08-2408
LOCALLY ASSESSED PROPERTY
TAX YEAR: 2008
SIGNED: 08-19-09
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON, D. DIXON

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, vs. BOARD OF EQUALIZATION OF COUNTY, STATE OF UTAH Respondent.	**INITIAL HEARING DECISION** Appeal No. 08-2408 Parcel No. ##### Tax Type: Property Tax / Locally Assessed Tax Year: 2008 Judge: R. B. Johnson

Presiding:
R. Bruce Johnson, Commissioner

Appearances:
For Petitioner: PETITIONER
For Respondent: RESPONDENT REP. 1, COUNTY Assessor
RESPONDENT REP. 2, COUNTY Deputy Assessor
RESPONDENT REP. 3, COUNTY Chief Deputy Clerk/Auditor

STATEMENT OF THE CASE

This matter came before the Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. § 59-1-502.5, on April 30, 2009. The Assessor originally valued the improvements at $$$$$, and the land at $$$$$, for a total value of $$$$$. The Board of Equalization upheld the land value, but reduced the value of the improvements to $$$$$, for a total value of $$$$$.

The property in question is a residential property located at ADDRESS, CITY, Utah. As of the lien date, January 1, 2008, the residence was under construction. Taxpayer is a contractor and is building the residence himself. He began construction in November 2007. He obtained a temporary certificate of occupancy on February 25, 2008, and a permanent certificate of occupancy on April 4, 2008. The home is located on a 5-acre tract of land; however, there is a road easement that occupies 1-acre of land. Accordingly, the County has only valued the land as a 4-acre parcel.

Taxpayer argues that the land value is too high because it has "skyrocketed" in recent years and has now "crashed." He also argued that his property is less valuable than otherwise comparable properties because

it is located on a main street that has additional traffic. He also makes an equalization argument that his property is valued at a higher rate per square foot than other properties in his development.

Taxpayer argues that the value of the improvements should be based on his actual costs (including his labor), discounted for the fact that no one would reimburse him for 100% of his costs for a partially completed building. He submitted a statement of costs indicating his building costs through December 31, 2007, were $$$$$ (which included a $$$$$ charge for his own labor.) The total cost was calculated at $$$$$ (which included a total of $$$$$ in charges for his own labor.) He testified that he believes a prospective buyer would only give him (X) cents on the dollar for an uncompleted residence.

Finally, he argues that he should receive the residential exemption, or in the alternative, a pro-rated residential exemption to reflect the fact that the property was his primary residence for the majority of the year.

APPLICABLE LAW

Any party requesting a value different from the value established by the County Board of Equalization has the burden to establish that the market value of the subject property is other than the value determined by the County Board of Equalization. To prevail, a party must: 1) demonstrate that the value established by the County Board of Equalization contains error; and 2) provide the Commission with a sound evidentiary basis for changing the value established by the County Board of Equalization to the amount proposed by the party. 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).

"Local governments may legislate by ordinance in areas previously dealt with by state legislation, provided the ordinance in no way conflicts with existing state law." (Emphasis added.) *Price Dev. Co. v. Orem City*, 2000 UT 26, 995 P.2d 1237 (Utah 2000). In harmony with the Court, Utah Code Ann. § 59-2-1001(6) provides:

> [t]he county board of equalization may make and enforce any rule which is consistent with statute or commission rule, and necessary for the government of the board, the preservation of order, and the transaction of business. (Emphasis added.)

Administrative rules have the force and effect of law and are an integral part of the statutes under which they are made. *Horton v. Utah State Retirement Bd.*, 842 P. 2d 928 (Utah Ct. App. 1992). The Supreme Court of North Carolina found that "the legislature is always presumed to act with full knowledge of

prior and existing law and that where it chooses not to amend a statutory provision that has been interpreted in a specific way, we may assume that it is satisfied with that provision." *Polaroid Corp. v. Offerman*, 349 N.C. 290, 507 s.E. 2d 284 (N.C. 1999). This finding has been similarly expressed by the Utah Court. "The fact that the legislature has known of the administrative interpretation of the term fair market value since 1937 is persuasive of the fact that the legislative intent was expressed by the regulation." *Vrontikis Bros. v. Utah State Tax Comm'n*, 337 P. 2d 434 (Utah 1959). "This argument is based upon the familiar{1948 Utah LEXIS 5} doctrine that the re-enactment of the pertinent provisions in successive acts without substantial change must be treated as legislative approval of the regulations and of the administrative interpretation placed upon them." *New Park Mining Co. v. State Tax Comm'n*, 196 P.2d 485 (Utah 1948).

The law governing primary residential status is set out in Utah Code Ann. § 59-2-103, as follows:

> (1) All tangible taxable property located within the state 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 provided by law.
>
> (2) Subject to Subsections (3) and (4), beginning on January 1, 1995, the fair market value of residential property located within the state shall be reduced by 45%, representing a residential exemption allowed under Utah Constitution Article XIII, Section 2.
>
> (3) No more than one acre of land per residential unit may qualify for the residential exemption.
>
> (4) (a) Except as provided in Subsection (4)(b)(ii), beginning on January 1, 2005, the residential exemption in Subsection (2) is limited to one primary residence per household.
>
> (b) An owner of multiple residential properties located within the state is allowed a residential exemption under Subsection (2) for:
>
> (i) subject to Subsection (4)(a), the primary residence of the owner; and
>
> (ii) each residential property that is the primary residence of a tenant.

59-2-102. Definitions.

. . .

(18) (a) For purposes of Section 59-2-103:

(i) "household" means the association of persons who live in the same dwelling, sharing its furnishings, facilities, accommodations, and expenses; and

(ii) "household" includes married individuals, who are not legally separated, that have established domiciles at separate locations within the state.

. . .

(31) "Residential property," for the purposes of the reductions and adjustments under this chapter, means any property used for residential purposes as a primary residence.

. . .

59-2-103.5. Procedures to obtain an exemption for residential property.

(1) Subject to the other provisions of this section, a county legislative body may by ordinance require that in order for residential property to be allowed a residential exemption in accordance with Section 59-2-103, an owner of the residential property shall file with the county board of equalization a statement:

(a) on a form prescribed by the commission by rule;

(b) signed by all of the owners of the residential property;

(c) certifying that the residential property is residential property; and

(d) containing other information as required by the commission by rule.

(2) (a) Subject to Section 59-2-103 and except as provided in Subsection (3), a county board of equalization shall allow an owner described in Subsection (1) a residential exemption for the residential property described in Subsection (1) if:

(i) the county legislative body enacts the ordinance described in Subsection (1); and

(ii) the county board of equalization determines that the requirements of Subsection (1) are met.

(b) A county board of equalization may require an owner of the residential property described in Subsection (1) to file the statement described in Subsection (1) only if:

(i) that residential property was ineligible for the residential exemption authorized under Section 59-2-103 during the calendar year immediately preceding the calendar year for which the owner is seeking to claim the residential exemption for that residential property;

(ii) an ownership interest in that residential property changes; or

(iii) the county board of equalization determines that there is reason to believe that the residential property no longer qualifies for the residential exemption in accordance with Section 59-2-103.

(3) Notwithstanding Subsection (2)(a), if a county legislative body does not enact an ordinance requiring an owner to file a statement in accordance with this section, the county board of equalization:

(a) may not require an owner to file a statement for residential property to be eligible for a residential exemption in accordance with Section 59-2-103; and

(b) shall allow a residential exemption for residential property in accordance with section 59-2-103.

(4) (a) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the commission shall make rules providing:

(i) the form for the statement described in Subsection (1); and

(ii) the contents of the form for the statement described in Subsection (1).

(b) The commission shall make the form described in Subsection (4)(a) available to counties.

Pursuant to this statute, COUNTY has enacted Ordinance No. 422, which provides in relevant part:

PREAMBLE

WHEREAS, the Utah Code givers the County the authority to "'make and enforce any rule which is consistent with statute or commission rule, and necessary for the government of the [Board of Equalization], the preservation of order, and the transaction of business:"

. . .

Section 2. Criteria for Determining Eligibility for the Residential Exemption

B. Eligibility Guidelines

3. Buildings Under Construction: Buildings that are not completely constructed and occupied as a primary residence on January 1 of the tax year do not qualify for the residential exemption. To qualify, the building must be: (a) complete, (b) valued by the Assessor for property tax purposes as a completed building, and (c) legally occupied by a person who uses it as their primary residence.

Section 4. Conflict

In the event of any conflict between this Ordinance and State or Federal law, the provisions of the latter shall be controlling.

The Tax Commission has promulgated Administrative Code R884-24P-20, which provides in part as follows:

E. Appraisal of Properties not Valued under the Unit Method.

1. The full cash value, projected upon completion, of all properties valued under this section, with the exception of residential properties, shall be reduced by the value of the allocable preconstruction costs determined D. This reduced full cash value shall be referred to as the "adjusted full cash value."

2. On or before January 1 of each tax year, each county assessor and the Tax Commission shall determine, for projects not valued by the unit method and which fall under their respective areas of appraisal responsibility, the following:

a) The full cash value of the project expected upon completion.

b) The expected date of functional completion of the project currently under construction.

(1) The expected date of functional completion shall be determined by the county assessor for locally assessed properties and by the Tax Commission for centrally-assessed properties.

c) The percent of the project completed as of the lien date.

(1) Determination of percent of completion for residential properties shall be based on the following percentage of completion:

(a) 10 - Excavation-foundation

(b) 30 - Rough lumber, rough labor

(c) 50 - Roofing, rough plumbing, rough electrical, heating

(d) 65 - Insulation, drywall, exterior finish

(e) 75 - Finish lumber, finish labor, painting

(f) 90 - Cabinets, cabinet tops, tile, finish plumbing, finish electrical

(g) 100 - Floor covering, appliances, exterior concrete, misc.

(2) In the case of all other projects under construction and valued under this section the percent of completion shall be determined by the county assessor for locally assessed properties and by the Tax Commission for centrally-assessed properties.

3. Upon determination of the adjusted full cash value for nonresidential projects under construction or the full cash value expected upon completion of residential projects under construction, the expected date of completion, and the percent of the project completed, the assessor shall do the following:

a) multiply the percent of the residential project completed by the total full cash value of the residential project expected upon completion; or in the case of nonresidential projects,

b) multiply the percent of the nonresidential project completed by the adjusted full cash value of the nonresidential project;

c) adjust the resulting product of E.3.a) or E.3.b) for the expected time of completion using the discount rate determined under C.

The Tax Commission has also promulgated Administrative Code R884-24P-52, which provides in relevant part:

F. Administration of the Residential Exemption.

. . .

3. If the county assessor determines that a property under construction will qualify as a primary residence upon completion, the property shall qualify for the residential exemption while under construction.

. . .

6. If the county assessor determines that an unoccupied property will qualify as a primary residence when it is occupied, the property shall qualify for the residential exemption while unoccupied.

Utah Code Ann. § 59-1-210 grants the Commission certain powers with respect to the counties, including:

(7) to exercise general supervision over assessors and county boards of equalization …, and over other county officers in the performance of their duties relating to the assessment of property and collection of taxes, so that all assessments of property are just and equal, according to fair market value, and that the tax burden is distributed without favor or discrimination.

DISCUSSION

Residential Exemption. The application for the residential exemption provided under § 59-2-103.5 only allows for a county to establish an ordinance to require an application for exemption, not to determine what constitutes a primary residence. Before considering the relevant state laws and the applicability of the ordinance, we see three legal principles at issue. To begin, the Court is quite clear that a county ordinance cannot supersede Utah law. Utah Code Ann. § 59-2-1001(6) is consistent with this principle. Second, the Court is equally clear that an Administrative Rule has the same force and effect as a statute. Lastly, it is presumed that the legislature is aware of existing law when enacting new law. We conclude that the county's ordinance is in effect only to the extent it does not conflict with statutes and Tax Commission rules applicable to the primary residential exemption.

COUNTY passed Ordinance No. 422 ("ordinance"), which states under Section 2.B.3. that "[b]uildings that are not completely constructed and occupied as a primary residence on January 1 of the tax year do not qualify for the residential exemption." The preamble to the ordinance recognizes and cites § 59-2-1001(6)[1], stating that "the Utah Code gives the County the authority to 'make and enforce any rule which is consistent with statute and commission rule.'" (Emphasis added.) Furthermore, Section 4. of the ordinance unequivocally requires that state law is controlling over the ordinance. The ordinance also requires that the application "include a copy of . . . Utah Administrative Code R884-24P-52." An initial critical concern of the

Commission is that this ordinance is internally inconsistent. The construction and occupancy requirements, in fact, violate both the preamble and the conflict provision under Section 4.

The only state law that addresses the exemption for vacant and/or incomplete property is Administrative Code R884-24P-52 ("Rule 52.") It provides specifically under subparagraph F.3.: "[i]f the county assessor determines that a property under construction will qualify as a primary residence upon completion, the property shall qualify for the residential exemption while under construction." Subparagraph F.6. further provides that "[i]f the county assessor determines that an unoccupied property will qualify as a primary residence when it is occupied, the property shall qualify for the residential exemption while unoccupied." This rule was created for an express purpose – to allow the primary exemption for property either under construction or completed but vacant, whether owned by residential property developers or by individuals, as long as it can be determined that the property will qualify for the residential exemption once occupied.

With respect to the Utah Code, § 59-2-103.5(1) allows a county to pass an ordinance requiring that "an owner of the residential property shall file with the county board of equalization a statement." There are three relevant parts applicable to the subject property. First, subsection (1)(c), requires the owner to certify that the property is residential property. Second, subsection (2)(b)(i) provides that the statement may only be required for property that was ineligible for the exemption in the year prior to the lien date. The final part, governing all of this, is Subsection (2)(a), which mandates that a county shall allow the residential exemption if the county first, enacts the ordinance described in Subsection (1), and second, determines that the requirements of Subsection (1) are met. Subsection (1) allows a county to require a signed form certifying that the property is a residential property, and containing information provided by rule. There is nothing in statute that allows the ordinance to establish when a property qualifies for the residential exemption. Furthermore, there is nothing in the record that shows that the Taxpayer has not complied with § 59-2-103.5. In addition, §§ 59-1-210(5) and (7) mandate that the Tax Commission "administer and supervise the tax laws of the state," and "exercise general supervision over assessors and county boards of equalization . . ., and over other county officers in the performance of their duties relating to the assessment of property . . .."

We have also considered the governing law under § 59-2-103. Subsection (4)(a) limits a single residential exemption to a single household. We recognize that there are two possible interpretations of this

[1] The ordinance incorrectly identifies the statute as Utah Code Ann. 59-2-100 (6). The Commission does not necessarily interpret this statute to define a board of equalization rule to be the same as a county ordinance.

provision. One view is that under a given circumstance, a household occupying residential property, owned or leased on the lien date, cannot receive the residential exemption for another property that is vacant and under construction, but which will become a primary residence after completion. This view would have to be further qualified by holding that the construction and occupancy provisions are applicable only in a county that has passed an ordinance, and that such an ordinance would apply to all property under construction regardless of ownership, as well as to all rental property that was temporarily vacant on the lien date. Furthermore, to hold that this interpretation of § 59-2-103(4)(a) stands independently would render paragraphs F.3. and 6. of Rule 52 to have no force and effect, and COUNTY Ordinance No. 422 would be unnecessary. The Commission believes this logic to be circular.

Although this interpretation of the statutes and rule is consistent with the county ordinance, we find it unacceptable for several reasons. First, this position allows an ordinance to supersede state law. Moreover, the express provisions of the ordinance require that the county must make its rules "consistent with statute and commission rule," and that state law is controlling.

We take another view of the statute, finding a more reasonable reading to be that the legislation was intended to prevent different members of a household from receiving two residential exemptions by occupying separate residences simultaneously on the lien date. We do not believe the intent was to prevent a household from receiving an exemption for a residence under construction that will qualify as a primary residence when completed, while they temporarily occupy a rental property or even their own home as they are waiting for completion of their new home. Nor do we believe that the statute permits a county to create an ordinance that would disallow a residential exemption for an incomplete residential property simply because it is located in a county with a high amount of secondary residential property. To the contrary, an ordinance is not even necessary for this situation. The assessor is required to grant the exemption only when it can be established that the property will be used as a primary residence. If such a determination cannot be made, there is no requirement to grant the exemption, and the burden is on the property owner to establish both 1) that the property will be a primary residence, and 2) that its status as a primary residence was knowable on the lien date.

Our overall interpretation of § 59-2-103(4) reconciles two critical areas. First, it is internally consistent between subsection (4)(a), which specifies the single exemption per household, and subsection (4)(b), which provides a residential exemption for a rental property irrespective of the household of the owner. Second, it is

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However, the underlying premise is the same.

compatible with Rule 52. To that end, we note as well that the legislature is presumed to have been aware of the provisions of Rule 52 when it passed § 59-2-103. It could have done something to override the specific provisions for construction and vacancy, but chose not to.

Equally, if not more important in support or our interpretation, § 59-2-103(4) must be read within the meaning and context of § 59-2-102(18)(a), which defines "household" to include "married individuals, who are not legally separated, that have established domiciles at separate locations within the state." These two statutes should also be considered with the fact that there is no law whatsoever addressing a second residential exemption for residential property under construction that is owned by a household with a single domicile. Accordingly, we find that § 59-2-102(18)(a) is not only consistent with our interpretation of § 59-2-103(4), it practically compels such an interpretation. Rather than prohibiting a married household from receiving an exemption for a property that is temporarily vacant, and which the household intends to move into, § 59-2-103(4) is intended to prevent married couples who live in separate homes, in different counties, from receiving two exemptions.

Aside from the inconsistencies within the ordinance itself, and the conflict between the ordinance and state law, we have some concern with the potential ramifications of the construction and occupancy requirements under the eligibility provision of the ordinance. This provision only disallows the exemption for property that is under construction. Absolutely no provision exists to disallow the exemption for property that is vacant, but complete.[2] Thus, two similarly situated households are subject to disparate treatment. For example, household number one benefits from two exemptions; one exemption for the property it occupies on the lien date, and a second, under the provisions of Rule 52F.6., for a completed property that is vacant but will be occupied when complete. Household number two, on the other hand, may be in a nearly identical situation, only that the second residence is %%%%% complete. In this case, according to the ordinance, there is no exemption for the sole reason that there are no appliances or carpeting. We find this disparity to be untenable. We are also concerned that such provisions, in general, have the potential to create untenable disparities among and within counties. Similarly situated individuals and developers would be treated completely differently, depending on whether an ordinance were passed requiring property to be occupied on the lien date in order to be considered residential property. Likewise, we believe the ordinance itself creates a disparity for residential properties that are completed but vacant and residential properties that are under construction.

[2] This distinction is necessary; it is administratively impossible for an assessor to determine whether every residential property in the county is occupied or vacant.

In conclusion we find that Section 2.B.3. of the ordinance conflicts with the express provisions of Rule 52. We note that the legislature is presumed to have been aware of the provisions of Rule 52 when it passed § 59-2-103. It could have done something to override the specific provisions for construction and vacancy, but chose not to. In addition, the assessor has not disputed that the property will be used as a primary residence. Nor was there any argument that the application had not been timely submitted. Therefore, in accordance with Rule 52, §§ 59-2-102, 103, 103.5, and 59-1-210, as well as parts of the County's own ordinance, the subject property is entitled to the residential exemption.

Although we find that the specific provision under Section 2.B.3 to be invalid, at this time we do not see any other provision to be inconsistent with property tax law in Utah. We currently believe the rest of Ordinance No. 422, including provisions not expressly granted by statute, to be valid. The Commission does not want to dampen the ability of an entity to enact rules and ordinances it feels necessary to further the interests of its citizens. At the same time we recognize the difficulty for COUNTY in effectively administering the residential exemption in light of the diversity of ownership. We reiterate, moreover, that Rule 52.F.2. and 6. provide for the assessor to disallow the exemption when use and occupancy cannot be determined.[3] Finally, while the Commission cannot impose any part of a local ordinance upon the County, we suggest that the County modify Section 2.B.3., along with the corresponding provision in the application, to require a property owner to certify that the property will be used as a primary residence upon completion and occupancy. Additional evidence or documentation to support the certification could be required as needed.

Cost of construction in progress. The Board of Equalization essentially valued the house as a $$$$$ house that was %%%%% complete on the lien date. The Assessor testified that their costs were based on Marshall & Swift tables incorporated within their mass appraisal program. She further testified that she had verified the appropriate variables with the County Building Department.

Taxpayer's numbers are based on a $$$$$ house that was approximately %%%%% complete on the lien date (at least in terms of costs incurred.) Taxpayer's cost includes $$$$$ for his own labor through December 31, 2007, and another $$$$$ through February 29, 2008. No labor is included thereafter. The Taxpayer's figures do not include any entrepreneurial profit, which would normally be included if the complete home were to be sold to a third party.

No specific testimony was provided as to what a reasonable entrepreneurial profit might be. %%%%% to %%%%% percent of the total direct and indirect costs would appear to be reasonable. Thus, even using the Taxpayer's

[3] The assessor's determination may be appealed to and reversed by the Board of Equalization under the express provisions of the ordinance.

costs, entrepreneurial profit would add between $$$$$ and $$$$$ to the cost approach for the improvements. Similarly, no specific testimony was provided on the reasonableness of $$$$$ of labor costs for a property of this nature, although the Assessor argued it appeared to have been understated. The Marshall & Swift tables include labor costs and the costs they publish are generally accepted by the appraisal profession. Given the issue of entrepreneurial profit and the lack of comparable information on labor costs, we find that Taxpayer has not carried his burden of showing the value of improvements is erroneous. We further hold that Rule 884-24P-20 provides no allowance for a %%%%% discount for an unfinished building like that requested by Taxpayer; nor was any market evidence presented to support such a discount.[4]

Land. Taxpayer argues that the value of the land has increased greatly in recent years and has now dropped in value. The only sales data presented at the hearing, however, support the County's values as of the lien date. Taxpayer notes, however, that the sale and the assessments in his area are based primarily on 5-acre lots. Because his lot is effectively 4 acres, he argues that his value should be %%%%% of the value of a 5-acre lot. The County's valuation methodology, however, values the first acre homesite at $$$$$, and the backage at $$$$$ per acre. Thus, a 5-acre parcel would be valued at $$$$$ and a 4-acre parcel, such as Taxpayer's, would be valued at $$$$$. This use of a high value for a lot, with a lower value for backage is a generally accepted methodology. Although it may be unlikely that a buyer would pay $$$$$ for a 4-acre parcel if an otherwise comparable 5-acre parcel was available for only $$$$$ more, we were presented with no market evidence that would justify us in substituting our judgment for the Assessor's. Accordingly, we find that Taxpayer has not carried his burden of proof.

DECISION AND ORDER

For the reasons stated above, the decision of the Board of Equalization is affirmed on the valuation. The Commission reverses the decision of the Board with respect to the primary residential exemption, and finds that the property qualifies for the exemption.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division

[4] Although the issue of "level of trade" is more often used in the personal property context, we note that appraisal methodology generally requires the appraisal to be based on the "appropriate level of trade" that reflects its continued and expected productive use, rather than some highly discounted liquidation value.

210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

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