IMPROVEMENTS IN TAX PROCEEDINGS

1. BAA: Transparency in selection; creation of standards for and evaluation of performance.

The BAA is a quasi-judicial tribunal legislatively created within DOLA to hear appeals from decisions of the State DPT or a county BOE. C.R.S. §§ 39-2-123, 39-2-125. The only requirements for membership on the BAA are to be "experienced in property valuation and taxation" and "licensed or certificated" as Colorado appraisers. C.R.S. § 39-2-123(2). BAA members are selected by the Governor with consent of the Senate, and are not subject to term limits or state personnel system laws. *Id.* When asked, neither the BAA nor DOLA were able to point to any policy or consistency in the method used to advertise for BAA member positions, or for selection of the same. There is no statutory or regulatory method to evaluate performance of BAA members, and we can find no published standards to which BAA members must adhere.

The BAA's lack of transparency, hiring procedures, and performance review is unlike other judicial and quasi-judicial appointees. For example, Administrative Law Judges ("ALJ") are appointed by the executive director of the state department of personnel for the purpose of conducting hearings on matters that come before the office of administrative courts. C.R.S. §§ 24-30-1003, 24-50-103. ALJs are legally trained professionals who are subject to the standards of conduct set forth in the Colorado code of judicial conduct and performance standards, including requirements for preparedness and fairness/impartiality. *Id.* ALJs are also subject to performance review plans in line with the code of judicial conduct. *Id.*

Judges in Colorado are appointed by the Governor after being vetted by a judicial nominating commission in their district. Colo. Const., article VI, § 20. Judges are held accountable through a series of safeguards. After an initial two-year term, judges are subject to retention elections. Judges are also subject to performance evaluations and discipline through detailed statutory processes set forth in Title 13.

Given that the BAA handles matters that have significant monetary implications for taxpayers and local governments alike, there should be established and transparent processes around appointment of members to serve on the BAA, standards for performance, and mechanisms for performance review. Finally, the BAA should be held to standards that disallow actions running contrary to the principles of due process in quasi-judicial proceedings. For example, the judiciary may not subjectively select judges to sit on particular cases for particular parties across multiple disputes and multiple tax years, and cannot participate as both party/advocate and decision maker – yet, this is commonplace for the BAA.

2. BAA: Ability of Respondent to Move Case to District Court.

Taxpayers that are dissatisfied with a decision of a county BOE may choose one of three options for further appeal. They may submit the case to binding arbitration, or file a complaint in district court, or the BAA. C.R.S. § 39-8-108. Appeals from the BoCC decision on an abatement petition may only be filed with the BAA. Respondent counties have no input in which venue is selected or appropriate for consideration of the issue in dispute. However, the procedure of the available venues and legal training for the decision makers are vastly different. Often times, the BAA is required to consider legal issues (e.g., classification of property for tax purposes) or complex high-dollar valuation issues requiring significant discovery. In these scenarios, legal and evidentiary decisions are being made by BAA members without legal training, and are subject to no particular standards or codes of conduct. The BAA does not give ample time to parties for hearing, and has even prohibited the parties from making a record on appeal – indicating they don't want to hear "legal objections."

Additionally, despite the BAA's rules providing inadequate discovery parameters, relaxed evidentiary rules, and limited civil procedural rules, many petitioners treat the BAA as a venue for traditional litigation and employ tactics to exploit this informality. There should be a statutory mechanism to allow a respondent county to request to move or transfer a case that may have been filed in the BAA to the district court venue when the public interest requires (e.g., properties valued in excess of $20M; disputes involving legal issues). Providing this right to respondent counties aligns with similar rights provided to defendants and respondents in other contexts. *See,* 28 U.S.C. §§ 1441-1453; Fed. R. Civ. Pro. 81(c)(removal of case from state to federal court); C.R.S. § 13-6-408 (removal of a small claims case to county court); C.R.S. §§ 13-6-104 and 105 (specific limits on civil jurisdiction – certain types of cases, and cases with monetary implications over $25,000 must be heard in district, not county court). If legally trained County Court judges, subject to the code of judicial conduct performance standards and judicial discipline, are not allowed to hear cases with monetary implications over $25,000 (likely due to limited discovery and truncated procedure at county court), it is surprising the BAA often hears cases with hundreds of thousands (if not millions) of dollars at issue under even more limited discovery parameters, relaxed or nonexistent evidentiary rules, and abridged or limited-application of rules of civil procedure. Again, given significant monetary implications for taxpayers and local governments, the overall public interest concerns raised by certain types of cases favors a process governed by a more qualified decision maker in a venue with procedural rules that accommodate disclosure of and appropriate time to process the vast amount of information necessary to resolve such complex issues, as is more common in our survey of other state property-tax adjudication systems

3. **Tax Appeal Process: Removal of Disincentives to Reasonable Resolution and/or Penalties for False Reporting**

In Colorado, respondent counties are at an information disadvantage when conducting the mandatory income-approach to value non-residential real property. While property owners may be required to provide certain information to the assessor under C.R.S. § 39-5-115, or the county board of equalization under C.R.S. § 39-8-107, there is no penalty for failure to comply, for misreporting information, or from blatantly changing the information in the middle of proceedings to gain a litigation advantage. Attempts to gather relevant and reliable information is costly for counties; the inability to rely on information gathered is frustrating and undermines the entire system.

In contrast, for sales and income taxes, there are significant penalties for failure to disclose information to the Department of Revenue. *See e.g.,* C.R.S. §§ 39-21-118 (felony penalties for willfully making or aiding in the making of false statements in connection with application for refund of taxes; misdemeanor for negligent misrepresentation). The legislature should reform property-tax disclosure laws to include penalties for misrepresentations and/or requirements that property owners are bound by prior disclosures. In addition, the legislature may want to consider review of the penalty tax-refund provisions that provide 1% per month interest on any refund of taxes. This has become a perverse incentive to stall resolution of tax appeal cases through timely disclosures and prosecution of cases, since the potential refund interest provisions are so potentially lucrative.

4. **Tax Agents: Regulation of Conduct**

In Colorado, there is no requirement for licensure or regulation of persons (or employees of entities) designated as an agent to act on behalf of property owners and receive a fee in exchange for the analysis, protest or appeal of valuations for assessment. No regulation or oversight into this industry unfortunately leads to abuse of the system at expense of state and local resources. Many of these agents charge large fees or receive a percentage of their client's tax refund as commission, creating perverse incentives within the industry. This creates a system favoring unscrupulous tactics, disfavoring timely resolution of appeals, and lending itself to a concern that some

tax agents fail to actually act in the best interest of the taxpayer/client. Even so there is no penalty for these persons providing false information, withholding relevant information, or for mishandling of cases for their clients.

To avoid such abuses, many other states (e.g., California, Texas, Arizona, Illinois) have licensing and regulation programs for property tax agents and consultants. Given the growth of this industry in Colorado, and the increasing numbers of property tax appeals filed with the BAA and district courts across the state, the Colorado legislature should consider a licensing program for tax consultants (who are not already licensed attorneys). Tax agents should be subject to typical rules that apply to legal practitioners, including but not limited to the duties of conferral with opposing counsel, candor to the tribunal, timely disclosure of evidence, and overall compliance with the law.