15-201
TAX TYPE: LOCALLY ASSESSED PROPERTY
TAX YEAR: 2014
DATE SIGNED: 12-16-2015
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER, Petitioner, v. BOARD OF EQUALIZATION OF SALT LAKE COUNTY, STATE OF UTAH, Respondent.	**INITIAL HEARING ORDER** Appeal No. 15-201 Parcel No. PARCEL-19 Tax Type: Property Tax / Locally Assessed Tax Year: 2014 Judge: Chapman

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. Subsection 6 of that rule, pursuant to Sec. 59-1-404(4)(b)(iii)(B), prohibits the parties from disclosing commercial information obtained from the opposing party to nonparties, outside of the hearing process.
Pursuant to Utah Admin. Rule R861-1A-37(7), 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:	REPRESENTATIVE -1 FOR TAXPAYER, Owner
	REPRESENTATIVE -2 FOR TAXPAYER, Sister of REPRESENTATIVE -1 FOR TAXPAYER
	REPRESENTATIVE -3 FOR TAXPAYER, Witness
For Respondent:	RESPONDENT-1, from the Salt Lake County Assessor's Office
	RESPONDENT-2, from the Salt Lake County Assessor's Office

STATEMENT OF THE CASE

TAXPAYER ("Petitioner" or "taxpayer") brings this appeal from the decision of the Salt Lake County Board of Equalization ("County BOE"). This matter came before the Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. §59-1-502.5, on July 1, 2015.

At issue is the fair market value of an #####-tenant industrial building as of the January 1, 2014 lien date. The subject property is located at SUBJECT ADDRESS in CITY-1, Utah and is identified as Parcel No. ##### ("subject property" or "Parcel 19"). The County BOE reduced the $$$$$ value at which the subject property was originally assessed for the 2014 tax year to $$$$$. The taxpayer asks the Commission to reduce the subject's value to somewhere in the range of $$$$$ to $$$$$. The County asks the Commission to reduce the subject's value to $$$$$.

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 §59-2-102(12) defines "fair market value" 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 subject property is comprised of #####-acres of land and an #####-tenant industrial building that was built inYEAR. The building has a total of #####-square feet of rentable space (#####-square feet of industrial warehouse space and #####-square feet of office space). The subject property is contaminated from a gasoline leakage that occurred on a property adjacent to the subject property in the 1990's. The value of the adjacent property is also at issue in a separate appeal for which a hearing was held on the same day as the subject's hearing. The adjacent property on which the contamination originated is identified as Parcel No. ##### ("Parcel 18").

County BOE Value. The County Assessor's Office established the subject's original 2014 assessed value of $$$$$ (rounded) with the following income approach:

#####	Rentable Sq. Ft.
x $$$$$	Market Rent Per Sq. Ft. (triple net) (actual rate used is $$$$$ per square foot)
$$$$$	Potential Gross Income ("PGI")
- $$$$$	Vacancy & Collection Losses (8% of PGI)
$$$$$	Effective Gross Income ("EGI")
- $$$$$	Expenses (10% of EGI)
$$$$$	Net Operating Income ("NOI")
÷ %%%	Capitalization Rate
$$$$$	Value Derived with this Income Approach (rounded to $$$$$)

The County explained that the original assessed value of $$$$$ (which was allocated $$$$$ to the subject's land and $$$$$ to its improvements) was determined under the misconception that the subject property's value was no longer diminished because of the contamination issue. The County subsequently determined that the contamination issue still affected the subject's value and recommended to the County BOE

that it reduce the subject's income approach value by 20% to account for the contamination and stigma associated with it.

The County BOE accepted the County's recommendation and reduced the subject's value to $$$$$ (which represented a $$$$$ reduction in value). The County BOE allocated all of this reduction proportionally between the subject's original land and improvements values and, thus, reduced the subject's land value to $$$$$ and its improvements value to $$$$$ (the sum of which is the subject's current value of $$$$$).

Contamination of Subject Property and Adjacent Parcel 18. Years ago, Parcel 18 was leased by BUSINESS-1 ("BUSINESS-1"), which installed underground fuel tanks at the rear of Parcel 18's building near the boundary with the subject property. Before the underground tanks were removed in 1996, gasoline had leaked from the tanks not only into Parcel 18's ground, but also into the subject property's ground.

After the contamination was discovered, a significant amount of petroleum-impacted soil was removed. However, the soil under both parcels' buildings was not removed, which left in place residual contaminants in the groundwater and the soil. The taxpayer indicates that in 2012, it and the owner of Parcel 18 reached a settlement with BUSINESS-1 and the Utah Department of Environmental Response and Remediation ("DERR") concerning the remaining contaminants. The taxpayer proffers that under this settlement, the State would spend up to the limit of the BUSINESS-1 insurance policy to inject a chemical into the pollution plume to reduce the petroleum concentrations and that the remaining contaminants would be allowed to dissipate through natural attenuation. Under the agreement, the taxpayer asserts that it and the owner of Parcel 18 agreed to "live with" the contaminants that remained on their properties because of the economic infeasibility to perform a complete cleanup of the contamination.

Subsequent to the injection of chemicals into the subject property and Parcel 18, the taxpayer proffers that BUSINESS-1 requested a No Further Action letter from the Utah Department of Environmental Quality ("DEQ"). The County explained that a No Further Action letter would release BUSINESS-1 and the property

owner from any liability for future remediation costs. The taxpayer proffers that DEQ has denied the request for a No Further Action letter first in 2012 and again in both 2013 and 2014.

The County proffered a copy of a January 4, 2013 Request for No Further Action for the subject property and Parcel 18 that was prepared by BUSINESS-2 ("BUSINESS-2"), an engineering services company. In the request, BUSINESS-2 identified the soil and groundwater contamination levels still present on the subject property and Parcel 18 and determined that the remaining contaminants are at depths and location that do not pose a current threat to human health or the environment.

The County also proffered an email it received on June 30, 2015 from NAME-1, who is the DERR project manager handling the contamination issues on the subject property and Parcel 18 for the State. In this email, NAME-1stated that he expects a No Further Action letter to be issued for the subject property and Parcel 18 later in 2015. He stated that the issuance of such a letter would mean that DERR is not requiring any further sampling or remedial action unless "there is a change on the property usage or contamination that was not known about is discovered."

NAME-1 further stated in the email that "[m]ost of the contamination known to remain at the site is in the groundwater with a little remaining in the soil. If a new building of any type were to be built, the DERR may be interested in the construction workers (sic) exposure." NAME-1 further stated that even if a No Further Action letter is issued in regards to the subject property and Parcel 18, additional costs could arise if some sort of construction work or utility work is performed on the properties, specifically as follows:

> If contamination is encountered they are notified that they have to dispose of the contaminated soil and/or groundwater properly. This proper disposal will usually incur additional costs. This site has spent the entire insurance coverage from the PST Trust Fund so it would be up to the property owners and BUSINESS-1 to cover those costs.

Taxpayer's Valuation Information. The taxpayer indicates that around 2010, a supervisor at DERR indicated that it should not have to pay property taxes on the contaminated subject property. The taxpayer

indicates that while the County has never assessed the subject property at a $$$$$ value, as suggested by DERR, the County had assessed it at a much lower value for years prior to 2014. For both 2012 and 2013, the County assessed the subject property at $$$$$, which is significantly lower than the $$$$$ value that the 2014 County BOE established for it or the $$$$$ value the County is now proposing.[1]

The taxpayer proffers that BUSINESS-3 has estimated that it would cost at least $$$$$ to remove the remaining pollution from the subject property and dispose of it in the west desert at BUSINESS-4. The taxpayer notes that this cost would be more than the property would be worth if it were uncontaminated and contends that it could argue that the subject property has a negative worth and should be assessed a $$$$$ value. However, the taxpayer admits that the subject property has a "residual value" if the State will not require further cleanup. Because the State has not issued a No Further Action letter, however, the taxpayer is concerned that it could still be liable for further cleanup costs.

The taxpayer also asks the Commission to consider that the contamination on the subject property is not expected to dissipate to acceptable levels through natural attenuation until 2030 under the best scenario and that banks are reluctant to lend money on contaminated properties. In addition, the taxpayer asks the Commission to consider that few buyers will even consider getting involved with a contaminated property. Finally, the taxpayer asks the Commission to consider that one of its tenants filed a lawsuit against the taxpayer for getting cancer. For these reasons, the taxpayer believes that the subject property's value should be somewhere in the range of $$$$$ to $$$$$ and asks the Commission to reduce the subject property's 2014 value to a value in this range.

1 The County explained that an environmental contamination adjustment was made to the subject property's value at the 2004 County BOE and that the adjustment had remained on the subject property for the past decade until the property was reappraised for the 2014 tax year. During the 2014 reappraisal process, the adjustment was removed. The County admits that some adjustment is still required, but indicates that the adjustment should not be as large as the adjustment that was made in 2004 when the property was in a much earlier phase of the remediation process.

To lend support to its proposed value range, the taxpayer had REPRESENTATIVE-3 FOR TAXPAYER, a realtor, proffer testimony about his experiences with contaminated properties. REPRESENTATIVE-3 FOR TAXPAYER expressed his opinion that contaminated buildings are "basically unsellable" because he had a deal for another contaminated property in the County "fall through" because DERR had not issued a No Further Action letter for the property. REPRESENTATIVE -3 FOR TAXPAYER admitted that he has not been asked to determine a value for the subject property, but stated that the value of a contaminated property is dependent on the cost of remediation. REPRESENTATIVE-3 FOR TAXPAYER admitted that he has never sold a property for which a No Further Action letter has been issued and, as a result, does not know what effect it would have on the price that a buyer would pay. Nevertheless, because the taxpayer's evidence shows that the cost to remediate the subject property would be in excess of $$$$$, REPRESENTATIVE-3 FOR TAXPAYER opined that the taxpayer's proposed value range of $$$$$ to $$$$$ is what a potential buyer would pay for the subject property based on his "feel" for the market and buyers.

County's Valuation Information. The County agrees that the subject property is still contaminated to some extent from the gasoline leakage. The County, however, states that it is unaware of any sale of a contaminated property still occupied by tenants that might be used to estimate the subject's value. As a result, the County is relying, in part, on the income approach with which it derived the subject's original assessed value of $$$$$ and which the County BOE used when establishing the subject's current value of $$$$$. For the local BOE hearing, the County recommended a 20% adjustment to the $$$$$ income approach value to account for contamination and stigma, which the County BOE accepted and used to reduce the subject's value to $$$$$. The County explained that it typically applies a 20% adjustment to contaminated properties for which DERR *has* issued a No Further Action letter for stigma, even though the owner of such a property is no longer responsible for remediation costs.

Since the local BOE hearing, however, the County has learned that DERR had refused to issue a No Further Action letter in regards to the subject property as of the 2014 lien date. The County explained that where a taxpayer is expected to incur future remediation costs before a No Further Action letter is issued, it will determine a value for a contaminated property by deducting the costs that a property owner is expected to incur to remediate the contamination from the property's "clean" value (i.e., the value of the property as though uncontaminated). The County, however, does not recommend that the subject property's 2014 value be determined with this methodology because it believes that it is likely that the taxpayer will not need to expend any additional remediation costs for the subject property. The County has made this determination after learning that a No Further Action letter for the subject property is "pending." It appears, however, that the County did not learn that a No Further Action letter was pending as of the January 1, 2014 lien date because DEQ last denied a request to issue a No Further Action letter for the subject property sometime in 2014.

Nevertheless, because a No Further Action letter had not been issued for the subject property as of the 2014 lien date at issue, the County believes that the stigma associated with the subject property is greater than the stigma associated with a property for which a No Further Action letter has been issued. As a result, the County believes it would be appropriate to increase the 20% adjustment it applies to contaminated properties for which a No Further Action letter *has* been issued to 30% in the instant case. The County has determined that the subject property's "clean" value is $$$$$. If this "clean" value is reduced by 30% instead of the 20% rate used by the County BOE, it results in a value of $$$$$ for the subject property. The County did not provide any evidence to support its position that the value of a contaminated property for which a No Further Action letter has not been issued is 30% lower than its value as though uncontaminated or 12.5%[2] lower than a contaminated property for which a No Action Letter has been issued. Yet, the County asks the Commission to find that its newly proposed

2 If a property's "clean" value is reduced by 30%, the resulting value is 12.5% less than the value that results from reducing the same "clean" value by 20%.

approach is more convincing than the taxpayer's approach to estimate the subject's fair market value as of January 1, 2014. For these reasons, the County asks the Commission to reduce the subject's 2014 value to $$$$$.

The County's proposed value of $$$$$ would represent an $$$$$ reduction to the $$$$$ value established by the County BOE. The County asks for this reduction to be applied proportionately to the $$$$$ land value and the $$$$$ improvements value that resulted from the County BOE decision. A proportionate allocation of the $$$$$ reduction would result in a $$$$$ land value and a $$$$$ improvements value for the subject property (the sum of which is $$$$$).

Analysis. The taxpayer has not challenged the County's assertion that the subject's "clean" value as though uncontaminated would be $$$$$ (before any reduction in value due to contamination and stigma). Moreover, the taxpayer's realtor, REPRESENTATIVE-3 FOR TAXPAYER, stated that the County's income approach valuation might be appropriate if the subject property had been uncontaminated. As a result, the issue before the Commission is to what extent the subject's $$$$$ "clean" value should be reduced to account for the contamination still remaining on the subject property and the stigma associated with it.

Neither party has submitted a formal appraisal in which the subject's value as a contaminated property is estimated, but both parties indicate that the subject's value is diminished because of the contamination and stigma. The County recommends a 30% reduction to the subject's $$$$$ "clean" value, which represents a reduction of $$$$$ to account for the contamination and stigma. The taxpayer, in effect, is asking the Commission to reduce the subject's $$$$$ "clean" value to no more than $$$$$, which represents a reduction of at least $$$$$ to account for the contamination and stigma. Because both parties ask the Commission to reduce the $$$$$ value established by the County BOE, that value no longer has the presumption of correctness. Accordingly, the Commission must consider whether either party has shown its proposed value to be more reliable by a preponderance of the evidence.

Frankly, neither party's proposed value is supported by convincing evidence. The County proffered no evidence to support a 30% reduction to the property's "clean" value because of its belief that a No Further Action letter may be issued more than 1½ years after the lien date. In addition, the taxpayer did not explain how it estimated a value in the range of $$$$$ to $$$$$ for the subject property as of the 2014 lien date. REPRESENTATIVE-3 FOR TAXPAYER stated that a property probably will not sell without a No Further Action letter, but stated that he "feels" that the subject property could have sold for a price between $$$$$ and $$$$$ as of the lien date even though no such letter had been issued. Not only are these statements somewhat contradictory, but REPRESENTATIVE-3 FOR TAXPAYER's "feeling" is also not reliable evidence, especially where he admits that he has had little experience selling contamination properties.

Finally, the $$$$$ value at which the County assessed the subject property for prior tax years is not helpful in establishing its 2014 value. The Commission generally does not use a prior or subsequent tax year's value to establish a property's current year's value because, as in this case, it does not know how another year's assessed value was determined and whether it was correct. For these reasons, neither party has provided convincing evidence to support its proposed value. As a result, the Commission should consider its prior decisions and determine whether they are helpful in establishing the subject's 2014 value.

The Commission has considered the values of other properties whose improvements can still be used even though the underlying land is contaminated. In cases where the costs of remediation exceed the "clean" value of such a property, the Commission has often reduced the property's land value to $$$$$, thus establishing a value for the contaminated property that is equal to its improvements value only. *See USTC Appeal No. 06-1656* (Initial Hearing Order Jun. 29, 2007), *USTC Appeal No. 07-1428* (Initial Hearing Order Jun. 2, 2008), and *USTC Appeal No. 09-3783* (Initial Hearing Order Oct. 14, 2010), all of which involved the same commercial

property that had been contaminated by leakage from underground fuel tanks.[3] The contamination suffered by this property is similar to the contamination suffered by the subject property. For the property at issue in these prior cases, the EPA planted trees along the property's border to resolve the *groundwater* contamination. However, the *soil* contamination on that property was not remediated because of the prohibitive clean-up costs that DEQ would have required. The estimated costs of remediation were much higher than the "clean" value of the property.

Although the property owner in these three prior appeals was still allowed to use the commercial building on the property, the State of Utah would have had to give clearance for the owner to perform any construction on the property involving excavation. The circumstances in these three cases are somewhat similar to those in the instant appeal for several reasons. First, the commercial improvements of both properties could still be used even though contamination remained at the time of valuation. Second, it does not appear that any construction requiring excavation could be performed on either of the properties without possible State involvement and without exposing the property owner to the possibility of additional clean-up costs. Third, the costs to completely remediate the remaining contamination on both properties appear to be greater than the "clean" values of the properties. For these reasons, these prior cases lend support to reducing the subject's land value to $$$$$.

The Commission has also reduced land value to $$$$$ in other cases involving contaminated residential properties in which the owners were still able to inhabit the residential improvements and where the remediation costs exceeded the properties' "clean" values. In *USTC Appeal No. 03-0336* (Findings of Fact, Conclusions of Law, and Final Decision Feb. 26, 2003), the Commission considered the value of a residential property that was located within an EPA Superfund Site. In that case, the EPA had agreed to pay for the future remediation of the property without any contribution from the property owner. As a result, the property owner in that case was likely

3 Redacted copies of these and other selected decisions can be viewed on the Commission's website at http://www.tax.utah.gov/commission-office/decisions.

to have no future remediation liability. In that case, it was also estimated that remediation costs would slightly exceed the "clean" value of the property. The Commission reduced the property's land value to $$$$$ and valued the property at an amount equal to its improvements value only. The County appealed the Commission's decision in *Appeal No. 03-0336* to the Utah Court of Appeals, which sustained the Commission's reduction of the property's land value to $$$$$.[4]

The Utah Court of Appeals' decision in the case just described is similar to a prior decision by the Utah Supreme Court in *Schmidt v. Utah State Tax Commission,* 1999 UT 48, 980 P.2d 690 (Utah 1999). In *Schmidt,* the Court considered the value of a residential property whose land was contaminated because of its proximity to the site where a smelter had operated in the 1870's. The Schmidts and Salt Lake County both challenged the Commission's decision to reduce the property's land value to $$$$$. The Schmidts argued that the *total* value of their property should be $$$$$, even though they were still able to inhabit the home. The County, on the other hand, argued that the property's value should only be reduced by 20% for stigma. In its decision, the Court considered the Commission's findings that: 1) the '"normal method" of calculating the value of a contaminated property is to deduct the costs of remediation from the value of the property as calculated before any deduction for contamination; 2) when the normal method results in a value that is negative, it implies that the property in uninhabitable (i.e., that the improvements cannot be used); and 3) where a contaminated property is usable, it must have some positive value. The Court sustained the Commission's decision that the property had "value-in-use" and that the land and improvements should be treated separately for valuation purposes because the contamination was in the soil and not in the improvements. As a result, the Court sustained the Commission's "alternative" method to value the land at $$$$$ and to establish a value for the contaminated property that was equal to its improvements value only.

4 *See Salt Lake County Board of Equalization v. Utah State Tax Commission, ex rel. Daniel Baggett*, 2005 UT App 360 (Utah Ct. App. 2005).

All of these cases support a reduction of the subject property's land value to $$$$$.[5] In the instant case, the subject property is still usable, and the taxpayer's evidence suggests that the costs to remove the contamination from it would exceed its "clean" value. The County BOE relied on the County's determination that the subject's "clean" value as though uncontaminated would be $$$$$, which is allocated $$$$$ to the subject's land and $$$$$ to its improvements. As a result, it seems reasonable in the instant case to reduce the subject's land value to $$$$$ and to value the subject's improvements only. Accordingly, the Commission should reduce the subject's 2014 value to $$$$$.

_____

Kerry R. Chapman
Administrative Law Judge

5 In another case, the Commission determined the value of an improved contaminated property by deducting the amount that the taxpayer had offered the Environmental Protection Agency ("EPA") as a settlement to absolve it from any further liability concerning the contamination. *See USTC Appeal No. 10-0540* (Initial Hearing Order Dec. 15, 2010), which involved a commercial property that the property owner was able to lease to tenants even though its soil and groundwater were contaminated. In the instant case, however, no evidence exists to suggest that the taxpayer or BUSINESS-1 has offered a governmental agency a specific settlement amount to absolve them of any future liability. Furthermore, NAME-1 email suggests that the taxpayer may still be exposed to future liability even if DEQ does issue a No Further Action letter. For these reasons, the circumstances of *Appeal No. 10-0540* do not appear to be similar enough to the instant case to be helpful in establishing the subject's 2014 value.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission finds that the subject's current value of $$$$$ should be reduced to $$$$$ for the 2014 tax year. The Salt Lake 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, or emailed, 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
CITY-1, Utah 84134

or emailed to:

taxappeals@utah.gov

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

DATED this _____ day of _____, 2015.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner