09-0435
LOCALLY ASSESSED PROPERTY
TAX YEAR: 2008
SIGNED 09-10-2009
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON, D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, vs. BOARD OF EQUALIZATION FOR RURAL COUNTY, UTAH, Respondent.	**INITIAL HEARING ORDER** Appeal No. 09-0435 Parcel No. ##### Tax Type: Property Tax/Locally Assessed Tax Year: 2008 Presiding: Hendrickson

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:
Pam Hendrickson, Commission Chair

Appearances:
For Petitioner: PETITIONER REP, PETITIONER
For Respondent: RESPONDENT REP 1, RURAL COUNTY Assessor
RESPONDENT REP 2, Appraiser for RURAL COUNTY Assessor's Office
RESPONDENT REP 3, Witness for RURAL COUNTY

STATEMENT OF THE CASE

Taxpayer brings this appeal from the decision of the RURAL COUNTY Board of Equalization ("the County"). This matter was argued in an Initial Hearing on July 9, 2009. The RURAL COUNTY Assessor's Office assessed the subject property at $$$$$ as of the January 1, 2008 lien date, which the Board of Equalization sustained. The County is requesting the

Commission sustain the Board of Equalization value. The Taxpayer is requesting the value of the subject property be reduced to $$$$$.

The issue in this proceeding is identical to that in Appeal 09-0444 as well as in four of seven parcels in Appeal 09-0445. The parties were informed that the Commission will base its decision on evidence and testimony in both hearings.

APPLICABLE LAW

Utah Code Ann. §59-2-103 provides for the assessment of property, 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.
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> (3) No more than one acre of land per residential unit may qualify for the residential exemption.
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> Utah Code Ann. §59-2-103 (2008).

For property tax purposes, "fair market value" is defined in Utah Code Ann. §59-2-102(12), as follows:

> "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.
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> Utah Code Ann. §59-12-102(12) (2008).

A person may appeal a decision of a county board of equalization, as provided in Utah Code Ann. §59-2-1006, in pertinent part below:

> (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.
>
> (4) In reviewing the county board's decision, the commission shall adjust property valuations to reflect a value equalized with the assessed value of other comparable properties if:
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> (a) the issue of equalization of property values is raised; and
>
> (b) the commission determines that the property that is the subject of the appeal deviates in values plus or minus 5% from the assessed value of comparable properties.
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> Utah Code Ann. §59-2-1006 (2008).

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)

DISCUSSION

The subject property is a 3.39 acre parcel of vacant commercial land located on ADDRESS 1 in CITY Utah. Taxpayer argues that because this property has a colony of ANIMALS ("ANIMALS" or "ANIMALS") on it, its use as a commercial development is not feasible. He presented three newspaper articles outlining the ANIMAL issue in RURAL COUNTY. He stated that RURAL COUNTY had entered into an agreement with the State of Utah, Division of Wildlife Resources ("DWR"), to limit the amount of ANIMALS that can be removed each year and to establish the process to develop the land after removal of the ANIMALS. His argument is that while the agreement protects the ANIMALS, nothing is being done to protect the property owner, and enable him to develop his property as he wishes. Further, he argues that he cannot sell or develop the property until the ANIMAL issue is resolved and the process established by the County makes that impossible. Therefore, based on his inability to use and develop his land, it has no value for tax purposes.

Next, Taxpayer presented a copy of an offer to sell the property dated May 2008, where he had no sale price listed, inviting prospective buyers to make an offer. He stated that he has had no offers to date.

Taxpayer also submitted two letters addressed to him from the DWR, the first dated April 2006 where they stated "the estimated population for this parcel is 54 animals. Development of this parcel will result in 'take' of 54 ANIMALS and 3.5 acres of their habitat." The letter also states that no development can occur until RURAL COUNTY Commissioners authorizes a "take". Taxpayer explained that he has been told he could only apply for and "take" ten (10) ANIMALS in any one year, and that once he came to the top of the waiting list he had to be ready to develop the property within 60 days of removing the ANIMALS. The second letter was issued to Taxpayer on June of 2009 and informed Taxpayer that another survey had been performed and that the DWR determined that there were 21 ANIMALS on the property at that time. Taxpayer stated that there is also a mitigation fee of $$$$$ per acre to get the permit to "take" the ANIMALS. In addition, the property must be in continuous development once the ANIMALS are removed and, based on the down-turn in the economy, it is not prudent to invest at this time.

Additionally, Taxpayer argues that the County has relied on two sales and two listings that do not have ANIMALS on the property, and do not have the same limitations as his property, to determine the value of his property. He believes the 30% adjustment made the past two years by the County to be inadequate. He further argues that a suggestion by the County to remove the ANIMALS and fence off the property one section at a time, is not workable and not a viable option.

In response to the Taxpayer's arguments, the County Assessor stated that the county has made an attempt to resolve the issue of determining the fair market value of properties that can documented as having a ANIMAL impact, by reducing the normalized value by 30% for the "cost to cure". He stated that in trying to understand the impact of the ANIMALS to the property they had contacted the DWR and had requested information. He stated that his responsibility is to find the best determination of what someone would pay for the property knowing of the limitations and the impact of the ANIMALS. He invited an expert from the DWR to explain the process for removing or "taking" the animals from the property.

The County also presented an analysis grid containing two properties listed for sale near the subject and two actual sales. The first, a 5-acre parcel listed for $$$$$ an acre and the next, 2.3 acres, listed at $$$$$. Two sales were also presented to establish the beginning point for determining market value. Sale #1 is .52 acres and sold Dec. 2008 for $$$$$ an acre and #2 sold

March 2007 for $$$$$. The County then determined the per-acre value of this property to be $$$$$ and further reduced it to $$$$$ an acre to adjust for the ANIMAL impact.

In addition, the County disclosed another sale of a parcel 8.21 acres in size in the general area, approximately one mile from subject, that had occurred in Aug 2006 for $$$$$ an acre, which they said had been developed even though it had ANIMALS. It is unclear whether the mitigation occurred before or after the sale as well as the extent of the ANIMAL population on this property but it does indicate that properties encumbered by the ANIMALS can be sold and developed.

At the hearing the County, after consulting with an employee from DWR on another property value appeal, offered two different computations for the remediation of the impact of the ANIMALS. The first computation was made by estimating the cost to fence the perimeter of the entire property after removal of the ANIMALS, which resulted in a cost of just over $$$$$ per acre. The cost of the ANIMAL removal was based on a $$$$$ per acre charge, and the cost of the fence was estimated at a total of $$$$$ per lineal foot. A second option was to divide the property into three equal pieces and over a three- year period remove 10 ANIMALS per year and fence each section. The calculation was made on the same basis as the first option, with another 700 lineal feet for additional fence needed to section off the property. With this adjustment, the estimated cost to cure is approximately $$$$$. The County contrasted these figures with the $$$$$ per acre already included in the assessment.

Based on information presented by RESPONDENT REP 3, Sensitive Species Biologist from the DWR, who was present at the hearing, we understand that the Utah ANIMAL is a federally threatened species that occurs only in southwestern Utah. A large proportion (65%) of the total population occurs in RURAL COUNTY and a high percentage (86%) of those are on privately owned land based on data from the HABITAT CONSERVATION PLAN for UTAH PRARIE ANIMALS in RURAL COUNTY, UTAH ("HCP") developed for RURAL COUNTY in 1998. The agreement between RURAL COUNTY and DWR currently allows for 70 ANIMALS to be removed from land in RURAL COUNTY each year and restricts that to a maximum take of 10 ANIMALS per year for an individual who qualified for a permit. The agreement sets up a process for making application to the county for permits to "take" the ANIMALS. Until recently there has been a long waiting list to get permitted. Once permits are issued and the fees paid, a property owner has 60 days to begin construction and this must be uninterrupted construction. The property owner may apply for and receive one 60-day extension. Based on RESPONDENT REP 3's information, there must be a parking lot, gravel, or concrete

on the ground to alter the land so that the ANIMALSs cannot rehabitat the property. He stated that a barrier fence could be built but that it may not be very effective in keeping ANIMALS out. He also stated that an owner cannot just clear the land of ANIMALS for future development by simply building a fence and doing nothing more. The requirement to be in "uninterrupted construction" is strictly enforced.

RESPONDENT REP 3 did say that the land could be used in agriculture – that the land could be disked, planted, and watered but that there could be not "deep-disking" as that would disturb the colony of ANIMALS. He also said the property would be developable and saleable following those steps.

In addition to his testimony, RESPONDENT REP 3 provided a copy of the HCP, on which most of his testimony was based. The HCP also provides for a waiver, under which an individual may receive a building permit, subject to any fines and penalties that would be imposed for violations of the Endangered Species Act.

The County assessor stated that the debate is "cost to cure," which is difficult to determine. He is aware of properties where it would be next to impossible to develop. If a property had 100 ANIMALS, the "takes" would have to occur over a number of years. A property 3.50 acres in size with 54 ANIMALS would require several years to remove the ANIMALS however continued development must be maintained as the ANIMALS are being removed.

Based on the information presented we find that the highest and best use of this property; according to the following criteria: "physically possible, legally permissible, financially feasible, and maximally productive;"[1] would not be as commercially developable property. Such a use is neither possible, legal, nor feasible at this time. The question of whether a use is legally permissible addresses more than zoning; in this case, commercial development with ANIMALS on the property would be a violation of state and federal law.

Although the County argues that the issue is cost to cure, we are persuaded that the issue is far more complex than the dollar amount. In fact, even the County's estimate of the cost to cure is not valid, since adding fence is not adequate to prevent the return of the ANIMALS. Although a cost to cure is difficult to estimate, that aspect does not even enter into the valuation problem until the property qualifies for a "take." In the case of the subject property, there are more ANIMALS than would be allowed to be taken in a single year. Thus, assuming once the initial "take" was completed, and a portion of the land developed to DWR specifications, the

[1] See The Appraisal of Real Estate, 12th ed.

owner would be required to go through at least two subsequent applications, which might not even be approved in the immediate future.

The Commission, after reviewing the evidence and testimony presented at the hearing, finds that a prudent investor would not purchase vacant land that is a known ANIMAL habitat without a deep discount, and possibly would not purchase the property at all. The risk of not being able to develop the land, associated with the cumbersome task of complying with the HCP makes what would be an otherwise sound investment prohibitive.

Accordingly, we find that the 30% discount applied by the assessor accounts for only some of the stigma, risk, legal restrictions, and time value of money associated with development. The discount is insufficient, however, to further account for actual costs to cure.

Given the testimony from DWR, we find that the only possible use as of the lien date for this property is agricultural. The Commission does not believe that a value based on an interim speculative use is supported by the evidence on record. We recognize that an agricultural use and value may be hypothetical. We also consider that a highest and best use as agricultural land might not be legally permissible, depending on zoning restrictions. Nonetheless, an agricultural value reflects the only determinable value of the subject property in its "as is" situation, and may be considered as a substitute for a price an investor might be willing to pay. It also reflects an interim value until the ANIMAL situation is mitigated. Furthermore, in reviewing aerial and ground-level photographs provided by the county, it appears that much of the land in the vicinity of the subject property may be under agricultural use. Therefore we believe an agricultural value is not unreasonable. In general, vacant land where there is a known ANIMAL colony should be valued according to agricultural values in the closest immediate area.

DECISION AND ORDER

On the basis of the foregoing, the Tax Commission directs the county to place a value consistent with property that is being used for agriculture uses that reflect the conditions that would be allowed by DWR. The value will be established on the assessment basis for agricultural property in closest proximity to the subject property. It is so ordered.

This Decision does not limit a party's right to a Formal Hearing. Any party to this case may file 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
210 North 1950 West

Salt Lake City, Utah 84134

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

DATED this _____ day of _____, 2009.

_____
Pam Hendrickson
Commission Chair

BY ORDER OF THE UTAH STATE TAX COMMISSION.

DATED this _____ day of _____, 2009.

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

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