Approved: Feb 22, 1994
Date

MINUTES OF THE SENATE COMMITTEE ON ASSESSMENT AND TAXATION.

The meeting was called to order by Chairperson Audrey Langworthy at 11:12 a.m. on February 21, 1994 in Room 519-S of the Capitol.

Members present: Senator Langworthy, Senator Tiahrt, Senator Bond, Senator Corbin, Senator Feleciano Jr., Senator Hardenburger, Senator Lee, Senator Reynolds, Senator Sallee, Senator Wisdom

Committee staff present: Tom Severn, Legislative Research Department
Chris Courtwright, Legislative Research Department
Bill Edds, Revisor of Statutes
Don Hayward, Revisor of Statutes
Elizabeth Carlson, Committee Secretary

Conferees appearing before the committee: Larry Clark, Kansas County Appraisers' Association
Eric Melgren, Kansas Bar Association
Jack Shriver, Board of Tax Appeals
Karen France, Kansas Association of Realtors

Others attending: See attached list

APPROVAL OF MINUTES

Senator Tiahrt moved to approve the minutes of February 18, 1994. The motion was seconded by Senator Sallee. The motion carried.

Chairman Langworthy pointed out to the committee a memo from David Cunningham, Director, Property Valuation Division, regarding Taxation of personal property not being "used". (Attachment 1)

SB 756--BOARD OF TAX APPEALS PROCEDURE

Don Hayward, Revisor, reviewed **SB 756** for the committee. In Section 1, the bill changes the qualifications of the members of the Board of Tax Appeals; in Section 2, it changes the quorum of the Board of Tax Appeals from three to two; and in New Section 3, provides for hearing officers to hear the smaller cases which would allow the Board more time for larger more complicated cases. He also explained what kind of presiding officers would be used.

Proponents

Larry Clark, Kansas County Appraisers' Association, spoke in support of **SB 756.** (Attachment 2) He said this bill should benefit the taxpayers of the state of Kansas and allow for a more rapid review of those cases classified as "routine property valuation appeal cases". It also brings greater specific appraisal expertise on appeals at the Board of Tax Appeals level. There should be equal emphasis placed upon resolving valuation disputes using accepted appraisal standards and methodology. The county appraisers and hearing officers at the county level have to meet certain standards for appraisal education and experience and the next appeal level in the property tax system should have to do the same.

Eric Melgren, Kansas Bar Association, said **SB 756** would give important relief to the Board of Tax Appeals docket system. (Attachment 3) Hearing officers would handle the smaller cases and would expedite the hearings. He said the KBA Board of Tax Appeals Task Force has been meeting for the past year to discuss issues concerning BOTA and this bill provides the recommendations from the Task Force. He suggested the change in the bill from "routine" to "small". He said this term is consistent with the statutes in other states for similar procedures. He recommended an amendment to New Sec. 3 to adopt rules and regulations defining what a small case is. He also suggested a change in New Sec. 3, (d) which would simplify the review process. It is the intent of the Task Force that the small case procedure should be revenue neutral. Therefore, they recommend that BOTA be reduced from five members to three, such a reduction would insure the five presiding officers could be appointed without any additional revenue requirement. The Task Force also

recommends the word "technology" on line 21, page 2 of **SB 756** should be removed.

There were questions from the committee concerning the qualification of BOTA members. Mr. Melgren said it was not their intention to limit the membership to just attorneys; their concern is that the members appointed to BOTA have some experience in hearings and deciding disputes. Another question was should the appointments to the BOTA come through the Judicial Nominating Commission? The Task Force discussed this and came to the conclusion this would not work out for the Commission. Mr. Melgren was also asked if through New Section 3, was the Task Force trying to address the back log of cases in the Board of Tax Appeals? He answered he thought with the Hearing Officers some of the decisions could be made immediately.

Chairperson Langworthy call the committee's attention to the written testimony of Gordon Garrett, CPAK. (Attachment 4)

Opponents

Jack Shriver, Chairman, Board of Tax Appeals, appeared to oppose **SB 756.** (Attachment 5) He said the Board had discussed the bill and they thought the Board qualifications should have no input from the current members. He also questioned what is a "routine" case. He said the backlog is not in that kind of case. He also said they did not understand who would determine what a "small" or "routine" case is. He thought it would create a bigger backlog. He had a number of questions concerning **SB 756**. He suggested the oath being given by the Secretary or any member be changed in the current law to include the court reporter.

He answered questions from the committee about when the dispute is resolved at the county level how did BOTA dismiss it or get it off the docket. Mr. Shriver answered it goes through the Property Valuation Division. He also said the Board has turned down some stipulations. He passed some material to the committee concerning the stipulations. (Attachment 6) In answer to a question regarding three members as compared to five members, Mr. Shriver said if BOTA was provided hearing officers, three members might be sufficient; however, he did not think it was going to take that many cases away from the Board. He said the problem is going to continue. Mr. Shriver also said he thought there would be appeals from a Hearing Officers decision.

Karen France, Kansas Association of Realtors, said they had many concerns about this bill. (Attachment 7) She thought the additional experience requirements in the bill was very vague. If the intent of the bill is to have BOTA members be attorneys, that should be said. She thought it would have a chilling effect upon the ability of the average taxpayer to seek redress before the Board. She hoped the committee was not looking at this in coming up with solutions to the problems which exist. She also asked about the fiscal note in New Sec. 3 for 5 hearing officers. She said the taxpayer has already been through several hearings before going before the hearing officers, and she asked if it is fair to require them to have another hearing before finally getting to the Board of Tax Appeals. She said they believe **SB 542** will go much further in facilitating the process at BOTA than what **SB 756** will do. She opposed **SB 756.**

Chairman Langworthy announced **SB 756** would go to a subcommittee and they would work on how to get rid of the backlog.

The meeting adjourned at 12:05 p.m.

The next meeting is scheduled for Tuesday, February 22, 1994.

GUEST LIST

SENATE ASSESSMENT AND TAXATION COMMITTEE

DATE: Feb 21, 1994

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Becky Sanders	BOTA	
Barb Conroy	Topeka	KRTA
Larry Plank	Olathe	Ks Co Appraisers
Alan Steppat	Topeka	Pete McGill & Assoc.
Myra Myers	BOTA	BOTA
Fred Nusich	BOTA	BOTA
Brad Bidol	Lakin, Ks	Lakin KS
Dennis Tippany	Liberal, Ks	Grant Co
JANET STUBBS	TOPEKA	KBIA
KAREN FRANCE	TOPEKA	KAR
BEV BRADLEY	Topeka	Ks Assoc of Counties
Bob Corkins	"	KCCI
Michelle Clum	"	atty Jon Small
Eric Melgren	Wichita, Ks	Ks Bar Assoc
Emily Dexter	Topeka, Ks	" " "

STATE OF KANSAS

David C. Cunningham, Director
Robert B. Docking State Office Building
915 S.W. Harrison St.
Topeka, Kansas 66612-1585

(913) 296-2365
FAX (913) 296-2320

Department of Revenue
Division of Property Valuation

MEMORANDUM

To: Senator Audrey Langworthy, Chair
Senate Assessment and Taxation Committee

From: David C. Cunningham, Director,
Division of Property Valuation

Date: February 16, 1994

Subject: Taxation of personal property not being "used."

On Thursday, February 10, 1994, the issue of whether commercial and industrial machinery and equipment not being used was taxable came up in the hearing on H. B. 2623. I have reviewed this issue and would like an opportunity to address the question at your convenience.

The discussion revolved, in part, around whether commercial and industrial machinery and equipment would be taxable if it were no longer being "used." Article 11, Section 1 (a), Class 2 (5) reads as follows:

> Commercial and industrial machinery and equipment which, if its economic life is seven years or more, shall be valued at its retail cost when new less seven-year straight-line depreciation, or which, if its economic life is less than seven years, shall be valued at its retail cost when new less straight-line depreciation over its economic life, except that, the value so obtained for such property, notwithstanding its economic life and as long as such property is being used, shall not be less than

Senate Assess + Tax
February 21, 1994
attach 1-1

> 20% of the retail cost when new of such property...(emphasis added)

It was suggested that equipment not being "used" was not taxable. However, this interpretation creates an implied exemption for taxable tangible personal property. The Kansas Supreme Court has held that implied exemptions are not allowed. [See, Director of Taxation v. Kansas Krude Oil Reclaiming Co., 236 Kan. 450, 691 P.2d 1303 (1984).] In other words, unless there is a specific statutory or constitutional exemption granted, the property in question is taxable. Additionally, K.S.A. 79-101 states that all tangible personal property is taxable unless specifically exempted. K.S.A. 79-301 provides that all taxable tangible personal property must be listed and assessed (appraised). Finally, the constitution also addresses tangible personal property in sub-section (6), which states: "All other tangible personal property not otherwise specifically classified...."

I believe the counties have and would take the position that all tangible personal property not specifically exempted is taxable. The Division of Property Valuation has and would take the same position. I agree that the valuation procedures for commercial and industrial machinery and equipment that is not being "used" is different than what appears to have been applied in the Leavenworth County example. In fact, I plan to issue instructions to the counties on what procedures should be applied to eliminate any possible mis-application in March 1994.

With respect to the value, the counties should be using a market approach if the commercial and industrial machinery and equipment is not being used rather than the prescribed depreciated value. This will more often than not result in a lower value, if any value at all, due to the age and obsolesce of the property. Determining the appropriate assessment level is more problematic. Since the property is no longer being used and is therefore not valued pursuant to subsection (5), there is an argument that subsection (6) is applied not only for valuation purposes, but also for assessment level purposes, i.e. 30 percent. However, the property is still arguably commercial and industrial machinery and equipment so while it is valued at market, it is assessed

at 25 percent. I will advise the counties which assessment level to use when I issue instructions on the correct valuation procedures.

In conclusion, it is generally accepted that property is taxable unless specifically exempt. The Constitution provides how certain property types are to be valued; however, it does not provide an exemption for commercial and industrial machinery and equipment not being used.

If you have questions, please give me a call.

SENATE BILL 756

COMMITTEE ON ASSESSMENT AND TAXATION

FEBRUARY 21, 1994

Madame Chairman and members of the Senate Committee on Assessment and Taxation, my name is Larry Clark and I am here representing the Kansas County Appraisers' Association in support of Senate Bill 756.

In our opinion the provisions in new section three propose two areas of improvement which should benefit the taxpayers of the state of Kansas. First, it presupposes a classification of cases sent to the board and allows for a more rapid review of those which the statute classifies as "routine property valuation appeal cases". The concept of one board reviewing all cases of a given type provides more consistency. However, it also may result in that board being forced to devote nearly as much energy and resources on relatively minor cases as it does on the more complex ones. The state board of tax appeals was established to resolve several different types of disputes in addition to property tax appeals which further complicates the situation. The ability to focus on one particular appeal type should provide greater efficiency and result in quicker resolution of the problems brought to the board's attention.

Second, and more important from the appraiser's viewpoint, this amendment brings greater specific appraisal expertise to bear on appeals at that level. Valuation issues are no more or less important than any of the other issues faced by the board, but they are different. With the emphasis upon appraisal quality and uniformity brought by the state wide mill levy, there should be equal emphasis placed upon resolving valuation disputes using accepted appraisal standards and methodology. This legislature has taken steps over the last few years to insure that county appraisers and hearing officers at the county level meet certain standards for appraisal education and experience. It seems only logical to take the next step and address those same concerns with regard to the next appeal level in the property tax system.

Senate Assessment & Taxation
February 21, 1994
attach 2-1

SENATE ASSESSMENT & TAXATION COMMITTEE
February 21, 1994

SB 756

Kansas Bar Association
Eric F. Melgren
Foulston & Siefkin
700 Fourth Financial Center
Wichita, Kansas 67202
316/267-6371

A KBA Board of Tax Appeals Task Force has been meeting for the past year to discuss BOTA issues. The Task Force is composed of attorneys who frequently appear before BOTA.

Among other matters, we have considered how the large caseload at BOTA could be more effectively handled.

Earlier this month, at the request of Senator Langworthy, we provided legislative recommendations regarding this matter through Task Force member Ben Neill.

On behalf of the Task Force, Mr. Neill and I also have provided some drafting suggestions to the Revisor's office.

WE SUPPORT SENATE BILL 756. We believe that a small case procedure before BOTA can provide several advantages, including:

An expedited procedure for small property owners to obtain a decision.

An informal procedure where they can obtain a hearing without an attorney.

Relief for BOTA's docket, by separating off the smaller valuation disputes, allowing the BOTA members to focus on the more complex disputes and the many other responsibilities assigned to BOTA.

We Would Offer the Following Comments and Recommendations Regarding SB 756:

1. SB 756 creates a "routine property valuation appeal case procedure." We think a better term than "routine" is "small." That term more accurately describes the purpose of this procedure, and is the terminology used by other states' boards of tax appeals or state tax courts, and by the United States Tax Court, for similar procedures.

Senate Assess + Tax
Feb. 21, 1994
attach 3-1

2. We recommend an amendment to New Sec. 3, (a), requiring BOTA to adopt rules and regulations defining what a small case is, and/or what types of cases will be referred to the small case procedure. One suggestion is to have BOTA annually adopt a "small case assessed valuation threshold" amount, and to assign all cases where the amount of the assessed valuation in dispute between the parties falls below this threshold. Under such a procedure, BOTA would still reserve the right to hear directly a case otherwise falling below that threshold if the case presented a "significant legal issue."

3. We have concluded that the Kansas Administrative Procedures Act (K.S.A. 77-501 et seq.) might create a confusing and complicated appeal process from a decision of the small case presiding officer. Under KAPA, such appeals would have to follow a "petition for review" process under 77-527 and a "petition for reconsideration" process under K.S.A. 77-529. In this context, such a course of proceeding is cumbersome and unnecessary. To simplify the review process, we offer the following substitute for the existing New Sec. 3, (d):

> A hearing of a small property valuation appeal case shall be considered a proceeding before the Board. Any order issued by a presiding officer shall be considered a final order of the Board. Petitions for reconsideration of such orders shall be made pursuant to K.S.A. 77-529, and amendments thereto, and shall be addressed directly to the Board rather than to the presiding officer who issued such order. All final orders of the Board shall be subject to review in accordance with the Act for Judicial Review and Civil Enforcement of Agency Actions.

4. It is our intent that this adoption of the small case procedure should be revenue neutral. BOTA's existing budget may permit appointment of the five presiding officers. The Task Force had recommended that BOTA be reduced from five members to three, particularly in light of the small case relief BOTA would be provided. If the cost of this procedure becomes a concern, such a reduction would insure that the five presiding officers could be appointed without any additional revenue requirement.

5. We have received recommendations that the added qualifications language for appointment to BOTA which is contained in Section 1 of the bill should be even more specific. We do not necessarily oppose that, but wish to remind this committee that BOTA deals with a range of matters far broader than just property tax issues. Therefore, we would oppose any qualification language for the BOTA members themselves which focused on property appraisal qualifications.

6. Concerning the qualifications for presiding officers, we believe the inclusion of the word "technology" on line 21, page 2 of SB 756 is inappropriate and should be removed.

Gordon T. Garrett
Vice President -
Legal Counsel

Samuel V. Alpert
Associate Director

CPAK
Commercial Property
Association of Kansas

LEGISLATIVE TESTIMONY

Gordon T. Garrett, Vice President
Commercial Property Association of Kansas

before

Senate Committee on Assessment and Taxation
February 21, 1994

We would like to voice our support for Senate Bill #756. Our support is not a criticism of any individual BOTA member or any individual BOTA decision. We feel this bill accomplishes several positive things for the appraisal appeals process.

1. For a position as important as a seat on the Board of Tax Appeals, increased qualifications is very obviously a good idea. As we all know, one of the Legislative Post Audits concerns on their report last summer was the lack of Board qualifications.

2. The Board of Tax Appeals is a court of record. This is the record that goes to the District Court. A requirement of increased Board qualifications for members that serve as a court of record is almost unassailable.

3. The creation of the hearing officers under the Board would create a very valuable and useful service in the appeals process. The requirement that the hearing officers have appraisal or administrative training will serve taxpayers well. Further, the hearing officer process that Senate Bill #756 provides for would allow the Board to be quicker in its handling of appeals and the docket to be managed better. With the hearing officers taking the routine cases it will help clear the backlog and the Board will then be able to focus on the important cases of law and fact.

4. This procedure in SB #756 will dictate that BOTA will know more about each individual case when it arrives at the agency, because at that point, the agency will make a decision whether or not to give it to a hearing officer or to the full Board.

Senate Assessment + Tax
February 21, 1994
attach 4-1

214 S.W. 7th Street - Topeka, KS 66603 - 913-232-0486 - FAX 913-233-5659

J. Shriner Chairman
BOTA

SENATE BILL 756

Qualifications of board members should be a decision between the Legislative branch and the Executive branch. Any input from the current members of this board could be seen as self-serving.

Oath to be given by secretary or any member of the board should be changed to include the court reporter.

Three members shall constitute a quorum. Should current Section 1 read: "The votes of three members shall be required for any final action to be taken by the board."? Would a change in "quorum" eliminate our ability to hold two sets of hearings simultaneously? If so, it would add to, not decrease, the backlog of cases.

Appointing five presiding officers creates all kinds of questions. The bill does not say "up to 5". We could not keep five appointees busy with our present caseload of "routine property valuation appeal cases". Who would determine what a "routine" case was. Would a pre-hearing be required on all cases to determine if valuation was the only legal issue? Individual taxpayers do not usually understand the procedure or the law well enough to provide that information on the original application. What would prevent the board from appointing themselves or members of their legal staff as presiding officers? They would all qualify. Presiding officers to receive cases on a "random" basis --- would they be based out of Topeka? If so, travel and lodging would be quite high.

Neither party shall be required to be represented by counsel. Could they be represented by anyone else? Tax rep, etc.?

Orders subject to judicial review. If so, a proper record must be made of the hearing. Court reporter services would be expensive. If a tape recording was made, and transcribed at a later date, how would we deal with blanks left by a transcriptionist due to being unable to distinguish voices or understand a word or phrase? Could we "certify" the record to the District Court or Court of Appeals if it were incomplete? Would the case need to be reheard?

Senate Assessment + Tax
February 21, 1994
attach 5-1

Memorandum

To: Senate Committee on Assessment and Taxation

From: Board of Tax Appeals

Re: Stipulations

There have been some questions concerning the Board's actions in rejecting stipulations made between the County Appraiser and the taxpayers. This memorandum represents a brief statement of the reasons why the Board has authority and the obligation to reject stipulations as to value between the Counties and the taxpayers.

All real and personal property is required by law to be valued in accordance with the statutory definition of fair market value. To determine fair market value requires the interpretation of the statute K.S.A 79-503a . The appellate courts in this state have held that the interpretation of a statute is a question of law. Therefore since the the determination of fair market value is a question of law the Board is not bound by stipulations that the parties allege represent fair market value. The Courts have further held that the Courts are not bound by stipulations that involve public interest. Uniform and equal valuations in this state are a matter of public policy. There is an additional public policy concern in determining the value of property in that there is a state wide mill levy to fund public education. With the state wide mill levy it is imperative that all property is valued according to fair market value.

Finally, the protest procedure requires the Board to review change of value made by the appraiser at the protest hearings and the Board has the authority to reject those changes and set the matter for hearing if if the property is not valued according to law. It is illogical to conclude that the Board would not have the same authority when a matter is docketed for a Board hearing to review a stipulation by the parties to insure that the properties are valued according to law. Such a conclusion assigns a different standard of review depending on what stage you are in the appeal process.

Senate Assess + Tax
Feb. 21, 1994
attach 6-1

It has been argued that the Board of Tax Appeals must accept, without review, a stipulation of fair market value between the county and taxpayer. An action by a county official is presumed to be correct; however, this inclination is tempered by and read in conjunction with the Board's statutory mandate, under threat of criminal sanctions, to value property at its fair market value.

RATIONALE

1. After thoroughly reviewing the testimony of the witnesses, the evidence presented, and the applicable law, the Board of Tax Appeals (hereinafter referred to as the Board or BOTA) finds that the Stipulation of value proposed by the parties is not supported by substantial evidence to establish that the stipulation represents fair market value. The Board therefore does not adopt the Stipulation.

2. The primary issue in this case is the fair market value of subject property. "Real property is to be valued according to the fair market value in money." K.S.A. 79-501 (Supp. 1992). Fair Market Value is defined as follows:

> [T]he amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion. ...Sales in and of themselves shall not be the sole criteria of fair market value but shall be used in connection with cost, income and other factors including but not by way of exclusion:
>
> a. The proper classification of lands and improvements;
> b. the size thereof;
> c. the effect of location on value;
> d. depreciation, including physical deterioration or functional, economic or social obsolescence;
> e. cost of reproduction of improvements;
> f. productivity;
> g. earning capacity as indicated by lease price or by capitalization of net income;
> h. rental or reasonable rental values;
> i. sale value on open market with due allowance to abnormal inflationary factors influencing such values;
> j. restrictions imposed upon the use of real estate by local governing bodies, including zoning and planning boards or commissions; and
> k. comparison with values of other property of known or recognized value. The assessment-sale ratio study shall not be used as an appraisal for appraisal purposes.

K.S.A. 79-503a (Supp. 1992)

3. The Board of Tax Appeals is the highest administrative tribunal charged with the "ultimate authority, subject to judicial review in a proper case, in the administration of matters of assessment and valuation." Cities Service Oil Co. v. Board of County Commr's., 224 Kan. 183, 187, 578 P.2d 718 (1978) (citing Mobil Pipeline Co. v. Rohmiller, 214 Kan. 905, 917, 522 P.2d 923 (1974)). Courts have long recognized that matters of valuation and taxation are administrative in character and within the discretion of the Board of Tax Appeals. See Mobil Pipeline Co. v. Rohmiller, 214 Kan. 905, 522 P.2d 923 (1974) (citing Board of County Commissioners v. Brookover, 198 Kan. 70, 422 P.2d 906 [Syl. ¶4] (1967)); Colorado Interstate Gas Co. v. Morton County Comm'rs., 247 Kan. 654, 663, 802 P.2d 584 (1990). Additionally, "It has thus been seen that the powers, duties, and supervisory responsibilities of BOTA are coextensive with the state's entire scheme of taxation.... BOTA is the paramount, lawfully constituted taxing authority in the state." Wirt v. Esrey, 233 Kan. 300, 314, 662 P.2d 1238 (1983). Furthermore, in the case of In Re Tax Appeal of Director of Property Valuation, 14 Kan. App. 2d 348, 353, 791 P.2d 1338 (1989), the Court of Appeals stated, when discussing the Board of Tax Appeals, "To put it bluntly the BOTA is a tribunal whose very reason for existence is to decide matters of this nature and we give great credence and assign high value to its decisions when it is acting within its area of expertise." Since real property must be valued according to its fair market value, and the Board is the highest authority charged with ensuring proper valuation, the Board has the duty to review all matters before it to verify that the values reflect the statutory fair market value.

4. Whether the proposed stipulations of values are interpreted to be contracts, stipulations, agreements, findings of facts or conclusions of law, the Board has the authority and statutory duty to inquire as to the fair market value of the subject property. "The ruling of an administrative agency on questions of law, while not as conclusive as its findings of facts, is nevertheless persuasive and given weight, and may carry with it a strong presumption of correctness, especially if the agency is one of special competence and experience." In re Tax Appeal of Director of Property Valuation, 14 Kan. App. 2d 348, 354, 791 P.2d 1338 (1989) (citing Kansas Bd. of Regents v. Pittsburg State Univ. Chap. of K-NEA, 233 Kan. 801, 809, 667 P.2d 306 (1983)), (hereinafter referred to as Regents). The Regents Court also stated, "The PERB orders in this case are partly factual determinations...and partly determinations of law...Usually, however, the legal interpretation of a statute by an administrative board or

agency, charged by the legislature with the authority to enforce the statute, is entitled to a great deal of judicial deference." Regents, at 809. The issue in the case at bar is the fair market value of subject property. The highest administrative tribunal in issues of valuations is the Board of Tax Appeals. Therefore, the Board is to be given great deference in exercising its administrative function of applying K.S.A. 79-503a to a set of facts, testimony and exhibits to calculate fair market value. Additionally, the Regents Court stated, "This court has long given great weight under the doctrine of operative construction to the interpretation of a statute by the administrative body charged with enforcing the statute." Id. at 809 (citing State v. Helgerson, 212 Kan. 412, 413, 511 P.2d 221 (1973)). The Regents Court further discussed the standard of review that is applied when:

> the administrative agency has construed or interpreted a written contract or other document, and such construction or interpretation, reflected in the agency's order, is challenged upon appeal. The construction or interpretation of contracts is, of course, a question of law. However, and particularly if the writing is an instrument of a type which comes regularly before the agency and with which it must of necessity acquire some familiarity and expertise, its interpretation, if reasonable, is persuasive and is entitled to careful consideration by the review courts. If there is a rational basis for the agency's decision, it should be upheld...

Regents at 810.

The facts of the instant case reflect a contract/stipulation which the parties request the Board to adopt. The Board in applying K.S.A. 79-503a and interpreting the stipulation, finds that insufficient evidence exists to clearly demonstrate that the value is reflective of fair market value, and accordingly the Board does not adopt the same.

5. The Board of Tax Appeals is a creature of statute, and its power is dependent upon the authorizing statutes. See Vaughn v. Martell, 226 Kan. 658, 660, 603 P.2d 191 (1979); Pork Motel, Corp. v. Kansas Dept. of Health & Environment, 234 Kan. 374, 378, 673 P.2d 1126 (1983). It is a fundamental rule of statutory construction:

> [T]hat the purpose and intent of the legislature governs when that intent can be ascertained from the statutes. In construing statutes,

> the legislative intent is to be determined from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. To this end, it is the duty of the court, as far as practical to reconcile the different provisions so as to make them consistent, harmonious, and sensible.

Watkins v. Hartsock, 245 Kan. 756, 759, 783 P.2d 1293 (1989); See also Brabander v. Western Cooperative Electric, 248 Kan. 914, 916-17, 811 P.2d 1216 (1991); Wirt v. Esrey, 233 Kan. 300, 313, 662 P.2d 1238, (1983).

The statutory powers and duties of the Board of Tax Appeals are found in K.S.A. Chapter 74, Article 24. One of the duties of the Board is to hear and decide applications for refunds of protested taxes pursuant to K.S.A. 79-2005. See K.S.A. 74-2439(e). In addition the Board has the power and duty of "Constituting, sitting and acting as the state board of equalization as provided in K.S.A. 79-1409." See K.S.A. 79-2439(a). While performing his/her duties, the members of the Board of Tax Appeals are bound by K.S.A. 79-1426 which states:

> Any county assessor, deputy assessor, member of the state board of tax appeals, director of property valuation, or member of any county board of equalization and every other person whose duty it is to list, value, assess or equalize real estate or tangible personal property for taxation, who shall knowingly or willfully fail to list or return for assessment or valuation any real estate or personal property, or who shall knowingly or willfully list or return for assessment or valuation any real estate or personal property at other than as provided for by law, or any assessing officer who shall willfully or knowingly fail to appraise, assess or to equalize the values of any real estate or tangible personal property, which is subject to general property taxes as required in K.S.A. 79-1439, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding five hundred dollars ($500) or imprisonment in the county jail for a period not exceeding ninety (90) days, and in addition thereto shall forfeit his or her office if an officer mentioned herein. A variance of 10% in the appraisal at fair market value in money shall not be considered

a violation of this section.

It is the duty of the Board, to ensure that all properties properly on appeal are valued according to fair market value. The Board cannot simply rely on the parties stipulation of value to reflect fair market value, in fact, the Supreme Court of Kansas has stated: "...a court may not abdicate its duties by relying upon a stipulation of the parties." In re Petition of City of Shawnee for Annexation of Land, 236 Kan. 1, Syl. ¶6, 687 P.2d 603 (1984), See also Beaver v. Kingman, 246 Kan. 145, 149, 785 P.2d 998 (1990).

6. In further support of not adopting a stipulated value without analysis of fair market value, the Board points to K.S.A. 79-2005. This statute requires the Board to review changes in value made by a county appraiser or county commissioners after a protest hearing, but before the appeal is docketed with the State Board of Tax Appeals. If the appraiser and the taxpayer entered into an agreement (stipulation) changing the fair market value at that stage in the process, the stipulation requires submission to the Board of Tax Appeals for review. The timeline is the only difference between the stipulations prior to a protest being docketed, and the stipulations after a protest is docketed with the Board of Tax Appeals. It would be illogical to treat similar situations differently merely because the parties reached an agreement early or late in the process. There is no legal justification for a disparate treatment of protesting taxpayers based upon the willingness and timeliness of the County to stipulate to value. It would be inequitable to Taxpayers to mandate different standards of review by the Board of Tax Appeals based solely on the timeliness of the County's stipulation of value. In essence, a taxpayer that reached a stipulated value prior to docketing the protest with the Board of Tax Appeals, would have the stipulation reviewed by the Board to determine if the stipulation reflected fair market value. Whereas, a taxpayer that failed to reach a stipulated value with the County until after a protest had been docketed with the Board, would argue the stipulation would bind the Board without further analysis as to fair market value. More absurd would be the situation in which the Board reviewed a stipulation reached prior to docketing and rejected it. Then, after the protest was docketed, the County and taxpayer could enter into the very same stipulation, and the Board would be bound to accept it. The result of this argument renders K.S.A. 79-2005 powerless.

7. The entire taxing structure is a system of checks and balances to ensure that taxpayers are provided with equality of taxation with respect to findings of fair market value.

Additionally, the Kansas Constitution, Article 11, Section 1 dictates that property be valued uniformly and equally. K.S.A. 79-1439, states: "All real and tangible personal property which is subject to general ad valorem taxation shall be appraised uniformly and equally as to class and, unless otherwise specified herein, shall be appraised at its fair market value, as defined in K.S.A. 79-503a, and amendments thereto." When discussing K.S.A. 79-503a, the Kansas Supreme Court stated as follows:

> The manifest purpose of the statute was to require uniformity and equality in the mode of assessment of all real property in the state and to benefit and protect the individual taxpayer from a sacrifice of his property by a disregard to its provisions in which his rights might be injuriously affected. It is evident the Legislature intended that from and after January 1, 1964, all real property in every taxing district would be uniformly and equally assessed at thirty percent of its justifiable value in money. (79-501, 79-1406 and 79-1439.) To accomplish that purpose, the Legislature detailed the factors or combinations thereof to be considered by taxing officials in assessing real property and directed they apply the same in determining justifiable value. State and local taxing officials may not ignore the standards prescribed, since the statute clearly requires consideration of the pertinent factors to specific property and of an assessment of specific property in conformity with its provisions.

Garvey Grain, Inc. v. MacDonald, 203 Kan. 1, 10, 453 P.2d 59 (1969).

8. The Board of Tax Appeals is the highest administrative agency exercising its statutory duty to find fair market value. In this pursuit the Board has Constitutional and Legislative mandates with which to comply. In this case, the Taxpayer and the County have reached an agreed to value for the tax year in question and have presented a Stipulation. The Board has the authority to inquire into the factual basis of the proposed stipulation to ensure that the property is equally and fairly valued pursuant to K.S.A. 79-503a. While it might be argued that the stipulation is binding on the Board without further analysis, this argument is flawed in several ways. The Supreme Court has stated that while courts are normally bound by stipulations of litigants, this rule is not applicable in certain circumstances, one being when the stipulation affects public interest and another being when

the stipulation involves legal conclusions. See In re Petition of City of Shawnee for Annexation of Land, 236 Kan. 1, 16-17, 687 P.2d 603 (1984). The proposed stipulation of value in the case at hand involves both public interest and legal conclusions.

9. What could be of more public interest then the Kansas Constitution? K.S.A. 79-1409 provides the State Board of Tax Appeals, acting as the State Board of Equalization, the authority and duty to equalize the valuations and assessments of properties located throughout the state. The Kansas Supreme Court, when discussing public interest stated, "We are forced to conclude that public interest not only requires equality of assessment for taxation as between property owners within a county but also as between property owners of the state." Board of County Commissioners v. Brookover, 198 Kan. 70, 77, 422 P.2d 906 (1967). It is clear that uniform and equal taxation is an area of public concern. To allow two parties to stipulate to a value without regard or defense of the public interest, would violate the Kansas Constitution and Kansas Case Law.

10. What is at issue in this instance is whether such a stipulation binds the Board without discretion and whether such a stipulation is a question of law or fact. The most definitive statement concerning stipulations appeared from the Kansas Supreme Court in In Re Petition of City of Shawnee for Annexation of Land, 236 Kan. 1, 687 P.2d 603 (1984):

> A stipulation . . . is an agreement, admission, or concession made in a judicial proceeding by the parties or their attorneys, respecting some matter in a judicial proceeding by the parties or their attorneys, respecting some matter incident thereto. Its purpose is generally stated to be the avoidance of delay, trouble and expense.
>
> It may be stated as a broad general principle, subject to the limitations hereinafter noted, that matters relating to the conduct of a pending proceeding or to the designation of the issues involved therein, which affects only the rights or convenience of the parties thereto and does not involve any interference with the duties and functions of the court, may be the subject of a stipulation. But, as more fully developed elsewhere, parties may not by stipulation invest a court with jurisdiction over the subject matter of a cause which it would not otherwise have had. And clearly the parties to an action may not stipulate for the determination thereof by

> the trial court in a manner contrary to the statutes or rules of of court. It is also established that matters affecting the public interest cannot be made the subject of stipulations so as to control the court's action in respect of such matters.
>
> While ordinarily, courts are bound by stipulations of litigants, that rule cannot be invoked to bind or circumscribe a court in its determinations of questions of law. It has generally been stated that the resolution of questions of law rests upon the court, uninfluenced by stipulations of the parties, and accordingly, virtually all jurisdictions recognize that stipulations as to the law are invalid and ineffective. The same rule applies to legal conclusions arising from stipulated facts . . . Notwithstanding the right of a party to confer judgment as to demands of certain kinds, it is generally that a mere stipulation of law as to the validity of a cause of action or defense is invalid. . . .
>
> The propriety of enforcing the rule against stipulations as to matters of law is especially clear where the case in which the stipulation is made concerns the public.

Id. at 16-17 (quoting 73 Am.Jur.2d, Stipulations §§ 1, 4, 5).

11. It is bedrock principle, both in Kansas and elsewhere, that parties cannot bind a court to a stipulation pertaining to a question of law. Beams v. Werth, 200 Kan. 532, Syl. ¶ 10, 438 P.2d 957 (1968) (court is not bound by parties erroneous admission of law); In re Estate of Maguire, 204 Kan. 686, Syl. ¶ 5, 466 P.2d 358 (1970) (stipulations as to what law is are invalid and ineffective); Urban Renewal Agency v. Reed, 211 Kan. 705, Syl. ¶ 4, 508 P.2d 1227 (1973); Mobile Acres, Inc. v. Kurata, 211 Kan. 833, 839, 508 P.2d 889 (1973); State v. Gregory, 218 Kan. 180, 187, 542 P.2d 1051 (1975); State v. Young, 228 Kan. 355, Syl.¶ 1, 614 P.2d 441 (1980) (only agreements as to facts within purview of parties); Wentz Equip. Co. v. Missouri Pacific R.R. Co., 9 Kan.App.2d 141, 142, 673 P.2d 1193 (1983).

12. The next inquiry is what constitutes a question of law. The difference between questions of law and fact is admittedly not self-defining. There is no "bright line" delineating the demarcation point. Findings of fact have been defined as

"Determinations from the evidence of a case, either by court or an administrative agency, concerning facts averred by one party and denied by another. . . . Conclusion drawn by trial court from facts without exercise of legal judgment." Black's Law Dictionary 569 (5th ed. 1979). Findings of law, on the other hand, are "rulings of law made by court in connection with findings of fact; such findings or rulings of law are subject to appellate review. Id.

13. In general, questions relating to the construction, meaning or interpretation of statutes, including the applicability of a given set of facts, are matters of law for the court. Furthermore, questions involving the existence, contents, constitutionality, or validity of statutes are matters of law. 75A Am.Jur.2d, Trial § 718 (1991). The determination of fair market value involves the "exercise of legal judgment". This determination is subject to appellate review. Given the definition of both findings of fact and law, the Board's conclusion as to a property's fair market value is a conclusion of law.

14. Even if fair market value were deemed a finding of fact, it is the type of "ultimate fact" which should be treated as if it were a conclusion of law. The U.S. Supreme Court has recognized that certain of findings of fact more closely resemble conclusions of law:

> The phrase "finding of fact" may be a summary characterization of complicated factors of varying significance for judgment. Such a "finding of fact" may by the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness of a "finding of fact" depends on the nature of the materials on which the finding is based. The finding of even so-called "subsidiary fact" may be more or less difficult process varying according to the simplicity or subtlety of the type of "fact" in controversy" Finding so-called ultimate "facts" more clearly implies the application of standards of law. . . . Though labeled "finding of fact," it may involve the very basis upon which judgment of fallible evidence is to be made.

Baumgartner v. United States, 322 U.S. 665, 670-71, 64 S.Ct. 1240, 88 L.Ed. 1525 (1944).

15. The Board submits that there is no more "ultimate" a fact in our hearings than the determination of fair market value. In ascertaining fair market value, the Board makes "a summary

characterization of complicated factors" involving a "mass of details" which involves "the very basis upon which judgment of fallible evidence is to be made." The finding of fair market value is the very purpose of the hearing.

16. Given that stipulations concerning questions of law are not binding upon the Board; given the definition and distinctions between questions of law and fact; given the extensive statutory scheme governing the BOTA; given the statutory provision to appraise property at its fair market value; and given the Constitutional mandate of uniform and equal assessment of like properties, there seems little doubt that fair market value is a question of law.

17. The interpretation of a statute is a matter of law. Amoco Production Co. v. Director of Taxation, 213 Kan. 636, Syl. ¶ 4, 518 P.2d 453 (1974); State ex rel., v. Unified School District, 218 Kan. 47, 49-50, 542 P.2d 664 (1975); McGinnis v. Kansas City Power & Light Co., 231 Kan. 672, 678, 647 P.2d 1313 (1982); First Nat'l Bank of Manhattan v. Kansas Dept. of Revenue, 13 Kan. App. 2d 706, 708, 779 P.2d 457 (1989); Corbet v. Board of Shawnee County Comm'rs, 14 Kan. App. 2d 123, 127, 783 P.2d 1310 (1989); In re Tax Protest of Spangles, Inc., 17 Kan. App. 2d 335, 336 (1992).

18. Fair market value is defined by, and implemented by, statutes enacted by the legislature; thus, a determination of fair market value is an interpretation of statutes applied to specific facts, and, consequently, a question of law. A court is severely limited in altering stipulations when they pertain to the facts of a case. Stipulations concerning the interpretation of statutes, on the other hand, potentially render the statutes and those who interpret them, obsolete. While questions of fact and those of law are often interrelated, the distinction is often crucial. An example is illustrative. Questions of fact deal with evidence; however, a question and finding of law is the culmination of such evidence and the conclusion a fact finder derives from such evidence. In a valuation appeal, a tribunal would have to accept the parties stipulation concerning, for example, the acreage of the property, the type of structure involved, the square footage, depreciation, the amount of income generated by the property, the location of the property, or how the land is zoned. Based upon these facts, the fact finder will find the fair market value, as defined by statute.

19. The Board is not aware of any Kansas case which states point-blank that the determination of fair market value is a question of fact or a matter of law. Yet examples abound, from analogous and indistinguishable cases, that fair market

value cannot be stipulated to. A stipulation to fair market value is, in essence, a contract between the taxpayer and the county concerning what both parties believe to be the fair market value of the property. The courts of Kansas are not bound to recognize or enforce a contract which is in contravention of a statute. Adams v. John Deere Co., 13 Kan. App. 2d 489, 492 (1989). Interpretation of a contract is a question of law. Parties are presumed to contract with reference to existing statutes, which provisions will be read into and become part of the contract by implication as though expressly inserted therein, except where a contrary intention is manifested. Steele v. Latimer, 214 Kan. 329, ¶ 7, 521 P.2d 304 (1974). Therefore, all of the provisions of the Kansas statutes concerning the duties of this Board, how property is assessed, and the definition of fair market value are read into the stipulation as though set forth by the parties. Thus, the parties are unable to contractually abrogate the Board mandate to find fair market value of property and the Board is free to reject stipulations when they do not reflect fair market value.

20. The Board finds In re Tax Protest of Spangles, Inc., supra, to be persuasive and controlling in this matter. In Spangles, the BOTA denied the taxpayer a protest and request for a refund. The district court affirmed the Board's conclusion that the county had complied with the statutory scheme for levying and assessing taxes. The Court of Appeals agreed stating: "Since the facts are not disputed, and the decision turns on BOTA's interpretation of relevant statutes, the appellate scope of review is plenary. See Amoco Production Co. v. Arnold, 213 Kan. 636, ¶¶ 4-5, 518 P.2d 453 (1974)." Spangles, 17 Kan. App. 2d at 336. The Court of Appeals reliance upon Amoco Production is significant. The syllabus numbers cited to in Spangles state that an interpretation of a statute is a question of law. Thus, the Court of Appeals recognized that the Board's interpretation of a statute is a question of law. As we have seen, conclusions of law cannot be stipulated to. Therefore, the Board of Tax Appeals is free to reject stipulations.

21. This Board's determination of fair market value according to statute is indistinguishable from other cases in which the Kansas courts have stated that stipulations cannot control questions of law: stipulation as to the boundary line in a deed, Beams v. Werth, supra; stipulation as to an option right under a will, In re Estate of Maguire, supra; stipulation as to construction of a lease agreement, Mobile Acres, Inc., supra; stipulation as to what the evidence shows, State v. Gregory, supra; stipulation that blood alcohol test should be suppressed, State v. Young, supra; and a stipulation as to interpretation of Interstate

Commerce Act, Wentz Equip. Co., supra.

22. Finally, the Board's Orders must be written in compliance with K.S.A. 74-2426, which references the Administrative Procedure Act, specifically K.S.A. 77-526.

> A final order...shall include, separately stated, findings of fact,...Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings.

K.S.A. 77-526(c) (emphasis added).

It is a "general rule of administrative law that an agency must make findings that support its decision, and those findings must be supported by substantial evidence." In re Tax Appeal of Horizon Tele-Communications, Inc., 241 Kan. 193, 196, 734 P.2d 1168 (1987) (citing Class I Rail Carriers v. State Corporation Commission, 191 Kan. 201, 208, 380 P.2d 396 (1963)). See also Kansas Racing Mgmt, Inc. v. Kansas Racing Commission, 224 Kan. 343, 366-67, 770 P.2d 423 (1989); Blue Cross & Blue Shield v. Bell, 227 Kan. 426, 433-434, 607 P.2d 498 (1980). The Board, therefore, has a duty to make findings of fact based upon substantial evidence. If the Board "blindly" adopted stipulated values without inquiry into the factual basis and application of K.S.A. 79-503a, the Board would not be able to make findings of fact and thus would be violating the law.

23. The Board has the Constitutional and Statutory duty to find fair market value. The Board cannot abdicate its duties to the stipulating parties, nor can the Board ignore the standards prescribed by K.S.A. 79-503a. See Garvey Grain v. MacDonald, 203 Kan. 1, 453 P.2d 59 (1969) (holding that the standards prescribed by K.S.A. 79-503a may not be ignored by taxing officials). Accordingly, since insufficient evidence exists to establish that the stipulated value represents fair market value, the Board has no option but to reject the stipulation of value.

IT IS THEREFORE, BY THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS, CONSIDERED AND ORDERED that for the reasons more fully set forth herein, the proposed Stipulation is not adopted and the original County value of $_____ is approved.

KANSAS ASSOCIATI( )F REALTOI

Executive Offices:
3644 S. W. Burlingame Road
Topeka, Kansas 66611-2098
Telephone 913/267-3610
Fax 913/267-1867

TO: SENATE ASSESSMENT AND TAXATION COMMITTEE

FROM: KAREN FRANCE, DIRECTOR, GOVERNMENTAL AFFAIRS

DATE: FEBRUARY 21, 1994

SUBJECT: SB 756, QUALIFICATIONS OF BOARD OF TAX APPEALS MEMBERS

Thank you for the opportunity to testify. On behalf of the Kansas Association of REALTORS®, I appear today to oppose SB 756.

We have many concerns about this bill and its impacts on the taxpayers of the state.

First, we have several questions about the additional experience requirements laid out on line 25 of Section 1 of the bill. The requirement for "legal training or experience" is very vague--does this mean a paralegal would qualify or does it mean a law degree is required? Additionally, the phrases "experience with Kansas tax law or Kansas administrative law" are vague--could it mean someone who had appeared before BOTA, or does it require that someone had been an administrative hearing officer?.

If the real intent here is to require that the members of BOTA be attorneys, then let's just say that up front. And if that is the intent, then we need to talk about the problems with that concept. The Board of Tax Appeals is generally considered to be sort of a "poor man's court" where an aggrieved taxpayer could go for remedy without the need for representation by an attorney. If the membership of the Board is a bank of attorneys, who will feel comfortable coming to argue the case before a bunch of attorneys without having attorney representation? Such a change in the make up of the board will have a chilling effect upon the ability of the average taxpayer to seek redress before the board. We hope that this is not what this committee is looking for in coming up with solutions to the problems which exist.

Also, the requirement for a law degree does not necessarily insure that someone will be better qualified to serve on the board than someone who does not have a law degree. An attorney could have a patent law practice or perhaps a domestic relations practice, or perhaps has just passed the bar and has not practiced at all. Are these the kind of individuals whom you want serving on the Board, reviewing property tax cases or any other kinds of cases? An individual with real life experience can be much more knowledgeable on the Board than many attorneys would be, yet, if this bill were passed such an individual would be prevented from serving unless they happened to have legal training or experience, or experience with Kansas tax law or Kansas administrative law.

Senate Assess + Tax
February 21, 1994
attach 7-1

Next, we have several issues to raise concerning new section 3. While the concept of creating a hearing officer step at the BOTA level may be appealing, there are many flaws with creating another level of bureaucracy which need to be considered. First of all, what is the fiscal note for the cost of these 5 presiding officers. Will they be treated as full time employees and will they need support staff? Will they be available for travelling the state, and if so, what will those costs be?

We also have a concern about the definition of a "significant legal issue" referred to in line 14. How is a taxpayer to know whether their case raises a "significant legal issue", thus apparently requiring the use of an attorney if the language in section 1 becomes law. Attorneys may be the only ones who know what "significant" means, but even they would argue about that among themselves.

Paragraph (d) at line 31 indicates that orders issued by the presiding officers shall be "reviewable" by the board pursuant to the Administrative Procedure Act. Is this a de novo review, or is it on the record? Will a taxpayer be able to provide additional evidence when it is "reviewed" or will it be purely on the record? The statute referenced in the bill provides for briefs and permits oral arguments, but says nothing about presenting additional evidence.

Consider this, when taxpayers reach the BOTA level they have already been through a hearing with the appraiser and then a hearing panel of some sort in his own county. Is it really fair to force him to go through yet another level at the state level before they can get to the body which can finally resolve the problem, the Board of Tax Appeals.

Overall, this proposal was brought forward in the name of efficiency and consistency. But is it really more efficient to create an extra step of bureaucracy in order for a taxpayer to get redress? As far as consistency goes, given that this is considered to be an equalization process, rather than a judicial process, precedent setting will not occur and it is probably inappropriate.

We believe that the proposed changes to the property tax appeals process which have been agreed to in SB 542 will go much further in facilitating the process at BOTA than what this bill offers. We ask that this committee stand by that solution, rather than adopt this one.