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BEFORE THE UTAH STATE TAX COMMISSION

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CUSTOM ENTERPRISES, INC.,

Petitioner,

v.

BOARD OF EQUALIZATION OF  
DAVIS COUNTY, STATE OF UTAH,

Respondent.

**INITIAL HEARING ORDER**

Appeal No. 10-0059

Parcel No. #####

Tax Type: Property Tax / Locally Assessed

Tax Year: 2009

Judge: Chapman

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**This Order may contain confidential "commercial information" within the meaning of Utah Code Sec. 59-1-404, and is subject to disclosure restrictions as set out in that section and regulation pursuant to 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 notice, specifying the commercial information that the taxpayer wants protected. The taxpayer must mail the response to the address listed near the end of this decision.**

**Presiding:**

Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER REP. 1, Owner  
PETITIONER REP. 2, Representative  
PETITIONER REP. 3, Fee Appraiser  
PETITIONER REP. 4, Engineer

For Respondent: RESPONDENT REP. 1, Davis County Assessor  
RESPONDENT REP. 2, from Davis County Assessor's Office  
RESPONDENT REP. 3, from Davis County Assessor's Office

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 May 25, 2010.

At issue is the fair market value of the subject property as of January 1, 2009. The subject is a 35.22-acre parcel of vacant land located where STREET 1 turns into STREET 2 in CITY, Utah. The Davis

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County Board of Equalization (“County BOE”) sustained the \$\$\$\$ value at which the subject was assessed for the 2009 tax year. The taxpayer asks the Commission to reduce the subject’s value to \$\$. The County asks the Commission to sustain the subject’s current value of \$\$\$\$.

APPLICABLE LAW

Utah Code Ann. §59-2-103(1) provides that “[a]ll tangible taxable property shall be assessed and taxed at a uniform and equal rate on the basis of its fair market value, as valued on January 1, unless otherwise provided by law.”

In UCA §59-2-102(12), “fair market value” is defined to mean “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. . . .”

UCA §59-2-1006(1) provides that “[a]ny 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 . . . .”

For a party who is requesting a value that is different from that determined by the County BOE to prevail, that party must: 1) demonstrate that the value established by the County BOE contains error; and 2) provide the Commission with a sound evidentiary basis for reducing or increasing the valuation to the amount proposed by the party. *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, (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).

DISCUSSION

The 35.22-acre parcel at issue is currently subject to litigation. In 2007, a number of litigants filed a lawsuit seeking a right-of-way or easement over the subject property. The taxpayer is not aggressively

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pursuing the lawsuit because market conditions are not conducive to developing the land into residential lots at this time. Nevertheless, a notice of lis pendens has been filed to inform any potential purchasers that the subject property is in litigation and that they risk being bound by an adverse judgment.

Given these circumstances, the taxpayer proffers an appraisal that considers the effect of the pending litigation and the lis pendens on the subject's fair market value. The appraisal estimates that subject's fair market value as of January 1, 2008, one year prior to the current lien date. However, PETITIONER REP. 3, who prepared the appraisal, attended the Initial Hearing and stated that market conditions have not improved between 2008 and 2009 in regards to property development or prices. In addition, the property is subject to the same litigation and lis pendens on the 2009 lien date as it was on the 2008 lien date. As a result, PETITIONER REP. 3 states that the values he determined for the property as of January 1, 2008 are also applicable to the January 1, 2009 lien date.

In the taxpayer's appraisal, PETITIONER REP. 3 estimated the subject property's fair market value to be \$\$\$\$\$, based on his conclusion that the parcel is not currently developable due to the pending litigation. PETITIONER REP. 3 also "hypothetically" valued the subject at its highest and best use as though currently developable into residential lots, with this hypothetical value estimated to be \$\$\$\$\$. PETITIONER REP. 3 asserts that the pending litigation affects the subject's current development potential and must be taken into account when establishing its fair market value for property tax purposes. For these reasons, the taxpayer asks the Commission to reduce the subject's fair market value to \$\$\$\$\$ for the 2009 tax year.

The County asserts that the effect of litigation and lis pendens cannot be considered when establishing a property's fair market value for property tax purposes. The County proffers an appraisal prepared by RESPONDENT REP. 3, a County appraiser, in which he estimates the fair market value of the subject property to be \$\$\$\$\$ as of the 2009 lien date, based on the parcel being used for one residential lot (the County indicates that City of CITY informed it that it would approve one residential lot on the property). In

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his appraisal, RESPONDENT REP. 3 does not consider the effect on value, if any, that the litigation and lis pendens would have on the subject's fair market value. On the basis of RESPONDENT REP. 3's appraisal, the County asks the Commission to sustain the subject's current value of \$\$\$\$\$.

The issue before the Commission is whether the litigation and lis pendens should be considered when determining the fair market value of the subject parcel for property tax purposes and, if yes, whether the taxpayer's proposed value appears to be a reasonable estimate of the subject's value given the circumstances that exist on the lien date. The County contends that the Commission has previously ruled in *USTC Appeal No. 07-0348* (Initial Hearing Order May 30, 2008) that a lis pendens cannot be considered when valuing a property. The County is correct that the Commission determined that the lawsuit and lis pendens at issue in that appeal would have no effect on the fair market value of the property at issue. However, the lawsuit in that appeal concerned a person who owned a life estate in the property at issue and whether that person could sell the property to pay her creditors. Although the Commission ruled that a lis pendens filed in regards to that ownership issue would not affect the property's value for property tax purposes, it also stated that the result might be different if the lis pendens affected the highest and best use of the property.

In another appeal, the Commission determined that litigation and lis pendens concerning a property could have a negative effect on its value. In *USTC Appeal No. 06-0812* (Findings of Fact, Conclusions of Law and Final Decision Aug. 24, 2007), the Commission considered a property for which a lawsuit had been filed to prevent the owner from developing a vacant parcel. The County and the taxpayer both agreed that if legally permissible, the highest and best use of the parcel would be to develop it into a residential lot and that it would have a value of \$\$\$\$\$ for this purpose. The County argued, however, that the litigation and lis pendens should not affect the subject's fair market value for property tax purposes. The taxpayer's appraiser, on the other hand, determined that the litigation and lis pendens potentially affected the parcel's highest and best use, thus reducing its current fair market value to \$\$\$\$\$. In that appeal, the

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Commission sustained the \$\$\$\$ value estimated by the taxpayer's appraiser, who took into account the diminution in value for the lawsuit and lis pendens issues. However, the Commission suggested that each case involving litigation and lis pendens would need to be considered separately, stating:

the Commission would note that it agrees with both parties that the fact that a lis pendens is filed on a property and that there is an ongoing lawsuit would not per se result in a specific percentage reduction in value. The facts and circumstances need to be considered and a determination made ultimately on the nature of the risks and how they will affect market value.

In the current appeal, it is arguable that the legally permissible highest and best use of the subject property, or at least a majority of it, will remain the same, even if a right-of-way is eventually granted. However, it may be some time before the subject property can be developed into residential lots, given the current litigation, the economic climate, and building restrictions currently placed on the property. The County submitted a letter from an attorney in the County Attorney's Office who expressed his opinion that the portion of the subject property that lies west of STREET 2 is not affected by the right-of way sought in the litigation. A reading of the complaint filed in the lawsuit suggests that the County attorney's opinion may be correct. However, the legal description in the complaint and lis pendens describes the entire property, including that portion that is west of STREET 2. As a result, the lis pendens appears to affect the entire subject property and, possibly, its potential to be developed as of the lien date.

Section 59-2-102(12) provides that "fair market value" is "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. . . ." A buyer aware of the litigation and the lis pendens might reasonably anticipate that development of the subject property could be delayed due to the legal problems. If so, that buyer might pay less for the subject property than he or she would if the litigation did not exist. For these reasons, it appears appropriate to consider the effect on value that the lawsuit and lis pendens may have on the subject property in this matter.

The County admits that it has not considered the lawsuit and lis pendens in its appraisal under the mistaken belief that litigation and lis pendens can never impact a determination of fair market value for property tax purposes. As a result, it is not known what value the County would have determined for the subject property had it considered the effect on value resulting from the lawsuit and the lis pendens.

On the other hand, PETITIONER REP. 3 has considered the lawsuit and lis pendens in determining a current value of \$\$\$\$ for the subject property in the taxpayer's appraisal. PETITIONER REP. 3 has compared the subject property to various parcels of vacant residential land, including some with development issues, to estimate the subject's value. PETITIONER REP. 3 made a number of large, subjective adjustments to the comparables that he used in his appraisal. For example, PETITIONER REP. 3 applied a 75% adjustment to the sales prices of comparables that were developable at the time of sale in order to estimate the subject's value as undevelopable land. In addition, PETITIONER REP. 3 determined that the subject's current value, due to the pending litigation, is similar to the sales price of land (Comparable Land Sale #1 from Taxpayer's Appraisal) that is not developable due to water pressure issues. Although both parcels may not be currently developable, it is questionable whether the circumstances affecting each parcel have an equivalent negative effect on value.

However, the County did not argue that PETITIONER REP. 3 had used an inappropriate methodology to consider the effect on value resulting from the lawsuit and the lis pendens. In addition, the County did not refute the adjustments that PETITIONER REP. 3 made in his appraisal. Finally, PETITIONER REP. 3's adjustments to developable land results in a value similar to his undevelopable land, which required no adjustment. For these reasons and given the information available at the Initial Hearing, the taxpayer is found to have shown that the County's assessment contained error and that the subject's value should be reduced to \$\$\$\$ for the 2009 tax year.

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Kerry R. Chapman  
Administrative Law Judge

DECISION AND ORDER

Based upon the foregoing, the Tax Commission finds that the subject's current value of \$\$\$\$\$ should be reduced to \$\$\$\$\$ for the 2009 tax year. The Davis County Auditor is ordered to adjust its records in accordance with this decision. It is so ordered.

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 taxpayer'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 \_\_\_\_\_, 2010.

R. Bruce Johnson  
Commission Chair

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

Michael J. Cragun  
Commissioner

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