From:	Publicrecords
To:	Steve Christy; Beth Borozan
Subject:	Response PRR No. 2018-084
Date:	Thursday, March 8, 2018 10:19:26 AM
Attachments:	Fwd Staples vs. TKG El Con.msg DOC030718-030718.pdf

Good morning,

Attached please find the response to your recent public records request.

This information was provided by the Pima County Assessor:
Attached please find the most recent documents filed with the Arizona Supreme Court. Also attached is a spreadsheet detailing the 2015 noticed full cash, limited and closed roll (SBOE) values for El Con Mall. Please note the Mall sold for $81,750,000 in 2014.

The amount of value contested is in excess of 30,000,000.

Figuring a possible tax increase is difficult as assumptions need to be made.
Therefore:
30,000,000 FCV or approximately 25,000,000 limited value.
25,000,000 X 18.5% /100 = 46,250
46,250 X 16.966 (2015 tax rate for area 0150) = 784,677 estimated tax increase for 2015.

If this lawsuit is successful, the increased limited value would cascade forward.

Thank you,
Clerk of the Board
520-724-8449

From: Jeffrey Hrycko <hrycko.jeff@hlwaz.com>
Sent: Wednesday, February 7, 2018 1:00 PM
To: Bill Staples
Cc: Roberta S. Livesay; Teresa C. Young
Subject: Fwd: Staples vs. TKG El Con
Attachments: Response To Petition For Review.pdf; Reply iso Motion to Dismiss 2018 Feb 05.pdf; TKG Resp to Motion for Judg on the Pleadings final.pdf

****

This message and sender come from outside Pima County. If you did not expect this message, proceed with caution. Verify the sender's identity before performing any action, such as clicking on a link or opening an attachment.

****

Bill,

I hope you are having a good week and getting outside to enjoy the beautiful weather. We filed the attached Response to TKG's Petition for Review in the Supreme Court. We will keep you posted as that progresses.

I also attached a copy of our response to and TKG's reply in support of their Motion to Dismiss the Parcel 1350 Defendants filed in the Tax Court. The Tax Court will likely schedule that one for oral argument soon. We will let you know when that is scheduled.

Jeffrey Hrycko
Of Counsel

1619 E. Guadalupe Rd., Suite 1
Tempe, AZ 85283
480-345-9500
Fax: 480-345-6559

contents of this transmission are strictly prohibited. If you have received this email in error, please notify the sender by reply email and immediately delete this transmission and its contents entirely from your data storage system. Nothing in this message is intended to create an attorney-client relationship. Thank you.

Begin forwarded message:

From: "Terry Young" <young.terry@hlwaz.com <mailto:young.terry@hlwaz.com> >

Subject: Staples vs. TKG El Con

Date: February 7, 2018 at 11:17:00 AM MST

To: "'Jeffrey Hrycko'" <hrycko.jeff@hlwaz.com <mailto:hrycko.jeff@hlwaz.com> >

Terry Young
Legal Assistant
<http://www.hlwaz.com/>

<http://www.hlwaz.com/>
HELM, LIVESAY & WORTHINGTON, LTD.
1619 East Guadalupe Road, Suite 1
Tempe, AZ 85283
Telephone: 480-345-9500
Fax: 480-345-6559
E-Mail: <mailto:tyoung@helmkylelaw.com> young.terry@hlwaz.com
Website: www.hlwaz.com <http://www.hlwaz.com/>

ARIZONA SUPREME COURT

TKG EL CON CENTER, LLC, a Delaware limited liability company; MAGNA/EL CON, L.L.C., a Utah limited liability company; K-GAM EL CON (FC), L.L.C., an Arizona limited liability company; and K-GAM EL CON (LJ), L.L.C., an Arizona limited liability company Petitioners, vs. HON. CHRISTOPHER WHITTEN, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa, Respondent, BILL STAPLES, Pima County Assessor, Real Party in Interest.	**CV-17-0374-PR** **Court of Appeals** **1 CA-CV 17-0302** Maricopa County Superior Court Cause No. TX2014-000606

RESPONSE TO PETITION FOR REVIEW

Helm, Livesay & Worthington, Ltd.
(Firm Bar # 00056800)
Roberta S. Livesay-AZ Bar #010982
Jeffrey L. Hrycko-Of Counsel, AZ Bar #023280
1619 E. Guadalupe Rd.; Suite 1
Tempe, AZ 85283
Livesay.Roberta@hlwaz.com
Hrycko.Jeff@hlwaz.com
480-345-9500

Special Counsel for Real Party in Interest

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

¶ 1 Pursuant to Rule 23(f) of the Arizona Rules of Civil Appellate Procedure, Real Party in Interest, Plaintiff/Counterdefendant below, the Honorable Bill Staples, Pima County Assessor, hereby responds in opposition to Petitioners, Defendants/Counterclaimants below, Petition for Review ("Petition") to review the Court of Appeals' Order Declining Jurisdiction ("Order") declining special action jurisdiction to overrule the Respondent Judge's decision that denied Petitioners' summary judgment motion. As set forth below, review is not appropriate, and the Petiton should be denied.

I. ISSUE PRESENTED FOR REVIEW

¶ 2 Whether the Court of Appeals correctly declined Petitioners' request to reverse a decision by the Respondent Judge denying summary judgment below finding that Petitioners had failed to demonstrate that the facts of this case, and the plain language of A.R.S. § 42-16203(A) does not allow the Real Party in Interest ("RPI") Pima County Assessor to appeal decisions by the State Board of Equalization ("SBOE") reducing property values below the noticed values.

II. LIST OF ADDITIONAL ISSUES PRESENTED TO BUT NOT DECIDED BY COURT OF APPEALS WHICH MAY NEED TO BE DECIDED IF REVIEW IS GRANTED

None.

III. STATEMENT OF FACTS AND INTRODUCTION

¶ 3 RPI Assessor timely issued notices of value for the El Con Mall shopping center for TY 2015 on January 31, 2014. Petitioners' Appendix ("PA") 7, Plaintiff's Response to Defendants'/Counterclaimants Statement of Facts In Support of Their

Motion for Summary Judgment Re: Plaintiff's Remaining Tax Year 2015 Claims and Plaintiff's Statement of Additional Facts In Support of His Opposition to Defendants' Motion for Summary Judgment re: Plaintiff's Remaining Tax Year 2015 Claims, Exh. A thereto, APP 0151-0179. The Full Cash Value ("FCV") on the Notices of Value totaled $64,345,124. Id. at Exh. C, APP0183. On May 19, 2014, Petitioner TKG El Con Center, L.L.C. purchased all but one parcel comprising the shopping center from the prior owner for approximately $81.7 Million. Id. at Exh. B, Affidavit of Property Value recorded May 19, 2014, APP0181. The sole parcel not sold (125-10-1350) is owned by Petitioners Magna/El Con L.L.C., K-Gam El Con FC L.L.C., and K-Gam El Con LJ L.L.C. Id. at Exh. C, APP0184.

¶ 4 As a result of Petitioners' significant changes to two of the fourteen parcels, the RPI assessor issued notices of change for those parcels increasing the noticed total FCV of the shopping center from $64,345,124 to $65,450,352. Id. at APP0183. Petitioners appealed the noticed values of some of the parcels administratively to both the RPI and to the SBOE. As a result of both appeals, on November 6, 2014, the total Full Cash Value of the parcels comprising the El Con Mall was finally reduced to $45,545,574, which is $36.2 million less than the May 19, 2014 purchase price. PA 7, APP0149.

¶ 5 RPI Assessor filed this case on December 12, 2014 in the Tax Court as a combined appeal of decisions by the SBOE on Tax Years ("TY") 2014 and 2015. RPI Assessor seeks an increase in value for TY 2015. PA 3, Complaint and Notice of Property Tax Appeal. Petitioners' Answer includes a counterclaim seeking a further reduction in the full cash value for the El Con Mall. RPI's Appendix hereto, at

17-19. The instant Petition relates to the Respondent Judge's denial of Petitioners' Motion for Summary Judgment regarding the RPI's TY 2015 claims. PA 1.

¶ 6 Petitioners misstate many facts in their "Introduction and Statement of Facts." The most egregious misstatement occurs at Petition, pages 4-5. During the administrative appeals process, the Parties did not reach an agreement to any reduction in values. Had there been such an agreement, it would have been memorialized and made a part of this record. See, A.R.S. § 42-16056 (B) ("If the petitioner and the assessor reach an agreement within five business days after the conclusion of the meeting, both parties shall sign the agreement, and both parties waive the right to further appeal.") This twisting of the facts continues at Petition, page 12, stating "Plaintiff, having initially determined the Values appealed the SBOE's TY 2015 valuation-confirming decisions[.]" The "initial values" were in fact far greater than the values determined at the SBOE. PA 7, APP0149. The Assessor did not waive his right to further appeal and the Petition must be denied.

IV. REASONS WHY REVIEW SHOULD BE DENIED.

¶ 7 The Court should not grant review in this matter because the Respondent Trial Judge correctly determined that, under the applicable statute, A.R.S. § 42-16203(A), the RPI Pima County Assessor is entitled to appeal the decision of the State Board of Equalization (SBOE) to the Superior Court in accordance with the statutory procedure. Not only was the Respondent's decision soundly reasoned under the facts of this case, but also the statute clearly permits the procedure that was followed. The Petition is replete with disputed issues of material fact, and does not raise a pure

legal issue. See, Orme School v. Reeves, 166 Ariz. 302, 303, 802 P.2d 1000, 1002 (1990). Moreover, the Respondent's decision denying summary judgment has little, if any, practical impact beyond the case at bar, and is therefore not a matter of statewide importance.

V. ARGUMENT

¶ 8 Petitioners are not only asking this Court to reverse the Court of Appeals' decision declining special action jurisdiction to allow them to "cut the line" and get into the Court of Appeals ahead of other fully developed cases, but they are also asking this Court to reverse the factual findings of the Respondent Judge and his resultant decision denying their motion for summary judgment on those facts.

¶ 9 Respondent Judge's denial of Petitioners' motion for summary judgment ("MSJ") is nothing special and not an issue of statewide importance meriting grant of Petitioners' requested relief. See, Id.; see also, Sonoran Desert Investigations, Inc. v. Miller, 213 Ariz. 274, 276, ¶ 2, 141 P.3d 754, 756 (App. 2006) ("Consistent with our policy of avoiding piecemeal appeals, however, we accept jurisdiction of a special action challenging a denial of summary judgment only in exceptional cases."). In the instant matter, Respondent Judge's decision to deny Petitioners' MSJ was based on his review of the facts presented, which should be given deference by this Court. Orme School, 166 Ariz. at 303, 802 P.2d at 1002 ("the appellate system should exercise its discretion to refuse jurisdiction of cases in which it is asked to review the factual or even legal basis of the trial court's denial of a motion for summary judgment."); Sonoran Desert Investigations, Inc., 213 Ariz. at 276–77, ¶ 5,

141 P.3d at 756–57 ("We review a denial of a motion for summary judgment for an abuse of discretion and view the facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion.").

¶ 10 Petitioners' motion for summary judgment relied entirely on a hearsay affidavit and inadmissible "transcript" prepared by Petitioners' expert, which was nevertheless reviewed by the Respondent Judge and found to be "as clear as mud." PA 1, Minute Entry filed November 9, 2017, APP0003. RPI did object, at length, to the affidavit and "transcript" in his Response to the Petitioners' Statement of Facts. PA 7, APP0146-0148. After reviewing the non-certified, inadmissible un-official "transcript" and the minutes of the SBOE provided by Petitioners, the Respondent Judge found that the transcript disclosed no clear evidence of the terms of any purported agreement by the RPI to waive his appellate rights, nor was there any record of an agreement in the SBOE minutes that meets the requirements of Rule 80(a), Arizona Rules of Civil Procedure. Id. As the Respondent Judge notes, "Nowhere in the minutes of the administrative hearing is an agreement between these parties set forth or even mentioned." Id. Consequently, based on his review of the facts, Respondent Judge correctly found that the judicial doctrines of invited error, judicial estoppel, or lack of standing did not apply in this case. In contrast with this case, in Guard v. Maricopa County, 14 Ariz. App. 187, 189, 481 P.2d 873, 875 (1971) the Court of Appeals decided that the parties to a stipulation were bound by the terms of that agreement because the terms of the agreement were entered into the minutes of the trial court in detail and thus the Appellant was foreclosed from challenging the stipulated judgment on appeal.

¶ 11 Petitioners invite this Court to reverse the Respondent Judge's factual determinations on a record consisting of unclear, inadmissible hearsay statements that would result in the deprivation of the Pima County Assessor's statutory right to appeal SBOE decisions that he is dissatisfied with. After viewing the facts and all reasonable inferences therefrom in the light most favorable to the RPI, the party opposing the motion, Sonoran Desert Investigations, Inc., 213 Ariz. at 276, ¶ 5, 141 P.3d at 756, and based on the evidence provided by Petitioners, this Court should decline Petitioners' invitation.

A. The Petition Lacks Any Valid Basis And Overstates The Effects Of The Respondent Judge's Ruling.

¶ 12 Petitioners admit that while a denial of an MSJ is typically not reviewable by special action brought on the basis that the denial will force the parties to go to trial and then appeal; nonetheless, Petitioners assert that the Respondent Judge's ruling denying Petitioners' MSJ is a "plain and obvious" error of law or a "clear abuse of discretion" justifying them cutting the line and getting the Court of Appeals and this Court to review their argument long before the case is factually developed. Petition 7-8. Petitioners are wrong.

¶ 13 In contrast with Petitioners' bald assertions, there is no reason to believe that Petitioners will ultimately succeed in this case in the Tax Court, or on appeal, if any. The Court of Appeals did not err by declining to review the Respondent Judge's ruling, which was based on his review of the evidence and the plain language of the applicable statute. Petitioners' argument that the RPI assessor waived his right to appeal to the Tax Court by allegedly agreeing to reduce noticed property values is

unsupported by the record and Respondent Judge reviewed their evidence and decided that there was insufficient proof to find a stipulated agreement or waiver. The Respondent Judge also recognized "After all, tax appeals are de novo. A.R.S. § 12-168. The opinion of the State Board is of no effect in this Court except to the limited degree that it has the presumption of correctness, so the County would see no benefit from the Board's award." PA 1, APP0003.

¶ 14 In contrast with Petitioners' assertion, Respondent Judge's denial of their MSJ is not an issue of statewide importance or one of first-impression. Respondent Judge issued a run of the mill denial of a motion for summary judgment based upon his review of the facts presented, although disputed by the RPI, and found that even taking them as presented, they were not sufficient to support Petitioners' arguments. Furthermore, contrary to Petitioners' assertion that there are no genuine disputes as to any material facts, the RPI's Responses to Petitioners' Statement of Facts and Statement of Additional Facts clearly demonstrate that RPI objected to/controverted many of Petitioners' statement of fact on the grounds that they were supported entirely by inadmissible, hearsay evidence, which is prohibited by Rule 56(c)(5), Arizona Rules of Civil Procedure. PA 7, APP0146-0148. Rule 56(c)(5) specifies that affidavits provided in support of a motion for summary judgment must be made on personal knowledge and set out facts that would be admissible in evidence. See also, Lujan v. MacMurtrie, 94 Ariz. 273, 278, 383 P.2d 187, 190 (1963) (reversing grant of summary judgment that was based upon hearsay affidavit because it was not based *on personal knowledge*, shall set forth such *facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the

matters stated therein.'") (emphasis in original). The hearsay affidavit and un-certified transcript of the SBOE hearing by Petitioners' expert would not be admissible in evidence and therefore cannot be used to support their MSJ.

¶ 15 Petitioners' parade of horribles argument that a decision by this Court refusing to overturn the Respondent Judge's ruling will "wreak havoc in real property valuation, and eviserate an entire statutory scheme by permitting non-aggrieved parties to contest any value at any time – no taxpayer will be able to rely on either an Assessor or SBOE decions as final" is complete hogwash. The legislature provided a clear procedure for appealing SBOE rulings and states that any SBOE decision is final if not appealed "within the time prescribed by § 42-16203." A.R.S. § 42-16169. A.R.S. § 42-16203(C) specifies that any appeal must be taken within 60 days of the date of mailing of the SBOE decision. The RPI filed his appeal on the SBOE decisions in accordance with the statute. PA 3, APP0009. Had the RPI failed to file the appeal timely and the appeals period had lapsed, then Petitioners' hypberbolic argument that the ruling allows "non-aggreived parties to contest any value at any time" and taxpayers cannot obtain finality of SBOE decisions might have some merit. However, the RPI complied with the applicable statutes and the Petitioners' argument is unsupported and false. There is absolutely no risk of undermining property owner expectations because the applicable statute prescribes a short window in which to appeal SBOE decision before they become final and non-appealable.

B. The Respondent Judge Correctly Applied A.R.S. § 42-16203, And The Court Of Appeals Correctly Declined Jurisdiction To Review The Respondent Judge's Denial Of Petitioners' Motion For Summary Judgment.

¶ 16 The applicable statute, A.R.S. § 42-16203, states in pertinent part:

> A. Any party, . . ., that is dissatisfied with the valuation . . . of property reviewed by the state board of equalization may appeal to court as provided by this article.
>
> . . .
>
> C. An appeal to court shall be taken within sixty days after the date of mailing of the state board's final decision.
>
> . . .

¶ 17 When the words of a statute are unambiguous, courts apply the plain meaning without engaging in statutory construction. Phelps v. Firebird Raceway, Inc., 210 Ariz. 403, 405, ¶ 10, 111 P.3d 1003, 1005 (2005). Statutes are to be interpreted to avoid "rendering statutory provision[s] meaningless, unnecessary, or duplicative." Ariz. Dep't of Revenue v. Action Marine, Inc., 218 Ariz. 141, 143, ¶ 10, 181 P.3d 188, 190 (2008).

¶ 18 There is nothing ambiguous in the phrase contained in subsection (A) of the statute, "Any party... that is dissatisfied with the valuation. . . of property reviewed by the state board of equalization. . . ." It needs no interpretation. The legislature unambiguously provided a broad appellate right to property owners and county assessors to seek review of decisions of the SBOE. When the plain language is applied, the RPI is clearly entitled to appeal the SBOE decisions regarding the subject property pursuant to the deadline and procedure contained within A.R.S. § 42-16201 *et seq*. In light of the Respondent Judge's finding that there was no evidence of a clear waiver of appellate rights or Rule 80(a) stipulation to forego

those rights, he correctly ruled that the plain language of the statute controls.

C. The RPI Is Aggrieved By The SBOE Decisions And Has Standing To Pursue The Litigation In The Tax Court.

¶ 19 The RPI is an aggrieved party with standing to pursue this appeal because the SBOE rulings reduced the total values of four specific parcels from the originally noticed total value of $11,526,379 to $7,917,100[1] and the total value of the shopping center from at total noticed Full Cash Value of $65,450,352 to $45,545,574. Meanwhile, the entire economic unit, the shopping center known as the El Con Mall, was sold on May 19, 2014, for $81.75 million during the TY 2014 valuation year for TY 2015. PA 7, APP0181. While the real market value of the parcels increased, the SBOE decisions reduced the Full Cash Values thereby harming the taxpayers of Pima County, decisions with which the RPI is "dissatisfied."

¶ 20 In effect, Petitioners' argument would have this Court rule that if a party to an SBOE proceeding gets some, but perhaps not all of the results that they seek, they then would forego any appellate right in the Tax Court. As the Respondent Judge recognized, the applicable statute is not so limiting as it provides parties a broad right to appeal SBOE decisions with which they are dissatisfied. Petitioners' argument would have the effect that only a total loss at the SBOE would be appeallable by a party, while the statutory scheme does not prescribe an amount of aggrievement a party must sustain before being permitted to appeal those decisions. The legislature presumably knew what it was doing when it gave parties to SBOE

[1] These are the before and after total FCVs of the four parcels that were appealed by Petitioners to the SBOE, 125-10-1360, -1400, -1460, and -1470.

hearings broad appellate rights, but limited the exercise of those rights to a short sixty-day window. The Court should deny the instant Petition for Review as Petitioners' arguments lack any merit.

D. The Respondent Judge Correctly Held That the Doctrine of Judicial Estoppel Does Not Apply In This Matter.

¶ 21 Trial on the valuations of tax parcels is de novo in the Tax Court. A.R.S. § 12-168; see also, A.R.S. § 42-16212(B) ("At the hearing both parties may present evidence of any matters that relate . . . to the full cash value of the property in question as of the date of its assessment."). If the RPI Assessor overcomes the presumption of correctness by introducing sufficient competent evidence that the value set by the SBOE is too low, then the Tax Court can determine the full-cash value of the property in question. See e.g., Biltmore Hotel Partners v. Maricopa County, 177 Ariz. 167, 168-70, 866 P.2d 149, 150-153 (Tax Ct. 1993).

¶ 22 The SBOE is not a court of record. A.R.S. § 42-16203 specifically allows a "dissatisfied" party to appeal any SBOE decision on property the board has reviewed. Petitioners fail to cite any statute or case law supporting their assertion that the SBOE decisions are not appealable by either party. Indeed, either party can overcome the presumption of correctness with sufficient competent evidence. See Id. Petitioners' judicial estoppel argument fails because the SBOE is not a judicial court of record and the policy of "protecting the integrity of the judicial system" does not apply here, and because the applicable statute specifically allows any "dissatisfied party" to appeal a decision on a property reviewed by the SBOE.

¶ 23 Moreover, just as in the case cited by Petitioners, Bank of America v.

Maricopa County, 196 Ariz. 173 993 P.3d 1137 (App. 1999), it is not clear here that the SBOE had an opportunity to accept or evaluate the myriad facts related to RPI assessor's valuation claims, especially the recent sale price. The "transcript" presented by Petitioners shows no evidence was presented by the Assessor employees to support the values stated. Moreover, there is no "risk of inconsistent results" because no factual or legal determinations were made by the SBOE and the appeal to the Tax Court is not a horizontal appeal. The SBOE decisions are not final and remain appealable to the Tax Court until the sixty-day period prescribed by A.R.S. § 42-16203(C) has lapsed. Petitioners' judicial estoppel argument lacks merit.

VI. Conclusion

¶ 24 The Court of Appeals correctly declined jurisidiction to review a decision by the Respondent Judge denying Petitioner's Motion for Summary Judgment. This Court should also deny review and allow the parties to continue this litigation in the trial court.

Dated this 5th day of February 2018.

Helm, Livesay & Worthington, Ltd.

/s/ Roberta S. Livesay

Roberta S. Livesay – AZ Bar # 10982
Jeffrey L. Hrycko – Of Counsel AZ Bar # 23280
1619 E. Guadalupe, Suite One
Tempe, AZ 85283
Livesay.Roberta@hlwaz.com
Hrycko.Jeff@hlwaz.com
480-345-9500
Special Counsel for Real Party in Interest

VII. Certificate Of Service

ORIGINAL of the foregoing Response to Petition for Review was Electronically Filed with the Clerk of the Arizona Supreme Court, this 5th day of February 2018

One COPY of the foregoing MAILED via first-class mail, postage pre-paid, this 5th day of February 2018, to:

The Honorable Christopher Whitten
Judge, Arizona Tax Court
Maricopa County Superior Court
Old Courthouse, #201
125 W. Washington
Phoenix, AZ 85003
Respondent

Jodi A. Bain
BAIN LAW FIRM P.L.L.C.
P.O. Box 64217
Tucson, AZ 85728

J. William Brammer, Jr
Michael J. Rusing
RUSING LOPEZ & LIZARDI, PLLC
6363 N. Swan Rd., Suite 151
Tucson, AZ 85718
Attorneys for Petitioners TKG El Con Center, LLC., et al.

Jerry F. Fries
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington Street
Phoenix, AZ 85007
Attorneys for Counterdefendant Arizona Department of Revenue

By:
/s/ Terry Young

VIII. Certificate of Compliance

1. This certificate of compliance concerns:

☐A brief, and is submitted under Rule 14(a)(5)

☐ An accelerated brief, and is submitted under Rule 29(a)

☐A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)

☑ A petition or cross-petition for review, a response to a petition or cross-petition, or a combined response and cross-petition, and is submitted under Rule 23(h)

☐ An amicus curiae brief, and is submitted under Rule 16(b)(4)

2. The undersigned certifies that the brief/motion for reconsideration/petition or cross-petition for review to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 3,282 words.

3. The document to which this Certificate is attached does not, or does exceed the word limit that is set by Rule 14, Rule 22, Rule 23, or Rule 29, as applicable.

/s/ Jeffrey L. Hrycko
Roberta S. Livesay
Jeffrey L. Hrycko
Helm, Livesay & Worthington, Ltd.
1619 E. Guadalupe Rd.; Suite One
Tempe, AZ 85283
480-345-9500

APPENDIX

Jodi A. Bain
BAIN LAW FIRM P.L.L.C.
P.O. BOX 64217
Tucson, Arizona 85728
Telephone: (520) 203-3044
State Bar Number 029270
jbain@blfaz.com
Counsel for Defendants and Counter-claimants

THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN THE ARIZONA TAX COURT

BILL STAPLES, Pima County Assessor, Plaintiff, vs. TKG EL CON CENTER, LLC, a Delaware limited liability company; MAGNA/El Con, L.C., a Utah limited liability company; K-Gam El Con (FC), L.L.C., an Arizona limited liability company; and K-Gam El Con (LJ), L.L.C., an Arizona limited liability company Respondents/Defendants. and TKG EL CON CENTER, LLC, a Delaware limited liability company; MAGNA/El Con, L.C., a Utah limited liability company; K-Gam El Con (FC), L.L.C., an Arizona limited liability company; and K-Gam El Con (LJ), L.L.C., an Arizona limited liability company Defendants/Counter-Claimants vs. BILL STAPLES, Pima County Assessor; and ARIZONA DEPARTMENT OF REVENUE, an agency of the State of Arizona Counterclaim Defendants	NO. TX2014-000606 **ANSWER AND COUNTERCLAIM TO COMPLAINT AND NOTICE OF PROPERTY TAX APPEAL** **(Assigned Hon. Christopher Whitten)**

7.4 Defendants further allege that Personal Property of the subject property was not properly considered in the valuation, classification and/or ratio of the subject property by the Assessor which impacts the overall value, classification and/or ratio of the subject property.

7.4 Defendants further allege that Plaintiff has lack of standing and failed to join an indispensable party. Moreover, that Pima County, a body politic and subdivision of the State of Arizona, is an indispensable, necessary and proper party to proceed with this matter.

7.5 Defendants further allege that Plaintiff is barred from correcting property tax errors and issuing NOPCs due to limitations set forth in A.R.S. 42-16256 and, therefore, this Court lacks subject matter jurisdiction.

7.6 Defendants further allege that this Court lacks subject matter jurisdiction to the extent Plaintiff failed to timely file all or part of the case matter.

7.7 Defendants further allege that additional facts may be revealed by future discovery which support affirmative defenses available to, but unknown by the Defendants. Accordingly, Defendants hereby incorporate by this reference and reserve the right to set forth any additional affirmative defenses pursuant to Rule 8 or Rule 12 of the Arizona Rules of Civil Procedure and Title 42 of the Arizona Revised statutes as thought set forth fully herein.

8.0 COUNTERCLAIM

8.1 For Defendants' Counterclaim to Plaintiff's Complaint and Notice of Property Tax Appeal, Defendants admit, deny and allege as set forth above in Defendant's Answer to Plaintiff's Complaint and Notice of Property Tax Appeal.

8.2 Defendants further claim and allege that Plaintiff improperly established and noticed the valuations for the subject property as required by Arizona Revised Statute and, therefore, the subject property has been improperly valued.

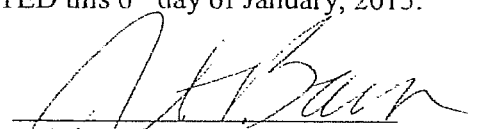
8.3 Defendants further claim and allege that the full cash value, limited property value, classifications and/or assessment ratios for the subject property should be properly adjusted to reflect the correct full cash values, limited property values, classifications and/or assessment ratios in connection with the properly established valuation based upon the evidence in this case and, therefore, the subject property has been illegally taxed.

8.4 Defendants further claim and allege that the valuation and property taxes for the tax roll were unlawfully changed by Plaintiff and do not reflect the decisions at the highest level of appeal and, therefore, the subject property has been illegally taxed.

WHEREFORE, having Answered and Counterclaimed as to Plaintiff's Complaint and Notice of Appeal, Defendants prays as follows:

1. That judgment be denied Plaintiff and entered in favor of the Defendants establishing the valuations, classifications and assessment ratios of the subject property based upon the evidence in this case; and
2. That as a result thereof, this Court order the Pima County Assessor to correct his records to conform to the determination of this Court; and
3. That the Court order the Pima County Treasurer to refund to the taxpayer any taxes overpaid as a result of the incorrect valuation, classification and assessment of the subject property and that Defendants have judgment to that effect; and
4. That Defendants be awarded its costs, expenses and attorney's fees incurred in defense of this action; and
5. For such other and further relief as the Court may deem just and proper under the circumstances.

RESPECTFULLY SUBMITTED this 6th day of January, 2015.



Jodi A. Bain
Attorney for Defendants and Counter-claimants

BAIN LAW FIRM P.L.L.C.
P.O. BOX 64217
Tucson, Arizona 85728

The foregoing was e-filed with the Clerk of the Arizona Tax Court on January 6th, 2015.

COPIES of the foregoing MAILED this 6th day of January, 2015, to:

David W. Krula
Deputy County Attorneys
PIMA COUNTY ATTORNEY
CIVIL DIVISION
32 N. Stone Avenue, Suite 2100
Tucson, Arizona 85701
Attorney for Plaintiff

AND

ARIZONA DEPARTMENT OF REVENUE,
an agency of the State of Arizona
1600 W. Monroe St. (Main Office),
Phoenix Arizona 85007-2650

J. William Brammer, Jr. – AZ Bar No. 002079
Michael J. Rusing – AZ Bar No. 006617
RUSING LOPEZ & LIZARDI, P.L.L.C.
6363 N. Swan Road, Suite 151
Tucson, Arizona 85718
(520) 792-4800
wbrammer@rllaz.com
mrusing@rllaz.com

Jodi A. Bain – AZ Bar No. 029270
THE BAIN LAW FIRM P.L.L.C.
P.O. Box 64217
Tucson, Arizona 85728
(520) 777-3747
jbain@blfaz.com
Attorneys for Defendants/Counterclaimants TKG El Con Center, LLC., et al.

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

BILL STAPLES, Pima County Assessor,

Plaintiff,

vs.

TKG EL CON CENTER, LLC, a Delaware limited liability company; *et al.*,

Respondents/Defendants.

TKG EL CON CENTER, LLC, a Delaware limited liability company; *et al.*,

Counterclaimants,

vs.

BILL STAPLES, Pima County Assessor; and ARIZONA DEPARTMENT OF REVENUE, an agency of the State of Arizona,

Counterdefendants.

No. TX 2014-000606

REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS CERTAIN DEFENDANTS

(*Assigned to the Hon. Christopher Whitten*)

ORAL ARGUMENT REQUESTED

Rusing Lopez & Lizardi, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800

INTRODUCTION

Defendants Magna/El Con, L.C., K-Gam El Con (FC), L.L.C., and K-Gam El Con (LJ), L.L.C. (collectively the "Parcel 1350 Defendants") hereby submit their Reply in support of their Motion for Judgment on the Pleadings and to Dismiss Certain Defendants ("Motion").

The only issue before the Court is whether the Parcel 1350 Defendants are proper parties to this case. Plaintiff's only remaining claims on appeal contest the State Board of Equalization's ("State Board") 2015 tax year ("TY") decisions valuing parcels 125-10-1360, 125-10-1400, 125-10-1460, and 125-10-1470 (the "TKG Parcels"). No one appealed the TY 2015 value of parcel 125-10-1350 owned by the parcel 1350 Defendants – the "Parcel" - to the State Board. The Parcel 1350 Defendants did not own the TKG Parcels in 2015, nor are they responsible for any tax due, or that would be refunded, as to them for 2015.

Any appeal to (or from) the State Board regarding property owned by the Parcel 1350 Defendants - the Parcel - has long been time barred. *See* A.R.S. §§ 42-16056, -16168, -16201, and -16203. The Motion clearly shows why the Parcel's TY 2015 value is not before the Court - and the Plaintiff's Opposition to the Motion provides nothing to the contrary. This Reply addresses items Plaintiff raises in his Opposition. Undisputed facts contained in the Motion generally will not be restated.

ARGUMENT

1. <u>The Court has no Jurisdiction over TY 2015 value for the Parcel or its owners.</u>

a. No appeal of the Parcel's TY 2015 value to the State Board

Nothing in Plaintiff's complaint asserts that anyone appealed the Parcel's TY 2015 value to the State Board. Indeed, nothing in the mountain of information currently in the

Court's file so states. Accordingly, there was no State Board TY 2015 decision for the Parcel that Plaintiff could have appealed to this Court.

Plaintiff's citation of the relevant statutes - A.R.S. §§ 42-16056, -16168, -16201, and -16203 - provides him no jurisdictional comfort, nor this Court jurisdiction over the Parcel or its owners, the Parcel 1350 Defendants. Only where State Board review occurred and a State Board decision exists is there the statutory predicate for an appeal to court. When construing the statutory scheme, the Court will look to the plain meaning of the statutes as the most reliable indicator of their meaning. *See Nordstrom v. Maricopa County*, 207 Ariz. 553, 556, ¶12, 88 P3d 1165, 1168 (App. 2004)(court's decision was on appeal of State Board review and decision on parcel), *citing State v. Mitchell*, 204 Ariz. 216, 218 ¶12, 62 P3d 616, 618 (App. 2003). Once the Court conducts that review, it should be crystal clear that it is without jurisdiction to proceed further here, as no State Board decision on the Parcel has been appealed.

b. The Parcel 1350 Defendants are not Owners of Property Liable for the Value and Tax Plaintiff Seeks to Contest.

Plaintiff states that the reason the Parcel 1350 Defendants "are named in the lawsuit [is] because they are and were the owners of property 'that is liable for tax.'" Opposition, p. 3, ll. 20-21. Of course they are liable for any tax assessed to the Parcel. So what? Something about the Parcel's value leading to the tax must have been contested for A.R.S. §42-16251(4) to apply. No issue of the Parcel's TY 2015 value or taxes was before the State Board, so no appeal properly can be before this Court.

That the Parcel 1350 Defendants owned the entire El Con Mall ("Mall") until May of 2014, and thereafter owned only the Parcel, is irrelevant. Although the date of value for TY 2015 was January 1, 2014 when the Parcel 1350 Defendants owned the entire Mall, the taxes for TY 2015 are the burden of the Mall's parcels's owner in 2015 – Defendant TKG - not the Parcel 1350 Defendants. "[T]he owner of a parcel of land is not personally liable

Rusing Lopez & Lizardi, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800

for payment of the taxes associated with the parcel. Rather, "[r]eal property taxes in Arizona are assessed against the property, not the owner." *Premiere RV & Mini Storage LLC v. Maricopa County*, 222 Ariz. 440, 445, ¶ 17, 215 P3d 1121, 1126 (app. 2009) (citation omitted).

Accordingly, the responsibility for the taxes due, and the values upon which they are based, for the TKG Parcels - the four parcels Plaintiff contests here - are upon TKG, the 2015 owner of the TKG Parcels, not their previous owner, the Parcel 1350 Defendants. Each property owner has the responsibility for paying only their respective taxes.

c. That the Parcel is Accorded "Shopping Center" Valuation Methodology does not trump Jurisdictional Prerequisites.

Plaintiff also asserts that the Motion should be denied because "the TY 2015 El Con Mall valuation is at issue in this case." Opposition, p. 3, ll. 9-10. The only matters before the Court according to Plaintiff's complaint are "the decisions of the SBOE for tax year 2015." Complaint, ¶ 5.5. Only the TKG Parcels' values are contested in the Complaint, and nothing in the Complaint states that its object is the "Mall valuation."

As has been proven to the Court innumerable times, only the TY 2015 values for the TKG Parcels, all owned by Defendant TKG, were before the State Board. None of them were the Parcel, owned by the Parcel 1350 Defendants. The Mall's "valuation" is not before the Court; the only items jurisdictionally available for review by the Court are the values of the four TKG Parcels Plaintiff identified in his complaint.

d. Plaintiff's Hiding Behind the counterclaim is a red herring.

The prophylactic counterclaim all Defendants pled relates only to the values of the "subject property" – those four parcels for which the State Board issued TY 2015 decisions, and that the Plaintiff has appealed to this Court. Indeed, the answer and counterclaim the Defendants filed denied many of the complaint's allegations, including whether anything about the Parcel was before the Court. See Answer, ¶¶ 3.1, 3.2.

Rusing Lopez & Lizardi, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800

Rusing Lopez & Lizardi, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800

Plaintiff asserts that the Counterclaim "includes a claim that [the Parcel] is 'improperly valued,'" citing to ¶¶ 8.1 - 8.4 of the answer and counterclaim. Opposition, p. 3, ll. 11-12. Nothing in those paragraphs refers specifically to the Parcel. Instead, they refer to the "subject property," an undefined term that the Defendants already had denied specifically included any particular parcel.

The counterclaim also applied to TY 2014 values, but the Court has dismissed those claims, and the counterclaim as to them now is abandoned and without subject matter. Nothing in the counterclaim supports Plaintiff's Opposition.

Further, that the Parcel and TKG's parcels are valued pursuant to "shopping center" valuation methodology, as the appropriate statutes require, does not provide a basis for this Court to exercise jurisdiction over a claim that was not brought as dictated by the operative statutes. Plaintiff did not appeal any TY 2015 value for the Parcel either to the State Board or this Court. Accordingly, any such claim neither is before, nor can be decided by, this Court. *See* A.R.S. §§ 42-16056, -16201, and -16203.

2. The Parcel 1350 Defendants have not Waived Anything and Are Not Necessary Parties; They Have Fulfilled Their Discovery Obligations to Date.

a. Waiver.

Plaintiff did not assert any TY 2015 valuation claim regarding the Parcel in his complaint over which the Court could have had jurisdiction. Therefore, there was no jurisdictional defense that the Parcel 1350 Defendants could have raised in their answer, or have waived for failing to raise it. Not until recently when Plaintiff maintained that the valuation of the entire Mall, including the Parcel, was before the Court that the jurisdictional issue could have been raised. Accordingly, we now raise it. Because the Parcel 1350 Defendants had no jurisdictional defense to be waived until now, and because the Parcel 1350 Defendants now have raised that defense, Plaintiff's claim of waiver is invalid and the Court must reject it.

Because the Parcel 1350 Defendants thought the motion for summary judgment they and TKG filed would end the case, there was no reason to raise a separate motion such as the one this Reply supports. Such would have been a waste of judicial resources and time, and, with respect, it is required now only because the Court erroneously denied the motion for summary judgment.

b. Not a Necessary Party.

The only necessary – and proper - party to the TY 2015 litigation is TKG, the owner of the TKG Parcels as to which the State Board made the TY 2015 full cash value determinations that Plaintiff has appealed to this Court. The Parcel 1350 Defendants have no ownership interest in those parcels, and did not in the year 2015, the year for which any tax was due for those four parcels. There is no reason whatsoever for them to be defendants in this matter, and they must be given judgment dismissing them from the case with prejudice.

3. All Discovery Obligations are Current.

The Parcel 1350 Defendants – indeed, all Defendants - have provided Plaintiff considerable income and expense information and rent rolls, both in their Initial Disclosure in August 2017, but also in response to the specific request for that information (see for example, Bates # ElCon 000249 -000917). They also previously provided Plaintiff such materials when he originally was valuing the Parcel for TY 2015. No prejudice whatsoever accrues to Plaintiff by dismissing the Parcel 1350 Defendants from this action.

Although Plaintiff may not like the information that he has been provided, he cannot legitimately claim he has not been provided such information, nor that the Parcel 1350 Defendants have either failed or refused to comply with Plaintiff's requests for production. Further, Plaintiff has never told the Defendants what information he needs for "Plaintiff's appraisal expert to do his work." Plaintiff apparently claims the expert cannot do that work

Rusing Lopez & Lizardi, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800

without some unspecified information. Opposition, p. 6, ll. 13-14. Indeed, that work seems to relate solely to parcels neither owned nor controlled by the Parcel 1350 Defendants; they should not be burdened any further by the discovery requirements of this action.

4. The Motion is Proper and Respects the Court's Previous Rulings.

As noted above, the Motion requests that the Court recognize it has no jurisdiction over the Parcel for TY 2015, and that the Parcel 1350 Defendants no longer are proper parties to this case. The Court's May 2017 ruling to which Plaintiff refers dealt with whether the State Board had utilized the appropriate method to value four parcels' TY 2015 limited values, not how to value the Parcel, whose full cash value had not been appealed by Plaintiff or the Parcel 1350 Defendants to either the State Board or this Court.

That ruling certainly did not conclude that the Parcel 1350 Defendants were proper parties to the action, whether the Complaint had asserted any issue regarding the Parcel's TY 2015 values, nor whether the Court had jurisdiction over the Parcel for TY 2015. Apples and oranges!

The Court's previous rulings in this matter have not addressed the issue the Motion raises. It is ripe to be decided, and to be decided in favor of the Parcel 1350 Defendants.

CONCLUSION

The Parcel 1350 Defendants have no ownership interest in any of the four TKG Parcels Plaintiff appealed to this Court, nor did they during 2015, the year for which tax would be paid based on any valuation decision coming from this matter. Nothing regarding the Parcel for TY 2015 is before the Court, as it was neither appealed to nor determined by the State Board, nor has Plaintiff appealed anything regarding the Parcel to this Court.

Nor were the Parcel 1350 Defendants ever required to plead this Court's lack of jurisdiction in their answer, as Plaintiff did not appeal the Parcel for TY 2015 in his

Rusing Lopez & Lizardi, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800

complaint. That defense was never required to have been raised then, and it was not, nor has it been, waived.

For all the reasons previously stated, the Parcel 1350 Defendants are neither proper nor necessary parties to this action. The Court's May 2017 order has no bearing on this matter as it determined wholly different issues than the State Board's TY 2015 decisions for the four TKG Parcels Plaintiff appealed to this Court. These Defendants have not ignored or disrespected that ruling in bringing the Motion.

And, all Defendants have provided Plaintiff a plethora of information by way of disclosure and discovery response, both that the Plaintiff requested, and that he did not, all of which likely was and certainly could be utilized to analyze the value of the Parcel. However, none of that information currently is germane because the Parcel's value is not before the Court.

The Parcel 1350 Defendants are entitled to be awarded judgment in their favor and against Plaintiff, dismissing them from this action with prejudice. For the reasons previously stated, they also are entitled to be awarded from Plaintiff their attorney fees and costs incurred in defending this action and bringing the Motion pursuant to A.R.S. §12-348(B).

Respectfully Submitted this 5th day of February, 2018.

RUSING LOPEZ & LIZARDI P.L.L.C.

/s/ J. William Brammer, Jr.

J. William Brammer, Jr.
Michael J. Rusing

BAIN LAW FIRM P.L.L.C.

/s/ Jodi A. Bain

Jodi A. Bain
Attorneys for Defendants/Counterclaimants TKG El Con Center, LLC., et al.

Rusing Lopez & Lizardi, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800

Electronically filed with the Clerk of
the Arizona Tax Court this 5th day of
February, 2018 via AZ Turbo Court.

COPY of the foregoing delivered Via
AZ Turbo Court to:

The Honorable Christopher Whitten
Judge, Arizona Tax Court
Maricopa County Superior Court
Old Courthouse, #201
125 W. Washington
Phoenix, Arizona 85003

COPY of the foregoing e-mailed and
mailed this 5th day of January, 2018, to:

Roberta Livesay
Jeffrey L. Hyrcko
HELM, LIVESAY & WORTHINGTON, LTD.
1619 E. Guadalupe, Suite One
Tempe, Arizona 85283
livesay.roberta@hlwaz.com
hrycko.jeff@hlwaz.com
Special Counsel for Plaintiff/Counterdefendant Bill Staples

Jerry F. Fries
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington Street
Phoenix, Arizona 85007
Jerry.Fries@azag.gov
Attorneys for Counterdefendant Arizona Department of Revenue

/s/ Jason Linaman

Rusing Lopez & Lizardi, P.L.L.C.
6363 North Swan Road, Suite 151
Tucson, Arizona 85718
Telephone: (520) 792-4800

HELM, LIVESAY & WORTHINGTON, LTD.
1619 E. Guadalupe, Suite One
Tempe, Arizona 85283
Telephone: (480) 345-9500
Facsimile: (480) 345-6559
Roberta S. Livesay – 010982
Jeffrey L. Hrycko, Of Counsel – 023280
livesay.roberta@hlwaz.com
Special Counsel for Plaintiff/Counterdefendant Bill Staples

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

BILL STAPLES, Pima County Assessor, Plaintiff, vs. TKG EL CON CENTER, LLC, a Delaware limited liability company; *et al.*, Respondents/Defendants.	No. TX 2014-000606 **Plaintiff's Opposition to Defendants'/Counterclaimants Motion for Judgment on the Pleadings and to Dismiss Certain Defendants/Counterclaimants**
TKG EL CON CENTER, LLC, a Delaware limited liability company; *et al.*, Counterclaimants, vs. BILL STAPLES, Pima County Assessor; and ARIZONA DEPARTMENT OF REVENUE, an agency of the State of Arizona, Counterdefendants.	(*Assigned to the Hon. Christopher Whitten*) ***Oral Argument Requested***

Plaintiff/Counterdefendant Bill Staples, Pima County Assessor, hereby responds in opposition to Magna/El Con, L.C., K-Gam El Con (FC), L.L.C., and K-Gam El Con (LJ), L.L.C. ("Parcel 1350 Defendants'") Motion for Judgment on the Pleadings and to Dismiss Certain Defendants/Counterclaimants ("Motion") and requests this Court deny the Motion for several

reasons 1) because Defendants have failed to demonstrate that they are not proper defendants in this matter under the facts alleged in the Complaint; 2) because the argument has been waived by Defendants' conduct; and 2) because the argument is barred by this Court's May 2017 ruling that the El Con Mall is to be valued as an economic unit in accordance with the Shopping Center Statute, A.R.S. § 42-13201 *et seq.* and is also a waste of judicial resources because it is duplicative of Defendants' Motion for Summary Judgment that is currently on appeal before the Arizona Supreme Court as of the date of this Opposition.

Respectfully Submitted this 24th day of January 2018.

HELM, LIVESAY & WORTHINGTON, LTD.

/s/ Roberta S. Livesay
Roberta S. Livesay
Jeffrey L. Hrycko
Special Counsel for Plaintiff/Counterdefendant

HELM, LIVESAY & WORTHINGTON, LTD.
1619 East Guadalupe Road, Suite One
Tempe, Arizona 85283
Telephone: (480) 345-9500
Fax: (480) 345-5559

MEMORANDUM OF POINTS AND AUTHORITIES

Argument

The Court "should not grant a motion to dismiss unless it appears certain that the plaintiff would be entitled to no relief under any state of facts which is susceptible of proof under the claim stated." San Manuel Copper Corp. v. Redmond, 8 Ariz. App. 214, 218, 445 P.2d 162, 166 (1968). Further, a motion for judgment on the pleadings tests the sufficiency of the complaint in stating the claim for relief. Food for Health Co. v. 3839 Joint Venture, 129 Ariz. 103, 106, 528 P.2d 986, 989 (App. 1981). "A motion for judgment on the pleadings for the purposes thereof admits all material allegations of the opposing party's pleadings, and all allegations of the moving party which have been denied are taken as false so that a motion for judgment on the pleadings is only granted if the moving party is clearly entitled to judgment." Id. Here, the Complaint states a claim for relief against

HELM, LIVESAY & WORTHINGTON, LTD.
1619 East Guadalupe Road, Suite One
Tempe, Arizona 85283
Telephone: (480) 345-9500
Fax: (480) 345-6559

the Parcel 1350 Defendants, and taking all allegations as admitted, retaining the Parcel 1350 Defendants in this lawsuit is necessary as parcel 1350 was valued as a part of the economic unit, commonly known as the El Con Mall in TY 2015.

1. This Court has jurisdiction over Defendants, because they are the owners of property, which is at issue in this case.

Parcel 1350 Defendants argue that this Court "has no jurisdiction over the Parcel 1350 Defendants" asserting that the Court lost jurisdiction over those Defendants/Counterclaimants when it allowed Plaintiff to dismiss his TY 2014 claims with prejudice. Motion at 3. This argument fails for three reasons: 1) the El Con Mall parcels ("subject property") were valued as an economic unit under the Shopping Center Statute, A.R.S. § 42-13201 *et seq.*, in TY 2015 and because the TY 2015 El Con Mall valuation is at issue in this case, all El Con Mall taxpayers are necessary parties under A.R.S. § 42-16208(A)(4) and A.R.C.P. Rule 19; 2) Defendants' Counterclaim includes a claim that parcel 125-10-1350 is "improperly valued" and "illegally taxed" and therefore its value is at issue, Answer and Counterclaim ¶¶ 8.1–8.4; and 3) the Parcel 1350 Defendants owned all of the subject property on January 1, 2014, the date of value for the 2015 tax year until May 2014.

Parcel 1350 Defendants' assertion that the Court has no jurisdiction over them is faulty. It is undisputed that these Defendants owned the entire El Con Mall on the date of value, January 1, 2014, and during valuation year 2014 before selling all but parcel 125-10-1350 to co-Defendant/Counterclaimant TKG in May 2014. Complaint ¶2.4; Answer/Counterclaim ¶2.4. It is likewise undisputed that parcel 125-10-1350 received the benefit of the shopping center valuation methodology in TY 2015. Defendants are named in this lawsuit because they are and were the owners of property "that is liable for tax." A.R.S. § 42-16251(4); Premiere RV & Mini Storage LLC v. Maricopa County, 222 Ariz. 440, 445 ¶17, 215 P.3d 1121, 1126 (App. 2009). Defendants' prior

motion for summary judgment regarding which LPV rule to apply was denied by this Court because "the valuation of the property must be that of the shopping center as a whole, the sum of its parts, the sum of the valuations of each unit and parking and common areas, must by definition be the valuation of the whole." Minute Entry dated 5/18/2017. By itself, parcel 125-10-1350 is not a "shopping center" and is not entitled to valuation under the shopping center statute on its own. See, Nordstrom v. Maricopa County, 207 Ariz. 553, 557 ¶¶ 13–14, 88 P.3d 1165, 1169 (App. 2004). The instant motion is another attempt to dismantle the El Con Mall into its constituent parts while avoiding the consequences that come from not being valued as a "shopping center."

Separately and independently, the instant motion fails for the simple reason that Defendants' Counterclaim challenges the valuation of the entire subject property, *i.e.*, the El Con Mall, which includes Parcel 1350 Defendants' parcel. In pertinent part, Defendants' Counterclaim asserts,

> 8.2 Defendants further claim and allege that Plaintiff improperly established and noticed the valuations for the subject property as required by Arizona Revised Statute and, therefore, the subject property has been improperly valued.
>
> 8.3 Defendants further claim and allege that the full cash value, limited property value, classifications and/or assessment ratios for the subject property should be properly adjusted to reflect the correct full cash values, limited property values, classifications and/or assessment ratios in connection with the properly established valuation based upon the evidence in this case and, therefore, the subject property has been illegally taxed.

Defendants' prayer for relief requests, in pertinent part, as follows:

> 1. That judgment be denied Plaintiff and entered in favor of the Defendants establishing the valuations, classifications and assessment ratios of the subject property based upon the evidence in this case; and
>
> ...

Parcel 1350 Defendants' instant motion will not extinguish their Counterclaim, nor have they moved to amend their Answer and Counterclaim. Defendants' instant motion should be denied.

HELM, LIVESAY & WORTHINGTON, LTD.
1619 East Guadalupe Road, Suite One
Tempe, Arizona 85283
Telephone: (480) 345-9500
Fax: (480) 345-9559

2. Defendants have waived their claim that the Court lacks jurisdiction over the Parcel 1350 Defendants by failing to raise this issue in their Answer & Counterclaim or during the past three years of litigation.

Parcel 1350 Defendants argument that the Court lacks jurisdiction over them is barred by their failure to raise this particular affirmative defense in their Answer & Counterclaim and by actively litigating this matter without raising the defense in the three years since the Complaint was filed. Affirmative defenses can be waived by subsequent conduct even if the defense is raised in an Answer or a Motion to Dismiss. City of Phoenix v. Fields, 219 Ariz. 568, 574 ¶28, 201 P.3d 529, 535 (2009); Russo v. Barger, 239 Ariz. 100, 103 ¶13, 366 P.3d 577, 580 (App. 2016).

Defendants filed their Answer & Counterclaim in January 2015. Since then, they have participated in numerous status conferences, filed three motions for summary judgment, a special action in the Court of Appeals, and a petition for review with the Supreme Court, in addition to the instant motion. The instant motion is the first time this particular affirmative defense has been raised.

Moreover, the potential prejudice to Plaintiff of allowing the Parcel 1350 Defendants to walk away from this litigation at this stage is great. As already noted, these Defendants owned the entire El Con Mall on the date of value and for several months thereafter. A.R.S. § 42-16208 states in pertinent part that the one necessary party to a lawsuit brought by the Assessor is the taxpayer. A "taxpayer" is defined as "the owner of real or personal property that is liable for tax." A.R.S. § 42-16251(4). As these Defendants were, and remain, the owners of property subject to tax that is part of the El Con Mall shopping center, they are necessary parties to this litigation. All Defendants/Counterclaimants are represented by the same attorneys, and it seems unlikely that any additional work will be necessary by their attorneys or appraisal expert beyond what is needed to represent TKG, which owns the other parcels comprising the shopping center. Finally, because the structuring of the sale and purchase transaction is unknown to undersigned counsel at this time, it is

HELM, LIVESAY & WORTHINGTON, LTD.
1619 East Guadalupe Road, Suite One
Tempe, Arizona 85283
Telephone: (480) 345-9500
Fax: (480) 345-9559

unknown whether in the absence of the Parcel 1350 Defendants this Court will be able to grant complete relief; thereby making these Defendants necessary parties pursuant to A.R.C.P. Rule 19.

3. Defendants' instant motion lacks merit and ignores this Court's previous ruling that the El Con Mall is valued as an economic unit, and therefore is a waste of time and judicial resources.

Defendants could have raised the argument they now advocate in their December 2016 amended motion for partial summary judgment thirteen months ago, or in their August 2017 Motion for Summary Judgment denied by this Court on November 9, 2017 that Defendants have filed an unsuccessful special action petition at the Court of Appeals and pending Petition for Review before the Supreme Court. The present argument certainly existed and was known to Defendants in December 2016, and August 2017. Rather than raising all of their "case-dispositive" issues is one motion, or even two, Defendants have extended this litigation over a year and now have filed a third motion. **Meanwhile, Defendants' have continued to refuse to comply with Plaintiff's Requests for Production by failing to disclose information necessary for Plaintiff's appraisal expert to do his work.**[1] Due to Defendants' ongoing delaying tactics, Plaintiff will be forced to file a motion to compel production of their financials, tax returns, and the leases on the El Con Mall. The instant Motion appears to be just another attempt to delay and drive up this cost of this litigation. These tactics should not be tolerated, and their Motion should be denied.

Conclusion

For the reasons stated above, Defendants' motion lacks legal merit, is a waste of time and resources, and therefore, should be denied.

---

[1] It is unknown at this time whether these Defendants have turned over all of the necessary documentation to TKG that has been requested by Plaintiff in his Requests for Production so that his expert can appraise the entire shopping center. If these Defendants are dismissed, Plaintiff will be forced to engage in burdensome efforts to obtain necessary financial information in order to complete its appraisal, which has already been repeatedly delayed due to Defendants' stall tactics.

HELM, LIVESAY & WORTHINGTON, LTD.
1619 East Guadalupe Road, Suite One
Tempe, Arizona 85283
Telephone: (480) 345-9500
Fax: (480) 345-6559

Respectfully Submitted this 24th day of January 2018.

HELM, LIVESAY & WORTHINGTON, LTD.

/s/ Roberta S. Livesay
Roberta S. Livesay
Jeffrey L. Hrycko
Special Counsel for Plaintiff/Counterdefendant

Electronically filed with the Clerk of the Arizona Tax Court this 24th day of January 2018 via AZ Turbo Court.

COPY of the foregoing **delivered Via AZ Turbo Court** to:

The Honorable Christopher Whitten
Judge, Arizona Tax Court
Maricopa County Superior Court
Old Courthouse, #201
125 W. Washington
Phoenix, AZ 85003

COPY of the foregoing **mailed** this 24th day of January 2018, to:

Jodi A. Bain
BAIN LAW FIRM P.L.L.C.
P.O. Box 64217
Tucson, AZ 85728

J. William Brammer, Jr
Michael J. Rusing
RUSING LOPEZ & LIZARDI, PLLC
6363 N. Swan Rd., Suite 151
Tucson, AZ 85718
Attorneys for Defendant/Counterclaimant TKG El Con Center, LLC., et al.

Jerry F. Fries
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington Street
Phoenix, AZ 85007
Attorneys for Counterdefendant Arizona Department of Revenue

/s/ Terry Young

HELM, LIVESAY & WORTHINGTON, LTD.
1619 East Guadalupe Road, Suite One
Tempe, Arizona 85283
Telephone: (480) 345-9500
Fax: (480) 345-6559

El Con 2015

	NOV-FCV	NOV-LTD	Close-FCV	Close-LTD
125-10-1350	2,367,394	2,132,513	2,045,000	1,912,075
125-10-1360	990,570 SUPP	926,183 SUPP	877,000	819,995
125-10-1370	1,177,377	1,100,847	877,500	820,463
125-10-1380	1,222,484	1,143,023	975,000	911,625
125-10-1390	816,983	763,879	816,983	763,879
125-10-1400	1,403,337 SUPP	1,312,120 SUPP	957,600	895,356
125-10-1410	1,313,865	1,228,464	1,313,865	1,228,464
125-10-1420	1,952,688	1,825,763	1,952,688	1,825,763
125-10-1430	2,429,015	2,271,129	2,429,015	2,271,129
125-10-1440	982,131	918,282	982,131	918,282
125-10-1450	1,064,292	995,113	1,064,292	995,113
125-10-1460	899,552	841,081	577,500	483,069
125-10-1470	8,232,920	7,697,780	5,505,000	4,334,482
125-10-1480	40,597,744	37,958,891	25,172,000	23,535,820
Totals	65,450,352	61,115,068	45,545,574	41,715,515