

2008

# Wasatch County v. Utah State Tax Commission, Warren and Tricia Osborn, et al. : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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WASATCH COUNTY

Petitioner/Appellant

vs.

UTAH STATE TAX COMMISSION,

Respondent/Appellee,

WARREN AND TRICIA OSBORN, et al.,

Appellees.

Case No. 20080732-CA

District Court Case No. 080907392

Tax Commission Appeals Nos: 06-1504,  
06-1505, 06-1506, 06-1507, 06-1508,  
06-1509, 06-1510

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**APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY  
JUDGE JOHN PAUL KENNEDY**

---

**BRIEF OF APPELLEES WARREN AND TRICIA OSBORN, ET AL.**

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## STATEMENT OF JURISDICTION

The present case is Wasatch County's appeal to the Utah Supreme Court of the district court's Order Granting Warren and Tricia Osborn's Motion to Dismiss Wasatch County's Petition for Review of the Utah State Tax Commission's Final Order issued April 1, 2008 for lack of jurisdiction. Appellant Wasatch County (the "County") filed its Petition for Review in district court after having filed a separate and prior Cross-Petition for Review of the Tax Commission's Final Decision in the Utah Supreme Court. A copy of the district court's Order is attached as Addendum 2 to this brief. A copy of the Tax Commission's Final Decision is attached as Addendum 3.

The Utah Supreme Court had jurisdiction to decide this case, Case No. 20080732-CA, pursuant to Utah Code Ann. § 78A-3-102(3)(k)(appeals from district court). The Supreme Court transferred the County's appeal of the district court Order to this Court pursuant to Rule 42(a) of the Utah Rules of Appellate Procedure. This Court has jurisdiction to decide the County's appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j)(cases transferred to the Court of Appeals from the Supreme Court).

This Court also has jurisdiction to decide Petitioner/Appellees' Warren and Tricia Osborn *et al.* (the "Taxpayers") request for attorneys' fees pursuant to Rule 33 of the Utah Rules of Appellate Procedure.

## **STATEMENT OF THE ISSUES**

### **Issue I – The District Court Dismissal of the County’s Second Appeal**

The Taxpayers dispute the County’s framing of the issue this Court must decide. The County attempts to distort the sole issue of this appeal by incorrectly assuming in its favor that Utah Code Ann. § 59-1-602 (“Section 602”) permits the filing of what the County’s brief labels as the County’s “protective” appeal of the Utah State Tax Commission’s Final Decision issued April 1, 2008 to the Utah Supreme Court. In truth, there is neither express nor implied authorization in Section 602 for a so-called “protective” appeal of the Tax Commission’s Final Decision, which the County filed in the Utah Supreme Court before filing a second appeal in the district court. Further, the County’s claim that its first Cross-Petition for Review filed in the Supreme Court was a so called “protective” appeal is not factually supported by the record.

Given the County’s false premise - that the County’s first Cross-Petition for Review was a “protective” appeal and that “protective” appeals are permitted under Section 602 despite express statutory language to the contrary - the County now claims that the issue before this Court is whether the district court properly decided that the County’s “protective” filing of a cross petition for review of the Tax Commission’s Final Decision in the Utah Supreme Court deprived the district court of jurisdiction. County Brief at 1.

Contrary to the County’s invented “protective” appeal premise, Section 602 clearly states that a county or taxpayer appearing before the Tax Commission

“may at that party’s option petition for judicial review in the district court pursuant to this section, or in the Supreme Court or the Court of Appeals pursuant to Section 59-1-610.” (Emphasis added.) Hence, a more accurate statement of the issue this Court must decide is as follows:

**Taxpayers’ Restatement of Issue I**

Given the express language of Utah Code Ann. § 59-1-602(1)(a), providing that a “county whose revenues are affected” by a Tax Commission final decision has the “option” of petitioning for review of the decision before the district court “or” the Utah Supreme Court, did District Court Judge Kennedy properly dismiss the County’s second-filed Petition for Review of the Tax Commission’s April 1, 2008 Final Decision because the County had already elected its remedy by exercising its “option” to file a prior Petition for Review of the same Tax Commission Final Decision in the Utah Supreme Court?

**Taxpayers’ Issue II – Rule 33 Claim for Attorneys’ Fees - The County Appeal is “Frivolous.”**

Is the County’s appeal to this Court of the district court’s dismissal of its second appeal of the Tax Commission’s Final Decision a “frivolous” appeal, an appeal “not warranted by existing law, or not based on a good faith argument to extend, modify or reverse existing law,” which justifies an award of attorney’s fees and costs against the County and in favor of the Taxpayers, pursuant to Rule 33 of the Utah Rules of Appellate Procedure?

## **STANDARD OF REVIEW**

### **Issue I**

Whether the district court properly dismissed the County's second appeal of the Tax Commission's April 1, 2008 Final Decision for lack of jurisdiction after the County had previously filed an appeal with the Utah Supreme Court "presents a question of law, which we review for correctness." *Ameritemps, Inc. v. Labor Comm'n*, 2005 UT App 491, ¶ 7, 128 P.3d 31.

### **Issue II**

This Court held in *O'Brien v. Rush*, 744 P.2d 306, 310 (Utah Ct. App.1987) that "a frivolous appeal is one without merit." Whether the County's appeal of the district court's dismissal of the County's second appeal of the Tax Commission Final Decision is "without merit" is a question of law, pursuant to Rule 33 of the Utah Rules of Appellate Procedure, which provides for recovery of attorney's fees and either single or double costs for appeals lacking merit.

## **DETERMINATIVE CONSTITUTIONAL PROVISION**

Utah Constitution, Article XIII, Section 6(4):

Notwithstanding the powers granted to the State Tax Commission in this Constitution, the Legislature may by statute authorize any court established under Article VIII to adjudicate, review, reconsider, or determine any matter decided by the State Tax Commission relating to revenue and taxation.

## **DETERMINATIVE STATUTES**

1. Utah Code Ann. § 59-1-601 (district court jurisdiction over appeals from Tax Commission final decisions in a "trial de novo," defined in Section

601(2) as an “original, independent proceeding and does not mean a trial on the record.”).

2. Utah Code Ann. § 59-1-602 (vesting an “aggrieved party” or affected county appearing before the Tax Commission with the “option” to appeal to the district court “or” an appellate court).

3. Rule 33 of the Utah Rules of Appellate Procedure (Damages for delay or frivolous appeal; recovery of attorney's fees).

In addition to the above-cited constitutional provision and statutes, the County cites Rule 1(c) and Rule 14 of the Utah Rules of Appellate Procedure as determinative rules. However, neither of these rules is determinative or even relevant in deciding whether the district court properly dismissed the County’s second appeal of the Tax Commission’s Final Decision. Even assuming, hypothetically, that the district court had jurisdiction to conduct a trial “de novo” on the County’s second appeal as an “original and independent proceeding,” such trials are not and cannot be conducted under the Utah Rules of Appellate Procedure.

Rule 33 of the Utah Rules of Appellate Procedure applies because the County’s appeal of the district court’s Order of Dismissal before this Court is not warranted by existing law, but rather requests that this Court modify or reverse Utah statutory law. There is no good faith argument to be made that this Court has jurisdiction to amend a Utah statute. Hence, attorney’s fees and double costs should be awarded to Taxpayers.

## **STATEMENT OF THE CASE**

### **NATURE OF THE CASE**

As referenced under the “Jurisdiction” section of this brief, the County’s present appeal before this Court is of the district court’s Order Granting Appellees’ Motion to Dismiss the County’s second-filed Petition for Review for lack of jurisdiction, which County petition sought district court review of the Utah State Tax Commission’s Final Order issued April 1, 2008. The County filed its second Petition for Review in district court after having filed a separate and prior Cross-Petition for Review of the Tax Commission’s Final Decision in the Utah Supreme Court.

### **PROCEDURAL BACKGROUND AND RELEVANT FACTS**

1. On April 1, 2008, the Tax Commission issued its Final Decision in *Osborn et al v. Board of Equalization of Wasatch County*, Appeal No. 06-1504. (R. at 26.) Subsequent to entry of the Tax Commission’s Final Decision, the Taxpayers filed their Petition for Review of the Tax Commission’s Final Decision with the Utah Supreme Court on April 10, 2008, Case No. 20080304- CA. (R. at 94.) On April 29, 2008, the Utah Supreme Court transferred the Taxpayers’ appeal of the Tax Commission’s Final Decision to the Utah Court of Appeals. (R. at 95.)

2. The County then filed a Cross-Petition for Review of the Tax Commission’s Final Decision with the Utah Supreme Court on April 24, 2008 (“First Petition for Review”) in the same case, thereby exercising its statutory



“option” of seeking review of the Final Decision in *either* the district court *or* the Utah Court of Appeals or the Utah Supreme Court. (R. at 94.)

3. Contrary to the plain language of Utah Code Ann. § 59-1-602(1)(a), the County then filed a second Petition for Review in the district court on April 25, 2008 (“Second Petition for Review”). *Id.*

4. On April 30, 2008 the County filed its first Motion to Stay Case No. 20080304-CA, in which the County filed its First Petition for Review of the Tax Commission’s Final Decision initially filed with the Utah Supreme Court and later transferred to this Court. (R. at 129-130.)

5. The County’s first Motion to Stay requested that this Court stay proceedings on the Taxpayers’ Petition for Review and the County’s First Petition for Review in Case No. 2008034-CA, pending disposition of the County’s Second Petition for Review filed in the district court. On June 4, 2008, this Court granted the County’s Motion to Stay in Case No. 20080304-CA pending disposition of the County’s Second Petition for Review in the district court. *Id.*

6. In the Order granting the County’s first Motion to Stay, this Court stated in pertinent part:

[Wasatch County’s second Petition for Review] seeks de novo review of the same order of the Utah State Tax Commission pursuant to Utah Code section 59-1-601 (2006); see also Utah Code Ann. §59-1-602(1)(a) (2006) (allowing a party the option to petition for judicial review of a decision of the Utah State Tax Commission in either the district court or the appellate court)

*Id.* (emphasis added).

7. On May 20, 2008, the Taxpayers filed a Motion to Intervene and a Motion to Dismiss in the district court action in response to the County's Second Petition for Review. (R. at 2\*<sup>1</sup>.) The Taxpayers' motion sought dismissal of the County's Second Petition for Review filed in the district court for lack of jurisdiction. (R. at 7-24\*.) District Court Judge John Paul Kennedy heard oral argument on the Taxpayers' Motion to Dismiss on July 14, 2008, and again at a second hearing on July 28, 2008. (R. at 94.) On August 1, 2008 Judge Kennedy entered his Order of Dismissal, a copy of which is attached as Addendum 2 to this brief. (R. at 206.) The district court's Order of Dismissal states in pertinent part:

Utah Code Ann. § 59-1-602 provides that "any aggrieved party appearing before the commission or county whose tax revenues are affected by the decision," including Wasatch County, has the "option" of filing a petition for review in the district court "or" in the Supreme Court. Wasatch County exercised its statutory option pursuant to Utah Code Ann. § 59-1-602(a)(1) by invoking the jurisdiction of the court of its choice, the Utah Supreme Court, by filing its Cross-Petition for Review with the Utah Supreme Court on April 24, 2008. Consequently, Wasatch County's subsequent attempt to invoke the jurisdiction of this Court by filing its Petition for Review on April 25, 2008 failed to invoke this Court's jurisdiction and was in violation of Utah Code Ann. § 59-1-602(a)(1). Because this Court lacks jurisdiction to adjudicate Wasatch County's subsequently filed appeal with this Court, it retains jurisdiction only to dismiss Wasatch County's Petition for Review.

(R. at 205.).

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<sup>1</sup>The Record is numbered 1-39, then starts again with numbering from 1-214. Therefore, for clarity, cites to the second pages 1-39 will be denoted with a \*).

9. On June 4, 2008, this Court issued an Order of Stay in Case No. 2008034-CA (the first appeal of the Tax Commission Final Decision before this Court) pending Judge Kennedy's disposition of the County's second appeal of the Tax Commission's Final Decision in the district court action, Case No. 080907392, now Case No. 20080732-CA. (R. at 129-130.) Judge Kennedy's final Order of Dismissal in the County's second appeal of the Tax Commission's Final Decision (the district court action) mooted the reasons this Court issued Stay in Case No. 2008034-CA. *Id.* Accordingly, this Court lifted its Stay on September 18, 2008.

10. On October 1, 2008, the County filed its second Motion to Stay with this Court, again requesting that this Court stay proceedings in district court Case No. 20080304-CA. The County's second Motion to Stay sought a delay of the Taxpayers' Petition for Review and the County's First Petition for Review until the County's appeal of the district court's Order of Dismissal, Case No. 20080732-CA, is decided, essentially depriving Taxpayers of their right of appeal from the Tax Commission to this Court.

11. On October 16, 2008, Taxpayers filed their Memorandum in Opposition to the County's Second Motion to Stay Appeal in this Court, in which Taxpayers argued that the County's appeal of the district court's Order of Dismissal was (and is) ripe for summary disposition by this Court, dismissing the County's appeal of the district court's Order, pursuant to Rule 10(e) of the Utah Rules of Appellate Procedure. Taxpayers argued that the County's appeal of the

district court's Order of Dismissal (Case No. 20080732-CA) is totally devoid of merit, and hence presents no substantial legal question. This Court did not act on the Taxpayers' request for summary disposition of the County's appeal of the district court's Order of Dismissal, but denied the County's second Motion to Stay on October 31, 2008.

### SUMMARY OF ARGUMENT

Utah Code Ann. § 59-1-602 provides that “any aggrieved party appearing before the commission or county whose tax revenues are affected by the decision,” including the County, has the “**option**” of filing a petition for review in the district court “**or**” in the Supreme Court. The County exercised its statutory option pursuant to Utah Code Ann. § 59-1-602(1)(a) by invoking the jurisdiction of the court of its choice, the Utah Supreme Court, by filing its Cross-Petition for Review with the Utah Supreme Court on April 24, 2008. Consequently, the County's subsequent attempt to invoke the jurisdiction of the district court by filing its Second Petition for Review on April 25, 2008 failed to invoke the jurisdiction of the district court and was in violation of Utah Code Ann. § 59-1-602(a)(1).

The County attempts to confuse the sole issue in this appeal by claiming that Section 59-1-602 does not provide guidance for handling a disagreement among the parties as to the venue for appeal of a Tax Commission decision, and claims to have adhered to the proper procedure for invoking the district court's jurisdiction. The County's arguments are not relevant to this appeal because this

is not a case where the parties disagreed over the venue for an appeal of the Tax Commission's Final Decision. Rather, both parties exercised their statutory option in invoking the jurisdiction of the Utah Supreme Court by filing separate Petitions for Review in the Utah Supreme Court. The County attempts to frame the issue as whether one party's exercise of its statutory option pursuant to Utah Code Ann §59-1-602 can preempt another party's exercise of its statutory option pursuant to Utah Code Ann. §59-1-602.

In so distorting the issue, the County ignores the plain language of Utah Code Ann. §59-1-602, and fabricates legal and factual positions that are not supported by Utah law or the record. Specifically, the County argues that its First Petition for Review was not an exercise of its statutory option, but rather was merely a "protective appeal." The County's "protective appeal" argument is unsupported by Utah law. Further, the County's First Petition for Review does not include any indication that it was in fact a "protective appeal," and such argument is unsupported by the record.

Therefore, the County's appeal essentially requests a judicial amendment of Utah Code Ann. §59-1-602 to authorize the County's duplicative appeals to the Utah Supreme Court and the Utah district court. To the contrary, there is no good faith argument that this Court can or should amend Utah Code Ann. § 59-1-602 to cure the County's failure to comply with clear statutory law. Accordingly, this Court should dismiss the County's appeal of the district court's Order of

Dismissal, and award the Taxpayers their attorney fees and costs pursuant to Rule 33 of the Utah Rules of Appellate Procedure.

## ARGUMENT

**I. DISTRICT COURT JUDGE KENNEDY CORRECTLY HELD THAT THE COUNTY FORECLOSED ITSELF FROM A TRIAL DE NOVO BECAUSE THE COUNTY FAILED TO FOLLOW THE CLEAR PROCEDURES STATED IN UTAH CODE ANN. § 59-1-602(1)(a) BY FILING DUPLICATE AND PROSCRIBED APPEALS OF THE TAX COMMISSION'S FINAL DECISION.**

The County's brief is replete with omissions and misrepresentations of fact and law. To begin, the County's "Argument" section of its brief accurately quotes Utah Code Ann. § 59-1-602:

**59-1-602. Right to appeal -- Venue -- County as party in interest.**

(1) (a) Any aggrieved party appearing before the commission or county whose tax revenues are affected by the decision may **at that party's option** petition for judicial review in the district court pursuant to this section, **or** in the Supreme Court or the Court of Appeals pursuant to Section **59-1-610**.

(b) Judicial review of formal or informal adjudicative proceedings in the district is in the district court located in the county of residence or principal place of business of the affected taxpayer or, in the case of a taxpayer whose taxes are assessed on a statewide basis, to the Third Judicial District Court in and for Salt Lake County.

(c) Notwithstanding Section **63G-4-402**, a petition for review made to the district court under this section shall conform to the Utah Rules of Appellate Procedure.

(2) A county whose tax revenues are affected by the decision being reviewed shall be allowed to be a party in interest in the proceeding before the court.

County Brief at 7-8. (Emphasis added.)

The County Brief omits a recitation of Utah Code Ann. § 59-1-601 (“Section 601”), which provides:

**59-1-601. District court jurisdiction.**

(1) In addition to the jurisdiction granted in Section **63G-4-402**, beginning July 1, 1994, the district court shall have jurisdiction to review by trial de novo all decisions issued by the commission after that date resulting from formal adjudicative proceedings.

(2) As used in this section, "trial de novo" means an original, independent proceeding, and does not mean a trial de novo on the record.

(3) (a) In any appeal to the district court pursuant to this section taken after January 1, 1997, the commission shall certify a record of its proceedings to the district court.

(b) This Subsection (3) supercedes Section **63G-4-403** pertaining to judicial review of formal adjudicative proceedings.

*Utah Code Ann. §59-1-601 (Emphasis added.)*

Having accurately quoted Section 602, while omitting Section 601, the County’s distortions begin. As the district court appropriately held, Section 602(1)(a) gives an aggrieved party the “option” of petitioning either the district court or an appellate court for review of the Tax Commission final decision, **NOT BOTH**, as the County did and now attempts to justify by distortions of law. The County’s argument essentially urges this Court to rewrite Section 602(1)(a) to “make sense” (meaning a rewrite of Section 602 so the County can file duplicate appeals) because, the County claims, the statute is nonsensical. County Brief at 8-10.

The County's brief further claims, as did the County Attorney in the district court hearing, that "[Petitioner/Taxpayers'] counsel for the first time [at oral argument before the district court] mentioned that there was 'an issue' as to whether the county was entitled to exercise its right to district court review because the county had also elected to simultaneously participate in the Osborns' supreme court appeal arising from the same Tax Commission decision." County Brief at 5.

The County misrepresented the facts to the district court and repeated its misrepresentation in its brief submitted to this Court. As Osborns' counsel, Mr. Maxwell Miller, explained to the district court at oral argument:

If you look at page twelve footnote three of our memorandum [Taxpayers' initial memorandum in support of its Motion to Dismiss], it says, and I quote, "it is clear that this Court has no jurisdiction to adjudicate Wasatch County's petition for review, because Wasatch County filed a cross-petition for review of the Tax Commission's final decision in the Utah Court of Appeals on April 24, 2008 and then filed its petition for review on April 25, 2008 in this Court. Utah Code Ann. 59-1-602 provides any aggrieved party appearing before the Commission or County whose tax revenues are affected by the decision may at that party's option, petition for judicial review in the District Court pursuant to this section or in the Supreme Court or the Court of Appeals pursuant to Section 59-1-610."

(R. at 197.), Taxpayer Transcript at 18.<sup>2</sup>

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<sup>2</sup> Rule 11(e)(2) of the Utah Rules of Appellate Procedure provides "Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant



Judge Kennedy then asked Mr. Miller, “That was in the brief you filed where?” to which Mr. Miller replied, “In this Court.” Record at 19. Judge Kennedy then asked the County Attorney, Thomas Low, “Well...what about, you’re saying it’s in a response? And therefore you don’t have to pay any attention to it?” (R. at 198-199), Taxpayer Transcript at 19-20.

To summarize, the County’s initial misrepresentation is that the Taxpayers’ jurisdictional issue had not been raised at the district court before oral argument, when in fact, the issue had been raised multiple times. Yet precisely to moot the County’s fained surprise over jurisdiction at the district court, Judge Kennedy extended the opportunity of a second hearing to the County so it could respond to the Taxpayers’ jurisdictional arguments. Even though the County was given a second opportunity to address the Taxpayers’ jurisdictional arguments, the County had no adequate rebuttal to the Taxpayers’ arguments, because there is none. Accordingly, Judge Kennedy dismissed the County’s unlawfully filed Second Petition for Review.

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portions of the transcript.” (Emphasis added.) Taxpayers had an unofficial transcript of the district court proceedings prepared because the County abdicated its responsibility, even though its brief quotes from Taxpayers’ Transcript and cites it as the “Record.” The transcript the Taxpayers prepared is not the official “Transcript,” but clearly shows Judge Kennedy’s perceptive analysis and strong disapproval of the County’s arguments. The transcript prepared by counsel for Taxpayers, a copy of which is attached as Addendum 4 hereto appears at R. 180-207, and shall be referred to herein as Taxpayers’ Transcript so as to avoid confusing it with the official transcript, which does not exist because the County failed to cause it to be prepared.

Another County misrepresentation is its “Certificate That No Transcript is Needed” in this case, which the County filed with this Court on September 26, 2008. The County has now reversed itself by relying on portions of the unofficial transcript of the district court proceedings in its brief and citing it as the “Record.” Counsel for Taxpayer had an unofficial transcript of the oral arguments before Judge Kennedy prepared because the County, whose duty it was to prepare the official transcript for its appeal of the district court’s Order of Dismissal, failed to comply with such duty.

To sustain its argument for a judicial rewrite of Section 602 so as to permit duplicate appeals by the same party, the County Brief argues that the statute, while generous in providing that all parties appearing before the Tax Commission have a right to appeal the Tax Commission’s Final Decision, “is somewhat parsimonious in its guidance on how to sort through the conflicts that can arise from the parties’ competing exercise of that discretion.” County Brief at 8. Section 602 is not “parsimonious,” even falsely assuming “parsimony” is a legitimate ground for ignoring express statutory language or rewriting the statute to suit the County’s preferences. Neither does Section 602 fail to instruct parties on how to protect their standing in another party’s appeal as the County further argues. Nor is there any competing exercise of discretion. Nor does the statute mandate, in the County’s words, an “unforgiving procedure,” *id.* at 9, as the County has further argued in an attempt to persuade this Court to ignore clear statutory language. Neither would this Court “sacrifice the county’s right to obtain district court

review merely to preserve the appellees' right to continue their appeal before this Court (in case number 2008034), which right the appellees do not stand to lose anyway." *Id.* at 12.

Notwithstanding the County's arguments of hypothetical conflicts, the County, citing *Park and Recreation Comm'n v. Dept. of Finance*, 388 P.2d 233, 234 (Utah 1964), concludes Argument I of its brief by urging this Court to construe (essentially rewrite) a statute to make sense, if a statute is subject to more than one construction. *Id.* at 10.

In response, Taxpayers stress that Section 602 already makes sense, is not ambiguous, and is not subject to multiple good faith constructions. As Judge Kennedy held: "Wasatch County's subsequent attempt to invoke the jurisdiction of this Court by filing its [second] Petition for Review on April 25, 2008 failed to invoke this Court's jurisdiction and was in violation of Utah Code Ann. § 59-1-602(a)." (R. at 205.)

Again contrary to the County's misrepresentations, Taxpayers have no desire, nor could they ever, "extinguish another's right to exercise the appellate option of that party's choice." County Brief at 8. Simply stated, the County's argument presents a hypothetical situation that is not relevant to the facts of this case. The County attempts to confuse the sole issue its appeal presents by claiming that each party is entitled to exercise its statutory option pursuant to Utah Code Ann. §59-1-602, and that one party's exercise of its statutory option cannot preempt another party's exercise of the same option. *Id.* The Taxpayers do not

disagree with this proposition, but that is not the issue the County's appeal presents. The County affirmatively exercised its statutory option by filing its First Petition for Review, and now requests that this Court authorize the filing of a second appeal, after the County already exercised its statutory option. This is not permitted by the plain and unambiguous language of Utah Code Ann. §59-1-602.

The County has never been deprived of its right to a de novo trial in district court. The County has deprived itself of a trial de novo by failing to comply with Section 602 in filing two appeals instead of the statutorily mandated one appeal. As further argument for its request that this Court either ignore or rewrite Section 602, the County postulates a hypothetical circumstance in which multiple parties at the Tax Commission level appeal to different courts – either to the Utah Supreme Court or the district court. County Brief at 11. But that is not what happened here, as Judge Kennedy made clear in his questioning of Assistant Attorney General Timothy Bodily at oral argument on the Taxpayers' Motion to Dismiss the County's second, statutorily precluded, appeal of the Tax Commission's Final Decision:

**Assistant Attorney General Timothy Bodily:**

Thank you, your honor. I do want to clarify this is not the first time that this issue has arisen. This certainly is a little bit different because the way the parties have decided to approach it. But because of the \_\_\_\_ or situation, quite often you have, well not quite often, but I have seen at least three circumstances, this will be the fourth, where one party chooses to file first in the Supreme Court and the other party chooses to go to the District Court and my understanding is that in all cases the Appellate Court defer to the District Court to pursue the appeal there .. .

**Judge Kennedy:**

Well what about the situation, where as here, the, one party appeals the Tax Commission decision to the Supreme Court and then comes back and appeals also to this Court for trial de novo, on that issue? Is that something you see happening?

**Timothy Bodily:**

I have not seen that issue.

(R. at 194-195) Taxpayer Transcript at 15-16.<sup>3</sup>

Hence, the wholly dispositive response to the County's Argument I in its brief – that Section 602 should be construed (essentially rewritten) to give the County two appeals instead of its statutorily mandated choice of one - is that the County was never precluded from seeking a de novo trial in the district court pursuant to Utah Code Ann. § 59-1-601. Like all aggrieved parties from a decision of the Tax Commission, the County had the statutory “option” of filing its cross-appeal with the Utah Supreme Court (which it did), or the district court. The County has only itself to fault for choosing to foreclose the district court from conducting a trial de novo with respect to the Tax Commission's Final Decision. The County does not have the option to disregard and violate the plain, and unambiguous language of Utah Code Ann. § 59-1-602(1)(a)'s mandate that an

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<sup>3</sup> Mr. Bodily then claimed that the County had not filed duplicate appeals but merely a “protective appeal.” Record at 18. The Court disagreed for the obvious reason that Section 602 does not authorize any so-called “protective appeals,” and that “they [the County] have done both [two appeals] haven't they?” *Id.*

aggrieved party must choose one forum (the Supreme Court) *or* another (the district court).

Neither can the County lawfully deprive the Taxpayers of their right of appeal to this Court, as the County has attempted, of a purely legal issue. This Court's resolution of the Taxpayers' appeal and the County's cross-appeal in Case No. 20080304-CA. could and should moot many, if not all, issues the County's second and statutorily precluded second attempt to appeal the Tax Commission's Final Decision for a trial de novo in district court.

Taxpayers are informed of two unpublished cases in which the issue of jurisdiction between the district court versus the Supreme Court has arisen under Section 602. The first case involved *Baker v Tax Commission* (20030949) and *Regan v. Tax Commission* (20030887). There, two taxpayers filed an appeal to the Utah Supreme Court, while a third taxpayer filed in the district court. The Tax Commission's Motion to Stay the district court appeal was denied.

The second case involved *Beaver County, et al. v. T-Mobile* (20051010-CA). In *T-Mobile* apparently the counties filed first in the Utah Supreme Court and the taxpayer filed second in the district court. The taxpayer moved to stay the Supreme Court appeal, which motion was granted.

A compelling and dispositive distinction between these non published cases and this case is the distinction Judge Kennedy articulated in the above-quoted questioning of Assistant Attorney General Timothy Bodily at oral argument on the Taxpayers' Motion to Dismiss the County's second appeal of the Tax Commission

Final Decision before the district court. No party in the cases cited above sought jurisdiction in a second court having first elected its remedy and invoked jurisdiction in this Court, as did the County in Case No. 20080304-CA, the first appeal, followed by Dist. Court Case No. 080907291, the second appeal. Once the County elected its remedy to file a Cross-Petition for Review in the Utah Supreme Court on April 24, 2008, the County's Second Petition for Review, filed in the Fourth District Court on April 25, 2008, was a nullity, and was properly dismissed for lack of jurisdiction.

**II. THE COUNTY DEFIED UTAH CODE ANN. §§ 59-1-601 AND 59-1-602 NOT ONLY BY FILING A SECOND APPEAL, IN VIOLATION OF SECTION 602, BUT BY ATTEMPTING TO FORCE THE DISTRICT COURT TO CONDUCT A "TRIAL DE NOVO" USING THE UTAH RULES OF APPELLATE PROCEDURE, IN VIOLATION OF SECTION 601.**

The County claims to have "faithfully followed the requirements of Section 59-1-602(1)(c) and Rule 14 of the Utah Rules of Appellate Procedure to invoke the jurisdiction of the district court." County Brief at 13. This argument is without merit and internally inconsistent because Arguments II and III in County Brief presume and claim entitlement to a district court trial de novo governed by the Utah Rules of Appellate Procedure. This is nonsensical. Once again, the County's argument defies Utah Code Ann. § 59-1-601(2), which expressly provides that "As used in this section, 'trial de novo' means an original, independent proceeding, and does not mean a trial de novo on the record." An

original, independent proceeding cannot be conducted pursuant to appellate rules, but must be conducted under the Utah Rules of Civil Procedure.

In further response to the County's Argument II of its brief, Taxpayers reiterate their prior Argument I in this brief that the County is not entitled to a "trial de novo" before the district court, pursuant to Utah Code Ann. § 59-1-601 (district court jurisdiction), because the County violated Utah Code Ann. § 59-1-602(1)(a) by ignoring the statutory mandate to exercise an "option" and choose one forum (the district court) or another (the appellate courts), not both.

Yet, hypothetically assuming that the County is entitled to a district court review, the County has once again confused and distorted the statutory options. Utah Code Ann. § 59-1-602(1)(c) provides that "a petition for review made to the district court **under this section** shall conform to the Utah Rules of Appellate Procedure." (Emphasis added). The County then argues that "By properly following the procedures outlined in Rule 14 [of the Utah Rules of Appellate Procedure] to invoke the district court's jurisdiction, the county has clearly and unequivocally expressed its 'option' to have the district court conduct a de novo review." County Brief at 14.

Therefore, in addition to the County's violation of Utah Code Ann. § 59-1-602(1)(a) in NOT exercising an "option" for the district court OR the appellate court, the County confuses and distorts the remedies available to appellants of a Tax Commission final decision in district court. Appellate review is available on the record in district court pursuant to Utah Code Ann. § 59-1-602(1)(c). Such a



proceeding would be governed by the rules of appellate procedure. That remedy, however, is separate and distinct from and cannot be merged with the right for a trial de novo in district court under a separate statute, Utah Code Ann. § 59-1-601. Subsection (2) of Section 601 states that “As used in this section, ‘trial de novo’ means an original, independent proceeding, and does not mean a trial de novo on the record.” Hence, the County’s argument that its so-called right to a trial de novo using appellate procedures is nonsensical, even overlooking the County’s violation of Section 602(1)(a) in filing two appeals instead of choosing the district court OR an appellate court. This is because all trials de novo, especially those statutorily defined in Section 601(2) as an “original and independent proceeding,” cannot possibly be conducted using the Utah Rules of Appellate Procedure if the district court is to take the statutory words “original and independent” seriously. A district court review of the record in a trial de novo pursuant to Section 602 under appellate rules is inconsistent and incompatible with Section 601’s definition of a trial de novo as an “independent” and “original” proceeding. As Mathew Cook, co-counsel for Taxpayers, described to Judge Kennedy:

**Judge Kennedy:**

And, therefore, there’s nothing to do here?

**Matthew Cook:**

Correct. If what they’re seeking is an appeal. An appeal is governed by Section 59-1-602 which indicates that it is an option. You can either appeal to the Utah Court of Appeals, the Utah Supreme Court or the Utah District Court. If an appeal is made to the Utah District Court under Section 59-1-602 then the Rules of

Appellate Procedure and the District Court sits as an appellate court in those circumstances. Whereas, if you file for a trial de novo under a different section which is 59-1-601, the rules of civil procedure apply and you must file the rules of civil procedure to invoke the district court's jurisdiction for a new trial. So, there's essentially two different avenues that you can take depending on what statute you're attempting to invoke the district court's jurisdiction under. If you're attempting to invoke this court's jurisdiction for a trial de novo you're under 59-1-601 the rules of civil procedure apply. If you're trying to invoke the district court's appellate jurisdiction then you file under 59-1-602.

**Judge Kennedy:**

And what was done?

**Matthew Cook:**

They've essentially blended the two statutes together so in their petition for review they say they're filing under 59-1-601 and 59-1-602. And now the problem is if that if you are under 59-1-601 to invoke the court's jurisdiction you have to file a new complaint and the rules of civil procedure apply. Otherwise, the situation would be unworkable because Utah Rules of Appellate Procedure don't allow for entry of new evidence, new discovery and it is also important to note that in Wasatch County's petition for review they've asked for a new remedy which wasn't raised before the Tax Commission. It seems clear that the Utah Rules of Appellate Procedure don't allow for new remedies.

(R. at 189.) Taxpayer Transcript at 10.

In essence, the County urges this Court to read Utah Code Ann. §§ 59-1-601 and 602 in piecemeal fashion, and then treat Utah Code Ann. §§ 59-1-601 and 602 as a single statute. But nowhere does Utah Code Ann. §59-1-601 provide that the Utah Rules of Appellate Procedure govern a request for a new trial made pursuant to Section 601. The plain language of Utah Code Ann. §59-1-601 makes it clear that the purpose of the statutory citation to Utah Code Ann. §63G-4-402,

which grants the district court jurisdiction to review by trial de novo all final agency action resulting from **informal** proceedings, is to enlarge the jurisdiction granted in tax cases, pursuant to Utah Code Ann. §63G-4-402, to encompass review by trial de novo of final agency actions resulting from **formal** as well as informal proceedings. Further, Utah Code Ann. §63G-4-402 expressly provides, “the petition for review of informal adjudicative proceedings shall be by complaint governed by the Utah Rules of Civil Procedure.” Tax cases are unique in that an appeal from informal as well as formal adjudicative proceedings may be reviewed by “trial de novo” before the district court.

In other cases, Taxpayers’ counsel has participated in trials de novo before a district court taken on appeal from a Tax Commission final decision pursuant to Section 601(2). None of such trials has ever been conducted pursuant to the Utah Rules of Appellate Procedure, nor could they be so governed. All such de novo trials have been conducted pursuant to the Utah Rules of Civil Procedure, which must govern original, independent proceedings. The County’s arguments to the contrary, essentially that a district court can incorporate and apply appellate rules with trials de novo that are statutorily defined as “original” and “independent” proceedings in the district court, are frivolous. Such arguments do not meet the good faith standard under Rule 33 of the Utah Rules of Appellate Procedure.

**III. THE COUNTY ITSELF, AND NO ONE ELSE, HAS DEPRIVED THE COUNTY OF ITS RIGHT TO A DE NOVO TRIAL BEFORE THE DISTRICT COURT.**

The County's final arguments are to the effect that the right to a de novo district court review of a Tax Commission final decision is important and that the Utah Legislature and the people of Utah intended to preserve the viability of such right. County Brief at 14. Concededly, a taxpayer's or taxing authority's right to a trial de novo on appeal from a Tax Commission final decision is important, and, depending upon the unique facts and circumstances of a Tax Commission final decision, a taxpayer or county should be and is permitted to choose that option. However, the County's argument falsely presumes that the right to a trial de novo is somehow jeopardized when the County fails to comply with clear statutory law in petitioning for review of the Tax Commission's Final Decision in district court or in the Supreme Court, but not both. The County argues that the right to a trial de novo pursuant to Section 601 is an unqualified right. That is not an accurate assertion. A party must avail itself of its right to a trial de novo by following the procedures prescribed by Section 601 or else such right is forfeited. The County blames everyone else but itself for the forfeiture of its right to a trial de novo of the Tax Commission's Final Decision. The County's argument is totally without merit and cannot be made in good faith.

The County's brief devotes multiple pages to extolling the virtues of vesting parties aggrieved by a Tax Commission decision the "option" of a trial de novo, which no one disputes. The County accurately points out that the enactment

of Utah Code Ann. § 59-1-601 (which counsel for Taxpayers originally drafted, submitted and supported in the Utah Legislature) was intended to overturn, and did, in fact, overturn, the Utah Supreme Court decision in *Evans & Sutherland*, 953 P.2d 435 (Utah 1997), which held that taxpayers were not then entitled to a trial de novo in district court of a Tax Commission final decision resulting from formal adjudicative proceedings under the former Utah Constitution. Such arguments in the County's brief are frivolous because, once again, none of them is relevant to the issue at hand that this Court must decide – whether Judge Kennedy's Order dismissing the County's second, unauthorized and illegal appeal of the Tax Commission's Final Decision to this Court was lawful. No one's right to a trial de novo before the district court from a Tax Commission final decision is or has ever been in jeopardy.

Taxpayers do not argue that a trial de novo should not be a viable option to any aggrieved party appearing before the Tax Commission, including the County. In fact, counsel for Taxpayers have exercised the statutory option for a trial de novo before a district court on appeal from an adverse Tax Commission decision on several occasions for other taxpayers, but never after having first appealed to the Utah Supreme Court. Had the County complied with the clear and unambiguous language of Utah Code Ann. § 59-1-601(1) by exercising its option to petition for review for a trial de novo in district court, rather than first exercising its statutory option by seeking a review in the Utah Supreme Court, no

one would have or could have disputed the County's right to a trial de novo in district court.

In Case No. 2008034-CA pending before this Court, the Taxpayers exercised their statutory option to petition for review of the Tax Commission's Final Decision because they disagreed with the Tax Commission's Final Decision on a single legal issue – the allocation of property withdrawn from greenbelt. That issue is the subject of the Taxpayers' Petition for Review in Case 2008034- CA, in which the Taxpayers herein have filed their opening Appellants' brief. Had the County complied with Section 601 and petitioned for review, pursuant to the Utah Rules of Civil Procedure, in district court, rather than pursuant to the Utah Rules of Appellate Procedure in both the district court and the Supreme Court, the trial de novo would have proceeded without objection from the Taxpayers. Based upon the cases cited above in which one party appearing before the Tax Commission appealed to the district court and another appealed to the Utah Supreme Court, the appellate review of the Tax Commission Final Decision would likely have been stayed. But as Judge Kennedy emphasized in his comments to Assistant Attorney General Timothy Bodily, the County's appeal of the Tax Commission's Final Decision to the district court in this case, does not raise the situation in which one party appearing before the Tax Commission appeals to one forum and another party appearing before the Tax Commission appeals to another.

Rather, in this case, the County appealed to both the district court and the Utah Supreme Court in total disregard of Section 602. Hence, this Court should

not take it upon itself to rewrite Section 602 so that the County does not suffer the consequences of its own failure to read and comply with Section 602 by filing two appeals when Section 602's "either-or" language clearly authorizes only one appeal. The County's arguments that it has been deprived of a trial *de novo* before the district court by anyone other than itself are specious.

**IV. THE COUNTY'S TOUTED "EFFICIENCY" OF A TRIAL *DE NOVO*, AS COMPARED TO THIS COURT'S APPELLATE REVIEW OF THE TAX COMMISSION'S DECISION, IS NOT A PROPER ISSUE THIS COURT MUST, CAN OR SHOULD DECIDE**

The County's final argument in its brief, Argument IV, is that "allowing the County to enjoy its district court review is an efficient use of judicial resources." County Brief at 17. The County again argues the merits of having a statutory trial *de novo* option. The County then summarizes its view of the Tax Commission Final Decision, including the issues involved in the Tax Commission's Final Decision, and why, from the County's perspective, the legal issues involved in the case merit examination by a district court. County Brief at 21. These arguments are, once again, not only irrelevant to the issues before this Court, but further distort Section 601 and Section 602. The allocation issue, whether the Tax Commission's Final Decision correctly allocated value of a legally indivisible 160-acre lot to 10 acres of that lot is already before this Court in Case No. 2008034-CA.

Moreover, the only issue before this Court is whether the district court improperly determined that it lacked jurisdiction over the County's Second

Petition for Review. Even if there were sound policy reasons for the district court to retain jurisdiction, which there are not, no authority exists for the courts to create jurisdiction where it is lacking. “When we lack jurisdiction, we retain only the authority to dismiss the action.” *Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah Ct. App. 1989).

Taxpayers in this case, who are Appellants in Case No. 2008034-CA, have already submitted their opening Brief of Appellants to this Court on the “allocation issue.” Judge Kennedy, appropriately, neither addressed nor decided the “allocation issue” or any of the merits of the Tax Commission’s Final Decision now on appeal to this Court in Case No. 2008034-CA. Instead, he correctly dismissed the County’s Second Petition for Review on jurisdictional grounds. It is now improper for the County to argue the merits or issues of the Tax Commission’s Final Decision before this Court. The only issue before this Court in this appeal is whether Judge Kennedy properly dismissed the County’s Second Petition for Review, not the merits or lack thereof in the Tax Commission’s Final Decision.

Further, the County’s argument is based on the County’s unsupported assertion that a “trial de novo” simply allows the County to supplement the record created during the proceeding before the Tax Commission. Section 59-1-601 defines a “trial de novo” as “an original, independent proceeding, and does not mean a trial de novo on the record.” Clearly, the County’s assertion that it can pick and choose the portions of the Tax Commission proceeding that support its



position and supplement the portions that are contrary to its position, is contrary to the very meaning of the term “trial de novo” in the statute.

If the County wishes to supplement the record it bears the burden of proving that the Tax Commission’s Final Decision was not supported by substantial evidence. If the County is successful, this Court would then remand this case to the Tax Commission for further fact finding pursuant to Utah Code Ann. §63G-4-404(1)(b)(v). The County’s only other option would have been to perfect its right to a trial de novo, which it did not do, and start anew with a new trial, not a review or trial on the record. In a trial de novo, which is not “a trial de novo on the record,” the record of the Tax Commission proceeding is not relevant.

**V. THE TAXPAYERS IN THIS CASE ARE ENTITLED TO ATTORNEYS’ FEES IN OPPOSING THE COUNTY’S APPEAL OF DISTRICT COURT JUDGE KENNEDY’S ORDER OF DISMISSAL BECAUSE THE COUNTY APPEAL IS FRIVOLOUS.**

Rule 33 of the Utah Rules of Appellate Procedure (“Rule 33”) provides:

(a) Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it **shall** award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, **not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.** An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase

in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

Utah R. App. P. 33

When Rule 33 is determined applicable to the facts of a particular case, the award of damages is mandatory. *See Advisory Committee Notes to Rule 33*. The case law applying Rule 33 holds that an appeal lacking in merit violates Rule 33. For example, *O'Brien v. Rush*, 744 P.2d 306, 310 (Utah Ct.App.1987) stated, “a frivolous appeal is one without merit.” Further, *Chapman v. Uintah City*, 81 P.3d 761 (2003) held, “A claim should be deemed to be without merit when it “is 'frivolous' or 'of little weight or importance having no basis in law *or* fact.” In *Porco v. Porco*, 752 P.2d 365, 368--69 (Utah Ct.App.1988) this Court held, “[w]e recognize that sanctions for frivolous appeals should only be applied in egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court decisions.”

The question, therefore, is whether the County’s appeal of the district court Order dismissing its Second Petition for Review is lacking in merit and is an egregious appeal for which the County should be sanctioned with an award against it for attorney’s fees and costs. In this case, it is both. The County’s second appeal of the Tax Commission’s Final Decision to the district court is totally lacking merit because the County’s primary argument, that its First Petition for Review was merely filed as a protective measure, is demonstrably false. As explained above, Section 602 does not authorize “protective” appeals. Neither is

there any language in Section 602 preserving what the County claims as its “true” intent - to seek a trial de novo before the district court – when the County could have, but did not, filed its first appeal seeking a trial de novo.

Moreover, the first time the County asserted its “protective appeal” argument was after the Taxpayers sought dismissal of the County’s Second Petition for Review. There is no evidence of the County’s purported intent to file a “protective appeal” in the County’s First Petition for Review or in the Record and the County has never indicated that it would dismiss its First Petition for Review in the event that its Second Petition for Review was permitted to proceed. Essentially, the County’s argument attempts to retroactively assert a “protective” intent, which was not evident or present at the time of filing its First Petition for Review.

Further, the County’s “protective appeal” argument assumes that it needed to protect its rights in this Court. If the County had first filed a petition for review in the district court requesting a trial de novo, the outcome of such a trial would or could moot the Tax Commissions Final Decision. Any further appeals would be of the district court’s decision following a trial de novo. The time for filing a notice of appeal would run from the date the district court issued its final order. This is because the district court decision would supersede the Tax Commission Final Decision. These conclusions are evident in Judge Kennedy’s comments to Mr. Bodily:

Well and Mr. Low says that it’s been a race here for the first time,

maybe that's something we ought to let you do [which the Court did by permitting further oral argument on the jurisdictional issue]. But, I'm troubled by that. It seems to me that there are a number of things that the County could have done here. They could have filed, it seems to me, here first, and then filed a cross-appeal afterwards saying, we're just filing our cross-appeal to protect ourselves in the Appellate Court. We've already got a case pending in the District Court and we're happy to respond on the merits in the Appellate Court, if that's what the Appellate Court wants us to do. I would think they could have done that. They didn't do that.

(R. 196-197), Taxpayer Transcript at 17-18.

The County's brief includes arguments that stress the importance of "de novo" review and that such an important right cannot be granted or denied as a result of a foot race to the courthouse. None of those arguments has any relevance or merit here because the County, and no one else, made the choice to disregard Section 602 and file two appeals rather than solely petitioning for a trial de novo, as was its right. The consequences of the County's disregard of Section 602's plain language should not be shifted to innocent taxpayers. Such a shift is grossly inequitable, and imposes unnecessary and unfair costs on the Taxpayers in resisting the County's frivolous arguments. That result is an egregious consequence to Taxpayers.

The Taxpayers again stress that they do not deny the importance of the County's right to a trial de novo, but like any right, the County, like any taxpayer invoking a court's jurisdiction under Section 602, must properly exercise that right or face the consequences of its own failure to comply with statutory requirements, and not shift such consequences to innocent taxpayers

In addition, the Taxpayers are entitled to attorney's fees with respect to this appeal because Utah Code Ann. §59-1-601 does not permit the filing of a so-called, County-invented, "protective" appeal, nor do the Utah Rules of Appellate Procedure. The Utah Code, Utah Rules of Civil Procedure and the Utah Rules of Appellate Procedure prescribe the proper procedure that must be followed to perfect one's right to appeal. They are not written, as the County nonsensically argues, such that every action not expressly prohibited by the Utah Code, Utah Rules of Civil Procedure and the Utah Rules of Appellate Procedure, is authorized. County Brief at 14.

Because the County has argued a position that directly contravenes the plain and unambiguous language of Utah Code Ann §§ 59-1-601 and 59-1-602, Rule 33 of the Utah Rules of Appellate Procedure applies: "a frivolous appeal, motion, brief, or other paper is one that is not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law" justifies an award of attorneys' fees against the offending party. Clearly, a good faith argument for an amendment, modification, reversal or extension of Utah statutory law cannot be made in the courts. If the County desires an amendment to Section 601 or Section 602, the proper place for the County to assert such arguments is before the Utah Legislature.

The procedure for requesting attorney fees under Rule 33 is straightforward. Rule 33(1) states:

The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the **appellee's brief**, or as part of a party's response to a motion or other paper.

Utah R. App. Pro 33(1)

Therefore, Taxpayers have incorporated their request for attorney fees in their Appellee Brief.

### **CONCLUSION**

The County wrongly attempts to confuse the sole issue its appeal of the district court's Order of Dismissal presents with arguments that are neither supported by the record nor Utah law. Specifically the County argues: (1) that the County's First Petition for Review was not an exercise of its statutory option, and (2) that public policy supports the district court jurisdiction over the County's Second Petition for Review. The only legitimate issue before this Court is whether the County's exercise of its statutory option by filing its First Petition for Review in the Utah Supreme Court precluded district court jurisdiction over the County's later filed Second Petition for Review.

This Court should affirm Judge Kennedy's dismissal of the County's Second Petition for Review by enforcing the plain and unambiguous language of Utah Code Ann. §59-1-602(1)(a), which provides each aggrieved party the option of selecting the venue of its choice for appealing a decision of the Utah State Tax Commission.

Further, this Court should award the Taxpayers attorney's fees and double costs because the County's present appeal of the district court Order of Dismissal is totally lacking in merit, and imposes an unfair and egregious burden on Taxpayers by forcing them to oppose the County's frivolous arguments, which urge this Court to amend Utah statutory law.

DATED this 10th day of December, 2008

A handwritten signature in black ink, appearing to read "Maxwell A. Miller", written over a horizontal line.

RANDY M. GRIMSHAW

MAXWELL A. MILLER

MATTHEW D. COOK

PARSONS BEHLE & LATIMER

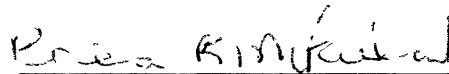
Attorneys for Taxpayers

**CERTIFICATE OF MAILING**

I hereby certify that on this 10th day of December, 2008, I caused to be served, via U.S. mail, postage prepaid, two true and correct copies of the foregoing **BRIEF OF APPELLEES WARREN AND TRICIA OSBORN, ET AL.** to each of the following:

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\_\_\_\_\_



ADDENDUM 1

Determinative Statutes

## **ADDENDUM**

### Addendum 1: Determinative Statutes

#### **63G-4-402. Judicial review -- Informal adjudicative proceedings.**

- (1) (a) The district courts have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings, except that the juvenile courts have jurisdiction over all state agency actions relating to:
  - (i) the removal or placement of children in state custody;
  - (ii) the support of children under Subsection (1)(a)(i) as determined administratively under Section 78A-6-1106; and
  - (iii) substantiated findings of abuse or neglect made by the Division of Child and Family Services, after an evidentiary hearing.
- (b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains the petitioner's principal place of business.
- (2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:
  - (i) the name and mailing address of the party seeking judicial review;
  - (ii) the name and mailing address of the respondent agency;
  - (iii) the title and date of the final agency action to be reviewed, together with a copy, summary, or brief description of the agency action;

(iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;

(v) a copy of the written agency order from the informal proceeding;

(vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;

(vii) a request for relief, specifying the type and extent of relief requested; and

(viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

63G-4-404. Judicial review -- Type of relief.

- (1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.
  - (b) In granting relief, the court may:
    - (i) order agency action required by law;
    - (ii) order the agency to exercise its discretion as required by law;
    - (iii) set aside or modify agency action;
    - (iv) enjoin or stay the effective date of agency action;
  - or
  - (v) remand the matter to the agency for further proceedings.
- (2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

Addendum 2 The District Court's Order of Dismissal

Addendum 3 Utah State Tax Commission Findings of Fact, Conclusions of Law,  
and Final Decision dated April 1, 2008.

Addendum 4 Taxpayer Transcript of District Court Proceedings (Prepared by  
Counsel for Taxpayer)

ADDENDUM 2

District Court's Order of Dismissal

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BEFORE THE UTAH STATE TAX COMMISSION

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

Petitioner,

vs.

BOARD OF EQUALIZATION OF WASATCH  
COUNTY, UTAH,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND FINAL DECISION**

Appeal Nos. 06-1504, 06-1505, 06-1506, 06-  
1507, 06-1508, 06-1509, 06-1510

Tax Type: Property Tax/Locally Assessed

Tax Year: 2006 & Roll Back Period 2001-05

Judge: Phan

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 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 order, specifying the commercial information that the taxpayer wants protected.

**Presiding:**

Pam Hendrickson, Commission Chair

Marc Johnson, Commissioner

Jane Phan, Administrative Law Judge

**Appearances:**

For Petitioner: Max Miller, Attorney at Law  
Randy Grimshaw, Attorney at Law  
Norman Provan, Owner  
Douglas Anderson, Developer

For Respondent: Thomas Low, Wasatch County Attorney  
Glen Burgener, Wasatch County Assessor

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on December 18-19, 2007. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

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### FINDINGS OF FACT

1. Petitioners are appealing the assessed values as set by the Wasatch County Board of Equalization for the land on the subject lots, for the 2006 tax year. In addition to the 2006 assessed value, Petitioners Sullivan, Mirsky, Crittenden, Provan and Trumper are appealing the rollback tax assessment against each of their properties subject to this appeal.

2. As of the lien date at issue the properties had residences or buildings either constructed or in partial states of construction. The value of the buildings was not at issue in this appeal.

3. The subject properties are all located in the Wolf Creek Subdivision in Wasatch County. The owner, parcel number, size and valuations as assessed by Respondent, which are the subject of this appeal, are as follows:

<b>Petitioners</b>	<b>Lot/Parcel No.</b>	<b>Acres</b>	<b>County's Rollback Values Appealed</b>	<b>County Board's 2006 Values Appealed</b>
Warren & Tricia Osborn	61/OWR-4B61	160	No Rollback Appeal	Land-GreenBelt \$ 201,800 Land-Homesite \$ 550,000
Michael Sullivan	46/OWR-3A46	184	2001-2005 \$360,000 per year	Land-Greenbelt \$1,040,288 Land-Homesite \$ 360,000
David & Cynthia Mirsky	53/OWR-4A53	160	2002-2006 \$698,200 per year	Land-Greenbelt \$1,150,000
Gary & Catherine Crittenden	75/OWR-5B75	160	2001-2005 \$360,000 per year	Land-Greenbelt \$ 562,100 Land-Homesite \$1,080,000
Norman Provan	25/OWR-2A25	160	2001-2005 \$773,200 per year	Land-Greenbelt \$ 476,800 Land-Homesite \$ 773,200
Jeffrey & Nancy Trumper	50/OWR-3A50	160	2001-2005 \$360,000 per year	Land-Greenbelt \$1,040,000 Land-Homesite \$ 360,000



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David Checketts & Mount	12/OWR-2012	160	No Rollback	Land-Greenbelt \$ 201,800
Clyde Enterprises LC			Appeal	Land-Homesite \$ 845,000

4. The Wolf Creek Ranch subdivision (“Ranch”) is an exclusive, approved and platted subdivision. It covers approximately 14,000 acres and has 84 single-family home site parcels. With the exception of a few parcels, all home site parcels in the subdivision are at least 160 acres. All parcels subject to this appeal are 160 acres or larger. Access to the subdivision is from a main gate at 3480 Bench Creek Road in Woodland and a secondary gate located off of Lake Creek Road in Heber City. Access to the subject lots is provided year round by paved interior roadways, which are maintained by the subdivision.

5. The land uses surrounding the Ranch are primarily recreational and agricultural in nature. The Ranch shares approximately seven miles of common boarder with the Uinta National Forest on the east, which is accessible from the Ranch. Jordanelle Reservoir is ten miles west and Rockport State Park and Reservoir 20 miles north. Park City with its ski and summer resorts is located approximately 22 miles northwest.

6. The subdivision amenities at the Ranch include a 26-acre common area with an equestrian center and stables, a 2,800 square foot guesthouse and two large trout stocked ponds. There is another 23-acre common area with tepees, fire pits, campground areas, corrals and approximately one-mile of frontage along the Upper Provo River. There are several yurts at the property that can be accessed by the residents. There is approximately fifty miles of equestrian trails through the ranch and the entire property is protected by private security.

7. Although each subject parcel is 160 acres or larger, it can be developed as only one, single-family home site.

8. The limitations on development are both from zoning and a conservation easement. The property is zoned P-160 under the jurisdiction of Wasatch County. P-160 is a preservation zoning where

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development may be limited do to remoteness of services, topography and other sensitive environmental issues. Residential development is allowed in the zoning with basically one residence per 160 acres. Conditional uses include groupings of residential lots provided that density is not increased, water storage, fishing activities and sand and gravel quarrying.

9. The principal developer of the Ranch, Douglas Anderson, testified that the area had been ranched for over one hundred years and it was the intent in developing the Ranch to preserve large amounts of open space and continue the ranching tradition. As there was the possibly that zoning could be changed and higher density allowed at some point in the future by the County or other governmental jurisdiction, to insure the restrictions remained permanently, they placed conservation easements on the property as it was subdivided. The conservation easements were granted to the Utah Open Lands Conservation Association, Inc. As such the subject lots are permanently encumbered by the conservation easements. The conservation easements allow for one-home site with the improvements specifically limited to the 10-acre building envelope. Within the 10-acre building envelope the property owner may construct both a primary single-family residence and a caretaker residence. A garage and other barns and outbuildings may be constructed. All the buildings must be located within the ten-acre envelope as well as any roadways, utility lines; water wells water storage tanks, waterlines and septic tanks. The 10-acre building area may not be located in wildlife birthing areas, goshawk nesting habitats or riparian areas. The conservation easement would permanently prohibit buildings or other improvements on the acres outside of the 10-acre building envelope. Further, there could be no quarrying or mining on the property.

10. Subject to some restrictions, that included specified habits and riparian areas or the County building requirements regarding slope and setbacks, the purchaser chooses which ten contiguous acres to use for the building envelope, and then chooses the home site within those acres. Norman Provan, an owner of one

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of the subject lots, and Mr. Anderson both testified that not only could the homeowners choose the site of the building envelope it was possible to move the building envelope at least until construction commenced, and even then there was some possibility of adjustment as long as it encompassed the buildings. Mr. Andersen testified that typically the location of the building envelope was limited only by County building restrictions. During the period now subject to the rollback, the 10-acre building envelopes had not yet been designated. Based on these factors the Commission finds that during the rollback period there was no specific one-acre of the property designated as the home site or ten acres designated as the building envelope.

11. Mr. Provan, an owner of one of the subject lots testified that he purchased the lot because of size and restrictions on development. He indicated he chose the property over other subdivisions because he liked that all 14,000 acres would be preserved with the same restrictions and remain as a wilderness setting. He also felt he was doing something good by preserving open space. Another owner, Mike Sullivan testified that they purchased the property because they wanted the large acreage and a place to ride their horses. It was his understanding that the restrictions on the property made it so that each lot could not be subdivided.

12. As the property had been ranched for many years it had been assessed under the Farmland Assessment Act ("FAA") for property tax purposes, based on its agricultural use, rather than its market value. Agricultural use continues over most of the Ranch property as of the date of the hearing as the Homeowners Association leases the Ranch property out to a sheep operation. A property owner may fence their 10-acre building envelope to keep the sheep out of that portion of the property, but must allow sheep to graze on the remaining acreage. As of the lien date, none of the Petitioners had chosen to fence their 10-acre building envelopes and have allowed the sheep to graze throughout their properties. The County had assessed these properties with the entire parcel valued as greenbelt property under the FAA even after the subdivision was platted, up until the time a building permit was issued. Once a building permit was taken out on a particular

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parcel the County removed the one-acre home site from valuation under the FAA and that one acre became subject to the roll back tax. However, the County considered the other 159 acres or more on each parcel to remain as greenbelt and the County continues to assess the remaining acres under the FAA.

13 The FAA requires disparate treatment regarding the home site and remaining acres that are ranched or farmed. Pursuant to the FAA, the farmhouse and land used in connection with the farmhouse is not taxed under the act, but is instead assessed based on fair market value. For greenbelt properties located outside of city limits, Wasatch County applies a standard of one as the land used in connection with the farmhouse or home site.

14 As there had been sales of lots in the Ranch, there was market information to determine a fair market value for each parcel at issue. The reason the matter came before the Commission for the Formal Hearing was that the parties were in disagreement on how much of the total value of the 160 acre parcels should be attributed to the one-acre home sites. A determination of the value for the one-acre is relevant for the purposes of determining the amount of the rollback, as well as for the assessment for the 2006-year.

15 When the County issued the Tax Notices for the years that are now subject to the rollback, the notices did not list out or allocate a portion of the total market value to either the home site acre or the building envelope. Instead, the notices listed a single, total market value for the entire parcels. Because the property was taxed as greenbelt under the FAA, the amount of the tax assessed, however, was not based on the market value, but instead on the greenbelt value pursuant to the FAA.

16 Petitioners submitted an appraisal for each of the properties at issue, which had been prepared by Philip Cook, MAI, and CRE. Mr. Cook's appraisal was limited to a market valuation of the land only. It was Mr. Cook's appraisal conclusion that there was some variation in values between the lots, due to factors like view, slope and forestation. It was his appraisal conclusion that the total market value of the land for each

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of the parcels at issue, as of January 1, 2006, was as follows:

Lot 12	\$1,350,000
Lot 25	\$1,340,000
Lot 46	\$1,410,000
Lot 50	\$1,715,000
Lot 53	\$1,285,000
Lot 61	\$1,715,000
Lot 75	\$1,850,000

17. Mr. Cook's market values for each subject parcel were not substantially disputed by Respondent. Mr. Cook's market value conclusions for the land were based on eleven lot sales, all located within the Ranch. The sales had occurred from October 2004 through May 2006. The lots had sold for prices ranging from \$1,225,000 to \$1,800,000.

18. In his appraisal Mr. Cook also gave his opinion of how the total value should be allocated to the various components of the lot, including the one-acre home site. It was his position that allocations to the functional areas of each lot must reflect the market value and he indicated there were circumstances when a separate value for a home site consisting as part of a larger parcel could be determined. However, it was his conclusion that in this matter, any allocation of the total purchase price of the lot to the home site was simply not market supported. He reached this conclusion because the 160 acres could not be subdivided and with the restrictions from zoning and conservation easements the highest and best use of the subject lots were as large 160-acre single family lots. He pointed to the Uniform Standards of Professional Appraisal Practice and indicates that they specifically warn against allocating value without market support.<sup>1</sup> It was his opinion that the County had apportioned the values to the various components of the lots arbitrarily. It was Mr. Cook's conclusion that if it is necessary to allocate or apportion part of the total lot value to the home site acre, it could only be done pro rata, 1/160<sup>th</sup> of the total value, as it is the entire lot and the similarity to all other lots within

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1 Mr. Cook cites to Uniform Standards of Professional Appraisal Practice and Advisory Opinions, 2006 Edition, Appraisal

the development that create the value.

19. David A. Thomas, Professor of Law, testified that the zoning and conservation easement had to be taken into account in determining the value. It was his opinion that it was not legal to buy or sell any portion of the lot smaller than the total 160 acres. This was a point that was supported by all evidence and not disputed. It was Professor Thomas' conclusion that because one acre could not be sold separately, there was no fair market value for the one-acre home site, only a value for the property as a whole. Professor Thomas also pointed out that additional value will be taxed in the improvements.

20. Robert Crawford, PhD, testified that the conservation easement actually enhanced the value of the property. He also testified that the highest and best use of the property was not for agriculture, it was instead as a 160-acre residential building lot. As part of the whole he concluded that each acre of the 160-acre property had the same value as all the other acres. He stated that a fair market value for the one-acre home site could be determined but only on the basis of 1/160 of the total value as indicated by Mr. Cook. It was Dr. Crawford's conclusion that recognizing an allocated valuation method to all the acres is economically valid as it the way of expressing the enhanced value of the whole. The right to build a residence somewhere on the property presumably increase the value of the 160 acre lot. That will be reflected in the price per acre. He did not find an extracted market value using lots similar in size that have sold to be a valid valuation technique.

21. Glen Burgener, the Wasatch County Assessor, testified that under the FAA, the County is required to allocate a portion of the total value to the home site acre, which is subject to tax on a fair market value basis, while the remainder of the property was taxable under greenbelt. He testified that he had been applying the FAA to properties for seventeen years in Wasatch County. The County had farms with home sites on numerous properties of varying zones where the County is required to allocate a portion of the total

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value to the home site. In addition to farms in the P-160 zone, there were farms with home sites on properties in the following zones: A-20 allowing only 1 residence per 20 acres ; R-A-5 allowing only one residence per 5 acres; R-A-1 allowing only one residence per 1-acre. To establish a value for the home site, the County would consider values of buildable lots in the area. It was the County's position that the right to build a residence is part of the home site value.

22. In 1999, when the subject lots were platted and because of the conservation easement, Mr. Burgener sought advice from representatives of the State Tax Commission's Property Tax Division on how to allocate the total values of the property. At this time, the County made the determination that the total value, which was based on the sales, would be allocated 60% to the primary residential buildable site, 22% to the secondary or caretaker's buildable site, \$25,000 per acre to the rest of the acres in the building envelope and whatever was left of the market value to the remaining acres. It was the County's position that a substantial portion of the value of the remaining 150-acres shifted to the 10 acres building envelope due to the conservation easement. However, this valuation break out was not conveyed to the property owners on the annual Tax Notices issued for the years that are now subject to the rollback.

23. Blaine D. Hales, Certified General Appraiser, prepared an appraisal for the Respondent for purposes of estimating the value of the one-acre home site on the property. The appraisal was prepared for one lot, Lot 75, which was the Crittenden property. It was the County's intent that the same methodology for determining the value for the home site be applied to the other properties. It was Mr. Hales conclusion that the total value of Lot 75 was \$1,800,000, of which \$1,200,000 was for the one-acre home site and \$600,000 for the remaining 159 acres.

24. In his appraisal, Mr. Hales determined the value of the one-acre site by estimating the overall value of the entire parcel and using additional data to allocate or estimate the value contributed by the one-acre

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home site to the overall parcel. It was his conclusion that he could determine a fair allocation of the market value, despite that the one acre could not be legally sold separately.

25. Like Mr. Cook, Mr. Hales' estimate of the total market value came from sales within the Ranch, all located very near Lot 75. He also considered the purchase price of Lot 75, which was \$1,800,000 on October 29, 2004. It was his conclusion that the fair market value of the land only on Lot 75, as of the January 1, 2006 lien date, was \$1,800,000. As a comparison, Mr. Cook had valued this lot at \$1,850,000.

26. To determine a value for the one acre home site, it was Mr. Hales position that the building site, when reduced to one acre, must also include the legal right to construct a home because the appraiser must be careful to divide both the physical and legal components of the property. He attributed the right to build to the one acre while the remaining 159 acres he considered to have only the limited agricultural and recreational uses.

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. To determine the value of the unbuildable land, Mr. Hales found six comparables of rangeland with recreational desirability, but without the right for potential residential development. He concluded that these sales indicated a value for the unbuildable portion of the property to be \$500,000. In this analysis, Mr. Hales indicated that he considered 159 acres as unbuildable and only the one-acre, 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.



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28. Upon review of all the evidence in this matter, the Commission concludes that prior to designation of the 10-acre building envelope, as evidenced by the issuance of a building permit, there would be no distinction in value from one acre to the next for the 160 acre parcels, as the right to build was attached to the value of the entire lot as a whole and each acre up to the 160 acres contributed equally to the value.

29. However, once the 10-acre building envelope has been designated, the value is no longer equally contributed on a per acre basis. All development and improvement must be limited to the ten acres. The right to build attaches to the building envelope. Furthermore, the restrictions of the conservation easement are then attached to the now identifiable 150 acres. The owner may no longer build fences, roadways, corrals, swimming pools, manmade ponds or gardens on the 150 acres. Once the building envelope has been established there is a clearly identifiable difference between the 10-acre building envelope and the remainder of the property, a difference that does impact how these two portions of property contribute to the value.

30. Regardless of the fact that a one-acre home site may not legally be sold separately from the 159 acres of the lot, the County must allocate a fair market value to the one-acre based on the express language of the FAA. Mr. Hales was the only party who attempted to do this in a manner that reflects the reality that the building site is worth more than the undevelopable property subject to the conservation easement. Absent evidence from Petitioner's experts that addressed the disparity in value, the Commission accepts Mr. Hales conclusion that 65% of the value of the total lot is attributable to the developable portion of the land. However, the Commission finds that the building site is not one-acre, it is ten-acres. From a review of Mr. Hales' appraisal, his testimony at the hearing regarding the 10-acre building site and that of the other witnesses describing the potential for the 10-acre envelope, the Commission concludes that the 65% for the buildable portion applies to the 10 buildable acres and is not appropriately limited to a one-acre home site. Nine of the ten buildable acres as of the lien date were still being used for agricultural purposes and one acre must be

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valued as the home site according to statute. As far as allocating a portion of the 65% to the one-acre, the Commission is unable to further determine which portion of the value is attributable to each acre, other than using 1/10 of the 65% of the total market value.

31. Mr. Cook has appraised each individual lot at issue in this appeal to determine a total value as of the January 1, 2006 lien date. The County's assessments for 2006 were not always consistent with Mr. Cook's conclusions. The County did not substantially refute Mr. Cook's total values for each lot, and the County did not submit an appraisal of each lot. For tax year 2006, the Commission accepts Mr. Cook's total lot value for the land portion of each of the subject properties. The Commission finds the value of the 10-acre building envelope to be 65% of the total lot value, and the one-acre home site value to be 1/10 of the 65% attributed to the building envelope.

#### APPLICABLE LAW

1. All 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 provide by law. (2) Beginning January 1, 1995, the fair market value of residential property shall be reduced by 45%, representing a residential exemption allowed under Utah Constitution Article XIII, Section 2, Utah Constitution. (Utah Code Sec. 59-2-103.)

2. "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 a 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. (Utah Code Sec. 59-2-102(12).)

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3. For general property tax purposes, land may be assessed on the basis of the value that the land has for agricultural use if the land: (a) is not less than five contiguous acres in area. . . and (b) except as provided in Subsection )5): (i) is actively devoted to agricultural use; and (ii) has been actively devoted to agricultural use for at least two successive years immediately preceding the tax year for which the land is being assessed under this part. (Utah Code Sec. 59-2-503(1).)

4. All structures which are located on land in agricultural use, the farmhouse and the land on which the farmhouse is located, and land used in connection with the farmhouse, shall be valued, assessed, and taxed using the same standards, methods, and procedures that apply to other taxable structures and other land in the county. (Utah Code Sec. 59-2-507(2).)

5. (2) In addition to the value determined in accordance with Subsection (1), the fair market value assessment shall be included on the notices described in (a) Subsection 59-2-919(4); and (b) Section 59-2-1317. (3)The county board of equalization shall review the agricultural use value and fair market value assessments each year as provided under Section 59-2-1001. (Utah Code Sec. 59-2-505 (2)&(3).)

6. Except as provided in this section, Section 59-2-506.5 or Section 59-2-511, if land is withdrawn from this part, the land is subject to a roll back tax imposed in accordance with this section. (Utah Code Sec. 59-2-506(1).)

7. The county assessor shall determine the amount of the rollback tax by computing the difference for the rollback period described in Subsection (3)(b) between: (i) the tax paid while the land was assessed under this part; and (ii) the tax that would have been paid had the property not been assessed under this part. (Utah Code Sec. 59-2-506(3).)

8. 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

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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. (Utah Code Sec 59-2-1006(1).)

9. (2) In assessing the fair market value of a parcel of property that is subject to a minimum parcel size of one acre or more, a county assessor shall include as part of the assessment: (a) that the parcel of property may not be subdivided into parcels of property smaller than the minimum parcel size; and (b) any effects Subsection (2)(a) may have on the fair market value of the parcel of property. (3) This section does not prohibit a county assessor from including as part of an assessment of the fair market value of a parcel of property any other factor affecting the fair market value of the parcel of property. (Utah Code Sec. 59-2-301.2(2) & (3).)

#### CONCLUSIONS OF LAW

1. Petitioner has raised two separate but related issues. The first is whether the value of a home site contained within a larger and unsubdividable property may be retroactively established at the time of assessment of a rollback tax. The second is the fair market value of the existing home site for purposes of determining the current year's property tax assessment. To begin, a determination of the rollback tax presents issues of both fact and law to the Commission. Pursuant to Utah Code Sec. 59-2-506 the amount of the rollback tax is computed by taking the difference between the tax paid during the roll back period based on its agricultural use under the FAA and the tax that would have been paid annually based on an a fair market value assessment. For each year of the rollback period, the County on an annual basis had already determined the fair market value for the subject property. Furthermore, the County was required to list the fair market value on the Tax Valuation Notices as they were issued each year. If Petitioners were in disagreement with the market value set by the County, Petitioners' recourse was to appeal the market value each year as provided in

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Sec 59-2-1001 Therefore, the total fair market value for each property at issue for the rollback years was already established by the County pursuant to the annual notices they issued that were not appealed and may not now be challenged by either party based on the circumstances in this matter

2. Respondent's witnesses acknowledged, and it was supported by the exhibits and testimony of Petitioners' witnesses, that when the County listed the fair market value on the annual notices mailed out for the years subject to the rollback, it listed only a total value for the entire 160-acre parcel without any breakout for home site land. Petitioners did not file annual appeals regarding the total market value indicated on the notices for each of the rollback years. Petitioners were not given the opportunity to challenge the County's allocation of the total market value to the home site acre, because they were never given notice of what that amount was. Had Petitioners been notified of the allocation to the home site acre, and that it was an amount different from a 1/160 allocation of the total value, Petitioners may have appealed the value on annual basis as is provided in the statute at Utah Code Section 59-2-505 and 59-2-1001.

3. Furthermore, the Commission notes that for rollback purposes, valuation is based on the property, as it existed during the rollback period. Valuation is not based on the condition of the property that results after a portion has been withdrawn from greenbelt. The Commission finds that if the County valued the home site at a higher rate during the rollback years, the County should have indicated so annually on its valuation notices as they were issued for each of those years, so that the home site value could have been appealed annually pursuant to Utah Code Section 59-2-505 and 59-2-1001. Failure to do so alone is sufficient for the Commission to find that rollback tax is limited to 1/160<sup>th</sup> of the total value listed by the County each year in its valuation notices issued to Petitioners. Additionally, this legal basis is supported by the Commission's factual conclusion that during the rollback period, there were no designated building envelopes

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2 For Lot 46 which was 184 acres the rollback tax must be based on 1/184<sup>th</sup> of the total value

Appeal Nos 06-1504, 06-1505, 06-1506, 06-1507, 06-1508, 06-1509 & 06-1510

or home sites and, therefore, each one of the 160 acres was as valuable as the rest. Prior to the issuance of the building permit there would have been no basis for the County to determine the one-acre home site upon which the residence would be located.

4 With respect to the second issue, the question of the current home site value, it is the Commission's conclusion that the issue of determining the market value of the one-acre home site for the 2006 lien date presents both legal and factual issues. Petitioners' witness, Dr Thomas, argued that a market value could not be determined for the one acre as it could not be legally separated. Petitioners also argue that Utah Code Sec. 59-2-301.2 regarding minimum parcel size supports their contention. Although the one-acre home site may not legally be sold separately, Utah Code Sec. 59-2-507 requires that the County assess it at fair market value and is the specific and controlling statute on the taxation of a home site used in connection with greenbelt property. Subsection 507(2) provides that the farmhouse and land used in connection with the farmhouse shall be valued, assessed, and taxed using the same standards, methods and procedures that apply to other taxable land and structures in the County. However, the subsection does not provide specific guidance on how to make that determination when the home site is part of an unsubdividable lot. Utah Code Sec. 59-2-301.2 does prohibit the County from valuing the 160-acre subject parcels as if they were subdividable into numerous single-family residential lots. The County has not valued this property as if higher density was allowed. Furthermore, subsection 59-2-301.2 (3) expressly provides that the County Assessor may include as part of the assessment other factors affecting the fair market value of the parcel of property. Finally, the fact that Mr. Cook's valuations differ based on specific property characteristics, in addition to size, implicitly demonstrates that the value of any given unit of land may vary from another within each lot.

5. The Commission finds that each acre of the 160- acre parcel contributes to value. Prior to the designation of the building envelope this was on an equal basis. However, once the buildable envelope was

Appeal Nos 06-1504, 06-1505, 06-1506, 06-1507, 06-1508, 06-1509 & 06-1510

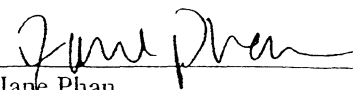
designated, as had occurred for all properties subject to this appeal by the 2006 lien date, there are two distinct and identifiable classes of property, the 10 acre building envelope and the remaining undevelopable area covered by the conservation easement. These two areas do not contribute equally to the value. Respondent has offered an appraisal that makes a distinction. Although the Commission disagrees with the limitation of the analysis to the one acre, because the entire 10 acres is developable with the possibility of a second home, garages, barns, outbuildings, yard features and so forth, which all contribute to the value of the building site, the Commission finds that in the absence of testimony and evidence to the contrary, Mr. Hales' analysis adequately supports that 65% of the value is attributable to the buildable envelope for these properties.

6. As of the lien date, only one acre of the ten-acre buildable envelope had been withdrawn from greenbelt for each of these properties. As additional improvements are made in the buildable envelope, additional acreage may be withdrawn and rollback assessed.

#### DECISION AND ORDER

Based upon the foregoing, the Tax Commission finds that the County is to calculate the rollback taxes for each of the properties for each rollback year based on the market value for the home site acre being 1/160<sup>th</sup> or 1/184<sup>th</sup> depending on the size of the lot, of the total value indicated for that year on the tax notices issued by the County. The County is to calculate the fair market value of the home site acre for the 2006 tax year for each parcel at issue on the basis of 65% of the total value of the lot as determined in the Cook appraisal divided by 10. It is so ordered. The County Auditor is ordered to adjust the assessment records as appropriate in compliance with this order.

DATED this 1 day of April, 2008.


  
\_\_\_\_\_  
Jane Phan  
Administrative Law Judge

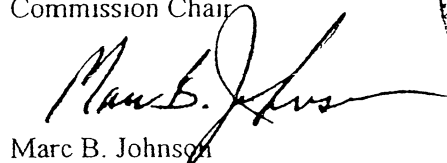
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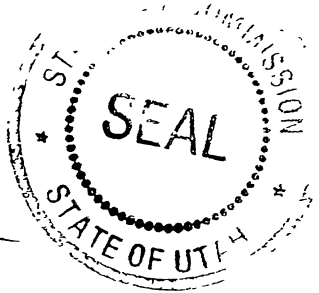
BY ORDER OF THE UTAH STATE TAX COMMISSION

The Commission has reviewed this case and the undersigned concur in this decision

DATED this 1 day of April, 2008

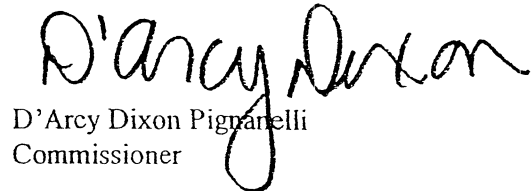
  
Pam Hendrickson  
Commission Chair

  
Marc B. Johnson  
Commissioner



**EXCUSED**

R. Bruce Johnson  
Commissioner

  
D'Arcy Dixon Pignatelli  
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. Sec. 63-46b-13. 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 Sec. 59-1-601 et seq. and 63-46b-13 et seq.

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*Utah State Tax Commission*  
*USTC - Appeal*  
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**Warren & Tricia Osborn vs Wasatch County BOE**

**06-1504**

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Wasatch County Assessor  
25 North Main  
Heber, UT 84032

Respondent

Wasatch County Auditor  
25 North Main  
Heber, UT 84032

Respondent

**Maxwell Miller**  
201 South Main, Ste. 1800  
P.O. Box 45898  
Salt Lake City, UT 84147

Attorney for Petitioner

**Thomas Low**  
Wasatch County Attorney  
805 W 100 S  
Heber City, UT 84032

Attorney for Respondent

**Warren & Tricia Osborn**  
4290 N Vintage Circle  
Provo, UT 84604

Petitioner

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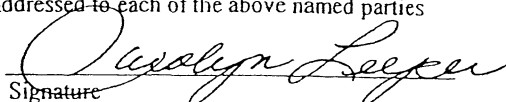
**\*\*\*\* CERTIFICATION \*\*\*\***

I hereby certify that I mailed a copy of the foregoing document addressed to each of the above named parties

Date

4/1/08

Signature



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**Michael Sullivan vs Wasatch County BOE**

**06-1505**

---

Wasatch County Assessor  
25 North Main  
Heber, UT 84032

Respondent

Wasatch County Auditor  
25 North Main  
Heber, UT 84032

Respondent

**Maxwell Miller**  
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P.O. Box 45898  
Salt Lake City, UT 84147

Attorney for Petitioner

**Michael Sullivan**  
88 Turnberry DR  
Williamsville, NY 14221

Petitioner

**Thomas Low**  
Wasatch County Attorney  
805 W 100 S  
Heber City, UT 84032

Attorney for Respondent

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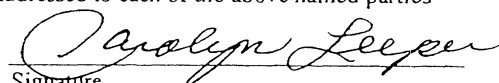
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**David & Cynthia Mirsky vs Wasatch County BOE**

**06-1506**

Wasatch County Assessor  
25 North Main  
Heber, UT 84032

Respondent

Wasatch County Auditor  
25 North Main  
Heber, UT 84032

Respondent

**David & Cynthia Mirsky**  
25331 Derbyhill DR  
Laguna Hills, CA 92653

Petitioner

**Maxwell Miller**  
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P.O. Box 45898  
Salt Lake City, UT 84147

Attorney for Petitioner

**Thomas Low**  
Wasatch County Attorney  
805 W 100 S  
Heber City, UT 84032

Attorney for Respondent

\*\*\*\* CERTIFICATION \*\*\*\*

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Date

4/1/08

Signature

*Candyn Leeper*

Utah State Tax Commission  
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Norman Provan Jr. vs Wasatch County BOE

06-1507

Wasatch County Assessor  
25 North Main  
Heber UT 84032

Respondent

Wasatch County Auditor  
25 North Main  
Heber, UT 84032

Respondent

**Maxwell Miller**  
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Salt Lake City, UT 84147

Attorney for Petitioner

**Norman Provan Jr.**  
919 Bonnie Brae Place  
River Forest, IL 60205

Petitioner

**Thomas Low**  
Wasatch County Attorney  
805 W 100 S  
Heber, UT 84032

Attorney for Respondent

\*\*\*\* CERTIFICATION \*\*\*\*

I hereby certify that I mailed a copy of the foregoing document addressed to each of the above named parties

Date 4/1/08

Signature Caryn Leeper

Utah State Tax Commission  
USTC - Appeal  
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Jeffery & Nancy Trumper vs Wasatch County BOE

06-1508

Wasatch County Assessor  
25 North Main  
Heber, UT 84032

Respondent

Wasatch County Auditor  
25 North Main  
Heber, UT 84032

Respondent

**Jeffrey & Nancy Trumper**  
900 Oakmont LN STE 210  
Westmont, IL 60559

Petitioner

**Maxwell Miller**  
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P.O. Box 45898  
Salt Lake City, UT 84147

Attorney for Petitioner

**Thomas Low**  
Wasatch County Attorney  
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Attorney for Respondent

\*\*\*\* CERTIFICATION \*\*\*\*

I hereby certify that I mailed a copy of the foregoing document addressed to each of the above named parties

Date 4/1/08

Signature Carolyn Leeper

Utah State Tax Commission  
USIC - Appeal  
Certificate of Mailing

Gary & Catherine Crittenden vs Wasatch County BOE

06-1509

Wasatch County Assessor  
25 North Main  
Heber, UT 84032

Respondent

Wasatch County Auditor  
25 North Main  
Heber, UT 84032

Respondent

**Gary & Catherine Crittenden**  
183 Ferris Hill RD  
New Canan, CT 06840

Petitioner

**Maxwell Miller**  
201 South Main, Ste 1800  
P.O. Box 45898  
Salt Lake City, UT 84147

Attorney for Petitioner

**Thomas Low**  
Wasatch County Attorney  
805 W 100 S  
Heber City, UT 84032

Attorney for Respondent

\*\*\*\* CERTIFICATION \*\*\*\*

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4/1/08  
Date

Carolyn Leeper  
Signature

Utah State Tax Commission  
USTC - Appeal  
Certificate of Mailing

Mount Clyde Enterprises LC vs Wasatch County BOE

06-1510

Respondent

Wasatch County Assessor  
25 North Main  
Heber, UT 84032

Respondent

Wasatch County Auditor  
25 North Main  
Heber, UT 84032

Attorney for Petitioner

**Maxwell Miller**  
201 South Main, Ste 1800  
P.O. Box 45898  
Salt Lake City, UT 84147

Petitioner

**Mount Clyde Enterprises LC**  
David Checketts  
27 Feather Peters LN  
New Canaan, CT 06840

Attorney for Respondent

**Thomas Low**  
Wasatch County Attorney  
805 W 100 S  
Heber City, UT 84032

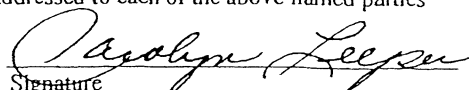
\*\*\*\* CERTIFICATION \*\*\*\*

I hereby certify that I mailed a copy of the foregoing document addressed to each of the above named parties

Date

4/1/08

Signature



ADDENDUM 4

Transcript of District Court Proceedings (Prepared by Taxpayers Counsel)



**WASATCH COUNTY V. UTAH STATE TAX COMMISSION 080907392**

**TRANSCRIPT of Hearing before Judge John Paul Kennedy, July 14, 2008**

Judge	Wasatch County v. Utah Tax Commission
	<i>(various background noises)</i>
Judge	All set.
	Yeah.
Judge	Okay, let's have your appearances, please.
Thomas Lowe	I guess I'll start. Good morning, Your Honor. Thomas Lowe for Wasatch County.
Tim Bodily	Tim Bodily. I'm appearing on behalf of the Tax Commission.
Matt Cook	Matt Cook on behalf of Warren and Tricia Osborne.
Max Miller	Maxwell Miller on behalf of Warren and Tricia Osborne.
Judge	Okay. Mr. Bodily, has anyone ever asked you if you're a character from a Shakespeare play, or something.
Mr. Bodily	No.
Judge	Not yet, huh?
Mr. Bodily	Not yet.
Judge	Okay, well. Put that down as a question that you've been asked.
Bodily	Okay, I'll do it.
Judge	Okay, Mr. Lowe, your office sent a courtesy copy of an appeals order staying the appeal pending. Tell me what happened and how we got to the appellate court and what they did and. . .
Lowe	I'd be happy to, thank you, your honor. Back in April, I think it was April. . . I don't have the dates exactly right now. April 1 <sup>st</sup> , I think, or so. Maybe it was the 10 <sup>th</sup> . The Tax Commission issued its decision in this case. The property owners represented by Mr. Miller, Mr. Grimshaw and Mr. Cook appealed to the Supreme Court and eventually the County cross appealed also. The Supreme Court then poured over that appeal to the court of appeals and the court of appeals has it now. The County filed a Motion for Stay. The Tax Commission joined in that motion and it was opposed by the petitioner, or, sorry, by the

	landowners. Subsequent to my brief, and the reason we provided that copy to the court was subsequent to our briefing the court of appeals did grant that stay. You have that order now. So the same exact appeal, essentially, is in two places. The Tax Commission's decision, which is being appealed by the property owners in the appellate courts is sitting there and is sitting there waiting for your initial review to conclude. And then this appeal in this court is now the primary action proceeding forth. So, that's a brief rundown of how we got where we are.
Judge	Was it appealed by the property owners to the appellate court first?
Lowe	Yes.
Judge	Okay, and then it went to the Supreme Court. The Supreme Court said no, we're going to give it back to the Court of Appeals. The Court of Appeals says, "well, there's another issue that needs to be decided first by the trial court." So, that's why we're here.
Lowe	Yes, that's why we're here. In fact, as far as timing goes, both their appeal and my cross appeal both were filed in the Supreme Court before an appeal was filed in the District Court. So those are both filed up there and then the County filed this appeal in the District Court within that 30-day window and the court of appeals who then examined that issue decided that this court ought to have the first stab at that. First review of the Tax Commission decision. Is it possible that your decision may eventually go back up now with the Court of Appeals on the one that's kind of staying there and just hanging in the air until we're done? Yeah, it could happen that way.
Judge	So, basically, you're telling me that my decision is going to be reviewed because it's already on appeal?
Lowe	It's already on appeal.
Judge	Even though I haven't made one yet.
Lowe	Yes. Again, it's not certain, but that's the proceeding as it currently sits.
Judge	Well, we could certainly save a lot of time here and I could just say whatever's been sentenced and said and just let it, let the appellate court go.
Lowe	Let it go. I'll tell you one of the issues. . .
Judge	Apparently, that isn't what the appellate court wants, however.
Lowe	Yeah, it's not, and maybe to inform the court of what was briefed with the court of appeals a little bit. Petitioners or landowners. . . sorry, I refer to them as landowners. They made the same arguments to them that they made to this court which is, you know, if the district court management would go away anyway, it was improperly filed and the wrong rules of procedure. Necessary parties

	<p>weren't joined. Same exact issues raised to you, and, so, just keep it and ignore the District Court action. And the County briefed an issue regarding the constitutional right that the counties have. . . or that anybody has, any taxpayer or county has. . . to supplement the record. In essence, the statutory scheme the way it currently sits and the way it was amended even into the Constitution a few years ago was to allow litigants before the Tax Commission, if they're unhappy with the results, to appeal the District Court, as well as the Supreme Court. But appeal the District Court and one of the purposes of doing that would be so that that party can supplement the record with additional evidence. Evidence that can then be reviewed and considered by the Court of Appeals. So, the appeal to this court wasn't happenstance. It wasn't the kind of a situation where they appealed and we appealed and "oh, shoot" we're in both places. Let's just take a short cut and go all the way to the court of appeals and stay there." The reason the County wants to be here, and the reason we're defending this and the reason we've asked for this court's jurisdiction and I assume the reason the Tax Commission's requested assignment to a tax judge, which is your honor, is so that for us is so that we can supplement the record. There's one narrow issue that the Tax Commission decided they didn't have sufficient evidence on in their decision. They said, "Well, we know how to get to this bar, but this last little bit, and I don't know how _____, but the last little bit. We don't know that sufficient evidence was given to us on this last issue and so we're going to, kind of, throw our hands up on the air and what they did was divide by ten. We're just going to. . . we know how to value every acre up until the final ten acre building envelope that these mansions can go in. After that, we don't know exactly what to do with that 10-acre building envelope, so let's take each acre and divided by 10. That's the issue that we'd like to supplement the record on. Help this court do what the Tax Commission felt it couldn't do and decide how to value individual acres within a 10-acre building envelope of a whole 160-acre parcel of ground. How to value that last 10 acres? In our opinion, if we went to the Supreme Court as our court of appeals right now, perhaps that issue still might not be sufficiently vetted and the facts provided. So, that's why we're here. And that's why we've asked for this court _____.</p>
Judge	So, there's a motion to intervene, is that what I see here? A motion to intervene?
Lowe	You have a motion to intervene and a motion to dismiss. And those are the two motions I think pending before the court and then, I guess. . .
Judge	While you're up, do you want to address the motion to intervene.
Lowe	I'd love to. In our brief – and I'll say it here as well – a motion to intervene is not necessary. This is an appeal and under the rules of appellate procedure the parties below are parties above. If you think this through, the normal rules of appellate procedure, if a party appeals a case to the Supreme Court, the other party, the appellees do not need to file a motion to intervene. They are already parties to the case.

Judge	_____ don't object to it.
Lowe	No, I don't object to it. I guess I object to his characterization if it's characterized as _____.
Judge	Are you aware of anyone objecting to it.
Lowe	No. I don't think Tax Commission objects either.
Bodily	Well, you mean _____ object to the. . .
Judge	. . . the motion to intervene.
Bodily	I don't, yeah, I don't think it's necessary. They're already parties in the fact that the appeal was made. I'm concerned that if you grant a motion to intervene that somehow you'll be implying that they have expanded rights. That they don't. . . that they haven't already reserved by filing their own appeal in district court or filing for cross appeal. Since those appellate procedures are in District Court. So I think the Tax Commission concern and we would request that you would deny their motion to intervene because it's. . .
Judge	Do you see the case as being the same case that the Tax Commission handled initially.
Bodily	Yes.
Judge	So, were they parties in that case.
Bodily	Yes.
Judge	They are also parties on the appellate case?
Bodily	Yes.
Judge	So, you're saying they don't need to intervene because it's the same case.
Bodily	Yes. But, since they hadn't raised their own issues as to our appeal. Or, I mean, as to the commission's decision, arguably I think their role here in this particular case would be limited to supporting and defending the Commission's decision.
Judge	So, despite what Mr. Lowe says about allowing additional information to come. You say they can't do that now. Bring in additional information?
Bodily	No, I think, certainly you can make arguments and present new factual issues but you cannot expand the matter beyond what was addressed below. And, I think clearly Mr. Lowe addressed below that he thinks the value of this particular party should be "X" and the Commission ruled that it should be "Y" and he has the right to bring the facts and arguments as to why the Commission was wrong on

	that particular point. The landowners in this case, for whatever reason, did not file their own appeal in district court nor prosecute it and so I am not so certain that they can make arguments beyond what the Commission already decided.
Judge	They went directly to the Court of Appeals?
Bodily	They did.
Judge	So, you're saying because they went directly to the court of appeals that any arguments that they might have raised in the court of appeals I can't consider here?
Bodily	Potentially "yes", your honor. Now, whether or not they would still have the right to raise those issues that they've addressed and they want to rely upon the record in that appeal, I guess I'll have to address that when it, when the Supreme Court rests that or _____ court of appeals lifts its stay.
Judge	So, where's their opportunity to bring in new information or new evidence or Mr. Lopes says it's such an important part of the process.
Bodily	Typically, it happens one of two ways, your honor, you either both file appeals to District Court or, in the case where Mr. Lowe instigated the appeal there they were certainly welcome to the rules of appellate procedure to file a cross appeal. And I'm not saying they could not have done that. . . and they certainly could have. They didn't. . . which creates this unfortunate situation and I'm not sure we could fully address here today at today's hearing. But, yes, it does create a problem because, if for whatever reason they chose to file this intervention and it goes to a simple cross appeal and they raise their own issue before you. And if had had happened I think the Commission would be certainly glad to let them argue their own issues here.
Judge	But now the time has passed and they can't raise it.
Bodily	That is correct, your honor. And I recognize fully this is a difficult situation and I agree with you that, unfortunately, is an unnecessary situation. I think we could have easily avoided it by simply just filing a cross appeal. We could be having our status conference today addressing how the appeal should proceed and we should set the discovery and then the trial should be held and so forth. That they've chosen to go this what I consider to be somewhat of a strange route and argue that this is somehow some civil complaint that needs to be filed and should have been filed and they need to intervene which seems to me just counter to what the statutes indicate and they should have simply filed the rules of appellate procedure and all of these issues would have been avoided.
Judge	Mr. Lowe, anything further?

Lowe	Yeah, I appreciate Mr. Bodily's statements there. When I indicated that I did not object. What was . . . the end of my sentence was going to be I don't object to the Osborns or any of the other taxpayers participating in this appeal to the extent authorized by the rules of appellate procedure. Certainly, an intervention formally is unnecessary as argued in our brief. The concern that we have is. . . maybe to elucidate a little further what Mr. Bodily said. We have filed a petition for review in this court in order to preserve the right to supplement the record for the issue that we have raised. Counsel for Petitioner, or for landowners have not. So. . .
Judge	So what cuts off their right to. . .
Lowe	The 30 days.
Judge	So, is that a rule.
Lowe	Yeah.
Judge	. . . of civil procedure.
Lowe	Rule of appellate procedure.
Judge	Okay, but what you're saying that the Rules of Appellate Procedure control the District Court in an appeal from the Tax Commission.
Lowe	Yeah, nothing could be clearer.
Judge	So it's just a standard, it's a standard jurisdictional one-month period of time?
Lowe	Yeah, I don't know how many appellate opinions we've seen where they've said this wasn't filed on time, we have no jurisdiction to consider this matter.
Judge	You're saying that the District Court on an appeal from the Tax Commission is covered by that rule?
Lowe	Yeah.
Judge	Where is that?
Lowe	59-1-602 is a statute that indicates that the Rules of Appellate Procedure apply. And then we look at the Rules of Appellate Procedure, that's where you find, the rule that indicates that appeals must be filed within 30 days of the decision below. So while we have preserved our opportunity to supplement the record for the issue that we have raised, the short way of saying it is that the landowners have not.
Judge	Now do they raise any issues when they took their appeal?

Lowe	They raised a legal issue, an issue of law, not an issue of fact.
Judge	Okay. And when they appealed to the Supreme Court, any new issues or is that all together?
Lowe	Yeah, no, it's just one appeal, the Supreme Court ____, and it's just one legal issue that they've raised that they want the Court of Appeals to reverse the Tax Commission on. No issues of fact, they haven't filed anything with this Court to request supplementing the record with this Court, so in the County's opinion, and our position is, that the record as far as they're concerned is cemented in. They've got as much evidence in their behalf as they want or need or desire to preserve. The County, on the other hand, does have some additional evidence, not much, but some additional evidence it would like to put forth.
Judge	And they should be able to rebut that?
Lowe	Yeah, certainly, they'd be able to rebut what we bring in. They can cross examine the witness if we bring in a witness.
Judge	And maybe even bring in their own evidence to the contrary.
Lowe	Uh, the more we go along that line, for example, one issue here is that the Tax Commission did not rely on their appraiser at all in rendering its decision. So if the time came before this Court that the landowners wanted to bring in their appraiser and have him testify again, I'd probably object and say that's beyond what we've appealed. There's nothing that gives you that right to do that, so. It depends on how close it gets to rebutting versus bringing in new evidence.
Judge	You say you're going to bring in evidence regarding this last portion and try to fill in the gaps that apparently weren't filled in earlier. Shouldn't they be able to rebut that whatever way they can?
Lowe	Rebut, yes.
Judge	So that, I mean you could bring in a new witness to rebut the testimony. There's no limit as to what, that you have to keep your old witnesses do you?
Lowe	No. I think you're correct on that, Your Honor. But would only go to that last, for example, here we've got ____ talking about the ten acres. It would only go to those last ten acres.
Judge	Has there been discovery on those issues?
Lowe	There has been. There's been full discovery. Honestly, I don't know that there will be more discovery required in this court proceedings.
Judge	Well, what if they want to take discovery?

Lowe	They would certainly have that right. And we would certainly have that right. So, yeah, that may occur. I don't know if it will.
Judge	Mr. Bodily, do you agree with all that?
Bodily	I do, Your Honor.
Judge	Okay.
Bodily	That's the _____ issue. Do you want to stop there?
Judge	Yeah, let's stop there and hear what you all have to say about that.
Miller	<p>Your Honor, my name is Maxwell Miller. I'd turn the time over in a moment to Mr. Cook of our office, but I wanted to preface my remarks, because I think both Mr. Bodily and Mr. Lowe have misrepresented something important to this court. The question was, is it the same thing before the Supreme Court before this court and both of them said yes, and the answer is no. An appeal to the Supreme Court by the property owners is an appeal as any appeal to the Supreme Court on the record, on the record before the Tax Commission. To the contrary, Mr. Lowe wants a trial de novo before this Court and a trial de novo and 601 specifically says it does not mean a trial on the record. It's defined that way. It, of course, is directly repugnant to his argument that the Rules of Appellate Procedure apply and I have done many cases in the Tax Court on a trial de novo and no Tax Court in this state has ruled that in a trial de novo the rules of the appellate procedure apply. Essentially, if this court took jurisdiction it would be depriving the property owners of their right to an appeal on an issue that may moot their trial. Besides, there is an issue as to whether they're even entitled to be here. Under 602, it says an aggrieved party appearing before the commission or county whose tax revenues are affected by the decision may at that party's option – and I stress the word, “option” – petition for judicial review in the District Court pursuant to this section or – and I stress the word, “or” – in the Supreme Court. Before the county filed a petition for a trial de novo in this court, it filed a cross appeal in the Supreme Court. And by application of 602, they are foreclosed from going to this court because the statute says they have an option, and they are trying to implement both ends when the statute says they cannot.</p>
Cook	<p>I believe the issues related to the motion to intervene are relatively uncontroverted. If the rules of appellate procedure govern the motion to intervene, then the Osborns as well as the six other Wolf Creek Ranch property owners are already parties to the case. In any event, Wasatch County nor the Tax Commission has objected to the Osborns' participation as intervenors in this matter.</p> <p>One point that needs to be clarified is although Wasatch County refers to this matter as an appeal, what they've requested is a trial de novo under Utah Code</p>



	<p>Annotated 59-1-601, which is statutorily defined as an original, independent proceeding and not a review of the record. And so, although they bring in terms of their requesting an appeal before the District Court, what they're really requesting is a whole new trial, and, in that regard, the Rules of Civil Procedure apply to a request for a new trial, and not the Rules of Appellate Procedure which the issues kind of bleed over into the Motion to Dismiss on the issue.</p> <p>So, there's really not any controversy over whether they should intervene. The real controversy is whether the Osborns as well as the other Wolf Creek Ranch property owners are in _____ at this time.</p> <p>Another point of clarification is the reason that the Osborns as well the other Wolf Creek Ranch property owners didn't file a cross petition in this matter is because they never wanted to be before the District Court. They didn't choose to exercise their rights to a trial de novo before this court.</p>
Judge	Read that passage again that you read about
Cook	About a trial do novo.
Judge	The either or.
Cook	So, Utah Code Annotated 59-1-602 states that any aggrieved party appearing before the Commission or County whose tax revenues are affected by the decision.
Judge	So, it could be any aggrieved party or the County. . .
Cook	Correct.
Judge	Who is negatively affected by the
Cook	Correct.
Judge	So, in this case we have the County and we have some people who think they are aggrieved parties. Is that right?
Cook	Correct. We have. . .the issue in this case is property tax assessment on 7 parcels of real property located in Wasatch County. Essentially, what this matter boils down to is these parcels are 160-acre parcels that were historically used as farmland for grazing sheep and cattle and there's a conservation easement of 150 acres of the property so there's a 10-acre building envelope and the issue relates to the property owners have disturbed one acre and so that one acre is removed from assessment under the Farmland Assessment Act and determining what value that one acre is essentially the controversy in this matter and what they're seeking as far as their trial de novo is to adjudicate the property rights of the Osborns as well as the 6 other property owners that were parties to the tax

	commission proceeding.
Judge	So, you're saying that there's an either/or proposition. They need their election by going into the appellate court?
Cook	Correct.
Judge	And, therefore, there's nothing to do here.
Cook	Correct. If what they're seeking is an appeal. An appeal is governed by Section 59-1-602 which indicates that it is an option. You can either appeal to the Utah Court of Appeals, the Utah Supreme Court or the Utah District Court. If an appeal is made to the Utah District Court under Section 59-1-602 then the Rules of Appellate Procedure and the District Court sits as an appellate court in those circumstances. Whereas, if you file for a trial de novo under a different section which is 59-1-601, the rules of civil procedure apply and you must file the rules of civil procedure to invoke the district court's jurisdiction for a new trial. So, there's essentially two different avenues that you can take depending on what statute you're attempting to invoke the district court's jurisdiction under. If you're attempting to invoke this court's jurisdiction for a trial de novo you're under 59-1-601 the rules of civil procedure apply. If you're trying to invoke the district court's appellate jurisdiction then you file under 59-6-102.
Judge	And what was done?
Cook	They've essentially blended the two statutes together so in their petition for review they say they're filing under 59-6-101 and 59-1-602. And now the problem is if that if you are under 59-1-601 to invoke the court's jurisdiction you have to file a new complaint and the rules of civil procedure apply. Otherwise, the situation would be unworkable because Utah Rules of Appellate Procedure don't allow for entry of new evidence, new discovery and it is also important to note that in Wasatch County's petition for review they've asked for a new remedy which wasn't raised before the Tax Commission. It seems clear that the Utah Rules of Appellate Procedure don't allow for new remedies.
Judge	So, he, Mr. Lowe has filed a petition for judicial review. He asks for an independent proceeding in the form of a trial de novo. And you say that when he filed that he had already made an election to pursue the matter on appeal.
Cook	Correct. Correct. The Wasatch. . . or, Wolf Creek Ranch Property Owners filed for judicial review in the Supreme Court. Wasatch County then filed a cross appeal.
Judge	Were they filed on the same day, or, who filed first.
Cook	The Wolf Creek Ranch Property Owners filed first in the Utah Supreme Court, then Wasatch County filed a cross appeal in the Supreme Court and then a day or

	two later they filed for a trial de novo in this court.
Judge	Never withdrawing their cross appeal or anything like that.
Cook	Correct.
Judge	And in the meantime the Supreme Court had overruled the Court of Appeals.
Cook	Correct
Judge	Which then sent it back here.
Cook	These _____ stayed the appeal pending what's going to happen in this court.
Judge	So, what do you think I should do?
Cook	<p>A reading of the plain language of the statute would require dismissal because essentially the Osborns, as well as the 6 other Wolf Creek Ranch Property owners weren't made parties to this District Court case so they didn't have an opportunity to file a cross complaint in this action because they were served with process. They were never properly joined as parties in this case. Wasatch County's argument for that is that they are already automatically a part of this case because the rules of appellate procedure apply. But, clearly, by the plain language of the statute, that there's a distinction between requesting to invoke the District court's jurisdiction – appellate jurisdiction – pursuant to a trial de novo. If Wasatch County is requesting a trial de novo, the manner in which the _____ invoked under the rule of civil procedure. In that event the Osborns and the other Wolf Creek Ranch property owners weren't properly joined and, therefore, this court lacks jurisdiction over that issue and the petition for review requesting a trial de novo should be dismissed. If what they're really asking for is an appeal pursuant to 59-1-602 to invoke the appellate jurisdiction of this Court they've, there's no jurisdiction either because they've already elected to file an appeal with the Utah Supreme Court. It's clear in 59-1-601, it states "in addition to the jurisdiction granted in Section 63g-4-402 which is the Administrative Procedures Act and that relates to the manner in which you file for a trial de novo following an informal adjudicative proceeding before the Tax Commission and that manner is filing, it says a petition for, the petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure. And so the purpose of 59-1-601 is to enlarge the district court's jurisdiction in the context of a trial de novo to include formal as well as informal adjudicative proceedings before the Tax Commission and the manner in which you do so is under the Rules of Civil Procedure by filing a new complaint and initiating an original independent proceeding.</p>

Judge	Thank you. Mr. Lowe do you want to respond to that?
Lowe	Yeah, if I could. It sounds like we're kind of addressing everything now. The either/or argument that you just heard was never made to this court until the day. It wasn't briefed; it wasn't raised in the briefing of the parties. That was raised in the briefing to the court of appeals. The court of appeals addressed that issue. Well. . . we assume they addressed that issue. They issued a very short decision and declined to grant the relief requested by landowners which is that because the appeal. . . the County's appeal to the court of appeals was one day before the County's appeal to the district court, that somehow was an exercise in an option that foreclosed the other option. It'd be a little bit difficult. . .
Judge	Well, let's just review this. I mean, I think everybody would have to admit that what's taking place in this case is not the typical situation. As I understand it. . . someone who is an aggrieved party or County that feels its revenues are impacted by a decision of the Tax Commission can do one of two things. They can either go to the District Court or they can go to the Supreme Court. If they go to the District Court they have two options. One option is to appeal
Lowe	No.
Judge	No, you don't think so.
Lowe	No, you've been misstated the law.
Judge	Okay, what do you think the rule is.
Lowe	Okay, the rule is that. . . and honestly, maybe the most articulate on this is Mr. Bodily, but let me first do my stab at it. The rule is that previously you could only appeal the District Courts for informal Tax Commission proceedings, or from informal Tax Commission proceedings. The statute was amended to allow appeal to District Court for also formal Tax Commission proceedings. That's the change in the law and then the law specifically says when you appeal the District Court. . . all appeals to District Court are trial de novo. All of them. There is no such thing as you acting as only an appeal, appellate court on the records or an appellate court for a trial de novo. All appeals to the District Court are trial de novo. And it says that the court shall conform. . . that's the word. The District Court's shall conform to the Utah Rules of Appellate Procedure. So that's the only. . . you don't different hats you can put on here. I'm going to sit as a trial de novo district court kind of judge and here is an appellate court judge and only looking at the record. In both sections, 59-1-601 and 59-1-602 it refers to this court as a same appellate court. Even in 601. . . and by the way this is an argument that's never been advanced. . .

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Lowe	<p>Appellate court have been given any favorable ruling on this, this is a novel argument being created for your ears. Even in 59-1-601, which I'm just hearing today for the first, this has never been argued anywhere, either refused of the court of appeals or this court in the briefing. At 59-1-601 is the de novo statute and 59-1-602 is an appeal statute. That's brand spankin' new today. Even in 59-1-601 it requires the commission to certify a record of its proceedings to the District Court. And this Court is then to do a trial de novo, which means an original independent proceeding, and does not mean a trial de novo on the record. Essentially it means you can bring in new evidence and then at 602 it specifically says, you are to apply the rules of appellate procedure. So that the county, first of all would object to a new argument made to this court that hasn't been briefed. When it was fully briefed and argued before the Supreme court, our Court of Appeals when it was poured over, the constitution, the amendments to the constitution and those rights are brought into play and argued and set forth and they did what they did there. Here, you don't have any of the benefits of that. There are many practical and constitutional reasons why these statutes ought to be read that way, but also that's the way they have been read by the Court of Appeals. The Constitution gives us that right to appeal to the District Court, to supplement the record. There's not two different appeals, there's only one. As far as the relief requested, again this is a new argument today that either the court ought to dispose of the matter for us failing to join indispensable parties, which is applying Rules of Civil Procedure, which just don't fit. Or, the Court should deny this appeal, simply because the County previously exercised its right to cross-appeal in the Supreme Court. Those are two angles that, again, were not brought up in the briefing. The Court of Appeals has already held, at least implicitly, that we have the right to do what we have done. If you think about it there's some good sense for that. We didn't choose for them to file their appeal in the Supreme Court. They chose to do that. The statute gives both parties the right to appeal. You say, you guys can appeal to the Supreme Court or to District Court, whatever you want. They exercise their right to appeal to Supreme Court. Once somebody does that, either party does that, the other side has a deadline. If we don't cross-appeal and preserve our issues for appeal, they're foreclosed as well. So their appeal to the Supreme Court forces our hand. If we want to have standing in the Supreme Court to say anything, contrary to the tax commission's decision, we have to file a cross-appeal. Whether we want to be there or not, we have to file a cross-appeal. And then the decision is also given to me under the statute. You can also appeal wherever you want to appeal. Well, I chose to appeal; my County chooses to appeal to the District Court.</p>
Judge	<p>Do you have to file a cross-appeal? Couldn't you file instead a Motion to Stay Proceedings in the Supreme Court so that you can proceed to</p>

	exercise your rights in the trial court?
Low	I could, and I did. The difficulty is, I guess what your assuming is that I could file the Motion to Stay...
Judge	You didn't file a Motion to Stay in the Supreme Court. Did you?
Lowe	I did and was granted.
Judge	Was that filed before your filed your cross-appeal?
Lowe	It was filed after.
Judge	So, you filed your cross-appeal, then you come in and say, on second thought, I want to have the District Court hear this.
Lowe	Not on second thought.
Judge	Why didn't you file just a motion to stay the time running through your cross-appeal and say that you want to proceed in the District Court? Instead of doing what the other side says in this case is, elect your alternative and that is to proceed in the Supreme Court.
Lowe	For the extremely simple reason, your honor, that there is no rule that would afford me the protection of saying that the Motion for Stay tolls the 30 days. Nothing gives anybody that protection. If you file a Motion for Stay, while that motions pending, and in fact, ___ the Court of Appeals a couple of months to issue their decision on that. There's nothing that grants me the protection that says a motion for stay tolls, there are similar rules and the Rules of Civil Procedure, for example, on a motion for new trial, or a motion to adjust the findings of fact, let's say that tolls, or stays the time to file an appeal. There is no protection.
Judge	And you don't think you could have asked the Court for, the Supreme Court, the Utah Court, some kind of expedited decision on that?
Lowe	Yeah. I could have asked for the world, your honor. I could have asked for my best case scenario.
Judge	Well, the point is, the point is the time....ticking you've got, what over 30 days to respond? And you filed your Motion for Stay and expedited the ___ and court doesn't respond in a timely way, you can still come in at the last minute and file down here.
Lowe:	Yeah, but then what's the difference. For example, say I had filed.

Judge	The difference is, is that you wouldn't appear to have elected your remedies. Other than, or the fact that you were worried about the time.
Lowe	I still haven't elected my remedies by going to Supreme Court.
Judge	You haven't...
Lowe	If I had filed in...
Judge	How do you interpret the word or?
Lowe	Either or meaning, they can choose where they want to go, I can choose where I want to go. But the statute doesn't do is help anybody figure out, what if the parties disagree? What if one side wants to go here, and the other side wants to go there? There is no outline of how that dispute is resolved. And which court goes first and how that's done. In fact, in the briefing before.
Judge	Alright. Well I think I understand your position on that. Let's hear from Mr. Bodily, if he has any insight on the, on this particular aspect.
Lowe	Can I just, this one issue, on if, we had filed District Court first, like the Court was indicating. If, just assume that the County had first filed its District Court appeal and then the time, being the 30 days is coming up and then we file our cross-appeal in the Court of Appeals. How would that change this scenario? Even then, someone could argue, this perhaps is being argued here today, for the first time, but the County changes its mind, decided as District Court review was a waste of time and wasn't worth its while. And so it chose appeal to the Court of Appeals. The same scenario could be argued, no matter what happens in that process, without any guarantee that we could preserve our rights and knowing that the subject m___ jurisdictional issue, which can leave the Court of Appeals no discretion on whether an issue is preserved before it. The County has no choice but to preserve its standing in the Appellate Court, and the Appellate Court agreed with that and stayed it, so this Court could be ___ issue first. Thank you.
Bodily	Thank you, your honor. I do want to clarify this is not the first time that this issue has arised. This certainly is a little bit different because the way the parties have decided to approach it. But because of the ___ or situation, quite often you have, well not quite often, but I have seen at least three circumstances, this will be the fourth, where one party chooses to file first in the Supreme Court and the other party chooses to go to the District Court and my understanding is that in all cases the Appellate Court defer to the District Court to pursue the appeal there. And then once the proceedings are brought, if they are eventually brought back, and appealed to the appellate level, then the appeals are

	typically consolidated at that time period. So I think it is appropriate that the County's preserve their cross-appeal in the Supreme Court while they pursue their District Court appeal. While I also think it would have been appropriate for the taxpayers, the land owners to also preserve their cross-appeal in the District Court, even though they may have not have been here. So that all parties have their issues preserved, so the Tax Commission knows who is contesting what part of the decision and we're familiar as to who's contesting what, where and ultimately, the Supreme Court or the Court of Appeals decides who's going to go first. And as I indicated earlier, typically, at least my experience is that they defer to the District Court. I don't believe there's anything out of the ordinary in that particular situation. And I think the Court of Appeals spoke fairly...
Judge	Well what about the situation, where as here, the, one party appeals the Tax Commission decision to the Supreme Court and then comes back and appeals also to this Court for trial de novo, on that issue? Is that something you see happening?
Bodily	I have not seen that issue.
Judge	Isn't that what we have here?
Bodily	No.
Judge	I thought we did. I mean, I thought the County, I'm looking at a petition for judicial review that the County submitted here. I guess, I don't know when it was filed, it was dated on the 25 <sup>th</sup> of April and that was after they already filed an appeal, or a cross-appeal in the Supreme Court. Isn't it?
Bodily	Your honor, they way I would view that is, that you have the land owners who filed an appeal with the Utah Supreme Court. The Counties not knowing, ultimately, whether the District Court will maintain jurisdiction or whether the Supreme Court will retain jurisdiction...
Bodily	appeals. Filed simply a protective cross-appeal, which I think is appropriate. And a simple way to address the situation. And then they pursued their District Court appeal, of which they entitled to do so. I do not see there's been an election on the party of the County, by simply filing a protective cross-appeal in the Supreme Court. And so I disagree with you on...
Judge	Well, but they've done both haven't they?



Bodily	They have done, they've filed a protective cross-appeal.
Judge	And doesn't the statute say they can do one or the other?
Bodily	The statute says you can choose to file in the Supreme Court and...you could choose...
Judge	No, it says or....
Bodily	Or you can choose to file in the District Court. I do not believe that the County's filing of the protective cross-appeal in the Supreme Court somehow is an election of remedies at that point. I don't believe they have an option but to pr...
Judge	Is there a case that says that that's not the...
Bodily	Well you do...
Judge	That it's not an election of remedy.
Bodily	You do, you do have that issue and it was argued.
Judge	Right.
Bodily	Before the Court of Appeals and they obviously didn't seem to find it was compelling enough to rule on it, and hence they deferred to this District Court as they have in all other cases, for you to administer this appeal that you have before you.
Judge	Well, what, I mean they, are they, they may be just asking me to say, they've elected remedies and I don't have jurisdiction to proceed on the matter.
Bodily	And certainly we don't what, what is in their minds. I didn't find any specific direction for you to rule on that first so that they could....
Judge	And there's no case other than what they did here that you can point to that says that that's not an election of remedies. That they can do both.
Bodily	I have not researched that issue, quite frankly, your honor.
Judge	Well and Mr. Lowe says that it's been raised here for the first time, maybe that's something that we ought to let you do. But, I'm troubled by that. It seems to me that there are a number of things that the County could have done here. They could have filed, it seems to me, here first, and then filed a cross-appeal afterwards saying, we're just filing our cross-appeal to protect ourselves in the Appellate Court. We've already got a case pending in the District Court and we're happy to respond on

	<p>the merits in the Appellate Court, if that's what the Appellate Court wants us to do. I would think they could have done that. They didn't do that. They didn't ask for a stay of the Appellate Court proceedings, pending resolution of the matter here. It said they filed it on the merits in the Appellate Court and then they come back and file on their merits here. Seems to me that's, that's some election of remedies took place in the process. It seems, I don't know? I'm interested in whether there is some case authority one way or the other.</p>
Bodily	<p>Well, I'm not familiar with anything in the state of Utah, your honor. So I can't respond to that. I will say that there were additional issues with respect to the Supreme Court appeal because neither party was noticed by the land owners, so there was some time concerns on the part of the County, I'm certain. But to me, I simply just view it as a protective cross-appeal, and their intent was always to pursue a remedy here before the District Court. But we'll certainly brief that if you would like me to research that further.</p>
Judge	<p>Let's hear what the other side; I think Mr. Maxwell Miller wanted to say something to me about that.</p>
Miller	<p>Yes your honor, I did. I think Mr. Lowe has, again, misrepresented to the Court. He said that this issue was the first time before this Court. If you look at page twelve footnote three of our memorandum, it says, and I quote, "it is clear that this Court has no jurisdiction to adjudicate Wasatch County's petition for review, because Wasatch County filed a cross-petition for review of the Tax Commission's final decision in the Utah Court of Appeal on April 24, 2008 and then filed its petition for review on April 25, 2008 in this Court. Utah Code Ann. 59-1-602 provides any aggrieved party appearing before the Commission or County whose tax revenues are affected by the decision may at that party's option, petition for judicial review in the District Court pursuant to this section or in the Supreme Court or the Court of Appeals pursuant to Section 59-1-610." Wasatch County having elected to file its cross-petition for review in the Utah Court of Appeals cannot then invoke the jurisdiction of this Court by filing a petition for review. Under the statute, when Wasatch County elected to invoke the jurisdiction of the Utah Court of Appeals where the controversy is currently pending, Wasatch County's statutory option was exercised and no jurisdiction existed to come to this Court. This is not the first time that is argued; that is in our brief.....</p>
Judge	<p>Alright, thank you. That was the brief that you filed where?</p>

Miller	In this Court.
Judge	In this court. Quite a _____. Thank you.
Miller	One more point is that also Mr. Lowe argued that the parties have an option. Yes, one party has an option to appeal to the Supreme Court and maybe another party has an option to go to the District Court. But in this case, we're having Wasatch County trying to pursue both options, simultaneously. And the statute explicitly says you cannot do that.
Judge	Alright, thanks.
Bodily	If I may just address briefly, the argument that's been addressed that somehow there's two distinct appeals to the District Court. One under 601 and one under 602, I certainly never seen it interpreted that way, your honor. I think counsel for the County is correct, in that regard, that this certainly years ago, everyone had the right to informal administrative adjudicated proceedings to go to District Court. And for formal proceedings your only right was to go to the Supreme Court. That was changed by the statute and hence they ____ at 601, which granted jurisdiction to the District Court for all decisions of the Commission whether they be informal or formal. And it's specifically provided in all appeals; the record of the Tax Commission would be, would be sent to the District Court and certified to the District Court. And in 602, simply indicates who may file that appeal to the District Court and it also specifies that for appeals, the proper procedure to file that appeal is the Utah Rules of Civil Procedure, which was followed in this case. We believe that makes sense, given the situation here, where most appeals at the Tax Commission are formal proceedings. So parties have had trials and evidence and arguments and decisions, everybody's place on notice as to what the issues are, it simply a matter of narrowing those issues that are truly contested by the appeal process and once we're here we can decide how we're going to proceed. In some cases, taxpayers chose to rely upon record and do so by stipulation. And other cases we simply have a new evidentiary hearing on those issues that they dispute. And, so we don't believe there's a need to file a complaint. We don't believe there's a need to file an intervention. If you do want to raise your own issues on the appeal, simply file a cross-appeal. Any other questions?
JUDGE:	Thank you, no. The role, despite the footnote you feel like you are caught with that contention, I take it?
Lowe	Yes, if you look at the taxpayers' motion, it never raises that issue.
Judge	Well...what about, you're saying it's in a response? And it's therefore

	you don't have to pay any attention to it?
Lowe	No, no, not in the motion. It is only raised in a footnote in a memorandum.
Judge	Yeah.
Lowe	The motion does not request to relief that is argued in the footnote of the memorandum. It seems like that the memorandum ought to somehow fit within the four corners of the motion.
Judge	Well, how much time do you need to respond to that?
Lowe	Well, if I could just first, and I understand the Court has some problems or some difficulties with this issue and you want some help with it. There's a good reason, however to hold, even today, that the law of this case has already been established. That that is an invalid argument. The argument that is in a footnote and not in the motion, and nowhere really addressed in the memorandum other than a footnote, is fully briefed before the Court of Appeals. It was fully argued by them and fully briefed by the County. And the Court of Appeals declined, or overruled the objection raised by the taxpayers.
Judge	I don't see a hold in this short opinion that you've given me that says, one way or the other that this, that or should be read to be and.
Lowe	No, it's not. So what you have though is a County saying, your honor, Court of Appeals, please stay this until District Court's done. And you have taxpayers saying, no, don't stay it, because the County has elected their remedy essentially, using Mr. Bodily's language. Have elected their remedy and so it needs to stay here and not go back.
Judge	Well, you're giving me your reading of their decision and I think someone here, maybe it was Mr. Bodily already indicated that you're not sure really what the Appellate Court is think and I agree with that....
Lowe	Well we know what they did though.
Judge:	Well?
Lowe	We know that they denied the relief requested based on the arguments made.
Judge	Well, but I don't know what the reason they denied it for, was. And that troubles me. So, what I'm going to do, if you would like some additional time to brief this, I'll give it to you. If you feel that it's been

	fully briefed and there is no additional time, I'm ready to rule.
Lowe	It hasn't been briefed at all.
Judge	Okay.
Lowe	By either party.
Judge	Well they say they've given you at a least a footnote with their position. How long will it take you to respond on that end?
Lowe	Your honor, it is already briefed for the Court of Appeals, I could have a copy of that to this Court within a week.
Judge	Okay and how much time do you need to reply?
Miller	Five days.
Judge	Okay, so we're looking at two weeks, okay. Let's do that. Does that fit with your schedule of ___?
Bodily	Yes, your honor, I don't think I'll necessarily need to file something since it has been previously briefed. I've seen the arguments of the parties before the Court of Appeals considered, and I think it's unlikely that we'll be filing something, but we'll be here to participate in the whole argument, your honor.
Judge	Okay. Let's see if we can pick a date sometime between the 29 <sup>th</sup> of July and the like the 4 <sup>th</sup> of August for argument on this.
Lowe	If you feel like you've heard enough argument on it and the briefing is sufficient, your honor, I don't know that we need to come back for that. Unless the Court,
Judge	Well, I want to give you a chance if you feel like you; you say you haven't had a chance, I don't want you...
Lowe	Well it's not me, so much as, your honor; I don't think the Court has seen all the aspects of that argument made by the counsel today.
Judge	Well, I'd like you to do whatever you think you need to do. If you don't want it, I won't give it to you. We can, I'll rule today.
Lowe	I'd like to least have the brief on the record, your honor, but I don't think we need oral arguments again.
Judge	Well I may want oral arguments, that's why I want to set it so it

	doesn't get strung out.
Court Clerk	We could do the 28 <sup>th</sup> of July at 9:30?
Lowe	That would be tight; I have to be back in Heber by 11:00. But I think we could probably do that.
Judge	What's the next day or two after that?
Court Clerk	We could put it on the 30 <sup>th</sup> at 1:30, July 30 <sup>th</sup> .
Lowe	And that's worse. That's our District Court date on, there for a law and motion calendar. It's preliminary hearings on the afternoon calendar.
Judge	Alright, let's do it on the 28 <sup>th</sup> at 9:30.
Lowe	Thank you, your honor.
Judge	Okay, thank you.