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October 18, 2018

VIA EMAIL ONLY

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Re: Draft AAB Manual Language re Postponements and Continuances

Dear Messrs. Yeung and Moon:

I am counsel for the Santa Clara County Assessment Appeals Board and write to comment on the draft language for the Assessment Appeals Manual section on Postponements and Continuances that you recently circulated. My comments are provided below and I have attached a redline with additional explanatory comment bubbles regarding suggested revisions:

- It would make organizational sense to switch the order of “Postponements” and “Continuances” in the title and the order of these subsections in the manual.
- The SBE may wish to add a general discussion of the difference between postponements and continuances since this has long been a source of confusion and incorrect language usage for many. [No suggested language provided in my redline.]
- These pages of the AAB manual should be organizationally structured so that any new language generally applicable to both postponements and continuances is separate from the specific subsections for postponements and continuances. As presently structured, the

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SBE's draft language would insert at the end of the subsection specific to postponements two paragraphs of proposed language that the SBE intends to pertain both to postponements and continuances. As noted in the attached redline, I have both suggested new organizational placements for these paragraphs and also suggested substantive edits detailed further in the discussion below.

- The new draft language states that the board should ensure that “unnecessary continuances and postponements are not granted.” In Santa Clara County, self-represented applicants very frequently request continuances either at morning roll call or when they first state their appearances once their case is called for hearing. These self-represented applicants frequently state that (a) after listening to the first few cases they realize that they have not come to the hearing properly prepared with evidence to support their position and now seek more time to prepare for hearing; or (b) they do not want to spend the time that day to wait until their case is called (or cannot do so) and prefer to come back on another day. Currently, the Santa Clara County Assessment Appeals Board frequently grants such continuance requests out of a desire to give self-represented Applicants every possible opportunity to put their best foot forward. If the SBE adopts its draft language regarding “unnecessary continuances,” then it would be useful for the SBE to provide guidance in the manual regarding whether these types of continuances are “unnecessary continuances” that should be denied.

Continuances

- I recommend moving the SBE's draft language, “The board should make every reasonable effort, however, to hold the hearing expeditiously” so that this language precedes the specific subsections on postponements and continuances and is therefore made generally applicable to both subsections.
- I suggest deleting the new draft language re “where practicable a continuance should not exceed 90 days unless...” The guidance to hold the hearing expeditiously is already encompassed in the new general language drafted by the SBE. Also, the 90-day reference is not drawn from the RTC or Property Tax Rules.
- To improve the organizational structure of this subsection, I suggest moving the paragraph that begins “If the applicant requests a continuance within 90 days of the two-year limitation period . . .” so that it comes before the explanation of primary reasons for continuing a hearing.
- Primary reasons for continuing a hearing:
 - I suggest changing the order of the primary reasons to improve the logical flow. Additionally, as permitted and envisioned by RTC 1604(c)(2), the manual should include as a primary reason for continuance that the Applicant has failed to

provide all information required by law. Where an applicant has failed to provide all information as required by law, the applicant is not yet entitled to a hearing and the AAB has discretion to continue the matter. As presently written, the draft language omits reference to this and misleadingly provides guidance only about the mandatory continuance required under RTC 441(h). The manual should also include as a primary reason for continuance those situations in which the AAB continues the hearing because it needs more information to make its value decision. I have also suggested various textual edits shown on the redline of suggested edits. Thus, I suggest five primary reasons for continuance arranged in the following order: amendment of an application; applicant has failed to provide all information required by law; new information following section 1606 exchange; inspection of assessor's records; and further information required by board.

- As shown on the attached redline, in the discussion regarding mandatory continuances required pursuant to 441(h), I suggest adding language regarding the automatic tolling of the two-year statute required by 441(h) when such continuances are granted.
- As shown on the attached redline, in the discussion regarding continuances pursuant to Section 408, I suggest adding language regarding the automatic tolling of the two-year statute required by Section 408 when such continuances are granted.

Postponements

- As shown on the attached redline, in an effort to improve clarity and logical flow, I have suggested some minor organizational and linguistic changes that fall within the first seven paragraphs.
- The SBE draft language adds two new paragraphs to the end of the “postponement” subsection. However, these two new draft paragraphs are not specific to postponements but rather expressly pertain both to postponements and continuances. I suggest moving the first of these two paragraphs so that it becomes the first paragraph under “Postponements and Continuances” and precedes the “postponement” and “continuance” subheadings.
- Final paragraph:
 - As further described below, I suggest either deleting the final paragraph or making various substantive edits to that paragraph to render it consistent with governing law. If it is not deleted, then I recommend inserting a new third subheading before the paragraph. See redline for suggested heading.

- **1st Sentence:** See redline for suggested modifications to this sentence. As written, the phrasing incorrectly suggests that such a postponement or continuance is allowed for the benefit of the taxpayer rather than properly reflecting that all information required by law must be provided by the applicant and the board has discretion to postpone or continue the hearing where the applicant has not complied with that statutory requirement.

- **2nd and 3rd sentences:** The draft language is contrary to law. Section 1604(c)(2) makes clear that applicants must first provide all information required by law before they are entitled to a hearing. And the SBE counsel has advised that in situations where the applicant has failed to comply with this legal requirement, it is within the board's discretion to decide whether to postpone/continue the hearing pending the applicant's provision of the required information or instead nevertheless press forward with the hearing. The SBE's draft language, however, would erroneously advise boards that applicants may simply refuse to turn over documents responsive to the assessor's requests and as long as the applicant states in writing that those documents will not be forthcoming, then the AAB cannot serially continue or postpone the case pending applicant's compliance with its statutory obligations. This is contrary to the law. As shown on the suggested redline, if the draft paragraph is not deleted, then I suggest revising the draft language to set forth that if the Applicant has provided the AAB with a declaration under penalty of perjury stating that they have already provided all responsive information or that no further information exists, then the information request may not be the sole basis for further serial continuances and postponements unless the assessor advises the board that the assessor will be using a subpoena, seeking a court order, or relying on other legal remedies to obtain the requested information.

- **4th Sentence:** This draft language is contrary to Section 1604(c) and also improperly impedes the exercise of the AAB's discretion. The law requires applicants to provide all information required by law and it is evident from Section 1604(c) that they are not entitled to a hearing until that information has been provided. Where applicants have not provided all information as required by law, it is properly up to the discretion of the AAB to decide whether to nevertheless press on regardless with a hearing. To state that, even though an applicant has not complied with its duty to provide all information required by law, the board should nevertheless "in most cases hold a hearing..." is both contrary to law and contrary to the proper exercise of the AAB's discretion.

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- **Last Sentence:** As shown on the attached redline, I suggest eliminating this sentence as the concepts contained therein are, I believe, addressed more clearly in the alternate language I suggest.

Very truly yours,

JAMES R. WILLIAMS
County Counsel

A handwritten signature in blue ink, appearing to read "Marcy L. Berkman", written over the printed name of the Deputy County Counsel.

MARCY L. BERKMAN
Deputy County Counsel

MLB:mlb

1875188



POSTPONEMENTS AND CONTINUANCES .


It is within the board’s discretion to grant requests for a continuance or postponement of a hearing. However, in considering postponement and continuance requests beyond those that must be granted as a matter of right and those that are stipulated to between the parties, the board should ensure that unnecessary postponements and continuances are not granted. The reasonable needs of the county board of equalization or assessment appeals board or county hearing officer and the parties to the proceedings may be considered in determining whether to grant a postponement or continuance. The board should make every reasonable effort, however, to hold the hearing expeditiously.


CONTINUANCES

The board may, in its discretion, continue a hearing to a later date.¹ If the hearing is continued, the clerk must notify both the applicant (or agent) and the assessor, in writing, of the time and place of the continued hearing. This notification must be made not less than 10 days prior to the date of the continued hearing will inform the applicant (or agent) and the assessor in writing of the time and place of the continued hearing not less than 10 days prior to the new hearing date, unless the parties agree in writing or on the record to waive written notice.²

If the applicant requests a continuance within 90 days of the expiration of the two-year limitation period provided in section 1604, the board may require a written extension signed by the applicant extending and tolling the two-year period indefinitely. The applicant has the right to terminate the extension agreement upon 120 days written notice.⁷

There are five primary reasons for continuing a hearing:

- 
 - **Amendment of an application.** If the appeals board grants an applicant's request to amend an application, upon request of the assessor, the hearing on the matter ~~will~~ shall be continued by the board for no less than 45 days, unless the parties mutually agree to a different period of time.⁶
- **Applicant has failed to provide all information required by law.** The AAB is not required to hold a hearing until the Applicant has provided all information required by law.

 - If the Applicant has not yet provided all information required by law, the hearing may be continued to a later date. In such circumstances, the hearing may be continued to a later date for the hearing on the merits of the application or it may be continued to a date at  which the board will further inquire into the status of whether Applicant has yet provided all information required by law. FN
 - ~~If the assessor did not receive information from the applicant, as requested pursuant to section 441(d), and the applicant presents such information at the hearing, the assessor may request a continuance for a reasonable period of time.~~ If an applicant fails to provide information to the assessor pursuant to section 441(d) and introduces any requested

materials or information at any assessment appeals board hearing, the assessor may request and shall be granted a continuance for a reasonable period of time. The continuance shall extend the two-year period specified in 1604(d) for a period of time equal to the period of the continuance. 4

- **New information introduced at the hearing following Section 1606 exchange.** If new material relating to the information received from the other party during an exchange of information is introduced, the other party may request a continuance for a reasonable period of time.³
- **Inspection of assessor's records.** If the assessor fails to permit the inspection or copying of materials or information, as requested by the applicant pursuant to section 408 (d) or (e), and the assessor introduces any such requested materials or information at any assessment appeals board hearing, the applicant may request a continuance for a reasonable period of time. The continuance shall extend the two-year period specified in Section 1604(c) for a period of time equal to the period of the continuance. 5
- **Further Information required by the Board.** If, in the opinion of the board, not enough evidence was provided during the course of the hearing for the course to make a proper determination of value, the board may continue the hearing so that information the board believes is pertinent may be assembled and brought before them.

POSTPONEMENTS

Rule 323, subsection (a), provides in part:

The applicant and/or the assessor shall be allowed one postponement as a matter of right, the request for which must be made not later than 21 days before the hearing is scheduled to commence.

If the applicant requests a postponement of a scheduled hearing within 120 days of the expiration of the two-year limitation period provided in section 1604, the postponement will be contingent upon the applicant agreeing to extend and toll indefinitely the two-year period. The applicant has the right to terminate the extension agreement with 120 days written notice.

The assessor is not entitled to a postponement as a matter of right if the request is made within 120 days of the expiration of the two-year limitation period. However, ~~at the discretion of the board,~~ in its discretion, may grant such a request. ~~may be granted.~~

If the applicant or the applicant's agent are unable to attend a properly noticed hearing, the applicant or the applicant's agent may request in writing, prior to the hearing date, a postponement of the hearing with a showing of good cause to the board.⁸

Requests for postponements beyond those that are a matter of right, whether by the applicant or the assessor, must be made in writing, and good cause must be shown for the requested postponement. A stipulation by an applicant and the assessor shall be deemed to constitute good cause. Postponements granted to an applicant for good cause or by stipulation shall result in extending and tolling indefinitely

the two-year limitation period, subject to termination of the agreement by 120 days written notice by the applicant

Any information exchange dates established pursuant to Rule 305.1 remain in effect based on the originally scheduled hearing date, notwithstanding the hearing postponement, except when a hearing is postponed due to the failure of a party to respond to an exchange of information.⁹

A board of supervisors may delegate decisions concerning postponement to the clerk in accordance with locally adopted rules.

C. FURTHER GUIDANCE ON POSTPONEMENTS AND CONTINUANCES BASED ON APPLICANT'S FAILURE TO PROVIDE ALL INFORMATION AS REQUIRED BY LAW

The board may continue or postpone a hearing because an applicant has not yet complied with a request for information from the assessor or the board. Where a taxpayer has provided the assessment appeals board a declaration under penalty of perjury stating that the taxpayer has already provided all responsive information required by law and that the taxpayer either does not have any further responsive information or that no further responsive information exists, then the information request at issue may not be the sole basis for further serial continuances and postponements unless the assessor advises the board that the assessor will be utilizing a subpoena, seeking a court order, or relying on other legal remedies to obtain the requested information.

1 Rule 323, subdivision (d).

2 Rule 323, ~~subsection~~ subdivision (c).

FN Section 1604(c)(2)

3 Rule 305.1, ~~subsection~~ subdivision (c).

4 Section 441(h)

5 Section 408(f)(3).

6. Rule 305, ~~subsection~~ subdivision (e)(2)(C)(iv).

7 Rule 323, ~~subsection~~ subdivision (a).

8 Rule 313.

9 Rule 305.1, ~~subsection~~ subdivision (d); Rule 323, ~~subsection~~ subdivision (a).