

CAUSE NO. D-1-GN-18-006098

TEXAS PROTAX-AUSTIN, INC;	§	IN THE DISTRICT COURT OF
FIVE STONE TAX ADVISERS, LLC;	§	
46 COMMERCIAL PROPERTY	§	
OWNERS; 113 RESIDENTIAL	§	
PROPERTY OWNERS,	§	
Plaintiffs,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
TRAVIS APPRAISAL REVIEW	§	
BOARD; MARYA CRIGLER,	§	
CHIEF APPRAISER,	§	
(In her Official Capacity),	§	
Defendants.	§	201ST DISTRICT COURT

CRIGLER’S MOTION TO DISMISS
PURSUANT TO THE TEXAS CITIZENS PARTICIPATION ACT
AND FOR LACK OF JURISDICTION

TO THE HONORABLE JUDGE OF THE COURT:

Marya Crigler, in her official capacity as Chief Appraiser for Travis Central Appraisal District (Chief Appraiser), Defendant in the above-entitled and numbered cause, moves to dismiss the claims against her pursuant to chapter 27 of the Texas Civil Practice and Remedies Code, also known as the Texas Citizens Participation Act (TCPA) or Anti-Strategic Lawsuits Against Public Participation (Anti-SLAPP) legislation.

I. Introduction

1. Texas Protax-Austin, Inc. (Protax), Five Stone Tax Advisers, LLC (Five Stone), 46 commercial property owners allegedly represented by Protax (Commercial Owners), and 113 residential property owners allegedly represented by Five Stone (Residential Owners), filed Plaintiffs' Original Petition and Discovery Requests (Petition) on October 8, 2018.¹ Plaintiffs name Marya Crigler, in her official capacity as Chief Appraiser for Travis Central Appraisal District, (Chief Appraiser) and Travis Appraisal Review Board (TARB). Plaintiffs seek prospective injunctive relief against the Chief Appraiser to prevent her from providing assistance to TARB in scheduling appraisal protest hearings as permitted in section 6.43(f) of the Tax Code.²

2. Meritless lawsuits that target the legitimate exercise of the right to engage in truthful speech, lawful petitioning, or legal association have become known as "Strategic Lawsuits Against Public

¹ Notwithstanding a non-suit filed by one of the alleged property owners, Tarin Lewis, the actual number of property owners exceeds 46 commercial property owners and 113 residential property owners; some properties have more than one owner and some owners own more than one property. A more accurate description would be the owners of 46 commercial properties and the owners of 113 residential properties. The counties of residence of the Commercial Owners and Residential Owners (that is the plaintiffs other than Protax and Five Stone) is unknown but they plead they all own property in Travis County.

² References herein to the "Tax Code" are to the Texas Property Tax Code.

Participation” (SLAPP) suits. In response, the Texas legislature enacted the Texas Citizens Participation Act (TCPA) to prevent SLAPP litigation and offer SLAPP victims, such as the Chief Appraiser, a quick and efficient remedy: mandatory and immediate dismissal of retaliatory lawsuits relating to the lawful exercise of a person’s right to free speech, petition, or association. *See* Tex. Civ. Prac. & Rem. Code Ann. ch. 27; *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). Because any actions or communications the Chief Appraiser has taken or will take to schedule protest hearings for TARB were taken or will be taken to exercise a lawful duty in conformity with the Tax Code, and Plaintiffs cannot prove a prima facie case for injunctive relief, the Court should dismiss the claim for injunctive relief, award attorney’s fees incurred in defending against the action, and order sanctions under the TCPA. Tex. Civ. Prac. & Rem. Code § 27.009(a); *see also* *Watson v. Hardman*, 497 S.W.3d 601, 606 (Tex. App.—Dallas 2016, no pet.).

II. Exhibits

- Exhibit 1 Affidavit of Marya Crigler
- Exhibit 2 Appointments of Agent
- Exhibit 3 Notices of Protest
- Exhibit 4 Notices of Schedules of Hearings

- Exhibit 5 Schedules of Hearings
- Exhibit 6 TCAD – Board of Directors Minutes of the September 5, 2017 Meeting
- Exhibit 7 Travis Appraisal Review Board Formal Hearing Procedure
- Exhibit 8 Protax Designation of Agent Forms
- Exhibit 9 Inflection Point Report
- Exhibit 10 Master Panel Schedule
- Exhibit 11 TCAD & TARB Minutes
- Exhibit 12 Informal Meeting Schedules

III. Factual Background

3. As of the July 20 deadline for certification, Protax filed 55,953 protests and Five Stone filed 14,708 protests, for a combined total of 70,661 accounts. *See* Exhibit 2; Exhibit 3. Plaintiffs now sue on 159 of those 70,661 protested accounts. Travis Central Appraisal District (TCAD) and TARB used the same procedures and guidelines for the protests filed on behalf of Commercial Owners and Residential Owners that they used to address the other 140,428 protests received for the 2018 tax year. *See* Exhibit 7.

4. On February 13, 2018, to effect changes in procedures and policies implemented by TARB, TCAD met with tax agents, including Protax and Five Stone. *See* Exhibit 1.

5. At the request of TARB Chairperson Betty Thompson, and in accordance with the Tax Code and TARB's Formal Hearing Procedures, the Chief Appraiser provided clerical assistance to TARB by scheduling hearings for all protests filed for the 2018 tax year. *See* Exhibit 1; Exhibit 7, ¶ III. 1; Exhibit 11; Tex. Tax Code § 6.43 (f).

6. When scheduling the dates and times for the protests on behalf of TARB, the Chief Appraiser grouped the protested properties by the following TARB criteria: property type (i.e., industrial, retail, vacant land, residential, etc.); neighborhood; and, whether the protest had an unresolved informal meeting. *See* Exhibit 1; Exhibit 9; Exhibit 11.

7. The Chief Appraiser then considered per agency the number of properties protested and the value of each property protested. *See* Exhibit 1; Exhibit 9. The Chief Appraiser gave agencies representing a greater number of protested properties priority over agencies representing fewer protested properties. *See* Exhibit 1; Exhibit 9.

8. The Chief Appraiser considered the value of each protested property against an "inflection point" when prioritizing protest hearings according to these groupings. *See* Exhibit 1; Exhibit 9. The inflection

point for tax year 2018 was \$365,000. *See* Exhibit 1; Exhibit 9. A protest on a property valued above the inflection point gave that protest a higher priority for scheduling an earlier hearing date than a protested property of the same property type whose value fell below the inflection point. *See* Exhibit 1; Exhibit 9.

9. By scheduling the protests of the highest valued properties above the inflection point for agencies with the greatest volume of protests, the Chief Appraiser could reach the appraisal roll certification deadline more quickly. *See* Exhibit 1; Exhibit 9; Tex. Tax Code § 41.12 (c)(2). However, the Chief Appraiser scheduled some hearings for properties valued below the inflection point before properties valued above the inflection point because the primary consideration for scheduling the protest hearings was grouping the protests by neighborhood, property type, and unresolved informal meetings. *See* Exhibit 1.

10. The TARB scheduled approximately 50 protests per hearing room. *See* Exhibit 1; Exhibit 9.

11. After the Chief Appraiser grouped the accounts for each hearing room, TARB randomly assigned TARB panel members to each

room to hear the protests. *See* Exhibit 1; Exhibit 7, ¶ III. 4; Tex. Tax Code § 41.66.

12. The Chief Appraiser performed the process of scheduling formal protest hearings as clerical support to TARB under the guidance, oversight and direction of the TARB. *See* Exhibit 1. The TARB occasionally scheduled protest hearings on its own, without TCAD assistance. *See* Exhibit 1.

13. Although Plaintiffs plead in their Petition that “Plaintiffs Texas Protax and Five Stone were validly appointed as tax agents for each of the Plaintiff property owners as shown in the list included in this Petition,” the evidence does not support this allegation. *See* Plaintiffs’ Original Petition and Discovery Requests, ¶ 6.b. For two accounts (account numbers 55820 and 709119), an agent was not designated to represent the property owner(s). *See* Exhibit 2.

14. Additionally, on several of the accounts listed in the Petition, the designation of agent form does not properly list or furnish information identifying the capacity of the assignee to designate Protax or Five Stone as the respective tax agent for the property owner. *See* Exhibit 2. For instance, the property owners for accounts 165254,

557421, 741044 list Tax Tiger as the designated agent.³ *See* Exhibit 2. TCAD does not have information authorizing Protax or Five Stone to represent these property owners of accounts 165254, 557421, 741044.

15. Subsequent, to filing the Petition, Protax filed new designation of tax agent forms with TCAD. *See* Exhibit 8. These forms attempt to designate Protax employee David Brown as the tax agent for the Commercial Owners. *See* Exhibit 8. Protax seemingly relies on its contracts between the Commercial Owners and Protax to establish its employee Bawcom had authority to re-designate a specific tax agent employee, Mr. Brown, on behalf of the Commercial Owners. *See* Exhibit 8.

16. On each of the accounts that Plaintiffs timely protested, TARB sent Plaintiffs notices of the scheduled hearing date and time at least two weeks before the hearing date and reminded Plaintiffs that they could submit affidavits in lieu of presenting evidence in person at hearings. *See* Exhibit 4.

17. Before the formal scheduled hearing date for the protests, TCAD conducted 52 informal meetings regarding properties included in

³ Upon information and belief, Tax Tiger may be a predecessor to Five Stone.

this lawsuit with Protax and Five Stone in an attempt to agree on a value for those properties. *See Exhibit 1; Exhibit 12.* Protax and Five Stone participated in some of the informal meetings, but for many of the protested accounts, elected to not appear for a scheduled appointment or not schedule an informal meeting even after TCAD extended the informal meeting deadline and even offered Saturday meeting times. *See Exhibit 1; Exhibit 12.*

18. Despite Protax's suspiciously timed request for computer intensive information, TCAD fully complied with the almost daily demands, including Protax's information request on June 15, 2018. TCAD ramped up to 24 hour, around-the-clock staffing and provided the requested information on June 26, 2018, before TARB began to hear protests. *See Exhibit 1.*

19. On the dates of Plaintiffs' scheduled hearings, Protax and Five Stone employees were present at the Expo Center. *See Exhibit 1.* However, neither company appeared for their respective principles at the hearing for the accounts listed in the Petition. *See Exhibit 1.* Instead of abandoning the hearings, Plaintiffs could have filed affidavits in lieu of appearing in person at the TARB protest hearings,

but apparently chose to file this litigation instead.⁴ See Exhibit 1; Tex. Tax Code § 41.45 (b) & (n).

20. Some of the accounts included in this lawsuit are either still open protests or received some other type of final order after a hearing:

Agent	Account Number
Five Stone	100425; 100734; 101151; 128119; 148146; 161982; 177749; 187662; 207219; 222654; 231699; 302703; 306096; 329451; 333253; 460747; 484290; 501082; 752729; 891396
Protax	163256
Tax Tiger	165254; 557421; 741044

IV. Argument and Authorities

A. TCPA OVERVIEW

1. In 2011, the Texas Legislature enacted the TCPA to encourage and safeguard the constitutional right to speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights to file meritorious lawsuits for demonstrable injury. Tex. Civ. Prac. & Rem. Code § 27.002; *see also Lipsky*, 460 S.W.3d at 586. The

⁴ The Notices of Schedules of Hearings also reminded Plaintiffs that they could file affidavits in lieu of appearing in person. See Exhibit 4.

TCPA provides a special motion procedure for the expedited dismissal of frivolous claims based on, related to, or filed in response to a party's exercise of the right of free speech, petition or association, and allows a party to recover attorney's fees and sanctions if the trial court dismisses the action. Tex. Civ. Prac. & Rem. Code Ann. §§ 27.005 (b) and 27.009 (a); *Watson*, 497 S.W.3d at 605 (citations omitted).

2. The motion procedure is a two-step process. *Lipsky*, 460 S.W.3d at 586-87. First, the defendant has the initial burden to show by a preponderance of the evidence that the plaintiff's request for relief is based on, relates to, or is in response to the defendant's exercise of: 1) the right of free speech; 2) the right to petition the government; or 3) the right of association. Tex. Civ. Prac. & Rem. Code § 27.005 (b); *Watson*, 497 S.W.3d at 605.

3. Second, once the defendant demonstrates that the plaintiff's allegations implicate one of these rights, the burden shifts to the plaintiff to establish, by clear and specific evidence, a prima facie case for each essential element of the claims in question. Tex. Civ. Prac. & Rem. Code § 27.005 (c). The trial court must dismiss each claim for which the plaintiff fails to provide sufficient evidence for a prima facie

case. Tex. Civ. Prac. & Rem Code. § 27.005 (b) and (c); *Watson*, 497 S.W.3d at 605.

4. However, regardless of whether the plaintiff carries its burden to establish a prima facie case for each essential element of each claim, the trial court must dismiss if the defendant establishes by a preponderance of the evidence each element of a valid defense to the plaintiff's claims. Tex. Civ. Prac. & Rem Code. § 27.005 (d).

B. TCPA APPLIES TO PLAINTIFFS' CLAIMS AGAINST THE CHIEF APPRAISER

5. Plaintiffs have named the Chief Appraiser, in her official capacity as a party to this lawsuit. See Plaintiffs' Original Petition and Discovery Requests, ¶ 4.b. The plain language of the TCPA does not preclude its application to government officials sued in their official capacity. *Roach v. Ingram*, 14-16-00790-CV, 2018 WL 2672546, at *10 (Tex. App.—Houston [14th Dist.] June 5, 2018, pet. filed.). Thus, the Chief Appraiser may move for dismissal under the TCPA.

C. PLAINTIFFS' ACTION IS BASED ON THE CHIEF APPRAISER'S RIGHTS TO FREE SPEECH, PETITION AND ASSOCIATION

6. To meet the first step of dismissal under the TCPA, the Chief Appraiser need only show that Plaintiffs' legal action is based on,

relates to, or is in response to her exercise of the right of free speech or the right to petition or the right of association. *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017). “Communication” under the TCPA encompasses “the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” Tex. Civ. Prac. & Rem. Code § 27.001(1).

7. The TCPA defines the “[e]xercise of the right of free speech” means a communication made in connection with a matter of public concern. Tex. Civ. Prac. & Rem. Code § 27.001 (3); *Hersh*, 526 S.W.3d at 466. A “matter of public concern” includes, but is not limited to, an issue related to economic or community well-being, the government, a public official, or a public figure. See Tex. Civ. Prac. & Rem. Code § 27.001 (7). The TCPA does not require that the form of the communication be public. *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015). Taxation, including the valuation of property for taxation, serves the public purpose of defraying governmental expense. *City of Wichita Falls v. Cooper*, 170 S.W.3d 777, 289 (Tex. Civ. App.—Fort Worth 1943, writ ref’d). Therefore, any statement made by or document produced by the Chief Appraiser with respect to taxation of

property is a communication made in connection with a matter of public concern and is subject to the TCPA.

8. The TCPA defines the “[e]xercise of the right to petition” to include a communication in or pertaining to a judicial proceeding, an official proceeding, other than a judicial proceeding to administer the law, or any other proceeding before a subdivision of the state government. Tex. Civ. Prac. & Rem. Code § 27.001(4) (A)(i), (ii), and (iii). It also includes communications in connection with an issue under consideration by a governmental body in an official proceeding. Tex. Civ. Prac. & Rem. Code § 27.001(B). “Governmental proceedings” under the TCPA include any proceeding before any board, such as TARB. Any communications regarding scheduling of an appraisal review board hearing in which the Chief Appraiser assists TARB pertains to an official proceeding and falls within the exercise of the right to petition.

9. The TCPA defines the “[e]xercise of the right of association” as a communication between individuals who join together to collectively promote, pursue, or defend common interests. Tex. Civ. Prac. & Rem Code § 27.001 (2).

10. Furthermore, a defendant may obtain dismissal under the TCPA while denying he or she ever made the alleged communication. *Hersh*, 526 S.W.3d at 463 (holding when it is clear from plaintiff's pleadings that the alleged action is covered by the TCPA, the defendant need not show more and may deny making the alleged communication altogether).

D. PLAINTIFFS CANNOT DEFEAT THE CHIEF APPRAISER'S DEFENSE

11. Notwithstanding whether Plaintiffs can establish by clear and specific evidence a prima facie case for each essential element of their claim against the Chief Appraiser, the Chief Appraiser is entitled to dismissal of Plaintiffs' action against her under the TCPA because she is entitled to governmental immunity, the remedies set forth in the Texas Tax Code are exclusive, and she has committed no ultra vires acts.

1. Governmental Immunity

12. Unless the legislature has clearly and unambiguously waived sovereign immunity or consents to suit, a political subdivision's immunity from suit is a jurisdictional bar against all lawsuits. *Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842–843

(Tex. 2009). This protection available to governmental entities extends to protect an individual who is sued in her official capacity. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 380 (Tex. 2009). Where a governmental entity enjoys immunity, so too does the governmental employee. Moreover, under Texas law, a suit against a government employee in her official capacity is a suit against her government employer. *Texas A & M University Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007). Here, Plaintiffs have failed to establish a waiver of sovereign immunity.

a. Tax Code Overview

13. The Tax Code is an example of a pervasive regulatory scheme that evidences the legislature's intent to vest the appraisal review boards with exclusive jurisdiction. *See Jim Wells County v. El Paso Prod. Oil & Gas Co.*, 189 S.W.3d 861, 871 (Tex. App.–Houston [1st Dist.] 2006, pet. denied). The Tax Code sets forth administrative procedures for aggrieved property owners to protest their tax liabilities. *See generally* Tex. Tax Code Ann. ch. 41–42. Therefore, the appraisal review boards have exclusive jurisdiction over property tax disputes, and property owners generally must exhaust their administrative

remedies before seeking judicial review via a petition brought against the appraisal district. *See* Tex. Tax Code Ann. § 42.21(b); *MAG-T, L.P. v. Travis Cent. Appraisal Dist.*, 161 S.W.3d 617, 624 (Tex. App.—Austin 2005, pet. denied). The Tax Code provides that such remedies “are exclusive.” Tex. Tax Code Ann. § 42.09 (a). As to claims against government officials for declaratory, mandamus, or injunctive relief that could not be pursued through the administrative process, the property owner must show that a waiver or exception to immunity applies. *See Stiefer v. Moers*, No. 14–14–00617–CV, 2015 WL 6950104, at *3 (Tex. App.—Houston [14th Dist.] Nov. 10, 2015, pet. denied) (mem. op.).

b. Filing a Protest

14. The administrative remedies for a property owner dissatisfied with the value of the owner’s property as noticed by the chief appraiser are generally provided in Chapter 41. After a value is noticed, a property owner who disagrees with the noticed value from the chief appraiser, including the denial of an exemption, may file a protest with the appraisal review board. Generally, a property owner who seeks to protest must file its written Notice of Protest by May 15 or no

later than the 30th day after the date that the notice was delivered to the property owner as provided by section 25.19 in connection with any other property, whichever is later. Tex. Tax Code § 41.44 (a). This remedy is exclusive, and a failure to pursue it generally precludes judicial review of the appraisal. Tex. Tax Code § 42.09; *Escamilla v. City of Laredo*, 9 S.W.3d 416, 422 (Tex. App.—San Antonio 1999, pet. denied).

c. Hearings before the ARB

15. The duties of the appraisal review board set forth in Chapter 41 of the Tax Code include determining protests initiated by property owners. Tex. Tax Code § 41.01 (a). The local administrative judge, not the appraisal district's board of directors, appoints appraisal review board members in counties with a population of more than 120,000. Tex. Tax Code § 6.41 (b) and (d-1).⁵ TARB consists of more than three members; however, TARB must sit in panels of not fewer than three members to conduct hearings. Tex. Tax Code § 41.45 (d). The recommended determination of the protest (or motion) by these panels must then be considered by the full appraisal review board: any

⁵ The Chief Appraiser requests that the Court take judicial notice that the population of Travis County exceeds 120,000. Tex. R. Evid. 201.

recommendation made by an appraisal review board panel hearing a protest must be considered by the appraisal review board and if the appraisal review board does not accept a panel recommendation, the appraisal review board may refer the matter for rehearing or make its own determination after giving notice to the subsequent determination hearing. Tex. Tax Code § 41.45 (d). When TARB meets to examine appraisal records, a majority of its 75 members constitutes a quorum. Tex. Tax Code § 6.42 (a); Exhibit 6.

16. If a chief appraiser and a property owner enter into an agreement before an appraisal review board makes a determination relating to any matter that may be protested to the appraisal review board, the agreement is final and the appraisal review board may not review or reject that agreement. Tex. Tax Code §§ 1.111 (e) and 41.01 (b). However, nothing in the Tax Code requires a chief appraiser and a property owner to enter into settlement negotiations before an ARB considers any protest.

17. When a property owner initiates a protest, the property owner is entitled to appear at an appraisal review board hearing to offer evidence or argument, either in person or by affidavit without

personally appearing or by telephone conference. Tex. Tax Code § 41.45 (a); *Webb County. Appraisal Dist. v. New Laredo Hotel, Inc.*, 792 S.W.2d 952, 955 (Tex. 1990) (“We hold that taxpayers contesting property valuation must appear, either personally, by representative, or by affidavit, at the protest hearing as a prerequisite to an appeal to district court.”). A property owner may designate a lessee or other person to act as the agent for the owner. Tex. Tax Code § 1.111 (a).

18. If a property owner fails to appear at a hearing, within four days of the hearing, that property owner may provide a written statement showing good cause for the failure and request a new hearing. Tex. Tax Code § 41.45 (e-1). Once an appraisal review board determines a protest, it makes its decision by written order. Tex. Tax Code § 41.47 (a) (make a written order of its decision on a protest). However, a dismissal of a protest or motion is not an appraisal review board determination.

d. Appeals to District Court

19. Parties dissatisfied with an appraisal review board determination may seek judicial review of the determination. Property owners are entitled to appeal to district court orders of an appraisal

review board determining protest by the property owner as provided by Subchapter C of Chapter 41. Tex. Tax Code § 42.01 (a) (1). A petition for review to district court may be brought any time after the protest hearing, but must be brought no later than 60 days after the party receives notice that the ARB order from which the appeal may be had has been entered. Tex. Tax Code § 42.21 (a).

20. The Tax Code also provides that a property owner who has been denied a hearing to which the property owner is entitled under Chapter 41 file a petition or application in district court to compel the appraisal review board to provide a hearing. Tex. Tax Code § 41.45 (f).⁶

e. Plaintiffs Have Not Exhausted Administrative Remedies

21. This Court does not have jurisdiction over Plaintiffs' claims because Plaintiffs have failed to exhaust their administrative remedies. The only relief Plaintiffs seek against the Chief Appraiser is for this Court to “grant an injunction against Marya Crigler, in her capacity as

⁶ Section 41.45 (f) does not “allow a property owner to circumvent the appeal provision in Chapter 42 and sue in district court simply by alleging the Board failed to adhere to procedural guidelines.” *Appraisal Review Board of Harris County Appraisal District v. O'Connor & Assocs.*, 267 S.W.3d 413, 418 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Moreover, if a property owner fails to appear in person, by agent, or by affidavit at a scheduled protest hearing, the property owner fails to exhaust administrative remedies. *Appraisal Review Board of Dallas Central Appraisal District v. O'Connor & Assocs.*, 275 S.W.3d 643, 646 (Tex. App.—Dallas 2009, no pet.).

Chief Appraiser of Travis County and against her staff and successors in office, from determining the ARB panel selection by which appraisal protest in Travis County will be heard.” Plaintiffs’ Original Petition and Discovery Requests, p. 17. Plaintiffs also seek to compel the TARB to grant additional hearings on their 2018 appeal protests.

22. It does not matter whether Protax and/or Five Stone chose not to show up because they were not prepared, understaffed, or mad that the Chief Appraiser had managed to meet all of the deadlines for producing hearing files and their public information act requests, the Tax Code provides Plaintiffs’ exclusive remedies. Tax Code §§ 42.09, 41.45 (e-1). Those remedies do not include Plaintiffs’ claim for injunctive relief against the Chief Appraiser.

**2. Plaintiffs Fail to Allege a
Waiver of Immunity or Ultra Vires Acts**

23. For claims against government officials for declaratory or injunctive relief that could not be pursued through the administrative process, the property owners must show that a waiver of immunity or an exception to the exhaustion of remedies requirement applies. *See Piwonka v. SPX Corp.*, 14-15-00915-CV, 2017 WL 1181302, at *4 (Tex. App.—Houston [14th Dist.] Mar. 30, 2017, pet. denied) (mem. op.),

citing *Stiefer v. Moers*, No. 14–14–00617–CV, 2015 WL 6950104, at *3 (Tex. App.—Houston [14th Dist.] Nov. 10, 2015, pet. denied) (mem. op.).

24. The exceptions to the exhaustion-of-remedies doctrine include (1) when an injunction is sought an irreparable harm would result; (2) when the administrative agency cannot grant the requested relief; (3) when the issue presented is purely a question of law; (4) when certain constitutional issues are involved; and (5) when an administrative agency purports to act outside its statutory powers. *Gibson v. Waco I.S.D.*, 971 S.W.2d 199, 200 – 203 (Tex. App.—Waco 1998), *vacated on other grounds*, 22 S.W.3d 849 (Tex. 2000). Only if Plaintiffs establish at least one of the exceptions does the exhaustion-of-remedies doctrine not apply.

25. “A suit asserting that a government officer acted without legal authority or seeking to compel him to comply with statutory or constitutional provisions is an ultra vires suit and is not subject to pleas of governmental immunity.” *Lone Star College System v. Immigration Reform Coalition of Tex. (IRCOT)*, 418 S.W.3d 263, 272 (Tex. App.—Houston [14th Dist.] 2014, pet. ref’d) (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009)); *see also Stiefer*, 14-14-00617-CV, slip

op. at *3 (Tex. App.—Houston [14th Dist.] Nov. 10, 2015, pet. denied). An ultra vires suit seeks to enforce existing policy, not to alter it. *IRCOT*, 418 S.W.3d at 272; *Stiefer*, 14-14-00617-CV, slip op. at *3. The ultra vires exception to governmental immunity depends upon the plaintiff's allegation and proof that the officer acted without legal authority or that she failed to perform a purely ministerial act. *IRCOT*, 418 S.W.3d at 272; *Stiefer*, 14-14-00617-CV, slip op. at *3. A complaint about how the officer exercised his discretion is not an ultra vires complaint. *IRCOT*, 418 S.W.3d at 272; *Stiefer*, 14-14-00617-CV, slip op. at *3.

26. Although the Tax Code prohibits ex parte communications between members of the appraisal review board and the chief appraiser or other employee of an appraisal district, that prohibition does not apply to

communications with a member of an appraisal review board by the chief appraiser or another employee . . . of an appraisal district or a property tax consultant or attorney representing a party to a proceeding before the appraisal review board:

* * *

(3) that are specifically limited to and involve administrative, clerical, or logistical matters related to the

scheduling and operations of hearings, the processing of documents, the issuance of orders, notices and subpoenas, and the operation, appointment, composition, or attendance at training of the appraisal review board.

Tex. Tax Code § 6.412. Further, the Tax Code permits the appraisal office to “provide clerical assistance to the appraisal review board, including assisting the board with the scheduling and arranging of hearings.” Tex. Tax Code § 6.43(f).

27. Here, the evidence establishes that TARB requested assistance in scheduling protest hearings from the Chief Appraiser. *See* Exhibit 1, Exhibit 7. Plaintiffs contend that the Chief Appraiser acted *ultra vires* because they contend that the TARB panels were not randomly assigned to hear their protests as required by section 41.66(k) of the Tax Code. Plaintiffs’ Original Petition and Request for Disclosures, ¶ 11. However, the Chief Appraiser assisted the TARB by assigning protest hearings to specific rooms while it was the TARB that randomly assigned the panels of TARB members to the rooms, thereby complying with the requirement of random panel assignments. Exhibit 1, Exhibit 4, Exhibit 10. The Tax Code gives an appraisal review board the discretion to schedule hearings on protests concerning properties filed by the same designated agent and the discretion to use

different panels to conduct the hearings based on the appraisal review board's customary scheduling. Tex. Tax Code § 41.66 (k). An appraisal review board is also permitted to consider property types in scheduling the hearing. Tex. Tax Code § 41.66 (k).

28. Plaintiffs' assertion that all of the properties assigned to a specific employee of either Protax or Five Stone within a three-day period before five TARB panels does not violate Texas law.

29. As explained by the Chief Appraiser, the TARB set forth the guidelines for scheduling and she and her employees simply implemented these guidelines. See ¶ III.1. Exhibit 7, Travis Appraisal Review Board Formal Hearing Procedures.

30. Plaintiffs are not entitled to the injunctive relief they seek against the Chief Appraiser. Plaintiffs failed to exhaust their administrative remedies under the Tax Code because the relief Plaintiffs seek, that is hearings on their protests, is encompassed in the Tax Code. *See Piwonka*, slip op. at 8–9. By failing to appear in person, by agent, or by affidavit, the Plaintiffs failed to exhaust their administrative remedies.

31. The Chief Appraiser and TCAD employees did not engage in unauthorized ex parte communications with TARB and TARB did not engage in unauthorized ex parte communications with the Chief Appraiser or TCAD.

32. Plaintiffs cannot establish that the Chief Appraiser exceeded the scope of her authority. As discussed above, the Chief Appraiser appropriately complied with section 41.66 of the Tax Code to schedule hearings. Even if Plaintiffs' assertions were truthful and not baseless, Plaintiffs failed to meet the burden of proof of alleging a valid waiver of immunity because Plaintiffs merely allege that the Chief Appraiser (TCAD) did not fully comply with the procedural requirements of the Tax Code. Therefore, Plaintiffs fail to satisfy the 'acting outside statutory authority' exception for governmental immunity. Plaintiffs are not excused from exhausting their administrative remedies under the Tax Code.

3. No Standing or Capacity

33. Neither Protax nor Five Stone have standing to bring suit on their own behalf or have capacity to bring suit on behalf of the Property Owner Plaintiffs.

34. Protax and Five Stone are not property owners; rather they are agents for the Commercial Owners and Residential Owners. *See* Exhibit 2. Thus, neither Protax nor Five Stone have a justiciable interest in this suit. *Austin Nursing Center, Inc. v. Lovato*, 171 S.W.3d 845, 848–849 (Tex. 2005).

35. Likewise, Protax does not have capacity to bring suit on behalf of the Commercial Owners who have designated Protax as their tax agent. The contracts between the Commercial Owners and Protax expressly reserve the authority to bring suit on the Commercial Owners' behalf. *See* Exhibit 8. Thus, Protax does not have capacity to bring suit on behalf of its assignees.⁷

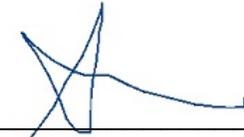
Request for Relief

36. Wherefore, Defendant, Marya Crigler, in her official capacity as Chief Appraiser for Travis Central Appraisal District, requests that this Court grant her motion to dismiss pursuant to the TCPA, grant her plea to the jurisdiction, dismiss all claims of Plaintiffs, award attorney's fees, award sanctions, and grant all other relief to which she is entitled.

⁷ Moreover, if the assignment of agency from Protax to Ms. Bawcom is effective, Ms. Bawcom, not Protax is the agent for the Commercial Owners.

Respectfully submitted,

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By:  _____

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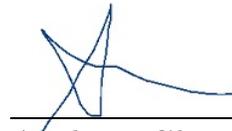
ATTORNEYS FOR DEFENDANT,
Marya Crigler, in her official capacity
as Chief Appraiser for Travis Central
Appraisal District

CERTIFICATE OF SERVICE

I certify that on the 21st day of November 2018, a copy of this Crigler's Motion to Dismiss Pursuant to the Texas Citizens Participation Act, was served by transmitting a copy through the electronic filing manager established by the Office of Court Administration via an electronic filing service provider certified by the Office of Court Administration in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure to all counsel of record as follows:

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Andrea Chan