



Informational Guide to Model Hearing Procedures for Appraisal Review Boards

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Property Tax Assistance Division
Texas Comptroller of Public Accounts

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Introduction

Effective Jan. 1, 2014, Tax Code Section 5.103(a) requires that the Comptroller of Public Accounts prepare model hearing procedures for appraisal review boards (ARB). The model procedures are required to be followed, according to subsection (d), when an ARB establishes its hearing procedures, as required by Tax Code Section 41.66(a).

Tax Code Section 5.103(b) lists 17 topics, 16 of which are addressed in the model hearing procedures under the categories of (1) ARB membership, (2) ARB duties, (3) ARB hearings, (4) conduct of ARB hearings, and (5) evidence considerations. The last statutorily-required topic—“any other matter related to fair and efficient appraisal review board hearings”—is addressed under the last section entitled “Other Issues.”

The model procedures address specific matters required by Tax Code Section 5.103. An ARB may include additional procedures in its local hearing procedures regarding legal and administrative matters that are not addressed by these model procedures. Input from ARB legal counsel is advisable to establish local hearing procedures. The local procedures, however, may not contradict, negate, or otherwise substantively change the model procedures. If a conflict exists between the model procedures and local procedures, the model procedures prevail.

This informational guide is provided to aid ARBs in understanding the legal bases of the model procedures and to provide samples of additional or modified procedures that follow the model procedures, but do not contradict, negate, or otherwise substantively change them. The Comptroller’s Property Tax Assistance Division is providing this guide solely as an informational resource. It is the model procedures that are required by statute and that must be followed by ARBs in establishing procedures under Tax Code Section 41.66(a). The legal provisions included in this guide are not exhaustive and the sample procedures are only illustrative. In providing sample procedures in this guide, the Comptroller neither advocates that an ARB establish such sample procedures, nor takes a position with regard to whether such provisions are advisable or legally enforceable. Those decisions should be made with the advice of ARB legal counsel. The information provided in this guide neither constitutes nor serves as a substitute for legal advice. Questions regarding applicable statutes or additions or modifications to the model procedures should be directed to ARB legal counsel.

I. ARB Membership

[Tax Code Section 5.103(b)(16), (15), and (12)]

Tax Code Section 6.41(a) establishes an appraisal review board (ARB) for each appraisal district. Subsection (b) requires that the board must have at least three members. The appraisal district board of directors by resolution may increase the size of the ARB to an appropriate number. Subsection (d) provides that, except as provided by Subsection (d-1), ARB members are appointed by resolution of a majority of the board of directors.

Tax Code Section 6.414(a) permits boards of directors to provide “for a number of auxiliary appraisal review board members that the board considers appropriate to hear taxpayer protests ... and to assist the board in performing its duties.” Subsection (g) states that “appraisal review board member” includes an auxiliary ARB member.

Beginning in 2014, in a county with a population of 120,000 or more, ARB members, including auxiliary ARB members, are appointed by the local administrative district judge. Tax Code Section 6.41(d-1) states that the members of the ARB are appointed by the judge. If the appraisal district board of directors provides for the existence of auxiliary ARB members in counties with populations of 120,000 or more, the local administrative law judge must appoint those members, as well as regular ARB members [Tax Code Section 6.414(b)].

Subsection (d-1) also states that “all applications submitted to the appraisal district or to the appraisal review board from persons seeking appointment as a member of the appraisal review board shall be delivered to the local administrative district judge. The appraisal district may provide the local administrative district judge with information regarding whether an applicant for appointment to or a member of the board owes any delinquent ad valorem taxes to a taxing unit participating in the appraisal district.”

Applications are not required from persons seeking appointment to an ARB by the board of directors in counties with populations of less than 120,000; however, they may be requested by the board of directors to assist it in making appointments.

Tax Code Section 6.41(c) requires that an individual must be a resident of the appraisal district and must have resided in the district for at least two years in order to be eligible for appointment to an ARB. This eligibility requirement exists regardless of the county population.

Tax Code Section 5.041(e-2) requires each ARB member who is in the second year of his/her first term or has been reappointed to a subsequent term to complete the required training offered by the Comptroller of Public Accounts annually. An ARB member may not participate in a hearing, vote on a protest determination, or be reappointed to an additional term until the person completes the training and receives a certificate of course completion.

A. Administration of ARB Appointments

Tax Code Section 6.41(d) – (d-9) addresses appointment of ARB members. Section 6.41(d) sets forth the general rule that ARB members are appointed by resolution of a majority of the appraisal district board of directors. Section 6.41(d-1) – (d-9) provides for appointment of ARB members by the local administrative district judge in counties with a population of 120,000 or more. Additionally, in appraisal districts in which ARB members are appointed by the local administrative district judge, Section 6.41(i) expressly prohibits communication by an ARB member with the judge regarding the appointment of ARB members. Pursuant to Section 6.41(k), a violation of the prohibition in Section 6.41(i) is a Class A misdemeanor.

B. Conflicts of Interest

1. Tax Code Provisions

The term “conflict of interest” is used generally with regard to public officials and fiduciaries and their relationships to matters of private interest or gain to them. As the term relates to the duties of ARB members, statutory provisions outline restrictions.

Considered a restriction on eligibility of ARB members, Tax Code Section 6.412(c) prohibits members of the board of directors, an officer, or employee of the appraisal district, an employee

of the Comptroller, or a member of the governing body, officer, or employee of a taxing unit from serving on an ARB. This eligibility requirement must be investigated carefully so that appointments are not made to the ARB if such a conflict exists. If a conflict arises due to employment or appointment to one of the prohibited positions after appointment to the ARB, the member must resign from the ARB immediately.

Also a restriction on eligibility of ARB members, Tax Code Section 6.413 deals with interests in certain contracts. A person cannot serve on an ARB if the member or a business entity in which the member has a substantial interest is a party to a contract with the appraisal district or with a taxing unit that participates in the district. Likewise, the appraisal district or a taxing unit may not enter into a contract with a member of an ARB or with a business entity in which the ARB member has a substantial interest.

“Substantial interest” is defined in subsection (d). This eligibility requirement should be investigated before ARB member appointment. If an ARB member discovers a conflict after his/her appointment, the member must resign from the ARB or disengage from the contract creating the conflict immediately.

Tax Code Section 41.69, which is entitled “Conflict of Interest,” provides direct guidance regarding conflicts of interest as they relate to protest hearings. It states that “a member of the appraisal review board may not participate in the determination of a taxpayer protest in which he is interested or in which he is related to a party by affinity within the second degree or by consanguinity within the third degree, as determined under Chapter 573, Government Code.”

To restate, Section 41.69 prohibits participation in a protest hearing if the ARB member is interested in the protest in any way or if the ARB member is related to a party in a protest hearing by affinity within the second degree or by consanguinity within the third degree (see chart of kinship in the *Appraisal Review Board Manual*). An ARB member may be removed from the board due a violation of this provision [Tax Code Section 6.41(f)(1)].

2. Local Government Code Provisions

Tax Code Section 6.413(f) provides that “this section does not limit the application of any other law, including the common law relating to conflicts of interest, to an appraisal review board member.” Not just Tax Code provisions determine conflicts of interest. ARB members may wish to review publications regarding conflicts of interest that are published by the Texas Attorney General (AG) and available on the AG’s website. Questions regarding laws regarding conflict of interest should be directed to ARB legal counsel or, as applicable, your personal legal counsel.

One example of legal restrictions regarding conflicts of interest found outside the Tax Code is Local Government Code Chapter 171. Local Government Code Chapter 171 defines “local public official” to include elected or appointed officer “who exercises responsibilities beyond those that are advisory in nature.” If a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if (1) the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public, or (2) it is reasonably foreseeable that an action on the matter will have a special economic effect on

the value of real property, distinguishable from its effect on the public. The affidavit must be filed with the official record keeper of the governmental entity.

“Substantial interest” is defined for purposes of Chapter 171. Under Chapter 171, a person has a substantial interest in a business entity if he/she (or a person related in the first degree by consanguinity or affinity as determined under Government Code Chapter 573) owns 10 percent or more of the voting stock or shares of the entity, or owns either 10 percent or more or \$15,000 or more of the fair market value of the business entity; or funds received by the person from the business entity exceed 10 percent of the person’s gross income for the previous year. A person has a substantial interest in real property if the interest is an equitable or legal ownership with a fair market value of \$2,500 or more.

If a local public official is required to file and does file an affidavit of conflict of interest, he/she is not required to abstain from further participation in the matter requiring the affidavit if a majority of the members of the governmental entity of which the official is a member is composed of persons who are likewise required to file and who do file affidavits of similar interests on the same official action. (Local Government Code Section 171.004)

A violation of these provisions is a Class A misdemeanor.

C. *Ex Parte* and Other Prohibited Communications

1. Tax Code Section 41.66(g) and (f)

Tax Code Section 41.66(g) states:

At the beginning of a hearing on a protest, each member of the appraisal review board hearing the protest must sign an affidavit stating that the board member has not communicated with another person in violation of Subsection (f). If a board member has communicated with another person in violation of Subsection (f), the member must be recused from the proceeding and may not hear, deliberate on, or vote on the determination of the protest. The board of directors of the appraisal district shall adopt and implement a policy concerning the temporary replacement of an appraisal review board member who has communicated with another person in violation of Subsection (f).

Tax Code 41.66(f) prohibits communications between appraisal review board members and other persons concerning the following matters:

- the evidence, argument, facts, merits, or any other matters related to an owner’s protest, except during the hearing on the protest; or
- a property that is the subject of the protest, except during a hearing on another protest or other proceeding before the board at which the property is compared to other property or used in a sample of properties.

If an ARB member has communicated in this manner, the member may not participate in a protest hearing. The ARB member must recuse himself or herself immediately from the hearing and report the matter to the chair or secretary of the ARB.

In the recusal process, the ARB member not only may not vote on the matter that is the subject of the protest, but also may not hear or deliberate on the determination of the protest.

As noted above, the board of directors of the appraisal district, pursuant to Tax Code Section 41.66(f), must adopt and implement a policy concerning the temporary replacement of an ARB member who has communicated with another person in violation of Section 41.66(f).

A violation of Tax Code Section 41.66(f) may give rise to a Class A misdemeanor under Section 6.411(a) and (d). In addition, an ARB member may be removed from the board due a violation of this provision [Tax Code Section 6.41(f)(1)].

2. Tax Code Section 6.411

Subsection (b) prohibits communications between the chief appraiser or other employee of the appraisal district, a member of the board of directors, a property tax consultant, or an attorney representing a party to a proceeding before an ARB and a member of the ARB. These communications must be made “with the intent to influence a decision” of the ARB.

This prohibition does not apply to communications between:

- the ARB and its legal counsel; or
- the ARB and the chief appraiser, another employee of the appraisal district, a member of the board of directors, a property tax consultant, or an attorney representing a party to a proceeding before the ARB (1) during a hearing, (2) socially, (3) that are limited to administrative, clerical, or logistical matters related to scheduling and operation of hearings, processing documents, issuance of order, notices or subpoenas, and the operation, appointment, composition, or attendance at ARB training; or (4) that are required for the board of directors to determine whether to appoint, reappoint, or remove a person as a member or the chair or secretary of the ARB.

A violation of this provision is a Class A misdemeanor.

3. Tax Code Section 6.41(i) and (j)

The chief appraiser or other employee or agent of the appraisal district is prohibited from communicating with an ARB member, a member of the district board of directors, or the local administrative district law judge (in counties with populations of 120,000 or more) regarding “a ranking, scoring, or reporting of the percentage by which the appraisal review board or a panel of the board reduces the appraised value of property.” [Subsection (j)] An ARB member is prohibited from communicating with the local administrative district judge regarding the appointment of ARB members in counties with populations of 120,000 or more. [Subsection (i)] Violations of these provisions are Class A misdemeanors.

Prohibitions regarding communications with local administrative district judges in counties with populations of 120,000 or more do **not** apply to communications between an ARB member and the judge regarding the member’s reappointment to the ARB, or removal of an ARB member from the board.

II. ARB Duties

[Tax Code Section 5.103(b)(1), (5), and (6)]

A. Statutory Duties of an ARB

1. Tax Code Section 41.01 provides:

- (a) The appraisal review board shall:
 - (1) determine protests initiated by property owners;
 - (2) determine challenges initiated by taxing units;
 - (3) correct clerical errors in the appraisal records and the appraisal rolls;
 - (4) act on motions to correct appraisal rolls under Section 25.25;
 - (5) determine whether an exemption or partial exemption is improperly granted and whether land is improperly granted appraisal as provided by Subchapter C, D, E, or H, Chapter 23; and
 - (6) take any other action or make any other determination that this title specifically authorizes or requires.
- (b) The board may not review or reject an agreement between a property owner or the owner's agent and the chief appraiser under Section 1.111(e).

Statutory mandates for ARB actions deal with these duties (see Tax Code Chapters 41 and 25). The law authorizes actions for an ARB to take, such as establishing hearing procedures [Section 41.66(a)] and making determinations of protests and motions. By signing the statement at the conclusion of the training provided by the Comptroller of Public Accounts, members of the ARB acknowledge that they will comply with the duties prescribed by law for them [Tax Code Section 5.041(b-1)].

2. Deadlines for Completing Statutory Duties

Tax Code Section 41.12 provides the deadlines and steps that must be taken in order for the ARB to complete its duties. By July 20, all or substantially all timely filed protests and challenges must be heard and determinations made. By the same date, changes in the appraisal records must be submitted to the chief appraiser and the appraisal records must be approved. In counties with populations of at least one million, the deadline can be postponed, with approval of the appraisal district board of directors, until August 30. The board of directors in counties with populations of at least one million may also authorize the ARB to approve the records "if the sum of the appraised values, as determined by the chief appraiser, of all properties on which a protest has been filed but not determined does not exceed 10 percent of the total appraised value of all other taxable properties."

B. Notices Required under the Property Tax Code

Notices addressing various property tax matters are specifically required throughout the Property Tax Code. Many of these notices are set out in Tax Code Chapter 11 regarding taxable property and exemptions, Chapter 23 regarding appraisal method and procedures, and Chapter 41

regarding taxpayer protests and other matters. Only those notice requirements typically relevant to the ARB and the protest process will be mentioned here.

To be entitled to a protest hearing, property owners or their agents are required to timely file a notice of protest with the ARB under Tax Code Section 41.44. If the property owner wants to appear by telephone conference call, the owner must state this intention in the notice of protest or provide separate written notice to the ARB at least ten days before the hearing. In response to the notice of protest, the ARB is responsible, under Tax Code Section 41.46, for sending to the property owner or owner's agent and the appraisal district, written notice of the date, time, and place of the ARB hearing. The ARB also is required to send written notice of its decision on the protest and of the owner's right to appeal the decision to district court under Tax Code Section 41.47.

The appraisal district is required by law to provide property owners or their agents notice of various appraisal-related determinations. Among those determinations, notice is to be provided regarding the appraised value of property as well as any cancellation or reduction of a previously approved exemption for a particular property under Tax Code Section 25.19. Notice also is required under Tax Code Chapter 23 of the chief appraiser's decision to deny an application for special appraisal or that a change in use of specially-appraised property has occurred (which renders the property unqualified for special appraisal and possibly subject to rollback tax treatment).

C. Remedy for Failure to Provide Required Notice

Property owners have a remedy for the failure of the chief appraiser or the ARB to provide or deliver a notice to which the property owner is entitled. Pursuant to Tax Code Section 41.411, the property owner is entitled to protest the failure to the ARB to provide or deliver required notices. If failure to provide or deliver the notice is established, the ARB shall determine the protest on any other grounds of protest authorized by law relating to the property to which the notice applies. The property owner must pay his/her taxes according to the requirements of Tax Code Section 41.4115.

- Sample Procedure for ARB Consideration of Protests for Failure to Provide Notice

When a property owner files a protest pursuant to Tax Code Section 41.411 that a notice to which the owner is entitled has not been delivered, the chair of the ARB should notify its attorney to provide an analysis of the notice that is claimed not to have been delivered, investigate the facts of the protest, and provide legal advice as required by Tax Code Section 6.43(d).

The hearing must be bifurcated. The ARB must first determine if the notice is one that is required by law. If it is, the ARB must determine if it was delivered according to Tax Code Section 1.07 or, if applicable, Section 1.085. If the notice was not properly delivered, the ARB must determine if taxes were paid as required by law. After these jurisdictional determinations are made and it is determined that the property owner is entitled to a hearing, the protest may be determined on its merits at that time and without postponement, unless the parties agree that the hearing on the protest merits should be postponed. "If failure to provide or deliver the notice is established, the appraisal review board shall determine a protest made by the property owner on

any other grounds of protest authorized by this title relating to the property to which the notice applies.” [Tax Code Section 41.411(b)]

D. Determination of Good Cause for Late Protests under Tax Code Section 41.44(b)

Tax Code Section 41.44(b) provides:

A property owner who files his notice of protest after the deadline prescribed by Subsection (a) of this section but before the appraisal review board approves the appraisal records is entitled to a hearing and determination of the protest if he shows good cause as determined by the board for failure to file the notice on time.

This provision permits the ARB to allow a late-filed protest to be heard and a determination made if good cause is shown. Although Tax Code Section 41.44 does not define “good cause” for purposes of a late-filed protest, this term is defined in Tax Code Section 41.45(e-2) for purposes of postponement requests and requests for new hearings due to failure to appear. Tax Code Section 41.45(e-2) provides that “good cause” is “a reason that includes an error or mistake that: (1) was not intentional or the result of conscious indifference; and (2) will not cause undue delay or other injury to the person authorized to extend the deadline or grant a rescheduling.” When making a determination regarding good cause under a statute, each element of the definition must be considered on a case-by-case basis by the ARB.

In making determinations regarding claims of good cause for accepting late-filed protests under Tax Code Section 41.44(b), the ARB may wish to implement local standards to provide for a uniform method of consideration, just as there is a uniform method under Section 41.45 for postponed and new hearings. The ARB should consult with its legal counsel to take steps or implement additional procedures as necessary or advisable to ensure that claims of good cause under Tax Code Section 41.44(b) are carefully considered to maintain statutory filing deadlines and uniform application of standards.

E. Delivery of ARB Hearing Procedures

Under Tax Code Section 41.66, each ARB is required to establish its own hearing procedures, and “to the greatest extent practicable,” these procedures are to be “informal.”

The ARB’s written hearing procedures must be delivered to the property owner not later than 10 days before the hearing and may be delivered with the ARB’s notice of the hearing. A copy of the hearing procedures, which must follow the Comptroller’s model procedures, is required to be posted in a prominent place in each room where ARB hearings are held. (A property owner is entitled to a copy of the hearing procedures when the owner makes the request in the notice of protest or in a separate writing delivered to the ARB on or before the date the notice of protest is filed.)

III. ARB Hearings: Types of Hearings and Pre-Hearing and Administrative Matters

[Tax Code Section 5.103(b)(3), (4), (7), and (14)]

ARB hearings are not informal meetings between property owners and appraisal district staff. Rather, they are an integral part of the legal process created by statute to protest the value of property appraised for tax purposes. There are three types of hearings the ARB may conduct under Tax Code Section 41.45(b), depending on how the property owner or the owner's agent decides to appear at the hearing:

- in person to offer evidence and argument,
- by telephone conference call to offer argument with evidence offered and delivered by affidavit before the hearing begins, or
- by written affidavit to offer evidence and argument delivered to the ARB before the hearing begins.

If a property owner files an affidavit, the ARB is not required to consider the affidavit at the scheduled hearing but may consider it instead at a hearing designated for the specific purpose of processing affidavits in certain circumstances under Tax Code Section 41.45(n). This procedure is permissible if the property owner:

- states in the affidavit that he or she does not intend to appear at the hearing; or
- does not state in the affidavit whether he or she intends to appear in person **and** has not elected to appear by telephone conference call.

Property owners who elect to appear only by affidavit are required to file both their evidence and any argument before the hearing begins. The ARB may not consider any of these affidavits previously submitted, however, if the property owner appears in person at the hearing. [Tax Code Section 41.45(n)] To be valid, affidavits offered at an ARB hearing must meet the requirements of Tax Code Section 41.45(i). As such, these affidavits must be attested before an officer authorized to administer oaths and include the property owner's name, a description of the property, and evidence or argument.

A. Scheduling of Hearings

When a timely notice of protest is filed, the ARB is required to schedule a hearing [Tax Code Section 41.45(a)]. The ARB has no authority to refuse to schedule a hearing for a timely filed protest. Scheduling of hearings is considered a clerical function that may be performed by the staff of the appraisal district as provided by Tax Code Section 6.43(f) with direction and final decision-making by the ARB chair or an ARB member designated by the chair [Tax Code Section 41.66(o)].

If more than one protest is filed related to the same property, a single hearing on all timely filed protests related to the property must be scheduled. A single hearing for a property owned by an undivided or fractional interest, including separate interests in minerals in place, shall be scheduled to allow all owners who have filed timely protests to participate. [Tax Code Section 41.45(a)] Tax Code Section 41.71 requires that the ARB provide for hearings on protests in the evening or on a Saturday or Sunday.

B. ARB Panel Assignments and Hearing/Rehearing Schedules

If an ARB sits in panels as authorized by Tax Code Section 41.45(d), protests shall be assigned randomly, except that the ARB chair with clerical assistance from the staff of the appraisal district [see Section 6.43(f)] may consider the type of property or the protest grounds in order to assign the protest to a panel with members who have particular expertise. [Tax Code Section 41.66(k)]

Once a protest is scheduled to be heard by a specific panel, it shall not be reassigned to another panel without the consent of the property owner or a designated agent. If cause exists to reassign a panel, the owner or designated agent may agree to the reassignment or request a postponement of the hearing. The ARB is required to postpone the hearing if requested in this situation. “A change of members of a panel because of a conflict of interest, illness, or inability to continue participating in hearings for the remainder of the day does not constitute reassignment of a protest to another panel.” [Tax Code Section 41.66(k)]

Membership for ARB panels or the chairmanship of a panel may not be based on an ARB member’s voting record in previous protests. [Tax Code Section 41.66(m)]

Tax Code Section 41.45(d) provides:

If the recommendation of a panel is not accepted by the board, the board may refer the matter for rehearing to a panel composed of members who did not hear the original hearing or, if there are not at least three members who did not hear the original protest, the board may determine the protest. Before determining a protest or conducting a rehearing before a new panel or the board, the board shall deliver notice of the hearing or meeting to determine the protest in accordance with provisions of this subchapter.

C. Requests for Postponement of ARB Hearings and Determinations of Good Cause

The Tax Code recognizes a property owner’s right to a postponement in several circumstances. The Comptroller’s model procedures address how the ARB is to handle postponements allowed under Tax Code Sections 41.45(e), 41.45(e-1), 41.45(g), 41.66(h), 41.66(i), and 41.66(k). The provisions set forth in the Tax Code regarding postponement of hearings vary. Questions regarding applicability and legal requirements of the various provisions should be directed to ARB legal counsel.

In many instances a showing of “good cause” is required before the property owner’s request will be granted. However, a property owner who has not designated an agent to represent himself or herself at the hearing is entitled to one postponement to a later date, without showing good cause, so long as the request is made to the ARB before the date of the hearing. Tax Code Section 41.45(e) recognizes not only this one-time postponement but also the type for which there is no limitation in the number of postponements that may be granted: if the property owner or owner’s agent shows “good cause” for the postponement or if the chief appraiser consents to the postponement.

As mentioned previously, “good cause” under Tax Code Section 41.45(e-2) means:

a reason that includes an error or mistake that:

- (1) was not intentional or the result of conscious indifference; and
- (2) will not cause undue delay or other injury to the person authorized to extend the deadline or grant a rescheduling.

A hearing on a protest filed by a property owner who is not represented by an agent is required to be set for a time and date certain; if the hearing does not begin within two hours of the time set, the ARB is required to postpone the hearing on the property owner’s request [Tax Code Section 41.66(i)].

- Sample Procedure for Postponement Requests Under Tax Code Section 41.66(h) for Failure to Comply with Tax Code Section 41.461

The ARB is required to postpone a hearing (one time only) if the property owner requests additional time to prepare for the hearing and establishes that the chief appraiser failed to comply with Tax Code Section 41.461. Only the property owner may request a postponement for this reason. [Tax Code Section 41.66(h)]

To obtain a postponement, the property owner must request additional time to prepare for the hearing and establish that, at least 14 days before the hearing, the chief appraiser did not comply with the requirements of Tax Code Section 41.461 by:

- (1) failing to deliver a copy of the Comptroller’s publication *Property Taxpayer Remedies* to the owner, or to a designated agent if requested by the agent;
- (2) failing to inform the property owner or agent that he/she may inspect and obtain a copy of information that the chief appraiser plans to introduce at the hearing; or
- (3) failing to deliver a copy of the local ARB hearing procedures.

For compliance with subsection (a)(2), the appraisal district is not required to deliver the information it may use at the hearing to the owner 14 days before the hearing. Rather, the appraisal district is required only to inform the property owner that the information may be inspected and a copy obtained.

IV. Conduct of ARB Hearings

[Tax Code Section 5.103(b)(2), (9), and (10)]

In addition to a property owner's right to an ARB hearing, Tax Code Sections 41.45 (Hearing on Protest) and 41.66 (Hearing Procedures) as well as Tax Code Section 23.01(g) and 41.413, require the ARB to recognize certain rights in the conduct of each hearing. These rights include:

- The right of the property owner to elect to present his or her case either before or after the appraisal district presents its case. [Tax Code Section 41.66(b)]
- The right of both parties to present evidence. [Tax Code Section 41.66(b)]
- The right of both parties to examine and cross-examine witnesses and other parties. [Tax Code Section 41.66(b)]
- The right of both parties to present argument on the matters subject to the hearing. [Tax Code Section 41.66(b)]
- The right of a property owner to appear in person at the hearing (even if an affidavit was filed previously or a TCC hearing was requested). [Tax Code Section 41.45(n)]
- The right of a property owner to appear by telephone conference call or by affidavit (if certain statutory prerequisites are met). [Tax Code Section 41.45(b-1)]
- The right of the property owner (or lessee qualified under Tax Code Section 41.413) to appear by his or her agent. [Tax Code Section 41.66(c)]
- The right of a taxing unit to appear through a designated agent. [Tax Code Section 41.66(c)]
- The right of property owners representing themselves to offer an opinion of and present argument and evidence related to the market and appraised value or the inequality of appraisal of the owner's property [Tax Code Section 23.01(g)]

A. Conducting Hearings Open to the Public

- Introductory Statement

This introductory statement should be read at the beginning of each hearing:

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

The ARB or ARB panel does not have to read the statement above if the owner or agent has previously appeared before the ARB or any ARB panel for the ARB for that county that same day. If the ARB hearing is a telephone conference call, the ARB should verbally state the URL of the survey in the survey instructions.

- Exchange of Evidence

Tax Code Section 41.45(h) requires the parties to exchange, before or immediately after the ARB hearing begins, any materials they intend to use at the hearing. These materials may be produced

in either paper or electronic form. The ARB is required to retain a set of the materials offered or submitted by the parties as evidence for its records under Comptroller Rule 9.803 (relating to Requirements for Appraisal Review Board Records). The specific requirements regarding the exchange of evidence in electronic form are governed by Comptroller Rule 9.805 as well as the ARB's hearing procedures. The appraisal district and the property owner or the owner's agent may agree to exchange evidence in another manner so long as a copy of the evidence may be retained in the ARB's records.

- Audiovisual Equipment Use at the Hearing

If the appraisal district uses audiovisual equipment at ARB hearings, the appraisal district shall make available audiovisual equipment of the same general type, kind, and character for use at the hearing by the property owner or the owner's agent. The equipment made available shall be capable of reading and accepting the same types of electronic file formats and small portable electronic devices the ARB has determined are generally accepted under its hearing procedures.

Property owners and their agents may bring their own audiovisual equipment for their presentation of the evidence at ARB hearings. If the operation of audiovisual equipment at the hearing requires access to and connection with the Internet for the presentation, the parties must provide their own Internet connection and access through their own service provider. The property owner and the owner's agent may not access the appraisal district office's network or Internet connection nor any of the appraisal district office's technology or equipment other than that made available under the ARB's hearing procedures. The appraisal district and the property owner or the owner's agent may use audiovisual equipment with specifications that are different from those in the hearing procedures if the parties agree to do so in writing or verbally agree as shown in the audio recording of the hearing.

B. Conducting Hearings by Telephone Conference Call (TCC)

The ARB must conduct a protest hearing by telephone conference call, pursuant to Tax Code Section 41.45(b-1), if the property owner provides timely written notice to the ARB of the owner's intent to appear by telephone conference call. A TCC hearing also may be conducted if the ARB itself propose it and the property owner agrees. Notice to the ARB for a TCC hearing is to be provided either in the property owner's notice of protest or by a separate written notice filed with the ARB no later than 10 days before the hearing. [Tax Code Section 41.45(b-1)]

A property owner who appears by telephone conference call must offer any evidence by affidavit and it must be submitted to the ARB before the hearing begins under Tax Code Section 41.45(b). To be valid, affidavits offered at an ARB hearing must meet the requirements of Tax Code Section 41.45(i). As such, these affidavits must be attested before an officer authorized to administer oaths and include the property owner's name, a description of the property, and evidence or argument. The ARB may not consider any of these affidavits previously submitted, however, if the property owner appears in person at the hearing. [Tax Code Section 41.45(n)]

A hearing the ARB conducts by telephone conference call must be held in a location equipped with telephone equipment that allows each board member and the other parties to the protest who are present at the hearing to hear the property owner offer argument under Tax Code Section 41.45(b-2)(2). The ARB shall provide a telephone number for the property owner to call to participate in the hearing under Tax Code Section 41.45(b-2)(1). A property owner is

responsible, however, for providing access to a telephone conference call hearing to another person that the owner invites to participate in the hearing under Tax Code Section 41.45(b-3). At the scheduled hearing time, property owners who elected TCC hearings may present argument to the ARB.

C. Conducting Hearings Closed to the Public

ARB hearings are open to the public according to Tax Code Section 41.66(d). Exceptions exist in subsections (d-1) and (d-2). Notwithstanding Government Code Chapter 551 (the Open Meetings Act), the ARB is required to conduct a hearing that is closed to the public, if the property owner or the chief appraiser intends to disclose proprietary or confidential information at the hearing to assist the ARB in making its determination **and** if there is a joint motion by the property owner and the chief appraiser. The proprietary or confidential evidence presented at the hearing giving rise to the closed hearing is that information obtained under Tax Code Section 22.27.

- Sample Procedure for Conducting Hearings Closed to the Public

Prior to the scheduled hearing time, a joint motion by the chief appraiser and the property owner must be filed with the ARB in writing to request that the hearing be closed because of an intent to disclose proprietary or confidential information that will assist the ARB in determining the protest. The hearing shall be conducted in the manner required by Government Code Chapter 551, Subchapter E, relating to closed meetings.

The ARB or panel chair shall convene the hearing as an open meeting and then announce that the meeting will be closed to the public as permitted by Tax Code Sections 41.66(d) and (d-1). Only the parties to the protest, including witnesses, and the ARB members are permitted to stay in the hearing room. The same order as for hearings open to the public should be followed.

The secretary of the ARB is responsible for ensuring that a separate tape recording or certified agenda is kept for the closed meeting according to the requirements of Government Code Section 551.103. The proprietary or confidential evidence presented at the hearing giving rise to the closed hearing is confidential according to Tax Code Section 22.27 shall be stamped as “confidential” and retained separately in the ARB records. The confidentiality of the documents and their content must be maintained by the ARB members. After deliberation, the ARB shall reconvene in open meeting and vote or take final action on the protest deliberated in the closed meeting (see Government Code Section 551.102).

D. Right to Examine and Cross-Examine Witnesses or Other Parties

Tax Code Section 41.66(b) states that “each party to a hearing is entitled to offer evidence, examine or cross-examine witnesses or other parties, and present argument on the matters subject to the hearing.” The ARB may not prohibit this entitlement in any way; however, it may enforce time limits and dictate the order of ARB hearings for witness examination and cross-examination.

The model procedures for conducting hearings provide for the orderly presentation of evidence and examination and cross-examination of witnesses or other parties.

E. Party’s Right to Appear by an Agent

Tax Code Section 41.66(c) provides that “a property owner who is entitled as provided by this chapter to appear at a hearing may appear by himself or by his agent.” The representation of property owners at protest hearings is governed by Tax Code Section 1.111 and Comptroller Rule 9.3044. Subsection (i) of Tax Code Section 1.111 requires an ARB to accept and consider a motion or protest filed by an agent if an agency authorization is filed at or before the hearing on the motion or protest. The ARB may not require that an agency authorization be filed at an earlier time. In addition, subsection (g) states that “an appraisal district, appraisal review board, or taxing unit may not require a person to designate an agent to represent the person in a property tax matter other than as provided by this section.”

In addition, under Tax Code Section 41.413, if the property owner does not file a protest, a person leasing the property who is contractually obligated to reimburse the property owner for taxes imposed on the property is entitled to protest before the ARB the appraised value of the property. These lessees may designate another person to act as their agent in the manner provided by Tax Code Section 1.111. These designated agents have the same authority and are subject to the same limitations as an agent designated by a property owner.

V. Evidence Considerations

[Tax Code Section 5.103(b)(8), (11), and (13)]

A. A Party’s Right to Offer Evidence and Argument

Each party to a hearing is entitled to offer evidence, examine or cross-examine witnesses or other parties, and present argument on the matters subject to the hearing. [Tax Code Section 41.66(b)]

The Tax Code requires that all testimony be given under oath and before an individual testifies, an ARB member is to swear in the witness under Tax Code Section 41.67(a).

A property owner, attorney, or agent offering evidence or argument in support of a protest concerning appraised or market value or unequal appraisal is not subject to Occupations Code Chapter 1103 (the Texas Appraiser Licensing and Certification Act) unless the person states they are offering the evidence or argument as a person holding a license or certificate under that statute. [Tax Code Section 41.66(l)]. The model procedures provide for inquiry by the ARB as to the applicability of the Texas Appraiser Licensing and Certification Act. For example, if a professionally licensed fee appraiser also holds a property tax consultant certificate or a real estate broker or sales agent license, this professional is required by law to state the capacity (the license or certification) under which he or she is appearing before the ARB in that case.

Tax Code Section 41.67(b) provides that copies of documentary evidence may be admitted if original documents are not readily available. A party is entitled to an opportunity to compare a copy with the original document on request.

Tax Code Section 41.67(c) provides that official notice may be taken of any fact judicially cognizable. A party is entitled to an opportunity to contest facts officially noticed.

B. Prohibition of Consideration of Information Not Provided at the ARB Hearing

Tax Code Section 41.66(e) prohibits an ARB from considering “any appraisal district information on a protest that was not presented to the appraisal review board during the protest hearing.” For example, in order for any appraisal district record (i.e., appraisal roll history, appraisal cards) to be presented or considered by the ARB, it must be presented as evidence by a party, party representative, or witness (e.g. chief appraiser, appraisal district representative, property owner, or agent) at the protest hearing.

The role of the ARB in a hearing is to receive, consider, and make determinations based on evidence provided at the hearing, and follow the law in doing so. No provision in the Tax Code provides for the ARB to consider any evidence that is not presented during the hearing. In fact, the Tax Code includes only provisions that prohibit consideration of certain information – like Tax Code Section 41.66(e) discussed above and provisions regarding ex parte communications. Each ARB should discuss with its legal counsel whether the ARB should establish local procedures to supplement the model procedures to address issues that might arise in this context.

C. Exclusion of Evidence Required by Tax Code Section 41.67(d):
Failure to Comply with Tax Code Section 41.461

Tax Code Section 41.67(d) states:

Information that was previously requested under Section 41.461 by the protesting party that was not made available to the protesting party at least 14 days before the scheduled or postponed hearing may not be used as evidence in the hearing.

Tax Code Section 41.461(a)(2), in particular, requires that at least 14 days before a hearing on a protest, the chief appraiser shall “inform the property owner that the owner or the agent of the owner may inspect and may obtain a copy of the data, schedules, formulas, and all other information the chief appraiser plans to introduce at the hearing to establish any matter at issue.”

For evidence to be excluded under Tax Code Section 41.67(d), the property owner must establish that: (1) he or she timely requested the information; and (2) the appraisal district did not make available as required the information sought to be excluded.

If the property owner can not show he or she timely requested the information for purposes of exclusion of the evidence under Tax Code Section 41.67(d), a one-time postponement of the hearing may be granted under Tax Code Section 41.66(h) if the appraisal district failed to comply with Tax Code Section 41.461 by not delivering the required *Property Taxpayer Remedies* pamphlet or local hearing procedures or not providing notice that the evidentiary materials were available.

It is important to note that Tax Code Section 41.461 does not require the delivery of the information that the chief appraiser plans to introduce at the hearing, only that the appraisal district notify the property owner or agent that the information is available for inspection and copying. The only provisions in Tax Code Section 41.461 requiring delivery by the chief appraiser to the property owner 14 days before the hearing are those pertaining to the Comptroller’s publication *Property Taxpayer Remedies* and the local ARB hearing procedures. [Tax Code Section 41.461(a)(1) and (3)]

VI. Other Issues

[Tax Code Section 5.103(b)(17)]

The model hearing procedures also may include “any other matter related to fair and efficient appraisal review board hearings.” In addition to the model procedures related to this section, two additional issues are addressed here that ARBs may wish to discuss with legal counsel to determine if supplemental local procedures are warranted or might be helpful: weighing evidence and orders determining protest.

A. Weighing Evidence

1. Burden of Proof Requirements in the Tax Code

In addressing which party is assigned the burden of proof, the Tax Code makes clear that if the party with the burden fails to meet its burden, the protest shall be determined in favor of the other party, *e.g.*, Tax Code Sections 41.43(a), (a-1), (a-4), and (d).

In most tax cases, the burden of proof is by a “preponderance of the evidence.” In protests involving the appraised value or unequal appraisal of the property the appraisal district has the burden of establishing the value of property by a preponderance of the evidence presented at the hearing under Tax Code Section 41.43(a). There is an exception to this rule, however, that typically applies to protests regarding the appraised value or unequal appraisal of tangible personal property used for the production of income. If the property owner fails to deliver, before the date of the hearing, the required rendition statement, property report or information the chief appraiser requested under Chapter 22, the property owner has the burden of proof by a preponderance of the evidence. [Tax Code Section 41.43(d)]

Protests involving other matters that can be the subject of a protest, such as ownership, exemptions and entitlement to special appraisal, require that the protesting party (rather than the appraisal district) establish its position by a preponderance of the evidence. *E.g.*, *North Alamo Water Supply Corp. v. Willacy County Appraisal Dist.*, 804 S.W.2d 894, 899 (Tex.1991).

Three exceptions to the “preponderance of the evidence” standard exist under Tax Code Sections 41.43(a-1) and (a-3) (“clear and convincing evidence”) as well as 23.01(e) (“substantial evidence”), in these limited circumstances if the required conditions are met:

- a. For property with a market or appraised value of \$1 million or less, the appraisal district’s burden of proof shifts to the “clear and convincing evidence” standard under Tax Code Section 41.43(a-1) but only if the following conditions are met:
 - at least 14 days before the hearing the property owner delivers to the chief appraiser, and files with the ARB, a USPAP compliant appraisal report prepared within six months of the hearing which meets all other requirements of Tax Code Section 41.43(a-1) and (a-2).
- b. For property whose appraised value was lowered for the previous tax year as a result of a protest or other legal proceeding (*i.e.*, arbitration or lawsuit) and not by agreement of the parties, the appraisal district’s burden of proof shifts for a protest

in the subsequent tax year to the “clear and convincing evidence” standard under Tax Code Section 41.43(a-3) but only if the following conditions are met:

- at least 14 days before the hearing, the property owner delivers to the chief appraiser and files with the ARB the following information:
 - for protests regarding the property’s appraised or market value, information, such as income and expense statements or information regarding comparable sales, that is sufficient to allow for a determination of the appraised or market value of the property; and
 - for protests regarding unequal appraisal of the property, information that is sufficient to allow for a determination whether the property was appraised unequally.
- c. For property whose appraised value was lowered under Subtitle F for the previous tax year as a result of a protest or other legal proceeding (*i.e.*, arbitration or lawsuit) and not by agreement of the parties, the appraisal district has the burden to reasonably support an increase in value for a protest in the subsequent tax year “by substantial evidence when all of the reliable and probative evidence in the record is considered as a whole” under Tax Code Section 23.01(e).

If the previous year’s value was lowered based on a claim of unequal appraisal, the chief appraiser may satisfy the “substantial evidence” burden by “showing that the inequality in the appraisal of property has been corrected with regard to the properties that were considered in determining the value of the subject property” in the previous year.

2. Standards for Burden of Proof

Pattern jury charges in Texas provide one source of guidance concerning the meaning of two different burden of proof standards: “preponderance of the evidence” and “clear and convincing evidence.”

a. Preponderance of the Evidence

The term “preponderance of the evidence” means the greater weight of credible evidence presented in this case. A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that a fact is more likely true than not true.

b. Clear and Convincing Evidence

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

c. Substantial Evidence

The Tax Code does not address what the “substantial evidence” standard means except to provide one example under Tax Code Section 23.01(e). In an unequal appraisal case when the property’s appraised value was lowered the previous year under Subtitle F, the chief appraiser may satisfy this standard “by presenting evidence showing that the inequality in the appraisal of property has been corrected with regard to the properties that were considered in determining the value of the subject property.”

The legal term “substantial evidence” typically refers to the standard of review a court is to apply in reviewing an administrative agency’s decision under the Texas Administrative Procedure Act (APA), Government Code Chapter 2001. Generally speaking, under the APA, if a court determines the agency’s decision is “reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole,” it will be upheld. [See, Government Code Section 2001.174(2)(E)]

Texas court decisions, including those from the state supreme court, have explained what “substantial evidence” means. In *City of Dallas v. Stewart*, 361 S.W.3d 562, 566 (Tex. 2012), the state’s highest appellate court described it as “more than a mere scintilla,” but less than a preponderance of the evidence:

Substantial evidence review is limited in that it requires "'only more than a mere scintilla,' to support an agency's determination." *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 566 (Tex. 2000) (quoting *R.R. Comm'n v. Torch Operating Co.*, 912 S.W.2d 790, 792-93 (Tex. 1995)); see also W. Wendell Hall, *Standards of Review in Texas*, 38 St. Mary's L.J. 47, 290-92 (2006) (describing substantial evidence review as applied to Texas administrative agencies). Substantial evidence review "gives significant deference to the agency" and "does not allow a court to substitute its judgment for that of the agency." *Torch Operating*, 912 S.W.2d at 792. As such, "the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence." *Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984).

Put another way, under this standard, if the evidence, taken as a whole, is such that reasonable minds could have reached the same conclusion as the appraisal district, then the appraisal district’s value or determination should be accepted. *Webworld Marketing Group, L.L.C. v. Thomas*, 249 S.W.3d 19, 25 (Tex. App.—Houston [First], 2007).

3. ARB Consideration

ARBs are to consider these standards in applying the law and in drafting supplemental procedures. In determining whether the burden of proof has been met, the ARB must weigh all the evidence presented by both parties. This responsibility requires that the ARB consider the credibility and reliability of each witness as well as the quality of the evidence each presents. To make its determination, the ARB must rely solely on the evidence presented at the hearing and then weigh each party’s evidence to make its decision.

B. Orders Determining Protest

Tax Code Section 41.47(a) states that “the appraisal review board hearing a protest shall determine the protest and make its decision by written order.”

Each issue that is the subject of the protest must be determined separately by the ARB and each determination should be reflected on the written order determining protest. In addition, the ARB must state in the written order the appraised value of the property as shown on the appraisal records submitted to the ARB by the chief appraiser under Tax Code Section 25.22 or 25.23 as well as the value the ARB determined from the protest hearing.

A model order determining protest is prepared by the Comptroller’s office and posted on the Comptroller’s website (Form 50-221). The ARB should provide input to the appraisal district staff, if utilized, in the preparation of the written order determining protest to ensure that each matter protested and determined is shown.