CALIFORNIA ALLIANCE
OF TAXPAYER ADVOCATES

January 19, 2018

Mr. David Yeung
Chief
Property Tax Department - County Assessed Properties Division
State Board of Equalization
450 N Street
Sacramento, CA 94279-0064

RE: Concerns/Issues Related to the Assessment Appeals Process.

Dear David:

On behalf of the California Alliance of Taxpayer Advocates ("CATA"), I want to take this opportunity to thank you and the other State Board of Equalization staff for convening a meeting with members from CATA, CAA and CACEO on December 18, 2017 to discuss concerns/issues related to the assessment appeals process. CATA is dedicated to the professional practice of state and local tax consulting through education, advocacy and high ethical standards. We believe strongly that assessors, taxpayers and assessment appeals boards are best served in a transparent environment.

However, I must express CATA's great disappointment that at the outset of the December 18 meeting Dean Kinnee announced there would be no "Interested Parties" Process, rather that the December 18 meeting and any subsequent meeting would be informal meetings. We were further disappointed that even before this meeting was concluded and all the issues aired, staff opined that there would likely be no regulatory changes, only the prospect of a Letter to Assessors (LTA).

December 18, 2017, Meeting Contrary to BOE Members' Direction, Fails Transparency Test & Denies BOE Members the Ability to Attend Meetings

First, this change by staff is in direct conflict with the unanimous and explicit direction the Members of the BOE gave to staff at the August 29, 2017 BOE meeting. Among the Board Member comments are the following (a full transcript may be found attached):

Board Member Horton stated, ". . . I would concur that there should be an interested parties process in order to have some uniformity throughout the state of California." BOE Member Horton went on to say, ". . . in order to make an interested parties process fruitful, we should set a date for the interested parties and begin that process, and we have asked the property tax unit to begin that process . . .." BOE Member Horton concluded by stating, ". . . 1) we can assure that all the parties that are impacted are present and have an opportunity to testify. 2) they have an understanding of what all the issues are prior to their testimony, so that they are not coming to a hearing and all of a sudden, they are learning of another issue, to the extent that we can, we will flush out what those issues are and the present them, to all of the parties for some consideration, but that interested parties process can be expedited, and I would ask the Department to sort of speak to expediting it. Traditionally, historically, it has been 5-6 months." [Emphasis added]

Board Member Runner stated, ". . . I think just to see if we are all on the same, or at least the consensus that it seems that there is an interest to establish an expedited interested parties process in order to move through this, get this thing done, so that we can see if we can come to consensus. I think it is important that we are able to participate in that and that we guide that. Because at the end of the day, there will be a product, and then that product is then what we are able to communicate for a consistent application of property tax law, and issues, once we have that product in hand." [Emphasis added]

Finally, Yvette Stowers on behalf of Board Member Yee stated, "Just one comment, madam chair, quickly, it's late. I just want to say we do support an interested parties meeting, as well, and looking at the one letter from LA County, it is a very positive letter. I would suggest that staff gets it and when you guys move forward with the IP process and see if there is a way to have a standard letter placed onto the BOE website so that the Assessors can have easy access to it." [Emphasis added]

In addition to being in direct conflict with the unanimous and explicit direction the Members of the BOE gave to staff at their August 29, 2017 meeting, the lack of an interested parties process runs the real risk of excluding an interested party in the process and preventing all the parties from being present and having the opportunity to testify. Since there was no formal public notice of the December 18 meeting, CATA received several calls from interested parties who had heard about such a meeting but could not find any information about the date, time and location of the meeting and how they might call in. If CATA received such calls, we can only imagine that there were other interested parties who did not know of the meeting and or how to participate. The lack of an "Interested Parties" Process also gives the impression that there is a lack of transparency. In addition to excluding interested parties, the lack of an "Interested Parties" Process also has the effect of excluding Members of the Board of Equalization from being able to participate in these meetings, understanding firsthand the issues raised and the views of taxpayers, Assessors and the Assessment Appeals Boards.

Therefore, in support of following the direction of the BOE Members, in order to ensure public access to these meeting and providing transparency and finally to allow the BOE Members the opportunity to attend and participate in these meetings, CATA strongly urges BOE staff to initiate an "Interested Parties" Process as they were directed on August 29, 2017.

BOE Staff Pre-Maturely Concludes No to Regulations

First, it is inconceivable to CATA that even before the December 18 meeting was concluded and all the issues aired, that staff would opine that there would likely be no regulatory changes, only the prospect of a Letter to Assessors (LTA). This provided to CATA the appearance that staff had already concluded what the outcome would be.

CATA also concurs with Board Member Horton in his statement at the August 29, 2017, BOE meeting that there has not been a thorough review of the regulations governing the Assessment Appeals process since the 1990s. It strikes CATA that staff is summarily dismissing a review of these regulations and is prematurely concluding there will be no changes to the regulations.

We urge staff and the Members of the BOE, to come at these issues with an open mind not a predisposition.

Staff suggesting that there would likely be no regulatory changes, only the prospect of a LTA fails to recognize that an LTA is not enforceable by the BOE or the taxpayer and that any Assessor or Assessment Appeals Board is free to ignore a LTA.

While LTAs provide an ongoing "advisory service" for county assessors and other interested parties, they do not have the force or law like a statute or a regulation. In CATA's view, the only way for the Assessment Appeals practices to be enforceable is for the BOE to adopt regulations.

The practices our members have observed are both unfair and inconsistent between counties. So, we are bringing these concerns before you and respectfully request that you exercise your authority to provide counties and taxpayers direction and oversight under Government Code Section 15606, subdivision (c).

It states, "The State Board of Equalization shall do all of the following:

(c) Prescribe rules and regulations to govern local boards of equalization when equalizing, and assessors when assessing, including uniform procedures for the consideration and adoption of written findings of fact by local boards of equalization as required by Section 1611.5 of the Revenue and Taxation Code."

By convening an interested party's meeting, the BOE does not commit itself to adopting regulations nor does it commit the BOE to a specific regulatory outcome. Rather, the interested parties process provides the following:

- It offers all interested parties the opportunity to provide the BOE with their views on how the Assessment Appeals Process needs to be improved;

- It will allow the BOE to evaluate the perspectives of all interested parties and determine their merit; and

• Finally, it will provide the BOE the opportunity to decide what to do and whether it best done via regulation or LTA.

CATA is prepared to provide the BOE Members, BOE staff and all interested parties proposed regulatory changes for your consideration. However, if there is a predisposition that no regulatory changes will even be considered, then there is no purpose in our doing so.

Parties Should Also Seek to Meet Outside the Interested Parties Process

At the August 29, 2017, BOE Meeting BOE Member Horton, in an effort to make the most of the "Interested Parties" Process, also encouraged all parties to meet outside the interested parties process and to find agreement on solutions. CATA agreed then and agrees now. CATA and representatives from CAA did meet on November 30 for two hours. Those discussions were fruitful in airing the issues, but did not lead to resolving any issues. Subsequent to the November 30 meeting, CATA asked on several occasions to again meet, both before and after the December 18 meeting. Unfortunately, while CAA promised CATA future proposed meeting dates, none have been offered. This is reminiscent of CAA's prior unresponsiveness. We, therefore, would ask that the BOE again urge CAA and the other parties to not just participate in the "Interested Parties" Process, but to also work outside that process to resolve the issues.

Assessment Appeals Issues

The below restates the issues we have raised with you since our initial letter in September of 2016. It is important to note that proceedings leading up to an assessment appeal—as opposed to the appeal itself—are where both assessors and taxpayers are most often in conflict. Disputes over discovery under Revenue and Taxation Code Section 441(d)[1] are frequently a subject of contention.

This Board's own Assessor's Handbook governing assessment appeals sets the proper tone for addressing this topic:

> "In the administration of the property tax in California, achieving equity in the equalization process requires two elements. First, the taxpayer and the appeals board should have as much relevant information as possible about the value of the property and about the assessment placed on that property by the assessor. Second, all parties must receive an adequate, impartial hearing of any appeal regarding that property."
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> "… To discharge these duties, most counties have adopted rules of notice and procedure relevant to appeals hearings under their jurisdiction. The divergence of the local rules and practices adopted by the various counties has created confusion for taxpayers who have property in more than one county…"

[1] All further statutory references are to the Revenue and Taxation Code. References to "rules" or "regulations" are to corresponding sections of Title 18 of the California Code of Regulations.

Fairness and consistency are the goals of the Board in providing this guidance. They are CATA's goals as well. CATA's position is that it is in the best interests of the taxpayer/applicant to cooperate with the assessor by responding to reasonable requests for information that is both relevant and readily available. And although most assessors have fairly applied—and continue to fairly apply—Section 441(d), some assessors and assessment appeals boards have misused this statute. There is also a lack of statewide uniformity in the application of Section 441(d).

A new property tax rule—one that combines the concepts of timely, reasonable and adequate discovery (both for taxpayers and assessors) with constitutional requirements of due process—is necessary and will help provide much needed direction for taxpayers, assessors and appeals boards, clearing a backlog of appeals counties are struggling to resolve. With that said, the following are our concerns with the CAA's letter.

(1) <u>The law requires only that taxpayers make records available to Assessors—nothing more</u>

Section 441(d) states in pertinent part as follows:

"At any time as required by the Assessor for assessment purposes, every person shall make available for examination information or records regarding his or her property or any other property located on premises he or she owns or controls. In this connection details of property acquisition transactions, construction costs, rental income and other data relevant to the determination of an estimate of value are to be considered as information essential to the proper discharge of the assessor's duties."

It is clear from the text of Section 441(d) that the taxpayers are not required to submit or mail copies of records. It requires only that the information or records be made available for examination. This is confirmed by Section 470 which states in relevant part:

"Business Records. (a) Upon request of an assessor, a person owning, claiming, possessing or controlling property subject to local assessment shall make available at his or her principal place of business, principal location or principal address in California . . . a true copy of business records relevant to the amount, cost and value of all property that he or she owns, claims, possesses or controls within the county."

The plain language of this statute requires taxpayers to make records available at his or her principal place of business, but there is no requirement or legal obligation for the taxpayer to submit copies of this information by mail or otherwise directly to the Assessor.

As there is no legal authority requiring the taxpayer to mail copies to the assessor and therefore the taxpayer cannot be non-compliant for failure to respond to an assessor's request to send copies of any requested information.

If, on the other hand, the Assessor requests a mutually agreeable time to meet for the purpose of inspecting the information requested at the taxpayer's primary place of business, then the taxpayer would have been required to comply with the request. Accordingly, any request or demand for information letter from the Assessor that cites Section 441(d) requesting that copies

be mailed or otherwise delivered to the Assessor is inconsistent with the statutory text. Any Board regulation regarding Section 441(d) requests must also be in keeping with this language.

(2) Assessor's cannot deny a taxpayer's right to a hearing or impose other consequences on taxpayers that are not set forth in statute.

Although CATA respects the Assessor's preference that the taxpayer provide copies of the information being sought, we find no legal support for some of the proposed consequences in the event that a taxpayer fails to comply. Specifically, there is no legal support authorizing the Assessment Appeals Board to compel the applicant to comply with the assessor's request for information nor to deny the appeal.

For example, in CAA's Guidelines Consequences it recommends that "unless you provide the following requested information by [insert date], the Assessor will request a continuance or postponement of your hearing, and ask the Assessment Appeals Board to require you to provide the requested information in advance of the rescheduled hearing date."

These statements are based on the erroneous assumption that the Assessment Appeals Board has the authority to compel taxpayer compliance with the Assessor's interpretation of Sections 441(d) and 470. However, the authority to compel compliance with these statutory discovery provisions is not now and never has been vested in the Assessor or the Assessment Appeals Board. Instead the authority to enforce compliance with Sections 441(d) and 470 is vested in the Superior Courts. This is so because there are criminal penalties which can be imposed under Section 462 for any taxpayer who actually refuses to make information or records available for examination at his principal place of business. These penalties include fines and imprisonment which can only be imposed by the Superior Courts.

Therefore, the Assessment Appeals Board has no authority to order taxpayer compliance nor does it have the authority to deny the taxpayer's application for failure to comply with the Assessor's request for copies of information and records. However, the Assessment Appeals Board does have some limited authority with respect to the discovery provisions of 441(d). This authority can be found under Section 441(h) which reads in part as follows:

"If a taxpayer fails to provide information to the assessor pursuant to subdivision (d) and introduces any requested materials or information at any assessment appeals board hearing, the Assessor may request and shall be granted a continuance for a reasonable period of time."

This continuance represents the only legal ramifications or consequences that may apply to a taxpayer who fails to respond to a Section 441(d) request. There is no legal provision that allows an assessment appeals board to deny the appeal or to compel the taxpayer to provide the requested information. Accordingly, the sole purpose of the continuance is not to compel additional compliance from the taxpayer, but rather to provide the Assessor additional time to review the materials or information that were requested but not received until the hearing. In other words, this continuance can be granted only if a taxpayer introduces information at a hearing which the assessor previously requested, that the taxpayer failed to make available for inspection before the hearing at the taxpayer's primary place of business.

Therefore, it is our contention that the Assessment Appeals Boards do not have the authority to compel the taxpayer to provide information to the assessor in a manner that is not accordance with Sections 441(d) and 470 of the Revenue and Taxation Code. We further suggest that the Assessment Appeals Boards do not have the legal authority to deny the taxpayer's application by refusing to proceed with the evidentiary hearing based on the Assessor's erroneous interpretation of the property tax laws. This is particularly true when it becomes clear that the authority to compel compliance with Sections 441(d) and 470 of the Code is vested in the Superior Courts. The jurisdiction of the Assessment Appeals Board is limited to granting a continuance under Section 441(h), which can only be exercised after the taxpayer has presented evidence at a hearing which was specifically requested in writing by the Assessor prior to the hearing and not made available for inspection by the taxpayer at his/her principal location of business prior to the hearing.

The most flagrant contravention of Sections 441(d) and 470 concerns one county that maintains two hearing calendars consisting of both "compliant" and "non-compliant" applicants. "Compliant" applicants become compliant only after the assessor informs the Assessment Appeals Board that they have satisfactorily complied with the Assessor's request for information. "Non-compliant" applicants are those who have not done so. The hearing is then automatically continued to a future date for the sole purpose of securing the taxpayer's full compliance with whatever information request the assessor has propounded. There is no legal support for this ongoing violation of taxpayer rights.

We also want to provide a brief discussion of State Board of Equalization v. Ceniceros (1998) 63 Cal. App. 4th 122, 73 Cal.Rptr.2d 539. First, the Court cited Midstate Theatres, Inc. v Board of Supervisors, supra, 46 Cal.App.3d at p. 208, which held, "A taxpayer has a right to a hearing on his property tax assessment, and if an application for a hearing is denied for insufficient legal reason there is a denial of due process."

In the Ceniceros case, the Court discussed that the Riverside Board of Supervisors passed local Rule 10 on July 12, 1994, which attempted to enforce "discovery procedures" on both the applicant and the assessor. If the taxpayer failed to comply with these pre-hearing discovery requirements the appeal would be denied. Concurrently if the assessor failed to comply with these pre-hearing discovery requirements the value as placed on the appeal by the applicant would be enrolled.

On October 8, 1996 the BOE filed for a writ of mandate seeking the revocation of Rule 10 by the Riverside Board of Supervisors. On that same day the Riverside Board of Supervisors amended Rule 10 removing the previously established consequences to both the taxpayer and the Assessor for failure to comply with these pre-hearing discovery requirements.

Nonetheless, the BOE proceeded forward with its efforts to have Rule 10 reversed for several reasons. One of the more important of these reasons was reiterated by the Court in its discussion portion of its ruling where it stated, "The SBE contends that if a taxpayer fails to comply with the assessor's request for information, the hearing on the taxpayer's assessment appeal will be

continued indefinitely until the taxpayer complies to the satisfaction of the assessor. It concludes that the appeal might never come to hearing, and Rule 10 therefore denies taxpayers due process."

The court went on to rule that these concerns raised by the BOE were not valid due to the protections afforded the taxpayer under Section 441(d), 441 (h) and 470. The court continued,

"Nothing in the rule provides or suggests that the hearing on the appeal will not be set until the taxpayer has complied with the assessor's demands for information. The rule says only that the hearing will be continued if (1) the taxpayer has failed to comply and (2) the taxpayer introduces evidence which should have been disclosed in response to the assessor's request. Therefore, the grounds for a continuance cannot be shown to exist until after the hearing has commenced.

"Nor does the rule provide that, once continued, the hearing may not be resumed until the taxpayer belatedly complies with the assessor's request and the assessor is satisfied with the adequacy of that response. The continuance is not designed to provide time for the taxpayer to make a further response to the assessor's request. The evidence having been disclosed by its introduction at the hearing, requiring another disclosure directly to the assessor would serve no purpose. Instead, the reason for the continuance of the hearing is to allow the assessor time in which to evaluate and attempt to rebut the previously undisclosed evidence introduced at the hearing by the taxpayer." [Emphasis added]

This court decision demonstrates that there is no legal authority requiring a taxpayer to provide copies of any information requested from the assessor in accordance with Section 441 (d). In addition, there is no legal support for any consequences other than a possible continuance being granted to the assessor in accordance with Section 441 (h). It is also important to note that the concerns raised by the BOE in its action against the Riverside Board of Supervisors regarding due process were valid. Assessment appeals are in fact being continued indefinitely until the taxpayer complies to the satisfaction of the assessor in at least one county which has formalized a Compliant/Non-Compliant hearing agenda as outlined earlier herein.

We look forward to working with the Board, Board staff, and all interested parties to further our mutual goals of transparency, fairness and consistency. Should you have any questions, please let us know.

Thank you for considering our views.

Sincerely,

Mardiros H. Dakessian
President
California Alliance of Taxpayer Advocates

cc: Hon. Diane Harkey, Chair, State Board of Equalization
Hon. Jerome E. Horton, Member, State Board of Equalization
Hon. Fiona Ma, Member, State Board of Equalization
Hon. George Runner, Member, State Board of Equalization
Hon. Betty T. Yee, State Controller
Charles W. Leonhardt, Plumas County Assessor, CAA President
John McKibben, California Association of Clerks and Election Officials
Dean R. Kinnee, Executive Director, State Board of Equalization
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