REPORT AND RECOMMENDATIONS OF LGA AD HOC COMMITTEE ON LOCAL TAX APPEAL PROPOSALS

I. Formation and Charge of the LGA Ad Hoc Committee

On April 5, 2006, Andrew McRoberts, President of the Local Government Attorneys of Virginia, Inc. (LGA), formed an ad hoc committee to study Recommendation 4-2.3.6. of the Supreme Court Commission on Virginia Courts in the 21st Century ("Commission") and Senate Bill 333 considered by the 2006 Session of the Virginia General Assembly. The ad hoc committee is tasked with developing a local government response on these proposals and recommending an official position for consideration by the President and Board of Directors of the LGA.

The ad hoc committee is known as the LGA Committee on Local Tax Appeal Proposals (hereinafter sometimes referred to as "the LGA Committee" or "the Committee"). The Committee members are Ellen Posner, Assistant County Attorney for Fairfax County; Karen Adams, Senior Assistant County Attorney of Henrico County; Ara Tramblian, Deputy County Attorney for Arlington County; Karen Snow, Assistant City Attorney for the City of Alexandria; Barbara Rose, retired from Hanover County; Debra Mallory, Taliaferro & Mallory, LLP; Christopher Boynton, Senior City Attorney for the City of Virginia Beach; Karen Stapleton, Assistant County Attorney for Loudoun County; and serving as Chair, Jan Proctor, Deputy City Attorney of Chesapeake.

With such a large and talented group, there were a number of opinions and comments to assess and assimilate. The following report and recommendations reflect a consensus of the Committee. In general, the Committee believes that the LGA should take a strong position against the proposals set forth in the Commission Recommendation and Senate Bill 333.

II. Overview of Senate Bill 333

Senate Bill 333 was introduced to the 2006 General Assembly by Senator Mark Obenshain, based on a proposal by the VBA Tax Court/Litigation Study Committee. The proposed legislation requires that judicial appeals of certain state and local real taxes brought under Section 58.1-1825 or Section 58.1-3984 of Virginia Code be subject to new procedural rules. The stated purposes for these special rules include reducing litigation costs for both the taxing authority and the taxpayer, creating more efficient proceedings, narrowing the controversy to a simple set of facts and disputed issues, and providing for more expeditious rulings by the court.

Upon learning of Senate Bill 333, local government officials began to raise questions over the substance of the bill and development of the proposal without the involvement of local government attorneys. The LGA, through its President, immediately took action to register preliminary concerns with the Virginia Municipal League, the Virginia Association of Counties and members of the VBA Committee that developed the proposal.

In response to the LGA and other local government organizations, the VBA Committee offered to remove local taxes from Senate Bill 333 if each organization participated in a cooperative study to improve the procedural rules applicable to local tax litigation. The goal would be to render the procedures acceptable to local governments for inclusion in the law next year. The LGA President agreed to study the rules but refused to promise unconditional support of any resulting legislation.

On February 8, 2006, Senate Bill 333 was continued to the 2007 Senate Committee on Courts of Justice.

III. Overview of Commission Recommendation 4-2.3.6.

On March 8, 2006, the Commission adopted Recommendation 4-2.3.6. to create a new forum or process to address state and local tax disputes. The reasons cited mirror those given by the VBA in support of Senate Bill 333. In addition, the proposed procedural changes discussed by the Subcommittee are largely identical to those set out in Senate Bill 333.

On March 16, 2006, the Commission on Virginia Courts in the 21st Century took a non-binding advisory vote that did not approve Recommendation 4-2.3.6. The Commission will discuss the matter further on June 19, 2006.

IV. General Comments

Due to the duplicative content of Senate 333 and Commission Recommendation 4-2.3.6, the LGA Committee has combined general and specific comments to cover both proposals (collectively referred to herein as "the Proposals"). In broad terms, the Committee feels that the Proposals are based on erroneous assumptions and a fundamental misunderstanding of local tax cases. The Commission Recommendation repeatedly states, without any substantiation, that the current tax litigation system is inefficient and flawed. The proposed procedural changes will allegedly save the taxpayer and the taxing authority time, money and other resources.

In fact, however, any local government attorney familiar with erroneous tax assessment cases instantly realizes that the proposed rules will have the opposite of the intended effect. They will deny the parties basic rights of discovery, such as the right to take the deposition of a non-party. They will

subject attorneys to show cause hearings for refusing to reach stipulations. And perhaps most counter-productive to the objectives of the Proposals, the suggested changes will delay proceedings and result in additional expenses by encouraging, if not facilitating, unnecessary motions practice.

The Proposals represent an extraordinary departure from the manner in which erroneous local tax cases have been traditionally litigated in Virginia. Indeed, they represent an extraordinary departure from the manner in which any civil case is litigated. The proposals set out in Senate Bill 333 and Commission Recommendation 4-2.3.6 will have a substantial, adverse impact upon a local government's ability to reasonably respond to, address, and defend the myriad of real estate, personal property, machinery and tools, merchant's capital and business license tax claims presented in erroneous tax assessment cases filed throughout the Commonwealth.

V. Procedures under Current Law

Under current law, an aggrieved taxpayer has several avenues of relief from an erroneous local tax assessment. First, the taxpayer may file an administrative appeal with the tax official. State law requires the tax official to correct most types of assessment errors raised by a taxpayer or discovered independent of taxpayer claims. If no error is found in an administrative appeal, the tax official must provide a written determination explaining the reasons that the appeal is denied.

In the case of real estate assessments, a landowner may also appeal to the local board of equalization. These boards consist of citizens appointed by the circuit court (in most jurisdictions) and charged with hearing taxpayer complaints regarding non-uniform or erroneous assessments of real property. In many localities, the taxpayer need not file an administrative appeal with the taxing official as a precondition of filing an application with the board of equalization.

In the case of business personal property and business license tax, state law provides a streamlined process by which the taxpayer may appeal the determination of the local assessing official to the Virginia Tax Commissioner.

In both instances, the appeal process is procedurally straight-forward, involves minimal expense and provides for timely decision-making by an independent review body. However, should the taxpayer wish to forego these administrative remedies, an application to correct erroneous local taxes is usually filed directly with the circuit court. In the alternative, the taxpayer may pursue unsuccessful administrative appeals to the courts.

Pursuant to Section 58.1-3984 of the Code of Virginia, erroneous tax cases are considered actions at law that are tried without a jury. The Rules of the Supreme Court of Virginia govern discovery, pretrial and trial procedures in

erroneous tax assessments cases. All attorneys in Virginia must abide by these Rules and are presumed to know their meaning and application. Although the Supreme Court Rules are revised from time to time, the Rules are generally considered void of serious defect. Thus, the Proposals are not necessary to address any loud outcry of injustice or belief that the Rules are fundamentally flawed, unfair or overly burdensome. The Rules work well in erroneous local tax cases and do not warrant the changes advanced by the Proposals.

Despite the simplicity and convenience of the current administrative and judicial appeal system, the Commission believes that i) localities are inconsistent in the interpretation and implementation of tax laws; ii) decisions by the Virginia Tax Commissioner effectively result in the promulgation of regulations without due process and produce an inconsistent body of interpretative law; and iii) circuit court procedures allow localities to demand duplicative and irrelevant documents and information, thereby causing unnecessary inconvenience and expense to the taxpayer.

VI. Proposed Procedures

In order to cure these alleged but unsubstantiated ills, the Proposals recommend a number of changes to the procedures currently applicable in circuit court proceedings. These procedures will set erroneous local tax cases apart from all other general civil proceedings by substantially limiting a locality's ability to discover relevant facts and argue disputed issues at trial.

As previously mentioned, Commission Recommendation 4-2.3.6 and Senate Bill 333 recommend nearly identical changes in the current discovery and trial procedures for erroneous local tax cases. The most unreasonable of these recommendations relate to depositions, stipulations and the creation of a new set of rules for "small tax cases." The following discussion centers on the flaws of the proposed changes.

A. Depositions.

Under Rule 4.5 of the Rules of the Virginia Supreme Court, depositions of parties, including that of the taxpayer and the local tax official, and of nonparty witnesses may be taken as a matter of right without a court order. The unfettered right to take depositions of knowledgeable persons is the hallmark of civil discovery. In the specific setting of an erroneous local tax case, depositions provide an opportunity for the taxpayer to explain why the assessment is believed to be in error. Depositions also provide an opportunity for the local assessing official to explain how the assessment was made, including methodologies applied and information used to support the assessment. Not only is this exchange essential to trial preparation but often leads to stipulations and the settlement of cases.

Under the Proposals, the deposition of a party or non-party witness may only be available by consent, as set forth in a stipulation filed with the court. If a party refuses to consent to the deposition, a motion must be filed with the circuit court, a hearing scheduled, and a court order obtained before the deposition can be held. Such a concept is without precedent, injects into the proceedings unnecessary, time consuming, and costly motion and hearing practice, and would thwart, as opposed to enhance, the discovery process.

In addition, unless the parties consent otherwise, the taking of depositions of nonparty witnesses, referred to as "an extraordinary method of discovery," must await notice for trial. This departure from accepted practice could also operate to frustrate discovery, as opposed to facilitating it. If a party is forced to wait, a knowledgeable person with relevant information may die, retire, or relocate. Relevant documents may be lost, destroyed or become otherwise irretrievable. Consequently, the party seeking the deposition would be compelled to expend time and resources in an effort to obtain evidence and locate unavailable witnesses, and perhaps be required to travel to other jurisdictions to subpoena and depose persons with knowledge of facts in dispute..

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Moreover, again unless the parties consent to the deposition, the Proposals mandate that a party seeking to depose a nonparty witness show that the information sought cannot be obtained through another source. This concept requires yet another motion and court hearing, leading to additional fees and expenses. In addition, another information source, such as a document (that may or may not exist), may not be as reliable as the sworn testimony of a live witness. The evidence gleaned from the alternative source may be confirming, contradictory, or materially different from the testimony of a live witness or may serve as proof on an entirely different matter. The Rules of the Virginia Supreme Court have long recognized that different source materials may lead to different evidence and therefore, allow for alternative means by which discovery may be undertaken. Akin to the right to take depositions, the right to utilize all means of discovery is essential to zealous representation and should not be disturbed.

The Proposals also require that a transcript be prepared of every deposition, which under current rules is a matter of choice for the parties. This imposition will result in higher and often unnecessary expense, for both the taxpayer and the taxing authority.

B. Stipulations.

The recommendations in the Proposals regarding stipulations will undermine the accepted practice and purpose of stipulations. Under current practice, stipulations are voluntary, encouraged, and welcomed. Counsel routinely stipulate to matters that are not genuinely in dispute or not at issue.

Under the Proposals, parties will be effectively forced to stipulate and face the imposition of a show cause order if they decline one or more stipulations. The parties are required to enter into comprehensive stipulations to the fullest extent to which agreement can be reached or "fairly should be reached." This subjective standard will apply to stipulations concerning opinions, facts, application of law, documents, exhibits and all other evidence "which fairly should not be in dispute." Objections as to materiality or relevance may be noted but are not to be considered "just cause" for refusal to stipulate.

Stipulations shall be considered conclusive admissions, unless the parties agree otherwise or a court rules to the contrary. The Proposals go so far as to prohibit the court from qualifying, changing or contradicting a stipulation unless justice requires.

If a party refuses to make a stipulation, the other party may file a motion to show cause why the stipulation should not be admitted. A show cause order shall be entered and served upon the party refusing to the stipulations. The party must respond to the court. If the party on whom the show cause order is served fails to respond, or responds in a manner deemed evasive, the court shall order the stipulation.

This procedure is a radical departure from common practice and requires additional motions and hearings. It may also have a chilling effect on bringing truth to light. Parties may feel coerced into stipulating to disputable facts or other matters they reasonably believe are not supported by the evidence. Such a practice could undermine the elements of fair trial, possibly depriving the parties of due process.

C. Small Tax Cases.

The Proposals allow a petitioner to elect to have the case tried as a "small tax case" if the amount of the claim does not exceed $50,000. The case is to be conducted in an informal manner. No answer is to be filed unless the respondent carries the burden of proof on any issue or unless the court so directs. Trials shall be conducted informally, without briefs or oral argument, unless requested by the court.

While the concept of a small tax case is not without some merit, the idea as presented is vague and undeveloped. The proposed process is devoid of any procedural formality with respect to pleadings, discovery and evidence. As discussed earlier in this report, taxpayers are currently afforded informal and inexpensive means by which they may challenge local assessments and seek review by neutral and professional third parties. The proposed "small tax case" appears to unnecessarily duplicate these procedures, thereby wasting public resources and contravening principles of judicial economy.

Moreover, without developing some boundaries for the "informal" judicial proceedings, the small tax court practice will be unworkable and undoubtedly lead to time consuming and costly motions and hearings in an attempt to understand the intent of the legislature.

VII. Conclusions

Based on the foregoing analysis, the LGA Committee has reached a consensus on the following points:

1. The Proposals are based on erroneous assumptions that the current procedures for local tax cases are overly burdensome and ineffective; that localities have a limited need to conduct discovery; and that local officials may use the discovery process to harass petitioners by requesting irrelevant and duplicative information. These assumptions are made without any supportive evidence, anecdotal or otherwise, and appear to be derived from a misunderstanding of erroneous local tax cases.

2. The Proposals will not accomplish the stated goals of streamlining litigation and protecting the parties from unnecessary expenditures of time, money, and resources. In fact, the Proposals will have the opposite effect by cluttering the process with additional motions and hearings that will undoubtedly be necessary if either of the litigants wishes to conduct full discovery or object to a stipulation. In addition to resulting in increased attorney's fees, the Proposals will add directly to costs by imposing new rules such as the mandated transcription of depositions.

3. The Proposals will segregate local and state tax appeals from all other types of general civil litigation. The special rules are not warranted either by extreme complexity or simplicity of erroneous tax cases. They are neither exceptionally difficult nor easy cases to try. Like all other civil cases, local tax appeals require preparation, including obtaining documents that the taxpayer may not have produced during the tax assessment process and deposing witnesses such as financial officers or knowledgeable employees.

4. The Proposals will unnecessarily restrict the right of the parties to take depositions. This practice is more likely than not to be detrimental to the parties. Facts are often in dispute in local tax appeals and should be fleshed out to the greatest extent possible before trial. Clarification of facts and issues often leads to non-suits and settlement. Moreover, the court procedures that must be pursued simply to take a deposition when the opposing party denies consent will lead to additional time and expense for the litigants, again defeating the purposes that the proponents hope to achieve.

5. The Proposals will mandate comprehensive stipulations concerning all matters at issue upon which the parties should fairly agree. This standard is subjective and will likely give rise to disputes on its meaning and application. In addition, the burden is placed on a party disagreeing with a stipulation to show cause before the court why the stipulation should not be admitted. This restriction is perhaps the most extraordinarily unwarranted and most extreme of the proposals. Instead of allowing the parties to have their "day in court" to present their evidence and tell their side of the story, the rules may force the parties to compromise and concede the facts, issues and even application of law long before the trial is held. This type of procedure is unprecedented and may go so far as to result in coercive tactics and denial of procedural due process.

6. The Proposals will allow taxpayers seeking $50,000 or less in monetary relief to elect an "informal" proceeding as a "small tax case." This concept is undeveloped and unnecessarily duplicative of existing administrative appeal procedures.

VII. Recommendations

Based on the foregoing conclusions, the Committee recommends that the LGA take a strong position in opposition to the Proposals. Both the Commission Recommendation and Senate Bill 333 are unwarranted, unfair and will lead to protracted and more costly litigation. Perhaps most egregiously, the Proposals could ultimately lead to uninformed decision making to the detriment of tax law, localities, and in some cases, non-prevailing taxpayers.

The LGA Committee also recommends that a task force be formed, including representatives from affected groups such as the LGA, the Virginia Municipal League, the Virginia Association of Counties, the Virginia Association of Assessing Officials, and the Commissioners of the Revenue Association of Virginia and the Treasurer's Association of Virginia, to thoroughly examine local erroneous tax cases to identify true deficiencies in the process, if any, and develop appropriate and reasonable reform measures as may be necessary. Such reform measures may include mandatory pre-trial orders and settlement conferences, as currently used in Fairfax County and other jurisdictions that defend numerous and complicated tax appeals every year. The expertise of these localities should be used to formulate enhancements to the current efficient processes available to taxpayers wishing to challenge local tax assessments.

Respectfully Submitted,

LGA Ad Hoc Committee on
Local Tax Appeal Proposals