

17-1012
TAX TYPE: PROPERTY TAX
TAX YEAR: 2016
DATE SIGNED: 03/27/2018
COMMISSIONERS: J. VALENTINE, M. CRAGUN, R. PERO, R. ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER,</p> <p style="padding-left: 40px;">Petitioner,</p> <p>v.</p> <p>BOARD OF EQUALIZATION OF COUNTY, STATE OF UTAH,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 17-1012</p> <p>Parcel No. #####</p> <p>Tax Type: Property Tax</p> <p>Tax Year: 2016</p> <p>Judge: Phan</p>
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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. 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 send the response via email to taxredact@utah.gov, or via mail to the address listed near the end of this decision.

Presiding:

Rebecca L. Rockwell, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
REPRESENTATIVE FOR PETITIONER
For Respondent: RESPONDENT, Appraiser, COUNTY

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on December 14, 2017, in accordance with Utah Code Ann. §59-2-1006 and §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. Petitioner (“Property Owner”) filed an appeal of the decision of the COUNTY Board of Equalization regarding the fair market value of the subject property as set for property tax purposes. The appeal proceeded to this Formal Hearing before the Utah State Tax Commission.

2. The lien date at issue in this appeal is January 1, 2016.

3. The County Assessor had originally valued the subject property at \$\$\$\$ as of the lien date and the County Board of Equalization (“County”) reduced the value to \$\$\$\$\$. At the hearing, the Property Owner requested a reduction based on a prior decision issued by the Utah State Tax Commission which had reduced the land value to \$\$\$\$\$. This left the assessment based on the County’s building value. Using this method, the value for this parcel for the 2016 tax year would be \$\$\$\$\$. The representative for the County requested that the value remain as set by the County Board of Equalization.

4. The property that is the subject of this appeal is parcel no. ##### and is located at ADDRESS, CITY, Utah. The property is ##### acres of land, which is improved with a ##### square foot warehouse/office flex building that is leased to a single tenant. The building was constructed in 1966 and the County has given the building an effective year built of 1995, with an overall grade and condition as average. Twenty-nine percent of the building is improved with office area. The warehouse area has a clear height of ##### feet.

5. The land of the subject parcel has environmental contamination in the soil and groundwater due to a gasoline leak that originated from underground storage tanks approximately ##### years ago. This contamination is contained in the soil and ground water and does not prohibit the current use of the building as an industrial property. A conditional No Further Action letter (“NFA Letter”) had been issued by the Department of Environmental Quality on December 1, 2015, which stated, “The subsurface contamination is at depths and locations that are not currently considered a threat to human health or environment . . .”¹ From the evidence presented at the hearing, the property may continue at its current use, as long as there was no digging in the soil on the property. If there were to be digging on the property to replace utility lines or for construction, the Property Owner would have to contact DEQ and there may be expenses incurred to properly dispose of the contaminated soil. A change of use, for example to residential, would be a problem. The Property Owner did provide evidence at the hearing that the property is still contaminated with a report from Sage Environmental. Sage Environmental concluded that despite the remediation activities, which had taken place from 1996 to 2011, the property was still contaminated and would remain contaminated for many years to come.²

6. The Property Owner had appealed the value of the subject parcel for the January 1, 2014 lien date to the County Board of Equalization and appealed that decision to the Utah State Tax

¹ Letter included as part of Petitioner’s Exhibit 2.

² Petitioner’s Exhibit 1.

Commission. The Utah State Tax Commission reduced the value of the property in *Initial Hearing Order, Appeal No. 15-200* (December 16, 2015), by reducing the land value to \$0 and basing the assessment only on the County's value of the improvements. The order in *Appeal No. 15-200* pointed out that the Utah State Tax Commission had issued decisions in a number of appeals where the improvements could still be used, but the cost of remediation exceeded the "clean" value of the property. In those cases, "the Commission has often reduced the property's land value to \$0, thus establishing a value for the contaminated property that is equal to its improvements value only."³ In *Appeal No. 15-200*, which involved the subject property for tax year 2014, the decision noted that the Property Owner had provided information that indicated the cost to clean the property from the environmental contamination was at least \$\$\$\$\$, which was more than the value of the property. In that appeal, the Commission reduced the land value to \$0.

7. There is a factual difference between the 2014 tax year appeal and the subject appeal, but it is not clear if this was a controlling factor in the Tax Commission's decision to reduce the land value to \$0 for the 2014 appeal. In the 2014 appeal, the lien date at issue was January 1, 2014. At that point in time the DEQ had not yet issued its NFA Letter, although there was some expectation the letter would be issued at some point in the near future.⁴ The NFA Letter was issued December 1, 2015, just prior to the lien date at issue in the subject appeal. In the COUNTY Board of Equalization Record for the 2016 tax year value, the County states that the Tax Commission's 2014 decision did not apply to the 2016 tax year because of the issuance of the NFA Letter.

8. The Property Owner did not provide an appraisal, comparable sales or other evidence to establish the fair market value of the subject property in its current state. She did however present a letter from a real estate agent that stated contamination on a property was a deterrent to potential buyers and a devaluing factor. She also provided an email from a bank manager and reported on a discussion she had with an employee of a credit union. Both indicated there would be serious issues with trying to obtain financing for a property that has contamination.⁵

9. The Property Owner provided evidence that to actually clean the subject property of the contamination would require removal of part of the building, removal of contaminated soils down to 10 feet deep and then replacing the soil and the portion of the building. She provided an email from

³ *Utah State Tax Commission Initial Hearing Order Appeal No. 15-200*, pg. 11, citing *Utah State Tax Commission Initial Hearing Orders in Appeal Nos. 06-1656* (June 29, 2007); *07-1428* (June 2, 2008); and *09-3783* (October 14, 2010). Redacted Copies of these and other decisions can be viewed on the Commission's website at <http://www.tax.utah.gov/commission-offices/decisions>. *USTC Appeal No. 15-200* also cited to the Utah Supreme Court's decision which upheld the Tax Commission's \$0 land value conclusion in *Schmidt v. Utah State Tax Commission*, 1999 UT 48, 980 P.2d 690 (Utah 1999).

⁴ See *Initial Hearing Order, Appeal No. 15-200*, pg. 9.

⁵ Petitioner's Exhibit 4.

COMPANY that indicated a cost for this was from \$\$\$\$\$ to \$\$\$\$\$.⁶ This estimate was unclear as to whether it applied to both the subject property and the property adjacent to the subject property, which was also contaminated and owned by the Property Owner's brother. Either way this cost would be higher than the assessed values attributed to the land for the two parcels combined.

10. The Property Owner has been leasing the subject property to a single tenant and it has been leased for many years. It was fully leased in the period relevant to the 2014 appeal.

11. It was the representative for the County's position that there was no indication that any environmental cleanup would be required if the property were to continue at its current use, so at this time there is not an indication there would be a financial burden due to the contamination. He points out that the Property Owner is currently leasing the property to a tenant and it has been fully occupied for a number of years, so there has not been a financial impact. Based on this, it was the County's position that there was not a diminished income potential due to contamination. He also states that properties that had been contaminated are being purchased and developed. The County's representative did not refute that there was contamination on the subject property, but pointed out that the worst of the contamination is under the building. He acknowledged if the ground were to be excavated, the Property Owner would have to report that to DEQ and did not refute there could be issues if this occurred.

12. The County had valued the property based on an income approach to value. The County's representative RESPONDENT, Certified General Appraiser, COUNTY, testified that the Property Owner has not provided the County with the actual lease rate or expense information for the subject property so he had looked at market lease rate information. RESPONDENT had prepared the Proposed Conference Record which is the County's Assessor's recommendation submitted at the County Board of Equalization hearing.⁷ It had been RESPONDENT's recommendation that the value be reduced to \$\$\$\$\$. This was based on the following factors:

Lease Per Square Foot	\$\$\$\$\$
Potential Gross Income	\$\$\$\$\$
Vacancy	%
Effective Gross Income	\$\$\$\$\$
Expenses	%
Net Income	\$\$\$\$\$
Cap Rate	%
Market Value	\$\$\$\$\$

13. RESPONDENT had not made adjustment in this income calculation specifically for the contamination, but he argued that to be conservative he had used a higher vacancy and capitalization rate. In the Proposed Conference Record, he had provided portions of two reports on vacancy rates, one

⁶ Included in Petitioner's Exhibit 4.

⁷ This was included as part of Petitioner's Exhibit 1.

indicating that buildings the size of the subject had a vacancy around % in 2015, and the other indicating that for primary flex buildings the vacancy was around % at the end of 2015. He had used a % vacancy factor, which was higher than as indicated in these reports, but it is not clear in the Proposed Conference Record if this was due to the contamination on the subject. Assuming that it was to account for contamination, it results in less than a % reduction of value.

14. RESPONDENT had also provided in his Proposed Conference Record two capitalization rate reports, which were showing year end 2015 industrial cap rates of % and flex property rates of %. He looked at a second report that broke it down to Class C rentals, which showed rates between % and %. In the Proposed Conference Record he had noted, “Considering the subject’s age and condition, a cap rate of % appears to be reasonable and supported.” There was nothing in the Proposed Conference Record that indicated the higher capitalization rate was to account for the contamination.

15. After reviewing the information presented by the parties, despite that the County acknowledges there is contamination on the subject property and that the Tax Commission had previously ruled for a substantial reduction in value on the subject property due to the contamination for tax year 2014, the County has again valued the subject property with no reduction or a very limited reduction for the contamination. It does appear the County is correct that the tenant can continue with the current use on the property, but as soon as someone has to dig new utility lines or wants to rebuild or add on to the existing structures, the contamination is an issue. The evidence also indicates it will be difficult, although maybe not impossible, to obtain financing for the property because of the contamination, even with the NFA Letter.

16. An income approach is a legitimate appraisal technique, but ultimately property is assessed at its “fair market value” pursuant to Utah Code Sec. 59-2-103. “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 . . .” See Utah Code Subsection 59-2-102(13). An income approach often does reflect the fair market value for this type of property, but in this situation, the contamination limits the use of the property and would make it difficult for a buyer to obtain financing. These are factors that legitimately affect the amount for which the property would change hands and the County has not taken it sufficiently into account. The Commission has not been presented with a better way to consider these factors than the way it had done so in its prior decision that reduced the value for the subject property.

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.

For property tax purposes, “fair market value” is defined in Utah Code Ann. §59-2-102(13), 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 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.

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...
- (3) In reviewing the county board’s decision, the commission may:
 - (a) admit additional evidence;
 - (b) issue orders that it considers to be just and proper; and
 - (c) make any correction or change in the assessment or order of the county board of equalization.
- (4) In reviewing evidence submitted to the commission by or on behalf of an owner or a county, the commission shall consider and weigh:
 - (a) the accuracy, reliability, and comparability of the evidence presented by the owner or the county;
 - (b) if submitted, the sales price of relevant property that was under contract for sale as of the lien date but sold after the lien date;
 - (c) if submitted, the sales offering price of property that was offered for sale as of the lien date but did not sell, including considering and weighing the amount of time for which, and manner in which, the property was offered for sale; and
 - (d) if submitted, other evidence that is relevant to determining the fair market value of the property.
- (5) 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:
 - (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 value plus or minus 5% from the assessed value of comparable properties.

The Utah Legislature has adopted the following provisions for when there has previously been a reduction in value on a property at Utah Code Sec. 59-2-301.4 as follows:

- (1) As used in this section, “valuation reduction” means a reduction in the value of property on appeal if that reduction was made:
 - (a) within the three years before the January 1 of the year in which the property is being assessed; and
 - (b) by a: (i) county board of equalization in a final decision; (ii) the commission in a final unappealable administrative order; or (iii) a court of competent jurisdiction in a final unappealable judgment or order.
- (2) In assessing the fair market value of property subject to a valuation reduction, a county assessor shall consider in the assessor’s determination of fair market value:
 - (a) any additional information about the property that was previously unknown or unaccounted for by the assessor that is made known on appeal; and
 - (b) whether the reasons for the valuation reduction continue to influence the fair market value of the property.
- (3) This section does not prohibit a county assessor from including as part of a determination of the fair market of property any other factor affecting the fair market value of the property.

CONCLUSIONS OF LAW

1. Generally, in a proceeding before the Tax Commission, the burden of proof is on the petitioner to support its position. To prevail in this case, the petitioner must: 1) demonstrate that the subject property’s current value contains error; and 2) provide the Commission with a sound evidentiary basis for changing the subject property’s current value to the amount it proposes. *See Nelson v. Bd. Of Equalization of 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*, 2000 UT 46, 5 P.3d 652 (Utah 2000). The Property Owner in this case has presented evidence that the Tax Commission had issued a final order reducing the value for tax year 2014 based on the environmental contamination, that the subject property was still contaminated as of the lien date at issue, and that it would still cost more than the assessed value of the land to fully remediate the property.

2. This appeal presents to the Tax Commission the issue of how Utah Code Sec. 59-2-301.4 should be applied when there has been a prior reduction in value in a final decision issued by the Utah State Tax Commission. If a valuation reduction occurs within three years before the lien date at issue, a county assessor is required to consider the valuation reduction in assessing the fair market value of the property. Subsection 59-2-301.4(2) notes factors that the County “shall consider.” Subsection 59-2-301.4(2)(a) indicates these to be “any additional information about the property that was previously unknown or unaccounted for by the assessor that is made known on appeal; and (b) whether the reasons for the valuation reduction continue to influence the fair market value of the property.” In this case, the property was contaminated in the periods relevant for both the prior appeal and the current appeal and the cost to fully remediate the property is more than the value attributed to the land. In both the prior appeal

and the current appeal, the subject property was leased to a tenant and the contamination did not prevent the current industrial use of the property. There is a new factor for the current appeal, that being the issuance of the NFA Letter. That letter had not yet been issued for the 2014 tax year. However, the County has failed to sufficiently establish that the 2014 decision no longer applies because of the factors that have not changed between the two tax years. The County's valuation essentially makes no adjustment, or at the most a % adjustment, for the contamination that still exists on the subject property, regardless of the Tax Commission's prior decision that found a significant adjustment is warranted. The Commission should apply its method for valuing the property in the prior appeal to tax year 2016 and reduce the value of the land to \$0.

Based on these factors, the value of the subject property should be reduced to \$\$\$\$ for the lien date at issue in this appeal.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Tax Commission finds that the market value of the subject property as of January 1, 2016, is \$\$\$\$\$. The County Auditor is hereby ordered to adjust the records accordingly. It is so ordered.

DATED this _____ day of _____, 2018.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.