00-1391
LOCALLY ASSESSED PROPERTY
SIGNED 06-18-2004

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION**
Petitioner,	)	Appeal No. 00-1391
	)	Parcel No. Multiple-2
v.	)	
	)	Tax Type: Property Tax/Locally Assessed
BOARD OF EQUALIZATION OF TOOELE COUNTY, STATE OF UTAH,	)	Tax Year: 2000
	)	Judge: Davis
Respondent.	)	

Presiding:
G. Blaine Davis, Administrative Law Judge
R. Bruce Johnson, Commissioner

Appearances:
For Petitioner: PETITIONER REP, Attorney at Law
PETITIONER
For Respondent: RESPONDENT REP

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on September 29, 2003. The parties were thereafter given time in which to file their briefs and memorandums, and the final memorandum was filed with the Commission on January 14, 2004. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is property tax.

2. The year in question is 2000, with a lien date of January 1, 2000.

3. The subject property is located in Tooele County and is leased to the (X) on a long-term

lease for 50 years, with unlimited additional 50-year options for an original payment amount of $$$$$ for the total 50 year term of the lease and any additional 50 year terms.

4. The subject property consists of a total of 187.37 acres which were originally part of the (X). Although the property amounts are noted with precision, there are in fact some minor discrepancies that can only be reconciled with a property survey. The property is divided into two parcels as follows:

a. Tax Parcel #####- 1 contains 157.95 acres with various old improvements that were either part of the administration area of the (X), or were constructed on the property by the (X) pursuant to a long-term license agreement dated October 1, 1986. Of those total acres, 83 acres are not in either the area leased back to the (X) or licensed to the (X). The parties have stipulated to the value of those 83 acres, so that value is not at issue in this proceeding.

b. Tax Parcel ##### - 2 contains 29.42 acres which is improved with (#) large warehouse buildings originally built in 1943. These buildings are still occupied and used by the (X).

5. (PARAGRAPH REMOVED).

6 (PARAGRAPH REMOVED)

7 7. The testimony of WITNESS, CITY Attorney and also attorney to the (X) during this process outlined the length and complexity of this transfer process.

8. WITNESS testified that during the original negotiations, it was the intent of the (X) to retain ownership of the subject property for ongoing military operations.

9. Although the (X) had expressed its intent, WITNESS noted that there was also the possibility that at some time in the future the (X) may also close and abandon these remaining facilities. In light of this possibility, WITNESS suggested to the (X) that it might consider transferring the subject property but retain sufficient control to satisfy (X)'s long-term objectives.

10. WITNESS testified that the (X) initially rejected this option, but later agreed to transfer the property to the (X) and then leaseback the property in perpetuity with an unlimited series of 50-year leases for the total consideration of $$$$$. WITNESS noted that for all intents and purposes the (X) viewed this as a substitute for their initial ownership demand. This arrangement would allow the (X) to retain the full use of the property, but would avoid the necessity of compliance with future government regulations if (X) ever abandons the property.

11. This agreement was ultimately memorialized in a Memorandum of Agreement (MOA) signed in 1996 and the actual initial leaseback agreement was signed in 1998.

12. The entire former (X) property and facilities were transferred to the (X)-CITY in December 1998 and then transferred to a private ownership group, headed by the Petitioner, in January 1999. The majority of the property was then sold for various commercial operations. The subject property, pursuant to the terms of the leaseback agreement has remained in the possession of the (X) since it was acquired by Petitioner.

13. In the year 2000, the Tooele County Assessor originally valued the subject property as follows:

- Parcel #1 $$$$$
- Parcel #2 $$$$$
- Total $$$$$

14. The Tooele County Board of Equalization sustained the values of the original assessment.

15. Because of the terms and conditions of the leaseback agreement, Petitioner is prohibited from using the property. In addition, Petitioner has no expectation of any income from the property. The only value the property has to Petitioner is a right of reversion if the (X) terminates the lease and abandons the property. The only compensation paid for the lease was a token payment of $$$$$ to the (X) of CITY for

the entire 50-year term of the lease. That payment also included any additional future 50-year terms.

16. Petitioner presented an appraisal prepared by APPRAISER A, MAI, a licensed real estate appraiser in the State of Utah. APPRAISER A represented that although Petitioner has title to the properties, they have no use in the property or improvements during the term of the lease. He further stated that value is a product of use, and without any use in the property, or any rental income from the property, the only value to the Petitioner "is the present worth of the reversion of the property at the termination of the lease." Therefore, APPRAISER A based his determination of value upon the estimated value of the reversionary interest at the conclusion of the 50-year lease. APPRAISER A assumed that the (X) would terminate its lease at that time, and would then abandon the property. If the (X) does not abandon its lease at that time, then the value would be less than estimated by APPRAISER A, according to his analysis.

17. APPRAISER A based his calculation of value to be Janaury 1, 2003. However, because the lien date in this hearing is January 1, 2000, the value would be less. Nevertheless, because of the long period of time, without further testimony, the Commission deems that the difference in value for three years of additional time, would produce a result that is smaller than that testified to by APPRAISER A, but that the value would not be significantly different because of the effects of time.

18. APPRAISER A calculated the values of the subject properties to be as follows:

Subject Parcel #1 (Tax Parcel ##### - 1)	
Present worth of reversion of 59.68 acres at termination of lease to the U.S. Dept. of the (X) in 46 years	$$$$$
Present worth of reversion of improvements on the above 59.68 acres at termination of lease to the U.S. Dept. of the (X) in 46 years (improvements would be about 106 years old at that time)	$$$$$
Present worth of reversion of 15.27 acres at termination of license agreement to the (X) in 24 years	$$$$$
Present worth of reversion of improvements on the above 15.27 acres at termination of the license agreement (improvements to be removed by the (X))	
Market value of 83.00 acres not in either the area leased back to the U.S. Dept. of the (X) or licensed to the (X)	$$$$$
Total Market Value Est. of ownership interest	$$$$$

Subject Parcel #2 (Tax Parcel ##### - 2)	
Present worth of reversion of 29.42 acres at termination of lease to the U.S. Dept. of the (X) in 46 years	$$$$$
Present worth of reversion of improvements on the above 29.42 acres at termination of lease to the U.S. Dept. of the (X) in 46 years (improvements would be about 106 years old at that time)	$$$$$
Total Market Value Est. of ownership interest	$$$$$

19. The parties stipulated to the value of the 83 acres listed above, and the value of that portion is not in dispute in this proceeding.

20. In making his appraisal, APPRAISER A relied upon the determinations of value which were made by APPRAISER B, the appraiser for Respondent, for the sale of another parcel of the property, and calculated only the reversionary values assuming that the unrestricted values of the property calculated by APPRAISER B were correct.

21. Respondent presented an appraisal prepared by APPRAISER B, a certified general appraiser in the State of Utah who is licensed to do appraisals in this state.

22. In preparing his appraisal, APPRAISER B represented that he was estimating the fee simple estate in the property. In his view, the (X), through its lease held the majority interest in the property, and the balance of the fee simple estate was owned by Petitioner. However, the position of

Respondent was that no reduction should be given because of the long-term leaseback to the (X). Therefore, his appraisal valued the property as though it had no restrictions.

23. APPRAISER B based his appraisal upon another sale of the contiguous property which was also part of the property acquired from (X)and sold at an arms length transaction. Based upon that comparable sale, APPRAISER B determined the values of the two parcels to be as follows:

Parcel	Value
##### - 1	$$$$$
##### - 2	$$$$$
Total	$$$$$

24. The parties do not have significant disagreement over the value of the property if there were no restrictions or limitations upon the property, and if it could be sold or leased at market prices. The only disagreement is whether the lease to the (X) for $$$$$ per year for 50 years or even longer, causes a reduction in the value for Utah State property tax purposes. If the property is valued without giving consideration to the long-term leases to the (X) and the (X), the values determined by APPRAISER B would prevail. If the property is valued by giving consideration to the long-term leases, the values determined by APPRAISER A would prevail.

APPLICABLE LAW

1. The Tax Commission is required to oversee the just administration of property taxes to ensure that property is valued for tax purposes according to fair market value. Utah Code Ann. §59-1-210(7).

2. 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 Tax Commission. In reviewing the county board's decision, the Commission may admit additional evidence, issue orders that it considers to be just and proper,

and make any correction or change in the assessment or order of the county board of equalization. Utah Code Ann. §59-2-1006(3)(c).

3. Petitioner has the burden to establish that the market value of the subject property is other than the value determined by Respondent.

4. To prevail, the Petitioner must (1) demonstrate that the County's original assessment contained error, and (2) provide the Commission with a sound evidentiary basis for reducing the original valuation to the amount proposed by Petitioner. *Nelson V. Bd. Of Equalization of Salt Lake County*, 943 P.2d 1354 (Utah 1997), *Utah Power & Light Co. v. Utah State Tax Commission,* 530 P.2d. 332 (Utah 1979).

5. The Commission must value the property at its "fair market value", which "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 knowledge of the relevant facts." (Utah Code Ann. §59-2-102(12).)

6. In determining the fair market value of a property, all facts must be considered that would be considered by a buyer or a seller, including all of the benefits and burdens associated with the property. (Alta Pacific Associates, Ltd. v. Utah State Tax Commission, 931 P.2d 103 (Utah 1997).)

DISCUSSION

Respondent's Post-Hearing Memorandum contained the following arguments:

> "Tooele County's appraisal of the subject property complies with the Utah Standards of Practice adopted by the Commission for the appraisal of real property in these circumstances. Utah Standard of Practice 5.5.4, Leasehold Improvements, provides:
>
> > The value of leasehold improvements shall be included in the value of the underlying real property and **assessed to the owner of the underlying real property**. Leasehold improvements should be appraised as real property based on replacement cost new less depreciation, derived from the Marshall and Swift Valuation Guide. Depreciation is accounted for by a percentage factor derived from economic life estimates obtained from Marshall and Swift and market

> analysis. Short-lived leasehold improvement should be treated as "short-life trade fixtures." [Emphasis supplied.]

Utah Standard of Practice 6.2.1, Property Rights Appraised, provides that:

> For ad valorem tax purposes, properties are generally appraised as if all ownership rights and interests are attached, i.e., fee simple interest.

The appraisal of the property by Tooele County complies with both of these standards by capturing the value of the landlords interest, together with the lessee's interest. This method is consistent with other widely accepted appraisal practice. The Appraisal of Real Estate (12th ed.) discusses "The Bundle of Rights" which Respondent valued in this case:

> The most complete form of ownership is title in fee. Such ownership establishes an interest in real property known as **fee simple interest** – i.e., absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat. Although fee simple interest represents the most complete form of ownership, often an appraiser will be asked to appraise the value of something less than the fee simple – i.e., a partial interest or fractional interest. The bundle of rights concept compares real property ownership to a bundle of sticks. Each stick in the bundle represents a separate right or interest inherent in the ownership. These individual rights can be separated from the bundle by sale, lease, mortgage, donation or other means of transfer.

Id. At 68-69 (emphasis supplied). To fairly and equally determine the value of the Petitioner's property, the entire bundle of rights must be considered. Petitioner's attempt to separate the value into that of the landlord and that of the tenant is not sanctioned in appraisal theory and should be rejected."

Respondent's Post-Hearing Memorandum also argues "that it is not proper or necessary to assess separate legal interests in a piece of property independently. Instead, there should be a single assessment of the property without separation of the interests of the lessor and the lessee."

The above statements from Respondent's Post-Hearing Memorandum accurately quote the cited sources, and also reflect the reasoning of some prior decisions of this Commission. However, the cases in which the above reasoning have been applied by this Commission are primarily cases in which an owner of property, through arms-length negotiations with a leasee, entered into an agreement that resulted in rents or

lease rates that were lower than market rents or lease rates for similar properties. Such below market rents may have been caused either by being below the market rate at the time the original agreement was made, or by the passage of time after the execution of an agreement which did not contain adequate cost-of-living increase provisions.

The Petitioner, in his Post-Hearing Memorandum has argued, with respect to the above arguments of Respondent, as follows:

> "In summary, the Commission has consistently stated its position regarding below market leases. However, the number of cases is very limited and in fact there has never been any direct discussion of the terms and nature of the leases in question. Lastly, the Commission has never formally adopted a rule reflecting such a broad policy determination. Such a blanket rule would be inconsistent with the fair market value standard found in Utah law.
>
> More illustrative of how the Commission has addressed the issue of overt earnings restrictions are a series of cases from Sevier County (Appeal Nos. 91-1714, 92-1792, 93-1744, 93-1745, Alta Pacific Assoc. Ltd. & Sevier Valley Development Co. v. County Board of Equalization of Sevier C. (copy attached as Appendix C). These cases involved federally subsidized housing and the rent restrictions associated with the housing facilities. These restrictions are imposed by federal statutes.
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> Although noting its general support for the proposition that the "full bundle of rights" should be valued, the Commission stated:
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> > "The Commission recognizes that the special federal financing programs offered through the HUD section 8 and FmHA have created a distinctly separate kind of property that requires the assessing entity to value the property in question in light of the federal restraints and corresponding benefits.
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> The Commission further held that the nature of the restrictions actually produced a separate market for multi-family housing – one a subsidized market and the other a non-subsidized market.
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> In summary, when confronted with the full impact of the federally-imposed earnings restriction, the Commission recognized the inherent unfairness of simply acting as though a willing buyer would view the property the same as property in an unrestricted setting. The Commission therefore found a way to incorporate the restriction into the valuation process. It did so by stating that federally-subsidized housing is a market unto itself.

> The facts of the present case and the draconian impact of the (X) lease present a situation more analogous to the subsidized housing cases than to the other referenced cases. If anything, the lease restrictions in the present case are far more restrictive than the housing case. Following the Commission's logic, the subject property and the associated restrictions creates a market of one – the (X). As in the housing cases, the Commission should not dismiss the inherent unfairness with a simple recitation "that the whole bundle of rights should be valued."
>
> Both PERSON A (Professor PERSON A, a BYU Law Professor) and APPRAISER A, a professional MAI appraiser of longstanding, indicated that there is no rationale under which a willing buyer would not consider the impact of the lease on the what a potential buyer would pay for the property. In fact, the Respondent's witness, APPRAISER B essentially agreed that a willing buyer would not view encumbered and non-encumbered property as identical in their attractiveness. APPRAISER B response was to dismiss the willing buyer/willing seller standard as applicable. Rather, his approach was to focus on the bundle of rights and what interest is being valued. The fair market value definition, however, (§59-2-102(12)) refers only to the interests of a willing buyer and seller."

Based upon the facts of this case, the Commission determines the nature of the lease in this appeal is very different than the leases in prior Commission decisions for the following reasons:

1. The term of the lease is for an initial period of fifty (50) years, with unlimited options to renew for additional fifty (50) year terms. In effect, it is a perpetual lease for as long as the (X) wants to occupy the property.

2. The price of $$$$$ for all of the terms of the lease is very unique. It is clear that the lease rate is not intended to reflect market rates, but is intended primarily to meet a legal requirement of giving some consideration. There was no profit or compensation motive in entering into the transaction.

3. There was no arms-length negotiation process on the term or price of the lease. Those terms were dictated by governmental fiat.

4. The limitations imposed on the property by the (X) are governmental restrictions. Those governmental restrictions were imposed on the property as a condition of Petitioner acquiring the property.

Those restrictions were not negotiated in arms-length negotiations by any owner. Those limitations have the same type of impact on the marketability of the property as zoning restrictions and rent limitations on government subsidized housing.

5. The owner of the property does not have any legal right to any use or access to the property during the term(s) of the lease.

6. The only legal right which Petitioner has to the property, or ever will have to the property, is a right-of-reversion if and when the (X) decides to cease using the property.

7. Those governmental restrictions are a burden on the value of the property that would be considered and evaluated by any potential buyer of the property.

While the "fee simple rule" set forth in Utah Standard of Practice 6.2.1 and as adopted in numerous Tax Commission decisions is generally valid and applicable, it is not required by the law in all circumstances and it cannot be blindly applied without considering all of the facts that would be considered by a willing buyer and a willing seller. It is not a rule of law, but instead is merely an aspect of appraisal methodology. In Alta Pacific Associates, Ltd. v. Utah State Tax Commission, 931 P.2d 103 (Utah 1997), the Utah Supreme Court stated:

> "In *Beaver County v. Utah State Tax Commission*, we held that the proper application of appraisal methods was a question of fact:
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> > The proper application of appraisal techniques depends upon varying factual circumstances that defy generalization: "Valuation is an art, not a science. It is a function of judgment, not a natural law . . . . For example—true market value for purposes of ad valorem taxation is always an estimate, always an expression of judgment, always a result built on a foundation of suppositions about knowledgeable and willing buyers and sellers endowed with money and desire, whose desires are said to converge in a dollar description of the asset."
> >
> > *Beaver County*, 916 P.2d at 355 (quoting *Utah Ass'n of Counties v. Tax Comm'n*, 895 P.2d 819, 825 (Utah 1995) (alteration in original)(quoting

> *Union Pac. R.R. v. State Tax Comm'n*, 716 F. Supp. 543, 554 (D. Utah 1988))). In another case, this court stated, "Because of the many different kinds of property and the various factors that affect their values, the determination of what constitutes equal 'in proportion to the value of . . . tangible property' . . . cannot be made by application of any single formula." *Rio Algom Corp. v. San Juan County,* 681 P.2d 184, 188 (Utah 1984)(quoting Utah Const. art XIII, §3). These rulings apply in this case because the application of the fee simple rule is not a rule of law but merely an aspect of appraisal methodology.
>
> The fee simple rule is a technique of appraisal whose application depends upon the specific characteristics of the property under assessment. The rule, as drafted by the Commission, provides, "For ad valorem tax purposes, properties are *generally* appraised as if all ownership rights and interests are attached, i.e., the fee simple interest." *Valuation Standards* at 2 (emphasis added). The word "generally" as used in the fee simple rule reveals that the rule was not drafted to apply in every case. The inclusion of the word implies that in some cases, property may be assessed in an encumbered state. In addition, none of the Commission's standards **{931 P.2d 109}** should be presumed to apply in every case. Rather, the standards were drafted only "as a guide to achieve equity and uniformity in the administration of real property assessment." *Id.* at 1. Equity and uniformity are the ultimate goals of property assessment, and these goals cannot, in every case, be achieved by resort to a single guideline. *See Rio Algom Corp.,*681 P.2d at 188. For these reasons, the fee simple rule is better viewed as merely a guideline for appraisal, and its utility and proper application, like all matters of appraisal methodology, is a question of fact. *See Beaver County,* 916 P.2d at 355."

Accordingly, the Commission determines that it is not appropriate to value the full fee simple interest of the subject property without giving consideration to the benefits and burdens created by the long-term government leases on the property.

In addition to determining that the benefits and burdens of the long-term government leases must be considered in determining the value of the subject property, there is also a legitimate question as to whether the terms and conditions of the lease between the Petitioner and the (X) constitute de facto "ownership" of the property in the hands of the (X). In Petitioner's Post Hearing Memorandum it is argued:

- "The testimony of WITNESS indicates that in fact the objectives of the lease were intended to provide effective ownership for the (X). WITNESS's testimony was that the (X) initially wished to retain outright ownership of the property in

> question. WITNESS asked about an alternative arrangement which would eliminate some of the very costly transition costs in the event the (X) chose to dispose of the remaining property at some future time. (X) later agreed to the WITNESS option – provided that the nature of any lease would leave the (X) with complete and total control over the property for as long as the (X) wished without payment of any consideration.
>
> William B. Stoebuck and Dale A. Whitman in their treatise on property law have commented on the impact of perpetual renewals. "Perpetual renewals are allowed and **are considered to amount to a conveyance in fee simple** (emphasis added). They do not violate the Rule Against Perpetuities because the grantee has a vested, indeed a presently possessory estate."[2] The authors do note that courts will usually resolve ambiguities against perpetual renewals. However, in the present case the reference to multiple renewals is explicit and there are no ambiguities. The important point is that existence of perpetual renewals constitutes a fee simple conveyance. In the present case that supports the premise that the (X) de facto owns the property.
>
> It is also worth noting that (X) retains and exercises all rights of access to the property. Access is controlled by means of military checkpoints which even the Petitioner is required to negotiate. In the case of the (#) warehouses, however, access to anyone other than authorized personnel is prohibited. This status has long predated the base closure process. The nature of the access to other areas has obviously been heightened as a result of the events of September 11, 2001. Nonetheless, there has always been some visible military control over access to the remaining property as well.
>
> Finally, the existence of the lease did not prompt any change in use or tax status. This is not a case of property being removed from the tax rolls and now being used by the (X). The (X) owned and controlled the property long before the BRAC process. The (X) has the same total control over the same property after the process."

Based on the arguments of Petitioner, the Commission determines that where the government has leased the property for 50 years, with unlimited automatic 50 year extensions at the will of the government at no further cost to the government, the (X) does have "de facto" ownership of the property. The only real legal interest in the property owned by Petitioner is a reversionary interest. That interest may be realized in 50 years, or maybe never.

The appraisal of APPRAISER A assumed a reversion of the property at the end of the first 50

year term. If the lease does in fact end in 50 years, then the appraisal of APPRAISER A is reasonably accurate. However, if the government extends the lease for an additional 50 year term, then the value may be significantly less than the value determined by APPRAISER A. Nevertheless, there is no testimony or evidence from which the Commission can determine a value lower than that determined by APPRAISER A.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission finds that the market value of the subject property that was at issue as of January 1, 2000, is as follows:

Subject Parcel #1 (Tax Parcel ##### - 1)	
Present worth of reversion of 59.68 acres	$$$$$
Present worth of reversion of improvements on the above 59.68 acres	$$$$$
Present worth of reversion of 15.27 acres	$$$$$
Present worth of reversion of improvements on the above 15.27 acres	$$$$$
Total Value of Parcel #1	$$$$$
(There is an additional 83 acres that are part of parcel #1. However, the parties have stipulated to the value on those 83 acres, and the Commission does not make any determination on the value of those acres.)	
Subject Parcel #2 (Tax Parcel ##### - 2)	
Present worth of reversion of 29.42 acres	$$$$$
Present worth of reversion of improvements on the above 29.42 acres	$$$$$
Total Value of Parcel #2	$$$$$

It is so ordered.

DATED this _____ day of _____, 2004.

_____
G. Blaine Davis
Administrative Law Judge

2 William B. Stoebuck and Dale A. Whitman, Property 377 (West, 3rd. ed., 2000)

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 _____,2004.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Marc B. Johnson
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. ∋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 Ann. ∋∋59-1-601 and 63-46b-13 et. seq.

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