

BEFORE THE UTAH STATE TAX COMMISSION

<p>SALT LAKE COUNTY ASSESSOR, SALT LAKE COUNTY, UTAH,</p> <p>Petitioner,</p> <p>vs.</p> <p>BOARD OF EQUALIZATION OF SALT LAKE COUNTY, UTAH, ex re (X),</p> <p>Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 06-0813</p> <p>Parcel No. #####</p> <p>Tax Type: Property Tax/Locally Assessed</p> <p>Tax Year: 2005</p> <p>Judge: Phan</p>
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This Order may contain confidential “commercial information” within the meaning of Utah Code Sec. 59-1-404, and is subject to disclosure restrictions as set out in that section and Utah Admin. Rule R861-1A-37. The rule prohibits the parties from disclosing commercial information obtained from the opposing party to nonparties, outside of the hearing process. However, pursuant to Utah Admin. Rule R861-1A-37 the Tax Commission may publish this decision, in its entirety, unless the property taxpayer responds in writing to the Commission, within 30 days of this order, specifying the commercial information that the taxpayer wants protected.

Presiding:

D’Arcy Dixon Pignanelli, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REPRESENTATIVE 1, Deputy Salt Lake District Attorney
PETITIONER REPRESENTATIVE 2, Appeals Supervisor, Salt Lake County
PETITIONER REPRESENTATIVE 3, Appraiser, Salt Lake County

For ex rel Party: EX REL PARTY REPRESENTATIVE 1, Attorney at Law
EX REL PARTY REPRESENTATIVE 2, Attorney at Law
EX REL PARTY REPRESENTATIVE 3, MAI, CRE

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on May 16, 2007. The parties post hearing submissions were received on June 8, 2007. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner is appealing the assessed value of the subject properties for the lien date January 1, 2005.

2. The property at issue is Parcel No. #####. It is located at ADDRESS, CITY, Utah.

3. For the January 1, 2005 lien date the Salt Lake County Assessor had valued the property at \$\$\$\$\$. Petitioner had appealed the value to the Salt Lake County Board of Equalization. When the matter was presented at the County Board of Equalization appeal hearing, there was no representative from the Salt Lake County Assessor's Office in attendance. The Salt Lake County Board of Equalization reduced the value to \$\$\$\$\$ based on an appraisal submitted by the property owner in which the conclusion was that the property was encumbered by the lawsuit and lis pendens that adversely affected the market value. It was the County Assessor's Office that appealed the decision of the County Board of Equalization to the State Tax Commission.

4. The subject property is a vacant .21-acre residential lot located in the DEVELOPMENT 1 in CANYON.

5. The subject property is zoned FM 20 (Forestry Multifamily Zones). Permitted in this zoning were single-family dwellings. In this zoning, construction is not permitted if the lot area is less than .50 acres in size, or the property from which the lot was subdivided contained less than one net developable acre, or the slope exceeds 30%, or the width is less than 100 feet. A P.U.D. in this zoning is a conditional use. Sometime prior to 2000 the property owner at that time, COMPANY A, recorded a plat of the DEVELOPMENT 1, which was originally comprised of 25 acres. On Lot 8 of the original P.U.D. a condominium building called DEVELOPMENT 2 was constructed. Lot 5 of the original plan was designated for parking for DEVELOPMENT 2 and other developments in the P.U.D. However, lot 5 was later reconfigured. Lot 9 of the original P.U.D. was used by DEVELOPMENT 2 for snow storage for several years. Whether DEVELOPMENT 2 had the right to use the original lots 5 & 9 was already an issue and the subject of

litigation when a subsequent owner of these lots, COMPANY B entered into the Definitive Settlement Agreement, dated November 9, 2000 (“Agreement”), with the CITY. Pursuant to the Agreement the CITY granted COMPANY B the right to develop the original Lot 9 into three single-family residential lots (now referred to as lots 8, 9 & 10) and to develop what was left of lot 5 into four single-family residential lots. However, in return COMPANY B was required to indemnify the CITY against the lawsuit the parties apparently anticipated. It was expected that DEVELOPMENT 2 would file the lawsuit arguing that it was legally entitled to continue using the lots. Additionally the development of the original Lot 9 into lots 8, 9 & 10 would adversely affect the views of some units in DEVELOPMENT 2.

6. On December 13, 2000, DEVELOPMENT 2 Condominium Owners Association filed a lawsuit against COMPANY B and the CITY. Since filed, the lawsuit proceedings have been ruled on in District Court, with actions in the Court of Appeals and the Utah Supreme Court, where some claims were resolved and some were remanded back to the District Court. In conjunction with the lawsuit a lis pendens was recorded with the Salt Lake County Recorder’s office against the subject parcel and other related parcels. The lis pendens was not released or extinguished by the January 1, 2005 lien date, or at any time during 2005. On the lien date the lawsuit was still actively being prosecuted and even as of the date of the hearing was not resolved.

7. In July 2001, the property owners obtained a building permit to bring in utilities, access and construct a retaining wall so that the original lot 9 could be developed into three residential building lots, now lots 8, 9 & 10. The current lot 9 is the property subject to this appeal. The CITY issued the permit pursuant to the Agreement in 2002. Construction on these improvements commenced and was completed prior to the lien date. These improvements were necessary preliminary improvements so that the subject lot could be used for residential purposes. However, the litigation on whether these lots should be developed or remain as snow

storage for DEVELOPMENT 2 continued.

8. Assuming it was legally permissible to develop the subject lot as a residential single family lot as allowed under the Agreement with the CITY, this use would be the highest and best use of the subject property under appraisal principles. If use for a single-family residence was a legally permissible use for the property, it would be this use that would be appraised for determining fair market value. However, the pending litigation calls into question whether this use is a legally permissible use for the property.

9. Petitioner submitted an appraisal in this matter prepared by PETITIONER REPRESENTATIVE 3, Certified General Appraiser. In the appraisal PETITIONER REPRESENTATIVE 3 valued the property as a developable residential lot in the CITY recreation area and made no adjustment for the lawsuit and pending litigation regarding whether this was a legally permissible use for the property. It was his appraisal conclusion that the value of this property was \$\$\$\$\$. In reaching this conclusion, PETITIONER REPRESENTATIVE 3 considered six lot sales in the immediate vicinity of the subject property. The largest appraisal adjustments for the comparable sales were for time of sale, with five of the sales occurring prior to 2004. One sale that had occurred on the lien date at issue supported the value of \$\$\$\$\$, assuming there were no legal impairments.

10. The current property owner, who is the ex rel party in this matter, submitted an appraisal prepared by EX REL PARTY REPRESENTATIVE 3, MAI, CRE. It was EX REL PARTY REPRESENTATIVE 3's appraisal conclusion that the lawsuit and lis pendens placed a cloud on the title that affects market value. In his appraisal EX REL PARTY REPRESENTATIVE 3 then determined a value for the lots as unimpaired, based on the highest and best use as a developable single-family P.U.D. lot, then he determined a value diminution attributable to the lawsuit and lis pendens. Like, PETITIONER REPRESENTATIVE 3, EX REL PARTY REPRESENTATIVE 3 concluded that the unimpaired value for this

lot would be \$\$\$\$\$. However, after taking into account the diminution in value for the lawsuit and lis pendens issues it was his conclusion that the market value of the property as of the lien date at issue was only \$\$\$\$\$.

11. In determining the value diminution, EX REL PARTY REPRESENTATIVE 3 considered the fact that some of the lots in the DEVELOPMENT 1 that were also subject to the lis pendens had been sold without discount. However, in order to do so the seller had indemnified both the title insurance company and the CITY against the possible loss in a suit. It was his opinion that residential building lots almost never sell with this type of indemnity. Therefore, the sales occurring with the indemnity were not “market” sales. To determine an appropriate deduction EX REL PARTY REPRESENTATIVE 3 talked to title companies and looked at sales studies of lots that were impaired by various easements. Ultimately he concluded that a 75% reduction from the unimpaired value would be appropriate.

12. It was EX REL PARTY REPRESENTATIVE 3’s appraisal that was accepted by the County Board of Equalization and provided the basis for the value that the County Board of Equalization placed on this property.

13. A willing buyer who was not under any compulsion to buy the subject property and had reasonable knowledge of the relevant facts would not pay the same amount for the subject lot as for a comparable lot that was not subject to the law suit and lis pendens that affects the subject property.

14. When determining a value for a property based on a certain use, in this case as a single family residential lot, and where there are issues regarding whether that use is legally permissible that are substantial enough that a buyer would pay less for the property, the questions regarding use affect the fair market value of the property. Petitioner has not taken into account factors that would be relevant to a knowledgeable buyer and that may affect the property’s highest and best use. Therefore, Petitioner has not shown error in the value set by the County Board of Equalization, nor provided a sound evidentiary basis to establish a new, higher value.

15. The ex rel party has submitted an appraisal that attempts to take into account the factors affecting fair market value.

APPLICABLE LAW

1. All tangible taxable property shall be assessed and taxed at a uniform and equal rate on the basis of its fair market value, as valued on January 1, unless otherwise provide by law. (2) Beginning January 1, 1995, the fair market value of residential property shall be reduced by 45%, representing a residential exemption allowed under Utah Constitution Article XIII, Section 2, Utah Constitution. (Utah Code Ann. Sec. 59-2-103.)

2. “Fair market value” means the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. For purposes of taxation, “fair market value” shall be determined using the current zoning laws applicable to the property in question, except in cases where there is a reasonable probability of a change in the zoning laws affecting that property in the tax year in question and the change would have an appreciable influence upon the value. (Utah Code Ann. 59-2-102(12).)

3. (1) Any person dissatisfied with the decision of the county board of equalization concerning the assessment and equalization of any property, or the determination of any exemption in which the person has an interest, may appeal that decision to the commission by filing a notice of appeal specifying the grounds for the appeal with the county auditor within 30 days after the final action of the county board. . . (Utah Code Ann. Sec. 59-2-1006(1).)

CONCLUSIONS OF LAW

1. The Commission has determined that the value set by the County Board of Equalization enjoys the presumption of correctness. In order to challenge the value set by the County Board of Equalization the

challenging party must (1) demonstrate that the County's assessment contained error, and (2) provide the Commission with a sound evidentiary basis for reducing or raising the valuation to the amount proposed by Petitioner. The Commission relies in part on *Nelson v. Bd. Of Equalization of Salt Lake County*, 943 P.2d 1354 (Utah 1997); *Utah Power & Light Co. v. Utah State Tax Comm'n*, 590 P.2d 332, 335 (Utah 1979); *Beaver County V. Utah State Tax Comm'n*, 916 P.2d 344 (Utah 1996) and *Utah Railway Co. v. Utah State Tax Comm'n*, 5 P.3d 652 (Utah 2000).

2. Petitioner argues that the pending litigation and lis pendens should not be considered in determining the value for this property, pointing to definition of fair market value at Utah Code Sec. 59-2-102(12) which states “‘fair market value’ shall be determined using the current zoning laws applicable to the property in question, except in cases where there is a reasonable probability of a change in the zoning laws affecting that property in the tax year in question.” Upon review of the facts and the law in this matter, the Commission concludes that this section does not support Petitioner’s position, and in fact gives credence to the appraisal submitted by the ex rel party. The property is zoned M20. There was no indication that this zoning would have changed during 2005. To develop the property into the higher density P.U.D. residential lots that the owners wanted and that results in the highest value for the property, requires a conditional use permit in this zoning. The CITY had entered into an agreement to allow the development and grant the conditional use permits, but only if the property owner indemnified the CITY against a lawsuit that both the property owner and CITY knew would likely ensue from this action. The lawsuit had commenced prior to the lien date and had yet to be resolved at the time of the hearing. It is the Commission’s conclusion that for the lien date at issue, pursuant to the statutory definition of fair market value, this property should be valued with a conditional use that was legally in dispute. However, Petitioner valued the property as having an unchallenged right to single-family residential development.

3. In light of the conclusion that the value must take into account that the use for single family residential development was being contested as of the lien date, and Petitioner has failed to value the property as such, Petitioner has not shown error in the value set by the County Board of Equalization, nor has Petitioner provided a sound evidentiary basis to adopt a new value.

DECISION AND ORDER

In reaching this conclusion, the Commission would note that it agrees with both parties that the fact that a lis pendens is filed on a property and that there is an ongoing lawsuit would not per se result in a specific percentage reduction in value. The facts and circumstances need to be considered and a determination made ultimately on the nature of the risks and how they will affect market value. In this case it was the use of the property that was contested, could the property legally be put to the use that would result in the highest value for the property.

Certainly COMPANY B had taken some substantial risks in constructing improvements and making indemnifications. Petitioner argues this shows that there was little risk COMPANY B would lose the lawsuit. However, this may show only that the COMPANY B may have been less adverse to risk than the typical buyer for this property. Upon reviewing the circumstances and evidence submitted in this matter, the Commission finds that a knowledgeable willing buyer that was not under any compulsion to buy, would not pay the full value for this property in a typical market transaction. If the purchase came with secure indemnifications the buyer might pay full price, but the Commission would agree with EX REL PARTY REPRESENTATIVE 3 that the indemnifications are not typical in this market, so would not represent a market sale. The Commission disagrees with Petitioner that this lis pendens and litigation pose such an insignificant risk to a willing buyer that there would be no diminution in value. Petitioner does not provide an alternative basis for reduction in value to the one presented by the ex rel party and accepted by the County Board of

Equalization.

The Commission would agree that there may be some circumstances where the risks from a lawsuit and lis pendens would not result in a diminution in value. Petitioner cited *Reservoir Place Realty Trust v. Bd. of Assessors or Waltham*, 665 N.E.2d 1040 (Mass.App.Ct. 1996) for this position. In reviewing *Reservoir*, the Commission disagrees that the subject case presents these minimal risks.

Additionally, Petitioner compares the facts in this case to property that is subject to a long-term below market leases, liens or unfavorable financing. These all relate more to issues of ownership. A long-term below market lease, for example, presents an issue of ownership, with the lessor transferring some ownership rights to the lessee, so that valuing only the lessor's interest would result in less than the full market value. The circumstances in this matter are distinguishable. For tax purposes the property is valued at its "fair market value." See Utah Code Sec. 59-2-103. Inherent in determining the fair market value is the appraisal concept of highest and best use, the use that will result in the highest value of the property that is, among other criteria, a legally permissible use.¹ Petitioner has valued the subject property as a single-family residential P.U.D. lot, which results in a value of \$\$\$\$\$, despite the fact that the legality of this use is contested and a knowledgeable buyer would be aware of possible limitations on use.

Based upon the foregoing, the Tax Commission finds that the market value of the subject property as of January 1, 2005, is \$\$\$\$\$. It is so ordered.

DATED this _____ day of _____, 2007.

¹ See appraisal Institute, *The Appraisal of Real Estate*, Twelfth ed. (Chicago, Illinois: Appraisal Institute, 2001, 305.)

Appeal No. 06-0813

Jane Phan
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2007.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. Sec. 63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Sec. 59-1-601 et seq. and 63-46b-13 et seq.

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