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WARREN AND TRICIA OSBORN, MICHAEL
F. SULLIVAN, DAVID AND CYNTHIA
MIRSKY, NORMAN PRO VAN, JEFFREY AND
NANCY TRUMPER, GARY AND
CATHERINE CRITTENDEN, DAVID
CHECKETTS AND MOUNT CLYDE
ENTERPRISE LC, WASATCH COUNTY v.
Utah State Tax Commission : Reply Brief of
Appellants and Brief of Cross-Appellees

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IN THE UTAH COURT OF APPEALS

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

Petitioners/Appellants,

WASATCH COUNTY,

Cross-Petitioner/Cross-Appellant,

vs.

UTAH STATE TAX COMMISSION,

Respondent/Appellee.

Appellate Case No. 20080304-CA

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

**REPLY BRIEF OF APPELLANTS AND BRIEF OF CROSS-APPELLEES
WARREN AND TRICIA OSBORN, ET AL**

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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, Dave Checketts and Mount Clyde Enterprises LC (collectively the “Property Owners”) each of whom are property owners of a legally indivisible 160 acre or 184 acre platted lot¹ (each shall be referred to herein as a “parcel” or “lot”) at Wolf Creek Ranch, located in Wasatch County, Utah, hereby submit this Reply Brief of Appellants and Brief of Cross-Appellees (the Property Owners) in answer to the Briefs of Respondents Utah State Tax Commission (“Tax Commission”) and Wasatch County (“Wasatch County”) and in response to the issues raised in Cross-Appellant Wasatch County’s Brief, as they relate to Wasatch County’s Cross-Appeal.

SUMMARY OF ARGUMENT RELATED TO PROPERTY OWNERS APPEAL

As proven herein, the Tax Commission’s Brief and Wasatch County’s Brief mischaracterize the sole legal issue presented by the Property Owners’ appeal of the Tax Commission’s April 1, 2008 decision (the “Tax Commission Decision”) as an appeal of a factual issue. In reality, the Property Owners’ appeal challenges only the legal foundation upon which the Tax Commission Decision rests.

¹ For purposes of clarity when the difference in the size of a parcel, 160 acres or 184 acres, is immaterial, each shall be referred to as a 160 acre parcel or lot.

Specifically, the Tax Commission's Brief and Wasatch County's Brief mischaracterize the ultimate issue of this case by:

(1) misrepresenting the issue before this Court as an issue of fact (choice and application of property valuation methodology) rather than an issue of law (the legal boundaries or constraints of a permissible valuation methodology). Specifically, the ultimate and controlling issue in this case is whether the Tax Commission can disregard, and effectively rewrite Utah's "fair market value" statute, Utah Code Ann. § 59-2-102(12), which requires that assessment of real property in Utah be made consistent with applicable zoning laws, which in this instance would include one acre of a legally indivisible 160 acre platted lot at Wolf Creek Ranch withdrawn from "Farmland Assessment"; and

(2) ignoring applicable zoning laws and manipulating indisputable material facts to achieve an excessive assessed value of one acre, within the legally indivisible 160 acre platted lot at Wolf Creek Ranch. Wasatch County's assessment and the Tax Commission Decision violated zoning laws by allocating a grossly disproportionate value of the entire 160 indivisible acre lot to the one acre no longer eligible for "Farmland Assessment," as if such one acre were a "stand-alone" divisible lot, legally separable from the other 159 acres, and as if each acre in the lot, except the one acre upon which a home was built, has negligible value.

While the Tax Commission's Brief refers to "fair market value," the Commission's Brief, significantly, never cites nor quotes the mandatory "fair market value" statute. The Tax Commission's Brief does not even list the "fair market value" statute among its "Determinative Statutes." Tax Commission Brief, p. 2. Although the Tax Commission does not deem the "fair market value" statute as relevant to the valuation and assessment of the subject property, a fair and reasonable application of the "fair market value" statute requires that each and every acre within a legally indivisible 160 acre platted lot be assessed at the same value.

Similarly, Wasatch County's Brief fails to address the sole issue presented by the Property Owners' appeal of the Tax Commission Decision ("Appeal"): whether the Tax Commission Decision violates Utah Code §59-2-102(12) by allocating 65% of the value of each parcel to the 10 acre building envelope based solely on a hypothetical sale of a 10 acre portion of the parcel when it is legally impossible for such sale to ever occur. It is legally impossible for a sale to occur because applicable zoning restrictions prohibit any division or separation of any portion of a Property Owner's parcel. Wasatch County elects instead to argue that the Tax Commission's Decision to ignore applicable zoning laws in violation Utah Code §59-2-102(12), presents a factual issue, therefore mandating that the Property Owners' Appeals be dismissed for failing to marshal the evidence.

SUMMARY OF ARGUMENT RELATED TO WASATCH COUNTY'S CROSS-APPEAL

Wasatch County's Cross-Appeal misunderstands the standard of review applicable to this Court's review of questions of fact. Wasatch County argues that there was substantial evidence in support of Wasatch County's argument, which the Tax Commission rejected, that the value of the building rights on each parcel migrates to the one-acre home site, rather than the ten-acre allowable building envelope. Wasatch County fails to address, much less demonstrate, that the Tax Commission Decision, which held that 65% of the value of the parcel attached to the ten-acre building envelope, was not supported by substantial evidence. Rather, Wasatch County urges this Court to reweigh the evidence presented during the Tax Commission hearing.

In the event this Court rules in favor of the Property Owners, which it must and should by applying Utah Code Ann. §59-2-102(12) (the "fair market value" statute) in accordance with its plain language, the factual issue (whether the Tax Commission Decision is supported by substantial evidence) presented in Wasatch County's cross-appeal becomes moot. The issue is mooted because the legal requirement for all assessments is that "fair market value" shall be determined using the current zoning laws, which zoning laws in this case prevent subdivision of the parcels. Necessarily, therefore, the only legally permissible "methodology" for valuation of a Property Owner's parcel is to value the entire parcel at its highest

and best use and multiply such value by 1/160 (or 1/184) to determine the fair market value of the one-acre home site. Then, for greenbelt purposes, the entire parcel must be valued according to its agricultural use and the aggregate must then be multiplied by 159/160 (or 183/184 as the case may be). Stated simply, valuing a Property Owner's parcel in any other manner violates the Utah Code and is a clear legal error.

ARGUMENT

I. THE TAX COMMISSION'S BRIEF MISREPRESENTS THE PRIMARY ISSUE BEFORE THIS COURT AS AN ISSUE OF FACT, WHEN THE PRIMARY ISSUE IS AN ISSUE OF LAW.

A. Statement of the Case

The Tax Commission's "Statement of the Case/Statement of Facts" essentially repeats and is not inconsistent with the Property Owners' "Factual Background and Chronology," as stated in the Property Owners' opening brief. In summary, the Property Owners' appeals to the Tax Commission arose from Wasatch County's "rollback tax" assessments for tax year 2006, which assessments Wasatch County issued to each Property Owner of a legally indivisible 160 acre platted lot at Wolf Creek Ranch in Wasatch County. The Property Owners' home and other building improvement assessments are not at issue. The sole issue is the valuation assessment of the land underneath the home.

The "rollback" tax assessments were and are authorized under the Utah Farmland Assessment Act, specifically Utah Code Ann. § 59-2-506, which

imposes a tax on the “fair market value” of land withdrawn from “greenbelt,” retroactive for five years. This “rollback tax” was imposed when a Property Owner withdrew an acre (or less) of the Property Owner’s lot at Wolf Creek Ranch from “greenbelt” for construction of certain improvements, typically a home.

The Wolf Creek Ranch subdivision is an approved, platted subdivision in Wasatch County. In each instance, the one (or less) acre of land disturbed for improvement, and hence withdrawn from “Farmland Assessment” or “greenbelt,” is part of a much larger, indivisible 160 acre (or more) platted lot which a Property Owner owns. Wasatch County assessed “rollback taxes” and property taxes on the one (or less) acre improvement site as if the home-site were independent from and could be assessed ignoring the legal and physical indivisibility of the 160 (or more) acre lot within which the one (or less) acre is a part, and as if each of the other 159 acres has only nominal value.

B. An Issue of Law, Not of Fact

The Tax Commission and Wasatch County mischaracterize the sole issue raised in the Property Owners’ Appeals as one of fact (valuation methodology) rather than law (whether the “fair market value” statute permits disregard of zoning laws in assessing property). Proper characterization of the issue raised in the Property Owners’ Appeals as one of law or fact is critical. This is because “in reviewing the Commission’s formal adjudicative proceedings, [the appellate

courts] grant no deference to the Commission's conclusion of law, reviewing them for correctness. Utah Code Ann. § 59-1-610(1)(b)(2006); *see also Kennecott Corp. v. State Tax Comm'n*, 858 P.2d 1381, 1383 (Utah 1993). [The Utah appellate courts] do, however, grant deference to the Commission's written findings of fact, applying the 'substantial evidence standard' on review.' Utah Code Ann. § 69-1-610(1)(a)." *Dennis Mandell v. Auditing Division of the Utah State Tax Commission*, 186 P.3d 335, 339 (Utah 2008).

Both the Tax Commission and Wasatch County attempt to twist the issue presented by the Property Owners' Appeals into an appeal of a valuation methodology, an inherently factual issue, essentially claiming that valuation is an art, not a science subject to rules. In so doing, both the Tax Commission and Wasatch County fail to acknowledge the legal boundaries and constraints the Utah Constitution and the Utah Code impose on valuation methodologies and standards. The Tax Commission and Wasatch County ignore the legal mandate that property tax assessments are required to meet the standards of uniformity and equality set forth in the Utah Constitution, and are required to satisfy the standard of "fair market value, as set forth in the Utah Code. *See* Utah Const, Art. XIII, §2; Utah Code Ann. §§ 59-2-102(12) and 59-2-103(1). The Tax Commission and Wasatch County nonsensically assert that the Tax Commission's adopted valuation

methodology, which violates the Utah Constitution and governing statutes, is an issue of fact, and is therefore entitled to deference.

To the contrary, the Utah Supreme Court has repeatedly held that decisions of administrative agencies, such as the Tax Commission, must accord with governing statutes and the Utah Constitution. Hence, assessment of property in conformity with constitutional and statutory law is not optional, as Wasatch County and the Tax Commission argue. *See, e.g., Crossroads Plaza Ass’n. v. Pratt*, 912 P.2d 961, 965 (Utah 1996)(“It is a longstanding principle of administrative law that an agency’s rules [and/or valuation methodology] must be consistent with its governing statutes. . . Further, an administrative rule out of harmony or in conflict with the express provisions of a statute would in effect amend the statute”). In this case, the Tax Commission Decision ignores and violates, rather than accords with, governing law, and therefore it is particularly specious to argue that such is entitled to deference.

The valuation methodology adopted in the Tax Commission Decision assumes applicable zoning ordinances on the subject property do not exist. Disregard of zoning ordinances applicable to the property being valued is not simply an optional valuation methodology entitled to deference. Exactly the opposite is true. The statutory definition of “fair market value” expressly provides that the applicable zoning restrictions and constraints must be applied in

determining value. In the present case, the zoning laws and ordinances applicable to Property Owners' Wolf Creek Ranch lots do not permit the sale, conveyance or separation of a one-acre home site from the other 159 acres that constitute the legally platted 160 acre lot. Accordingly, there is no legally permissible way to determine the "fair market value" of the 160 acre lot other than on an equal per acre (or pro rata) basis. Each and every acre in the single and legally indivisible lot must have a "fair market value" equal to each and every other acre as a matter of law. No higher assessed value can be concentrated on any single acre, as the Tax Commission has unlawfully done. *See* Petitioner Brief, p. 23.

C. The Tax Commission's Illegal Valuation Methodology

The Utah Supreme Court has further held that "all property shall be valued, for the purposes of assessment, as near as is reasonably practicable, at its full cash value; in other words, that the valuation for assessment and taxation shall be, as near as reasonably practicable, equal to the cash price for which the property valued would sell in the open market, for this is doubtless the correct test of the value of property." *Alliant Techsystems, Inc. v. Salt Lake County Bd. of Equalization*, 110 P.3d 691, 698 (Utah 2005). In other words, property must be assessed at "fair market value."

As noted in the Summary of Argument section of this brief, both the Tax Commission's Brief and Wasatch County's Brief ignore the "fair market value"

statute by assuming fair market value is solely a factual determination entitled to deference. Yet by its plain language, the “fair market value” statute establishes the mandatory legal framework in which all real property in Utah must be valued and assessed. The “fair market value” statute, Utah Code Ann. § 59-2-102(12), defines “fair market value” as:

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.

(Emphasis added.)

Note that the “fair market value” statute is based upon an exchange value of the property at issue. In this case, it is indisputable that the “current zoning laws applicable to the property in question,” specifically that the minimum lot size is 160 acres categorically preclude the sale of one acre subdivisions of the lot. Any sale or exchange (hypothetical or actual) can only be of the entire 160 acre platted lot. Hence, in valuing a single acre of the indivisible 160 acre platted lot, these mandatory zoning laws must be recognized and cannot be violated in determining

the “fair market value” of one indivisible part of the 160 acres in a Wolf Creek Ranch lot.

The Tax Commission states that “the one-acre home site within the parcel must be separately valued under the FAA [Farmland Assessment Act], because the one-acre home site is no longer eligible for Farmland Assessment.” Tax Commission Brief, p. 12. While such statement is true as a general proposition, it is misleading in this case. The fair market value of the one-acre home site must be valued in accordance with its highest and best use at “fair market value,” which can be no different than the highest and best use of the entire indivisible parcel of which the one acre is a 1/160th part. The undisturbed 159 acres of the indivisible parcel likewise have the same highest and best use. The fact that the 159 acres are subject to the Farmland Assessment Act does not change their highest and best use and associated fair market value. Application of the Farmland Assessment Act simply means that 159 acres of the indivisible lot will be taxed in accordance with its agricultural use value, not its highest and best use value. . The significance of that indisputable legal premise is that while a separate value must be identified for the one-acre home site as compared to the remaining acreage, this does not mean that the one acre portion of the parcel (taxed in accordance with its highest and best use) and the remaining 159 acre portion of the parcel (taxed in accordance with its

agricultural use) can somehow be valued independently by assuming that they are legally divisible, as the Tax Commission and Wasatch County argue.

Both the Tax Commission and Wasatch County misinterpret the term “separately valued” as meaning that the one-acre home site must be valued independently from the indivisible whole, by assuming and comparing the one-acre home site to incomparable one-acre home sites that are legally separate and divisible. Such interpretation violates the Utah Constitution, the Utah Code and the purpose of the Farmland Assessment Act. This interpretation ignores applicable zoning law and values certain rights that the Property Owners’ do not possess--the right to subdivide and further develop the parcel. Because no Property Owners’ parcel can be legally subdivided or further developed, it is clear that the one-acre home site does not have a value independent of the remaining acreage and visa versa. The “hypothetical sale between a willing buyer and a willing seller” upon which the Tax Commission Decision is supposedly based is legally impossible and surely is beyond an appropriate valuation methodology within which the Tax Commission may exercise its discretion.

Both the Tax Commission and Wasatch County misconstrue Utah Code Ann. §59-2-507(2), which provides:

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 Ann. §59-2-507(2) (emphasis added).

Both the Tax Commission and Wasatch County interpret this statute to mean that land withdrawn from agricultural use can be valued as if such land was separate and distinct from the parcel of which it forms a part. Noticeably absent from the plain language of the above quoted statute is any language providing authority to treat withdrawn land as an independent stand-alone parcel in valuing such withdrawn land. Indeed, the plain language of Utah Code Ann. §59-2-507(2) unequivocally mandates that withdrawn land must be valued, assessed and taxed using the same standards, methods and procedures that apply to other land in the county. Therefore, unless Wasatch County's usual assessment and valuation method is to ignore and violate zoning laws in assessing property, the one-acre home site cannot be treated as a stand-alone parcel for purposes of valuation and assessment.

Further, Wasatch County argues that the Farmland Assessment Act and the "fair market value" statute are inconsistent. While, as demonstrated above, such argument is demonstrably false, if there is any ambiguity or inconsistency between Utah Code Ann. §59-2-102(12) (requiring that fair market value be determined in accordance with existing zoning laws) and Utah Code Ann. 59-2-507(2) (requiring

that land excluded from assessment under the Farmland Assessment Act is valued using the same standards, methods, and procedures that apply to other taxable structures), then such ambiguity or inconsistency must be construed in favor of the taxpayer, in this case the Property Owners.

This is because the Farmland Assessment Act is not a tax exemption statute, but, as the Utah Supreme Court has held, is a tax imposition statute. *Wasatch Bd. Equalization v. State Tax Comm.*, 944 P.2d 370, 373 (Utah 1997). While it is true that the Farmland Assessment Act does provide for preferential tax treatment, it clearly does not exempt the Property Owners from property taxes. Indeed, the Farmland Assessment Act, including the provisions related to rollback taxes, impose a property tax, which is calculated in accordance with the land's agricultural use value.

In Utah, "our practice is to construe taxation statutes liberally in favor of the taxpayer, leaving it to the legislature to clarify an intent to be more restrictive if such intent exists." *Salt Lake County v. State Tax Comm'n*, 779 P.2d 1131, 1132 (Utah 1989). While it is true that the Farmland Assessment Act does provide preferential tax treatment for land that qualifies for agricultural use, the Act clearly cannot and does not undermine the "fair market value" statutory and constitutional standard for assessing property in Utah.

Moreover, the Tax Commission's and Wasatch County's interpretation of the term "separately valued" distorts both the law and the facts. Initially, the Tax Commission claims that "the Owners do not ask that their parcels be valued at fair market value." Tax Commission Brief, p. 12. That is a misrepresentation of the Property Owners' position, which is precisely the opposite. It is the Tax Commission and Wasatch County, and not the Property Owners, which seek to have the building envelope or a portion thereof valued as a separate parcel that does not and cannot exist, in violation of the "fair market value" statutory mandate.

To justify its disregard of applicable zoning laws, which preclude the divisibility of an indivisible 160 acre platted lot, the Tax Commission initially argues that when land, in this instance one acre of a legally indivisible 160 acre lot, is withdrawn from application of the Farmland Assessment Act, Utah Code Ann. § 59-2-503, the withdrawn land is subject to a "rollback tax." *Id.* at 13. The Property Owners do not dispute that initial premise. Both the Tax Commission and Wasatch County attempt to confuse the issue because "rollback taxes" are not relevant to this appeal.

From that undisputed point, the Tax Commission claims that "[S]ince the home site is only a small portion of the parcel, its value must be separately identified." *Id.* That is a misleading statement. The Tax Commission misstates the issues to be decided by falsely assuming the one acre lot in question is a separate

lot, and not an indivisible part of a legally indivisible lot. Quoting *Board of Equalization Salt Lake County v. Benchmark*, 864 P.2d 882 (Utah 1993), the Tax Commission notes that “Section 59-1-103(1) contemplates nothing more than a hypothetical sale to a hypothetical buyer.” *Id.* at 14. Assuming a hypothetical buyer, however, does not and cannot mean that the Tax Commission is at liberty to assume away the mandatory zoning ordinances applicable to all Wolf Creek Ranch lots. Moreover the “hypothetical sale” must be one that can legally occur in the real world. There is absolutely no language or even an implication in the Farmland Assessment Act to the contrary.

For example, if a parcel of property is zoned for residential use only, but such property’s highest and best use is a commercial use, it is indisputable that a county cannot ignore such zoning restriction and value such property in accordance with its commercial use. This is precisely what the Tax Commission has done in this case. The Property Owners’ do not have the right to subdivide their property because it is zoned P-160, yet the Tax Commission has valued the right to subdivide the 160 acre platted lot and in doing so is impermissibly valuing rights that the Property Owners do not possess, and, in effect, devaluing the other inseparable acres, which the Property Owners testified was the primary motivation for their purchase of the 160 acre lot.

Neither of the “Determinative Statutes” the Tax Commission lists in its Brief, specifically Utah Code Ann. § 59-2-507(1) and (2), which itemize the identifiable characteristics of agricultural use, authorize a disregard of the “fair market value” statute and its requirement that applicable zoning ordinances must be applied in valuing land withdrawn from agricultural assessment. Neither is there any language in the “rollback tax” statute, Utah Code Ann. § 59-2-506, which is not applicable to this appeal, that authorizes a disregard of the “fair market value” statute. The “rollback tax” statute simply provides that any change in land use or other withdrawal of land from agricultural use valuation subjects the land to the “rollback tax.”

A hypothetical sale, which the Utah Supreme Court has recognized as standard appraisal methodology, does not permit hypothetical disregard of mandatory zoning laws. Nor can a legitimate hypothetical sale be a sale that is legally impossible or impermissible. That is why the Tax Commission’s Decision is fundamentally flawed. As Law Professor David Thomas, whose expertise is property law, testified, “Here [in this case] the essential relevant [and undisputed] fact is that the only transaction possible between a willing buyer and a willing seller is for the entire 160-acre tract. This land cannot be separated from or treated differently from the rest of the 160-acres.” Thomas Report, R. at 000876.

II. THE TAX COMMISSION'S BRIEF AND WASATCH COUNTY'S BRIEF FURTHER DISTORT THE FACTS BY CLAIMING THERE WAS INSUFFICIENT EVIDENCE TO VALUE ONE ACRE AS AN INDIVISIBLE PART OF THE WHOLE.

The Tax Commission begins the second major argument of its brief by stressing that the choice of valuation method, and “the resulting determination of market value is a question of fact” to which this Court must give deference. Tax Commission Brief, p. 17, quoting *Beaver County v WilTel, Inc.*, 995 P.2d 602 (Utah 2000). Similarly, Wasatch County attempts to characterize the allocation of value to the one-acre home site and the remaining acreage as merely a choice of valuation method. While it is true that the choice of a valuation methodology involves a factual determination, that determination, as conclusively proven in the Property Owners’ Argument I above, must be within the legal constraints of the “fair market value” statute, which the Tax Commission has ignored.

Again, Wasatch County misstates the issue presented by the Property Owners’ Appeals by stating that, “the Petitioners’ arguments for a *pro rata* allocation are factually barred.” Wasatch County Brief, p. 19. The Property Owners’ are NOT arguing that the Tax Commission should have selected a different valuation methodology than the one chosen. Rather the Property Owners’ assert that the Tax Commission committed legal error by assuming for purposes of valuing the one-acre home site that the parcels are legally separate and divisible, which is in direct contravention of existing zoning laws.

Further, because the parcels are legally indivisible and under Utah law this fact cannot be merely hypothesized away, the only legally permissible manner by which to determine the value of the one-acre home site and the remaining acreage is by valuing the **entire** 160 acre parcel in accordance with its highest and best use and multiply such value by 1/160 (or 1/184 as the case may be) to determine the fair market value of the one-acre home site. Then, for “greenbelt” purposes, the **entire** parcel must be valued according to its agricultural use and such value must then be multiplied by 159/160 (or 183/184 as the case may be). Stated simply, valuing the Property Owners’ parcels in any other manner violates the Utah Code and represents a clear legal error.

The Tax Commission then claims it “allocated the fair market value of the parcel based upon the known characteristics of the one-acre home site.” *Id.* at 18. That is a demonstrably false claim. The Tax Commission does recite some (although largely irrelevant) facts, such as the “evidence showed that properties [are] subject to a conservation easement or properties with no building rights and limited to recreational or agricultural use had lower value than properties with building rights.” *Id.* However, the Tax Commission never mentions the indisputable fact that the building rights in the 160 acre lot do not exist absent the legally inseparable acreage of the other 150 acres upon which nothing can lawfully be built. Nor can the so-called 10 acre building envelope be separated or sold

independently from the non-buildable acres. Rather the Tax Commission, assuming a legal and factual fiction, concentrates the undisputed value of the 160 acre platted lot on the 10-acre building envelope, including the one-acre building site because the Tax Commission, again in disregard of the evidence, apparently concludes that building envelopes are always more valuable than non-building envelopes. The only disagreement between the Tax Commission and Wasatch County on this point is that the Tax Commission allocated 65% of a \$1.3 to \$1.8 million lot value to the 10 acre building envelope, whereas Wasatch County allocated solely to the one (or less) acre upon which the home was built.

Economist Dr. Robert Crawford testified “for comparability [valuation methodology purposes] using a 1 acre whole/piece as a comparable for a 1 acre moment/part to estimate its ‘market value’ is invalid, since by design, the subject part is purposely, and distinctly not comparable to any similarly sized saleable whole [the indivisible 160 lot].” Crawford Expert Witness Report, p. 3, Record 000862. Dr. Crawford’s testimony was uncontradicted. Stated simply, the 150 acre portion of the 160 acre parcel does not and cannot have a value independent of the 10 acre portion of the 160 acre parcel and visa versa.

In essence, both the Tax Commission and Wasatch County urge this Court to adopt a valuation methodology that is inconsistent with Utah law and the Utah Constitution. If some properties within the state are required to be valued in

accordance with existing zoning laws, while others can be valued by hypothesizing such zoning laws away and incorporating into such valuations the value of intangible rights which the property owner does not possess, then clearly property within the state will not be valued at a uniform and equal rate. Such a scenario clearly violates the statutory definition of “fair market value” and Article XIII, Section 2 of the Utah Constitution. Therefore, the only legally permissible manner of valuing different portions of the Property Owners’ parcels is as set forth above.

III. WASATCH COUNTY, RATHER THAN DEMONSTRATING THAT THE TAX COMMISSION DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, INAPPROPRIATELY URGES THIS COURT TO REWEIGH THE EVIDENCE IN ITS FAVOR.

Wasatch County’s Cross-Appeal fails to marshal the evidence in support of the Tax Commission Decision. Instead Wasatch County attempts to persuade this Court there was substantial evidence in support of the County’s argument, which the Tax Commission rejected, that the value of the building and development rights on each parcel migrates to the one-acre home site, rather than the ten-acre building envelope.

The Property Owners stress that in the event this Court rules in the Property Owners’ favor with respect to their Appeals, which must occur if the Court applies Utah Code Ann. §59-2-102(12) in accordance with its plain language, the County’s paramount issue - whether the Tax Commission Decision is supported by substantial evidence - becomes moot. The arguments that the Property Owners

here present under Argument III in this brief in opposition to Wasatch County's cross-appeal are made in the alternative.

Under the substantial evidence standard of review, this Court will uphold the Tax Commission's factual determinations so long as there is sufficient evidence to support its findings. *See County Bd. of Equalization v. Stichting Mayflower Recreational Fonds*, 2000 UT 57, ¶ 11, 6 P.3d 559. This Court, when reviewing agency decisions, does not reweigh the evidence, nor substitute its conclusions for that of the agency. *See Questar Pipeline Co. v. Utah State Tax Comm'n*, 850 P.2d 1175, 1178 (Utah 1993). Further, this Court will not disturb an agency's findings simply because another conclusion can be drawn from the evidence. *See Whitear v. Labor Comm'n*, 973 P.2d 982, 984 (Utah Ct.App.1998).

As applied to Wasatch County's cross-appeal, Wasatch County fails to establish that the Tax Commission Decision was not supported by substantial evidence. As demonstrated below, the Tax Commission Decision, albeit a decision violative of Utah law, was in conformity with the evidence. On the other hand, Wasatch County urges this Court to substitute its own conclusions from such evidence. Clearly, reweighing evidence and substituting conclusions is not the task before this Court. Therefore, Wasatch County's cross-appeal must be denied.

IV. WASATCH COUNTY FAILED TO MARSHAL THE EVIDENCE, WHICH IS SUBSTANTIAL, SUPPORTING THE TAX COMMISSION DECISION.

Wasatch County failed to satisfy its marshalling duty by failing to present substantial evidence, which supports the Tax Commission Decision. To satisfy the marshalling duty:

Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists."

Utah R. App. P. 24 (Advisory Committee Note) (citations omitted).

The Tax Commission Decision, which held that 65% of the value of the parcel attached to the ten-acre building envelope, is supported by the following evidence, which Wasatch County omits from its Brief:

1. Each of the Property Owners' parcels contained a ten-acre building envelope. (R. at 1426-1432).
2. Wasatch County's witness, Blaine Hales, testified that he valued the building rights in determining the value of the one-acre home site. Id.
3. The building rights, that allegedly justified attaching a higher value to the ten-acre portion of the parcel, attached not just to the one-acre home site, but rather to the ten acre building envelope. (Id.; R. 001371)

The factual determination that forms the basis of Wasatch County's cross-appeal is that it was improper for the Tax Commission to allocate 65% of the value of the entire parcel to the ten-acre building envelope on each parcel, rather than solely to the one-acre home site. The Tax Commission Decision states:

From 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 building 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.

(R. 000064).

This essential factual finding, which forms the sole basis of Wasatch County's cross-appeal, is supported by substantial evidence presented by Wasatch County's own witnesses. Rather than attempt to present such evidence, Wasatch County instead elects to ignore it completely and urges this Court to adopt Wasatch County's position, which was not even supported by Wasatch County's own witnesses at the hearing.

For example, Glen Burgener, the Wasatch County Assessor, testified as follows:

Mr. Burgener: In going over it, talking as a group about the effects of the conservation easement and development rights and the 10 acre area of disturbance, and the conclusion was that the value – the bulk of the value should be in the area that can be disturbed...

(R. 001371)

Mr. Burgener did testify further that he would allocate the bulk of value to the one-acre home site, but could provide no justification for doing so. (R. 001371-001373).

Mr. Hales, another Wasatch County Witness, when questioned by the Tax Commission testified as follows:

(Tax Commissioner Marc Johnson) Mr. Johnson: Okay great. Now did – as I listened to your testimony and – um – perused your appraisal, you looked at one acre and 159 acres. You didn't look at the 10 acre envelope.

Mr. Hales: You know, if it would have been my choice, I probably would've gone with 10 acres and said one, but the county [Wasatch County] told me that their standard was one acre. And so—

Mr. Johnson: Okay.

Mr. Hales: I wanted to be consistent with what the assessor had been doing.

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

Mr. Hales: Well, I probably would have chosen a little bit larger parcel. But it's so difficult because with the assessment, to know, if they put a barn on it to know – you can't – ...the county's decision to go with one acre was fine with me.

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

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

Mr. Johnson: ...don't let me force words into your mouth, but it appears to me you would not have appraised a one acre parcel of land, would that be correct?

Mr. Hales: I think that's correct. I think neither one of us actually appraised a one acre parcel. Both parties were trying to come to what hopefully what would be a reasonable allocation for that component of property.

Mr. Johnson: So you've allocated value to one acre of land?

Mr. Hales: With the building rights included.

Mr. Johnson: So this – these are my words – you are essentially allocating one of the sticks in the bundle of rights to an acre of land?

Mr. Hales: Those would be my words too.

(R. 001445-001450).

Mr. Hales, Wasatch County's own witness, testified that in attempting to value the one-acre home site, he valued the building rights and the building rights increased the value of the one-acre home site. It is undisputed that the building rights attach to the entire ten-acre building envelope. There was no testimony or

other evidence explaining why the value of the building rights should be allocated to a single acre, when up to ten acres of land (the building envelope) are available for buildings and improvements. When questioned, Mr. Hales testified that, “You know, if it would have been my choice, I probably would’ve gone with 10 acres and said one, but the county [Wasatch County] told me that their standard was one acre. And so” *Id.*

Curiously Wasatch County did not think any of this testimony provided any evidentiary support for the Tax Commission Decision, and therefore failed to even to present it. The testimony of Wasatch County’s own witnesses at the Tax Commission hearing repudiate Wasatch County’s appellate brief before this Court.

Clearly, it is undisputed that the building rights, which formed the sole basis for disproportionately valuing the ten-acre building envelope, attached to all ten-acres of the building envelope, not just the value of the one acre (or less) home site. Moreover, Wasatch County provided no evidence justifying the allocation of the value of such building rights to a single acre. The Tax Commission based its Decision solely on Wasatch County’s Witnesses and evidence, which indeed provided substantial evidence in support of the Tax Commission’s Decision.

Wasatch County failed to marshal the evidence presented above, failed to demonstrate that the Tax Commission Decision was not supported by substantial evidence, but rather merely argues that this Court should reweigh the evidence in

its favor even though there was no evidence presented to support its position that the entire value of the building rights attached to the one-acre (or less) home site. For these reasons Wasatch County's cross-appeal must be dismissed.

V. **WASATCH COUNTY FURTHER ARGUES THAT IT WAS SUBSTANTIALLY PREJUDICED BY THE TAX COMMISSION DECISION, WHEN IN FACT IT IS THE PROPERTY OWNERS WHO WERE SUBSTANTIALLY PREJUDICED.**

Wasatch County argues it was substantially prejudiced because the Tax Commission Decision "artificially reduces the value of the homes sites" thereby improperly shifting the property tax burden among the population. Wasatch County's argument is inappropriate and ignores reality. The effect of the Tax Commission Decision is to improperly shift value from the 159 acre part of a lot at Wolf Creek Ranch subject to the Farmland Assessment Act to the one-acre home site, which home site is not subject to the Act. The true effect of Wasatch County's improper shift is to artificially increase the property tax burden imposed on the Property Owners, and thereby violate the fundamental purpose of the Farmland Assessment Act. The Farmland Assessment Act is intended to slow development, and prevent the loss of farm land by imposing a property tax upon land subject to the Act in accordance with its agricultural use value, instead of the prevailing market value. By ignoring existing zoning laws, the Tax Commission Decision shifts the value of the Property Owners' parcels to land that is not subject

to the Farmland Assessment Act, thereby increasing the valuation of such portion of the parcels to 256 times its value.

Wasatch County has not, nor could it legitimately, challenge the Property Owners' eligibility for assessment under the Farmland Assessment Act. Instead Wasatch County seeks to negate the revenue loss caused by the application of the Farmland Assessment Act by attempting to migrate nearly the entire value of the entire 160 acre parcel to the single acre home site not subject to the Act.

Wasatch County is politically free to oppose the Farmland Assessment Act. While Wasatch County may not support the Farmland Assessment Act because it reduces property tax revenues, the purpose of the Farmland Assessment Act cannot be violated by using valuation sophistries to shift the vast majority of the value of a single 160 acre parcel of land from land subject to the Farmland Assessment Act to land that has been withdrawn from agricultural use (not subject to Act).

While it may be Wasatch County's subjective belief that the Property Owners' are not paying sufficient taxes because their parcels are undervalued, Wasatch County's subjective belief is irrelevant to an appropriate adjudication of this Appeal. The Property Owners' parcels must be valued, assessed and taxed in accordance with Utah law. If Wasatch County's subjective belief is that Utah law is unfair in this regard, the County is free to seek relief through legislative amendment, but must do so in the Utah Legislature, not before this Court.

Indeed, if subjective belief were relevant, it is undisputed that the Property Owners each pay more than their fair share of property taxes, if such taxes are compared to the basic benefits each Property Owner receives from Wasatch County. A substantial and undisputed property tax is imposed upon the structures (home and improvements) and each acre of land which each Property Owner owns.

Such property taxes amount to a windfall for Wasatch County as: (1) the Property Owners do not have children in Wasatch County schools; (2) the Property Owners generally do not receive any services from Wasatch County because all services are performed by their home owners' association at the sole expense of the Property Owners, including the original construction and paving of all roads, all repair and maintenance of the roads, all snow removal and keeping the roads open for travel, fire department services (home owner's association has 3 fire vehicles), weed control, full-time security; and (3) the majority of the Property Owners are present in the state for less than few weeks a year. They do not, therefore, use the local roads, benefit from mosquito abatement or Wasatch County facilities, each of which is paid for with property tax revenues.² (R. 001463-001468)

² Mr. Douglas Anderson, the "primary developer" at Wolf Creek Ranch testified at the Tax Commission hearing, "The homeowners association is repairing those [roads] currently [April 21, 2008]. And when they need to be replaced, resurfaced, or taken out and rebuilt, it will be the homeowners association that pays for all of that." Record at 001493.

Correct or not, tax policy is not within the province of the judiciary. Therefore if a change to the tax policy of the state is desired by one or more of the parties to this appeal, such change MUST be sought in the legislature.

CONCLUSION


As a matter of law, the Tax Commission's Decision must be reversed because it violates the statutorily and constitutionally mandated assessment of property at "fair market value," which requires that assessment of property be "determined using current zoning laws applicable to the property in question," Utah Code Ann. § 59-2-102(12), and not in disregard of such laws. The Tax Commission Decision disregards the "fair market value" statute and the zoning laws applicable to the Wolf Creek Ranch parcels because it concentrates value on less than the entire acreage when the applicable zoning laws preclude the sale or exchange of any part or subcomponent of the 160 acre platted lot.

Hence, this Court should reverse the Tax Commission's Decision and require Wasatch County to value the Property Owners' parcels in the only legally permissible manner, which is to value the entire 160 acre platted parcel at its highest and best use and multiply such value by the percentage such portion bears to the total acreage.

The purpose of the Farmland Assessment Act is to slow development and farm loss by taxing land subject to the Farmland Assessment Act in accordance

with its agricultural use value instead of the prevailing market value. The Tax Commission Decision frustrates this purpose by illegally shifting the value of the building rights to a one-acre part of the parcel even though legally a minimum of 160 acres is required in order to have a single home site. In fact, according to the Tax Commission Decision, the one-acre home site has a value 256 times greater than the remaining acreage regardless of the fact that all 160 acres are legally required to have a building right at all. It is clear that Wasatch County does not support the Farmland Assessment Act, but it should not be allowed to do an end around the Farmland Assessment Act by arbitrarily increasing the value of the land withdrawn from the Farmland Assessment Act, all of which is contained within an indivisible platted parcel, to make up for the property taxes its perceives have been lost as a result of the taxation under the Farmland Assessment Act. If Wasatch County seeks to repeal the Farmland Assessment Act, it must seek to do so in the Utah Legislature, not this Court.

DATED this 3rd day of March, 2009.



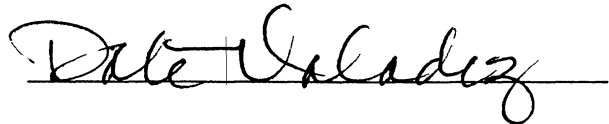
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CERTIFICATE OF MAILING

Pursuant to Utah Supreme Court Standing Order No. 8, I hereby certify that I submitted a courtesy copy of the foregoing **REPLY BRIEF OF PETITIONERS WARREN AND TRICIA OSBORN, ET AL.** on a compact disk in searchable PDF format with the Utah Court of Appeals. In addition, I mailed two true and correct copies of the foregoing brief and a compact disk containing the foregoing brief in searchable PDF format by first class mail, postage prepaid, to the following this 3rd day of March, 2009:

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A handwritten signature in black ink, appearing to read "Dale Valdez", is written over a horizontal line.

DETERMINATIVE STATUTES AND CONSTITUTIONAL PROVISIONS

Utah Constitution Article XIII, Section 2. [Property tax.]

(1) So that each person and corporation pays a tax in proportion to the fair market value of his, her, or its tangible property, all tangible property in the State that is not exempt under the laws of the United States or under this Constitution shall be:

(a) assessed at a uniform and equal rate in proportion to its fair market value, to be ascertained as provided by law; and

(b) taxed at a uniform and equal rate.

(2) Each corporation and person in the State or doing business in the State is subject to taxation on the tangible property owned or used by the corporation or person within the boundaries of the State or local authority levying the tax.

(3) The Legislature may provide by statute that land used for agricultural purposes be assessed based on its value for agricultural use.

(4) The Legislature may by statute determine the manner and extent of taxing livestock.

(5) The Legislature may by statute determine the manner and extent of taxing or exempting intangible property, except that any property tax on intangible property may not exceed .005 of its fair market value. If any intangible property is taxed under the property tax, the income from that property may not also be taxed.

(6) Tangible personal property required by law to be registered with the State before it is used on a public highway or waterway, on public land, or in the air may be exempted from property tax by statute. If the Legislature exempts tangible personal property from property tax under this Subsection (6), it shall provide for the payment of uniform statewide fees or uniform statewide rates of assessment or taxation on that property in lieu of the property tax. The fair market value of any property exempted under this Subsection (6) shall be considered part of the State tax base for determining the debt limitation under Article XIV.

59-2-503. Qualifications for agricultural use assessment.

(1) 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, except that land may be assessed on the basis of the value that the land has for agricultural use:

(i) if:

(A) the land is devoted to agricultural use in conjunction with other eligible acreage; and

(B) the land and the other eligible acreage described in Subsection (1)(a)(i)(A) have identical legal ownership; or

(ii) as provided under Subsection (4); 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.

(2) In determining whether land is actively devoted to agricultural use, production per acre for a given county or area and a given type of land shall be determined by using the first applicable of the following:

(a) production levels reported in the current publication of the Utah Agricultural Statistics;

(b) current crop budgets developed and published by Utah State University; and

(c) other acceptable standards of agricultural production designated by the commission by rule adopted in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(3) Land may be assessed on the basis of the land's agricultural value if the land:

- (a) is subject to the privilege tax imposed by Section **59-4-101**;
- (b) is owned by the state or any of the state's political subdivisions; and
- (c) meets the requirements of Subsection (1).

(4) Notwithstanding Subsection (1)(a), the commission or a county board of equalization may grant a waiver of the acreage limitation for land upon:

- (a) appeal by the owner; and
- (b) submission of proof that:
 - (i) 80% or more of the owner's, purchaser's, or lessee's income is derived from agricultural products produced on the property in question; or
 - (ii) (A) the failure to meet the acreage requirement arose solely as a result of an acquisition by a governmental entity by:
 - (I) eminent domain; or
 - (II) the threat or imminence of an eminent domain proceeding;
 - (B) the land is actively devoted to agricultural use; and
 - (C) no change occurs in the ownership of the land.

(5) (a) Notwithstanding Subsection (1)(b), the commission or a county board of equalization may grant a waiver of the requirement that the land is actively devoted to agricultural use for the tax year for which the land is being assessed under this part upon:

- (i) appeal by the owner; and
- (ii) submission of proof that:
 - (A) the land was assessed on the basis of agricultural use for at least two years immediately preceding that tax year; and
 - (B) the failure to meet the agricultural production requirements

for that tax year was due to no fault or act of the owner, purchaser, or lessee.

(b) As used in Subsection (5)(a), "fault" does not include:

(i) intentional planting of crops or trees which, because of the maturation period, do not give the owner, purchaser, or lessee a reasonable opportunity to satisfy the production levels required for land actively devoted to agricultural use; or

(ii) implementation of a bona fide range improvement program, crop rotation program, or other similar accepted cultural practices which do not give the owner, purchaser, or lessee a reasonable opportunity to satisfy the production levels required for land actively devoted to agricultural use.

59-2-506. Rollback tax -- Penalty -- Computation of tax -- Procedure -- Lien -- Interest -- Notice -- Collection -- Distribution -- Appeal to county board of equalization.

(1) 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 rollback tax imposed in accordance with this section.

(2) (a) An owner shall notify the county assessor that land is withdrawn from this part within 120 days after the day on which the land is withdrawn from this part.

(b) An owner that fails to notify the county assessor under Subsection (2)(a) that land is withdrawn from this part is subject to a penalty equal to the greater of:

(i) \$10; or

(ii) 2% of the rollback tax due for the last year of the rollback period.

(3) (a) 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.

(b) For purposes of this section, the rollback period is a time period that:

(i) begins on the later of:

(A) the date the land is first assessed under this part; or

(B) five years preceding the day on which the county assessor mails the notice required by Subsection (5); and

(ii) ends the day on which the county assessor mails the notice required by Subsection (5).

(4) (a) The county treasurer shall:

(i) collect the rollback tax; and

(ii) after the rollback tax is paid, certify to the county recorder that the rollback tax lien on the property has been satisfied by:

(A) preparing a document that certifies that the rollback tax lien on the property has been satisfied; and

(B) providing the document described in Subsection (4)(a)(ii)(A) to the county recorder for recordation.

(b) The rollback tax collected under this section shall:

(i) be paid into the county treasury; and

(ii) be paid by the county treasurer to the various taxing entities pro rata in accordance with the property tax levies for the current year.

(5) (a) The county assessor shall mail to an owner of the land that is subject to a rollback tax a notice that:

(i) the land is withdrawn from this part;

(ii) the land is subject to a rollback tax under this section; and

(iii) the rollback tax is delinquent if the owner of the land does not pay the tax within 30 days after the day on which the county assessor mails the notice.

(b) (i) The rollback tax is due and payable on the day the county assessor mails the notice required by Subsection (5)(a).

(ii) Subject to Subsection (7), the rollback tax is delinquent if an owner of the land that is withdrawn from this part does not pay the rollback tax within 30 days after the day on which the county assessor mails the notice required by Subsection (5)(a).

(6) (a) Subject to Subsection (6)(b), the following are a lien on the land assessed under this part:

(i) the rollback tax; and

(ii) interest imposed in accordance with Subsection (7).

(b) The lien described in Subsection (6)(a) shall:

(i) arise upon the imposition of the rollback tax under this section;

(ii) end on the day on which the rollback tax and interest imposed in accordance with Subsection (7) are paid in full; and

(iii) relate back to the first day of the rollback period described in Subsection (3)(b).

(7) (a) A delinquent rollback tax under this section shall accrue interest:

(i) from the date of delinquency until paid; and

(ii) at the interest rate established under Section **59-2-1331** and in effect on January 1 of the year in which the delinquency occurs.

(b) A rollback tax that is delinquent on September 1 of any year shall be included on the notice required by Section **59-2-1317**, along with interest calculated on that delinquent amount through November 30 of the year in

which the notice under Section **59-2-1317** is mailed.

(8) (a) Land that becomes ineligible for assessment under this part only as a result of an amendment to this part is not subject to the rollback tax if the owner of the land notifies the county assessor that the land is withdrawn from this part in accordance with Subsection (2).

(b) Land described in Subsection (8)(a) that is withdrawn from this part as a result of an event other than an amendment to this part, whether voluntary or involuntary, is subject to the rollback tax.

(9) Except as provided in Section **59-2-511**, land that becomes exempt from taxation under Utah Constitution Article XIII, Section 3, is not subject to the rollback tax if the land meets the requirements of Section **59-2-503** to be assessed under this part.

(10) (a) Subject to Subsection (10)(b), an owner of land may appeal to the county board of equalization:

(i) a decision by a county assessor to withdraw land from assessment under this part; or

(ii) the imposition of a rollback tax under this section.

(b) An owner shall file an appeal under Subsection (10)(a) no later than 45 days after the day on which the county assessor mails the notice required by Subsection (5).