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WARREN AND TRICIA OSBORN, MICHAEL
F. SULLIVAN, DAVID AND CYNTHIA
MIRSKY. NORMAN PRO VAN. JEFFREY AND
NANCY TRUMPER, GARY AND
CATHERINE CRITTENDEN. AND DAVID
CHECKETTS AND MOUNT CLYDE
ENTERPRISES L.C. v. Utah State Tax Commision
: Reply Brief of Cross-Petitioner

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IN THE UTAH COURT OF APPEALS

WARREN AND TRICIA OSBORN,
MICHAEL F. SULLIVAN,
DAVID AND CYNTHIA MIRSKY,
NORMAN PROVAN,
JEFFREY AND NANCY TRUMPER,
GARY AND CATHERINE
CRITTENDEN,
AND DAVID CHECKETTS AND
MOUNT CLYDE ENTERPRISES L.C.,

Petitioners.

WASATCH COUNTY.

Cross-Petitioner.

vs.

UTAH STATE TAX COMMISSION,

Respondent.

Appellate Case No. 20080304-CA

Utah State Tax Commission
Consolidated Appeal Nos. 06-1504,
06-1505, 06-1506, 06-1507, 06-1508, 06-
1509, and 06-1510


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DETAIL OF THE REPLY

I. THE EVIDENCE CITED BY THE COMMISSION DOES NOT SUBSTANTIALLY SUPPORT ITS DECISION.

The Commission supports its decision to allocate the value of the one acre home site to the entire ten-acre building envelope in which it is found based on the following facts: (1) “building rights” could be exercised throughout the 10-acre building envelope and not just on the one-acre home site; (2) the County’s appraiser, Mr. Hales, allocated the value of the “building rights” to one acre only because the County’s policy establishes one acre as the standard size of a home site in an otherwise agricultural property, and he would have been comfortable allocating the “building rights” to the 10-acre building envelope if he’d been asked to do so; (3) once the Commission allocated the value of the “building rights” to all ten acres in the building envelope, there was insufficient evidence to differentiate the value between any of those ten acres; (4) the County did not attempt to determine the value of a one-acre building lot through a direct sales comparison approach; and (5) a one-acre home site could have been located anywhere within the 10-acre building envelope. *Brief of Commission* at 19-20.

A. Four of the Five Bases Cited to Support the Commission’s Decision Arise from the Commission’s Misunderstanding of the Phrase “Rights to Build.”

The Commission’s explanation, set forth above, confirms the County’s belief as expressed in its opening brief that the Commission misunderstood the

nature of the testimony relating to the "rights to build." The evidence that was intended to place a value on "the right to build a primary residence" was instead interpreted as placing a value on "the right to build *anything*." This misunderstanding, at least, explains the Commission's assertions numbered 1, 2, 3, and 5, above. And it is this misunderstanding that led the Commission to place as much value in the right to build, say, a corral as it did in the right to build a single primary residence.

The Commission points to its examination of the County's expert, Blaine Hales. The relevant lines are as follows:

MR. JOHNSON: Okay great. Now did – as I listened to your testimony and – um – perused your appraisal, you looked at one acre and 159 acres. You didn't look at all at the 10 acre envelope.

MR. HALES: You know, if it would have been my choice, I probably would've gone with 10 acres and said one, but the county told me that their standard was one acre. And so –

MR. JOHNSON: Okay.

MR. HALES: -- I wanted to be consistent with what the assessor had been doing.

MR. JOHNSON: So – so if I understand that correctly, then if you had been asked – a change of an assignment – and I don't know how to find that, but you would – in doing an allocation, you would have allocated value to 10 acres?

MR. HALES: Well, I probably would've chosen a little bit larger parcel. But it's so difficult because with the assessment, you know, if they put a barn on it – you know – you can't – they only have a small envelope that they can use and you have to assume that a lot of that will be used for – you know – agricultural buildings. So – you know – the county's decision to go with one acre was fine with me.

MR. JOHNSON: So let me ask you, if this were just an appraisal assignment and you were asked to value the various components – if there were any –

MR. HALES: Yes.

MR. JOHNSON: Not even making that assumption, would – would you have broken it down into one acre, 10 acre components or would you have valued outside of the greenbelt statute just the entire 160 acres.

MR. HALES: If somebody had asked me to just break out the components, I probably would have just looked at it legally and not even worried about the physical aspect of it. You know, I would've said this is what the building right is worth –

MR. JOHNSON: Oh.

MR. HALES: This is what the land without it is worth. That is what I would've done.

MR. JOHNSON: And not associated with any specific acreage

MR. HALES: Right. That's the simplest way to do it.

Record at 1446, starting line 7, to 1447, ending line 25.

MR. JOHNSON: Okay, thanks. Um – if – again, don't let me force words in your mouth, but it appears to me you may not have "appraised" a one acre parcel of land, would that be correct?

MR. HALES: I think that's correct. I think neither one of us [referring also to the Petitioners' appraisal expert, Phil Cook] actually appraised a one acre parcel. Both parties were trying to come to what hopefully what would be a reasonable allocation for that component of the property.

MR. JOHNSON: So you've allocated value to one acre of land?

MR. HALES: With the building right included.

MR. [JOHNSON]: So this—these are my words—are you essentially allocating one of the sticks in the bundle of rights to an acre of land?

MR. HALES: Those would be my words too.

Record at 1448, starting line 25, to 1449, ending line 15.

In this interchange, Mr. Hales admits that he would have preferred to remove more than just one acre from the preferential treatment of the Farmland Assessment Act ("FAA"); however, he used the one-acre size because that was the standard adopted by the County Assessor pursuant to the Commission's instructions promulgated in its Standards of Practice. *See* Farmland Assessment Act Standard of Practice 7.4.1 (attached as Exhibit 1). However, the interchange also demonstrates that Mr. Hales was completely aware of what he actually did do; namely, *value only one acre of land* and also the right to build a *home* on that one

acre.¹ In fact, he testified that the value of the right to build the home—that single legal right among the figurative bundle of property rights—is the most important part of the calculation; and the specific acre where that right is exercised is relatively unimportant. However, *nowhere* did Mr. Hales attempt to value the right to build a caretaker’s dwelling, a barn, or a corral. In fact, his conversation with Commissioner Johnson contemplated that the right to build such buildings was *not* included in the right to build a primary residence. *Record* at 1446, starting line 23, to 1447, ending line 3 (Mr. Hales acknowledging that if the Assessor removed too much land from the FAA for the residence, and if an agricultural building were thereafter built on the land removed from the FAA, then the Assessor would have violated the FAA’s tax break intended for land used for agricultural buildings). As the value of the rights to build agricultural buildings was not at issue before the Commission, the Commission should not have taken the value that Mr. Hales had worked to establish for the right to build the primary residence and diluted it to cover these other rights as well.

Had Mr. Hales been asked to do so, perhaps he could have calculated the value of the rights to build a caretaker’s dwelling, a barn, and a corral on the other nine acres within the 10-acre building envelopes. But nobody, including the Commission, asked him to do so. Nevertheless, that does not mean that there is no

¹ See also *Record* at 1420, lines 14-17 (valuing one acre of land “in terms of space”); *Record* at 1413, line 20 (allocating value to the “home site”); *Record* at 1415, line 24, to 1416 line 2 (his assignment was to appraise the “one acre home sites”); *Record* at 1434, lines 6-9 (Mr. Hales’ methodology is “an allocation of value to the one acre”).

difference in value between the one-acre home site and the remaining nine acres in the envelope. For example, for a \$1.8 million parcel, Mr. Hales' allocations assigned 65%—or \$1,170,000—to the one-acre home site and \$3,000 per acre—or \$450,000—to the conservation-easement burdened 150 acres. This left exactly \$180,000 to be allocated to the remaining nine acres of the ten-acre building envelope. If each of these nine acres were to be valued equally, then they would be valued at \$20,000 each. Notably, when the Commission took Mr. Hales' allocation of value for the one acre home site and diluted it to cover these other nine acres as well, it had to wipe out this \$180,000 and leave it unaccounted for.

The foregoing explains how the Commission's justifications numbered 1, 2, 3, and 5, above are based on a misunderstanding of Mr. Hales' testimony. Namely, (1) while the Commission is correct that generally termed "building rights" are enjoyable throughout the 10-acre building envelope, the right to build a primary residence—the only right evaluated at trial—is enjoyable only on one of those acres; (2) had the County's standard adopted pursuant to Standard of Practice 7.4.1 been to remove *ten* acres from greenbelt for a residential dwelling, Mr. Hales would have been comfortable applying the right to build a primary residence to those ten acres, but since the County's standard is more generous to the landowner and only removes one acre from greenbelt for a dwelling, Mr. Hales conscientiously valued only that one acre; (3) contrary to the Commission's conclusion that there was insufficient evidence to differentiate the value between the one acre home site and the remaining nine acres in the building envelope, the

evidence established that the one-acre home site was worth, in a \$1.8 million parcel, more than \$1 million while the remaining nine acres were worth no more than \$20,000 per acre; and (5) while it is true that the one-acre home site could have been located anywhere within the ten-acre building envelope, it could never be used on more than one acre, and in each of these cases the acre on which it was used had been clearly identified by the construction of the primary residence on that acre.

B. While a Direct Sales Comparison Approach May Have Been Helpful, its Absence Does Not Support the Commission's Decision.

The County now turns to the Commission's fourth basis for its decision. The Commission points out that the County did not undertake a direct sales comparison to determine the value of the one-acre home site. This is true: the County did not. Indeed, it is interesting that the Commission faults the County for *not* employing this appraisal device while the Petitioners claim that the County actually *did* employ the device and *shouldn't have*. *Reply Brief of Petitioners* at 12.

Instead of conducting a direct sales comparison analysis, the County's expert arrived at the value of the one-acre home site through two separate methods—the accuracy of one being a check on the accuracy of the other. First, Mr. Hales calculated the value of the legal right to build a primary residence, and he concluded that this legal right represents 65% of the parcel's overall value. For a \$1.8 million parcel this would be \$1,170,000. In order to confirm that this

allocation was accurate, he then calculated the value of land on which no residential building permit could be obtained, and he concluded that the value of such acreage in the same area as the Petitioners' is \$3,000 per acre. The allocated value of the 150 acres of conservation-easement burdened land, therefore, would be \$450,000.² This second appraisal approach thereby confirmed that the 65% figure for the one-acre home site was very close to correct. Both appraisal approaches are valid and persuasive, and both were accepted by the Commission.

The Commission understood Mr. Hales' testimony, at least in part, and recited it in its Findings of Fact. The Commission stated,

27. To estimate the allocation to the one acre, Mr. Hales relied on two methods: 1) determining the value of the unbuildable portion of the property; and 2) determining the value of the right to build by considering sales of conservation easements. [. . .] In this analysis, Mr. Hales indicated that he considered 159 acres as unbuildable and only the one-acre.

² It is probable that eight of the nine acres in the ten-acre building envelope also would be valued at only \$3,000 per acre. State law allows agricultural buildings to be built without a permit. Utah Code § 58-56-4(5)(a). Therefore, zoning laws do not control their construction, and even property that is colloquially referred to as "unbuildable" can have barns and corrals built on them. Consequently, this \$3,000 per acre figure for "unbuildable" land necessarily includes the inherent right to build such buildings. As eight of the nine other acres in the building envelope are limited to agricultural buildings, the evidence would indicate that those eight acres are probably worth approximately this amount per acre. The only acre (other than the primary home site) that may be valued differently would be the one on which a caretaker dwelling could be built—a building that *would* require a building permit. Mr. Hales was not asked to evaluate the value of the acre on which a caretaker dwelling was built because no such dwellings have yet been built.

used by the County as the home site, as buildable. From the analysis of conservation easements he relied on six sales and concluded that the right to build on the subject along with the one-acre home site would represent approximately 65% of the subject's value while the remainder should be allocated to the unbuildable agricultural and recreational land. In his reconciliation of the two approaches he concluded that 65% of the total value should be allocated to the buildable home site and the remainder to the agricultural land.

Record at 63.

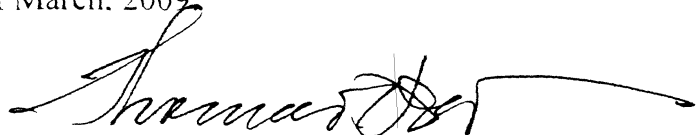
However, after reciting this accurate understanding of Mr. Hales' testimony, the Commission then concluded that the entire ten-acre building envelope is "developable" and "buildable," and that Mr. Hales erred in allocating the 65% value to the one-acre home site. Record at 64. In one sense, of course, the Commission was right: barns, corrals, and a caretaker dwelling can be built on the other nine acres within the ten-acre envelope. So in one meaning of the word, those acres are also "buildable." However, the building right that was evaluated by Mr. Hales was not the right to build a barn: it was the right to build a single primary residence. And that right was consumed once, and in its entirety, within the one-acre home site. The right to build that home was the only "building right" that Mr. Hales valued. It was an error on the part of the Commission to dilute this right by allocating it to the other nine acres where it could never be exercised.

Mr. Hales was the only witness who provided any evidence that accurately reflected the “reality that the building site is worth more than the undevelopable property” Record at 64. Nevertheless, the Commission faults Mr. Hales for not providing even more evidence: namely a direct sales comparison analysis. To the extent that a direct sales comparison analysis would help a fact-finder understand the allocation of value in this case, the County has demonstrated the desire to fill this perceived gap by filing a petition for *de novo* review in district court.³ However, even absent this additional evidence, the Commission’s decision, as it currently stands, is not supported by the only testimony that the Commission cites to support it.

CONCLUSION

For the foregoing reasons, Wasatch County asks the Court to reverse the Commission’s factual finding that 65% of the value of each parcel is attributable to the ten-acre building envelope. In its place, the County asks the Court to follow the evidence that the Commission found to be uncontroverted: namely, that 65% of the value of each parcel should be allocated to the one-acre home sites that have been established in each parcel.

DATED this 31 day of March, 2009.



THOMAS L. LOW, Attorney for Wasatch County
Appellee and Cross-appellant

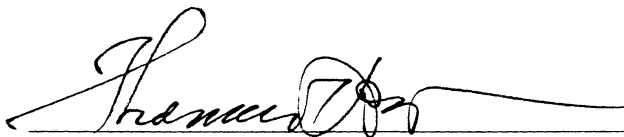
³ This petition was denied by the district court and the County’s appeal from that decision is now pending before this Court in case number 20080732.

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing brief, in its bound condition, by first class mail, postage paid, on the 1 day of ~~March~~^{April}, 2009, to each of the following:

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ADDENDA:

EXHIBIT 1: Utah State Tax Commission Standard of Practice 7.4.1
(available at
<http://www.propertytax.utah.gov/standards/standard07.pdf>)

Primary Producers

Under certain circumstances primary producers may also process agricultural products. In these cases, the land devoted to processing activities does not qualify for FAA assessment. In such cases, there may be a fine line between production and processing. County assessors must gather all facts necessary to make an accurate distinction. While there are no hard-and-fast rules that clearly distinguish between production and processing, the following guideline may prove helpful.

Guideline

In general, processing begins with those steps typically carried out at the first level of trade beyond production. Storage or packaging within the wholesale trade would constitute processing, as would slaughtering livestock. The producer's interim storage prior to sale to a wholesaler or other middleman would be considered a phase of production. Silage is a special case. While the final product is different from the product that was initially stored, the process should still be considered a primary production activity.

Processing occurs with activities that enhance the value of primary agricultural products, such as when they are broken into smaller parts or combined with other products. Milling grain, pasteurizing milk and packaging vegetables constitute processing. Packaging products for transport to either the wholesale or retail market would not constitute processing; however, packaging them for sale would be considered processing. The test is whether the packaging used for transporting is suitable packaging for retail sale.

7.3.2 Multiple Use of Land

To be eligible for FAA, it makes no difference whether agricultural use is the primary or secondary use of a land parcel. As long as other uses do not hinder or exclude the agricultural use, a parcel may receive FAA assessment. (See *Salt Lake County v Kennecott Corporation*, 1989, No. 3870368.)

Standard 7.4 Acreage Requirement

7.4.0 Acreage Requirement

To meet the qualifications for assessment under the FAA, land must be five contiguous acres in size. Exceptions are noted in *Standard 7.4.3 "Less Than Five Acres"*.

7.4.1 Home Site Deduction and Residential Exemption

Land on which the farmhouse is located, and land used in connection with the farmhouse, i.e., landscaping, gardening spots, etc., are not eligible for FAA assessment and cannot be included in the acreage to determine FAA eligibility. They shall be valued and taxed using the same standards, methods, and procedures that apply to other taxable land in the county. [Section 59-2-507(2)]

Guideline

The county assessor should establish a common home site size on a countywide or area-wide basis to be deducted from eligible land. This home site size cannot be included in the total acreage for FAA eligibility purposes. The home site market value listed on the assessment roll should equal the market value of an equivalent building site. A property assessed under the Farmland Assessment Act is to receive the residential exemption only for the home site. (R884-24P-52)