2017

Jesse Hammons Alison Hammons Plaintiffs/Appellants vs. Weber County Defendants/Appellees

Utah Supreme Court

39561

THE UTAH SUPREME COURT

JESSE HAMMONS and ALISON HAMMONS, Plaintiffs and Appellants, vs. WEBER COUNTY *et al.*, Defendants and Appellees.	Case No. 20151074-SC

REPLACEMENT BRIEF OF THE APPELLEES, WEBER COUNTY, WEBER COUNTY COMMISSION, JAN ZOGMAISTER, KERRY GIBSON, MATTHEW BELL, JOHN ULIBARRI, AND RICKY HATCH

Appeal from a 27 October 2015 "Order Granting in Part and Denying in Part Defendants' Motion for Judgment on the Pleadings and Denying Plaintiffs' Counter-Motion [sic] for Partial Judgment on the Pleadings" in the Utah Second District Court, Ogden Department, Weber County, by the Honorable Michael D. DiReda.

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APPELLEES REQUEST ORAL ARGUMENT

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PARTIES TO THE PROCEEDING

Plaintiffs and appellants: Jesse and Alison Hammons.

Defendants and appellees: Weber County, Weber County Commission, Jan Zogmaister, Kerry Gibson, Matthew Bell, John Ulibarri, and Ricky Hatch.

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INTRODUCTION

This dispute deals with the Property Tax Act's residential exemption. The residential exemption, found in Utah Code § 59-2-103[1], reduces by forty-five percent the fair market value at which counties assess residential properties for property taxes. But the exemption is limited, subject to some exceptions inapplicable here, to one acre of land per residence and one primary residence per household.

Sometime prior to the time Weber County sent out assessment notices in 2007, the county assessor flagged the appellants' (the Hammonses) home, which had been enjoying the residential exemption, as a possible non-primary residence based on its location and use of a post office box for its address. The assessor asserts that he sent a form to the Hammonses asking them to verify that the home was indeed their primary residence. The Hammonses claim they never received the assessor's letter. Without a response, the assessor did not apply the residential exemption and assessed the Hammonses' home at full market value in 2007 and 2008, until he received a verification from the Hammonses in 2009 that the home was their primary residence. The county assessor then began applying the exemption again in 2009.

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[1] The appellees reference the statutes in general terms here. They identify the precise versions at issue below.

Despite receiving assessment notices showing that their home was being assessed at its full value, the Hammonses did not appeal those valuations to the board of equalization under Utah Code § 59-2-1004, nor did they pay their taxes under protest, which would have allowed them to challenge the taxes later under Utah Code § 59-2-1327. They instead paid their property taxes in 2007 and 2008 based on the full market value of their home without protest.

It was not until several years later, in late 2012, that the Hammonses, through counsel, demanded refunds for the difference in the taxes they paid in 2007 and 2008 versus what they would have paid had the assessor applied the residential exemption to their home. The Weber County Assessor, the Weber County Tax Review Committee, and the Weber County Commission all rejected the Hammonses' demands, and the Hammonses eventually filed suit in summer 2014, seeking refunds and damages based on various claims.

The Hammonses here appeal from the district court's partial judgment on the pleadings dismissing their claims that their payments should be refunded under Utah Code § 59-2-1321, which allows refunds for redundant, erroneous, or illegal payments. The appellees ("County") contend that the Hammonses' claims are untimely and do not properly fit within section 59-2-1321's scope. The County also alternatively argues that the county assessor was authorized to take the actions he did. Finally, the County requests, if the Court reverses the district court's decision, to limit its opinion's retroactive effect to this suit.

STATEMENT OF JURISDICTION

This Court had original jurisdiction of this appeal under Utah Code § 78A-3-102(3)(j)[2]. By order on 25 January 2016 the Court transferred it to the Utah Court of Appeals as permitted by Utah Code § 78A-3-102(4). This Court vacated that transfer and recalled the appeal by order on 12 January 2017.

ISSUES AND STANDARDS OF REVIEW

First Issue. Were the claims the Hammonses filed in 2014 for refunds of taxes they paid without protest in 2007 and 2008 timely under the four-year statute of limitations applicable to actions brought under Utah Code § 59-2-1321?

Standard of Review and Preservation: Correctness. "[A]pplication of a statute of limitations to bar an action presents a question of law that we review for correctness." *Gillmore v. Summit County*, 2010 UT 69, ¶ 16, 246 P.3d 102 (footnote omitted). This issue presents an alternative ground for affirmance. *State v. Topanotes*, 2003 UT 30, ¶ 9, 76 P.3d 1159 ("[A]n appellate court may affirm the judgment appealed from 'if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, ...'" (quoting *Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158) (quotation marks and citations omitted)).

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[2] From this point forward, the County cites to statutes' current versions unless otherwise specified.

Second Issue. If the Hammonses' section 59-2-1321 claims were timely, were they based on erroneous and illegal collections within that section's scope?

Standard of Review and Preservation: Correctness. The district court implicitly held that the Hammonses' claims were not properly brought under section 59-2-1321 when it granted in part the County's motion for judgment on the pleadings. That decision is reviewed for correctness. *West v. Inter-Financial, Inc.*, 2006 UT App 222, ¶ 4, 139 P.3d 1059. A grant of a motion for judgment on the pleadings is affirmed "'only if, as a matter of law, the plaintiff could not recover under the facts alleged.'" *Id.* (quoting *Golding v. Ashley Cent. Irrigation Co.*, 793 P.2d 897, 898 (Utah 1990)). The facts from the complaint are taken as true and all reasonable inferences are drawn in a light most favorable to the plaintiff. *Id.* This issue is also a question of statutory interpretation, which is likewise reviewed for correctness. *State v. Steele*, 2010 UT App 185, ¶ 12, 236 P.3d 161 ("Issues involving interpretation of statutes and common law are questions of law, reviewed for correctness."). This issue is preserved at R.0432-0434.

Third Issue. Alternatively, was the elected county assessor authorized to investigate whether the property at issue was the Hammonses' primary residence and therefore qualified to receive the residential exemption, and if he was unpersuaded that it did, to not apply the exemption when valuing their property?

Standard of Review and Preservation: Correctness. The district court also made this challenged holding when it granted in part the County's motion for judgment

on the pleadings. That decision is reviewed for correctness. See above for the authorities cited for the second issue. This issue is preserved at R.0429-0432.

Fourth Issue. If the Court holds that the Hammonses' claims were timely, properly brought under section 59-2-1321, or that the county assessor acted illegally, should it limit its opinion's retroactive effect to this suit?

Standard of Review and Preservation: Because the retroactive and prospective effect of its opinions arises from a rule of judicial policy imposed by the Court on its own decisions, there is no standard of review and preservation is inapplicable. *See Monarrez v. Utah Dep't of Transp.*, 2016 UT 10, ¶ 28, 368 P.3d 846 (explaining that the general rule of retroactivity is one of "judicial policy rather than judicial power" (quotation marks and citation omitted)).

KEY CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

The following determinative statutes and ordinances are set forth in full in the addendum:

Utah Code § 59-2-103 (2004)[3], *Rate of assessment of property – Residential property*

[3] The 2004 version applied during the relevant time frame, and it is the version the County uses in this brief.

Utah Code § 59-2-103.5 (2002)[4], *Procedures to obtain an exemption for residential property*

Utah Code 59-2-1004 (2007)[5], *Appeal to county board of equalization – Real property – Time period for appeal – Decision of board – Extensions approved by commission – Appeal to commission*

Utah Code § 59-2-1321 (2017)[6], *Erroneous or illegal assessments – Deductions and refunds*

Utah Code § 59-2-1327 (2017), *Payment of tax under protest – Circumstances where authorized – Action to recover tax paid*

Weber County Code §§ 6-14-1 *et seq.* (1985), *Ordinance of Weber County Adopting and Defining Procedures the County Treasurer Shall Utilize for Notification and Refund of Real Property Tax Overpayments*

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[4] The section was amended in 2008 to reflect a changed citation to the Utah Administrative Rulemaking Act. Because the change was not substantive, the County refers throughout this brief to the 2002 version.

[5] The statute was amended in 2008, but the changes are immaterial to this analysis. The County accordingly cites to the 2007 version in this brief.

[6] Sections 59-2-1321 and 59-2-1327 remain unchanged since the relevant time frame, so the County refers to the current versions in this brief.

STATEMENT OF THE CASE

Nature of the Case

In 2007, the county assessor flagged the Hammonses' property for investigation into whether it was their primary residence and should be receiving the residential exemption (a statutory provision requiring counties to reduce by forty-five percent the fair market value used to assess residential properties, limited to one primary residence per household). According to the County, the assessor sent a letter asking the Hammonses to confirm that the property was their primary residence, including a form called a "Signed Statement of Primary Residence; Pursuant to Section: 59-2-103 and 59-2-307 UCA," but says it received no response. (R.206; R.0465/33:8-34:20.) Lacking a response, the assessor did not apply the residential exemption to the Hammonses' property in 2007 and 2008. (R.0033-0034.) The Hammonses paid taxes on the full value of their residential property those years (R.0004-0005 at ¶¶ 22, 24, 35-36) without protest and without initiating any formal process to challenge the assessments. (They contend, however, that at some point they inquired into the issue via a telephone call and were told by an unidentified county employee that the time to appeal the valuations had run. (R.0005 at ¶¶ 28-29.))

In early 2009, the Hammonses completed and submitted the assessor's form. (R.0005 at ¶ 32; R.0044-0045.) Upon receiving that confirmation, the

assessor again began applying the residential exemption to the Hammonses' property in 2009. (R.0035.)

The Hammonses took no action after that for almost three years, until fall 2012, when they sought a refund from the county assessor for the difference between the taxes they paid on the full value of their property in 2007 and 2008 and the lesser amount they would have paid had the assessor applied the residential exemption. (R.0006 at ¶ 45.) The assessor denied their request (R.0046-0048), and the Hammonses appealed that decision to the Weber County Tax Review Committee (R.0006 at ¶ 47). The committee heard the Hammonses' appeal and recommended that the county commission deny their refund request.

Before the county commission, the Hammonses argued for the first time that in 2007 and 2008 the county was barred from requiring them to provide a verification that their home was their primary residence because at that time the county had not passed an ordinance referenced in Utah Code § 59-2-103.5. (R.0006 at ¶¶ 49-50.) That statute allowed a county to pass an ordinance requiring a residential property owner to first file with the county board of equalization a statement certifying that the property was a residence and containing other information required by the Utah Tax Commission before receiving the residential exemption. Utah Code § 59-2-103.5. If a county had not passed such an ordinance, the statute provided that the board of equalization could not make the statement an eligibility requirement for the exemption and was required to allow the

exemption in accordance with the residential exemption statute, Utah Code § 59-2-103. *Id.*

The county commission remanded that new issue for the tax review committee to consider. (R.0007 at ¶ 51.) The committee did, and again recommended that the commission deny the Hammonses' refund request, which it did. (R.0007 at ¶¶ 52-53.) This suit followed.

The Course of Proceedings

This dispute has now gone through four levels of review: the county assessor, the county tax review committee, the county commission, and the district court. None has found in the Hammonses' favor.

The Hammonses brought their suit against not just the county and the county commission, but also against the county commissioners (Jan Zogmaister, Kerry Gibson, and Matthew Bell), the county assessor (John Ulibarri), and the county clerk/auditor (Ricky Hatch) in their official and personal capacities.[7] They alleged ten causes of action, ranging from alleged violations of ordinances, negligence, and unjust enrichment to fraud. (R.0001-0017.) The district court disposed of the case through a series of rulings on three County motions.

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[7] When the lawsuit was filed, appellees Jan Zogmaister, Kerry Gibson, and Matthew Bell were serving as the Weber County Commission. Mr. Gibson remains a county commissioner. John Ulibarri was and remains the Weber County Assessor, and Ricky Hatch was and remains the Weber County Clerk/Auditor.

The district court dismissed several causes of action when it ruled on the County's motion to dismiss (R.0166-0171), and entered judgment on the pleadings on all but one of the remaining causes of action on the parties' subsequent cross-motions for judgment on the pleadings. (R.0429-0437.) That ruling provides the basis for the Hammonses' appeal. They challenge the district court's ruling granting the County judgment on the pleadings on the Hammonses' first three causes of action, alleging that (1) denying them the residential exemption was illegal, (2) not notifying them that they had consequently overpaid their property taxes was illegal, and (3) not applying those overpaid taxes to the Hammonses' subsequent tax bill was illegal. (R.0429-0437; 0007-0011 at ¶¶ 57-86.)

The County thereafter moved for judgment on the pleadings on the Hammonses' sole remaining claim, for negligence, which the Hammonses did not oppose. (R.0446-0447.) This appeal followed.

The Disposition Below

The district court granted the County judgment on the pleadings on the Hammonses' first three causes of action. Regarding their first cause of action, asserting that the county assessor acted illegally when he did not apply the residential exemption to the Hammonses' property until they provided him with a statement verifying that it was their primary residence, the district court held that the county assessor's actions were legal. (R.0429-0437.) As for the Hammonses' second and third causes of action, respectively alleging that the county illegally

failed to notify them that they had overpaid their property taxes during the two years the county did not apply the residential exemption and that it illegally failed to apply those overpayments to the Hammonses' taxes, the district court held that the county was under no obligation to do so because the Hammonses had not timely appealed the county's withholding of the residential exemption under Utah Code § 59-2-1004. (R.0429-0437.)

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

Appellants Jesse and Alison Hammons own residential property in Liberty, Weber County, Utah. (R.0004 at ¶ 16.) In 2007, the Weber County Assessor, noting the owners' use of a post office box, flagged the Hammonses' property for investigation as to whether it qualified for the residential exemption as their primary residence. The assessor sent the Hammonses a letter asking them to verify that the property was their primary residence, including a form called a "Signed Statement of Primary Residence; Pursuant to Section: 59-2-103 and 59-2-307 UCA." The county assessor received no response. (R.0206; R.0465/33:8-34:20.)

The assessor thereafter valued the Hammonses' home at full market value, and did not apply the residential exemption to reduce the amount it was assessed in 2007 and 2008. The assessment notices the county sent to the Hammonses showed that their home was being assessed at its full fair market value without the residential exemption the county had previously applied, and notified them of their deadline to appeal the valuation. (R.0004-0005 at ¶¶ 20-22, 30; R.0033-0034 (the

deadline is not visible on the portion of the copy of the 2008 notice the Hammonses provided).) The Hammonses did not appeal the county's assessments, and paid the full assessments without protest respectively on 29 November 2007 and 24 November 2008. (R.0039-40; R.0429-0437.)

The Hammonses allege that they called an unidentified county employee about the issue and seeking a refund in 2007, but were told that their time to appeal the assessment had expired. (R.0005 at ¶¶ 28-29; R.0463/24:11-25:9.) They submitted an address change to someone at the county at some point in 2008. (R.0005 at ¶ 27.) When the Hammonses finally submitted the county's signed statement form in 2009, they wrote on the form that the property had been their primary residence since 2005. After receiving the executed signed statement form from the Hammonses in 2009, the county assessor began applying the residential exemption to their property again in 2009. (R.0005 at ¶¶ 32-34, R.0044-0045.)

In 2007 and 2008, Weber County had not enacted the ordinance referenced in section 59-2-103.5, requiring in certain circumstances property owners to first apply to the board of equalization in order to receive a residential exemption. (R.0005 at ¶ 37; R.0055-0056.) The county passed such an ordinance in 2010, which the Hammons contend was not published and of which they did not learn until 2012. (R.0006 at ¶¶ 43-44, 49.) The Hammonses filed this action on 12 August 2014. (Docket Index at 1.)

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ARGUMENT SUMMARY

The Hammonses brought their claims too late. Their refund claims under Utah Code § 59-2-1321 ("section 1321") are subject to a four-year statute of limitations measured from when the taxes were paid. Here, the taxes at issue were paid in November 2007 and 2008, but the Hammonses did not bring this action until August 2014. Neither the county code nor the discovery rule operate to avoid the claims' untimeliness. The county code merely puts in place procedures to effect refunds under section 1321. And the discovery rule is not available because there was no concealment or estoppel and no evidence that the Hammonses did not know or could not reasonably have known of their claims before the four years expired.

Even if the Hammonses' section 1321 claims were timely, they would nonetheless fail because the alleged illegal and erroneous collections on which they are based do not fit within section 1321's scope. They are not clearly illegal or erroneous from contemporaneous county records. The Hammonses should have instead challenged the assessments under Utah Code § 59-2-1004 ("section 1004") or paid them under protest and brought their claims under Utah Code § 59-2-1327 ("section 1327").

If the Court finds that the Hammonses' claims are both timely and properly within section 1321's ambit, the collections still were not illegal. County assessors are authorized to investigate whether residences within their counties qualify for

the residential exemption and, if they believe a property does not qualify for the exemption, are not required to apply the exemption when valuing the property. The legislature's enactment of Utah Code § 59-2-103.5 ("section 103.5") did not alter that authority, and the ordinance it requires a county to pass if the county wishes to require its citizens to apply for the residential exemption addresses applications to the board of equalization, not questions about whether a property owner continues to qualify for an exemption.

Finally, if the Court rules against the County on any of these issues, the County requests that it limit its opinion's retroactive effect to this suit. Such a decision would change the law upon which Weber County has reasonably relied, and it would create an undue burden by opening the county to claims for refunds of taxes that have already been collected, budgeted, and spent on county services.

ARGUMENT

I. The Hammonses' claims are untimely under section 1321 because they did not bring them within four years of paying the taxes at issue. (responding to Point III of the Hammonses' brief, pages 28-30)

Assuming that the Hammonses' claims fit within section 1321's scope, as they contend (Aplts.' Br. at 28-30), their claims are barred because they were not brought within four years from when the taxes at issue were paid. The Hammonses allege they overpaid and seek a refund for taxes collected in 2007 and 2008. But they did not commence this suit until 2014. The Hammonses cannot salvage their claims by relying on county ordinance that merely set forth procedures for making

refunds under section 1321, or by resorting the discovery rule when there was no concealment or estoppel and the Hammonses were aware of their claims well before the limitation period expired.

The part of section 1321 relevant here allows a county to order any taxes paid more than once, or erroneously or illegally collected, refunded: "Any taxes, interest, and costs paid more than once, or erroneously or illegally collected, may, by order of the county legislative body, be refunded by the county treasurer, ..." Utah Code § 59-2-1321. That language has undergone only minor changes during the last century. *Compare* Utah Code § 59-2-1321 (2017) *with* Utah Comp. Laws § 2642 (1907).

This Court addressed that statutory language at length in *Neilson v. San Pete County*, 123 P. 334 (Utah 1912). The Court explained that the section allowed, under narrow circumstances, a taxpayer a private right of action for a refund even when the taxpayer did not pay the disputed tax under protest, as required for an action under the precursor to what is now section Utah Code § 59-2-1327. *Neilson*, 123 P. at 338-39. Although the Court agreed that section 1321 née section 2642 required a taxpayer to "demand or request" a refund from the county, *id.* at 338, the Court rejected the argument that the demand or request must be a formally filed claim "done as a condition precedent to the right to maintain an action," *id.* The Court could not "see why more than a mere demand to refund is necessary to protect the county," *id.*, and held that "a demand in writing" for the return of the

taxes was "all that [wa]s necessary," *id.* at 340, not a "formal or verified claim," *id.* at 339-40.

If the county refused to order a refund, the taxpayer could then "bring an action to recover the tax." *Id.* at 340. The Court characterized such a suit as "an ordinary action as for money had and received," *id.* at 339, and applied the corresponding catchall four-year statute of limitations (then codified as Utah Comp. Laws § 2883 (1907)), but stopped short of deciding whether the limitation period started when the tax was paid or when the refund was demanded "because this question is not raised nor necessary to the decision of this case." *Id.* at 340.

Nearly thirty years later, the Court answered that question in *Wilson v. Weber County*, 111 P.2d 147 (Utah 1941), *overruled on other grounds by Shea v. State Tax Comm'n*, 120 P.2d 274 (Utah 1941). The Court held there that the four-year statute of limitations for section 1321 claims (which by then had been renumbered to R.S.U. § 80-10-17 (1933)) runs from when the tax is paid.

The plaintiff, Wilson, cross-appealed a lower court's ruling sustaining Weber County's demurrer to two causes of action because they were barred by the four-year statute of limitations. *Id.* at 148. Wilson contended that the limitation period for a section 1321 claim began to run from the demand, and that the demand had to be made within a "reasonable time after payment," which he argued was also four years. *Id.* The Court rejected that approach. Where a plaintiff states a section 1321 action ("the illegality of the collection has been determined, it is an

involuntary payment, the amount is liquidated, and is capable of exact proof from the records"), the demand "is part of the remedy and not part of the cause of action and it must be made or given, and the action must be filed, both within the statutory period from the date of payment." *Id.* at 150.

The Court's conclusion is consistent with the majority of courts addressing the topic. When a statute requires a claimant to make a demand, "but apparently does not require any substantial delay after" making the demand, "the majority of the courts hold that the requirement for presentation or notice does not affect the running of the statute of limitation. In such cases the reasoning is that the requirement is merely a part of the remedy and not an essential part of the cause of action." M.L. Cross, Annotation, *Limitation Period as Affected by Requirement of Notice or Presentation of Claim against Government Body*, 3 A.L.R.2d 711 § 2 (2017). *See also* 51 Am. Jur. 2d *Limitation of Actions* § 133 (2017) (advising similarly that, if the statute requiring the demand does not also prescribe a delay after the demand is made, "and no legal requirement prevents the claimant from perfecting the right to sue immediately," the limitations period starts as soon as the claimant may make the demand, "rather than on the day he or she actually does so").

For over seventy-five years, therefore, a four-year limitation period running from the date of payment has applied to section 1321 claims. The Hammonses might argue that the procedures Weber County adopted by ordinance to govern

refunding double and erroneous and illegal collections under section 1321 somehow extend that period. But such an argument would fail for at least two reasons.

First, Weber County's ordinances plainly were not intended to extend the limitations period applied to section 1321 claims. They rather reflect the county's effort simply "[t]o adopt procedures . . . for the refund of real property tax overpayments" under section 1321. Weber County Code § 6-14-2 (1985).[8] The ordinances assume that the taxes collected fall within section 1321's scope, i.e., are redundant payments or were erroneously or illegally collected within the statute's narrow application (see below, part II). Built onto that foundational assumption are the procedures for refunding such improper collections: the treasurer[9] is to make a good faith effort to notify the taxpayer when she or he discovers such taxes have been collected, Weber County Code § 6-14-3 (1985); if a taxpayer requests a refund of such payments, the treasurer is to pay it in a timely manner, Weber County Code § 6-14-4 (1985); if the treasurer does not refund such payments by August 15 of the year following their collection, the treasurer must apply them

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[8] The County includes the applicable ordinances in the addendum. They have since been renumbered in nearly identical form as Weber County Ordinances §§ 2-11-1 *et seq.* (2013).

[9] One of the few county elected officials the Hammonses did not name as a defendant.

against the current year's taxes, Weber County Code § 6-14-5 (1985). None of those procedures mentions a limitation period.

The closest any of the ordinances comes to addressing a timing limitation is section 6-14-4's provision requiring the treasurer to apply payments against the current year's tax bill if they have not been refunded by August 15 the year following payment. That provision nonetheless says nothing about a limitation on bringing actions under section 1321, much less indefinitely extending the limitation period. If anything, section 6-14-4 would shorten, not lengthen, the time to bring a claim because it requires the treasurer to apply payments that are not refunded by August 15 of the year following the payments "against the *current years* [sic] real property tax," Weber County Code § 6-14-5 (1985) (emphasis added), i.e., against the taxes for the year following the payments. Without a clear indication that Weber County intended to alter the limitations period set by state statute, there is no need to address whether the county could change the time limitation to bring a section 1321 claim.

But even assuming Weber County's ordinances actually attempted to extend the limitations period, they would be invalid because they would conflict with, and be preempted by, state statutes. "It is well established that, where a city ordinance is in conflict with a state statute, the ordinance is invalid at its inception." *Hansen v. Eyre*, 2005 UT 29, ¶ 15, 116 P.3d 290. An ordinance that permits "'that which the statute forbids and prohibits, and vice versa'" "'is in conflict with general laws.'"

Id. (quoting *Salt Lake City v. Kusse*, 93 P.2d 671, 673 (Utah 1938)). "Also, an ordinance is invalid if it intrudes into an area which the Legislature has preempted by comprehensive legislation intended to blanket a particular field." *State v. Hutchinson*, 624 P.2d 1116, 1121 (Utah 1980). Interpreting the county's ordinances to extend the limitations period would conflict with the four-year limitation set by section 1321 and Utah Code § 78B-2-307 (2017)[10] (setting the four-year limitation). That interpretation would also intrude into the comprehensive state legislation governing limitations periods and taxation, and would therefore be preempted. Each county does not get to set its own limitations period for a taxpayer to bring a section 1321 action.

The statute of limitation applicable to the Hammonses' claim, if properly brought under section 1321, is therefore four years from the date they paid the taxes at issue. The Hammonses made the payments at issue on 29 November 2007 and 24 November 2008, but they did not file suit until 12 August 2014, nearly two years too late to challenge even the most recent payment.

The Hammonses might attempt to argue that their time to bring their action was tolled because, although they changed their address with the county in 2008 and submitted the verification the assessor sought in 2009, which included a

[10] Although it has been renumbered several times, the language at issue has remained essentially unchanged since before *Neilson*.

handwritten note that the home had been their primary residences since 2005, the county did not notify them that they had made an illegal or erroneous payment under Weber County Code § 6-14-3 (1985). That argument, however, suffers from several flaws. First, the County is unaware of any evidence that either of the Hammonses' changes of address, assuming they could be interpreted as notices that they made illegal or erroneous payments in 2007 and 2008 (*see infra*, pt. II) were delivered to the treasurer, who is the county officer the ordinance charges with giving the notice. And, as just explained, the ordinance cannot change the applicable statute of limitation. Moreover, because all the Hammonses did was inform the county of their address change and that the home was their primary residence, the notices do not amount to section 1321 demands. And even if they did, they would not affect the limitation period, which runs from the date of payment.

Such an argument would be essentially an invocation of the discovery rule. But the Hammonses' change of address and verification form do not amount to concealment by the county. *See Russell Packard Dev. v. Carson*, 2005 UT 14, ¶ 26, 108 P.3d 741 (describing concealment version of discovery rule). Nor could the Hammonses argue that they did not know and could not reasonably have known of their claim without the treasurer's notice, as required to assert the extraordinary circumstances version of the rule. *See O'Neal v. Div. of Family Servs.*, 821 P.2d 1139, 1144 (Utah 1991) ("[T]o invoke the exceptional-circumstances version of the

discovery rule, the plaintiff must make a threshold showing that he or she did not know and could not know and could not reasonably have known of the existence of a cause of action."). The county's valuation notices showed that the residential exemption was not being applied, and the Hammonses' submission of their address change and their verification demonstrates that they knew they were being assessed more than they thought they should.

The Hammonses might also attempt to rely on their alleged telephone call with unidentified county personnel in 2008 wherein they claim they were told that their time to appeal the assessment had expired. There is no indication that the employee took affirmative steps intended to deceive the Hammonses. (In fact, depending on the call's timing, the employee might have correctly indicated that the time to appeal the assessment under section 1004—which allows appeals from the later of September 15 or forty-five days after the assessment notice—had expired. Utah Code § 59-2-1004(2)(a).) The alleged representation from an unidentified employee during a telephone call was also insufficient to estop the county. The concealment version of the discovery rule "'is essentially a claim of equitable estoppel.'" *Russell Packard*, 2005 UT 14, ¶ 26 (quoting *Warren v. Provo City Corp.*, 838 P.2d 1125, 1129-30 (Utah 1992)). And it is "very difficult to estop the government. Only 'well-substantiated representations' by a governmental entity will suffice. To estop a governmental entity, its representations must generally take the form of a written statement by an authorized person." *Bischel v.*

Merritt, 907 P.2d 275, 280 (Utah Ct. App. 1995) (Bench, J., dissenting) (quoting *Anderson v. Public Serv. Comm'n*, 839 P.2d 822, 828 (Utah 1992)) (citations omitted). A telephone call with an unidentified employee who potentially thought she or he was giving the correct answer does not provide a basis for the concealment version of the discovery rule.

Finally, the Hammonses might argue that the concealment version of the discovery rule applies to their claims because they did not become aware until 2012 that the county enacted the ordinance they assert was necessary before anyone at the county could request a signed statement from them verifying that they qualified for the residential exemption. They allege that the county concealed that it had passed such an ordinance because it was not timely published on the county's website. Although it might be true that the ordinance's enactment prompted the Hammonses to raise their argument, their contention is based on the ordinance's absence when the county assessor sought to verify that their home was their primary residence. Its passage had no effect, and neither did any delay in publishing it to the county website—they still raised the argument when they demanded a refund and before filing suit. (R.0006-07 at ¶¶ 50-53.)

A party asserting the concealment version of the discovery rule must show that it "has acted in a reasonable and diligent manner. In order to meet this reasonableness standard, a plaintiff must demonstrate that, 'given the defendant's actions, a reasonable plaintiff would not have brought suit within the statutory

period.'" *Russell Packard*, 2005 UT 14, ¶ 26 (citations omitted) (quoting *Warren*, 838 P.2d at 1130). Having been notified that the exemption was no longer being applied to their property and being aware enough to inquire about the taxes to the county, it was not reasonable for the Hammonses to pay without protest and wait more than four years to bring their claims.

At least insofar as the Hammonses' 2008 payment is concerned, their pre-25 October 2012 demand should be convincing evidence that, particularly for that claim, they were well aware of it within the four years they had to bring their action. Yet they failed to do so for nearly another two years.

II. If the Hammonses' claims were timely under section 1321, it would not matter because they do not fall within its scope and should have been brought under section 1004 or section 1327. (responding to Point III of the Hammonses' brief, pages 28-30)

The Hammonses argue that, under section 1321, they are entitled to refunds of the taxes the county collected on their home in 2007 and 2008 in excess of what they would have paid had the county assessor applied the residential exemption. They assert that their 2007 and 2008 payments constitute the illegal or erroneous payments addressed section 1321. Their desire to place them under section 1321 is understandable, since under section 1004 they must follow an administrative process under tight time constraints with which they did not comply, and under Utah Code § 59-2-1327 ("section 1327") they must have paid the taxes under protest, which they did not do. But to fall within section 1321's scope, the payments

must be clearly illegal or erroneous based on county documents at the time, which does not describe the Hammonses' payments. Instead, they should have challenged the alleged overpayments via section 1004 or, barring that approach, by paying under protest and bringing an action under section 1327. Because they did neither, they have waived their claims.

To state a claim under section 1321, the over-assessment or overpayment at issue, whether because it was redundant, erroneous, or illegal, must have been obvious at the time it was assessed or paid. In *Neilson*, the illegality of the taxes at issue was undisputed: the county had levied taxes on mortgages despite a constitutional amendment that exempted mortgages from taxation. *Neilson*, 123 P. at 335-36, 340. The Court explained that, while taxes challenged under what is now section 1327 address taxes deemed unlawful by the taxpayer but not necessarily by the tax collector, in contrast a claim under section 1321 "does not deal with any such taxes or demands. The taxes mentioned in that section are such only which it is clear the county had no authority to collect, and, in case they are collected, has no legal right to retain them." *Id.* at 338. "Whether a tax has been twice paid or erroneously or illegally collected usually is, and always should be, a matter of record in the county treasurer's office if he has complied with the law." *Id.*

In *Wilson*, the Court elaborated that, while the payment-under-protest statute "is applicable if the validity of the particular statute in question is yet to be

determined," what is now section 1321 "is applicable to the case when the validity of the statute requiring payment is not in question, but is assumed to be invalid. In other words, the illegality of the payment is unquestioned." *Wilson*, 111 P.2d at 149.

But in *Wilson* the Court held that the plaintiff stated a claim under section 1321's precursor for taxes paid before an intervening decision invalidated the portion of a statute under which they were collected. The Court reasoned that its decision rendered the statute void *ab initio*, which in turn meant that the tax payments were illegal. *Id.* at 149. That conclusion drew a partial dissent by two justices, who argued that whether a claim can be stated under what is now section 1321 must be evaluated at the time the tax was assessed or collected. They asserted that section 1321 "deals with a situation where there is no color of warrant for the assessment—a failure to follow law resulting in an erroneous or double assessment where even by any purported law, no tax as paid was due." *Id.* at 150 (Wolfe and McDonough, JJ., dissenting in part). "If the statute is invalid of course [the tax collector] has acted without warrant of law but not without color of warrant." *Id.* According to the dissenters, "only taxes collected without color of warrant by entirely extra-legal action, in contradistinction to those collected by color of warrant which by apparent law the officer was required to collect, are covered by [section 1321]." *Id.* at 151. Thus, "the Neilson case did not hold that taxes collected illegally but by color of warrant of law could be recovered by suit under [section 1321]. Its language seem to import just the opposite—viewed in light of the facts."

Id. at 150-51. In other words, section 1321 actions were for taxes collected under statutes that had already been voided when they were collected, not under statutes that were only subsequently invalidated.

A few months later, the dissenting justices appear to have persuaded their colleagues. In *Shea v. State Tax Commission*, 120 P.2d 274 (Utah 1941), the Court was again presented with a case where the plaintiff sought a refund for taxes paid without protest under a statute later held unconstitutional. *Id.* at 274-75. In affirming the district court's decision refusing to order a refund, the Court held that section 1321's predecessor applied "only to collections which the officials could themselves have determined at the time of collection that they should not collect, such determination to be made as a matter of fact and not as a matter of law." *Id.* at 276. "In cases in which legality or illegality of tax sought to be recovered by taxpayer necessarily involves determination of questions of law calling for exercise of strictly judicial functions, payment under protest and compliance with other provisions of the statutes afford the exclusive remedy." *Id.* at 275. The Court explicitly overruled *Wilson* to the extent it held that a plaintiff could seek a refund for taxes paid without protest because the statute they were paid under was subsequently invalidated. *Id.* at 276.

This Court confirmed that holding in *CIG Exploration, Inc. v. State Tax Commission*, 897 P.2d 1214 (Utah 1995), where it affirmed a district court's decision that the taxpayer was not entitled to a refund of ad valorem taxes when its

net revenues were adjusted downward in light of a decision made by a federal regulatory agency. *Id.* at 1214-15. Relying on its previous holdings that "events occurring subsequent to the collection of a tax do not render the collection erroneous," *id.* at 1216, n. 2, the Court held that the taxes were not erroneously or illegally collected as required to state a claim under section 1321, *id.* at 1216. The Court explained that the Property Tax Act left "no room for us to hold that a taxpayer is entitled to a refund of taxes which were paid on the basis of a valuation that was correct as of a given January 1st but which would have been different had the assessor known of a subsequent state of facts." *Id.*

Section 1321, therefore, has a "relatively narrow" scope. *Woodbury Amsource, Inc. v. Salt Lake County*, 2003 UT 28, ¶ 9, 73 P.3d 362. In *Woodbury*, the Court affirmed the dismissal of the taxpayers' section 1321 claims. The taxpayers, a group of landlords, asserted that they were being assessed more than once for leasehold improvements because the county assessed their tenants personal property tax on the improvements and assessed them real property taxes based on the improved property's value. *Id.* ¶ 3. The landlords brought their suit soon after a tax commission rule change that required leasehold improvements to be assessed to the property owner as a part of the underlying property's value. The commission said that it intended the amendment in part to "'reduce and eliminate the double assessment of leasehold improvements.'" *Id.* ¶ 6. In affirming the district court's dismissal, the Court found that the assessments did not fit within

section 1321's redundant payment clause because that referred to payments by the same taxpayer. *Id.* ¶ 18. The Court also held that the landlords' claims were not based on erroneous or illegal collections under section 1321 because they did "not allege an error of fact or law that would be readily apparent from county records," but rather challenged the county assessors' methodology. *Id.* ¶ 19.

"The legislative scheme clearly contemplates that the primary vehicle for challenging property tax assessments is the administrative appeals process laid out in section 59-2-1004." *Id.* ¶ 14. The Property Tax Act mandates "that taxpayers who dispute the valuation of their property take their claim to the board under Utah Code section 59-2-1004 within the prescribed time period or waive it." *Id.* ¶ 15. If waived, the taxpayer "may still pay the tax under protest if he disputes the legality of the tax and wishes to bring suit in district court under Utah Code section 59-2-1327." *Id.* Finally, if the taxpayer waives administrative review under section 1004 and fails to pay under protest as required for a section 1327 challenge, "in the limited circumstance where a taxpayer can point to an error of fact or law in the collection of the tax, or a payment more than once, that is readily apparent from county records, he may apply to the commission to refund the mistakenly collected amount under" section 1321 and bring an action if the commission denies the application. *Id.* But, "[i]f the illegality is in dispute, the taxpayer must first pay under protest before he has standing to challenge the tax in court under section 59-2-1327." *Id.* ¶ 12.

The Hammonses assert that the county illegally and erroneously collected taxes from them by failing to apply the residential exemption both because the assessor was not legally authorized to withhold the exemption and because the county's position that their home was not their primary residence was mistaken. The district court held that the assessor was legally authorized to deny the exemption and implicitly found that the Hammonses' factual challenge to the county's decision that their home did not qualify for the residential exemption as their primary residence did not rise to the type of erroneous collection covered by section 1321 when it held that challenge was barred under section 1004. The district court was correct that the Hammonses' challenge based on their home's qualification did not fall within section 1321's scope and it did not have to analyze the assessor's authority because that question also did not rise to level necessary for a section 1321 challenge.

The error in law the Hammonses allege here does not rise to the illegality required for a section 1321 challenge. The Hammonses claim that the county assessor lacked statutory authority to withhold the residential exemption from the Hammonses' property when he did not receive the verification he requested to confirm that the home was their primary residence. They base their position on their interpretation of section 103.5 as prohibiting any county officer or department from requesting verification that a home qualifies for the exemption unless the county has enacted an ordinance requiring property owners to apply for

the residential exemption. The County, however, disagrees with the Hammonses' reading of section 103.5, and contends that the county assessor is authorized to investigate whether properties qualify for the residential exemption and to not apply it if unconvinced. *See infra*, pt. III. This dispute about how to interpret the applicable statutes is not the clear legal error required for a section 1321 challenge.

As the Court explained in *Shea*, where the "legality or illegality of tax sought to be recovered by taxpayer necessarily involves determination of questions of law calling for exercise of strictly judicial functions, payment under protest and compliance with other provisions of the statutes afford the exclusive remedy." *Shea* at 275. The Hammonses' claim of legal error here is not like the one made in *Neilson*, where the Court had invalidated the statute at issue before the taxes were assessed and collected. In fact, here the collection has been upheld as legal now by the county assessor, the county's tax review committee, the county commission, and the district court. Under the circumstances, the legal error the Hammonses allege is not the clear error section 1321 is meant to address.

The Hammonses also assert their section 1321 challenge based on what they allege is a clear factual error: that contrary to the assessor's determination, their home was indeed their primary residence in 2007 and 2008. But that was not readily apparent from county records at the time the taxes were collected, as required for a section 1321 claim.

The Hammonses allege that they called someone at the county about the issue in 2007. But the county's records at that time indicated that it had sent out a request for verification that the home was the Hammonses' primary residence and received nothing in return. Their call was contrary to the county's records. In fact, their call indicates that the Hammonses had been alerted by the county's notice that the exemption had been removed and therefore could have timely challenged the taxes under section 1004 or paid under protest.

Next, the Hammonses assert that they submitted an address change (from a post office box to the home's physical address) to someone at the county at some point in 2008. Again, even assuming the address change was submitted to the assessor or the treasurer, the county's records still indicated that the Hammonses had not returned a verification that the home was their primary residence. It was not readily apparent from the county's records that it had withheld the residential exemption in error. (And, again, the Hammonses could have challenged the assessment under section 1004 or paid under protest.)

Finally, the Hammonses also base their claim on a handwritten note they included on the verification form they submitted to the county in 2009, stating that the property had been their primary residence since 2005. But that note did not create a county record from which it could be readily ascertained that the Hammonses had made erroneous payments in 2007 and 2008. The county employee receiving the form would have had to surmise from the note that the

Hammonses had made payments in 2007 and 2008 on the full value of their home and that they had not appealed those payments, which the employee could not do without further investigation. It would not be clear. Even assuming that the note was sufficient to alert the county that the Hammonses' 2007 and 2008 payments were erroneous, the note itself came after the payments, meaning that according to county records at the time of the payments, the Hammonses had not responded to the county's request that they verify the home was their primary residence. At best, the Hammonses' statement confirming that the property was their primary residence merely informed the County of what the trial court correctly termed "two potentially erroneous assessments." (R.0433.) Section 1321 is not so broad. If it were, it would greatly increase the county's workload to include monitoring and investigating every communication from a third party that could affect its tax liability, and would therefore expose the county to significantly increased risk.

The Hammonses' challenge to the assessor's decision to withhold the residential exemption from his assessment of their property in 2007 and 2008 is essentially a question about valuation, and as such was best suited for a challenge under section 1004. Utah Code § 59-2-1004(1)(a) (allowing taxpayers to appeal their valuations or equalizations to the board of equalization). When the county assessor withheld the residential exemption from the Hammonses' property, the result was that their property was assessed at full value, rather than forty-five percent less than full value (the amount of the household exemption). The

overpayment the Hammonses allege, therefore, resulted from an erroneous valuation.

The Hammonses could have appealed the county assessor's valuation of their property under section 1004. The assessment notice they received explained how they could have brought that appeal. They did not, however, take advantage of that process. Nor did they pay their taxes on the full value of their property under protest, which would have qualified them to raise their challenge under section 1327. Because their 2007 and 2008 payments do not constitute the illegal or erroneous collections covered by section 1321, they have waived their ability to challenge those collections, regardless whether they were timely.

III. Alternatively, even if the Hammonses' claims are timely and properly brought under section 1321, the county assessor's actions were not illegal because he acted within his authority.

(responding to Points I and II of the Hammonses' brief, pages 16-27)

In their complaint, the Hammonses based the three claims at issue on their theory that the county could not deny them the residential exemption if it had not passed the ordinance authorized by section 103.5. (R.0008 at ¶¶ 63-64 (alleging in their first cause of action that the county "had no statutory authority" to deny the Hammonses the exemption because it had not passed the ordinance), R.0008-0009 at ¶¶ 68-69, 71-74 (asserting that, because the county lacked authority to withhold the exemption without the ordinance, the Hammonses' full payments were actually overpayments of which the county was legally bound to notify them),

R.0010 at ¶¶ 78-84 (similarly contending that without the ordinance the county could not withhold the exemption, meaning that the Hammonses overpaid and that they should have received a tax credit for their overpayments).) But the county assessor's authority to investigate properties to determine whether they qualify for the residential exemption and to withhold that exemption if they do not was not affected by section 103.5's enactment.

A. Elected county assessors are and were statutorily authorized, and likely required, to determine whether a property qualifies for a residential exemption.

County assessors are elected and statutorily required to assess the fair market value of private property within a county to determine the amount of property tax to be charged those properties, including whether the value for certain residential property should be reduced under Utah's residential exemption. Assessors are correspondingly also statutorily empowered to investigate whether a property qualifies for the residential exemption.

Utah Code § 59-2-301[11] requires county assessors to "assess all property located within the county which is not required by law to be assessed by the [tax] commission." *Id.* By its plain language, therefore, assessors are required, with an exception inapplicable here, "to estimate officially the value . . . as a basis for taxation" of all property within their counties. *Webster's Encyclopedic*

[11] The statute remains unchanged from the relevant time, so the County uses the current version here.

Unabridged Dictionary of the English Language 125 (Gramercy Books 1996) (defining "assess").

Utah Code § 59-2-103 ("section 103") required at the relevant time (and still requires) that "[a]ll tangible taxable property" "be assessed . . . at a uniform and equal rate on the basis of its fair market value . . . unless otherwise provided by law." Utah Code § 59-2-103(1). In the immediately succeeding subsection, the law otherwise provided: the fair market value of residential property was to be reduced by forty-five percent, but only for one primary residence per household (and "[n]o more than one acre of land per residential unit"). Utah Code § 59-2-103(2)-(4).

Because the county assessor is charged with the duty to assess county property, and because residential property should be assessed at forty-five percent less than fair market value, but only for one primary residence per household, the county assessor must determine whether the residential property being assessed satisfies the requirements for the residential exemption. *See State v. Barrett*, 127 P.3d 682, 689 (Utah 2005) (explaining that Utah courts "read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters" (citation and quotation marks omitted)).

The Hammonses' argument that assessors were statutorily empowered to do nothing more than establish fair market value and verify ownership (R.248-250, 0253-0254) imposes too narrow a reading. A fair reading of the governing statutes

reveals that assessors were charged with assessing properties as the law instructed, including applying the residential exemption to only qualifying properties. The assessor is in the best position to confirm that the properties receiving the exemption qualify for it.

Other Property Tax Act sections applicable during the relevant time make the county assessor's authority to determine whether a property qualified for the residential exemption more explicit. Because county assessors had to (and still must) assess residential property at a reduced rate, but only if the property qualifies as a primary residence, it follows that county assessors would be authorized to investigate whether a property qualifies for the exemption. Utah Code §§ 59-2-306 and -307 empowered assessors to do just that. Utah Code § 59-2-306(1) (2000)[12] authorized an assessor to "request a signed statement from any person setting forth all the real . . . property assessable by the assessor which is owned, possessed, managed, or under the control of the person . . .." That signed statement "shall include" "all property belonging to, claimed by, or in the possession, control, or management of the person." Utah Code § 59-2-306(3)(a).

The act also authorized assessors to "subpoena and examine any person . . . in relation to any signed statement." Utah Code § 59-2-306(4). People who refused

[12] The section was amended in 2008 to add more specific dates and deadlines, but the substance relied upon here did not change. The County therefore uses the 2000 version throughout this brief.

to file the signed statement requested by the assessor, including "with respect to name and place of residence," were subject to statutory penalty. Utah Code § 59-2-307(1) (2006)[13].

When read together, sections 59-2-306 and 59-2-307 demonstrate the assessor's authority to investigate whether a property qualifies for the residential exemption.

The Tax Commission appears to have interpreted assessors' authority like the County did because its contemporary administrative rules authorized assessors to make such determinations in similar situations. For example, the commission's rules allowed a property to qualify for the residential exemption while under construction "[i]f the county assessor determine[d]" that it would qualify when completed. Utah Admin. Code § R884-24P-52(F)(3) (2007)[14]. The rules similarly also allowed an unoccupied property to qualify "[i]f the county assessor determine[d]" that it would qualify once occupied. Utah Admin. Code § R884-24P-52(F)(6). It would be inconsistent with a prohibition on assessors' ability to determine whether a home continues to qualify for the residential exemption to

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[13] The section was amended in 2008, but because those amendments are immaterial to the issue posed by the Hammonses' appeal, the County refers throughout this brief to the 2006 version.

[14] The rule was subsequently amended during the relevant time frame, but the cited provisions remained unchanged.

authorize those same assessors to determine whether unoccupied homes and homes under construction will qualify.

The Hammonses' reference to Summit County's current residential exemption ordinance (Aplts.' Br. at 20-21) is inapposite to interpreting the law applicable to Weber County approximately eight years ago. The County does note, however, that even under Summit County's ordinance, property owners are required to initially provide evidence that their property qualifies for the exemption to the county assessor, and explicitly authorizes the county assessor to investigate. (R.0319-0327 at Summit County Ord. 1-12B-1(A) & (D).)

B. The county assessor's authority to investigate whether a property qualified for the residential exemption and to withhold the exemption if the property did not qualify did not depend on the county's adoption of the ordinance referenced in section 103.5.

The state legislature did not modify county assessors' authority when it enacted section 103.5. That section only limited the circumstances under which residential property owners had to apply to their boards of equalization for the residential exemption before receiving it. Before section 103.5's enactment, all residential property owners first had to apply for the exemption to their county boards of equalization. After the statute's enactment, property owners no longer had to apply for the exemption unless their counties had passed an ordinance requiring an application and the property fell within one of three specified classifications. Section 103.5's 2002 enactment did not alter the exemption's

limitation in section 103 to "[n]o more than one acre of land per residential unit" (the primary residence requirement was added effective 2005), nor did it address, and therefore did not change, county assessors' statutory authority to investigate whether properties qualified for the exemption, including the power to request information related to ownership and residency.

Section 103.5 required county boards of equalization to allow property owners the residential exemption for their qualifying properties without having to file an application "on a form prescribed by the [tax] commission" and including "information as required by the [tax] commission," unless the county had passed an ordinance requiring property owners to apply for the exemption. *Id.* If a county had passed such an ordinance, the application was required if the property fell into one of three categories: (1) the property was not eligible for the exemption the previous year; (2) the property's ownership had changed; or (3) the board of equalization believed the property no longer qualified. *Id.*

Before the state legislature enacted section 103.5 in 2002, all property owners seeking the residential exemption had to apply for it to their county boards of equalization under Utah Code § 59-2-1102(3) (2000) ("No reduction may be made in the value of property and no exemption may be granted unless the party affected . . . makes and files with the board [of equalization] a written application for the reduction or exemption, ..."), which remains the case for some other types of exemptions. *See, e.g.*, Utah Code § 59-2-1102(3)-(11) (2015); *see also A.E., Inc.*

v. Summit County Comm'n, 2001 UT App 322, ¶¶ 9-11, 35 P.3d 1153 (affirming denial of the residential exemption because the property owner had not applied for it under section 59-2-1102(3) (2000)).

Section 103.5 therefore carved out the residential exemption from section 59-2-1102's requirement that property owners first had to apply for an exemption to the board of equalization. Instead, section 103.5 (passed the year following *A.E.*) required counties to pass an ordinance if they wished to continue that application requirement. The ordinance would require property owners to provide their local boards of equalization a statement meeting certain criteria in order to "be allowed a residential exemption," Utah Code § 59-2-103.5, but otherwise prohibited boards of equalization from requiring one. Section 103.5, however, did not abrogate section 103's limitation on residential exemptions to one acre of land per residential unit. In other words, just because a county had not adopted an ordinance requiring property owners to apply for the residential exemption did not mean that every property owner within that county could characterize her or his property as residential and automatically received the exemption, regardless whether it really was residential or limited to one acre as required at the time by section 59-2-103(3) (2002).

Section 103.5 repeatedly and explicitly reiterated that it was subordinate to section 103. It enjoined boards of equalization to allow the residential exemption in counties without ordinances requiring applications "in accordance with Section

59-2-103" (i.e., still limited to one acre of land per residential unit and, later, a single primary residence per household). Utah Code § 59-2-103.5(3)(b).

The interplay between sections 103, 103.5, 59-2-301, 59-2-306, and 59-2-307, read harmoniously as they must, described a system in which, unless a county passed an ordinance requiring otherwise, property owners no longer had to apply to the board of equalization for the residential exemption. Instead, their residential properties would automatically receive the exemption, so long as they qualified. The county assessor assessed qualifying properties (i.e., properties that were residences and, as of 2005, served as a household's primary residence) at fifty-five percent of their fair market values (i.e., applying a forty-five percent reduction). If the assessor was unsure about a property's status, the assessor could investigate, including seeking a signed statement and even exercising subpoena power to examine the property owner. And if the assessor did not apply the exemption, the property owner could challenge that decision by appealing to the board of equalization under Utah Code § 59-2-1004(1)(a) ("A taxpayer dissatisfied with the valuation or the equalization of the taxpayer's real property may make an application to appeal . . . .").

Because section 103.5 did not modify the county assessor's obligation to apply the residential exemption only to qualifying properties or his authority to investigate whether a property qualified for the exemption, his investigation whether the Hammonses' property was their primary residence, particularly by

requesting a signed statement confirming as much under his section 59-2-307 authority (the section the assessor's own form cited (R.0005 at ¶¶31-32, 34; R0044-0045))[15], was legal.

The Hammonses, however and in contrast to the County's harmonizing approach, view section 103.5 as an unrestricted tax break for all property that an owner can characterize as residential and that prohibited counties from even inquiring whether a property qualified for the residential exemption under section 103 unless they passed an ordinance that allowed their boards of equalization to ask for the statement the statute described (under limited circumstances). That reading ignores section 103.5's historical context and would render section 103's restrictions inoperative.

That the Hammonses' interpretation would render section 103's residential exemption limitations inoperative becomes clear when considering a hypothetical residential property that is not the owners' primary residence. If the county in which that property is situated did not pass an ordinance requiring a statement under section 103.5, the Hammonses' view would mean that the property owners would nonetheless automatically receive the exemption. But because the county

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[15] As opposed to using "a form prescribed by the [tax] commission." Utah Code § 59-2-103.5. The current version of that form, "Application for Residential Property Exemption (UC 59-2-103 and 59-2-10[3].5)," can be found at http://propertytax.utah.gov/library/pdf/forms/pt-023.pdf (last visited 12 August 2016).

assessor could not, according to the Hammonses, request information from the property owners to confirm that the property is their primary residence or withhold the exemption, the limitation restricting the exemption to one primary residence per household would be inoperative because no one could enforce or apply it. In fact, under the Hammonses' approach, in that situation a property owner could own two side-by-side residences and the assessor would have no choice but to value each applying the forty-five percent reduction under the residential exemption. The restriction would be meaningless under that interpretation.

The Hammonses have argued that the assessor should, in that situation, raise any suspicion that the property does not qualify for the exemption with the board of equalization. (R.251.) Setting aside whether the assessor would even suspect the hypothetical property did not qualify, approaching the board would be unavailing because, under the Hammonses' interpretation, the board could do nothing. Subsection 103.5(3) would require the board to, absent the ordinance referenced in section 103.5 requiring a statement, allow the exemption.[16]

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[16] That would be true even if the assessor knew that the property was not a primary residence. But under the County's interpretation, where section 103.5 succeeded section 59-2-1102's application process, a board of equalization could still, as an appellate body, review a county assessor's decision applying or denying a residential exemption under section 1004 (or the property owner could pay under protest and bring an action under section 1327).

Because Utah law requires courts to "give effect to every provision of a statute and avoid an interpretation that will render portions of a statute inoperative," *Thayer v. Washington County School District*, 2012 UT 31, ¶ 12, 285 P.3d 1142 (quotation marks and citation omitted), the County's interpretation should be endorsed and the Hammonses' rejected.

Under the circumstances alleged in this case, section 103.5 did not prohibit the county assessor from withholding the Hammonses' residential exemption until they provided a statement confirming that their property was their primary residence. That is so even though the county had not passed the ordinance referenced in section 103.5 that would have allowed the board of equalization to require a similar statement under certain circumstances before allowing the exemption in the first place.

IV. If the Court holds that the Hammonses' claims are timely, that their claims fall within section 1321's scope, or that the county assessor's conduct was unauthorized, the County alternatively requests that the Court limit its opinion's retroactive effect.

If the Court finds against the County on any of the foregoing points (i.e., holds that the Hammonses' claims are timely, the claims fall within section 1321's scope, or the assessor lacked authority for his actions), it alternatively requests that the Court limit its opinion's retroactive effect to the Hammonses' suit. Such decisions would result from a change in the law upon which the County has

justifiably relied and that would create an undue burden on the County if fully retroactively applied.

While the general rule is that the Court's opinions apply both retrospectively and prospectively, the Court has stated that it "will deviate from the default rule of retroactivity and apply [its] decision prospectively only when two requirements are met. First, the ruling must 'result [from] a change in the law' that 'significantly alters the legal landscape by ending or overruling a relied-upon practice.'" *Holmes v. Cannon*, 2016 UT 42, ¶ 15, 387 P.3d 971 (quoting *Monarrez*, 2016 UT 10, ¶ 28) (second alteration original). Second, "the party seeking prospective application of the ruling must also show either 'justifiable reliance on the prior state of the law,' or that retroactive application would create an undue burden." *Id.* (quoting *Monarrez*, 2016 UT 10, ¶ 28 (citation omitted)). Should the Court rule in the Hammonses' favor on any of the foregoing points, both requirements would be satisfied.

First, such rulings would significantly alter the legal landscape upon which Weber County has relied. As shown above, section 1321 claims have for decades been subject to a four-year statute of limitation measured from the date the disputed fees were paid. Additionally, the claims rising to the level necessary to be actionable under section 1321 have been obvious errors readily ascertainable from contemporaneous county records. Finally, the county assessor has assumed he acted within his authority when he investigates properties for compliance with the

residential exemption requirements and declines to apply the exemption if he concludes a property does not qualify. The County submits that a decision by this Court that alters any of those standards would represent a change in law that would require the County to alter the way it measures limitation periods for section 1321 actions, change what it considers proper section 1321 claims, or constrain the county assessor.

As the County has shown, the propositions upon which it has relied are based on well-settled law. The statutes have been in place in various forms and numbering for more than a century and the case law regarding the appropriate limitation period was decided more than seventy years ago. Opening the doors to additional claims that fall into one of those categories would invite more demands for refunds of taxes that have been paid without protest and which the county has already collected, settled, budgeted, and spent, thereby creating an undue burden. As this Court quoted approvingly in *Woodbury*, permitting a right of recovery in such situations "'would work disastrous results. It must of necessity be confined to extreme and exceptional cases.'" *Woodbury*, 2003 UT 28, ¶ 17 (quoting 3 *Cooley on Taxation*, 1295, 4th ed. (1924)). Limiting the retroactive effect of an opinion reversing the district court on any of the foregoing points to only this suit would avoid such an undue burden.

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CONCLUSION

For the foregoing reasons, the County requests that the Court affirm the district court's entry of judgment on the pleadings on the Hammonses' first, second, and third causes of action. Even assuming that the Hammonses' claims were properly brought under section 1321, they were brought too late and the Hammonses waived their ability to appeal their payments under section 1004 or section 1327. If the Hammonses' claims were timely under section 1321, it would not matter because they were not properly within that section's scope, i.e., they were not based on errors readily apparent from county records at the time the disputed payments were made. Finally, if the Hammonses' claims were timely and properly brought under section 1321, they were not illegal because the county assessor was authorized to investigate whether the Hammonses' home was their primary residence and to withhold the residential exemption when he did not receive the verification he requested from them.

If the Court reverses the district court and finds that the Hammonses' claims are timely, are properly within section 1321's scope, or that the payments were erroneous or illegal, the County requests that the Court limit its opinion's retroactive effect to the Hammonses' suit.

DATE: 10 March 2017.

GOEBEL ANDERSON PC

s/Barton H. Kunz II

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Attorneys for Defendants/Appellees

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah Rule of Appellate Procedure 24(f)(1), I certify that this brief contains 12,195 words, excluding the table of contents, table of authorities, and addendum. In compliance with the typeface requirements of Utah Rule of Appellate Procedure 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in 13-point Georgia typeface.

s/Barton H. Kunz II
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Attorney for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 10 March 2017, a searchable PDF of the foregoing replacement brief of appellees Weber County, Weber County Commission, Jan Zogmaister, Kerry Gibson, Matthew Bell, John Ulibarri, and Ricky Hatch were served upon the following by email, with two hard copies to follow within seven days by first class, postage prepaid U.S. mail:

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ADDENDUM

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Utah Code § 59-2-103 (2004)
Rate of assessment of property – Residential property

(1) All tangible taxable property located within the state shall be assessed and taxed at a uniform and equal rate on the basis of its fair market value, as valued on January 1, unless otherwise provided by law.
(2) Subject to Subsections (3) and (4), beginning on January 1, 1995, the fair market value of residential property located within the state shall be reduced by 45%, representing a residential exemption allowed under Utah Constitution Article XIII, Section 2.
(3) No more than one acre of land per residential unit may qualify for the residential exemption.
(4) (a) Except as provided in Subsection (4)(b)(ii), beginning on January 1, 2005, the residential exemption in Subsection (2) is limited to one primary residence per household.
(b) An owner of multiple residential properties located within the state is allowed a residential exemption under Subsection (2) for:
(i) subject to Subsection (4)(a), the primary residence of the owner; and
(ii) each residential property that is the primary residence of a tenant.

Utah Code § 59-2-103.5 (2002)
Procedures to obtain an exemption for residential property

(1) Subject to the other provisions of this section, a county legislative body may by ordinance require that in order for residential property to be allowed a residential exemption in accordance with Section 59-2-103, an owner of the residential property shall file with the county board of equalization a statement:

(a) on a form prescribed by the commission by rule;

(b) signed by all of the owners of the residential property;

(c) certifying that the residential property is residential property; and

(d) containing other information as required by the commission by rule.

(2) (a) Subject to Section 59-2-103 and except as provided in Subsection (3), a county board of equalization shall allow an owner described in Subsection (1) a residential exemption for the residential property described in Subsection (1) if:

(i) the county legislative body enacts the ordinance described in Subsection (1); and

(ii) the county board of equalization determines that the requirements of Subsection (1) are met.

(b) A county board of equalization may require an owner of the residential property described in Subsection (1) to file the statement described in Subsection (1) only if:

(i) that residential property was ineligible for the residential exemption authorized under Section 59-2-103 during the calendar year immediately preceding the calendar year for which the owner is seeking to claim the residential exemption for that residential property;

(ii) an ownership interest in that residential property changes; or

(iii) the county board of equalization determines that there is reason to believe that that residential property no longer qualifies for the residential exemption in accordance with Section 59-2-103.

(3) Notwithstanding Subsection (2)(a), if a county legislative body does not enact an ordinance requiring an owner to file a statement in accordance with this section, the county board of equalization:

(a) may not require an owner to file a statement for residential property to be eligible for a residential exemption in accordance with Section 59-2-103; and

(b) shall allow a residential exemption for residential property in accordance with Section 59-2-103.

(4) (a) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the commission shall make rules providing:

(i) the form for the statement described in Subsection (1); and

(ii) the contents of the form for the statement described in Subsection (1).

(b) The commission shall make the form described in Subsection (4)(a) available to counties.

Utah Code 59-2-1004 (2007)
Appeal to county board of equalization – Real property – Time period for appeal – Decision of board – Extensions approved by commission – Appeal to commission

(1) (a) A taxpayer dissatisfied with the valuation or the equalization of the taxpayer's real property may make an application to appeal by:

(i) filing the application with the county board of equalization within the time period described in Subsection (2); or

(ii) making an application by telephone or other electronic means within the time period described in Subsection (2) if the county legislative body passes a resolution under Subsection (5) authorizing applications to be made by telephone or other electronic means.

(b) The contents of the application shall be prescribed by rule of the county board of equalization.

(2) (a) Except as provided in Subsection (2)(b), for purposes of Subsection (1), a taxpayer shall make an application to appeal the valuation or the equalization of the taxpayer's real property on or before the later of:

(i) September 15 of the current calendar year; or

(ii) the last day of a 45-day period beginning on the day on which the county auditor mails the notice under Subsection 59-2-919(4).

(b) Notwithstanding Subsection (2)(a), in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the commission shall make rules providing for circumstances under which the county board of equalization is required to accept an application to appeal that is filed after the time period prescribed in Subsection (2)(a).

(3) The owner shall include in the application under Subsection (1)(a)(i) the owner's estimate of the fair market value of the property and any evidence which may indicate that the assessed valuation of the owner's property is improperly equalized with the assessed valuation of comparable properties.

(4) (a) The county board of equalization shall meet and hold public hearings as prescribed in Section 59-2-1001.

(b) The county board of equalization shall make a decision on each appeal filed in accordance with this section within a 60-day period after the day on which the application is made.

(c) The commission may approve the extension of a time period provided for in Subsection (4)(b) for a county board of equalization to make a decision on an appeal.

(d) The decision of the board shall contain a determination of the valuation of the property based on fair market value, and a conclusion that the fair market value is properly equalized with the assessed value of comparable properties.

(e) If no evidence is presented before the county board of equalization, it will be presumed that the equalization issue has been met.

(f) (i) If the fair market value of the property that is the subject of the appeal deviates plus or minus 5% from the assessed value of comparable properties, the valuation of the appealed property shall be adjusted to reflect a value equalized with the assessed value of comparable properties.

(ii) The equalized value established under Subsection (4)(f)(i) shall be the assessed value for property tax purposes until the county assessor is able to evaluate and equalize the assessed value of all comparable properties to bring them all into conformity with full fair market value.

(5) If any taxpayer is dissatisfied with the decision of the county board of equalization, the taxpayer may file an appeal with the commission as prescribed in Section 59-2-1006.

(6) A county legislative body may pass a resolution authorizing taxpayers owing taxes on property assessed by that county to file property tax appeals applications under this section by telephone or other electronic means.

Utah Code § 59-2-1321 (2017)
Erroneous or illegal assessments – Deductions and refunds

> The county legislative body, upon sufficient evidence being produced that property has been either erroneously or illegally assessed, may order the county treasurer to allow the taxes on that part of the property erroneously or illegally assessed to be deducted before payment of taxes. Any taxes, interest, and costs paid more than once, or erroneously or illegally collected, may, by order of the county legislative body, be refunded by the county treasurer, and the portion of taxes, interest, and costs paid to the state or any taxing entity shall be refunded to the county, and the appropriate officer shall draw a warrant for that amount in favor of the county.

Utah Code § 59-2-1327 (2017)
Payment of tax under protest – Circumstances where authorized – Action to recover tax paid

> Where a tax is demanded or enforced by a taxing entity, and the person whose property is taxed claims the tax is unlawful, that person may pay the tax under protest to the county treasurer. The person may then bring an action in the district court against the officer or taxing entity to recover the tax or any portion of the tax paid under protest.

CHAPTER 14
ORDINANCE OF WEBER COUNTY ADOPTING AND DEFINING PROCEDURES THE COUNTY TREASURER SHALL UTILIZE FOR NOTIFICATION AND REFUND OF REAL PROPERTY TAX OVERPAYMENTS

Sections 6-14-1 Title
6-14-2 Purpose
6-14-3 Notification Procedure
6-14-4 Procedure for Refund of Overpaid Real Property Taxes
6-14-5 Procedure for Credit Against Current Real Property Taxes Due
6-14-6 Procedure for Reporting and Approval of The County Commission
6-14-7 Administrative Expenses
6-14-1 Title. This ordinance shall be known as the "Real Property Tax Overpayment Refund Procedure."

6-14-2 Purpose. To adopt procedures pursuant to Section 59-2-1321 Utah Code Annotated 1953, as amended for the refund of real property tax overpayments.

6-14-3 Notification Procedure. If real property taxes are paid more than once or overpaid on a piece of real property the County Treasurer shall make a good faith effort to notify the owner of record and/or the payor of the real property tax overpayment. The notice shall include instructions concerning the procedures for obtaining a refund.

6-14-4 Procedure for refund of overpaid Real Property Taxes. If real property taxes are paid more than once or overpaid on a piece of property, and the payor of the real property taxers requests a refund, the County Treasurer is hereby directed to refund or pay as requested by the payor, the overpayment, without interest, in a timely manner subject to the final approval of the County Commission as required in Section 6.

6-14-5 Procedure for Credit Against Current Real Property Taxes Due. If the real property taxes are paid more than once or overpaid on a piece of real property and the overpayment has not been refunded on or before August 15, of the year following the overpayment, the County Treasurer shall apply the overpayment against the current years real property tax on that same piece of property and shall include in the tax notice required by Section 59-2-1317 Utah Code Annotated 1953, as amended a notification of the overpayment applied, thus reducing the balance due on the current years real property taxes.

6-14-6 Procedure for Reporting and Approval of the County Commission. As required by Section 59-2-1320 Utah Code Annotated, 1953 as amended, the County Treasurer shall present a report to the County Commission for approval indicating the activity in the overpaid tax account. The report shall be prepared in a manner similar to the following:

Balance in overpaid tax account at last reporting $XXX
add: Overpaid taxes received this period XXX
add: Interest earned on overpaid tax account this period XXX
less: Overpaid taxes refunded or credited this period XXX
less: Administrative expenses charged this period (XXX)
Balance in overpaid taxes account $XXX

6-14-7 Administrative Expenses. The County Treasurer may deduct from the overpaid tax fund and the interest thereon:
a. Costs for mailing and publication in connection with the unclaimed property tax overpayment;
b. A reasonable service charge for the County's administration of the unclaimed property tax account.

6-14-8 Severability. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.