
MEMORANDUM

OFFICE OF THE ATTORNEY GENERAL

TO: Chair of Senate Committee on Finance, Senator Ann Cummings
Chair of House Committee on Ways and Means, Representative Janet Ancel

CC: Cheryl Ewen, cewen@leg.state.vt.us, Sorsha Anderson, sanderson@leg.state.vt.us

FROM: Sarah London, Chief, General Counsel and Administrative Law Division

RE: Report pursuant to Act 73 (2017)

DATE: December 1, 2017

The Attorney General's Office submits this report pursuant to Section 28 of Act 73 of the 2017-2018 legislative session. Act 73 states in relevant part:

- (a) The Attorney General, in consultation with the Vermont League of Cities and Towns, property owners, and other interested stakeholders, shall study approaches to assisting municipalities with expenses incurred during litigation pursuant to 32 V.S.A. chapter 131, including assigning an Assistant Attorney General to the Division of Property Valuation and Review to support municipalities litigating complex matters.
- (b) On or before December 1, 2017, the Attorney General shall submit a report to the Senate Committee on Finance and the House Committee on Ways and Means on the findings of the study described in subsection (a) of this section. The report shall include recommendations for legislative action based on the findings of the study.

Section 28, Act 73 (2017).

In creating this report, the Attorney General's Office consulted with the Vermont League of Cities and Towns, a representative from the Vermont Association of Listers and Assessors (VALA), the Tax Department, and private counsel who have handled property valuation litigation on behalf of cities and towns.

This report consists of six sections:

- I. Background of Property Valuation and Litigation;
- II. Current Legal Services for the Tax Department;
- III. The Property Tax Appeals Process;
- IV. Data Collected;
- V. Feedback from Stakeholders; and
- VI. Recommendations and Options.

I. Background of Property Valuation and Litigation:

Approximately seventy percent of revenues from local property taxes go to the Vermont Education Fund, which is then redistributed back to municipalities as mandated by the Vermont Supreme Court. The work of valuing property for property tax assessment, and defending those values, is largely placed on towns. These values, sometimes determined through litigation, become the state-wide grand list.

The State has no specific authority over the values determined at the municipal level – the State has an advisory role through the Tax Department’s Division of Property Valuation and Review (PVR) and its district advisors, and through Department legal opinions. In larger municipalities, professional assessors often oversee property valuation. In smaller municipalities, volunteer listers often oversee the values. The difference in the qualifications of assessors can create perceived discrepancies in the quality of the valuations.

The Department of Taxes is responsible for determining the equalized education grand list. The calculation begins with the municipalities’ grand lists.

Municipal valuation appeals can create a discrepancy between the municipal grand list and the equalized education grand list because the equalized grand list needs finality every March 15 for the Education Fund and education tax rates. However, municipal tax appeals can take time to resolve, particularly if there is appellate review.

Towns are cautious with respect to this discrepancy when the property owner prevails, because it is possible that the property owner could owe an amount of state education tax less than the town owes to the State. There is at least anecdotal evidence of municipal tax appeals settling prior to March 15 so that a town does not risk responsibility for education tax “out-of-pocket.” From the perspective of certain State stakeholders, the concern is that towns would rather settle and have certainty than litigate defensible fair market values. From the perspective of municipal stakeholders, the concern is that the expense of defending market values, particularly against well-financed interests, may not make sense when – from a town’s perspective – 70% or more of the benefit goes to the State.

The Legislature has provided for a mechanism of reconciliation after a property tax appeal. 32 V.S.A. § 5412. Before 2017, a municipality could only apply to the State for reimbursement of the Education Fund taxes refunded to a party who successfully appealed a property’s value if the value of the municipality’s grand list was reduced by at least one percent as a result of the reduction of the value of the parcel. If the reduction was less than one percent, a city or town would bear the financial burden with respect to making successful property tax litigants whole.

Earlier this year, the General Assembly passed Act 73, which replaced the one percent limitation on property tax appeal adjustments with an annual cap of \$100,000 for total reimbursements to all eligible municipalities across the State. Municipalities may now request the adjustment annually by January 15, for an appeal resolved within the previous calendar year. Under the terms of Act 73, the Director of Property Valuation and Review within the Tax Department shall distribute the \$100,000 on a pro rata basis to all eligible municipalities as necessary.

Another provision of Act 73 asked the AGO to study and make recommendations for legislative action to assist municipalities that litigate property valuation matters, “including assigning an Assistant Attorney General to the Division of Property Valuation and Review to support municipalities litigating complex matters.”

II. Current Legal Services for the Tax Department:

All litigation and most general counseling services for the Tax Department are provided by Assistant Attorneys General assigned fulltime to the Department. For 2018, the Department expects to have five AAGs, one administrative assistant and one paralegal. The five AAGs include the Director of the Tax Unit, who also serves as General Counsel to the Department and supervises the Legal Unit. The Director, in conjunction with staff at the AGO central office, has assisted municipalities in handling complex tax appeal litigation involving TransCanada and the valuation of hydro-electric properties. The Director’s general counseling responsibilities include the review and approval of contracts, public record act requests, and consultation with Department leadership on legislative and policy matters. The other AAGs handle some general counseling, particularly to the Division of Property Valuation and Review, tax collections and appeals. In FY2017, the Legal Unit handled approximately 250 administrative and judicial matters, including appeals to the Vermont Supreme Court.

Included in the litigation handled by the Tax AAGs are cases initiated by municipalities against the State. A town may appeal its equalized education property value, which is set by the Tax Department’s Division of Property Valuation and Review annually by January 1. The appeal is first to the Director of PVR, then to the statewide Valuation Appeal Board, then to Superior Court. Most appeals are resolved at the Director level, but some go to Court. *See In re Appeal of the Town of Stowe*, Docket No. 77-4-15 Lecv; *Town of Bethel v. State of Vermont, Dept. of Taxes, Division of Property Valuation and Review*, Docket No. 36-1-13 Wrcv; *Town of Williston v. State of Vermont, Dept. of Taxes, Division of Property Valuation and Review*, Docket No. 643-6-13 Cncv.

III. The Property Tax Appeals Process:

Challenges to property tax assessments can follow either of the below paths, with both paths leading ultimately to the Vermont Supreme Court.

Local Assessor

Board of Civil Authority

Property Valuation Hearing Officer (formerly State Appraiser) OR Superior Court

Vermont Supreme Court

IV. Data Collected:

The Attorney General's Office sought to poll stakeholders to determine the volume of property tax assessment appeals at the various levels of appellate review noted above.

In 2016, there were five published property valuation appeals involving municipalities at the Vermont Supreme Court. Three were published decisions and two were unpublished decisions.

The AGO reached out to the Judiciary regarding the annual number of property tax assessment appeals in superior court. Previous legislative reports on this topic have stated the following:

There are no regularly published statistics on the number of appeals or the disposition of appeals filed in the Superior Court. In response to an inquiry, an ad hoc report generated from the Court's case management system indicated that there were 30 appeals filed during calendar year 2012 in Superior Courts around the State classified as "Appeal-Tax". In calendar year 2013, that number was 40.

Act 174 (2014) Tax Appeals Report by the Vermont Department of Taxes, Vermont League of Cities and Towns, and the Vermont Assessors and Listers Association, January 2015, available at:

[http://legislature.vermont.gov/assets/Documents/2016/WorkGroups/Senate%20Finance/Reports%20and%20Resources/W~Department%20of%20Taxes~Tax%20Appeals%20Report%20\(Act%20174%20of%202014%20Sec.%2065\)~1-15-2015.pdf](http://legislature.vermont.gov/assets/Documents/2016/WorkGroups/Senate%20Finance/Reports%20and%20Resources/W~Department%20of%20Taxes~Tax%20Appeals%20Report%20(Act%20174%20of%202014%20Sec.%2065)~1-15-2015.pdf)

If additional information regarding the annual number of property tax assessment appeals in superior court becomes available, this report will be updated accordingly.

The Tax Department advises that there were 134 appeals to the State property tax hearings officers for the 2016 grand list.

Following consultation with the VLCT and VALA, the AGO understands that it is not possible to report on the total number of tax appeals to local Boards of Civil Authority.

V. Feedback from Stakeholders:

The Attorney General's Office solicited feedback from each of the stakeholders listed below. A summary of that feedback follows. In the event additional feedback is received from any stakeholders, this report will be updated accordingly.

From the Tax Department: If state-funded lawyers are to take on greater responsibility for defense or litigation of values, it makes sense for the State to participate in the initial valuation of the properties at issue.

From VLCT: The League supports the creation of a new AAG position, and/or the creation of a new State Assessor position, on the condition that such positions are funded through the State

budget or funded with the proceeds of favorable decisions. VLCT would not support the creation of such positions if they were funded with property tax dollars.

From VALA: Subject to further consideration as to funding, VALA also supports the creation of the above positions, with a preference for creation of a State assessor position.

From private counsel who have handled property valuation litigation on behalf of municipalities:

Counsel that has represented towns and cities in numerous valuation appeals noted the following:

Cases involving “high-end” (i.e., multi-million dollar) commercial properties, as well as exempt and residential properties, can pose significant municipal expenditure to defend the valuation, and considerable exposure if the local assessment is determined to be incorrect. This is also true of appeals filed by neighbors or proximate properties where the individual exposure is much more limited, but where collectively, the stakes are high. Such cases often occur in municipalities with scarce resources to defend or absorb a loss of value, and where exposure is exacerbated by the Educational Property Tax. In other words, limiting the involvement of the AAG and State Assessor to “high value commercial properties” may be too restrictive.

The removal of the one percent threshold is a beneficial change – municipalities needed relief from that threshold. Whether \$100,000 is enough remains to be seen.

Counsel also noted that: “local listers (and even some Assessors) over-rely on the advice and encouragement provided by PVR rather than taking a close hard look at the facts and the law and making a practical assessment of the risks and rewards of an assessment defense before the BCA proceeding. There would seem to be a benefit to having a State Assessor (backed by an AAG) available as an ombudsman/resource for early evaluation of assessment methods leading up to and the values resulting from the assessment method/data. Municipalities would need to be assured that the exchange of information with the State Assessor would not be discoverable in litigation, and would not prejudice the Town’s interests in an equalization review or otherwise at PVR. And, I see the value in having an EPT risk threshold to screen out less significant cases.

The State has the legal responsibility to set the equalized education grand list, either endorsing the local valuation or making its own assessment determination, so it has a role (whether it aggressively pursues it or not) in setting the EPT. The State (PVR) has actively opposed being joined as a party in assessment appeals, leaving the local community to carry the burden of defense and exposed to refunds that often include EPT dollars.”

VI. Recommendations and Options:

Following discussion with the stakeholders noted above, the following options for legislative consideration emerged.

(1) Create and Fund a New Assistant Attorney General Position:

The General Assembly could create and fund a new Assistant Attorney General position, located within the Tax Department, to assist with property valuation litigation that is currently handled by cities and towns. The Attorney General's Office is currently handling complex litigation involving millions of dollars of contested value in the context of valuation of hydro-electric dams. The General Assembly has supported such efforts by appropriating funds to cover expert witness fees and litigation costs borne by towns.

Issues associated with this approach include:

- An appropriate threshold of Education Fund dollars at issue would likely need to be identified to warrant AGO and Tax Department assessment and/or litigation support. The Attorney General's Office expects that few cases would warrant representation of a municipality by both a town attorney and an Assistant Attorney General. In addition, there is a potential for conflicts of interest given the municipality's liability for a reduction in the grand list, and due to previously mentioned litigation of municipalities against the State/ the Tax Department.
- The State and municipalities would have to ensure that the State plays an appropriate role in the assessments of properties that are identified as presenting a significant risk of litigation.
- Ultimate decision-making authority in the context of both assessments and litigation would need to be clarified in cases involving AGO litigation support. In particular, the General Assembly may wish to clarify whether the State or a municipality has ultimate settlement authority in such cases.

(2) Create and Fund a New State Assessor Position:

Alternatively, the General Assembly may wish to create and fund a new position within the Tax Department that would assist in providing professionalized assessment services to cities and towns, especially with respect to complex commercial assessments. This person could play a role similar to that of the expert witness retained in the hydro-electric dam litigation.

The Tax Department has, through previous annual reports to the General Assembly, recommended that the Division of Property Valuation Review within the Tax Department assume responsibility for "high value commercial appraisals."

From the PVR Annual Report, 2016, pg 109, available through <http://tax.vermont.gov/research-and-reports/reports/pvr-annual-reports>:

Alternatively, the state could consider whether PVR should assume responsibility for high value commercial appraisal properties. Valuation of high value commercial properties is a complex undertaking and has significant financial impact on not only the municipal revenues but also the statewide education tax rates. This makes it crucial that such properties are valued in a consistent, fair, and equitable manner throughout Vermont. An appeal mechanism, or inclusion during the finalization of values, for the municipalities to challenge the values derived by the State would need to be part of the structure as those values can have such a significant impact on municipal budgets and tax rates.

From the PVR Annual Report, 2017, pg 109, available through <http://tax.vermont.gov/research-and-reports/reports/pvr-annual-reports>:

Valuation of high-value commercial properties is a complex undertaking, and has significant financial impact on both municipal and statewide property tax revenues. This makes it crucial that such properties are valued in a consistent, fair, and equitable manner throughout Vermont. However, acquiring specialized professional appraisers for these often distinct property-types can be time-consuming and costly. One possible alternative would be to move the responsibility for high-value commercial property appraisal from the municipalities to the State of Vermont in PVR. PVR assuming responsibility for the valuation of commercial properties could relieve significant amounts of financial and legal pressure on municipalities, and result in high-value commercial properties being treated in a consistent manner statewide. However, this would involve devoting a full-time equivalent to this task, potential legal defense fees, and potential appeal losses. A mechanism to include the municipalities in the finalization of values would need to be part of any change considered.

Issues associated with this approach include:

- Statutory changes would be required, unless the services to be provided were strictly voluntary and advisory.
- An appropriate threshold of Education Fund dollars at issue would likely need to be identified to warrant assessment by the State Assessor.

(3) Allow Cities and Towns to Retain a Larger Portion of Education Fund Revenues for Administrative Costs:

Currently, municipalities retain 0.225 of one percent of the total education tax collected and may charge a late fee in some circumstances. The AGO understands that this retainage is designed to compensate towns for the cost of collecting and defending the state education tax. 32

V.S.A. § 5402(c). In addition, municipalities retain \$8.50 per grand list parcel per year pursuant to 32 V.S.A. § 4041a(a) for reappraisal and grand list maintenance. If these amounts were increased, municipalities could use the funds for defending property values in litigation.

According to Tax Department data, in FY2016, compensation for municipalities pursuant to 32 V.S.A. § 5402(c) amounted to \$2,398,143. Municipal compensation for reappraisal and grand list maintenance pursuant to 32 V.S.A. § 4041a(a) in FY 2016 totaled \$2,837,000.

Issues associated with this approach include:

- Statutory changes would be required.
- This compensation is determined by the size of the municipality's total education tax collected and is not determined by how many appeals are filed or how costly the appeals are for the municipality.
- If statutory changes were made, the General Assembly may wish to tie the above compensation to the number of appeals filed or cost of the appeals to the municipality.

(4) Require Cities and Towns to apply to PVR for a “set-aside” of Educational Property Tax funds, and have the City or Town and their Counsel Defend the Assessment:

The following emerged as an additional option proposed by private counsel who have handled property tax assessment litigation on behalf of municipalities. Consideration of this option will require further review by relevant stakeholders, and presents an additional option for legislative consideration and action. Counsel noted:

“Having PVR as a party, represented by an AAG, and being responsible to defend the EPT assessment and share the costs of such defense (in appropriate cases) seems like a good response.

However, it may be more cost effective to simply make the municipalities apply to PVR for a set-aside of an amount of EPT funds (perhaps by withholding \$XX from an upcoming PVR transfer) and then have the municipalities and their counsel defend the assessment. If the defense is successful, the reserved monies are returned by the municipality (less an agreed upon contribution toward costs of defense) to PVR. If the defense is unsuccessful, the reserve funds are available to offset the refund owed and costs of defense. In this scenario, it seems that a qualified AAG should be a part of the PVR team to assist the Director and perhaps the Commissioner to make informed choices about assessment defense strategy.”

Issues associated with this approach include:

- Administration of this alternative may be complicated, and may benefit from being tested on a pilot basis before being immediately available statewide.