

# 2009 PROPERTY TAX CASES

## And Attorney General's Opinions

Last updated: August 2, 2010

### Cases

#### ***DL Louetta Village Square LP v. Harris County Appraisal District***

2009 WL 4913259 Tex. App. – Houston [14<sup>th</sup> Dist.], December 22, 2009, no pet.)(not reported)

Issues: who can file a protest or appeal

In 2007, the appraisal district appraised a real property in the name of Nomura. Nomura protested the appraisal of the property, and the ARB denied the protest. Nomura then filed suit to appeal the ARB's order. Nomura named itself in the lawsuit "as the Property Owners and the Property Owners." The district then discovered that the property had never been owned by Nomura; it was owned by Louetta. The district asked the trial court to dismiss the case because the plaintiff, Nomura did not own the property. Before the trial court could act on the appraisal district's request, Nomura amended its pleadings to add Louetta as a plaintiff. The district again urged the trial court to dismiss the case. The trial court granted the district's request, and the plaintiffs appealed.

The court of appeals upheld the trial court's decision. It explained that because Nomura did not own the property, it had no standing to contest the 2007 appraisal in a protest or lawsuit. Louetta was the owner of the property, but it had not been involved in the protest. It did not appear as a party to the lawsuit until after the deadline for a property owner to appeal an ARB order. The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to "correct or change the name of a party." The court of appeals rejected that argument and explained that the Code does not allow a new and different party (a party that had not filed a protest) to appear during the course of a pending suit. Even if Nomura's original pleading could be construed as a suit on behalf of Louetta, that would not solve the problem of Louetta's failure to protest. The court also rejected the argument that Nomura and Louetta were two names for the same company. There was no evidence that Louetta had ever done business under Nomura's name. The Rule of Civil Procedure allowing a party to substitute its formal name for its common name during the course of a suit does not allow the introduction of a new and different party.

#### ***Skylane West Ltd. v. Harris County Appraisal District***

2009 WL 4913256 Tex. App. – Houston [14<sup>th</sup> Dist.], December 22, 2009, no pet.)(not reported)

Issues: who can file a protest or appeal

In 2007, the appraisal district appraised an apartment complex in the name of Skylane West. Skylane West protested the appraisal of the property, and the ARB reduced the value of the property. Skylane West then filed suit to appeal the ARB's order and sought a greater reduction of the property's value. Skylane West named itself in the lawsuit "as the Property Owners and the Property Owners." Then someone apparently realized that Skylane West did not actually own the property. It had sold the property to Houston Skylane One in 2004. Skylane West amended its pleadings to add Houston Skylane One as a plaintiff. The appraisal district asked the trial court to dismiss the case because Skylane West did not own the property and because Houston Skylane One had not filed a protest. The trial court proceeded to dismiss the case, and Skylane West and Houston Skylane One appealed.

The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to "correct or change the name of a party." The court of appeals rejected that argument and explained that the Code does not allow a new and different party (a party that had not filed a protest) to appear during the course of a pending suit. The plaintiffs also tried arguing that Skylane West was not really a separate entity, that it was really just a "common name" for Houston Skylane One and that the Rules of Civil Procedure allow a party to substitute its formal name for its common name during the course of a suit. The court of appeals rejected that argument. It explained that because Skylane West had ceased to own the property prior to 2004, it had no standing to contest the 2007 appraisal in a protest or lawsuit. Houston Skylane One was the owner of the property, but it had not been involved in the protest. The record contained no evidence that Houston Skylane One had ever done business under the name of Skylane West. They were separate companies. The court of appeals upheld the trial court's dismissal of the case.

***Myrad Properties, Inc. v. LaSalle Bank National Association***  
300 S.W.3d 746 (Tex., December 18, 2009)

Issues: mistake in a deed

(This is not a property-tax case, but it is likely to be of interest to tax professionals.) LaSalle Bank lent money to Myrad, and the loan was secured by a deed of trust on Myrad's two apartment complexes. When Myrad defaulted on the loan, LaSalle directed the trustee to foreclose. The trustee mistakenly omitted one complex from the foreclosure notice and other documents. At the foreclosure sale, LaSalle believed that both complexes were being offered and bid accordingly. No other bids were received. The trustee prepared a deed to LaSalle, but again described only one complex in that deed. LaSalle later discovered the trustee's error and had the trustee prepare a correction deed purporting to convey both complexes to LaSalle. Myrad sued LaSalle claiming that the correction deed was invalid and that LaSalle owned only the complex described in the original trustee's deed. The trial court and the court of appeals both ruled for LaSalle and held that the correction deed had effectively conveyed both complexes to LaSalle.

The Texas Supreme Court agreed to consider the case and reversed the lower courts. The Supreme Court explained that a correction deed cannot be used to convey an additional, separate property that was not included in the original deed. The trustee's correction deed was therefore void. The Supreme Court went on to rescind the foreclosure sale because of the mistake made by LaSalle and the trustee. The original trustee's deed was contrary to the underlying intent of the parties because it conveyed only one complex instead of two. The Supreme Court's ruling left Myrad owning both complexes, but LaSalle would get its purchase money back and be able to foreclose its lien again, this time on both complexes.

***Dallas Central Appraisal District v. Friends of the Military***  
304 S.W.3d 556 (Tex. App. – Dallas, December 16, 2009, no pet. hist.)

Issues: charitable exemption

Vet to Vet was an organization formed to benefit disabled veterans. It owned vacant land adjacent to a cemetery. In 2002, according to the testimony of its founder, Johnson, Vet to Vet began considering the construction of a building on the land to provide services to disabled veterans. The city, acting through several different committees, was considering designating the cemetery and Vet to Vet's land as a historical landmark, a designation which would have prevented the organization from building on its land. Beginning in 2003, Johnson began efforts to persuade the city's various committees and the city council not to take actions that would prevent building on the land. Over the course of three years he attended approximately twelve committee meetings. (He was ultimately successful in dissuading the city from restricting the land's use.) Johnson considered it necessary to resolve his dispute with the city before the organization began building. Vet to Vet applied for a charitable exemption for its land for in 2004. It claimed that it was conducting a "land-use study" relating to the construction of improvements on the land. The appraisal district denied the application. Vet to Vet protested unsuccessfully before the ARB and then sued the appraisal district. After a trial, the jury found that: 1) in 2004, the land had incomplete improvements under physical preparation; and 2) those incomplete improvements were designed and intended to be used exclusively by a qualified charitable organization. The trial court entered judgment for Vet to Vet and the appraisal district appealed. The district argued that the evidence was legally insufficient to support the jury's verdict.

The court of appeals cited §11.18 of the Tax Code, which provides that unimproved land can qualify for a charitable exemption if it has "incomplete improvements" under "physical preparation." A "land-use study" counts as a type of physical preparation. The evidence was sufficient to allow the jury to find that the efforts made by Vet to Vet and Johnson with respect to the city's land-use requirements constituted a land-use study. Johnson's testimony also supported the jury's finding that the proposed building was designed and intended to be used exclusively by a qualified charitable organization, i.e. Vet to Vet. The appraisal district argued that the Jury's verdict did not reflect a finding that the building would be used for the charitable purposes reflected in Vet to Vet's charter. The trial court, however, had not included that question in its charge to the jury, and the district had not objected to the charge. It could not complain on appeal about

whether the evidence supported the jury's verdict on an issue that had not been submitted to the jury. The court of appeals upheld the jury's findings and the judgment in favor of Vet to Vet.

***Rourk v. Cameron Appraisal District***

305 S.W.3d 231 (Tex. App. – Corpus Christi, November 24, 2009, no pet. hist.)

Issues: taxability of travel trailers and RVs

In 2001, the appraisal district appraised travel trailers and RVs (collectively, "the RVs") located on leased land in trailer parks. Several owners of the RVs protested the appraisals and then sued the appraisal district claiming that the RV's were non-business personal property and exempt from taxation under Art. VIII, §1 of the Texas Constitution and §11.14 of the Tax Code. The appraisal district claimed that the RVs were real property and taxable as improvements to land. The trial court agreed with the appraisal district and ruled that the RVs were taxable. The owners appealed.

The court of appeals looked first at §1.04's definition of an improvement. A thing was an improvement (and a form of taxable real property) if it was "a building, structure, fixture, or fence erected on or affixed to land" or "a transportable structure that is designed to be occupied for residential or business purposes, whether or not it is affixed to land, if the owner of the structure owns the land on which it is located." The court reasoned that because the RV owners did not own the land on which their RVs sat and because an RV could be moved after just a few hours of preparation, the RVs were not improvements; they were personal property.

The court next considered whether the RVs were exempt. Section 11.14 exempted non-business personal property "other than manufactured homes." A "recreational vehicle" is *not* a manufactured home, and, according to federal regulations, a recreational vehicle: 1) is built on a single chassis; 2) has 400 square feet or less; 3) is self propelled or permanently towable by a light truck; and 4) is designed primarily for use as a permanent dwelling, not for temporary living quarters for recreational, camping, travel, or seasonal use. The owners showed that their RVs met these requirements. Thus the RVs were not manufactured homes. Additionally, an RV could not qualify for exemption if it was built before June 15, 1975. Most of the owners had shown that their RVs were built after that date, and the court exempted those RVs. A few owners had failed to show how old their RVs were, and the court ruled that they had failed to show that their RVs qualified for the exemption.

*Editor's Comment:* This case concerns the taxability of RVs and travel trailers under the constitutional and statutory provisions that existed in 2001. Those provisions have been changed since then.

***Daughtry v. Atascosa County Appraisal District***

307 S.W.3d 343 (Tex. App. – San Antonio, November 4, 2009, no pet.)

Issues: exhaustion of remedies; application for agricultural appraisal

Daughtry leased land from Bratton. The land had been appraised as open-space agricultural (1-d-1) land, but in early 2007, the appraisal district sent a notice to Bratton telling him to file a new application for that year. Bratton did not file a new application, and the appraisal district did not appraise the land as 1-d-1 land in 2007. The opinion does not say whether the district sent Bratton an appraisal notice showing the land appraised at its market value, but it seems reasonable to infer that such a notice was sent. Bratton did not protest the appraisal. He sold the land to Daughtry in July of 2007. Daughtry did not know that the land was not receiving a 1-d-1 appraisal and didn't discover that fact until he received the 2007 tax bill. In February of 2008, he filed a protest complaining about the denial of a 1-d-1 appraisal for 2007. The ARB scheduled a hearing on Daughtry's protest, but when it met, the ARB voted to deny Daughtry a hearing because his protest was filed too late. Daughtry sued the appraisal district and the ARB. The trial court dismissed the case because: 1) neither Bratton nor Daughtry filed a 1-d-1 application for 2007; and 2) Daughtry's protest was filed too late. Daughtry appealed.

The court of appeals affirmed the trial court's dismissal of the case. The court found it significant that the ARB never "accepted" Daughtry's late protest. It advised Daughtry that his protest was filed too late and that he would not receive a hearing. It never issued an order determining the protest, and there was no order that could be appealed to the trial court.

***Aviall Services, Inc. v. Tarrant Appraisal District***

300 S.W.3d 441 (Tex. App. – Fort Worth, October 29, 2009, no pet.)

Issues: freeport exemption

Aviall operated a distribution center in Tarrant County from which it shipped aviation parts to locations around the country. Aviall received a freeport exemption for the parts that it shipped to other states. It claimed that it should also receive the exemption for parts that it shipped to the Red River Army Depot, located in Bowie County, Texas. The Depot is within the boundaries of Texas, but it is a "federal enclave." During World War II, the Governor signed a deed ceding exclusive jurisdiction over the Depot to the United States and retaining jurisdiction only for the service of process there. Basically, this means that the federal government has more authority there than it has in ordinary places and the State and local governments have less authority. Aviall argued that the Depot was not a part of Texas and that parts shipped there were going out of state for purposes of the freeport exemption. The Depot was a "state within a state." The appraisal district disagreed and denied the exemption for the parts shipped to the Depot. After filing an unsuccessful protest, Aviall sued the district. The trial court entered a summary judgment for the district, and Aviall appealed.

The court of appeals explained that the freeport exemption, found in Art. VIII, §1-j of the Texas Constitution, applies to goods transported "outside this State." Tax exemption laws should be interpreted narrowly. The phrase, "outside this State," refers to a geographical location outside the borders of Texas, not to the jurisdiction or power of

the federal or State government. The court also reasoned that the taxation of goods in Tarrant County did not interfere with the federal government's authority over the Depot. The parts were not shipped outside of Texas and did not qualify for the freeport exemption. The court of appeals affirmed the trial court's judgment for the appraisal district.

***Gillum v. Harris County***

2009 WL 3400960 (Tex. App. – Houston [1<sup>st</sup> Dist.], October 22, 2009, no pet )(not reported)

Issues: evidence and burden of proof in delinquent-tax case

Taxing units sued Gillum for delinquent taxes on real property for the years 1989 through 2004. The trial court referred the case to a master, who then held a hearing. The taxing units offered certified copies of their delinquent-tax records for Gillum's property, and the master recommended a judgment for the taxing units. Gillum appealed the master's decision to the trial court. At some point the delinquent-tax records offered at the master's hearing were apparently lost. The trial court conducted a trial at which it first allowed Gillum to explain briefly her objections to the master's recommendation. The taxing units then introduced certified copies of their delinquent-tax records (showing the amounts that were in the records they had presented to the master plus additional interest that had accrued since the master's hearing). Gillum then testified that she had paid some taxes for 1989 through 2001 pursuant to a judgment in an earlier lawsuit and that the taxing units had misapplied her payments. Their records did not correctly reflect what she owed. She did not offer any documents or records to support her claim. The taxing units responded that the judgment in the earlier case had been vacated and that their records accurately reflected all payments received from Gillum. The trial court entered judgment for the taxing units and Gillum appealed claiming that the evidence did not support the judgment and that the trial court had wrongly placed the burden of proof on her.

The court of appeals explained that taxing units filing a delinquent-tax suit have the burden of proof. Under §33.47 of the Tax Code, they can meet that burden by introducing certified copies of their delinquent-tax records. Those records are prima facie proof of everything the taxing units need to prove. The burden then shifts to the property owner to offer evidence to invalidate the tax assessments. In this case, the trial court correctly placed the burden of proof on the taxing units, and they met that burden with their delinquent-tax records. Gillum offered no evidence to refute their evidence or to support her claims. The trial court correctly based its decision on the evidence presented at the trial. Thus the loss of the evidence from the master's hearing was of no consequence. The court of appeals affirmed the trial court's judgment for the taxing units.

*Editor's Comment:* The court of appeals was correct in affirming the trial court's judgment, but its explanation is somewhat confusing. The court of appeals' opinion is not technically correct when it says that Gillum offered *no evidence* that she had paid some of the taxes. In fact, her verbal testimony before the trial court was some

evidence, but, without any documents to back it up, it wasn't very persuasive. The trial court weighed the written delinquent-tax records against Gillum's verbal testimony and believed the records.

***KM-Timbercreek, LLC v. Harris County Appraisal District***

312 S.W.3d 722 (Tex. App. – Houston [1<sup>st</sup> Dist.], October 15, 2009, no pet.)

Issues: who can file a protest or appeal

In 2007, the appraisal district appraised a property in the name of Yorktown. Yorktown protested the appraisal of the property, and then filed suit to appeal the ARB's order. Yorktown named itself in the lawsuit "as the Property Owners and the Property Owners." Then the appraisal district realized that Yorktown did not actually own the property. It had sold the property to Timbercreek in 2006. Yorktown amended its pleadings to add Timbercreek as a plaintiff. The appraisal district asked the trial court to dismiss the case because Yorktown did not own the property and because Timbercreek had not filed a protest. The trial court proceeded to dismiss the case, and Yorktown and Timbercreek appealed.

The court of appeals upheld the dismissal of the case. The court explained that because Yorktown had ceased to own the property prior to 2007, it had no standing to contest the 2007 appraisal in a protest or lawsuit. The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to "correct or change the name of a party." The court of appeals rejected that argument and explained that §42.21 does not allow a property owner like Timbercreek to appear as a plaintiff in an appeal when it never filed a protest with the ARB. The plaintiffs also tried arguing that Yorktown was not really a separate entity, that it was really just a "common name" for Timbercreek and that the Rules of Civil Procedure allow a party to substitute its formal name for its common name during the course of a suit. The record, however, contained no evidence that Timbercreek had ever done business under the name of Yorktown. They were separate companies.

***Mei Hsu Acquisition Corp. v. Harris County Appraisal District***

2009 WL 3152152 (Tex. App. – Houston [1<sup>st</sup> Dist.], October 1, 2009, no pet.) (not reported)

Issues: who can file a protest or appeal

In 2006, the appraisal district appraised a real property in the name of Plaza. Plaza protested the appraisal of the property, and the ARB denied the protest. Plaza then filed suit to appeal the ARB's order. Thirteen months later, the district discovered a deed showing that Plaza had sold the property to Mei Hsu in 2003. The district asked the trial court to dismiss the case because the plaintiff, Plaza did not own the property. Before the trial court could act on the appraisal district's request, Plaza amended its pleadings to add Mei Hsu as a plaintiff. The plaintiffs tried arguing that Plaza was not really a separate entity, that it was really just a "common name" for Mei Hsu and that the Rules of Civil Procedure allow a party to substitute its formal name for its common name

during the course of a suit. The trial court proceeded to dismiss the case, and Plaza and Mei Hsu appealed.

The court of appeals upheld the trial court's decision. It explained that because Plaza had ceased to own the property prior to 2008, it had no standing to contest the 2008 appraisal in a protest or lawsuit. Mei Hsu was the owner of the property, but it had not been involved in the protest. It did not appear as a party to the lawsuit until fourteen months after the suit had been filed, much later than the deadline for a property owner to appeal an ARB order. The court rejected the argument that Plaza and Mei Hsu were two names for the same company. If that were true, there would never have been a deed conveying the property from one to the other.

***Gilbert v. Houston Independent School District***

2009 WL 3050886 (Tex. App. – Houston [1<sup>st</sup> Dist.], September 24, 2009, no pet )(not reported)

Issues: defenses to delinquent-tax suit; *pro se* representation

When Gilbert's parents died intestate, their house passed to Gilbert and other heirs. When the school district filed suit for delinquent taxes on the property, it was able to find and serve Gilbert and his sister. The court appointed an attorney ad litem to represent the unknown heirs. Only Gilbert claimed an interest in the property. The school district's lawyers sent Gilbert notice of the trial date, but the post office returned the notice marked "unclaimed." Gilbert did not appear at the trial, and the trial court entered judgment for the school district and ordered the property sold. Gilbert, who represented himself, appealed.

On appeal, Gilbert complained that the suit was unfair to his sister, who he claimed was mentally incompetent. The court of appeals responded that the sister was not a party to the appeal and that Gilbert did not have standing to complain about what had happened to her. He could not represent his sister because he was not a licensed lawyer and because he had not been appointed as her guardian or next friend. Gilbert also complained that the attorney ad litem had failed to properly represent his interests. The court pointed out that the attorney ad litem's job was to represent the *unknown* heirs, not Gilbert. There was no evidence that the attorney ad litem had done anything that harmed Gilbert. The court rejected Gilbert's claim that he was not notified of the trial. The evidence showed that the notice was mailed to him. Gilbert complained that the school district's lawyer had been rude to him and made him cry, but he did not ask the court to do anything about that. He also attempted to complain about the appraisals of the property. The court explained that he had not followed the Tax Code's protest procedures and that he could not contest the appraisals in the context of a delinquent-tax suit. The court of appeals affirmed the trial court's judgment for the school district.

***Travis Central Appraisal District v. Marshall Ford Marina, Inc.***

2009 WL 2900743 (Tex. App. – Austin, September 9, 2009, no pet.)(not reported)

Issues: Property omitted from appraisal rolls; exhaustion of remedies

Several property owners filed amnesty renditions with the appraisal district in the fall of 2003, after their 2003 appraisals had been approved by the ARB. The appraisal district determined that the property owners had personal property that had been omitted from the 2003 appraisal roll. The district sent corrected appraisal notices to the property owners showing increases in the 2003 values of the relevant accounts. The property owners protested alleging: 1) that they did not have any omitted property; 2) that the district had not followed the proper procedures for appraising omitted property; and 3) that the district had not provided them with the required notice of what it was doing. (Unfortunately, the court did explain the details of the last two claims.) The ARB conducted hearings and ruled for the property owners. It reduced the 2003 values to the amounts that it had originally approved. The orders did not specify the reason(s) for the ARB's decision.

Instead of appealing the ARB's orders, the district made a second attempt to recapture the omitted property. This time it created new, supplemental accounts for the omitted property and sent more notices to the property owners. The values on the supplemental accounts were the same amounts by which the district had first attempted to raise the values on the existing accounts. The property owners protested again. This time, the ARB ruled for the district, and the property owners filed suit. The trial court ruled for the property owners on the grounds that the district did not have the authority to make its second effort to appraise the omitted property. The district appealed.

The court of appeals affirmed the trial court's judgment in favor of the property owners. The higher court said that after the ARB issued its orders in the first round of protests, the appraisal district should have filed suits to appeal those orders. That was the only step the district could have taken under the Tax Code. Having chosen not to appeal, the district could do nothing more to recapture omitted property. According to the court, the district's second attempt to appraise the omitted property was an impermissible attempt to circumvent the ARB's orders.

*Editor's Comment.* The court of appeals obviously took satisfaction in ruling that the Code's procedures are binding on appraisal districts just as they are binding on property owners, but that ruling may have been too simplistic in this case. The real problem is that the ARB's first orders did not explain why the ARB was ruling for the property owners. If the ARB found that there was no omitted property, then the district did err when it made a second attempt to appraise that nonexistent property. If, on the other hand, the ARB thought that there might have been omitted property but the district had not taken the right steps to appraise it and add it to the roll, then there was no legal reason that the district could not try again. This second possible interpretation of the ARB's orders is more likely because the ARB later approved the district's actions when the district took the right steps for appraising omitted property.

***Tierra Sol Joint Venture v. City of El Paso***  
311 S.W.3d 492 (Tex. App. – El Paso, August 28, 2009, no pet.)

Issues: personal judgment for delinquent taxes; application of payments

In 1990, a court entered a judgment for the city and against Tierra for delinquent taxes, interest, penalties, etc. on a real property for the years 1982 through 1989 (the first case). The city later sued Tierra and a company called Samuel for delinquent 1990-1995 taxes, interest, penalties, etc. on the same property (the second case). After the second suit was filed, Tierra sent the city a check saying that it was paying the base taxes on the property for the years 1982 through 1995. The city applied the money to pay the judgment in the first case in full and then to the penalties and interest claimed in the second case. The court of appeals then ruled that the city could not recover penalties and interest in the second suit because it had failed to send the five-year delinquent tax notices that were required at that time. The court of appeal referred the second case back to the trial court for further proceedings. The city took the money that it had applied to interest and penalties in the second case and reapplied it to base taxes. That left approximately \$28,000 in unpaid base taxes, an amount reflected in the delinquent-tax records that the city offered as evidence in the second case. The trial court entered a judgment for that amount. The judgment ordered the sale of the property and stated that Samuel was liable for the debt. Tierra appealed.

On appeal, Tierra argued that Samuel was not the owner of the property and was not responsible for paying the judgment. The city agreed and released the Samuel from the judgment. The court of appeals explained that the city's release of Samuel mooted the personal-liability issue but did not affect the trial court's order for the property to be sold. Tierra also argued that the court of appeals' earlier ruling in the second case (disallowing the city's claims for interest and penalties) should also apply to the first case. The amounts applied to interest and penalties in the first case should be reapplied to the base taxes in the second case. The court of appeals disagreed and explained that its ruling did not affect the first case. The city's delinquent-tax records showed that Tierra's payment had been applied correctly and were sufficient to prove the amount due in the second case. The court of appeals affirmed the trial court's judgment in favor of the city.

***Harris County Appraisal District v. Nunu***

2009 WL 2620732 (Tex. App – Houston [14<sup>th</sup> Dist.], August 27, 2009, pet. denied)(not reported)

Issues: homestead exemptions

Nunu ran a law practice in the same house where he lived with his family. He admitted using one room entirely for his business and another room primarily for his business. He also claimed federal income-tax deductions on the grounds that some of the house's utility expenses were business expenses. The appraisal district determined that the two rooms used for business made up 12% of the house and reduced Nunu's residence homestead exemption by 12%. After an unsuccessful protest before the ARB, Nunu sued the appraisal district. The trial court ordered the appraisal district to give Nunu the full amount of the exemption, and the district appealed.

The court of appeals relied upon §11.13(k) of the Tax Code, which provides that a residence homestead exemption does not apply to the portion of a structure that is used primarily for purposes that are incompatible with the owner's residential use. The court explained that a law practice is incompatible with the residential use of the same part of a house. For example, a private family discussion would not occur in the same room where a lawyer was consulting with a client. The two rooms used primarily for business did not qualify for the exemption. The court also noted that under federal law, Nunu had to use part of the house for business "exclusively" and "on a regular basis" in order to claim the income-tax deductions.

Nunu also claimed that the whole house should qualify for a residence homestead exemption because all of it qualified as a "homestead" under the Property Code for purposes of protection from creditors. The court of appeals explained that a "homestead" protected from creditors under the Property Code was not the same as a "residence homestead" entitled to property-tax exemptions. The court of appeals reversed the trial court's judgment and ruled that 12% of Nunu's house did not qualify for the exemption.

***Dolenz v. Dallas Central Appraisal District***

293 S.W.3d 920 (Tex. App. – Dallas, August 13, 2009, pet.denied)

Issues: ownership of property; standing to file suit

Dolenz owned one of the stately mansions on Dallas's Swiss Avenue. He conveyed the property to the Universal Life Church Trust, which, then conveyed a life estate back to Dolenz and promised to pay all of his living expenses, including housing costs. Dolenz was the trustee of the trust. He claimed a religious exemption for the property, but his claim was rejected by the appraisal district and the ARB. Acting as trustee, he filed suit on behalf of the trust. The appraisal district responded that Dolenz could not represent the trust in court because he was not a licensed lawyer. The trial court ordered Dolenz to show his authority to represent the trust. When he failed to do so, his suit was dismissed, and Dolenz appealed.

On appeal, Dolenz attempted to rely on his personal status as the holder of a life estate in the property. The court of appeals noted that Dolenz had repeatedly argued to the trial court that the trust was the real owner of the property. The higher court also noted that the trust's commitment to pay Dolenz's living expenses obligated it to pay the taxes on the property. Thus, Dolenz did not have standing to sue in his personal capacity. The court of appeals upheld the trial court's dismissal of the case.

*Editor's Comment:* Dolenz apparently never read §25.05 of the Tax Code, which says that where someone holds a life estate in property, the property should be appraised and taxed in that person's name. Under §25.05, the property could not qualify for a religious exemption because it was owned by Dolenz, not by a religious organization. Dolenz, however, was the appropriate person to file a protest or lawsuit to contest the appraisal of the property.

***Vafaiyan v. Wichita County***

2009 WL 2414366 (Tex. App. – Fort Worth, August 6, 2009, pet. dismissed w.o.j.)(not reported)

Issues: delinquent taxpayer's notice of trial; discriminatory collections

Taxing units sued a corporation and two individuals for delinquent taxes on four pieces of real property. Vafaiyan, the sole shareholder filed an answer on behalf of the corporation. Vafaiyan was incarcerated and failed to attend the trial at which the court entered judgment for the taxing units. He then argued that the court had not sent him a notice of the trial and that it had wrongfully refused to issue a bench warrant that would have allowed him to attend. He also claimed that the taxing units conspired with the State to discriminate against him. Vafaiyan apparently believed that the taxing units were not usually as quick to file suits for delinquent as they had been in this case. The trial court declined to reconsider its judgment, and Vafaiyan appealed.

The court of appeals upheld the judgment. The higher court referred to a motion that Vafaiyan filed with the trial court after it had entered its judgment. In that motion, Vafaiyan admitted that he received the notice of the trial date. He could not complain about the trial court's failure to issue a bench warrant because there was nothing in the appellate record to show whether he had ever requested one. Further, the record contained nothing to support Vafaiyan's claim of discrimination. The taxing units could file suit to collect delinquent taxes anytime after those taxes became delinquent. They did nothing wrong by filing this suit relatively soon after the taxes became delinquent.

***In re Premcor Refining Group, Inc. v. Jefferson County Appraisal District***

2009 WL 2253290 (Tex. App. – Beaumont, July 30, 2009, no pet.)(not reported)

Issues: discovery in appraisal case

Valero sued the appraisal district to challenge the appraised value of a refinery. The appraisal district sent Valero requests for production, and Valero objected, claiming that some of the requests were overly broad and that they would require Valero to reveal trade secrets. (Unfortunately, most of the disputed requests are not quoted or described in the court of appeals' opinion.) The trial court imposed a compromise on the parties and ordered Valero to produce only the requested materials related to the refinery in question over the course of a three-year period. The trial court also ordered the appraisal district to protect the confidentiality of the information produced. Not satisfied, Valero sought a writ of mandamus from the court of appeals.

The court of appeals ruled that the appraisal district's requests were too broad. The court explained that requests for production are not for the purpose of seeking intangible *information*; they are for the purpose of seeking specific tangible items or categories of such items. The appraisal district's requests did not identify items or categories of items. Even if they had requested documents instead of information, the requests would have still been too broad. The court thought that the requests were not limited to relevant items and that they sought too much "tenuous information." The court

of appeals stated that the trial court was not responsible for rewriting the requests in order to narrow their scope and ruled that the trial court should simply sustain Valero's objections to the requests. The court of appeals also stated that the trial court did not need to consider the issue of trade secrets until the specific documents alleged to contain those secrets had been requested and identified.

***Expo Motorcars, L.L.C. v. Harris County Appraisal District***

2009 WL 2232017 (Tex. App. – Houston [1<sup>st</sup> Dist.], July 23, 2009, pet. stricken)(not reported)

Issues: constitutionality of vehicle inventory tax; constitutionality of protest procedures

Expo attempted to protest the appraisals of its vehicle inventories for 2004 and 2005, but in each year, it filed its protest too late. It then sued the appraisal district claiming that the protest deadlines in §41.44 of the Tax Code violated its constitutional right to due process. It argued that it should be able to protest a particular year's appraisal after that year had ended and it had all its sales data for that year. It also argued that the vehicle inventory tax violated the Texas Constitution's requirement of equal and uniform taxation. The trial court entered summary judgment for the appraisal district, and Expo appealed.

The court of appeals upheld the trial court's judgment. The higher court explained that under §23.121 a dealer's appraisal and taxes for one year are based on his sales during the *preceding* year. The dealer knows all that he needs to know in time to file a protest in the spring. Thus, his due-process rights are protected. The court also said that, under the Texas Constitution, the legislature may prescribe different methods for appraising different types of property, so long as those methods are not "unreasonable, arbitrary or capricious." The sales-based appraisal method prescribed for vehicle inventories is no more arbitrary than appraising properties on a single date such as January 1. That method "may not be perfect," but it is not unconstitutional.

*Editor's Comment:* Expo may not know much about property taxes, but they have some very cool cars. Check out their website: [www.expomc.com](http://www.expomc.com).

***Loposer v. Harris County Appraisal District***

2009 WL 2146151 (Tex. App. – Houston [14<sup>th</sup> Dist], July 21, 2009, no pet.)(not reported)

Issues: agreement resolving protest

Loposer appointed an agent to protest the value of his property. At the ARB hearing, the agent claimed a value that was exactly the same as the appraised value the appraisal district had placed on the property. When he realized that the values were the same the agent announced that he concurred with the appraisal district's value. The board announced that, based on the agent's request, it was sustaining the appraisal district's value and issued a written order to that effect. Loposer sued the appraisal district and the ARB to appeal the ARB's order. The trial court entered a summary judgment in favor of the appraisal district and the ARB, and Loposer appealed.

The court of appeals sustained the trial court's judgment. It applied the well-established rule that when a protesting property owner resolves his protest by reaching an agreement with the appraisal district, their agreement is final, and the property owner has no right to take the matter to court. This rule does not violate the property owner's due-process rights. Loposer argued that the ARB had somehow rejected the agreement that his agent made with the appraisal district. The court of appeals explained, however, that an ARB has no authority to reject an agreement between a property owner and an appraisal district. Whatever the ARB did, it did not invalidate the agreement.

***Amidei v. Harris County Appraisal District***

2009 WL 2050974 (Tex. App. – Houston [1<sup>st</sup> Dist], July 16, 2009, no pet.)(not reported)

Issues: agreement resolving protest

Amedei appointed the O'Connor tax-rep firm as his agent, and filed the appointment-of-agent form with the appraisal district. O'Connor filed a protest concerning the 2007 value of Amidei's house and sent its employee, Nguyen, to represent Amedei at the ARB hearing. Nguyen asked the ARB for a reduction in the market value of the house from \$127,000 to \$124,000, and the appraisal district's representative agreed to the reduction. The ARB signed an order reflecting their agreement. As Amedei's homestead, the house was subject to the cap on year-to-year increases in its appraised value. The cap was determined by taking the 2006 appraised value (\$96,900) and adding 10% of that value (\$9,690). The capped value (\$106,590) was lower than the reduced 2007 market value and was used as the 2007 appraised value of the house. Amedei sued the appraisal district and the ARB to appeal the ARB's order. The trial court entered a summary judgment in favor of the district and the ARB, primarily on the basis of the agreement between Amedei and the district. Amedei appealed.

The court of appeals affirmed the trial court's summary judgment. The court explained that even though Amedei's appointment-of agent form had named the O'Connor firm and not Nguyen in particular, O'Connor had the authority to act through Nguyen as its employee, and Nguyen had the authority to enter a binding agreement on behalf of Amedei. His agreement with the district was final, and Amedei had no right to take the matter to court. The certified transcript of the ABR hearing reflecting the agreement was proper summary-judgment evidence and was sufficient to prove that the agreement had been made. The cap on the 2007 appraised value was calculated and applied correctly. Section 42.23 provides that when an ARB order is appealed to a trial court, the actions of the ARB are sometimes not admissible as evidence. But, that rule does not apply when the property owner and the appraisal district reach an agreement at the ARB hearing, and the property owner has no right to appeal. Evidence of the agreement and the ARB's actions in response to it are admissible. An affidavit from Amedei stating that in his opinion the house was worth only \$96,900 was a mere opinion and was not proper summary-judgment evidence.

***Stoker v. City of Fort Worth***

2009 WL 2138951 (Tex. App. – Fort Worth, July 16, 2009, no pet.)(not reported)

Issues: delinquent taxes on inherited property; citation by intervening taxing units; trial when party is incarcerated

Stoker Sr. died owing delinquent taxes on real property. The city sued his heirs *in rem*, seeking the foreclosure of the tax liens on the property. Stoker Jr. was served personally. The other heirs could not be located and were served by publication. Other taxing units intervened with their own delinquent-tax claims. They did not serve new citations on Stoker Jr. When the trial was conducted, Stoker Jr. was incarcerated and could not attend. The trial court entered judgment *in rem* for the taxing units and ordered the sale of the property. Stoker Jr. appealed, raising several different arguments.

First, he argued that he did not have any interest in the property when the delinquent taxes were assessed. The court of appeals explained that Stoker Jr. was not personally liable for the taxes, but the property was still burdened by the tax liens, even after Stoker Sr. died and his heirs inherited the property. When a delinquent taxpayer dies, taxing units can make a claim on his estate, sue to foreclose their tax liens on the person's property, or do both. In this case, the taxing units correctly sought and the trial court correctly entered an *in rem* judgment against Stoker Sr.'s heirs. Second, Stoker Jr. argued that the taxing units should have followed the tax-seizure procedures described in §33.91 of the Tax Code. The court explained that the case did not involve a seizure; it was an ordinary suit to foreclose tax liens under §33.41. The tax-seizure procedures did not apply. Third, Stoker Jr. argued that the intervening taxing units should have served him with new citations. The court disagreed and cited Rule 117a of the Texas Rules of Civil Procedure. Once a defendant appears in a delinquent-tax case, he is charged with notice of subsequent interventions, and the intervening taxing units do not need to serve him with citations. Fourth, Stoker Jr. claimed that his due-process rights were violated because he could not attend the trial. The court responded that an inmate who wants to attend a civil court proceeding has the responsibility for providing the court with factual information showing that his interest in attending outweighs the burden on the correctional system. Stoker Jr. made no effort to show the trial court why he needed to attend the trial. Stoker Jr. made several other claims that the court of appeals did not consider because they were not properly briefed or because the record did not contain the information that the court would have needed in order to consider them. The court of appeals affirmed the trial court's judgment for the taxing units.

***Bexar Appraisal District v. John Williams Fine Furniture & Interiors, Inc.***  
2009 WL 1956385 (Tex. App. – San Antonio, July 8, 2009, pet. denied)(not reported)

Issues: contesting alleged ARB hearing errors; ARB as party to appeal

Williams protested the appraised value of its inventory. The ARB conducted a hearing and denied the protest. Williams appealed by suing the appraisal district and the ARB. In addition to seeking a trial de novo concerning the value of its property, Williams also alleged that the ARB had violated its due-process rights by applying the wrong burden of proof, preventing cross-examination, and ignoring evidence. Williams asked the trial

court to appoint a board of conservators to take control of the appraisal district's personal-property department. The district and the ARB claimed that they were protected by sovereign immunity and asked the court to dismiss the case. The ARB also argued that it should not be a party. The court refused to dismiss the case and the district and ARB appealed.

The court of appeals explained that sovereign immunity ordinarily shields governmental entities from being sued and from liability. The Tax Code contains an exception to this rule that allows a property owner to sue for judicial review of an ARB's order determining his protest. The trial court conducts a trial de novo and can determine the correct value of the property in question. The Code's rules satisfy due process. Neither the Code nor due process allows a property owner who receives a hearing to sue the ARB over alleged procedural errors in the conduct of that hearing. Williams had no right to sue over the ARB's alleged procedural errors and the trial court had no jurisdiction to grant the extraordinary relief requested by Williams. The court of appeals dismissed most of Williams's claims. The court noted, however, that Williams did have the right to a conventional trial de novo concerning its excessive-appraisal claims. The court of appeals referred that part of the case back to the trial court.

The court of appeals also noted that under §42.21 a property owner who files a suit against an appraisal district may also include the ARB as a defendant in the case if including the ARB is "appropriate." Williams did not offer any reasons why it was appropriate to sue the ARB under these circumstances. Consequently, the court of appeals dismissed the ARB from the case.

***Sanders v. Household Mortgage Services, Inc.***

2009 WL 1886194 (Tex. App. – Waco, July 1, 2009, no pet)(not reported)

Issues: contract to pay taxes; redemption following tax sale

Household held a mortgage on Sanders's property. Sanders was responsible for paying the property taxes, but he failed to do so. Taxing units filed suit, and the court ordered the foreclosure of their tax liens. Someone bought the property at the tax sale, and Household later bought it from that person. Sanders sued Household claiming that they had reached an agreement under which Household was to pay the delinquent taxes and Sanders was to repay Household through increased monthly payments. He claimed that Household breached their agreement by not paying the taxes and that Household also committed fraud. Household filed a no-evidence motion for summary judgment challenging Sanders to show the court that he had some evidence to support his claims. Sanders offered his own affidavit stating that he had an agreement with Household but providing no details and a bill issued by Household several months after the tax sale. At the hearing, Sanders also argued that when Household bought the property from the tax-sale buyer, it was really redeeming the property and returning it to Sanders. That argument, however, was not in Sanders's written pleadings. The trial court granted summary judgment for Household and Sanders appealed.

The court of appeals upheld the summary judgment for Household. The higher court explained that a contract must be reasonably definite in its terms in order to be enforceable. Sanders's description of the contract he claimed to have with Household was very vague and did not include details such as the specific amount that Household was to pay in delinquent taxes, which taxing units were to be paid or the interest to be charged to Sanders. Sanders's affidavit did not constitute evidence of an enforceable contract, so there was no evidence that Household had breached such a contract. Sanders failed to provide any evidence of fraud because he did not show that Household had ever made any false representations to him. The court said that it could not consider Sanders's claim that Household had redeemed the property because Sanders had not made that claim in his written pleadings.

***Pounds v. Jurgens***

296 S.W.3d 100 (Tex. App. – Houston [14<sup>th</sup> Dist.], June 18, 2009, no pet. hist.)

Issues: effect of tax sale on royalty interest; challenge to tax sale

Lewellen owned a tract of land. In 1929, she conveyed the minerals through an oil and gas lease. She retained a 1/8 royalty interest and a possibility of reverter, i.e., the right to get the minerals back if the lessee failed to explore and produce. By the mid 1980's, the interests that Lewellen owned in the land had descended to her heirs. The appraisal district appraised the surface interest and the royalty interest separately. The heirs paid the taxes on the royalty interest every year, but the taxes on the surface became delinquent. The taxing units filed a delinquent-tax suit against Lewellen (long since deceased) and her daughter (also deceased). The deceased defendants were served by publication, and the living heirs were not served at all. In 1986, the court entered judgment for the taxing units and ordered the sale of the property. The sheriff conducted the sale in 1987, and the land was bid in trust to the taxing units. They resold the land to Pounds in 1998. The judgment, the sheriff's deed and the resale deed described the land but did not mention the royalty interest or the possibility of reverter. Both Pounds and the heirs claimed to own the royalty interest and the possibility of reverter. When the lessee could not determine to whom it should pay the royalties, it sued them both. The trial court ruled that the tax sale was void as to the royalty interest and the possibility of reverter and that the heirs still owned both those interests. Pounds appealed.

The court of appeals agreed that the royalty interest was not transferred in the tax sale. The court explained that the tax lien on a particular property secures only the taxes assessed on that property. Because the surface and the royalty interest were appraised and taxed separately, the royalty interest could not be sold by the sheriff to satisfy the delinquent taxes on the surface. The heirs still owned the royalty interest, and the sheriff's deed was void to whatever extent it could be read to transfer that interest. The court of appeals, however, reversed the trial court's judgment with respect to the possibility of reverter. The possibility of reverter was never appraised or taxed separately from the surface. Further, §32.05 of the Tax Code provides that a tax lien takes priority over a possibility of reverter. Thus, the possibility of reverter was transferred along with the surface in the tax sale and was presently owned by Pounds.

The court of appeals also explained that there were no procedural rules that would prevent Lewellen's heirs from asserting their claims. Section 33.54 of the Code prescribes a one-year limitations period for most parties suing to challenge tax sales, but that statute of limitations did not apply to the heirs because: 1) they were not served in the delinquent-tax suit; and 2) they regularly paid the post-sale taxes on the royalty interest. Section 34.05 prescribes a one-year limitations period for most parties suing to challenge a resale of property. The heirs, however, were not really challenging the resale from the taxing units to Pounds. Instead, they were claiming that the original tax sale did not transfer the royalty interest and that the taxing units could not have resold an interest that they had never acquired. Section 34.08 requires that a person deposit the amount of a delinquent-tax judgment with the court before he can "commence an action" to challenge a tax sale that resulted from that judgment. That requirement did not apply to the heirs because they did not commence the action; the lessee did.

***D & KW Family, L.P. v. Bidinger***

2009 WL 1635216 (Tex. App – Houston [1<sup>st</sup> Dist.], June 11, 2009, pet. denied)(not reported)

Issues: effect of tax sale on easement

This story starts with a 50-acre subdivision with a single owner. In 1979, part of the land known as Block 13 was sold to Lewis. The deed to Lewis did not expressly include an easement for access, but the only access to Block 13 was over part of the remaining land known as Cherilyn Lane. Later, the school district filed suit to collect delinquent taxes on part of the 50 acres not owned by Lewis. The court ordered the foreclosure of the tax liens, and the school district acquired that land at a tax sale in 1995. The deed referred to the original 50 acres and purported to convey "all rights of way within such 50 acres." In 2003, the school district resold the land it had acquired to D & KW using a deed that also purported to convey "all rights of way within such 50 acres." Attached to the deed was a meets and bounds description that did not refer to any rights of way. In 2007, Bidinger bought Lewis's Block 13 and began accessing it via Cherilyn Lane. D & KW sued Bidinger claiming that it owned Cherilyn Lane, that Bidinger had no easement over the lane and that she was trespassing.

The central issue in the case was whether Bidinger had an implied easement by necessity to use the lane to access her Block 13. D & KW claimed that no such easement could have survived the tax sale. It relied on the deeds to the school district and to it purporting to convey "all rights of way within such 50 acres" and on §34.01 of the Tax Code which states that a tax sale conveys "good and perfect title." A tax sale does not extinguish a "valid easement of record," but D & KW argued that a tax sale does extinguish an implied easement. The trial court ruled that Bidinger did have an easement, and D & KW appealed.

The court of appeals affirmed the judgment for Bidinger. D & KW had the burden of proving its ownership of the lane, and it failed to do so. The deeds to the school district and to D & KW purported to include rights of way, but did not include any descriptions

identifying those rights of way. A deed, even a deed resulting from a tax sale, must include enough information to allow someone to locate the land conveyed, or it can incorporate that information from an existing document. The deeds in question failed to do either. Because it failed to show that it owned the lane, D & KW failed to show that Bidinger was trespassing on its property. The court did not decide the more general question of whether a tax sale can extinguish an implied easement.

***Briggs Equipment Trust v. Harris County Appraisal District***

294 S.W.3d 667 (Tex. App. – Houston [1<sup>st</sup> Dist.], June 4, 2009, no pet. hist.)

Issues: appraisal of heavy equipment inventory

Briggs was a heavy equipment dealer, leasing and selling heavy equipment. Under §§23.1241, *et seq.* of the Tax Code, its inventory taxes for 2007 were based on its sales in 2006. Briggs reported 2006 gross sales of \$98 million, but it subtracted \$62 million from that amount as “subsequent sales.” After it leased a piece of equipment once in a year, it treated any later leases of that equipment as subsequent sales, which would not count toward its inventory value. It relied on the provisions in §23.1241 defining “dealer’s heavy equipment inventory” to include equipment that is leased but subject to a purchase option and defining “subsequent sale” as a “dealer-financed sale of an item of heavy equipment that, at the time of the sale, has been the subject of a dealer-financed sale from the same dealer’s heavy equipment inventory in the same calendar year.” Briggs’s leases all contained options to purchase the leased equipment, although those options were typically not exercised by the lessees. The appraisal district disagreed with Briggs’s interpretation of the law and argued that multiple leases of the same equipment did not constitute subsequent sales. It refused to subtract from Briggs’s 2006 gross sales the \$62 million that Briggs claimed as subsequent sales. The trial court entered a take-nothing judgment, denying any relief to Briggs and essentially upholding the appraisal district’s appraisal of Briggs’s inventory. Briggs appealed.

The court of appeals also sided with the appraisal district. The court explained that Briggs’s lease transactions could not qualify as subsequent sales because they were not dealer-financed. Financing essentially means lending money. Briggs did not provide any money to further the lease or purchase of equipment by its customers. The court further explained that the “subsequent-sale” provision in the statute was intended to prevent double taxation of an item that was repossessed and resold by a dealer after the initial buyer defaulted on his note. It was not intended to apply to sequential leases.

Briggs also complained because the trial court entered a take-nothing judgment instead of a judgment expressly stating what the appraised value of Briggs’s inventory would be. The court of appeals concluded that Briggs waived that argument when its lawyer told the trial court that either form of the judgment would have the same effect. Briggs attempted to make other arguments about the calculation of the value of its inventory, but the court of appeals refused to consider those arguments because the trial court had not considered them. The court of appeals upheld the trial court’s judgment against Briggs.

***Industrial Communications, Inc. v. Ward County Appraisal District***

296 S.W.3d 707 (Tex. App. – El Paso, June 3, 2009, no pet. hist.)

Issues: exhaustion of remedies; delivery of notice to property owner

In 2000, Industrial bought the assets of ICP, including three radio towers. Industrial attempted to register the towers in its name with the FCC but failed to do so due to a “software problem.” Industrial began filing renditions with the appraisal district in 2001 but did not include the towers. The appraisal district, unaware of the sale of the towers, continued appraising them in the name of ICP and sending notices to ICP’s office in Pecos rather than Industrial’s office in Odessa. Industrial had an employee working in ICP’s Pecos office during the first half of 2003. The 2003 appraisal of the towers was approximately \$222,000. Finally, in April of 2004, Industrial rendered the towers, and the appraisal district appraised them in Industrial’s name at the rendered value of \$15,500. In November of 2004, Industrial received notice of the 2003 delinquent taxes on the towers. Industrial attempted to protest the 2003 appraisal and the appraisal district’s alleged failure to correctly deliver the 2003 appraisal notice, but the ARB said that the protest came too late. Industrial then sued the appraisal district. It asked the trial court for a declaration that its Due-Process rights under the U.S. Constitution had been violated. The court entered a summary judgment for the appraisal district, and Industrial appealed.

The court of appeals reversed the trial court’s judgment and entered judgment for Industrial. The higher court held that the Tax Code violated the Due Process Clause. The Code did not allow Industrial to protest the 2003 appraisal or the allegedly faulty delivery of the notice because, by November of 2004, the deadlines for those protests had passed. There was nothing that Industrial could do under the Code to contest the 2003 appraisal. The court therefore reasoned that Industrial could contest the appraisal by suing for a declaratory judgment. The court further held that Industrial was entitled to have the 2003 appraisal notice sent to its address even though: Industrial had not rendered the towers; it had not recorded its acquisition of the towers; and the appraisal district had no way of knowing that Industrial owned them, let alone the correct address for the delivery of the appraisal notice. The court declared that the 2003 taxes on the towers were void, thus letting Industrial escape the taxes altogether. The court even ordered the appraisal district to pay Industrial’s attorney’s fees.

The court noted that a 2007 amendment to the Code would probably lead to a different result if it applied to this case. That amendment to §41.411 extends a property owner’s deadline for filing a lack-of-notice protest under circumstances where the owner does not receive any tax bills or related notices.

*Editor’s Comment:* The opinion of the court of appeals is seriously wrong in ways too numerous to count. Due Process does not require clairvoyance on the part of a governmental entity. It requires that the government provide notice “reasonably calculated” to inform someone that the government is taking an action that affects his life, liberty or property. In this case, the appraisal district sent its 2003 appraisal notice to the company shown in the public records as the owner of the towers, and it sent the

notice to an office where Industrial had an employee. The court did not explain what other steps the appraisal district should have done in an effort reasonably calculated to notify the owner of the towers.

Although Industrial did not have actual notice of the 2003 appraisal, it did know that it owned the towers and that they were taxable property. When it did not receive any notices or bills related to the towers, it could have contacted the appraisal district to ask why, just as a person who does not receive an electric bill but knows that he is consuming electricity can contact the electric company. By imposing an impossible burden on the appraisal district and failing to impose any responsibility on Industrial, the court's opinion reflects the kind of big-government, nanny-state philosophy that one might expect to find in Massachusetts or Sweden but not in Texas.

***Lee County v. Everett***

2009 WL 1491944 (Tex. App. – Austin, May 29, 2009, no pet.) (not reported)

Issues: paying ad litem in delinquent-tax suit

Taxing units sued the Everetts for delinquent taxes on real property. When the Everetts could not be located, they were served by notice published in a newspaper, and the court appointed an attorney ad litem to represent their interests. The attorney ad litem filed an answer in the case and represented the Everetts' interests at the trial. The trial court entered judgment for the taxing units and ordered the foreclosure of the tax liens on the property. The court also ordered the taxing units to pay the attorney ad litem's fees. The taxing units appealed that part of the judgment.

The court of appeals reversed the trial court's judgment insofar as it ordered the taxing units to pay the attorney ad litem. The court of appeals explained that under §33.49 of the Tax Code, taxing units are not liable for court costs, including an attorney ad litem's fees. The attorney ad litem argued that when there is good cause for doing so, Rule 141 of the Texas Rules of Civil Procedure allows a court to ignore the ordinary rules for assigning costs and to assign those costs as it sees fit. The court of appeals responded that a procedural rule must yield when it is in conflict with a statute like §33.49. The court went on to explain that an attorney ad litem has a right to be paid out of the proceeds of a tax sale. In fact, the attorney ad litem's fees are paid immediately after the costs of advertising the tax sale and before the delinquent taxes are paid. That's how the trial court should have dealt with the attorney ad litem's fees. The court of appeals sent the case back to the trial court so that the lower court could correct its judgment.

***Hays v. Butler***

295 S.W.3d 53 (Tex. App. – Houston [1<sup>st</sup> Dist], May 21, 2009, no pet.)

Issues: challenge to tax sale

This case concerned competing claims to land. Hay's claim was based on a 1993 tax sale. In that year, a court rendered judgment in favor of a school district for delinquent

taxes on the land. The school district acquired the land at the tax sale. The judgment (and, presumably, the sheriff's deed to the school district) described the land as "lots 1 through 20, Clifton Land and Production Co. Subdivision, Edward Payne Survey." When the school district later resold the land, it included its tax account number in the deed to the buyer. The land changed hands several times more until it eventually reached Hays. One of the later deeds in the chain of title did refer to the specific block in the subdivision. Butler—his full name was J. Dude Butler—claimed the land under a different chain of title and sued Hays in order to have a court determine the actual ownership of the land. Hays argued that because his claim could be traced to a tax sale, it could not be challenged. He cited §33.54 of the Tax Code, which requires a court challenge to a tax sale to be filed within one year (in some cases, within two years) of the sale. That section provides, "When actions are barred by this section, the purchaser at the tax sale or the purchaser's successor in interest has full title to the property, precluding all other claims. The trial court upheld Butler's title to the land, and Hays appealed.

The court of appeals ruled that the 1993 tax judgment and the related documents purporting to convey something to the school district were void. Those documents referred to "Lots 1 through 20," but did not identify the block in which those lots were located. All of the blocks in the subdivision had at least twenty lots. A tax judgment's property description must be sufficiently particular to allow someone to locate the land. The judgment must describe the property with "reasonable certainty." The judgment can refer to another document to help identify the property, but that other document must be in existence at the time the judgment is entered. Consequently, neither the school district's later deed that included its tax account number nor the later deed that specified the block number could save the defective tax judgment. Because the tax judgment and the tax sale were void, they could still be challenged notwithstanding §33.54. The court of appeals upheld the trial court's judgment for Butler.

***Perdue, Brackett, Flores, Utt & Burns v. Linebarger, Goggan, Blair, Sampson & Meeks, LLP***

291 S.W.3d 448 (Tex. App. – Fort Worth, May 7, 2009, no pet.)

Issues: tax collection contracts

The Perdue law firm's tax-collection contract with the city of Fort Worth was nearing the end of its term, and Perdue was asking the city to extend it. The Linebarger law firm sent the city council a written statement critical of Perdue's performance. Representatives of Linebarger also appeared at a city council meeting to criticize Perdue. The council decided against extending Perdue's contract and, instead, entered a contract with Linebarger. Perdue sued Linebarger claiming that the statements that Linebarger made in writing and at the meeting were defamatory. Perdue's charges against Linebarger also included tortious interference, business disparagement and conspiracy. Linebarger responded by claiming that its statements were privileged and that it was protected by the doctrine of quasi-judicial immunity. The trial court granted a summary judgment for Linebarger, and Perdue appealed.

The court of appeals ruled that Linebarger's statements were privileged regardless of whether they were true, false or even malicious. The statements were privileged because: 1) the council had quasi-judicial authority to investigate and decide who should collect the city's taxes; and 2) the statements were related to the council's pending or proposed decision. The court explained that the privilege protects the free flow of information (even false information) to governmental decision makers and protects the right of citizens to appeal to those governmental decision makers. Linebarger was immune from Perdue's suit, and the court of appeals upheld the trial court's judgment for Linebarger.

***Gard v. Bandera County Appraisal District***

293 S.W.3d 613 (Tex. App. – San Antonio, May 6, 2009, no pet.)

Issues: recovery of attorney's fees

The appraisal district agreed to settle Gard's appeal and reduce the appraised value of his property. The reduction meant that Gard saved \$700 in taxes. Gard, however, insisted that he should recover \$13,000 in attorney's fees. The trial court awarded him only \$700 in attorney's fees, and Gard appealed.

On appeal, Gard acknowledged that §42.29 of the Tax Code would not allow him to recover more in attorney's fees than he saved in taxes, but he argued that §42.29 violated the Due Process Clause of the U.S. Constitution and the open-courts provision of the Texas Constitution. The court of appeals rejected his arguments. There was no Due Process violation because Gard did not have a constitutionally protected property right to recover attorney's fees and because the limits found in §42.29 are rationally related to the legislature's policy of limiting an appraisal district's exposure to large awards of attorney's fees. There was no violation of the open-court's provision because §42.29 did not unreasonably impede access to courts. The court reached this decision by balancing the legislative purpose behind the statute against any interference the statute might pose for people seeking access to the courts. The court of appeals upheld the award of \$700 for Gard's attorney's fees but refused to sanction Gard for filing a frivolous appeal.

***Cabot Capital Corp. v. USDR, Inc.***

2009 WL 1164928 (Tex. App. – El Paso, April 30, 2009, pet. denied)(to be published)

Issues: evidence of value

This is not primarily a tax case, but it does concern proof of a property's market value. Cabot foreclosed liens on real property owned by USDR. The parties disputed the market value of the property as of the date of foreclosure, May 6, 2003. At trial, Cabot presented the testimony of an appraiser named Briggs. Briggs did his appraisal in 2006, but he valued the property as of the date of foreclosure. He testified that 11 of 12 buildings on the property had been demolished since the foreclosure. The trial judge asked him the present value of the one remaining building, and he answered by saying \$35 to \$40 per square foot. USDR called an appraiser named Goodrich. She had

appraised several different interests in the property at different times over a period from 1996 to 2001, but she had not appraised it as of the date of the foreclosure. Another witness testified that the rent rolls used by Goodrich in her 2001 appraisal contained erroneous dates, names and rental rates. USDR's director also gave his opinion of the property's value, but he admitted that his opinion was based largely on Goodrich's 2001 appraisal and that he could not remember which tenants were still in the property in 2003 or what rents they were paying. In determining the property's value, the trial court considered only the one remaining building and gave it a value of \$40 per square foot. Cabot appealed the trial court's judgment.

The court of appeals concluded that the evidence was not sufficient to support the value found by the trial court. The trial court erred by valuing the property as of the time of the trial, not the date of the foreclosure. The lower court considered only one building and gave it the value per square foot that Briggs thought it had at the time of trial. Goodrich's testimony did not support the trial court's finding because her 2001 appraisal was based on erroneous rental information. The director should not have been allowed to testify to his opinion. The problem was not that he did not own the property individually. The court of appeals seemed to think that as the sole director and majority shareholder of USDR, he could testify even though he was not an expert appraiser. Instead, the problem was that he admitted not knowing what leases or rental rates were in effect at the time of foreclosure and he relied on Goodrich's faulty appraisal. The court of appeals reversed the trial court's judgment and sent the case back to the trial court for a new trial.

***ICAN Enterprises v. Williamson County Appraisal District***

2009 WL 1025084 (Tex. App. – Austin, April 17, 2009, pet. denied)(not reported)

Issues: exemption of leasehold interest in aircraft hangar

ICAN leased aircraft hangars from the city at the city's airport and used them to store several airplanes. The city's ownership interest in the hangars was exempt from taxation. The dispute concerned whether ICAN's leasehold interests in the hangars could be taxed. ICAN claimed that §25.07 exempted its leasehold interests. That section provides that a leasehold is not taxable if the leased property is part of a city-owned public transportation facility and is a building used primarily for "aircraft equipment storage." ICAN protested the appraisal of its leasehold interests and lost before the ARB. It also lost before the trial court and then appealed.

The court of appeals explained that statutory tax exemptions must be construed strictly. It drew a distinction between "aircraft equipment" and whole airplanes. The hangars leased by ICAN were used primarily for the storage of whole aircraft, not aircraft equipment. Consequently, ICAN's leasehold interests in the hangars was taxable under §25.07. The court of appeals upheld the trial court's judgment for the appraisal district.

***Averitt v. Caudle***

2009 WL 891034 (Tex. App. – Eastland, April 2, 2009, pet. denied.)(not reported)

Issues: evidence of value

Averitt protested the appraised values of his oil and gas interests for several years. When the ARB ruled against him each time, he appealed to the trial court. In a jury trial, the appraisal district called Benny Latham of Capitol Appraisal Group. Latham testified to the values he found using §23.175 of the Tax Code, which sets out the specific details of an income approach for use in appraising oil and gas interests. Latham further testified, however, that under the particular circumstances of this case, the method set out in §23.175 produced a value that was higher than the actual market value of Averitt's interests. He testified to lower values at which he arrived using other generally accepted appraisal methods. Those other values actually reflected the market values of the interests. Averitt's expert testified to much lower values and claimed that Latham's values did not comply with the Tax Code. The trial court asked the jury to find the market values required by law and instructed them about §23.175, the Tax Code's definition of market value and the requirement that appraisers use generally accepted methods. The Jury responded by agreeing with Latham's values. The court asked the jury whether the districts appraisals had failed to comply with §23.175 and they answered no. Based on the jury's answers, the trial court entered judgment for the district, and Averitt appealed.

On appeal, Averitt argued that the trial court should not have used the term "market value" in its questions to the jury. The court of appeals rejected that argument and found nothing wrong with the trial court's questions. Averitt argued that the jury could not have found that Latham's appraisals satisfied §23.175 because the evidence established that they did not. The court of appeals recited the Texas Constitution's rule that property may never be appraised above its market value and reasoned that the evidence did not conclusively establish any violation of law. Averitt next argued that Latham's testimony was conclusory and that it did not support the jury's answers. The court of appeals recounted how Latham had explained his appraisal in great detail. His testimony was not conclusory, and it was sufficient to support the jury's answers. The court of appeals upheld the trial court's judgment for the appraisal district.

***Millmeyer v. Burnet Central Appraisal District***

287 S.W.3d 753 (Tex. App. – Austin, April 2, 2009, no pet.)

Issues: evidence of value; recovery of attorney's fees

Millmeyer contested the value of a lake lot and house, first in a protest before the ARB, then in an appeal to the trial court. Millmeyer did not call an appraiser to testify. She testified to her own opinion of value based primarily on what she had spent to build the house. The appraisal district's witness testified about how the district generally determined the value of lake lots based on waterfront footage, a method that would yield a value somewhat lower than the district's appraised value of this particular land. The trial court ordered a reduction of approximately \$10,000 in the appraised value of the lot and house, an order that would save Millmeyer approximately \$225 in taxes. The court then ordered the district to pay several thousand dollars to Millmeyer to reimburse her for her attorney's fees. The district appealed.

The court of appeals concluded that the evidence was sufficient to support the value set by the trial court. A property owner can generally testify concerning the value of her property, even if she is not an appraiser or other expert on valuing property. Millmeyer's testimony coupled with the testimony of the appraisal district's witness provided a sufficient basis for the trial court's value. The court of appeals, however, reversed the trial court's award of attorney's fees to Millmeyer. The court explained that under §42.29 of the Tax Code, a property owner cannot recover more in attorney's fees than she saves in taxes. Because Millmeyer saved only \$225 in taxes, she could not recover more than that in attorney's fees. The court rejected Millmeyer's arguments that the limit on attorney's fees somehow violated the Equal-Protection and Due-Process clauses of the U.S. Constitution.

***Starflight 50, LLC, v. Harris County Appraisal District***

287 S.W.3d 741 (Tex. App. – Houston [1<sup>st</sup> Dist.], March 26, 2009, no pet.)

Issues: exhaustion of administrative remedies; taxable situs; allocation of value

Starflight had its offices in New Orleans and kept an aircraft at a local airport. The company flew the aircraft to Houston in August of 2005, just before Hurricane Katrina hit New Orleans. The storm destroyed Starflight's offices and the hangar where the aircraft had been kept. The company relocated its offices and employees to Houston and rented space for the aircraft at Hobby Airport. The pilot moved to Houston bringing all of his flight records with him. Starflight used the aircraft to serve its Houston offices, and a majority of the aircraft's flights in 2005 departed from Houston. Although the aircraft was in Houston on January 1, 2006, Starflight did not render it to the Harris County Appraisal District. It did not render the aircraft anywhere. The district discovered the aircraft in August of 2006 and appraised it for that year. Starflight sent a letter to the district admitting that the aircraft had been relocated to Texas but complaining about the appraised value placed on the aircraft. It then filed a protest contending that the aircraft was not taxable in Texas or in Harris County. The ARB denied the protest and Starflight appealed.

In the trial court, the district argued that Starflight had not exhausted its administrative remedies "with respect to its complaints of valuation, rendition and allocation because Starflight did not contest these issues on its protest form and did not raise them before the ARB." The district's lawyer, however, admitted that the ARB would have considered all of the disputed issues. The trial court concluded that: 1) Starflight had exhausted its administrative remedies before the ARB; 2) the aircraft was taxable in Texas and in Harris County; and 3) there was no need to allocate any of the aircraft's value for taxation outside Texas. Starflight appealed.

The court of appeals affirmed the trial court's judgment. The court explained that the evidence (including Starflight's letter to the district and the statement's of the district's lawyer) was sufficient to show that Starflight had exhausted its administrative remedies before the ARB with respect to all issues. The evidence also showed that the aircraft was in Texas and in Harris County for more than a temporary period despite Starflight's

claim that it intended to move the aircraft back to New Orleans eventually. The court further explained that although Starflight had not met its legal obligation to render the aircraft, the more serious problem was its failure to provide the district with any information that might have supported the allocation of some of the aircraft's value for taxation outside Texas. Because it had not provided that information before the rendition deadline, Starflight had waived its right to any interstate allocation of the aircraft's value.

***Midland Central Appraisal District v. BP America Production Co.***  
282 S.W.3d 215 (Tex. App. – Eastland, March 26, 2009, pet. denied)

Issues: taxability of oil in tank farms

Several oil companies owned crude oil in the possession of pipeline companies. The pipeline companies were common carriers that piped oil to and from various locations in Texas and other states and operated several tank farms in Midland where oil was stored throughout the relevant years. Oil commonly came from West Texas production fields to Midland so that it could be sold or traded. Then it would go on to other locations. The oil companies in question acquired their oil almost exclusively in Texas and generally had their oil transported only between locations in Texas. They had large quantities of oil in the tank farms at all times. At the time the appraisal district appraised the oil in the tank farms, the oil companies had not arranged to have any of it transferred out of state. They nevertheless protested the appraisals claiming that their oil could not be taxed because it was in transit in interstate commerce. After the ARB ruled against them, the oil companies appealed. At trial, witnesses for the oil companies speculated that as much as 90% of the oil in the tank farms would eventually go to other states, but offered no proof that *their* oil ever left Texas. They also testified that oil going to other states would generally leave Texas within a few weeks after leaving the tank farms. The trial court ruled that the oil was not taxable, and the appraisal district appealed.

The court of appeals affirmed the trial court's judgment. The court said that the oil was in transit in interstate commerce. The U.S. Supreme Court has explained the interstate commerce cannot be taxed in a state unless there is a "substantial nexus" between that state and the thing being taxed. In this case, the court of appeals admitted that there was a substantial nexus between Texas and the oil but said that there was no such nexus between Texas and the *activity* of having oil in an interstate pipeline system. The court also said that even if the oil was taxable in Texas, it would not be taxable in Midland under §21.01 of the Tax Code because it was there for only a temporary period.

*Editor's Comment:* The court of appeals declined to follow cases from other Texas courts (including the Texas Supreme Court) holding that in cases like this, the property that matters is not an individual molecule of oil that may move through a tank farm in just a few days, it is the massive inventory of oil that is present there for months or years at a time. The court also misunderstood the difference between a tax on property

and a tax on an activity and the difference between oil that is shipped out of state and oil that is not. The Texas Supreme Court should reverse the court of appeals.

***American Housing Foundation v. McLennan County Appraisal District***

2009 WL 782969 (Tex. App. – Waco, March 25, 2009, no pet.)(not reported)

Issues: community housing development organization exemption

Limited partnerships that owned two apartment complexes claimed exemptions under §11.182 of the Tax Code, the exemption for community housing development organizations (CHDOs), and specifically under the part of §11.182 that mentions limited partnerships. The appraisal district denied the exemptions. After pursuing unsuccessful protests before the ARB, the limited partnerships appealed. When the trial court ruled against them, the limited partnerships appealed to the court of appeals.

In a one-paragraph opinion, the court of appeals explained that the part of §11.182 that mentions limited partnerships applies to only housing constructed after December 31, 2001. The complexes in question were built before that date. Therefore, they could not qualify for the exemption. The court of appeals upheld the trial court's judgment for the appraisal district.

***American Housing Foundation v. Harris County Appraisal District***

283 S.W.3d 76 (Tex. App. – Houston [14<sup>th</sup> Dist], March 19, 2009, no pet.)

Issues: community housing development organization exemption

An apartment complex was owned by a limited partnership. Its general partner, which owned only 1% of the limited partnership, was owned in turn by a community housing development organization (CHDO). The other 99% of the limited partnership was owned by an unrelated, for-profit company. The partnership claimed an exemption for the complex under §11.182 of the Tax Code. That section contains somewhat confusing language referring to a limited partnership, but that language appears to apply only to housing built after December 31, 2001. In its suit against the appraisal district, the limited partnership argued its ownership of the complex was acceptable and that it did not matter that the complex was built before December 31, 2001. The trial court rejected those arguments and entered a summary judgment for the district. The limited partnership appealed.

The court of appeals explained that the reference to a limited partnership §11.182 did not change the requirement that a property must be owned by a CHDO in order to be exempt. Further, that language did not even apply in this case because the complex was built before December 31, 2001. Because the CHDO was owned by the limited partnership and not by a CHDO, it did not qualify for an exemption. The court of appeals upheld the trial court's judgment for the appraisal district.

***Old Farms Owners Association, Inc. v Houston Independent School District***

277 S.W.3d 420 (Tex., February 13, 2009)

Issues: delivery of tax bills; failure to deliver five-year delinquency notice

Taxing units assessed 1997 taxes on property owned by a trust. The appraisal district had the correct address for the trustee, but it mistakenly used an incorrect address on its 1997 appraisal roll. Consequently, the taxing units sent their 1997 tax bills to the wrong address. After the taxes became delinquent, the taxing units sued the trust in 1999, but then nonsuited their case in 2000. At that time, § 33.04 of the Tax Code required taxing units to send delinquency notices in years ending in 5 or 0. In 2002, the taxing units filed another suit to collect the delinquent 1997 taxes. The trust did not dispute the taxes, but claimed that it was not liable for penalties and interest because the taxing units had not delivered five-year notices in 2000. The taxing units pointed to a 2001 amendment to §33.04 that did away with the requirement of five-year notices. That amendment, however, provided that it did not apply to delinquent taxes that were the subject of a suit filed before September 1, 2001. The trust argued that because the taxing units had filed suit in 1999, the 2001 amendment did not apply and the taxing units were still required to deliver a five-year notice in 2000 or forfeit their claim for penalties and interest. The trust also claimed that the 1997 taxes were not really delinquent because the taxing units had used the wrong address on their tax bills. The trial court ruled for the trust, and the taxing units appealed.

The court of appeals reversed the trial court and ruled that the 2001 amendment to § 33.04 did apply to the taxes in question. When the taxing units nonsuited their first suit, it was as though that suit had never been filed. Consequently the requirement of a five-year notice was not preserved for those taxes. The court of appeals also ruled that the 1997 tax bills were valid even though they were sent to the wrong address. Under § 1.07, the taxing units were entitled to use the most recent address in their records even if it was the erroneous address provided by the appraisal district.

The Texas Supreme Court then considered the question of the five-year notice. The Supreme Court reversed the court of appeals and reinstated the trial court's judgment. The Supreme Court reasoned that because the delinquent taxes were the subject of a delinquent-tax suit before September 1, 2001, the amendment to §33.04 did not apply to them. The nonsuit of the first delinquent-tax suit did not change that. The taxing units were not entitled to recover penalties and interest.

***Travis Central Appraisal District v. Texas Protax-Austin, Inc.***

2009 WL 280910 (Tex. App. – Austin, February 6, 2009, no pet.)(not reported)

Issues: standing to sue appraisal district and ARB

Protax, a tax-rep firm, sued the appraisal district, the ARB and the appraisal district's lawyer alleging that they had engaged in improper *ex parte* communications concerning protests and other matters handled by the ARB. The defendants argued that Protax did not have standing, i.e., that it did not have a sufficient interest in the claims that it raised. The trial court refused to dismiss the case, and the defendants appealed.

The court of appeals explained that in order for a person to have standing to file a suit, that person must have suffered some actual injury. This suit was not filed by or on behalf of any particular property owner(s). Protax's general status as an agent or potential agent for property owners did not give it standing to challenge the manner in which the defendants handled their duties. The court of appeals reversed the trial court and dismissed the case.

***Blair v. Dallas County***

2009 WL 200983 (Tex. App. – Dallas, January 29, 2009, no pet.)(not reported)

Issues: amended answer in delinquent-tax suit

The county sued Blair for delinquent taxes on real property. Blair's daughter, Westbrook, was not a lawyer but nevertheless filed an answer on Blair's behalf. The county filed a motion to strike the answer on the grounds that Westbrook had no power to represent Blair. The hearing on the county's motion was set on the same day as the trial. On that day, Westbrook produced an amended answer that contained gibberish. Attached to the amended answer was a written statement by Blair to the effect that Westbrook had the authority to act for her. The trial judge refused the amended answer stating that amended pleadings could not be filed within seven days of a scheduled trial. The court struck the original answer. Then, because Westbrook could not represent Blair, the court treated Blair as being in default. After a short trial, the court entered judgment for the County. Blair then appealed.

The court of appeals explained that Rule 63 of the Texas Rules of Civil Procedure sometimes prohibits parties from filing amended pleadings within seven days of a trial, but the rule is not absolute. A party may file an amended pleading shortly before a trial unless: 1) the other party shows that it is surprised; or 2) the new pleading states some new claim or defense that is prejudicial to the other party. In this case, the county did not claim to be surprised by the amended answer, and the amended answer did not appear to contain any new claim or defense. The amended answer together with the attached statement from Blair showed that Blair was at least attempting to answer the suit. Consequently, the trial court erred by refusing to accept the amended answer. The trial court's error cost Blair the opportunity to participate in the trial. The court of appeals reversed the trial court's judgment and sent the case back to the trial court.

***City of San Antonio v. Bastrop Central Appraisal District***

275 S.W.3d 919 (Tex. App. – Austin, January 16, 2009, no pet.)

Issues: application for agricultural appraisal

For many years, the City of San Antonio received a public-property exemption for land that it owned in Bastrop County. When the appraisal district discovered that the land was no longer being used for public purposes, it cancelled the exemption retroactively for five years, 1999-2003. The city then claimed that the land was used for agriculture

during those five years, and it filed an application to have the land appraised as agricultural land for those years. The appraisal district granted the application for 2003, but it did not consider or determine the application for the earlier years. The application was not timely for 1999-2002 because it was filed after the deadline set out in §23.54 of the Tax Code. The city sued and asked the court to issue a writ of mandamus compelling the appraisal district to consider and determine the application for the earlier years. The trial court entered judgment against the city, and the city appealed.

The court of appeals explained that §23.54 generally requires a property owner to file an agricultural-appraisal application before May 1 of the year in question unless the chief appraiser finds that there is good cause for extending the deadline. Section 23.541 provides the one and only exception to the general rule. It directs an appraisal district to consider and determine a late application that is filed before the ARB approves the appraisal records. This means that an appraisal district “need not accept and need not approve or deny a late application filed after the appraisal records are approved.” Because the city filed its application after the appraisal records were approved for the years 1999-2002, the appraisal district had no duty to consider it for those years. The city’s due-process rights were not violated because it could have filed timely applications for those years, and the appraisal district would have had a duty to consider them. The fact that the land was erroneously receiving public-property exemptions in those years did not excuse the city from the requirement of filing timely applications. The court of appeals affirmed the trial court’s judgment for the appraisal district.

***Betz Louetta 25 Ltd. v. Appraisal Review Board of Harris County Appraisal District***

2009 WL 87584 (Tex. App. – Houston [14<sup>th</sup> Dist.], January 15, 2009, no pet.)(not reported)

Issues: contesting alleged ARB hearing errors

This case is very similar to *Appraisal Review Board of Dallas Central Appraisal District v. O’Connor & Associates* discussed below and to the 2008 case of *Appraisal Review Board of Harris County Appraisal District v. Spencer Square, Ltd.* A property owner (Betz) lost when its protest was heard and determined by the ARB but did not appeal the ARB’s order. Instead, it sued the ARB claiming that the ARB had not conducted its hearing properly. Betz cited §41.45(f) of the Tax Code and asked the court to order the ARB to conduct another hearing. The trial court entered a summary judgment against Betz, and Betz appealed.

The court of appeals explained that the ARB had conducted a hearing on Betz’s protest and that Betz had had the right to appeal the ARB’s order. Under those circumstances, §41.45(f) does not apply and does not provide an alternative to an appeal. Because an appeal would entitle the property owner to a trial *de novo*, it would render moot any procedural or evidentiary errors made by the ARB. The court further explained that

Betz's due-process rights had not been violated because it had received a hearing before the ARB and because it had had an opportunity to appeal the ARB's order.

***Appraisal Review Board of Dallas Central Appraisal District v. O'Connor & Associates***

275 S.W.3d 643 (Tex. App. – Dallas, January 15, 2009, no pet.)

Issues: contesting alleged ARB hearing errors

O'Connor filed protests on behalf of 67 property owners. The ARB conducted hearings and issued orders denying the protests. The property owners did not appeal. Instead, O'Connor and the property owners sued the ARB under §41.45(f) of the Tax Code claiming that the ARB had not conducted the hearings correctly, i.e., that it had failed to consider all of the issues, admitted the wrong evidence and failed to abide by statutory guidelines. They asked the court to order the ARB to conduct "proper" hearings. The ARB asked the trial court to dismiss the case. The court dismissed O'Connor's claims but not those of the property owners. The ARB appealed.

The court of appeals explained that a property owner must follow the Tax Code's protest and appeal procedures in order to contest the appraisal of his property. Section 41.45(f) allows a property owner to sue an ARB when the property owner is entitled to a hearing but the ARB refuses to hold the hearing. But, that section does not apply where an ARB conducts a hearing and issues an order determining the property owner's protest. In that case, the property owner's only option is to appeal the ARB's order. Because the property owners did not file timely appeals of the ARB's orders, they could not claim that the ARB had conducted its hearing erroneously and could not require the ARB to conduct more hearings. The court of appeals dismissed the property owners' claims.

***Prince v. Harris County Appraisal District***

2009 WL 20975 (Tex. App. – Houston [14<sup>th</sup> Dist.] January 6, 2009, no pet.)(not reported)

Issues: agreement resolving protest

Prince filed a protest claiming that his property was excessively and unequally appraised. At the ARB hearing, Prince's agent argued that the appraised value of the house should be reduced by approximately \$350,000. The appraisal district's representative announced that he concurred with the agent's proposed value. When the ARB gave the parties a chance to make final comments, the agent said "Nothing further." The ARB issued an order reflecting the reduced value and sent a copy of the order to the agent along with its standard documents describing a property owner's right to appeal. Prince then filed suit to appeal the ARB's order. The trial court concluded that Prince's agent had made an agreement with the appraisal district concerning the appraisal of the property and that Prince was bound by that agreement. The trial court signed a summary judgment for the district, and Prince appealed.

The court of appeals affirmed the judgment and agreed that Prince had made a binding agreement with the district. The court explained that under § 1.111 of the Tax Code, a protest that has not yet been determined by an ARB can be resolved by an agreement between the property owner and the appraisal district. An agreement is final and does not require the ARB's approval. An agreement is final regardless of whether it is later approved or adopted by the ARB. Prince argued that if he could not appeal, his constitutional right to due process of law would be violated. The court explained that his due-process rights were protected because he was given a hearing before the ARB.

## **Attorney General's Opinions**

### **Opinion No. GA-0752**

December 28, 2009

Issues: adding land to a homestead

A homeowner was receiving a residence homestead exemption for his house and lot in a platted subdivision. He acquired several other lots contiguous to the original lot and applied to have the added lots included as a part of his homestead. The Attorney General was asked whether a homestead exemption can apply to multiple lots. He explained that under §11.13 of the Tax Code, a homestead can include up to 20 acres of land. It does not matter whether the land consists of multiple lots as long as they have identical ownership are all used by the owner in the residential occupancy of the original homestead. If the lots in question met these standards, they could all qualify as part of the owner's homestead.

### **Opinion No. GA-0740**

October 13, 2009

Issues: referendum on frequency of reappraisals

The Webb County Attorney asked the Attorney General whether an appraisal district or its constituent taxing units could hold a referendum election on the question of limiting the frequency of reappraisals to once every three years. The Attorney General explained that it is an appraisal district's board of directors that has the responsibility for developing a plan for periodic reappraisals. Neither the Tax Code nor any other statute authorizes an election on this issue, even if people sign petitions calling for the election. An appraisal district's directors could adopt a plan to reappraise property only once every three years. Under § 23.23, the minimum required frequency for reappraisals is once every three years, and an appraisal district could adopt that minimum as its reappraisal plan. The Attorney General declined to offer advice on the wisdom or desirability of any reappraisal plan or on the effects that a particular plan might have on school-district value studies.

### **Opinion No. GA-0724**

July 9, 2009

Issues: eligibility of property for tax increment financing

A city created a reinvestment zone for purposes of tax increment financing. A member of the city council owned an interest in a real property in the new zone. He conveyed his interest in the property to his children but retained the right to the net proceeds from any future sale of that interest in the property. Section 312.204 of the Tax Code provides that property is ineligible for tax increment financing (and tax abatements) if it is owned or leased by a member of the governing body of the municipality that created the reinvestment zone. The Attorney General was asked to consider whether the council member in question should be considered an owner of the property by virtue of his retained interest in sales proceeds from the property. If he were considered an owner, the property would not be eligible for tax increment financing.

The Attorney General concluded that the council member was not an owner of the property. He did not have legal or equitable title to the property, and he had no control over the property. He had only an interest in the proceeds if the property were ever sold. The Attorney General noted that the council member still had an *interest* in the property because a change in the value of the property would also change the value of his retained interest in the proceeds of a sale. The Code, however, does not prohibit tax increment financing merely because a member of the governing body has an *interest* in a property in a reinvestment zone. Thus, the property was eligible for tax increment financing.

**Opinion No. GA-0724**

June 29, 2009

Issues: contract for collection of special assessments

A public Improvement district (PID) levied special assessments against various properties to pay for public improvements. The PID wanted to contract with the appraisal district or with another local government to have the other entity collect its special assessments. The Attorney General was asked whether such a contract would be legal. He concluded that the contract was not authorized under the Property Tax Code. Section 6.24 allows a taxing unit to contract with another taxing unit or with an appraisal district for the assessment and/or collection of *ad valorem* taxes. Special assessments are not *ad valorem* taxes even though they are subject to many of the same rules that govern the collection of taxes (e.g. penalties, interest and liens). “An *ad valorem* property tax is imposed throughout the taxing jurisdiction for the general support of its government, while a special assessment is imposed only upon the property that is specially benefited by the improvement, and its amount is based on the special benefits accruing to the property.”

The Attorney General also considered the Interlocal Cooperation Act (Chapter 791 Government Code), which allows a local government to contract with another local government “to perform governmental functions and services.” Functions covered by the Act include “administrative functions,” defined as “functions normally associated with

the routine operation of a government, including tax . . . collection.” The collection of special assessments is an administrative function. The Act provides, however, that one local government can contract to provide a service for another local government only if the first local government is authorized to perform the service for itself. An appraisal district could not contract to collect a PID’s special assessments because the appraisal district cannot levy or collect special assessments of its own. A local government that could levy and collect its own special assessments could contract to collect a PID’s special assessments.

**Opinion No. GA-0719**

June 2, 2009

Issues: lawyer providing tax-collection and other services to taxing unit

A school district contracted with a lawyer for the collection of its delinquent taxes. The lawyer also acted as an unpaid advisor to the school board on other matters. A district taxpayer claimed that the arrangement was improper. After considering the arrangement, the Attorney General concluded that the lawyer was not an officer or employee of the school district and was not affected by the conflict-of-interest laws that apply to a local government’s officers and employees. The Attorney General did not reach a conclusion concerning whether the lawyer’s uncompensated services to the school board violated §33.07 because he did not know all the relevant facts. He did not think that the arrangement violated any other laws. He declined to consider whether the arrangement might violate any of the State Bar’s ethical rules for lawyers because that would be the job of the Bar’s Committee on Professional Ethics.