

CAUSE NO. C2018-1576B

DOUGLAS WALTER KIRK,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	COMAL COUNTY, TEXAS
	§	
COMAL APPRAISAL DISTRICT	§	
	§	
Defendant.	§	207 TH JUDICIAL DISTRICT

AMENDED SECOND MOTION TO COMPEL INSPECTION, AND FOR SANCTIONS

Now comes the Defendant, Comal Appraisal District, and moves this court to enforce its prior directive of April 18, 2019, compel an inspection of the property that is the subject of this litigation, and sanction the Plaintiff for his contempt of court and abuse of the discovery process.

On April 18, 2019, on Motion of the Defendant, this Court directed the Plaintiff to allow the Defendant and its appraiser to inspect the property that is the subject of this litigation at a date agreed upon by the parties. The Court did not issue a written order, but clearly directed the Plaintiff to allow the inspection within limitations of who would be there and how long. The Court specifically refrained from ordering a weekend inspection as requested by the Plaintiff. The Plaintiff has failed and refused to comply with that directive. The Plaintiff has responded with the attached communication demanding far more than allowed by the Court or than any reasonable person might expect, inclusive of extensive invasion of the privacy of the participants, non-disclosure agreements, and exorbitant fees inclusive of \$4560 for deactivation of security, \$600 for an inspection security team, \$3000 for a liability insurance policy, \$500 deposit for damages, a \$10,000 surety bond for any damages done to be determined solely by the Plaintiff. He also demanded multiple other unreasonable and unnecessary limitations. See the attached exhibit.

As has been previously established by the Defendant, the inspection is reasonably necessary to the Defendant's preparation of this case.

Therefore, the Defendant requests the Court, pursuant to TEX. R. CIV. P. 215.2, to:

1. Enter an order directing the Plaintiff to allow the Defendant to inspect the subject property on a date certain, without any of the conditions set by the Plaintiff, or any others that he may seek to impose in the future;
2. Hold the Plaintiff in contempt of court for failing to comply with the Court's April 18, 2019 directive;
3. And, impose sanctions against the Plaintiff by awarding the Defendant all attorney fees incurred in the bringing of the first motion to compel and this motion.

Respectfully submitted,

LOW SWINNEY EVANS & JAMES, PLLC
623 S. Baker Cir.
Leander, Texas 78641
Phone (512) 379-5800
Fax (512) 367-5932

=

/s/ Kirk Swinney

By: _____

Kirk Swinney
State Bar No. 19588400
kswinney@lsejlaw.com
Ryan L. James
State Bar No. 24078731
rjames@lsejlaw.com
Peter William Low
State Bar No. 12619300
peterwilliamlow@lsejlaw.com
James R. Evans, Jr.
State Bar No. 06721500
jevans@lsejlaw.com

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF CONFERENCE

I certify that I have attempted to confer, with the Plaintiff in regard to the above referenced Motion to Compel Inspection and for Sanctions but have been unable to secure satisfactory responses to that discovery.

/s/ Kirk Swinney

Kirk Swinney

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been electronically forwarded to the Plaintiffs' counsel of record, on the 9th day of July, 2019, properly addressed as follows:

Douglas Walter Kirk
dougkirk@gvtc.com

/s/ Kirk Swinney

Kirk Swinney

CAUSE NO. C2018-1576B

DOUGLAS WALTER KIRK,
Plaintiff,

§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

v.

COMAL COUNTY, TEXAS

COMAL APPRAISAL DISTRICT
Defendant.

207TH JUDICIAL DISTRICT

AFFIDAVIT OF ATTORNEY FEES

Before me, the undersigned authority, on this date personally appeared Kirk Swinney, known to me, and on oath testified as follows:

My name is Kirk Swinney. I am over eighteen years of age and competent to make this affidavit. The matters stated herein are true and correct and within my personal knowledge.

I am the attorney for the Comal Appraisal District in this action, and am licensed to practice law in the state of Texas. I have been practicing as such for 35 years. For over 29 years, I have devoted my practice to the representation of appraisal districts. Partner Ryan James has devoted his practice to representing appraisal districts for six years.

The attached records are true and correct copies of entries of attorney fees which I, or attorneys and legal assistants under my direction, have charged to the Comal Appraisal District in the bringing of a motion to compel inspection, the hearing thereon, the attempts thereafter to arrange the inspection, and the bringing of the second motion to compel the inspection in the above styled and numbered cause of action. All of the same were necessitated by the actions of the Plaintiff in resisting inspection of his property. The listed charges are accurate and complete up through the date of this affidavit.

All of the described charges are reasonable and necessary, being well within standard hourly rates for attorneys of our level of experience and practice as well as for legal work in Comal County, Texas. The Defendant agreed to compensate my firm at the rate of \$180 per hour for experienced attorneys. All legal assistants employed in the defense of this case have been properly trained and licensed. They have appropriate knowledge of the legal system. They were supervised by me, or my experienced partner, Ryan James, in performing tasks which were reasonable and necessary and traditionally done by an attorney.

We spent 43 hours in the bringing of a motion to compel, the hearing on the same, the attempts to arrange the inspection, and the bringing of the second motion to compel. All expenses incurred were reasonable and necessary.


Based on the fee agreement with the Defendant, our fees, to this date for the above described actions are \$6498.50, plus expenses of \$71.10 for a total of \$6569.60.

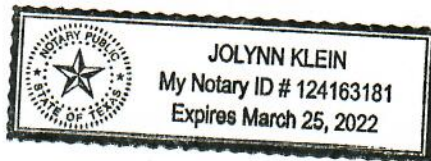
In my opinion, additional reasonable fees will be incurred by the Defendant in the following amounts:

1. Through the hearing on the motion, \$1100.
2. Through the appeal to the Court of Appeals, if mandamus is filed, \$7500.
3. Through the petition to the Texas Supreme Court for the same, \$5000.
4. Through the petition for writ of certiorari to the United States Supreme Court, \$150.


Kirk Swinney

Subscribed and sworn to before me this 9th day of July, 2019.


Notary Public, State of Texas



Invoice # 29359

In Reference To: *Comal CAD/Kirk, Douglas C2018-1576B*

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
03/12/19 KS retrieve, review opp to RFI; review objection to inspection, draft resp, corr P, JS	1.90 180.00/hr	342.00
03/13/19 KS update folder	0.20 180.00/hr	36.00
03/18/19 KS MTC, arrange hearing, corr P, corr JS, confer CZ	1.40 180.00/hr	252.00
03/19/19 KS update file, calendar hearing	0.20 180.00/hr	36.00
03/28/19 KS confer CZ re mt compel testimony	0.20 180.00/hr	36.00
For professional services rendered	<u>3.90</u>	<u>\$702.00</u>
Previous balance		\$4,500.00
Accounts receivable transactions		
3/19/2019 Payment - thank you. Check No. 21016		(\$4,500.00)
Balance due		<u><u>\$702.00</u></u>

Invoice # 29610

In Reference To: *Comal CAD/Kirk, Douglas C2018-1576B*

Professional Services

			<u>Hrs/Rate</u>	<u>Amount</u>
04/08/19	KS	confer RLJ	0.20 180.00/hr	36.00
04/09/19	KS	confer CZ, corr RLJ, procure supplies for hearing	0.50 180.00/hr	90.00
04/15/19	KS	confer CZ, RLJ re hearing	0.40 180.00/hr	72.00
	RJ	Confer DKS re: hearing; review filings; research.	2.60 180.00/hr	468.00
04/17/19	RJ	Prep for hearing; draft objections and orders; file the same; research.	9.00 180.00/hr	1,620.00
04/18/19	RJ	Travel to/from RR for MTC hearing.	4.10 100.00/hr	410.00
	RJ	MTC hearing; waiting for hearing; confer with CAD.	6.90 180.00/hr	1,242.00
04/22/19	KS	confer RLJ, draft R11, confer CZ, CA	1.20 180.00/hr	216.00
	RJ	Confer with DKS re: hearing and rule 11; research re DA.	0.70 180.00/hr	126.00
04/29/19	KS	R11 corr P	0.30 180.00/hr	54.00
		For professional services rendered	<u>25.90</u>	<u>\$4,334.00</u>
		Previous balance		\$5,691.50
		Accounts receivable transactions		
5/2/2019		Payment - thank you. Check No. 21119		(\$532.46)
		Balance due		<u><u>\$9,493.04</u></u>

Invoice # 30156

In Reference To: *Comal CAD/Kirk, Douglas C2018-1576B*

Professional Services

			<u>Hrs/Rate</u>	<u>Amount</u>
05/08/19	KS	corr P re inspection	0.10 180.00/hr	18.00
05/09/19	KS	corr P, CA, JS, review inspection demand documents, call to CZ	0.50 180.00/hr	90.00
05/10/19	KS	corr CA, CZ	0.30 180.00/hr	54.00
05/13/19	KS	corr P	0.30 180.00/hr	54.00
05/16/19	KS	motion to compel	0.80 180.00/hr	144.00
05/20/19	KS	file MTC	0.50 180.00/hr	90.00
05/24/19	KS	review disc from P, start responses, corr JS	0.50 180.00/hr	90.00
	LH	Begin draft responses RFD	0.30 90.00/hr	27.00
05/28/19	KS	review discovery corr	0.10 180.00/hr	18.00
	LH	Finalize Ds responses RFD	0.40 90.00/hr	36.00
		For professional services rendered	<u>3.80</u>	<u>\$621.00</u>
		Additional Charges :		
05/01/19		Reporters record		210.00
		Total additional charges		<u>\$210.00</u>
		Total amount of this bill		<u>\$831.00</u>
		Previous balance		\$9,508.04

	<u>Amount</u>
Balance due	<u>\$10,339.04</u>

Invoice # 30226

In Reference To: *Comal CAD/Kirk, Douglas C2018-1576B*

Professional Services

			<u>Hrs/Rate</u>	<u>Amount</u>
06/03/19	OS	Legal: Obtain motion to compel date. Prepare notice of motion.	3.90 75.00/hr	292.50
	KS	prepare responses to discovery set hearing, corr CA	0.50 180.00/hr	90.00
06/04/19	OS	Legal: Prepare discovery responses.	3.60 75.00/hr	270.00
06/06/19	OS	Legal: Follow up on hearing.	0.20 75.00/hr	15.00
06/10/19	OS	Legal: Call to Cummings on transcript.	0.10 75.00/hr	7.50
06/11/19	OS	LEGAL; TRANSCRIPT	0.30 75.00/hr	22.50
	KS	review record	0.60 180.00/hr	108.00
06/23/19	KS	prepare responses to discovery	2.70 180.00/hr	486.00
06/24/19	OS	Legal	0.80 75.00/hr	60.00
	KS	discovery responses	2.30 180.00/hr	414.00
06/25/19	OS	Legal Prepare amended responses.	0.50 75.00/hr	37.50
	OS	Legal	0.30 75.00/hr	22.50
		For professional services rendered	<u>15.80</u>	<u>\$1,825.50</u>
		Previous balance		\$10,339.04
		Accounts receivable transactions		
6/25/2019		Payment - thank you Check No. 21235 & 21161		(\$9,508.04)

	<u>Amount</u>
Balance due	<u>\$2,656.50</u>

Kirk Swinney

From: Douglas Kirk <dougkirk@gvvc.com>
Sent: Thursday, May 9, 2019 4:06 PM
To: Kirk Swinney; Douglas Kirk
Subject: Re: Kirk v Comal AD
Attachments: Court Ordered Inspection Agreement.pdf

Mr. Swinney:

May 19, 2019 1 pm.

Attached are the documents that will need to be signed and returned by noon May 16, 2019 with payment.

You still have an opportunity to settle this lawsuit.

The CAD returns the value to the average of the five years prior to their dramatic increase; the defendant pays my costs of court and expenses; the defendant agrees to leave me alone and stop harassing me; the Tax Assessor Collector returns to me the over payment made for the 2018 taxes.

This offer expires 11:59 am May 16, 2019.

Thank you.

Douglas Kirk

On 5/8/2019 4:45 PM, Kirk Swinney wrote:

Mr. Kirk

Will the Rule 11 regarding the inspection be acceptable to you? If not, would you propose a different date? I just need to know how to plan.

Kirk Swinney



www.lsejlaw.com

623 S. Baker Cir.
Leander, Texas 78641
(512) 379-5800
cell: (512) 422-2847

Background Status

Form A-29809

Date: _____

Last Name: _____ First Name: _____ Middle Name: _____

Current Address: _____ City: _____ State: _____ Zip: _____

Date of Birth: _____ Place of Birth: _____

National Origin: _____ Citizenship of which nation(s)? _____

Yes No Do you have a valid passport issued by the United States?

Yes No Do you have an original birth certificate?

Texas Driver's License Number: _____ Expiration Date: _____

Last Four Digits Social Security Number: _____

Have you ever been convicted of a felony? Yes No

If yes, for each conviction state charge, jurisdiction, punishment, date of offense.

Have you ever been convicted of a misdemeanor? Yes No

If yes, for each conviction state charge, jurisdiction, punishment, date of offense.

Are you a registered sex offender? Yes No

Are you an unregistered sex offender? Yes No

Have you ever been a member of any of the following? (Check all that apply.)

- | | |
|--|--|
| <input type="checkbox"/> Communist Party | <input type="checkbox"/> Republican Party |
| <input type="checkbox"/> Democrat Socialist Party | <input type="checkbox"/> Libertarian Party |
| <input type="checkbox"/> Students for a Democratic Society | <input type="checkbox"/> Green Party |
| <input type="checkbox"/> Democrat Party | <input type="checkbox"/> Tea Party |

I, (Print Name) _____ completed this form myself and under penalty of perjury I swear that all information provided is true, correct and full. Furthermore, by signing this document I give express permission to the requestor to conduct a full and unencumbered background check on me.

Signature: _____

Non-Disclosure Agreement

Form R-1499

I, (Print Name)_____ agree upon my own free will that anything I see or experience on premises owned by Douglas Walter Kirk, cannot and will not be disclosed, discussed, revealed, or shared with any living human being for as long as I shall live, and,

I agree that I will make no notes, write no biographies, record no audio, record no video as a result of my experience on premises owned by Douglas Walter Kirk, and,

I agree that anything I learn as a result of my experience on premises owned by Douglas Walter Kirk, is proprietary, confidential, classified and some, all, or part of what I experience may be covered by the Invention Secrecy Act of 1951 (Pub.L. 82–256, 66 Stat. 3, cdf 35 U.S.C. ch. 17) or other relevant secrecy laws.

Signature:_____

Limited Exception for Craig Zgabay of Candela Property Advisors

[Address:_____]:

Mr. Zgabay is permitted to incorporate only his property appraisal findings in a report prepared explicitly for CAUSE NO. C2018-1576B, Douglas Walter Kirk Vs. Comal Appraisal District, to be turned over only to Kirk Swinney as the attorney representing the Comal Appraisal District in this action. Mr. Zgabay is permitted to testify at trial regarding his report.

Craig Zgabay initials: _____

Texas Rules of Civil Procedure Rule 192.6 (b)(5) applies by agreement for all information gathered by Craig Zgabay while on the premises of Douglas Walter Kirk.

Craig Zgabay initials: _____

Limited Exception for Kirk Swinney of Low & Swinney, PLLC, 623 S. Baker Cir., Leander, Texas 78641:

Mr. Swinney is permitted to use only Craig Zgabay's report in preparation of his witness and his defense for the Comal Appraisal Dist. Kirk Swinney initials: _____

Texas Rules of Civil Procedure Rule 192.6 (b)(5) applies by agreement for all information gathered by Craig Zgabay while on the premises of Douglas Walter Kirk, which is reviewed by Mr. Swinney for trial preparation or trial.

Kirk Swinney initials: _____

Preparation and Prohibition Agreement

Form V-88976

The undersigned parties agree to the following conditions upon stepping foot on or otherwise entering the private property premises of Douglas Walter Kirk for a court ordered inspection:

Fees (Pursuant to rule 196.6):

1. A deactivation, security and reactivation fee, shall be paid in advance in the form of cash or cashier's check made payable to Douglas Walter Kirk in the amount of \$4,560. This non-refundable fee is to cover the cost of deactivating the passive deterrent system, reactivating the passive deterrent system and paying for security during the period that the system is being modified. (To be received on or before May 16, 2019.)
2. An inspection security and observation team fee of \$600 shall be paid in advance in the form of cash or cashier's check made payable to "The Bearer". If cash, the money shall be in the form of six one-hundred dollar bills. If cashier's check, each of three checks must be made in the amount of \$200 per check. (To be received on or before May 16, 2019.)
3. A liability insurance fee in the amount of \$3,000 must be paid in advance. This must be in the form of a cashier's check made out to "United Automobile Services Association." The note on the check must say: USAA Member Douglas Kirk. (To be received on or before May 16, 2019.)
4. A sum of \$500 cash will be given to the security team to pay for any incidental and immediate damage caused by the inspector and/or two observers, to be charged based upon the sole discretion of Douglas Walter Kirk. (To be received on or before May 16, 2019. Unused balance will be returned at the end of the inspection period.)
5. The undersigned parties are expected and obligated to do no damage to vegetation, wildlife, structures or improvements while on the premises of Douglas Walter

Kirk. To guarantee this performance, the undersigned parties, as an obligee, must provide a surety bond in the amount of \$100,000. If, in the sole discretion of Douglas Walter Kirk, the principal, any damage or harm is done to vegetation, wildlife, structures or improvements during the court ordered inspection, the bond is to be cashed by Douglas Walter Kirk and compensation to him in an amount he solely determines shall be removed from the bond. The unused balance will be returned to the obligee within 90 days. (This bond must be in effect as of the date of inspection and must be delivered to Douglas Walter Kirk on or before May 16, 2019.)

Manner and Conditions:

1. All parties will remain on foot at all times.
2. No vehicles will be used between the hours of 1 pm and 3 pm May 19, 2019.
3. No vehicles are to come on to the property.
4. Parties will stage at the East end of the property, just off Old Sattler Road, at 12:30 pm on May 19, 2019 for security check-in.
5. All cell phones, recording devices (audio and/or video) are prohibited and shall be locked in the cars during the period 1 pm to 3 pm May 19, 2019.
6. One camera will be permitted, upon court order, that is to be used only by Craig Zgabay and which is capable of exposing only still photographs. This camera is to be turned over to the security team at 12:30 pm for security check-in. (Note: If the camera is capable of making video or audio images, it will not pass security and will not be permitted.)
7. The camera may only be used to document taxable improvements for appraisal purposes only and may not photograph in any way any tangible thing, person or animal that is not a taxable improvement.
8. Upon conclusion of the inspection, the camera will be turned over to the security team for 30 minutes and any images that violate No. 7 above will be then and there permanently deleted. Mr. Zgabay will show the team how to operate the camera.
9. Only Craig Zgabay will perform the appraisal inspection. Defendant Jennifer Salazar and attorney Kirk Swinney are to observe only.
10. All documents must be completed and signed in advance of noon May 16, 2019 and signed originals must be turned over to Douglas Walter Kirk on or before noon May 16, 2019.
11. All parties must present proof of US Citizenship with either a valid US Pass-

port or an original birth certificate on May 19, 2019 before being permitted on the premises of Douglas Walter Kirk.

12. No videotaping or video recording will be permitted.
13. No audio or audio recording will be permitted. No radio or transmitter devices will be permitted.
14. No ladders or step stools will be permitted.
15. No camera extension handles will be permitted.
16. No talking will be permitted.
17. No touching of any structure, improvement or object will be permitted.
18. No moving of any object or plant will be permitted.
19. No peering through windows will be permitted without express permission.
20. No climbing of fences or barriers will be permitted.
21. All parties must stay within 10 feet of assigned escorts at all times and must remain within ten feet of each other at all times. Parties are not to spread out.
22. No smoking is permitted. No vapeing is permitted.
23. No drugs or alcohol are permitted. Anyone suspected of being drunk by Douglas Walter Kirk will be ejected from the premises without recourse.
24. No use of drones is permitted.

Note: Parties are NOT WELCOME on the premises of Douglas Walter Kirk and this inspection is only being allowed under duress upon court order. Douglas Walter Kirk considers this inspection a clear violation of his United States and State of Texas constitutional rights and various No Trespassing statutes.

The undersigned agree to the above provisions.

Signature Craig Zgabay:_____ Date:_____

Signature Jennifer Salazar:_____ Date_____

Signature Kirk Swinney:_____ Date_____

Return signed and dated originals to:

Douglas Kirk
1850 Old Sattler Road
Canyon Lake, Texas 78132

Signed and dated copies may be e-mailed to:
dougkirk@gvtc.com

For Office Use Only

Date originals received: _____ Douglas Walter Kirk: _____