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19 THE SUPERIOR COURT OF THE STATE OF ARIZONA

20 IN THE ARIZONA TAX COURT

<p>21 State of Arizona, ex rel. 22 Mark Brnovich, Attorney General, 23 24 Plaintiff, 25 v. 26 Arizona Board of Regents, 27 Defendant,</p>	<p>No. TX2019-000011 MOTION TO DISMISS NUMBER 2 (FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES) (Assigned to the Hon. Christopher Whitten)</p>
<p>28 Paul D. Petersen, in his official capacity as Maricopa County Assessor, and Royce T. Flora, in his official capacity as Maricopa County Treasurer, Relief-Defendants.</p>	

1 **MOTION**

2 Pursuant to Arizona Rules of Civil Procedure 12(b)(1) and Rule 12(c), the Arizona
3 Board of Regents (“the Board”) moves to dismiss all three counts of the Attorney General’s
4 (“AG”) complaint on the grounds that the Court lacks subject matter jurisdiction because
5 neither the Board nor the County Assessor has exhausted its administrative remedies for the
6 reasons set forth in the memorandum below.

7 **MEMORANDUM**

8 The Arizona Legislature has prescribed a clear process by which a property owner
9 and, in certain circumstances, the County Assessor and County Treasurer, may contest a
10 property’s valuation or classification for tax purposes. The AG has attempted to turn that
11 process on its head by suing the very people authorized to bring such an action—before
12 they have acted or even had an opportunity to act.¹ The AG alleges that a proposed
13 transaction in which the Board would lease its land to Omni Tempe, LLC (“Omni”) would
14 violate article IX, section 2(12) of the Arizona Constitution and A.R.S. § 15-1625(B)(4)
15 and prematurely requests the Court to classify the Omni Project as taxable. [Compl. ¶¶ 60–
16 66, 81–82, 98–101, 110–12]. Because the AG’s complaint bypasses established
17 administrative procedures at a time when neither the Board nor the County Assessor has
18 exhausted its administrative remedies, the Court lacks subject matter jurisdiction to hear
19 this case.

20 **ARGUMENT**

21 **A. The AG’s complaint must be dismissed for failure to exhaust**
22 **administrative remedies.**

23 The Tax Court is deprived of subject matter jurisdiction when a lawsuit is filed
24 without first exhausting administrative remedies. *See, e.g., Mountain View Pioneer Hosp.*

25 ¹ What is more, the AG would not even be a party to the administrative procedures
26 involving the property owner and the County Assessor because no statute authorizes him to
27 initiate, prosecute, or defend cases under those circumstances. *See Ariz. State Land Dep’t*
28 *v. McFate*, 87 Ariz. 139, 144, 348 P.2d 912, 915 (1960) (noting that, while “there are
occasions on which the [AG] may initiate proceedings on behalf of the State, and may even
appear in opposition to a particular State agency, . . . these instances are dependent upon
specific statutory grants of power”) (emphasis added).

1 *v. Emp't Sec. Comm'n*, 107 Ariz. 81, 85, 482 P.2d 448, 452 (1971) (noting that the failure
2 to exhaust administrative remedies deprives the Tax Court of subject matter jurisdiction);
3 *McNutt v. Dep't of Revenue*, 196 Ariz. 255, 265 ¶ 35, 995 P.2d 691, 701 (App. 1998) (same);
4 *Hamilton v. State*, 186 Ariz. 590, 593, 186 Ariz. 731, 734 (App. 1996) (same); *Estate of*
5 *Bohn v. Waddell*, 174 Ariz. 239, 245–46, 848 P.2d 324, 330-31 (App. 1992) (same). Here,
6 the AG has not even allowed the underlying administrative review process for property tax
7 determinations to have an *opportunity* to be followed. The completion of the administrative
8 process is essential to the creation of an administrative record upon which judicial review
9 can be conducted. The AG's decision to not allow the prescribed process to run its course
10 is a mistake that deprives the Tax Court of subject matter jurisdiction and precludes this
11 lawsuit from proceeding further.

12 **1. The Legislature established a mandatory administrative process**
13 **to challenge property tax valuation and exemption classifications.**

14 The Arizona Legislature has designated two distinct administrative processes by
15 which property tax valuation and classification determinations are made. Neither permits
16 the AG to intervene in the administrative tax assessment determination process at this
17 premature stage.

18 **a. No Notice of Value has been issued for the yet-to-be-**
19 **constructed Omni improvements.**

20 Before any challenge to property tax valuation or classification may be brought, the
21 Assessor must first issue a Notice of Value to the property owner or person in possession.
22 A.R.S. § 42-19006. If the property owner (or person in possession) disagrees with the
23 Notice of Value, it may either file an administrative appeal or seek relief directly from the
24 Tax Court. The Assessor may also initiate administrative challenges in certain
25 circumstances, as further described below. Therefore, if and when the Omni Project is
26 completed, the property owner—whether it be the Board as landowner, or Omni as owner
27 of the improvements—and the Assessor would at that point be the only two entities legally
28 authorized to initiate an administrative appeal process.

1 As the AG recognizes, no title has been transferred to date for the Omni site, and no
2 hotel or convention center has been built. [Compl. ¶¶ 60–69, 76, 81, 82, 98]. Thus, the
3 Assessor has not even had an opportunity to issue a Notice of Value for the project, and
4 neither party has had an opportunity to initiate, let alone exhaust, its administrative remedies
5 as to such an assessment. The AG cannot short-circuit the designated administrative
6 process and intervene at this premature juncture. His attempt to do so deprives the Court
7 of subject matter jurisdiction to hear his suit.

8 **b. Administrative and Tax Court Appeal Process.**

9 Following the issuance of a Notice of Value, a property owner may initiate an
10 administrative appeal process if it disagrees with the Assessor’s opinion of a property’s
11 valuation or classification. An administrative appeal is proper in the context of issues
12 requiring “discretion and judgment.” Arizona Department of Revenue, *2019 Personal*
13 *Property Manual* 89 (2019). Appropriate issues for an administrative appeal are “matters
14 of opinion on the part of the assessor.” *Id.*

15 To initiate the process, the property owner may file a petition to the Assessor within
16 30 days of his decision. A.R.S. § 42-19051(A). The Assessor must then rule on the petition
17 within 20 days. A.R.S. § 42-19051(B). If he rejects the petition, the Assessor must deliver
18 written notice of the grounds for his decision. A.R.S. § 42-19051(D). A petitioner whose
19 request is denied may appeal within 20 days to the State Board of Equalization.² A.R.S.
20 § 42-19052(A). If ultimately dissatisfied with the State Board of Equalization’s ruling,
21 either the property owner or the Assessor may appeal to the Tax Court within 60 days.
22 A.R.S. § 42-16203(C).

23 Alternatively, a property owner who is dissatisfied with the Assessor’s valuation or
24 classification may appeal directly to the Tax Court, bypassing the administrative appeal
25 process. A.R.S. § 42-16201(A). This can be done “regardless of whether the person has
26

27
28 ² A county board of equalization, rather than the State Board, may adjudicate matters
for properties outside of Maricopa and Pima counties. *See* A.R.S. § 42-16102(A).

1 exhausted the administrative remedies under this chapter.” *Id.* Note that this option is
2 available exclusively to the property *owner*—in this case, the Board.

3 **c. Error Reconciliation Process.**

4 Relatedly, either the taxpayer or the Assessor may initiate an administrative process
5 in the case of an alleged error in a property assessment or collection of taxes. A.R.S. §§ 42-
6 16251–42-16258. An “error” is specifically defined by statute as “any mistake in assessing
7 or collecting property taxes” resulting from various causes. A.R.S. § 42-16251(3). As
8 opposed to the administrative process described above, errors are the result of mathematical
9 or other objective mistakes, rather than issues of discretion.

10 If the Assessor determines that real property has been assessed improperly due to a
11 property tax error, the Assessor must send the taxpayer a Notice of Proposed Correction.
12 A.R.S. § 42-16252(A). Within 30 days, the taxpayer may file a written response “to either
13 consent to or dispute the proposed correction of the error and to state the grounds for
14 disputing the correction.” A.R.S. § 42-16252(C). The taxpayer may appeal any valuation
15 or legal classification issue that arises from the proposed correction. A.R.S. § 42-16252(D).
16 If the parties ultimately disagree on all or part of the proposed correction, the taxpayer may
17 file a petition with the State Board of Equalization within 30 days. The State Board of
18 Equalization will then hold a hearing within 30 days and issue a written decision. A.R.S.
19 § 42-16252(G). A dissatisfied party may *then* appeal the decision to Tax Court within 60
20 days. A.R.S. § 42-16252(H).

21 On the other hand, if a taxpayer believes that its property has been improperly
22 assessed as result of an error, the taxpayer may file a Notice of Claim with the Assessor.
23 A.R.S. § 42-16254(A). Within 60 days, the Assessor may file a written response either
24 consenting to or disputing the error. A.R.S. § 42-16254(C). If the parties fail to agree, the
25 taxpayer may file a petition with the State Board of Equalization within 90 days of the
26 meeting. The State Board of Equalization will then hold a hearing within 30 days and issue
27 a written notice. A.R.S. § 42-16254(F). A dissatisfied party may then appeal to Tax Court
28 within 60 days. A.R.S. § 42-16254(G). The statutory scheme specifically “does not

1 authorize an independent review of the overall evaluation or legal classification of property
2 that is not the result of an error defined in section 42-16251.” A.R.S. § 42-16256(D).

3 The County Treasurer may also request the Assessor to determine the valuation of
4 the property if he determines that any property has been omitted from the roll. A.R.S. § 42-
5 16258(A). The taxpayer is notified of the proposed correction in that case and may appeal
6 to the Department of Revenue, and subsequently to Tax Court. A.R.S. § 42-16258(D).

7 **2. The parties have not exhausted—or even been in a position to**
8 **exhaust—their administrative remedies.**

9 Because neither the Board nor the Assessor has yet exhausted, or even had the
10 opportunity to exhaust, the statutorily-prescribed administrative process, the AG may not
11 unilaterally ignore this process as to how various independent government agencies *might*
12 act and carry out their authorized duties. Further, the AG’s attempt to intervene at this
13 premature stage—before the Board and the Assessor have the opportunity to exhaust their
14 administrative remedies—deprives the Court of subject matter jurisdiction to hear this suit.

15 **a. The AG must first use the administrative process to**
16 **challenge the Omni Project’s potential tax exemption.**

17 The exhaustion of administrative remedies doctrine applies when there is an “express
18 statutory mandate” requiring issues to be resolved through a specific administrative process
19 before seeking judicial review. *See Medina v. Ariz. Dep’t of Transp.*, 185 Ariz. 414, 417,
20 916 P.2d 1130, 1133 (App. 1995). “A party’s failure to resort to and exhaust administrative
21 remedies deprives the superior court of jurisdiction to hear the party’s claim.” *McNutt*, 196
22 Ariz. at 265 ¶ 35, 995 P.2d at 701; *see also Mountain View Pioneer Hosp.*, 107 Ariz. at 85,
23 482 P.2d at 452 (similar); *Hamilton*, 186 Ariz. at 593, 925 P.2d at 734 (similar); *Waddell*,
24 174 Ariz. at 245–46, 848 P.2d at 330-31 (similar). There is no statutory authority for the
25 AG to ignore this mandated and well-established administrative process.

26 Had the Legislature intended to authorize the AG to intervene at this stage, it
27 certainly could have. “[W]here the legislature intended to authorize the [AG] to initiate
28 proceedings, it has so provided in clear terms.” *Ariz. State Land Dep’t v. McFate*, 87 Ariz.
139, 146, 348 P.2d 912, 916 (1960); *see also People ex rel. Spitzer v. Grasso*, 893 N.E.2d

1 105, 110 (N.Y. 2008) (dismissing claims on grounds that New York AG improperly
2 attempted to bypass statutory scheme in challenging the compensation of the former
3 chairman of the New York Stock Exchange: “The [AG] may not circumvent that [statutory]
4 scheme, however unreasonable that compensation may seem on its face. To do so would
5 tread on the Legislature’s policy-making authority.”). Such powers *must* be specifically
6 authorized, in fact, as the AG “has no common law powers; whatever powers are possessed
7 by the holder of that office must be found in the Arizona Constitution or in the Arizona
8 statutes.” *Gershon v. Broomfield*, 131 Ariz. 507, 508, 642 P.2d 852, 853 (1982).

9 Certain statutory schemes specifically permit an aggrieved individual *and* the AG to
10 file a civil action. *See, e.g.*, A.R.S. § 41-1492.08–.09 (both an “aggrieved person” and the
11 AG may file suit on basis of discrimination under the Public Accommodation and Services
12 chapter); A.R.S. § 49-264 (a person “that has an interest that is or may be adversely affected
13 by a violation” of the Water Quality Control chapter or related rulings may commence a
14 civil action, unless the AG has already “commenced and is diligently prosecuting a civil
15 action in the superior court”); A.R.S. § 33-424(B) (real property disclosure report violation
16 is “subject to enforcement through private action and prosecution by the attorney general
17 or by the county attorney of the county in which the real property is located”); A.R.S. § 44-
18 1698.02(J) (violation of Consumer Reporting Agencies and Fair Credit Reporting section
19 “is subject to enforcement through a private action and by the attorney general”). Courts
20 have also permitted the AG to sue when a statutory scheme authorizes “*any* person” to file
21 an action. *See State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 597, 667 P.2d 1304, 1312
22 (1983). But the property tax statutes do not permit “any” person to file suit, and they do
23 not permit the AG to bring suit on his own initiative at the time of his choosing and disrupt
24 the statutorily authorized administrative process. Instead, exclusively the property owner
25 and (in some circumstances) the Assessor may initiate administrative proceedings and
26 ultimately an action in Tax Court.

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b. The AG cannot justify bypassing the administrative process.

There is good reason why the Legislature gave the Assessor (and in some cases the State Board of Equalization) the initial say-so over property tax disputes. An administrative board or agency is designed “to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.” *Waddell*, 174 Ariz. at 246 (quoting *Parisi v. Davidson*, 405 U.S. 34, 37 (1972)). The AG’s complaint ignores this long-established process—of which he is clearly aware, by bringing this action in Tax Court. The AG asks this Court to ignore a designated and orderly process by weighing-in cold on the Board’s future potential tax exemption with respect to the Omni Project, totally deprived of the subject-matter expertise and corresponding administrative record that would be developed through the standard administrative review process.

The justification for short-circuiting administrative review cannot lie in the fact that constitutional claims are allegedly at issue. [See Compl. ¶¶ 15–19, 27, 79–86, 89–91, 93]. Exhaustion of administrative remedies plays a critical role in constitutional cases. See *Moulton v. Napolitano*, 205 Ariz. 506, 514 ¶ 22, 73 P.3d 637, 646 (App. 2003) (“[I]f . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued.”) (second alteration in original) (quoting *Pub. Util. Comm’n of Cal. v. United States*, 355 U.S. 534, 539–40 (1958)); *Third & Catalina Assocs. v. City of Phoenix*, 182 Ariz. 203, 207, 895 P.2d 115, 120 (App. 1994) (noting that “exhaustion of administrative remedies is of particular importance when the case raises constitutional issues” because it may “reliev[e] the courts of the need to decide” such cases). It is also no defense that the AG merely seeks declaratory relief. “[T]he declaratory judgment procedure may not be used to preempt or prejudge issues that are committed for initial decision to an administrative body.” *Tanner Cos. v. Ariz. State Land Dep’t*, 142 Ariz. 183, 188, 688 P.2d 1075, 1080 (App. 1984).

1 The AG does not allege that he allowed the exhaustion of any administrative process
2 before rushing to court. [Compl. ¶¶ 60, 76, 81–84, 90, 98, 108 (acknowledging the
3 contemplated hotel has not been leased to Omni, much less been constructed yet)]. By
4 asking the Court to order “the Maricopa County Assessor to place the Omni Property on
5 the ad valorem tax roll for Maricopa County . . . if a hotel and convention center is built on
6 the Omni Property,” [*id.* at 18, ¶ A (emphasis added)], the AG at least acknowledges that
7 the process hinges on the Assessor and the administrative process upon which the
8 Assessor’s decisions are reviewed and disputed. The complaint represents an attempted
9 end-around the Assessor’s decision-making authority and the resulting administrative
10 process to review that exercise of authority.

11 Instead of waiting for the Assessor to classify the completed Omni Project as tax
12 exempt, the AG flips the administrative process on its head by asking *the Court* to
13 precipitously classify the Project as taxable. This will force the party aggrieved by the
14 Court’s decision to take a judicial appeal pursuant to Title 12, Chapter 12 instead of an
15 administrative appeal pursuant to Title 42, Chapter 16. The Legislature could not have
16 intended a result where the party who eschews the administrative process is rewarded with
17 the instant gratification of judicial review. *See Minor v. Cochise Cty.*, 125 Ariz. 170, 172,
18 608 P.2d 309, 311 (1980) (“Where a board is specifically empowered to act by the
19 Legislature, the board should act before recourse is had to the courts.”).

20 Without a required administrative decision from the County Assessor (and
21 potentially the State Board of Equalization), the Court lacks subject matter jurisdiction to
22 entertain this lawsuit. *See* A.R.S. § 42-16203. The AG cannot ignore the exhaustion of
23 administrative remedies doctrine. The Court should dismiss this matter pending completion
24 of the Omni Project, the hotel and convention center lease to Omni, and the resulting
25 decision from the County Assessor.

26 **ATTORNEY FEES NOTICE**

27 The Board requests reasonable attorney fees as the successful party in this action
28 under A.R.S. § 12-348.01.

1 **CONCLUSION**

2 If and when the Omni Project progresses, the Assessor may issue a Notice of Value
3 to the property owner or person in possession. A.R.S. § 42-19006. At that time, the
4 property owner—whether it be the Board or Omni—may initiate an administrative appeal
5 process or action in this Court if it disagrees with the Assessor’s opinion of the property’s
6 valuation or classification. *See* A.R.S. § 42-19051. And if there is an error in the property
7 assessment or collection of taxes, either the Assessor or the taxpayer may initiate an
8 administrative process to remedy it. A.R.S. §§ 42-16251–42-16258. None of these
9 processes could even *potentially* have been exhausted at this stage, however, for a
10 transaction that has not closed, a lease that has not been executed, and a hotel and conference
11 center that have not been built. [Compl. ¶¶ 67, 68, 81, 82, 98, 108, 112]. Because the Board
12 and the Assessor have not exhausted their administrative remedies, the Court lacks subject
13 matter jurisdiction to hear this case.

14
15 Dated: March 8, 2019

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E-filed with the Court this March 8, 2019
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