09-0444
LOCALLY ASSESSED PROPERTY
TAX YEAR: 2008
SIGNED 09-24-09
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, M. JOHNSON, D. DIXON
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER 1 & PETITIONER 2, Petitioner, vs. BOARD OF EQUALIZATION FOR RURAL COUNTY, UTAH, Respondent.	**INITIAL HEARING ORDER** Appeal No. 09-0444 Parcel No. ##### -1 Tax Type: Property Tax/Locally Assessed Tax Year: 2008 Presiding: M. Johnson

Presiding:
Marc B. Johnson, Commissioner

Appearances:
For Petitioner: PETITIONER 1 & PETITIONER 2, *pro se*
For Respondent: RESPONDENT REP 1, RURAL COUNTY Assessor
RESPONDENT REP 2, RURAL COUNTY Commissioner
RESPONDENT REP 3, RURAL COUNTY Appraiser
RESPONDENT REP 4, Wildlife Technician with the Utah Division of Wildlife Resources (appeared by phone)

STATEMENT OF THE CASE

Petitioner ("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 7, 2009. The RURAL COUNTY Assessor's Office assessed the subject property at $$$$$ as of the January 1, 2008 lien date, which the Board of Equalization reduced to $$$$$. The County is requesting the Commission sustain the Board of Equalization value of $$$$$. The Taxpayer is requesting the value of the subject property be reduced to $$$$$.

The issue in this proceeding is the same as that in Appeal 09-0435 as well as in four of seven parcels in Appeal 09-0445. (There are differences in between the properties; in Appeal 09-0435 the property is undeveloped with little development in the immediate vicinity, while the others are platted residential subdivision lots.) The parties were informed that the Commission would base its decision in this appeal on evidence and testimony from the three related hearings. The Commission will incorporate its decision in part for Appeal 09-0435 into this Order. The four related parcels in Appeal 09-0445 were

heard at the same time as the subject parcel in this appeal. Accordingly, the Commission's decision in this Order will apply to those parcels as well.[1]

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.
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> (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.
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> (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

[1] The parcels in Appeal 09-0445 are ##### - 2, ##### - 3, ##### - 4, and ##### - 5.

> (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.

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 ("LOT A") is a 0.41-acre parcel of vacant residential land in Phase 1 of the SUBDIVISION 1, in CITY 1, Utah. From maps and an aerial photograph provided by the assessor's office, it appears SUBDIVISION 1 is a platted, partially developed subdivision, with most or all of the streets in place and several houses constructed. The Taxpayer explained that there are various undeveloped lots in the SUBDIVISION 1 where ANIMALS have moved in.

Taxpayer's Case

PETITIONER 1 testified on behalf of the Taxpayers, and will herein after be referred to in the singular "Taxpayer." He argues that because LOT A has one or more ANIMALS (also referred to as "ANIMAL's" or "ANIMALS") on it, it cannot feasibly be developed or sold. The Taxpayer asserted that at the present time he only wants to move dirt from some of the lots, but he cannot legally touch the dirt to move it because of the proximity to the ANIMALS. He stated that he was denied approval to add more dirt or move the dirt, as he wants to do. The Taxpayer provided that he fenced the property to keep the ANIMALS out, but now must move the fence to allow the ANIMALS to roam freely. Basically, the Taxpayer explained, the fence kept the ANIMALS in.

The Taxpayer also stated that even if a first "take"[2] is granted, a second take is nearly impossible to obtain by a second owner. The Taxpayer argues that for these reasons, he cannot currently develop the lots.

[2] The Commission understands granting or authorizing a "take" to mean the approval to remove a ANIMAL from a property. Take is defined in the HABITAT CONSERVATION PLAN for ANIMALS in RURAL COUNTY, UTAH as "[t]o harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct with respect to any species listed under the ESA (Section 3 (19)).

The Taxpayer believes that the $$$$$ adjustment by the BOE for ANIMALS is insufficient. He stated that after the lien date, his properties with ANIMALS, including the subject, have been listed for $$$$$ but will not sell. He requests the value be set at $$$$$.

County's Case

RESPONDENT REP 4, of the Utah Department of Wildlife Resources ("DWR"), explained the general procedures for removing ANIMALS as follows: First, the DWR requests permission to survey the land to determine whether it is a ANIMAL habitat. Next, if ANIMALS are found, the DWR, after a request from the owner, will issue a denial letters to develop the property. At that point the property owners may apply for a take from RURAL COUNTY. After applying to the County Commission, the matter is referred to the RURAL COUNTY. Mitigation Committee, which will place the property owner's request on a mitigation list prepared by the DWR. The Mitigation Committee will address the requests in the order of the applications. As takes are requested, the DWR appears before the RURAL COUNTY Mitigation Committee. RESPONDENT REP 4 stated that this process takes time. He explained that if RURAL COUNTY approves a property owner's request, the County will send a letter, to which a property owner may either accept the approval of the takes to develop the land or pass for up to three times. After three passes, a property must begin the mitigation request process all over again. RESPONDENT REP 4 also explained that the RURAL COUNTY Commission allocates the takes of the ANIMALS to the property owners.

RESPONDENT REP 4 further stated that the property owner has 90 days to develop the property and that of those 90 days, the property owner has 30 days to pay the mitigation costs of $$$$$ per acre or and has 60 days to finish developing the property. RESPONDENT REP 4 stated that once a take is granted, the property must be maintained, and if the development is not completed within 90 days, the property owner must start the process again. RESPONDENT REP 4 added that one could "google" "Utah " to find the RURAL COUNTY Habitat Conservation Plan for more information

In addition to the process described above, RESPONDENT REP 4 provided that the total takes per year is limited. Currently this number is about 84 takes for the county, but the number fluctuates from year to year.

RESPONDENT REP 2 of the RURAL COUNTY Commission stated that the County has about 2,500 requests for takes per year and currently has 84 takes available to allocate. He confirmed that the county would not grant permission to level the lots, as requested by the Taxpayer. However, he also testified that there was disagreement between the Commission and DWR as to who has the final say in granting permission or authorizing clearance and development.

Several letters from DWR were submitted, which clarified the process. Two letters in particular addressed LOT A. A letter dated October 25, 2005 addressed to Kip (sic) Smith stated:

> [n]o ANIMALS or recent sign were observed on the property, although it is located within mapped ANIMAL habitat. The property is considered to be "cleared," and

> development may begin at any time. We recommend that you begin development as soon as possible after you have disturbed the ground, to prohibit any future occupation by ANIMALS. If development of the property does not begin prior to March 31, 2006, another clearance survey may be required by the local building permit office prior to permit issuance.
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> A subsequent letter, dated April 10, 2007 stated:
>
> [o]ne (1) ANIMAL and seven (7) active ANIMAL (X) were found on the property. **Based upon this survey, estimated take for development of this property will be at least 1 ANIMAL and 0.41 acres of habitat.**
>
> No development can begin on this property unless RURAL COUNTY Commission authorizes "take." If you wish to pursue this project the Division suggests you make arrangements to appear at the next possible RURAL COUNTY Commission meeting and request the necessary "take" authorization from that body. Please be aware that currently there are no ANIMAL "take" credits available for 2007. You may, if you wish, be placed on a waiting list for distribution of any "take" credits that may become available in 2008. There is no guarantee that any such credits will become available.

Another letter was dated April 9, 2008, which is after the lien date. It is identified here for reference only. That addressed to PETITIONER 1 dealt with a survey for removal of five piles of dirt in the SUBDIVISION 1. The dirt piles were identified on a map only, from which the Commission is unable to identify any specific lots. There were no ANIMALS and the land was deemed to be "cleared." Permission was granted to transfer the dirt to SUBDIVISION 2 and a roadway adjacent to the SUBDIVISION, also identified on the map. According to the letter, the authorization lapses on April 1, 2010, at which time another survey must be requested if "**continuous, uninterrupted** work does not begin … prior to that date."

Additional testimony regarding the ANIMAL issue was provided by DWR in a subsequent hearing for Appeal 09-0435. The Commission incorporates and quotes its findings in relevant part:

> Based on information presented by (X), Sensitive Species Biologist from the DWR, who was present at the hearing, we understand that the ANIMAL is a federally threatened species that occurs only in REGION 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 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 (X) information, there must be a parking lot, gravel, or concrete on the ground to alter the land so that the ANIMALS 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.
>
> (X) 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 ANIMAL's. He also said the property would be developable and saleable following those steps.
>
> In addition to his testimony, (X) 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.

RESPONDENT REP 3, an appraiser from the assessor's office, explained that the BOE reduced all of the lots in question by $$$$$. The County provided comparable sales within both the SUBDIVISION 1 and the adjacent SUBDIVISION 3. The sale dates ranged from December, 2006 to October, 2008. The lots ranged in size from 0.25 acres to 0.56 acres and in selling price from $$$$$ (in December, 2006 for 0.35 acres) to $$$$$ (in July, 2007 for 0.56 acres). Several of the lots appear to have been sold by the Taxpayer or a related party. However, the County did not know whether there were ANIMALS on those properties when they were sold. The County argued that its comparable sales supported the assessed value for LOT A. Of those sales, the county indicated that Lot 11 sold in 2008, after the lien date, for $$$$$ "without ANIMALS." The county also provided that seven lots are listed at a combined price of $$$$$. Again, there was no indication that these lots had ANIMALS.

RESPONDENT REP 1, RURAL COUNTY Assessor, stated that the ANIMALS are a huge problem for the County appraisers when they do their annual appraisals. He stated that there are active ANIMAL colonies in most of RURAL COUNTY. He explained that to value the properties, a "cost to cure" the property of ANIMALS must be calculated. He provided that such a calculation would include: the mitigation fee of $$$$$ per acre; the cost to get on the mitigation list for a take; cost associated with risk that not everyone can get a take; the cost of fencing at $$$$$ per foot, $$$$$ total; the cost of moving dirt and grading, $$$$$ total; costs associated with maintenance and development to keep new ANIMALS out; and costs associated with the probability of re-infestation.

In the Initial Hearing Order for Appeal 09-0435, the assessor further refined his original cost to cure:

> . . . 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.

In support of the need to calculate a cost to cure PETITIONER 1 added that the "willing buyer and willing seller" concept is not tenable. The County Assessor acknowledged that he does not know the

cost to cure for removal of the ANIMALS. He stated that although he does not know the actual cost to cure, he has no reason to dispute the $$$$$ per lot adjustment made by the Board of Equalization.

At the hearing, all parties agreed that the comparable sales provided by the county reflected a reasonable range of values for property without ANIMALS.

The Assessor

Analysis and Conclusion

In the Initial Hearing Order for Appeal 09-0435, the Commission found as follows:

> 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;"[3] 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 ANIMAL's. 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 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

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

> 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.

Similarly, in this case, the Commission finds that the $$$$$ discount is insufficient to cover the risk associated with development of land with a known ANIMAL habitat. However, we find that the only possible use as of the lien date for this property is to be held for future residential development. Because of the suburban nature of the property, it does not appear that an agricultural use would be feasible. Furthermore, letters from the DWR suggest that the problem is not as critical for this Taxpayer as it was in Appeal 09-0435. Referring to the previously identified letter of April 10, 2007, DWR identified "at least 1 ANIMAL and 0.41 acres of habitat." However, the letter proceeded to clarify that "[n]o development can begun in thus property unless RURAL COUNTY Commission (Commission) authorizes "take." Thus, the major only obstacle to development is the possibility that a take may not be authorized. The mitigation costs or cost to cure do not appear to be significant.

The Commission's preference would have been to review the Land Valuation Guide[4] produced by RURAL COUNTY to determine if an alternative assessment basis would have been appropriate. The parties, however, could not agree on a procedure whereby the document could have been reviewed. Accordingly, we will establish a basis for valuation based on testimony and evidence presented in this hearing. One option would have been to apply a backage rate[5] established in the land guideline. Without knowing the specific amounts, however, the Commission is not comfortable applying that standard in this particular situation.[6] Instead, the Commission looks to its decision in Appeal 09-0435 wherein we found " … 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." In this case, a 30% adjustment is greater than the $$$$$ adjustment granted by the Board of Equalization. In the absence of any other reliable market information, the Commission will adopt the 30% adjustment used by the County in Appeal 09-0435, as it appears to be reasonable in this case where the actual mitigation costs seem to be minimal.

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[4] A land valuation guide is a document typically produced by or for each county under standards set forth by the Property Tax Division of the State Tax Commission. The guide establishes procedures and values to be used in the mass appraisal process.

[5] A backage rate is the additional value placed on a residential lot for acreage that exceeds or is less than a typical lot size in a particular subdivision.

[6] That problem was not present in Appeal 09-0435. In that case a general agricultural rate was used as the highest and best use for that property as agricultural land was clearly delineated and differentiated from the assessment based on commercial use.

LOT A is to be valued on the basis of the following formula; original lot value x 70% less ($$$$$ x 0.41[7]). Mathematically this is $$$$$ x 0.7 - $$$$$. The Commission notes that this process does not account for any market conditions that occurred after the lien date.

DECISION AND ORDER

On the basis of the foregoing, the Tax Commission finds the value of the subject property to be $$$$$ as of the lien date of January 1, 2008. 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.

_____
Marc B. Johnson
Commissioner

BY ORDER OF THE UTAH STATE TAX COMMISSION.

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

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[7] The HCP provides for a mitigation fee of $$$$$ per acre. In a letter to (X) from DWR dated January 13, 2005, DWR verified receipt of an $$$$$ mitigation fee for 0.80 acres of ANIMAL habitat.