

10-0540  
LOCALLY ASSESSED PROPERTY  
SIGNED 12-15-2010

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BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,  Petitioner,  v.  BOARD OF EQUALIZATION OF DAVIS COUNTY, STATE OF UTAH,  Respondent.	<b>INITIAL HEARING ORDER</b>  Appeal No.    10-0540  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, Attorney  
                          PETITIONER REP. 2, Taxpayer  
                          PETITIONER REP. 3, Taxpayer  
For Respondent:    RESPONDENT REP. 1, Davis County Assessor  
                          RESPONDENT REP. 2, from Davis County Assessor's Office  
                          RESPONDENT REP. 3, from the 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 October 26, 2010.

At issue is the fair market value of the subject property as of January 1, 2009. The subject is a commercial property that houses a ( X ) business and two retail stores. It is located on ADDRESS in CITY,

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Utah. The Davis County Board of Equalization (“County BOE”) reduced the \$\$\$\$ value at which the subject was originally assessed for the 2009 tax year to \$\$\$\$\$. 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.”

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 subject property consists of 0.64 acres of land and a commercial building that has 9,856 square feet of above-grade space. The original portion of the subject building was built in the 1940s, and newer portions have been added onto the building in the decades since. The building also has a basement that contains the boiler and is used minimally for storage. Most of the subject building is used by the owners to operate a ( X ) business. This portion of the building is approximately 7,000 square feet in size and is

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primarily warehouse space used to house the cleaning equipment. Approximately 2,900 square feet of the subject building is separate retail space that the taxpayer leases to two tenants, a cellular telephone store and a lingerie store.

A ( X ) business has operated at the subject property since the 1940s. The current owner purchased the property in the 1960s and continued operating a ( X ) business. In the mid-1990s, the Environmental Protection Agency (“EPA”) determined that the subject property and its land were contaminated by ( WORDS REMOVED ) and prior to the current owner purchasing the property. The EPA has drilled monitoring wells on the subject property and continues to assess the contamination. The taxpayer also indicates that the EPA plans to pump out ground water at the site to remove contamination and that this process could take as long as 50 years.

Although the EPA has yet to assess any penalty or require any action, the taxpayer explains that the EPA believes that the property owner is liable for clean-up costs and has not released the current owner from liability. The taxpayer explains that the EPA currently prevents the subject property from being used for purposes that could endanger the public, such as being used as a restaurant. The taxpayer has tried to borrow money from banks on the property, but has been unable since the contamination issues arose. The taxpayer also explains that it has spent in excess of \$\$\$\$\$ in legal fees in the 15 years since the contamination was discovered and anticipates additional legal fees in the future.

It has also spent considerable amounts to reclaim the subject property in an attempt to get the EPA to absolve it of future liability. For example, in 2009, the taxpayer relined the property’s sewer pipes and replaced floor drains and tile floors in the basement at the EPA’s suggestion. The taxpayer asserts that this work was completed in December 2009 at a cost of approximately \$\$\$\$\$. The taxpayer also indicates that it has offered \$\$\$\$\$ to settle any future liability from the contamination, an offer that the EPA has declined. The taxpayer states that the EPA has offered to settle for \$\$\$\$\$, which the taxpayer has not accepted. The taxpayer

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also indicates that it will have to settle with the State of Utah in the future as well, but that negotiations with the state have not begun.

The County contacted the EPA and states that the EPA has indicated that the subject “property may be purchased (with no further liability under CERCLA for the purchaser) by an entity who commits to taking ‘reasonable steps’ with respect to stopping continuing releases of contaminants, preventing future releases, complying with land use controls, and preventing or limiting humans, environmental, or natural resources exposure to earlier releases of contaminants.”

Based on the comment from the EPA and because the subject property is located near the INTERSECTION in CITY, which the County describes as the most valuable commercial area in ( X ) Davis County, the County asserts that the subject property’s current use is not its “highest and best use.” The County asserts that a ( X ) business is not the highest and best use of that portion of the subject building in which it is operated, and that the entire building should be used as retail space.

The County proffers an appraisal in which it estimates the subject’s value based on its “highest and best use” being changed to retail space entirely. In the appraisal, the County estimates that the subject’s fair market value is \$\$\$\$\$, if it were entirely used as retail space. The County submits the appraisal in support of the subject’s current value of \$\$\$\$\$ and does not ask the Commission to increase the subject’s value.

The County’s appraisal is not convincing. First, the County has not shown that the subject is not currently being used at its highest and best use. The taxpayer has not been able to get loans on the property. It is conceivable that the costs to convert the ( X ) business to retail space would be significant, costs that have not been accounted for in the County’s appraisal. It appears that a financial institution would not loan the money needed for the conversion. Second, the subject property does not have as much parking space available for retail stores as other retail properties in the area. The taxpayer stated that parking limitations were a major reason why the subject property was never converted to retail space in the past. Third,

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the statement that the County obtained from the EPA does not appear to absolve any future owner from liability. On the contrary, the statement is worded in a manner that suggests that liability for a future owner could occur or that the future owner might have to take significant steps to avoid liability. Fourth, the appraisal does not consider the costs that the owner will have to take to remediate the contamination on the property and the stigma associated with the contamination.

The taxpayer asserts that a retail store on STREET and several blocks from the subject property is currently being offered for lease for \$\$\$\$ per square foot. The taxpayer contends that this \$\$\$\$ per square is 33% less than the \$\$\$\$ per square foot lease comparables that the County used in its appraisal. If the subject's current value of \$\$\$\$ were reduced by 33%, the resulting value would be closer to \$\$\$\$. For these reasons, the taxpayer asks the Commission to reduce the subject's value to \$\$\$\$.

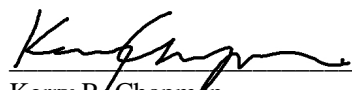
However, it is not clear that the subject's lease rate, as of the lien date, would be as low as \$\$\$\$ per square foot or that using this rate in an income approach would show that the subject's current value of \$\$\$\$ is incorrect. First, the \$\$\$\$ per square foot asking price is for October 2010, more than 20 months after the January 1, 2009 lien date at issue. The County indicates that rental rates have fallen significantly during this time period. Second, the two retail shops in the subject building, the cellular telephone store and lingerie store, were leased in 2009 at rates of \$\$\$\$ and \$\$\$\$ per square foot. The taxpayer asserts that these are triple net lease rates. If the County's income approach is revised to reflect the \$\$\$\$ and \$\$\$\$ per square foot rates for the 2,900 square feet of the building used as retail space and an \$\$\$\$ per square foot rate for the ( X ) business area, the income approach value would still be in excess of \$\$\$\$. Accordingly, the taxpayer's methodology is not convincing.

It would be preferable to obtain a market rental rate for a ( X ) business and substitute this rental rate into the income approach to obtain the potential gross income that the ( X ) portion of the subject property could generate. Based on this income and the income derived from the subject property's two retail

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stores, an income approach value could be obtained. From this value, the estimated costs to remediate the contamination could be subtracted to estimate the fair market value of the property.

The evidence proffered at the Initial Hearing does not convincingly show whether the subject's current value of \$\$\$\$\$ is a correct value for the property as though uncontaminated. The notes from the County BOE hearing do not suggest that remediation costs have been deducted to derive the \$\$\$\$\$ value. As a result, it would be appropriate to deduct those remediation costs that the taxpayer proffered at the hearing. First, the taxpayer expended \$\$\$\$\$ in costs in \$\$\$\$\$ (after the lien date) to partially remediate the property. These costs should be deducted. Second, the taxpayer has offered to settle the matter with the EPA for \$\$\$\$\$, which the EPA has rejected. In addition, the taxpayer has rejected the EPA's offer to settle the matter for \$\$\$\$\$. In the absence of a clearer amount that the taxpayer will have to pay to settle with the EPA, a deduction of \$\$\$\$\$ is appropriate. Third, no deduction is allowed for future attorney costs or costs to settle with the State of Utah, as no amounts were proffered by the taxpayer. For these reasons, \$\$\$\$\$ in remediation costs should be deducted from the subject's current value of \$\$\$\$\$, which results in a final estimate of value of \$\$\$\$\$. Accordingly, the subject's value should be reduced to \$\$\$\$\$.



Kerry R. Chapman  
Administrative Law Judge

DECISION AND ORDER

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Based upon the foregoing, the Tax Commission finds that the subject's value 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

  
D'Arcy Dixon Pignanelli  
Commissioner

EXCUSED

Michael J. Cragun  
Commissioner



DISSENT

I respectfully dissent from my colleagues. The lowest rent rate suggested by either party was the \$\$\$\$ per square foot rate at which a nearby retail/warehouse property was offered for lease as of the hearing date. If the County's income approach is used, but revised to substitute the \$\$\$\$ rate as the market lease rate for the subject's 6,952 square feet of ( X ) business and to reflect the actual 2009 rates of \$\$\$\$ per

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square foot for the 1,584 square-foot retail space and \$\$\$\$ per square foot for the 1,320 square foot retail space, the County's income approach would show a value of approximately \$\$\$\$ for the subject property, as though uncontaminated. The difference between the subject's current value of \$\$\$\$ and \$\$\$\$ is approximately \$\$\$\$\$. The taxpayer has shown that the reduction in value due to contamination is at least \$\$\$\$\$. However, it has not shown that it will have to expend \$\$\$\$ in future costs to address the contamination. Accordingly, the subject's current value has not been shown to be too high. It is arguably too low. For these reasons, I would accept the County's proposal to sustain the current value of \$\$\$\$.

I also note that to obtain a value of \$\$\$\$ with the County's income approach, using the actual lease rates for the two retail stores, the hypothetical lease rate of the 6,952 square-foot ( X ) area would need to be \$\$\$\$ per square foot, a rate that is less than half the rate of any lease discussed by either party.

Finally, I note that the County BOE value has neither been supported by any market data, nor has it been shown to exclude any contamination or stigma costs.



Marc B. Johnson  
Commissioner

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