

2019 Travis ARB Workshop New Members

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PROTEST PROCEDURES AND THE MODEL HEARING PROCEDURES

Due Process of Law

- The government may not take a person's life, liberty or property without **Due Process Of Law**
- Due Process requires notice **reasonably calculated** to let the person know what the government is doing
- Due Process gives the PO the **opportunity to be heard** at some point in the process, before the tax liability becomes final
- The Tax Code's procedures satisfy Due Process



Before the Hearing

- A protesting property owner is entitled to :
 1. have written notice of the ARB hearing delivered at least 15 days before the hearing
 2. have the following information delivered at least 14 days before the hearing”
 - a) A copy of the Comptroller’s pamphlet
 - b) A copy of the ARB’s hearing procedures
 - c) Notice of the right to inspect the appraisal district’s evidence



Before the Hearing

A PO may inspect and copy evidence that the appraisal district plans to introduce during the fourteen days before the hearing



Ex Parte Communications

- Be careful to avoid *ex parte* communications
- Don't communicate about:
 - The evidence, arguments, facts, merits, or any other matters related to an owner's protest; or
 - The property that is the subject of the protest
- An improper communication means that you cannot participate in hearing or deciding that protest
- This can be a criminal misdemeanor
- Be careful about any communications outside of a hearing

Ex Parte Communications

- You can communicate **during** a hearing
- You can talk about administrative, clerical or logistical matters
- You can have social conversations
- But don't create the wrong impression



Model Hearing Procedures

- §5.103 of the Tax Code requires the Comptroller to create Model Hearing Procedures
- Threw in several things not directly related to how hearings are conducted



Model Hearing Procedures

- An ARB can still have its local hearing procedures
- They must ***follow*** the Model Hearing Procedures
 - Pretty closely
- Local hearing procedures may not contradict, negate or otherwise substantially change the MHP (unless by agreement)
 - If a conflict exists between the MHP and local procedures, the MHP prevail
- An ARB can add to the MHP, but it generally cannot subtract anything relevant

Conflicts of Interest

- Rules apply when:
 - A member has some ownership interest in the property or the P.O; or
 - The protesting P.O. is closely related to the member
- The member may have to file a form stating why he is not participating
- A member doesn't have to recuse himself just because he is acquainted with the P.O.



Grounds for Removal

- Conflicts of interest
 - E.g.: Member takes a job with a taxing unit or hears a close relative's protest
- Violation of attendance policy
- Ex-parte communications
- Clear and convincing evidence of repeated bias or misconduct

ARB Hearings

Scheduling Hearings Generally

- When a timely notice of protest is filed, the ARB will schedule a hearing
- The TCAD will provide clerical assistance



ARB Panels

- A protest can be heard by a panel of three or more ARB members
- A panel's decision is only a recommendation
 - It is not final until it is approved by the full ARB



Appearance by Property Owner

- Po may appear:
 - In person
 - By authorized agent
 - By affidavit
 - By telephone
- Failure to appear (“no show”) means that the PO forfeits the protest
 - The ARB should dismiss without considering the merits
 - Subject to the PO’s four-day right to request a new hearing
 - PO has no right to appeal

IV. Conduct of ARB Hearings

- Read this:

“We are the appraisal review board that will be hearing your protest today. We do not work for the appraisal district. We are appointed to perform an independent review of your protest. At the end of the hearing, you may complete a survey regarding your experience today. [provide instructions on where to fill out the survey]. The survey is voluntary. You also have the right to appeal our decision. Appeal information will be provided to you with our determination.”

You don't have to read it if it has already been read to it to the same PO or agent that day.



IV. Conduct of ARB Hearings

a. Commence the hearing and announce the assigned protest number, property location and owner, and other identifying information.

- ARB should do this, not TCAD staff
- Staff can prepare a protest hearing sheet with basic information
 - Provide copies
- Refer to the notice of protest for grounds



Authorized Agents §1.111

- Tax consultants (and most other agents) must be authorized in a signed AOA form filed with the TCAD
 - Agent cannot sign his own form
- Form must be filed at or before the hearing
- Only one agent at a time
- A person does not need an AoA form if the person;
 - Is a business's owner or employee and is authorized to represent the business
 - Is a lawyer licensed in Texas

Right to Appear by Agent

- AoA form doesn't have to be filed at the time that an agent files a protest
 - But it has to be filed by the time the hearing begins
- An unauthorized agent may not appear for a PO
 - The protest should be dismissed as a no-show
 - Subject to a good-cause request within the four days following the hearing



IV. Conduct of ARB Hearings

b. Announce that, in accordance with Tax Code Section 41.45(h), all written material **and electronic evidence** that has not been provided must be provided.

- Property owner should provide copy to TCAD or allow scanning



IV. Conduct of ARB Hearings

- c. State that the ARB members who are considering the protest have not communicated with anyone about the protest and have signed affidavits to that effect.
- d. Welcome the parties and remind them of the content of the hearing procedures, time limits for the hearing, and other relevant matters.
- e. Ask if any testifying witness holds a license or certificate from the Texas Appraiser Licensing and Certification Board and if the witness is appearing in that capacity.

Testimony by Licensed or Certified Appraiser

- Licensed or certified appraiser appearing before the ARB must state the capacity in which he/she is appearing
- If the person is not appearing in his/her capacity as a licensed or certified appraiser, he/she is not subject to the appraisal standards and ethical rules that apply to appraisals
 - Consider the person to be a layperson
 - The person's level of objectivity may be affected



Testimony Under Oath

- “A member of the appraisal review board may swear witnesses who testify in proceedings under this chapter. All testimony must be given under oath.”
§41.67
- This includes testimony identifying a document or thing
- “We will give you a few minutes to talk to us, but we cannot consider what you say to be evidence unless you are under oath”



IV. Conduct of ARB Hearings

- f. Inform witnesses that all testimony must be given under oath and swear-in all witnesses who plan to testify.
- g. Ask the property owner to decide if he/she wishes to present his/her evidence and argument before or after the appraisal district
- h. If the property owner or agent presents his/her case first, he/she shall present evidence (documents and/or testimony). If witnesses are present, the property owner or agent may examine the witnesses as part of the presentation of evidence. At the end of the presentation, an opinion of value (if applicable) for the property must be stated.

IV. Conduct of ARB Hearings

- i. Next, the appraisal district representative may cross-examine the property owner, the agent, or the representative and/or witnesses.
- j. If the property owner or agent presented his/her case first, the appraisal district representative shall present evidence (documents and/or testimony) next. If witnesses are present, the appraisal district representative may examine the witnesses as part of the presentation of evidence. At the end of the presentation, an opinion of value (if applicable) for the property must be stated.

IV. Conduct of ARB Hearings

- k. Then, the property owner or agent may cross-examine the appraisal district representative and/or witnesses.
- l. Members of the ARB shall not be examined or cross-examined by parties.
- m. The party presenting its case first may offer rebuttal evidence (additional evidence to refute evidence presented by the other party).
- n. The other party may then offer rebuttal evidence.

IV. Conduct of ARB Hearings

- o. The party presenting its case first shall make its closing argument and state the ARB determination being sought.
- p. The party presenting its case second shall make its closing argument and state the ARB determination being sought.
- q. The ARB or panel chair shall state that the hearing is closed.
- r. The ARB or panel shall deliberate orally. No notes, text messages, or other form of communication are permitted.

IV. Conduct of ARB Hearings

- s. The ARB or panel chair shall ask for a separate motion for each matter that was the subject of the protest hearing. The motion should include the exact value or issue to be determined. A vote shall be taken and recorded by a designated appraisal district staff person or member of the ARB assigned for this purpose. Separate motions and determinations must be made for each protested issue (i.e., excessive appraisal and unequal appraisal must have separate ARB motions and determinations).
- t. Thank the parties for their participation and announce the determination(s) of the ARB and that an order determining protest will be sent by certified mail.

Telephone Hearings

- Property owner must make a request in writing at least 10 days before the hearing
 - It can be in the notice of protest



Telephone Hearings

- Property owner may offer **argument** by phone
- ARB must provide a phone number for owner to call
- ARB (this means the CAD) must have adequate conference call equipment
- Any **evidence** must come by affidavit
 - Don't ask for evidence
 - If there's an affidavit, it isn't a no show



Telephone Hearings

- PO should not say:
 - Let me tell you about the damage to my roof
 - I know of a comparable property that sold last year for \$_____
 - My house is older than most in my neighborhood
- PO might say:
 - The TCAD made an error in its calculations
 - My comps are closer or more recent than the CAD's comps
 - You can see from my affidavit that the NOI of my property has gone down two years in a row
- PO may offer *ipse dixit* opinion of value



Telephone Overview



- Determine who is on the line?
 - Property owner?
 - Authorized agent?
 - Stranger breathing heavily?
- Get a call-back number
- Is there an affidavit?

Affidavits in General

- An affidavit is a written statement made under oath before a notary or other person authorized to administer oaths
- An affidavit has to include only:
 - The name of the protesting property owner;
 - A description of the subject property'
 - Evidence or argument
- You will see minimalist affidavits
- Must be submitted before the hearing begins
- May incorporate other things like photos or documents
- **ARB doesn't have to read the whole affidavit aloud**

Member Questions

- There is nothing in the Tax Code or in the Comptroller's rules that prohibits questions or limits them to any particular time during a hearing
 - An ARB may have its own practices
- Time is used more effectively if questions are used to help understand what the parties are saying
- Try to avoid boldly going where no one has gone before
- Avoid soliciting or producing evidence



Grounds to Consider

- Owner/agent should not attempt to bring up issues not raised on the written notice of protest, but, if he does:
- The panel should not consider the new issues *unless the TCAD agrees*
- Explain that the panel can consider only the grounds of protest stated in the written notice
- Don't need motions or votes on grounds not properly raised by the property owner

Cross Examination

- Allow direct cross examination
- Legitimate purposes of cross examination:
 - Get additional information
 - Impeach (discredit) the person
- ARB or panel may enforce time limits



“Honestly Madam, do you expect this court to believe that *all* of your husbands mysteriously disappeared at this same time in November?”

Evidence Issues

- Hearings are generally not subject to formal rules of evidence
 - Take it with a grain of salt, but take it
- Original document is preferable, but a copy is fine for the records
- Consider only the evidence presented
- Settlement offers mean nothing



Evidence Controversy

- Arises from a PO' right to inspect and copy evidence that the appraisal district **plans** to introduce during the 14 days before the hearing
 - If the property owner objects, ARB should not consider evidence that the CAD should have produced but didn't
 - The best hearing is one in which neither side is tricked or ambushed
 - Postponement may be an option
 - Owner/agent may withdraw objection



Evidence Issues

- Hearings are generally not subject to formal rules of evidence
 - Take it with a grain of salt, but take it
- With any opinion of value, ask:
 - Does this person know what he/she is talking about?
 - Training, experience, etc.
 - Knowledge of this particular property and market
 - Is this opinion honest and objective?

General Thoughts

- The procedures are for the benefit of the parties
 - The parties may agree to waive some rights or otherwise modify the procedures
 - A party may decide to pass on an opportunity to speak
 - Conduct the hearing in a way that lets them know that they have that option
 - “Do you have any questions for the TCAD representative
 - Do you have any else that you would like to present in response to the Appraisal District?”

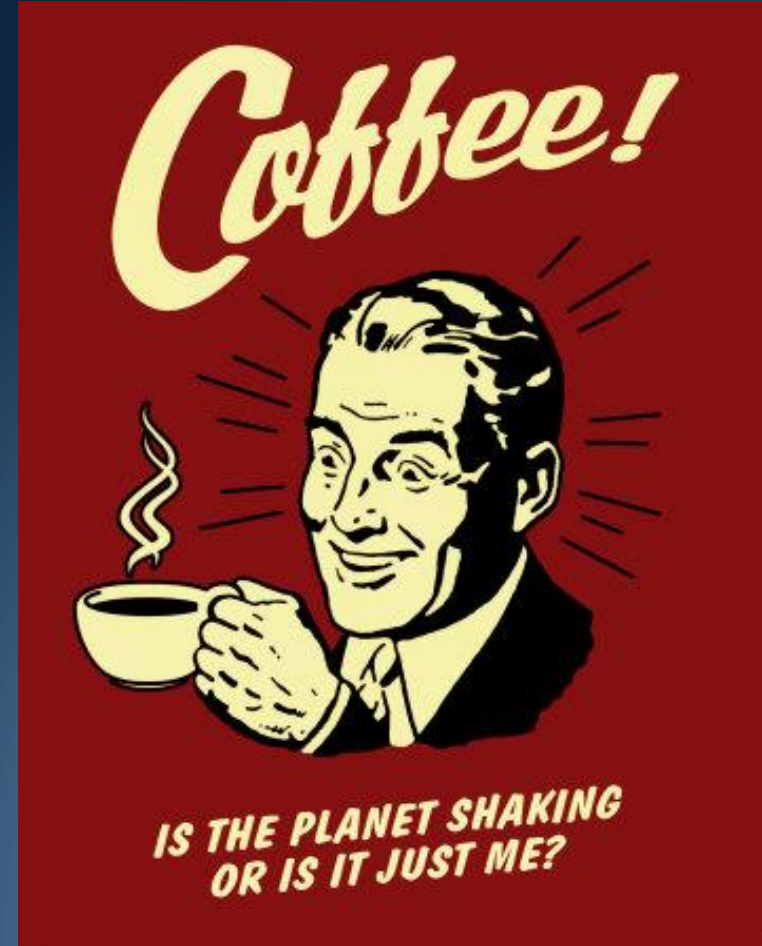
It's the law

- Somebody telling you the law, may not necessarily know it himself.
 - Or he may cite only part of it
- Use Tax Code and its index
- Consult officer about possibly calling A&A



General Thoughts

- Follow hearing procedures/scripts
- Be polite and attentive
 - Be aware of fatigue
- Speak clearly and audibly
- Avoid appearance of partiality



The ARB is like a Court

- A judge :
 - Is impartial
 - Is Dignified
 - Is in charge
 - Doesn't make the law
 - Applies the law even if she doesn't like it
 - Doesn't introduce evidence
 - Doesn't switch places with lawyers
 - Doesn't become an advisor to a party



One at a Time

- Don't think of your seat on the ARB as a policy-making office
- You are not responsible for the overall condition of the appraisal records/roll
- Decide each protest one at a time
- Decisions that may appear inconsistent may both be correct



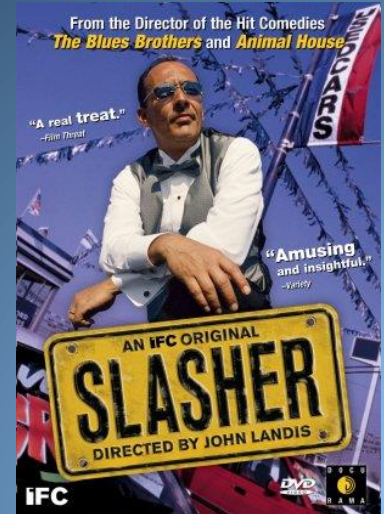
Remember

- You are **IN CHARGE**
- Especially the panel chairs
- Don't let anybody bully you or intimidate you
 - Disrupting a meeting of a governmental body is a criminal offense
- Don't defer to the Appraisal District
 - It is okay to ask both sides, "What do you suggest we do?"



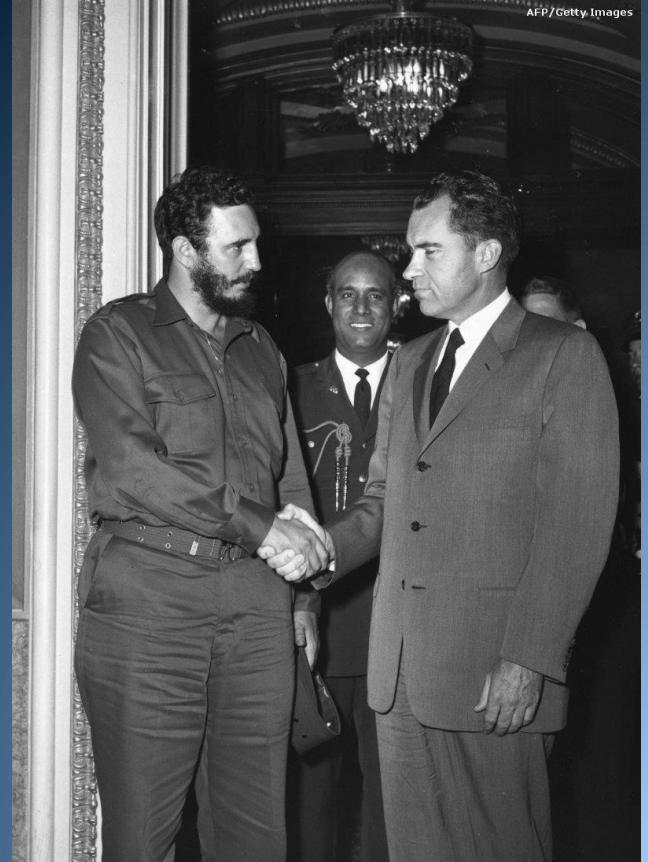
Attitude

- Every PO is entitled to have the ARB members consider his protest with open minds
 - He isn't necessarily entitled to win, even if he is a nice guy
 - You really just shift the burden of taxes; you don't eliminate it



Settlement Agreements

- If a property owner has a filed a protest or motion that has not yet been determined by the ARB, he can negotiate a settlement with the appraisal district
- Their settlement should be in writing, but an audio recording will do
- Their settlement agreement resolves the matter without the need for any action on the part of the ARB
- Property owner may not appeal



Not Exactly Settlement Agreements

- “Top Line” hearings
- Sort of a settlement and sort of not
- Tax consultant generally appears through an affidavit
- Value is recommended to the value but not technically agreed to
 - Wink, wink
- Preserves the P.O.’s option of going to court, arbitration, etc.

Order Determining the Protest

- When the full ARB has voted on a protest it will prepare a written order
- Notice describes right to appeal and deadlines
- Certified mail



APPEALS



Options for Appeals

- Either party can appeal to a court for a **trial de novo**
 - TCAD appeal requires value of \$1 million or more
- PO may appeal to binding arbitration
 - Value is \$5 million or less
 - Issue is value or unequal value
- PO May appeal to the SOAH
 - Value is \$1 million or more
 - Issue is value or unequal value



Due Process of Law

- Courts have ruled that the Tax Code's procedural requirements fully protect a property owner's Due Process rights
- If an ARB or panel makes a mistake in conducting a hearing, the property owner is protected by his right to appeal
- The owner may not sue the ARB or otherwise pursue the ARB or its members
 - You should be motivated to do things right, but that motive should not be fear

SUBSTANTIVE GROUNDS FOR PROTESTS

Grounds for protest

- Excessive appraisal
- Unequal appraisal
- Inclusion of property
- Denial of exemption
- Denial of special value
- Inclusion in a taxing unit
- Ownership
- Determination of change of use
- *Other action by Appraisal District, chief appraiser, or ARB that applies to and adversely affects property owner*

Excessive Value

- Most common claim
- ARB doesn't appraise properties to begin with
 - It decides disputes about appraisals done by the Appraisal District
- Owner says the value placed on his property by the TCAD is higher than the value required by law
- In most instances the law requires that property be appraised at its **market value** as of **January 1**
- The legislature has prescribed some special rules for appraising certain properties



Market Value §1.04(7)

- "Market value" means the price at which a property would transfer for cash or its equivalent under prevailing market conditions if:
 - (A) exposed for sale in the open market with a reasonable time for the seller to find a purchaser;
 - (B) both the seller and the purchaser know of all the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions on its use; and
 - (C) both the seller and purchaser seek to maximize their gains and neither is in a position to take advantage of the exigencies of the other.

Three Approaches to Value

- Market Approach (sales comparison approach) is based on actual arm's-length sales of comparable properties
 - Sales prices are fairly easy to get when we are looking at single-family residences sold through MLS
 - With other types of properties, sales prices may be difficult to get
 - Texas law does not require disclosure
- Income Approach is based on the income expected from the property
- Cost approach is based on estimating replacement cost and subtracting depreciation
 - Land value based on market approach

Sales Comparison Approach

- Based on arms-length sales of comparable properties
 - Comparability based on: location; size of land and improvements; age; condition; access; amenities; views; income; occupancy; legal burdens
 - Sales should be within 24 months of the relevant January 1
 - Adjustments for time and other factors may be required
 - Reasons should be explained
- Commonly used for single-family residences
 - Sales prices are fairly easy to get when we are looking at single-family residences sold through MLS
- With other types of properties, sales prices may be difficult to get
- Texas law does not require disclosure

Homesteads

- A residence homestead is a property that qualifies for a residence homestead exemption
 - Principal residence of owner
 - More when we talk about exemptions
- Generally, homestead should be appraised at market value, but there are some special rules



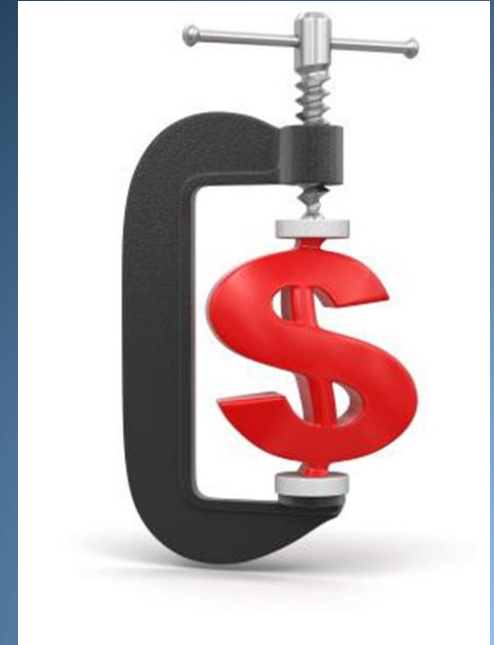
Special Rules for Homesteads

- The value of a residence homestead shall be determined solely on the basis of the property's value as a residence homestead, regardless of whether the residential use of the property by the owner is considered to be the highest and best use of the property



Residence Homestead Cap

- Designed to spread out effect of sharp value increases
- Applies to residence homesteads
- Begins in second year the property receives homestead exemption
- Ends when homestead exemption ends



Formula for Homestead Cap

- This year's appraised value may not exceed:
 - the appraised value of the property in the prior year, plus
 - 10% plus
 - the value of new improvements made to the property since the most recent appraisal

Homestead Cap Example

- In 2018, a homestead had an appraised value of \$300,000.
- The 2019 maximum appraised value would be \$_____, plus the value of any new improvements made since the most recent appraisal .

Excessive Value Protests: Burden of Proof

- The appraisal district has the burden of proof by a preponderance of the evidence



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Excessive Value Protests: Burden of Proof

- Evidence has the weight that the ARB members think it has



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Excessive Value Protests: Burden of Proof

- Owner has the burden of proof if he has not filed required rendition or supporting information requested by TCAD
- Appraisal District has a different burden under certain circumstances



Excessive Value Protests: Burden of Proof

- If a property's value was lowered last year as the result of a protest, lawsuit or binding arbitration and the TCAD raises it this year, the raised value must be supported by “substantial evidence”
 - The substantial-evidence standard that courts apply is not difficult to meet
 - The TCAD should have some reason other than, “The ARB or court was wrong last year.”

Substantial Evidence

“Substantial evidence” does not mean a large or considerable amount of evidence, but such relevant evidence as a reasonable mind might accept as **adequate to support a conclusion of fact**. The test **is not whether the agency made the correct conclusion** in our view, **but whether some reasonable basis exists in the record for the agency's action**. We must uphold an agency's finding **even if the evidence actually preponderates against it**, so long as enough evidence suggests the agency's determination was within the bounds of reasonableness.

Slay v. Texas Comm'n on Environmental Quality (Austin 2011)

Excessive Value Protests

- Does the ARB have to accept the value claimed by one side or the other?
 - No, but try to have some explainable basis for the value that you find
 - Don't just split the difference
 - The TCAD might be right on some points and the PO right on other points



Excessive Value Protests: Burden of Proof

- There may be more than two possible answers



Unequal Appraisal Protest

- Property owner is not necessarily saying that the appraised value of his property exceeds its market value
 - Owner may admit that CAD's estimate of market value is accurate or even low
- He is saying that his property is appraised unfairly compared to other properties
 - Because owner's property is appraised too high and/or other properties are appraised too low



Unequal Appraisal Protest

- Equality can be looked at in two ways:
 - One of them involves comparing the appraisal ratio for subject property with appraisal ratios for other properties
 - Less common
 - One involves comparing the appraised value of subject property with appraised values of comparable
 - More common

Comparing Appraisal Ratios

- Appraisal ratio

$$\frac{\text{TCAD's appraised value}}{\text{Actual market value}}$$

- Example:

$$\frac{\text{TCAD value - \$475,000}}{\text{Market value - \$500,000}}$$

- Ratio is 95%

Comparing Appraisal Ratios

- ARB should determine (based on the evidence presented) the appraisal ratio for the subject
- Compare that ratio with:

the median appraisal ratio for a sample of properties consisting of a **reasonable number** of properties similarly situated to, or of the same general kind or character as the subject

the median level of appraisal of a reasonable and representative sample of other properties in the appraisal district;

- If the ratio for the subject is higher than the median for other properties, lower the subject

Comparing Appraisal Ratios

- Party offering evidence needs to show:
 - A reasonable and representative sample of properties
 - The appraisal ratio for each property
 - That means showing each property's actual market value
 - The median ratio for the sample
 - How the median compares to the appraisal ratio for the subject
- If the ratio for the subject is higher than the median for other properties, lower the subject

Comparing Appraisal Ratios

Subject's CAD Value
Subject's Actual value

Comp 1 CAD Value
Comp 1 Actual Value

Comp 2 CAD Value
Comp 2 Actual Value

Comp 3 CAD Value
Comp 3 Actual Value

Comp 4 CAD Value
Comp 4 Actual Value

Comp 5 CAD Value
Comp 5 Actual Value

Comp 6 CAD Value
Comp 6 Actual Value

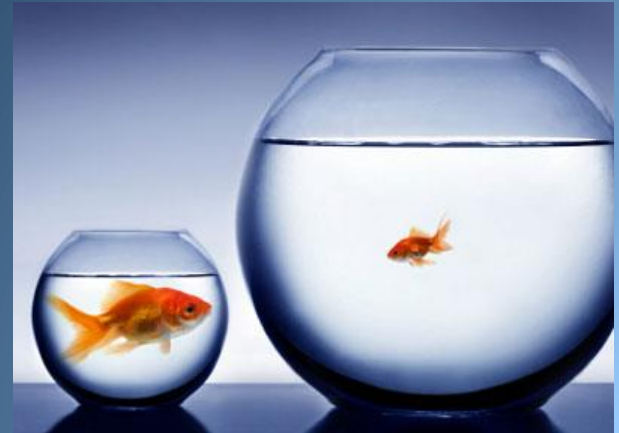
Comp 7 CAD Value
Comp 7 Actual Value

Comp 8 CAD Value
Comp 8 Actual Value

Comp 9 CAD Value
Comp 9 Actual Value

Comparing Appraised Values

- ARB should compare the appraised value of the subject with the median appraised value of a **reasonable number** of **comparable properties** appropriately adjusted



Comparing Appraised Values

- Party offering evidence needs to show:
 - A **reasonable number** of **comparable** properties
 - Whether adjustments are appropriate for factors such as: location; size of land and improvements; age; condition; access; amenities; views; etc.
 - What appraised value would the district have put on the comparable property if it had the same qualities as the subject?
 - The amounts of and reasons for any adjustments

Comparing Appraised Values

- If the appraised value for the subject is higher than the median appraised value for the comparable properties with appropriate adjustments, then lower the value of the subject down to the median
- E.G., the subject is appraised at \$350,000
 - The median appraised value of the comparables, after adjustments is \$327,000
 - The ARB should lower the value of the subject to \$327,000

§23.01

- In an unequal-appraisal analysis, the selection of comparable properties and the application of appropriate adjustments will have to be based on generally accepted appraisal methods and techniques.
- Adjustments must be based on recognized methods and techniques that are necessary to produce a credible opinion.
- This rule will not prevent a property owner who is representing himself from stating his opinions.



Unequal Appraisal Protests: Burden of Proof

- The TCAD has the burden of proof by a preponderance of the evidence
- The TCAD can compare appraisal ratios or appraised values
- The parties may address both appraisal ratios and appraised values
 - If the different methods produce different results, the ARB should go with the method that benefits the property owner most.
 - Any method used by one side is subject to being challenged by the other side

Approval of the Appraisal Records

- General Provisions Regarding Approval
 - The ARB must formally approve the records
 - Approval creates the appraisal roll
 - The Code sets a target date of July 20 for records approval
 - Substantially finished hearing protests



QUESTIONS,
COMMENTS,
FUNNY STORIES, ETC.