2003

Mountain Ranch Estates v. The Board of Equalization of Summit County and the Utah State Tax Commission : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

MOUNTAIN RANCH ESTATES, Petitioner/ Appellant v. THE BOARD OF EQUALIZATION OF SUMMIT COUNTY, AND THE UTAH STATE TAX COMMISSION, Respondents /Appellees	REPLY BRIEF OF PETITIONER MOUNTAIN RANCH ESTATES Case No. 20030423-SC

PETITION FOR REVIEW OFTHE UTAH STATE TAX COMMISSION'S FINAL DECISION DENYING PETITIONER'S REQUEST FOR AN ADJUSTMENT IN ITS 2001 TAX VALUATION PURSUANT TO UTAH CODE ANN. § 59-2-1006 (4).

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INTRODUCTION

His players always said the same thing, "Vince Lombardi treats us all the same, like dirt." If the Utah taxing authorities had done even that, we wouldn't be here. If Glenwild had been assessed at ninety five percent of the asking price, like Mountain Ranch Estates, instead of at twenty five percent, the Equalization Act would not apply, nor would the equal protection and uniform taxation provisions of the federal and state constitutions. It is the unequal and preferred treatment of Glenwild that the law addresses, nothing more, nothing less. The entire arguments of both the County and the Tax Commission have badly missed this point.[1]

ARGUMENT

I. ACTUAL SALES AND BONDING DEFINITIVELY ESTABLISH THE MARKET VALUE OF BOTH DEVELOPMENTS.

A. Principles of Market Economics and Testimony of the County's Appraisers Confirm the Determinative Role of Sales in Establishing Market Value.

This is a land value case and, in the absence of special circumstances not present here, the *sina qua non* of market value is the sale prices of the lots themselves. In the final analysis, it is the closing of sales that establishes taxable value.[2] County appraisers testified that sales price is the definitive element for purposes of tax evaluation, and that no specific number of sales is required in order to be determinative. (Testimony of Julianna Viar, R. 275 at 161; Testimony of

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[1] In footnote 1 of its brief the County attempts to place the onus on Petitioner for the absence from the record of the five page decision of the Board of Equalization. Petitioner consequently requests the Court to take notice of the fact that under Utah Rule of Appellate Procedure 11(d) (3) it is the responsibility of the agency to "transmit all papers to the appellate court." In this case, therefore, it was the duty of the Board of Equalization to transmit all papers, including its own decision, to the Tax Commission. Furthermore, the Court has made it clear that "on certiorari we review the decision of the court of appeals not the decision of the trial court. *State ex rel. A.T.* 2001 UT 82, ¶ 5, 34 P.3d 228 (citing *State v. James*, 2000 UT 80, ¶ 8, 13 P.3d 576). Analogously, therefore, in this appeal the Court reviews the decision of the Tax Commission, not the Board of Equalization. Thus, in reviewing the decision of the Tax Commission the court considers only such facts and records as were actually before that agency. Since the Board of Equalization failed to transmit its decision to the Tax Commission that document is not validly part of the record on appeal.

[2] Therefore, to the extent that infrastructure is relevant at all, sales related infrastructure such as entry way, landscaping and utilities for the sales trailer would be most significant. Both the Tax Commission and the County have studiously ignored the evidence that Glenwild was actually ahead of Mountain Ranch on these items. (Testimony of Andrew Shaw, R.275 at 64-66.)

Barbara Kresser, R. 275 at 178-179, 180; Deposition of Steve Martin, P-17 at 22-23, 24.) Supervising Appraiser Steve Martin testified that he would be comfortable switching from "underlying raw ground to more of a sales approach" with "sales that indicated a discount from list to sale price" and that there was no specific recommended percentage or number of sales prerequisite to making that switch. (P-17 at 28-29.)

Such testimony is validated by the 72 Am. Jur. 2d State and Local Taxation § 693 statement that "[g]enerally, the market value provides the most reliable valuation for assessment purposes regarding real property which must, pursuant to statue, be assessed at its full value." An assessor "violated the statute and committed an error of law" when he "did not rely on the sales prices to determine the fair market value of certain older properties," resulting in "dramatically lower" assessment than the value "traded for on the open market" (*Id.* citing *State ex rel. Levine v. Board of Review of Village of Fox Point,* 528 N.W.2d 424 (Wis.1995)).

89 A.L.R.3d 1126 (1979), collects support for the "[v]iew that price paid in fair sale is conclusive evidence of property's value," stating, "[t]he following cases support the proposition that the price paid for real property in a bona fide, arm's-length sale is conclusive evidence of the property's value for tax assessment purposes." *Id.* at II General views § 4. The A.L.R. remarks specifically that "in State ex rel. Lincoln Fireproof Warehouse Co. v. Board of Review (1973) 60 Wis 2d 84, 208 N.W2d 380, 89 ALR 3d 1114, the court indicated that a 'fair sale' of property is conclusive evidence of the fair market value of such property for tax assessment purposes, in declaring that it is error to utilize other evidence of intrinsic value in the assessment." *Id.*[3]

B. The Purchasing Public Demonstrated Confidence in the Bonds Required by the County by Paying Ninety Five Percent Plus of the Listed Prices of the Lots.

[3] Section 5, collecting support for the opposite view, is not applicable here, as it concerns sales too remote in time to be determinative, and special cases where outside factors influenced sale price.

In order to receive plat approval in Summit County a developer must deposit with the County bonds for at least 115% of the projected cost of completion for roads, sewer, water, all other infrastructure and complete amenities. Both Glenwild and Mountain Ranch Estates necessarily complied with this requirement. The fact that before January 1, 2001, Glenwild closed seven sales at more than ninety five percent of the listed price definitively counters the Commission's statement in its discussion that "almost all of the value of the potential selling price was in place for Mountain Ranch Estates . . . but much of the value for the potential selling price of Glenwild was not yet in place on the lien date." (Final Decision p. 10.) The selling price of the bonded Glenwild lots was not potential, but actual and $3,415,250—more than twenty six percent of the raw land purchase price used by the county in erroneously valuing the lots—testifies louder than mere words that full value of the lots was in place on the lien date.

The purchasers of the Mountain Ranch and Glenwild lots, at prices ranging from $155,000 to $712,500, (P-2; P-5), were not neophytes in the market. They were financially experienced and successful individuals, often building their dream home. (Testimony of Andrew Shaw, R.275 at 44, 47, 61.) It is surprising, therefore, that both the County and the Tax Commission have entirely ignored the County's own bonding system and have failed to counter or even acknowledge Petitioner's evidence of its effect on market value. Nevertheless, the sales indicate that for the buyers bonding was as good as completion.

C. Pre January 2001 Sales In Mountain Ranch Estates and Glenwild Were Comparable for Tax Appraisal Purposes.

The record indicates that before the January 2001 lien date Mountain Ranch had sold twelve lots, for a total of $2,317,000 and Glenwild had sold seven lots, for at total of $3,415,250. Petitioner, in its intitial brief, marshaled this evidence for comparative sales.

The difficulty in the instant case arises from the fact that although Glenwild had sold seven lots during the year 2000 appraiser Daugherty was only "aware" of three, and rejected one of those on the basis of his personal opinion. (Testimony of Ted Daughterty, R. 275 at 117, 123, 137.) Comparability must be based on objective fact, not on an individual's subjective awareness or failure to investigate. It was Daugherty's responsibility to know the actual sales in Glenwild and the Tax Commission could not validly base its decision on his ignorance.

Finding # 13 states that "Respondent introduced substantial evidence to demonstrate that the properties are not similar for purposes of being used as comparable sales in an appraisal of subject properties." The only such evidence actually introduced, however, was Daugherty's statement that he "would" still have assessed Glenwild on the basis of raw land value even if he "had known" of the seven sales (Testimony of Ted Daugherty, R 275 at 132-136.) Such after-the-fact testimony is so patently self-serving as to be useless as a source of factual information. Daugherty's remaining testimony on sales focused not on establishing the seven near asking price sales as insufficient, but on attempting to justify Daugherty's rejection of the only three sales which had come to his attention. (R. 275 at 132-136.)

II. ALTHOUGH INFRASTRUCTURE COMPLETION IS NOT DETERMINATIVE OF COMPARABILITY THE INFRASTRUCTURE OF MOUNTAIN RANCH ESTATES AND GLENWILD WAS COMPARABLE ON THE LIEN DATE FOR TAX ASSESSMENT PURPOSES.

In light of the confidence expressed by the purchasing public in the value of Glenwild with completion guaranteed by the bonding, the exact state of infrastructure completion is merely a red herring. If, however, the Court chooses to consider completion, the record supports the position that Mountain Ranch and Glenwild were comparable for tax appraisal purposes.

A. Tax Commission Finding # 7 That There Was Insufficient Evidence to Determine the State of Completion of Glenwild Arbitrarily Rejects the Uncontroverted Evidence.

The County's brief contains the astonishing statements that Mountain Ranch did not "provide sufficient evidence regarding the roads and other infrastructure that may or may not have been completed in the Glenwild subdivision" and thus "failed to marshal the evidence in support [of Finding # 7] and show that in light of that evidence there was a lack of substantial evidence in support of the finding." (County Brief p. 11.)

In point of fact, Mountain Ranch abundantly met its burden of proof below—an entirely separate obligation from the requirement to marshal—by supplying all of the information at its disposal regarding the condition of Glenwild. The record is replete with engineering notes, maps, and detailed testimony including the specifics of the autumn 2000 construction race between the Mountain Ranch and Glenwild paving operations, (P 7; P 13; P 14; P 15; P 16; Testimony of Andrew Shaw, R. 275 at 41, 50, 52-56) and of Shaw's observations of the condition of Glenwild. (R. 275 at 37, 52-53, 54-55, 58-59, 66, 67, 68, 72, 73-75.)

The Tax Commission, however, chose to ignore this evidence and find that it lacked substantial evidence upon which to determine the condition of Glenwild. The Commission acknowledged that "Mr Daugherty was out there in September . . . that's just a short time after [Glenwild] was approved and the information was just not there." Apparently no one else in the office of the County Appraiser was able to supply the information that Daugherty failed to gather. This, however, does not change the fact that Mountain Ranch did indeed meet its burden and supplied virtually all of the definitive evidence in the record on the condition of Glenwild.

Such evidence, by right, should have been supplied by the County's assessor Ted Daugherty, whose business it was to know the condition of the properties he was assigned to assess. Daugherty, however, could only admit that he never visited the property between September and the lien date (Testimony of Ted Daugherty, R 275 at 127-128), despite his

statutory duty under Utah Code Ann. section 59-1-201 (1) to assess the property as of January 1, 2001. Thus, the evidence for non-determinability of the condition of Glenwild was limited to Daugherty's admissions of what he didn't know. For example, Daugherty testified that even when he did visit after the lien date "[the roads] were muddy, you couldn't hardly see the asphalt. In fact, I didn't realize that there was asphalt under there until you brought it to my attention this summer." (R. 275 at 107; *See also* 108-109.) He further testified that "I did not observe what was going on to the point of being able to tell you if sewer lines, water lines, gas lines, and curb and gutter were in place, no," and admitted that he did not check for this information in engineering records. (R. 275 at 128.)

Petitioner did marshal the evidence in support of the non-determinability of the condition of Glenwild by citing extensively to the testimony of appraiser Daughtery, which constituted the total of such evidence. The difficulty of attempting to support a negative, however, is that any relevant positive information overcomes the non-information. The Tax Commission's finding that an evaluation of the condition of the Glenwild infrastructure was impossible was the inevitable consequence of its decision to ignore the substantial evidence presented by Mountain Ranch and consider only the lack of evidence presented by the County. Yet, in addition to the engineering notes indicating substantial work on Glenwild, Andrew Shaw testified under oath as to his experience and personal observations while working in close proximity to Glenwild, installing the same type of infrastructure and often using the same contractor. His reliability as a witness was not challenged. Therefore, the record itself directly contradicts the finding that there was insufficient evidence to determine the condition of Glenwild Phase I.

B. <u>In View of the Commission's Finding That It Could Not Determine the State of Completion of Glenwild, Petitioner is Unable to Marshal the Evidence for non-Comparability of the States of Completion of Mountain Ranch and Glenwild</u>.

Petitioner attacks Findings # 7 and #14 that the two developments were "at different stages of completion" as of the lien date. However, the Commission's rejection of the only determinative evidence for the state of completion of Glenwild and its consequent finding that the condition of the Glenwild infrastructure could not be determined leave Petitioner without one wing of the evidence necessary to marshal support for non-comparability. By all the rules of logic once the Tax Commission found that it could not determine the condition of Glenwild, it had no basis upon which to evaluate comparability. Neither can Petitioner marshal the evidence for a finding necessarily based on foundational evidence that the Tax Commission found did not exist and which the positive evidence in the record contravenes.

Petitioner also attacks Finding # 14 that "Glenwild was not sufficiently developed for building permits to be issued and construction to be commenced therein." The evidentiary problem, however, spills over into the issue of building permits. Without other evidence of state of completion, the only evidence that Glenwild was insufficiently complete for the issue of building permits would be the absence of the permits themselves.[4] Similarly, the only evidence for insufficient completion to allow construction would be the actual lack of construction. Since four building permits were, in fact, issued within Glenwild, and construction did begin, Petitioner once again finds itself without evidence to marshal in support of the finding. Finding #14 refers only to "building permits," not "residential building permits." To Petitioner's knowledge, it has no obligation to extend the language of the finding to "residential" building permits as the County would seem to demand.

C. Petitioner Has Marshaled Such Evidence as Is Found in the Record for the Remainder of the Tax Commission Findings on Completion that It Has Attacked.

[4] Even this would not be definitive without evidence that permits had been applied for and denied since builders might logically have been withholding applications for the building season regardless of the completion of the lots.

1. The Record Contains No Specific Evidence in Support of Tax Commission Finding # 3 that the Construction on "Curb, Gutter, Street paving, Telephone Lines, Electricity Lines, Gas Lines, and Cable Television Lines" Was "Substantially Complete By the End of the Year 2000."

The County's brief misconstrues both Finding # 3 and the cited evidence. (County Brief at p. 8.) The finding states that "improvements included curb, gutter, street paving, telephone lines, electricity lines, gas lines, and cable televisions lines" and that the "construction in *those items* was substantially complete by the end of the year 2000." (Emphasis added.) Petitioner attacks the finding as stated—that all of the items, not some few of them, were substantially complete by the end of the year 2000.

The County, in contrast, ignores the cumulative nature of the finding, focuses exclusively on the paving operations and misinterprets the record. Petitioner is required to marshal the evidence for the finding as stated and as attacked, not as interpreted by the County. In the record cites supplied by the County Andy Shaw did not testify that the subdivision was "substantially complete by the fall of 2000" (Brief of the County at p. 8) He testified rather that on the "lien date, there were a lot of things that weren't done. . . . the majority of our roads were paved. You, of course do two lifts, some had two lifts, some only had one. . . . we had our concrete curb and gutter in, we didn't have sidewalk in." (Testimony of Andrew Shaw, R. 275 at 56.) Shaw's testimony cited by the County at R. 275 page 58 does not even concern Mountain Ranch, but recounts a Christmas marketing party held at Glenwild. The County misleadingly cites only "we were substantially complete" from Shaw's statement recorded on pages 60 and 61 that "we were substantially complete *with the asphalt paving.*" (Emphasis added.) Neither do the statements regarding completion on pages 86 and 87 address any of the Commission's list of improvements other than paving. Julianna Viar's testimony at R. 275 page 164 is also limited to the condition

of the paving operation. Viar's testimony cited by the County on pages 167 to168 did not support completion, but on the contrary, discussed an engineering report that "talked about a few things that were still to be put in place." Contrary to the County's representation that "the testimony of Andrew Shaw and Spencer White that no residential building permits could be issued without *complete* infrastructure," (County Brief p. 9) (emphasis added), Shaw actually testified that "neither one of us could get building permits unless we had *paved roads*" (R. 275 at 55) (emphasis added), and that "you had to have water, enough to put out a fire, and you had to have your paved roads."[5] (R. 275 at 61.) Shaw made no mention of the additional elements of infrastructure listed in Finding # 3. Spencer White likewise limited his description of building permit requirements to roads and fire suppression. (Testimony of Spencer White, R. 275 at 205-207.)[6] Moreover, he called even the requirement for paving into question by testifying "I can say just based on my experience that, no, they don't necessarily require the paving to be in." (R. 275 at 220.)

Therefore, neither the County nor Petitioner has discovered support in the record for the Tax Commission's actual Finding # 3, which included not only paving, but also "telephone lines, electricity lines, gas lines, and cable televisions lines" To the contrary, as set forth in Petitioner's initial brief, Andrew Shaw's uncontroverted testimony was that "we didn't have any power, we didn't have any gas, we didn't have any telephone, we didn't have cable T.V., we didn't have the ability to receive mail." (R 275 at 25.) Petitioner did not "fail" to marshal the evidence in support of Finding # 3 but was unable to do so because the record is devoid of such evidence.

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[5] It is interesting to note that the Commission did not find Mountain Ranch to be substantially complete as to water. Evidently sufficient water to suppress a fire does not require final completion of residential water lines and storm sewers to each of the prospective building sites. Andrew Shaw testified that water and sewer were comparable in Glenwild and Mountain Ranch. (Testimony of Andrew Shaw, R. 275 at 55, 56-57.)

2. The Tax Commission's Arbitrary Definition of the Unfinished Elements of Mountain Ranch Estates as "Punchlist" Items Is Without Support in the Record.

The first statement in Finding # 6 and the second statement in Finding # 7 arbitrarily define the substantial elements of Mountain Ranch remaining incomplete as "punchlist" items. Therefore, Petitioner's attack on those findings consists of a challenge to an unsupported legal definition which the Tax Commission invoked by implication.

"Punchlist" is commonly considered to mean a list of minor completions to installed features. Examples include the recaulking of the corner of a room for smooth, uniform appearance, the leveling of a rooftop air condition unit, and the sealing of a condenser pipe penetration through a roof. *Interiors Contracting, Inc. v. Smith, Halander & Smith Associates* 827 P.2d 963, 966 (Utah App.,1992). There is no evidence in the instant case that the work remaining on, *inter alia,* electricity, gas, telephone or cable TV was limited to minor items, or that "all major items of work" on the contract "[had] been satisfactorily completed." *Id.* at 964. The record, rather, indicates substantial incompletion. Even by summer 2001 the homes for which the two building permits had been issued in Mountain Ranch "literally . . . were building off a Honda generator." (R. 275 at 65.) Andrew Shaw himself made the distinction, testifying "we had a punch list even mid, this summer, you know, in 2002 I had a four page punch list of stuff that still had to be done, a bunch of little details of things." To the question "[t]he main things that weren't done are the ones you've already listed?" he responded affirmatively.

III. PETITIONER HAS DILIGENTLY MARSHALED THE EVIDENCE IN SUPPORT OF THOSE TAX COMMISSION FINDINGS THAT: 1) PETITIONER HAS ATTACKED; AND 2) FOR WHICH EVIDENCE CAN BE FOUND IN THE RECORD.

In *Beaver County v. Utah State Tax Commission,* 916 P.2d 344, 355-56 (Utah 1996) the Utah Supreme Court stated that a petitioner must "marshal all of the evidence supporting the findings and show that despite the supporting facts and in light of the conflicting evidence, the findings

are not supported by substantial evidence." This requirement must be understood to be limited to evidence in support of findings that: 1) a petitioner has actually attacked; 2) for which there is evidence to marshal.

A. Petitioner Need not Marshal Evidence in Support of Findings that It Has Not Attacked.

Petitioner does not contest the factual determinations in Finding # 13 that Mountain Ranch and Glenwild are "deemed to be in different neighborhoods" and have different characteristics listed by the Tax Commission as the three-phase nature of Glenwild and the differences in amenities. Petitioner maintains that "deemed" is a vague and inconclusive term, and that location in different but closely adjacent neighborhoods does not defeat comparability—a legal issue[7]—but does not attack the finding of different neighborhoods. As to the phased nature of Glenwild and the disparity in amenities, Petitioner attacks the legal relevancy of these to tax appraisal but not the findings themselves.

Petitioner stresses that the Finding # 14 statement that the "properties in Glenwild also have different zoning than do the properties in Mountain Ranch Estates," is misstated, as the Tax Commission acknowledged (Tax Commission Brief p. 12 nt. 3), and the actual zoning requirements were, in fact, identical. Assessor Spencer White confirmed that with respect to zoning requirements the developments could have been built interchangeably in either location. (Testimony of Spencer While, R.275 at 214-215.) To the question "is the matrix for development density, open space amenities, bonuses, exactly the same for the two neighborhoods?" he responded "[t]hey appear to be identical, yes." (R. 275 at 217-218.) Finding # 8 is simply an accurate description of the method used to value Glenwild, yet the County goes

[7] Petitioner asks the Court to note that Respondents have offered neither legal authority nor argument in support of the assumption that comparable properties need always be located in the same neighborhood. The Court ruled to the contrary in *Alta Pacific Associates, LTD., v. Utah State Tax Comm'n*, 931 P.2d, 103, 112 (Utah 1997) allowing the Board of Equalization go outside not only the neighborhood, but the entire town, in search of a comparable property.

so far as to infer a marshaling requirement for a finding that the County evidently feels that Petitioner should have attacked, but has not. (County Brief p. 16.)

Such complaints are misleading to the Court, as Petitioner has no obligation to marshal evidence supporting any factual finding that it accepts. Moreover, a legal challenge to the relevance of such findings does not trigger the requirement to marshal. Petitioner has conscientiously marshaled the evidence in support of the findings that it has actually attacked, to the extent that the record contains such evidence.

B. Unproven Differences in Topography Are Legally Irrelevant to Tax Appraisal .

Apparently relying on the stricken testimony of assessor Ted Daugherty, Finding # 14 states that "Mountain Ranch is at least 500 feet lower in elevation than is Glenwild." (Final Decision p. 6.) Both the County and the Tax Commission conceded in their briefs that this finding was in error and the Tax Commission also acknowledged that the finding regarding topography "is not determinative" of comparability. (Tax Commission Brief p. 12.) Nevertheless the County backpedals by "direct[ing] the Court to the general statements of Mr. Daugherty which were not stricken, (R 275 at 150) and others regarding the general topography." (County Brief p. 14.)

Petitioner marshaled the evidence in support of the topographical differences, citing to the testimony of Glenwild assessor Daugherty, who admitted that he had never seen Mountain Ranch. However, "general" statements of someone who as never been to nor seen an area fall short of substantial evidence, as do the leading statements of County Attorney Jami Brackin, which cannot qualify as testimony and which Andrew Shaw emphatically refuted . (Testimony of Andrew Shaw, R. 275 at 78-81.) Other general statements refer irrelevantly to the topography within the two entire planning districts containing the developments. (Testimony of Spencer White, R. 275 at 202-203.) Such statements are not evidence subject to marshaling because the

issue before the Court here is not the comparability of entire planning districts, or even of Mountain Ranch and all of Glenwild. This case is strictly limited to the comparability between Mountain Ranch and Phase I only of Glenwild.

All of this, however, is beside the point, since both the Tax Commission and the County have failed to show the relevance of minor differences in topography to legal comparability for tax assessment purposes. During the Formal Hearing the Commission's ALJ expressed the conclusion that such factors do not "cause a legal difference." (Closing Arguments, R. 78 at 20.)

IV. TAKEN AS A WHOLE, THE RECORD SUPPORTS COMPARABILITY OF MOUNTAIN RANCH ESTATES AND GLENWILD FOR TAX APPRAISAL PURPOSES IN THE 2001 TAX YEAR.

Whatever the difficulties attending an attempt to marshal evidence in support of findings of non-comparability, the record as a whole contains substantial evidence affirming comparability as specifically illustrated in Petitioner's initial brief, hereby incorporated by reference. Petitioner notes that both the Tax Commission and the County have failed to address Petitioner's argument that Glenwild's more extensive amenities would not logically justify a lower tax rate, and Petitioner's evidence that completion of all amenities was guaranteed by greater than full price bonding, thus fixing that component of the lot value before the lien date, as witnessed by the near asking price sales. In summary, the two developments: were officially recorded within three months of each other in the year 2000; were located directly across the freeway from each other, in the same geographical[8] and economic area; were subject to the same zoning requirements; were sold to the same market and competed for purchasers; engaged in simultaneous infrastructure construction, even using the same contractors; made substantial progress but were not complete; were bonded to guarantee completion of amenities; received

[8] Andrew Shaw testified that "they're identical. . . . I can look out my back door and see them; they can look out their back door and see me . . . . There's probably not one flat spot of ground in all of Glenwild; there's probably not one flat spot of ground on our property." (Testimony of Andrew Shaw, R. 275 at 48.)

permits to be begin at least some building; and before January 1, 2001, closed sales sufficient to recoup a significant percentage of the raw land purchase price. Therefore, as of the lien date Glenwild fulfilled the Tax Commission's definition of a "residential building lot development[] in the same area that [was] at the same stage of completion and ready for sale, as was the property of Petitioner," and would consequently "be deemed to be the comparable propert[y]." (Final Decision at 11.)

V. THIS CASE CANNOT BE DECIDED UNDER *NELSON V. BOARD. OF EQUALIZATION.*

A. *Nelson* Was a Straightforward Determination of Fair Market Value and Did Not Turn On the Underassessment of Comparable Property.

Contrary to the Tax Commission's erroneous statement, (Tax Commission Brief at p. 20) *Nelson v. Board of Equalization,* 943 P.2d 1354 (Utah 1997) does not involve the same issue presented here and its reasoning is not helpful in applying section 59-2-1006 (4). The *Nelson* court clearly stated that the case "presented a straightforward question of fair market value." *Id.* at 1356. Nelson did not argue that comparable properties had been underassessed but that his own property had been assessed at more than fair market value by comparison. The task of the Court in the instant case, in contrast to *Nelson,* is to examine the statutory and constitutional impact of the discrepancy created by the underassessment of a comparable and directly competing property. This difference strongly distinguishes *Nelson* from the instant case, rendering its reasoning and holding inapposite here, as to both the statutory and constitutional issues.

B. *Nelson* Did Not Address Section 59-2-1006 (4) and Is Therefore Not Dispositive.

Unlike the instant case, *Nelson* did not address the Equalization Act but was limited to examining the assessment of the subject property itself in light of the assessment of various

comparable properties. Therefore, the Court required Nelson, as petitioner, "not only to show substantial error or impropriety in the assessment, but also to provide a sound evidentiary basis upon which the commission could adopt a lower valuation." *Id.* at 1355 (citation omitted).

The instant case, in contrast, turns upon section 59-2-1006 (4), which addresses not the fair market value of the subject property, but the underassessment of comparable property, and provides a statutory remedy. Petitioner here must meet not the *Nelson* test, but instead the statutory requirement to show a five percent deviation in valuation between Petitioner's and comparable properties. The requirement is for the deviation only, and does not extend to a showing of "substantial error or impropriety" in the assessment of either property. *Id.* at 1356 (citations omitted). Once the deviation is shown, the statutory mandate that the assessment of the subject property be lowered to match that of the lower assessed property supplies the basis upon which the commission not only could, but must, adopt a lower valuation. Therefore, the County's arguments relative to the *Nelson* requirement are irrelevant here.

C. Unlike *Nelson* the Instant Case Does Not Present a Choice Among Comparables.

Nelson chose comparables that the Court found less appropriate than those identified by the County. In the instant case, however, the County has attacked the comparability of Glenwild without supplying the Court with details of other comparables. Aside from the County's broad, nonspecific generalizations, the testimony of Andrew Shaw that Mountain Ranch and Glenwild "were the two major projects going on at that time," and there were no other viable comparables (Testimony of Andrew Shaw, R 275 at 82-83) remains entirely uncontroverted.

It is uncontested that Park City and Summit County each host numerous residential building lot developments. (Tax Commission Brief p. 5.) The Tax Commission makes unsupported general reference to "numerous other properties potentially comparable to Mountain

Ranch" and to "properties which are comparable with those of Petitioner for purposes of determining comparability under § 59-2-1004." (*Id.*; Findings of Fact and Conclusions of Law, and Final Decision ("Final Decision") p. 10.) Nevertheless, neither the Tax Commission nor the County has provided even anecdotal evidence of *one single additional property* that satisfies the Tax Commission's own broad statement that "for purposes of [section 59-2-1006 (4)], all residential building lot developments in the same economic area that were at the same stage of completion and ready for sale, as was the property of Petitioner would be deemed to be the comparable properties." (*Id.* at 11.)

Therefore, in summary, unlike *Nelson* the instant case: 1) turns on the underassessment of comparable property rather than the fair market value of the subject property; 2) addresses section 59-2-1006 (4); 3) does not include evidence on alternative or additional comparable properties suggested by the County; and 4) as shown in Petitioner's brief, incorporated here by reference, and summarized below involves specific and particular, rather than merely "anecdotal" evidence "that the similarly situated [] property was assigned a value much lower than [Petitioner's]." (Tax Commission Brief at p. 20.) Consequently, contrary to the County's characterization, the instant case cannot be decided under *Nelson* but must be examined on its own merits as a case of first impression as to the application of section 59-2-1006 (4). The constitutional issues must be decided under the relevant case law addressing underassessment of comparable properties rather than the fair market value of the subject property.

VI. GLENWILD FULFILLS THE SECTION 59-2-1006 (4) DEFINITION OF "PROPERTIES."

As discussed on Petitioner's Brief and above, under the Tax Commission's own definition Glenwild was the only property comparable to Mountain Ranch on the January 2001 lien date. Although Andrew Shaw's testimony discussed other properties in Summit County, his

repeated conclusion was that as comparables Mountain Ranch and Glenwild stood alone. (Testimony of Andrew Shaw, R. 275 at 82-84.) Contrary to the Tax Commission's interpretation (Tax Commission Brief p. 5) Shaw did not decide to focus on the dramatic undervalution of Glenwild to the exclusion of other actual comparables. Observation of the potentially comparable properties had already convinced him that none but Glenwild was sufficiently similar to Mountain Ranch, although, as he testified, other discrepancies existed in valuation. (R. 275 at 84.) Moreover, unlike the County and the Tax Commission, Shaw was not in possession of the records documenting comparability. If neither of those organizations, even under the pressure of self-interest, could establish the existence of other comparable properties, it must be assumed on the best evidence available that such did not exist. The Tax Commission and the County cannot misuse Shaw's candor to cover their own failure to meet their burden of supporting their averment of additional comparables with evidence in the record.

Therefore, regardless of whether Glenwild itself is considered as "property" or, on the basis of its 104 lots, as "properties" it constituted all comparable properties to Mountain Ranch on the lien date. Thus, Petitioner has gone even beyond the statute's requirement for an unspecified percentage of comparable properties by submitting compelling evidence of a 5% deviation between Mountain Ranch and *all* "comparable properties." Petitioner has qualified on all points for the statutory remedy.

VII. MOUNTAIN RANCH AND GLENWILD, AS COMPARABLE PROPERTIES, WERE PROPERTIES OF THE SAME CLASS ON THE LIEN DATE, AND THE UNEQUAL ASSESSMENT VIOLATES BOTH STATE UNIFORM TAXATION AND FEDERAL EQUAL PROTECTION.

A. Equal Protection Under U.S. Constitution, Amendment XIV, as Interpreted in *Allegheny*

Because Mountain Ranch and Glenwild were comparable properties on the lien date they were subject to "taxation which in fact bears unequally on persons or property of the same

class," under *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 488 U.S. 336, 102 L.Ed 2d. 688, 109 S. Ct. 633, (1989). Additionally, because the state of completion of the two developments was functionally comparable as indicated by similar sales, the County was without justification for applying different appraisal methods to Glenwild and Mountain Ranch, resulting in taxation of Mountain Ranch at one hundred percent and Glenwild at only twenty five percent of the respective market values established by actual sales. Petitioner maintains that the County's appraisal of Glenwild using a method that its own appraisers testified was appropriate only when "[t]here are no sales, no listings, no idea of the final price of the lots," and when, even then, the "value of the land would be basically the purchase price of the bare ground, *plus amenities . . . plus costs into it,* (Deposition of Steve Martin, P-17 at 21) constituted "intentional systematic undervaluation by state officials of other taxable property in the same class" under *Allegheny* and thus "contravenes the constitutional right" of Petitioner, who was "taxed upon the full value of his property." *Allegheny*, 488 U.S. at 345 (citations omitted).

The U.S. Supreme Court's introduction to the opinion illustrates the striking similarities between *Allegheny* and the instant case. Like the Utah Constitution, the "West Virginia Constitution guarantees to its citizens that, with certain exceptions, 'taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value....'W.Va. Const., Art. X, § 1." *Allegheny*, 488 U.S. at 338. In *Allegheny* the "Webster County tax assessor valued petitioners' real property on the basis of its recent purchase price, but made only minor modifications in the assessments of land which had not been recently sold." *Id.* In the instant case the Summit County tax assessor valued Mountain Ranch on the basis of the recent sales prices of the lots. However, the County compounded the

inequality found in *Allegheny* by failing to make even minor modifications in the assessment of Glenwild, on the basis of lots that *had also been recently sold.* Here, as in *Allegheny,* the practice of adjusting for sales price in the assessment of the subject property but not the comparable property has "resulted in gross disparities in the assessed value of generally comparable property, and . . . denied petitioners the equal protection of the laws guaranteed to them by the Fourteenth Amendment." *Id.*

Petitioner notes that it does not "admit that there was no governmental corruption" or that "there was no action of the County that was intentionally done." (Tax Commission Brief p. 24.) Petitioner admitted only that it declined to formally allege corruption due to the difficulty of proving governmental corruption which by its very nature is secret. Petitioner, nevertheless, remarked upon the motive and opportunity for the County to punish its litigational adversary and reward its water client through unequal taxation.

B. Uniform Taxation Under the Utah Constitution

Article XIII, section 2 of the Utah Constitution provides that

> All tangible property in the state . . . shall be taxed at a uniform and equal rate in proportion to its value, to be ascertained as provided by law.

The County's arguments focus on "in proportion to [the property's] value" but ignore the requirement for a "uniform and equal rate." The *Nelson* Court's statement that "[t]he uniformity requirement is satisfied when the property valuation is made at fair market value," *Nelson,* 943 P.2d at 1357 (citations omitted), addressed circumstances in which the Court determined that all the relevant property valuations had been made at fair market value. Once again, however, *Nelson* did not examine the undervaluation of comparable property and to that extent is not helpful in deciding the constitutional issues presented here.

In the instant case, Mountain Ranch's direct competitor Glenwild, although comparable, was assessed far below true market value. The promise of Article XIII section 10 to Petitioner is that not only his own property, but all comparable and competing property "shall be taxed at a uniform and equal rate in proportion to its value." The undervaluation of Glenwild renders that promise but hollow words by assessing Petitioner $94,706.13 more in taxes than would have been owed under the method applied to Glenwild, and assessing Glenwild $318,749.06 less than the method applied to Mountain Ranch would have required. The fact that Glenwild was the only property comparable to Mountain Ranch for tax assessment purposes on the lien date does not excuse the County and the Tax Commission from their obligation to honor the promise of the Utah Constitution.

RELIEF SOUGHT

Petitioner Mountain Ranch Estates has a right to adjustment of the valuation of its lots under Utah Code Ann. § 59-2-1006 (4): it has shown that Glenwild is a comparable property, and it has shown at least a five percent (in this case seventy percent) deviation in assessed values between the properties. Furthermore, Petitioner had the right to a remedy under both the U.S. and Utah Constitutions due to the undervaluation by Summit County of the lots of its competitor, Glenwild Phase I. For these reasons, Petitioner respectfully requests that the assessment of its lots for 2001 be adjusted to reflect a rate comparable to that applied to Glenwild: twenty five percent of the listed sales prices of the lots.

RESPECTFULLY SUBMITTED this 14th day of October, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2003, I caused two (2) true and correct copies of the foregoing REPLY BRIEF OF PETITIONER MOUNTAIN RANCH ESTATES, to be mailed, postage prepaid, as follows:

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