estimate income per square foot, expenses per square foot, vacancy allowances and capitalization rates in the valuation of all income-producing properties in the City based on general market data. The general market data is available in various publications (some of which were enumerated in the Preliminary Report).

Apparently, the justification for this proposal is DOF's belief that by using data that is non-property specific and open to public inspection, DOF could not only publish the Actual assessed valuations (i.e., the end product) of each parcel of real estate in the City, but also the underlying economic assumptions upon which the assessment is based. The argument is that this would allow for greater oversight, and would thereby reduce the opportunity for corruption. The report criticizes the current use of individualized property income and expense data submitted by owners because of (1) poor-compliance with reporting requirements and (2) the confidentiality of the income and expense statements, which ostensibly obscures oversight.

In New York City, it is a well-established principle of law that actual income and expenses must be used in the valuation of residential rental properties, due to the long-term existence of rent regulations.[5] There is also considerable law standing for the proposition that absent extenuating circumstances, the actual income generated by a commercial property is to be used in setting that property's assessment for real property tax purposes.[6]

Indeed, the proposed move away from relying upon a property's specific, individual income and expenses is contrary to the constitutional mandate that no property be assessed higher than "market value".[7] This "market value" standard requires that a property's individualized

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[5] See, e.g., Rockaway Crest Section 1, Inc. v. Tax Commission, 38 A.D.2d 759, 329 N.Y.S.2d 620, 621 (2nd Dept. 1972); Block v. Tax Commission, 33 A.D.2d 899, 306 N.Y.S.2d 1020, 1021 (1st Dept. 1970).

[6] See, e.g., Tyburski, 70 N.Y.2d at 331, 520 N.Y.S.2d at 546 ("Understandably, the income capitalization method can be effective only with thorough data, **including accurate actual income and operating expenses of the subject properties**.") (Emphasis added). Upholding a Local Law passed by New York City requiring owners of income-producing property to furnish annually to the Department of Finance income and expense information from the property's operation, the Tyburski court noted that the actual income and expenses serves to "assist the assessor in the valuation process and in the preparation of the assessment." Tyburski, 70 N.Y.2d at 334, 520 N.Y.S.2d at 549.

[7] See, e.g., NY Const. Art. XVI, sec. 2 ("[a]ssessments shall in no case exceed full value"); see also Grant v. Srogi,

characteristics, including, importantly, its income and expenses, be considered in arriving at a determination of that property's market value. It is self-evident that a willing, arms'-length buyer would never pay a seller a price for a particular property based on a set of data applicable to multiple properties.[8]

Finally, a move to generalized class generated assessments will result in substantial under-assessment of large numbers of properties. If class averages are used as income per gross square foot, for example, averages low enough that even the worst performing properties can pay the taxes generated by the assessments must be used. This means that the City walks away from the increased assessed valuation of all properties in a class that are performing better than the average. In addition, since the assessments of the poor performers are already at an "appropriate" level you can not simply adjust the class tax rates upward to recover the lost revenue because you would end up bankrupting the "average" assessed properties. This will result in the loss of much needed revenue that would otherwise be properly paid by those taxpayers doing better than the average.

B. Non-Compliance with RPIE Law Is Not a Serious Obstacle

Whether through compliance with the RPIE law, or the Tax Commission filing, the DOF has the most current income and expenses available on most buildings. The Preliminary Report finds substantial non-compliance with the RPIE filing requirement and concludes, as a result, that the use of RPIEs should be discontinued. In the alternative, the Report recommends that the income and expense data provided as part of an RPIE filing be made public, if the Department of Finance is to continue the use this data in the assessment process.

We have serious doubts whether the statistics enumerated in the Preliminary Report accurately represent RPIE compliance. The Department of Finance's records in this regard are highly suspect. We note that many properties satisfy their RPIE filing requirement in whole or in part by the filing of a current year Income and Expense Schedule for Rent Producing Property (form TC 201) with the New York City Tax Commission. In calendar year 2002, the owners of thousands of properties that filed such Income and Expense Schedules with the Tax Commission received letters from the DOF mistakenly informing them that they were required to file an RPIE Income and Expense Schedule (form RPIE-201) even though a Tax Commission Income and Expense Schedule, in fact, had been filed. Key punching errors on the part of the Department of Finance are significant. In many cases DOF shows that no income and expense statement has been filed with the Tax Commission when one has been filed, reviewed by the Tax Commission and used in the making of an offer of reduction in assessed valuation. In many instances, income and expense statements that cover more than one lot either to do not appear as filed on DOF records or only appear on one of the

52 N.Y.2d 496, 512 (1981).

[8] See In the Matter of Commerce Holding Corp. v. Bd. of Assessors, 88 N.Y.2d 724, 729, 649 N.Y.S.2d 932, (1996) ("In view of this market-oriented definition of full value, the assessment of property value for tax purposes must take into account any factor affecting a property's marketability.")

lots covered by the Income and Expense statement. Income and expense statements on commercial condominiums which cover entire buildings with multiple lots often appear on Finance records as not having filed an Income and Expense Schedule or only having filed on some of the lots within the building.

Additionally, the Tax Commission's statistics of the number of income and expense submissions to that agency clearly disprove the accuracy of Finance's reporting on RPIE compliance.[9]

The Report's statistical inaccuracies are significant for two reasons. First, the Department of Finance has access to many more income and expense statements then it believes it has based upon the erroneous statistics enumerated in the Preliminary Report. Second, Income and Expense Schedules filed with the Tax Commission are already in the public domain and are subject to the Freedom of Information Law. Thus, the extent the JTF is seeking to have DOF base its assessments on publicly available data, we note that this is already the case.

IV. Recommendations for Internal DOF Reform

At or about the time the RPIE law was originally enacted, an RPIE Unit was created within the Department of Finance. This Unit was responsible for monitoring RPIE compliance and for insuring that RPIE forms were keypunched in a timely manner. Unlike an income tax where a taxpayer's tax return can be keypunched and reviewed well after the date that the tax is due, RPIE forms are needed by assessing personnel immediately, as they are designed to be used in setting assessments on the tentative assessment roll.[10] The RPIE Unit was designed for rapid turnaround of RPIE income and expense data. This Unit also had the capability of making adjustments to income and expense statements independently of the District Assessor (one of the recommendations found in the Preliminary Report). Finally, this Unit was large enough to exercise Finance's authority to audit the income and expense statements that were filed. One of the problems with the RPIE filing enumerated in the Preliminary Report was the concern that assessors often think "owners have an economic interest in understating the income and overstating the expenses associated with their properties". This is a monitoring and compliance issue -- not a fundamental flaw in the RPIE program.[11] The RPIE Unit was disbanded in the early 1990s presumably as a cost savings measure.

The authors of the Preliminary Report make numerous recommendations affecting agency

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[9] Compare the JTF Report's estimate of 18,000 parcels (40%) having failed to comply with RPIE filing requirement in 2000 with the 2001 Annual Report of New York City Tax Commission showing only 462 properties that failed to comply with the RPIE law (out of more than 43,000 properties that applied for relief at the Tax Commission).

[10] RPIE forms are required to be filed by September 1st; the tentative assessment roll is published four months later, on January 15.

[11] Also, to the extent that RPIE compliance is largely accomplished through the filing of income and expenses with the Tax Commission, most such filings are required to be certified by a Certified Public Accountant, and furnished under the penalty of perjury by the applicant.

operations and management. Many of these appear to be reasonable efforts to improve internal DOF processes. No recommendation makes more sense or is more urgent than their finding that new resources must be allocated to the administration of the real property tax. We make the following additional proposals and observations:

First, new assessor and assistant assessor lines must be added to the Department of Finance. As noted in the Preliminary Report, the current system of rotating assessor district assignments has not precluded corrupt activity. The current broad-banding of assessor titles, the so-called "tier system", must be reviewed to provide Finance management with greater latitude in assessor assignments. An unintended result of the broad-banding has been a reduction in management capability to rotate assessors (salaries, for example, are frozen once an assessor has been at a tier level for a set amount of time). This loss in flexibility was dramatically increased by the decrease in budget allocated to the Real Property Assessment Unit in the early 1990s.

Second, a significant portion of such new personnel must be assigned to the Equalization Unit. The Equalization Unit is responsible for producing the guidelines used by assessing personnel and it also monitors quality control. Careful oversight of all major property assessments and of random lower valued assessments must be insured. Quality control must be viewed as a Department priority. It is clear from the diminution of this portion of the work force in the early 1990s that quality control has not been a priority. While Department of Finance personnel did not see assessments that were inappropriate, many members of the public saw them and a number of attempts were made over the years to draw these problems to the attention of City officials.[12]

Third, we agree with the recommendation made in the Preliminary Report that all assessors, regardless of salary, title or assignment, should be required to file financial disclosure forms. They should also be required to file the Department of Investigation's annual form.

Fourth, we agree with the recommendation made in the Preliminary Report that assessors require greater training and certification. Substantial training programs were undertaken in the past by contracting with the International Association of Assessing Officers, New York University's Real Estate Institute and others. The Department of Finance's budget should be augmented with sufficient funds to insure that all assessing personnel are properly trained. Corruption avoidance should be included in the curriculum and the Inspector General for the Department of Investigation should be included in this portion of any training regime that is implemented.

Fifth, as noted in the Preliminary Report, insufficient care has been taken in insuring the integrity of the underlying assessment database. One mechanism apparently used by the assessors involved in the current assessment scandal was to change various significant data elements (square footage of the building, year built, number of stories, etc.) without oversight or review. We agree with the recommendations made in the Preliminary Report concerning the need to preserve the integrity of the real property tax database. Procedures should be adopted that enumerate when a data

[12] See "Scandal Over Property Tax Bribes May Extend to Lawyers and Firms", New York Times, December 7, 2002 (referring, inter alia, to repeated warnings and information received by the City).

element is to be changed, who should review the decision to make the data change, and an audit trail should be created insuring that the change can be attributed to a particular individual and the particular supervisor who approved the change. (This recommendation may be more difficult to implement than it first appears because of the scope of the real property tax database. With close to one million parcels of real estate, implementation of this change will require a significant investment in additional staff, but that investment is necessary if the public is to regain confidence in the integrity and underlying fairness of the administration of this tax.)

We disagree with the recommendation that assessors not have contact with taxpayers or their representatives. While contact with the public always creates the opportunity for corruption, an integral part of an assessor's job is knowledge of the real estate market in general and the specific characteristics of the parcel being assessed. The corruption disclosed in the recent indictments was not caused by assessors being in the field and having contact with the public. A small handful of individuals would appear to have corrupted the system. Hence, barring the public from contact with assessing personnel is overly broad and unnecessary. We agree, however, that all contacts with the Department of Finance should commence in writing and minutes or recordings of all meetings should be kept. Furthermore, contacts with Department of Finance personnel should be formalized. There should be a standard form used to request a meeting with staff from the Department of Finance. If the person or entity requesting a meeting is not the taxpayer there should be a formal Notice of Appearance that must be signed by the taxpayer or a corporate officer of a corporate taxpayer authorizing the appearance. This requirement should apply whether a meeting is being sought to discuss an assessment before publication of the tentative assessment roll (so-called "pre-assessment meetings") or subsequent to publication of the tentative assessment roll where a taxpayer or representative is requesting that the Department of Finance exercise its authority to change an assessment pursuant to Section 1512 of the New York City Charter.

Where a taxpayer or representative appears or expects to appear on a significant number of properties (the number to be decided by the Department of Finance), the taxpayer or representative should be required to register with the Department of Finance and be assigned a Group Number similar to that used by the New York City Tax Commission. In this way, all contacts by taxpayers or representatives who practice before the Department of Finance can be tracked and monitored by supervisory personnel and management. Additionally, for all contacts, the Department should keep a log that would specify the property, representative, date and time of contact, and the identity of all DOF employees with whom the representative had contact. This log should be publicly available. Finally, all submissions made to DOF by property owners or their representatives should also be available for public inspection. This will allow for public scrutiny of any information that an assessor might rely upon in developing an assessment.

The authorization form signed by owners should contain an explicit guarantee that no illegal activity has been authorized by the owner and it should describe with particularity the criminal penalties for such behavior. The Department of Finance should seriously consider revising its notices of changed assessment, the so-called "Flack Notices", to include language that does not preclude contact with assessors but which informs taxpayers of the criminal penalties involved in inappropriate behavior and which explicitly enumerates the terms and conditions of appearances before the Department of Finance to discuss assessed valuations, whether such contact be pre- or post-publication of the tentative assessment roll.

Finally, the Preliminary Report rejects the recommendation of the Assembly Committee on Real Property Taxation that an independent agency be created to administer the real property tax in New York City. In light of the current corruption scandal, we are of the opinion that the proposal should not be rejected out of hand but rather should be reevaluated once the several recommendations relating to the reform of internal DOF practices contained both in the Preliminary Report and in this Response are implemented. The Real Property Assessment Unit appears to have been the victim not only of assessor corruption but management disinterest judging by the disproportionate budget cuts it suffered from in the 1990s. These cuts would appear to have been larger than those endured by the Department of Finance as a whole. An agency whose sole responsibility is the administration of the real property tax may be more capable of preserving its budget in the future and this proposal should be pursued with an open mind without any predisposition to preserve (or alter) the current jurisdiction of the Department of Finance in this regard.

V. The JTF Report's Recommendations Regarding the Process of Reviewing Real Property Tax Assessments are Ill-Advised

The JTF Report sets forth essentially five proposals with respect to reviewing real property assessments. These proposals are:

1. Replace de novo standard of review at the Tax Commission with a standard which seeks to determine whether the assessment "is supported by the record";
2. Enable the Tax Commission to increase assessments;
3. Allow the imposition of penalties for frivolous filings with the Tax Commission;
4. Require taxpayers to exhaust administrative remedies at the Tax Commission before permitting Article 7 review; and
5. Permit the City to appeal Tax Commission determinations to the Appellate Division.

As a general matter, we believe these recommendations weaken the review process, which should, if anything, be strengthened. More oversight, not less, is needed.

We believe that the Report's recommendations, when considered in their totality, would change the review process to require the confirmation of the DOF's assessments except in cases where a taxpayer can show clear error. In a system such as contemplated by the JTF Report in which cases are either "black or white," penalties for frivolous filings, and the ability of the reviewing agency to inhibit challenges by virtue of its authority to increase assessments, may have some superficial appeal. Since, however, the valuation of real property involves the exercise of judgment, within a given set of parameters, reasonable minds may differ as to a proper assessment of a given property. As such, none of the aforementioned proposals are sound.

A. Tax Commission Standard of Review and Jurisdiction

Currently, assessments set by DOF are reviewable by the Tax Commission. In its review, as in an assessment review by the Supreme Court under Article 7 of the Real Property Tax Law, the Tax Commission applies a presumption of validity to the assessment.[13] Where a taxpayer overcomes that presumption, the Tax Commission reviews evidence furnished by the taxpayer in making a de novo determination as to the proper assessment level. The Preliminary Report recommends that the Tax Commission move to an approach where it considers whether or not the DOF's assessment is "supported by the record". This would require striking changes in the way DOF assesses property. Today, there is no publicly accessible record of the assessor's deliberations, beyond mere conclusions, nor can there reasonably be expected to be one in the foreseeable future. The burden of providing a reasoned statement of the basis for assessing each of the approximately 900,000 parcels assessed each year by the Department of Finance would be overwhelming. To expect the Department of Finance to produce what would essentially be a mini-appraisal, setting forth the facts of the property and the reasoning used to derive the market value, is fanciful. In the absence of this kind of meaningful and substantial documentation, the Tax Commission would have little "record" to examine. Moreover, independent de novo review of assessments increases public confidence that the assessment system as a whole is free from corruption.

Furthermore, due process would require DOF, in creating a "record" for subsequent review by the Tax Commission, to afford each taxpayer a hearing and to accept and consider evidence submitted by the taxpayer at such a hearing.[14] In addition to the practical difficulties in an annual reassessment system of having such an evidentiary hearing at the DOF level and subsequent Tax Commission review of the record in a timely fashion, this proposal is wholly unnecessary and wasteful: the Tax Commission is already empowered to conduct evidentiary hearings on assessments and to issue timely determinations.

The Report's observation that the Tax Commission provides a second administrative procedure for review of assessments is misleading. The supposed "first" procedure, the opportunity to seek a "change by notice" from the Department of Finance, is of limited utility, particularly given current events. Moreover, we question the effectiveness of a review process conducted before the very agency whose determinations are to be reviewed. Indeed, the legislation formally separating the Tax Commission from the DOF in 1968 was enacted, in large part, out of concern that a taxpayer not be required to seek relief from an assessment before the same agency that made the assessments in the first place.

B. The Preliminary Report's Recommendation that the Tax Commission Be Empowered To Increase Assessments is Imprudent

[13] See, e.g., Gordon v. Town of Esopus, 296 A.D.2d 812, 745 N.Y.S.2d 334, 335 (2nd Dept. 2002).
[14] See, e.g., New York City Charter § 1041(1).

This historic change would subject a taxpayer to an inappropriate risk and would surely have a chilling effect on the exercise of a basic right. This risk would be felt by a taxpayer in all cases, except, perhaps, where the overvaluation or other defect in the assessment is unquestionable. Even in so-called "clear" cases, the taxpayer would bear the risk that the Tax Commission would err, and thereby increase the assessment. As previously discussed, unlike the income tax, a property's valuation includes some subjectivity. In light of this, a taxpayer's right to protest should not be effectively precluded by the risk of increase.

Furthermore, under current law, a taxpayer is required to file a protest with the Tax Commission before an Article 7 proceeding will lie. Today, with certain issues systematically ignored by the Tax Commission (including the issue of whether the DOF's announced 45% ratio of assessed value to market value is accurate), an assessment challenge may have merit in an Article 7 proceeding, where such issues may be addressed. To put the taxpayer at the risk of having his assessment increased by the Tax Commission as the price of obtaining ultimate review as permitted by State law, including that on the ratio issue, in an Article 7 proceeding, is surely inappropriate.[15]

In sum, the Department of Finance already has the opportunity under current law to increase tentative assessments through a change by notice prior to the publication of the final roll. Furthermore, during this period, DOF receives (via the Tax Commission filings) the most current income and expense information that would enable it to make such determinations. Unlike sales and income taxes, the real property tax is imposed in the first instance upon property owners by the City, which assigns a value to property without any input from the property owner. Furthermore, unlike other taxes, the property tax is imposed prospectively. Thus, taxpayers should be afforded a fair opportunity to contest a value imposed upon it by the City, without fear that the exercise of its rights will inure to its detriment.

C. <u>Penalties For Bringing "Frivolous" Cases Before the Tax Commission Should Not Be Imposed</u>

The concept of "frivolity" is not easily defined, especially in the context of property valuations which, by their very nature, include judgments and an element of subjectivity. Homeowners and others who may not be well-schooled in valuing real property will be particularly impacted by the proposed penalties. To the extent that the implementation of this proposal deters merely difficult (but not frivolous) cases, then the proposal is surely inappropriate. To the extent that it deters only "frivolous" cases, then the amount of time consumed in making the determination and prosecuting the penalty is likely to be greater than the amount of time saved by the deterrence. In either case, the proposal is ill-advised.

D. <u>Article 7 Jurisdiction</u>

[15] This risk might also include retroactive tax increases, depending on when the Tax Commission considers the case.

The Preliminary Report proposes that the Tax Commission be required to hold a hearing on every claim before an Article 7 proceeding can be brought. This is burdensome and ill-advised, and appears to be included in the JTF proposals for the sole purpose of reducing the number of Article 7 challenges brought.

There are several valid reasons why a taxpayer with a legitimate complaint about an assessment may not pursue a challenge at the Tax Commission. First, the Tax Commission has jurisdiction to consider only the current and one prior assessment, and requires the discontinuance of all other pending proceedings as precondition to accepting an offer of reduction. Thus, to the extent that a taxpayer has more than two unresolved assessments, the Tax Commission is powerless to settle the taxpayer's full complaint. In such cases, Tax Commission review may be meaningless.

Second, as discussed more fully supra, the Tax Commission does not consider certain issues, such as the assessment ratio, that are legitimately raised in an assessment review proceeding and which would be considered by the Supreme Court. In cases where these types of issues are an important element in a taxpayer's challenge, Tax Commission review may be meaningless.

Third, there are taxpayers who cannot comply with the myriad requirements that are prerequisites to Tax Commission review. For example, a taxpayer may not be able to afford to pay an accountant to prepare a certification of income and expenses that the Tax Commission requires, or he may not be able to comply with the strict time requirements within which he must file the required information with the Tax Commission. Finally, the taxpayer may not have certain information, without which the Tax Commission will not consider the taxpayer's claim.[16]

In addition to precluding Article 7 proceedings where a taxpayer voluntarily chooses not pursue relief at the Tax Commission, the Report's proposal presumably would render the same result for those taxpayers who made a filing with the Tax Commission but whose filing was deemed by the Tax Commission to be insufficient or otherwise precluded its review of the assessment. If the Tax Commission's decision to hold or deny a hearing on the merits becomes the key to eligibility for an Article 7 proceeding, then such decision itself will become the focus of controversy and, presumably, much litigation. This litigation will be in addition to the litigation about whether the assessment is accurate. We think the benefit to the City of precluding those Article 7 petitions currently filed by a taxpayer who did not seek Tax Commission review is outweighed by the burden of the additional litigation that will undoubtedly be brought to challenge the Tax Commission's determination that a taxpayer did not properly pursue relief before it, precluding its review of the assessment, thus rendering the taxpayer ineligible to file for review under Article 7.[17]

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[16] For example, the Tax Commission requires income information from the Sponsor or holder of unsold cooperative shares as a prerequisite to reviewing the assessment of a residential cooperative or condominium. The applicant, usually the co-op corporation or condominium association, may not be able to obtain this information; in many cases, the Sponsor and co-op/condo are at odds with each other and the Sponsor may refuse to share this information with the applicant, effectively eliminating the applicant's ability to obtain Tax Commission review.

[17] The Preliminary Report also proposes to enable the City to appeal a Tax Commission determination to the Appellate Division. This proposal assumes that the current legal structure, whereby a taxpayer may contest his assessment in a trial

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in Supreme Court, has been abolished, in favor of a system which requires a taxpayer to seek relief first at the Tax Commission, which would be limited to considering whether the assessment is "supported by the record", and then, if unsuccessful, at the Appellate Division, which would consider whether the Tax Commission's determination was itself supported by the record. This proposal, then, would permit the City to appeal a determination by the Tax Commission to the Appellate Division that the assessment was not supported by the record. As we have previously considered this proposal for changing the Tax Commission's role from one which includes a <u>de</u> <u>novo</u> review of the assessment once the taxpayer overcomes the assessment's presumption of validity to one which considers only whether the assessment is "supported by the record", we do not comment on the specific proposal to permit the City to take an appeal to the Appellate Division of a Tax Commission determination.