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BY HAND

Reed Schneider, Esq.
General Counsel
New York City Tax Commission
1 Centre Street, Room 936
New York, NY 10007

Re: Comments on Proposed Amendments to the Rules Pertaining to Practice for Proceedings Before the Tax Commission

Dear Mr. Schneider:

The Condemnation and Tax Certiorari Committee of the Association of the Bar of the City of New York hereby offers the following comments to the proposed Amendments to the Rules Pertaining to Practice for Proceedings Before the Tax Commission:

1. Section 2-01(h)(4) requires representatives to verify the accuracy of facts stated in an application, and specifically excludes the reference to government records as constituting such verification. This provision unfairly shifts the burden of ascertaining and confirming facts from an applicant to its representative, who often does not have independent knowledge of the facts. Section 2-02(k), as proposed, requires representatives to respond to factual and other issues raised by the Tax Commission, and this should suffice without the additional requirement that representatives verify facts that are already sworn to by the applicant. Failure to comply with this rule can result in the denial or deferral of review (see 2-02(q)); as such, this requirement is beyond the scope of the Tax Commission's authority, as outlined in the New York City Charter (Sections 153 et. seq.)

2. The requirement set forth in Section 2-02(f) that claimed market value may not be based on a standard formula cannot stand. Market value is not determinable until all of the relevant facts are established. These facts are often not established until after the March 1 deadline for filing applications, in which the claimed market value and requested assessment must be stated. Consistent with the concept of notice pleading, an applicant should be permitted to assert a market value which is lower than that upon which the assessment is based, subject to further proof and arguments to be made at the hearing.

3. Section 2-02(n) permits the Tax Commission to require that the representative furnish a sworn statement "detailing the circumstances of the representative's employment on an application." This phrase does not specify what the Tax Commission would be seeking to learn, or why the Tax Commission might be interested in such information. We believe this permits the Tax Commission to require the disclosure of confidential information, which may be subject to the attorney-client privilege. In addition, we believe the Tax Commission lacks the authority to require the submission of such information, as it is not related to its mandated function of resolving assessment disputes.[1]

4. Section 3-01 permits the Tax Commission to prescribe forms for applications and related schedules. Proper completion of all requested information on each of the prescribed forms is a prerequisite to the Tax Commission's consideration of a claim for review of the assessment. As such, the forms themselves, as well as the instructions for their completion, are properly considered rules, insofar as they require substantive information to be submitted and carry with them the penalty of rendering an application unreviewable where they have not been completed to the Tax Commission's satisfaction.[2] Therefore, we believe that the Tax Commission must promulgate all forms, as well as all instructions that set forth requirements that must be met, in accordance with the requirements of the City's Administrative Procedure Act

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[1] See 439 East 88 Owners Corporation v. Tax Commission ("439 East 88 Owners"), Decision and Order at 18 (December 3, 2002, Schoenfeld, J. Sup. Ct. NY County) (rejecting the Tax Commission's attempt to impose a requirement that an applicant provide information relating to whether two individuals indicted in an assessment bribery scandal performed assessment services on behalf of the applicant's property as beyond the Tax Commission's authority, concluding "the information the Commission seeks is tangential at best and useless at worst . . .for the purpose of determining the value of real property.")

[2] See New York City Charter Section 1041(5) (defining a rule for purposes of triggering the procedural requirements of the City Administrative Procedure Act as "the whole or part of any statement or communication of general applicability that (i) implements or applies law or policy, or (ii) prescribes the procedural requirements of an agency. . .); compare Section 1041(5)(a) (further defining a rule as "any statement or communication which prescribes (i) standards which, if violated, may result in a sanction or penalty) with Section 1041(5)(b)(ii) (making clear that a rule does not include a "form, instruction, or statement or communication of general policy, which in itself has no legal effect but is merely explanatory. . .").

("CAPA") (See New York City Charter Section 1041 et. seq.) We consequently believe Section 3-01 should not be included in these proposed rules, as it would sanction the promulgation of Tax Commission forms and instructions without the necessary compliance with CAPA.[3]

5. Section 3-02(b)(v) requires a contract vendee to be bound by an "unconditional contract" to purchase the subject property before the Tax Commission will consider that vendee applicant to have standing. This is wholly inconsistent with prevailing law, which has defined an "aggrieved party" for purposes of standing to contest an assessment as one whose pecuniary interests are or "have the potential to be" adversely affected by the assessment.[4] In addition, as virtually all contracts are conditional (conditions commonly found in contracts of sale include financing, environmental concerns, the ability of the seller to convey clear title, etc.), the Tax Commission's rule would have the effect of rendering all but the most unusual of vendees legally ineligible to protest assessments or to file a petition under Article 7. We urge the Tax Commission to remove this restriction in its entirety.

6. The requirement that an application be verified or certified by a person (hereinafter referred to as a "signer") with "personal knowledge" is found in proposed sections 3-02(h) and (k)(1 through 3). "Personal knowledge" is not defined in the proposed rules, although Section 3-02(k)(3) seems to indicate that facts set forth in an application must be ascertained first-hand by a signer ("review by an agent of an applicant's books and records alone shall not provide sufficient basis to attain personal knowledge"). Although the Charter (Section 163b) requires that a signer have "personal knowledge" of all facts set forth in an application, such a requirement imposes a practical difficulty in light of the complexity and variety of the information now required by the Tax Commission's forms. A signer (who is required to be among a limited pool of people defined in 3-02(g)(1 through 5)) may need to rely on others to gather the detailed information required in present-day applications. Surely the Tax Commission does not intend for each signer to measure the square footage of the applicable property personally, and yet that information is required to be sworn to by a signer with "personal knowledge". This requirement would also seem to require that a signer verify income and expense information which, in many circumstances, has already been certified to by a CPA. We therefore respectfully suggest that a definition of personal knowledge be included in these rules which would permit an application to be signed

[3] See also 439 East 88 Owners at 13-14 ("That the statement shall be on a form prescribed by the Commission does not mean that the Commission has discretion to extend the areas of inquiry any further than they otherwise are. . . . Nor may the Commission 'bootstrap' or increase its own jurisdiction by administrative fiat, i.e., by promulgating rules that enlarge its powers.")

[4] See, e.g., Mott Haven Furniture Company, Inc. v. Finance Administrator of the City of New York, 497 N.Y.S.2d 213, 215 (S. Ct. Bronx Cty. 1985) (internal citations omitted).

where the signer's personal knowledge was obtained by reviewing information he or she believes to have come from a reliable source.

7. We believe that Tax Commission notification to the Department of Finance (per Section 4-01(c)) is unnecessary and inconsistent with the mission of the Tax Commission to "review and correct" assessments (see Charter Section 153), and with its statutory mandate to be an agency that is "independent of the Department of Finance." It is inappropriate for the Commission to suggest to another agency that it accomplish what the Tax Commission cannot. (See, e.g., Annual Report of The New York City Tax Commission 2004 at 1 ("The Tax Commission is the City of New York's independent forum for administrative review of real property tax assessments set by the Department of Finance") and 4 ("The bifurcation of the assessment administration and formal assessment review functions was completed in 1984. . . Since 1984, the Tax Commission has served exclusively as an autonomous review body.")) Furthermore, the Commission's conclusion as to value for the year it just reviewed often may be of little use in the Department of Finance's estimation of value for the subsequent tax year.

8. Section 4-02 (i) requires the Tax Commission to deny review of an application if the application contains inconsistent or false statements. The relevant statutory scheme does not permit the Tax Commission to deny review to an applicant on these bases. We are especially concerned about a pre-hearing, mandatory denial of review – as seems to be contemplated by the proposed rules – where the application may contain inconsistent information, without permitting the applicant to explain the apparent inconsistency at a hearing, and without regard for whether the inconsistency is material to the determination of the applicant's claim.

9. Section 4-10(k) directs a hearing officer to consider "arguments, records or other evidence offered by the Department of Finance, records of the Tax Commission, or facts within the knowledge and experience of the hearing office" when reviewing an application for correction. In the interest of fairness, we recommend that these rules also provide that where a hearing officer is considering such arguments, records and/or facts, that the hearing officer be directed to inform the applicant or its representative of such information, records and/or facts, and that the applicant/representative be given the opportunity to comment on the same, provide additional information and/or documentation with regard thereto, and be permitted to do so within a reasonable period after said information is communicated to the applicant/representative.

10. In keeping with the mandate to value real property only, Section 4-11(a)(1) should include a restriction that limits the applicability of recent arm's-length transactions as evidence of the value of a property to those

instances in which the asset sold included only real property, and did not include any non-realty components.

11. Consistent with its current practice, we recommend that Section 4-11(k) be amended to require the provision of a copy of a lease or memorandum of lease only where requested by the Tax Commission. As drafted, the provision seems to require the submission of a lease or memorandum of lease in each case where the applicant is a lessee. There are many instances in which a lease between parties is not relevant to the valuation (i.e., between related entities), and submission of the lease should not be required in such instances.

12. In addition to the several instances referred to above, the proposed rules contain many requirements which, if not met, may result in the denial and/or deferral of the review of an application (see proposed Section 2-02(q) ("The Tax Commission may deny or defer review of an application or withdraw an offer affected by a representative's or applicant's failure to comply with a rule in this section.") We identify such proposed rules below, and specify our objection thereto; we note that these proposed restrictions exceed the Tax Commission's authority pursuant to its enabling legislation.[5]

    a. Section 2-02(c) and Sections 2-02(b), (d) – although we of course do not condone the filing of false or fraudulent documents or information, we are concerned about the application of a standard that is based on the Tax Commission's judgment as to what a representative "had reason to believe" or "reason to know";

    b. Section 2-02(h) – the Tax Commission is without the authority to prohibit otherwise lawful notaries public from notarizing documents;

    c. Section 2-02(k) and Section 3-03(j) – the Commission is limited by the City Charter with respect to the information that it is entitled to require an applicant to furnish as a prerequisite to reviewing an application;

        i. We note in addition that access to some of the information specified in Section 3-03(j) is restricted by law, and other information, while not legally restricted, may be confidential or sensitive data. We are concerned that requiring the attachment of this type of information to an application risks disclosure of this information pursuant to requests for copies of documents

[5] (See 439 East 88 Owners at 19 (citing Acme Folding Box Co. Inc. v. Finance Admin., 67 AD2d 689 (2d Dept. 1979) ("Acme thus stands for the proposition that the Tax Commission may not, simply for its own purposes, increase the requirements for review beyond those imposed by statute."))

made under the Freedom of Information Law (see proposed section 4-14(b)).

d. Section 2-02(o) - To the extent a representative does not comply with a code of conduct that governs that representative's profession, there exists ample recourse to seek punishment of that representative. The Charter, however, does not permit the Tax Commission to deny or defer review of an application on this basis;

e. Section 2-02(v) – this section permits the Tax Commission to publish a notice of a determination to deny or defer review for a representative's failure to comply with one of the rules proposed in this section, yet provides no recourse to the representative to challenge his or her alleged failure to comply;

f. Section 2-05(j) – although we urge practitioners to comply with the Tax Commission's request for electronic data in the formats that may specified by the Tax Commission, the Commission lacks the authority to defer review of applications or reject an applicant's request for a hearing where technical problems arise with a representative's application data file.

13. To the extent that Section 4-09(e) permits the Tax Commission not to hold a hearing where such is requested by an applicant otherwise entitled to same, it is inconsistent with Section 164(a) of the Charter.[6]

14. The requirement found in Section 4-09(l)(1) requiring all applicants for review of condominium unit assessments within the same condominium, tax class and use must designate a single representative to appear in support of their applications is beyond the scope of the Tax Commission's authority.

15. Insofar as Section 4-11(b)(3) permits the use of comparable sales as evidence of the value of a residential cooperative or condominium, it is inconsistent with the requirements of Real Property Tax Law Section 581.

Respectfully submitted,

Joel Ditchik
Chair

[6] See, e.g., 439 East 88 Owners at 21 (referring to New York City Charter Section 164(a), the Court states "This sentence takes as a given that the Commission will hold a hearing, and addresses only the question of the location thereof.")