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The Honorable Steve Bieda
State Representative
State Capitol
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306 Townsend Street

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Lansing, MI

48933-2012

RE: HB 4433 Michigan Tax Tribunal

Dear Representative Bieda:

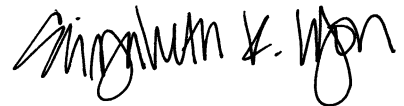
At its July 20, 2007 meeting, the State Bar of Michigan's Board of Commissioners unanimously voted to **support in principle**¹ **HB 4433**. The State Bar also adopted the position of the Alternative Dispute Resolution Section that includes recommendations for amendments and clarifications (see enclosed). The State Bar commends your efforts to encourage the use of alternative dispute resolution.

If you would like to discuss this position in further detail or have questions, please contact Janet Welch directly at (517) 346-6331, jwelch@mail.michbar.org; or Elizabeth Lyon directly at (517) 346-6325, elyon@mail.michbar.org.

Sincerely,



Janet Welch
Executive Director



Elizabeth K. Lyon
Director, Governmental Relations

CC. Kimberly M. Cahill, President
Nell Kuhnmuensch, Governmental Consultant Services, Inc.

¹ Definition of support in principle: pending legislation that the State Bar supports, but that is not the subject of active lobbying effort. The State Bar is on record on this position and will explain it upon request.

ALTERNATIVE DISPUTE RESOLUTION SECTION

STATE BAR OF MICHIGAN

Comments and Recommendations on HB 4433

Comments Regarding HB 4433

1. Section 31(C) would give the Tax Tribunal “exclusive and original jurisdiction” over mediation of a matter under the Tribunal’s jurisdiction. Those matters include:

- (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws; and
- (b) A proceeding for refund or redetermination of a tax under the property tax laws.

Comment:

Does “exclusive and original jurisdiction” mean that the parties are not free to mediate a property tax dispute except pursuant to this section? If, as HB 4433 proposes, mediation would only occur if the parties file a stipulation agreeing to mediation, it would seem all that is necessary is that the amendment merely authorize the Tax Tribunal to permit or allow mediation of a property tax dispute. Actually, rather than make it a jurisdictional issue, it seems it would be better to have the amendment encourage the use of mediation and, perhaps, authorize the Tribunal to order it where it deems it appropriate.

2. Section 32(E) would include among the powers granted to the Tax Tribunal by the Tax Tribunal Act the power of “Mediating a proceeding before the tribunal.”

Comment:

Is “mediating a proceeding” really a power of the Tax Tribunal? The Tribunal is not doing the mediating. It is merely authorizing, encouraging, permitting, etc. the mediation of a property tax dispute by the parties. Rather than make mediation a power of the Tribunal or make mediation a matter over which the Tribunal has exclusive and original jurisdiction (see Comment 1), it seems it would be better to simply have the Tribunal provide a process for mediation or other alternative dispute resolution processes in the Tax Tribunal rules, just as is done in the Michigan Court Rules. The system works well there and should work equally well in the Tribunal. This could be done by amending the quoted language to read: “Referring a proceeding to mediation.”

3. Section 47 provides for certification of a mediator by the Tax Tribunal. These certification provisions raise several issues.

A. What is “certification?”

Comment:

What is “certification?” Even the Michigan Court Rules, which have enabled mediation in state courts for many years, do not provide for “certification” of mediators. Instead, MCR 2.411 (general civil) and MCR 3.216 (domestic relations) both provide for the “qualification” of mediators. Under both rules, to be a qualified general civil or domestic relations mediator, the applicant must certify and demonstrate that he or she meets the training and internship requirements set forth in the court rules, which include satisfactory completion of a 40-hour mediation training program. It is suggested that, instead of certification, the legislation authorize the Tax Tribunal to adopt rules for qualifications of mediators in Tax Tribunal cases. Furthermore, the ADR Section recommends the qualifications in MCR 2.411.

B. The certification is for a one year period, and the Tribunal may charge an annual certification fee.

Comment:

Why annual certification? This appears to add an unnecessary administrative burden on the Tax Tribunal and on mediators. If qualification is to be required, why not make it for 3 or 5 years? Why not simply adopt MCR 2.411 which specifies the qualifications for mediators and then impose a periodic continued training requirement, where the mediator has the burden of submitting documentation to show compliance with the requirement?

The potential for an annual certification fee may keep many qualified mediators from applying for certification and also adds an administrative burden for the Tribunal and its mediators.

B. Pursuant to section 47(2), Tax Tribunal rules would establish requirements to be certified as a mediator which would include “5 years of state and local tax experience that occurred immediately preceding submission of the application.”

Comment:

(1) Is state and local tax experience really necessary, especially where the matter most commonly at issue is valuation? Mediators are taught that subject matter experience is not necessary and that the skills employed in the mediation process are most important. It seems that experience is a desirable requirement if the process permitted the Tribunal to appoint a mediator without the parties’ approval, but it does not. Since it does not, the parties should have the opportunity to mediate before a person without state and local tax experience if they so choose.

(2) What will constitute “5 years of state and local tax experience?” Our members with experience in the Tax Tribunal believe that, if and to the extent subject matter experience is important, the most important experience necessary is knowledge of appraisal theory and appraisal methodology. Thus, the best person to mediate a property tax dispute might be an appraiser who has completed an SCAO approved mediation training program. Such a person would bring his or her knowledge of appraisal methodology to the table along with the skills of a trained mediator to help test the parties’ own valuation methodologies, but such a person may not possess “state or local tax experience” per se.

(3) While it is not mentioned in HB 4433, formal mediation training should be a requirement. Beyond that, no specific subject matter experience should be required.

(4) If any experience is to be required, the requirement should be broadened to encompass experience in appraising property, analyzing appraisals, representing parties in property valuation matters (this could include eminent domain cases), etc.

C. Section 47(5) provides that the Tribunal “shall mediate” a matter before it if a) the parties file a stipulation agreeing to the mediation; b) the parties agree to a mediator, and c) the Tribunal issues an order designating the proceeding for mediation.

Comment:

Instead of saying the Tribunal “shall mediate” a proceeding, it would be better to say the Tribunal “rules shall provide for mediation” where the parties agree. It is the parties and the mediator who mediate, not the Tribunal.

As proposed, and unlike under the MCR, the amendment does not allow the Tax Tribunal to order a case into mediation unless the parties agree. This probably is a good start and taking the next step (giving the Tribunal the power to order mediation without agreement from the parties) would probably bring on strong opposition and doom the proposal.

Provision should simply be made in the Tribunal's rules for mediation upon agreement of the parties as early in the tax appeal process as possible (before both sides incur the expense of formal appraisals), but retaining the ability to have a mediation later in the process after appraisals have been exchanged.

There should also be a provision permitting the Tribunal to appoint a mediator from its list on a round robin basis where the parties agree to mediate but cannot agree on a mediator.

D. Section 47(7) (A) provides for the mediator to file a report “in a form prescribed by the Tribunal.”

Comment:

The report should be limited to the information allowed by MCR 2.411(C)(3); i.e., date of completion of the process, who participated in the mediation, whether settlement was reached, and whether further ADR proceedings are contemplated.

Recommendations

The attempt to provide for mediation of property tax disputes is laudable and represents a positive step toward the efficient resolution of such disputes in a fair and cost effective manner. The bill's proponents and drafters are to be commended for this effort.

The ADR Section of the State Bar of Michigan recommends, however, that HB 4433 be amended to provide for the following elements:

1. Authorization for the Tax Tribunal to provide in its rules for alternative dispute resolution processes, especially mediation. Then the details of the mediation and mediator qualification process can be detailed in the rules (similar to the MCR) rather than in the statute. In which case, the rules promulgated by the Tax Tribunal should be as similar as possible to those in the MCR [i.e. 2.410, 2.411 and 3.216].
2. If the details of the mediation and mediator qualification process are retained in the statute, they should conform as much as possible to those in MCR 2.410, 2.411 and 3.216.
3. That the ADR rules promulgated by the Tax Tribunal (or the legislature) provide for establishment of a list of *qualified* (as opposed to *certified*) mediators who meet established training requirements like those established by the MCR, including mediation training and observations.
4. If an experience requirement is part of the qualification process, the required experience should be more broadly defined but be capable of objective review and determination; and should be in the Tax Tribunal rules, not the statute..
5. That the proposed annual certification process be removed from the statute and replaced with a rule for the qualification process similar to that found in the MCR whereby the mediator must periodically submit evidence of continued training, but no earlier than three years after initial qualification.
6. That the report filed with the Tax Tribunal be limited to providing information only as to who participated in the mediation and whether the mediation was successful or not and permit no other information to be provided in order to preserve the confidentiality of the mediation proceedings. See MCR 2.411(C)(3).