Property Tax Special Notice

Department of Revenue Washington State

January 17, 2018

The Hirst Decision

In 2016 the Washington State Supreme Court issued a decision in *Whatcom County v. W Wash. Growth Mgmt. Hr'gs Bd. No. 91475-3.* The decision is commonly referred to as the Hirst Decision. This decision applies to wells that do not need a permit from Department of Ecology, such as users of small quantities of groundwater. The Court's decision requires the counties to develop criteria for drilling wells. The counties are required to develop a process that incorporates their new requirements, including an analysis of availability of water supply within the county. Per RCW 90.44.050, the permit exemption applies to: watering livestock (no gallon per day limit), watering a non-commercial lawn or garden half acre or less (no gallon limit per day but must be reasonable use), water for a single home or group of homes (limited to 5,000 gallons per day), and providing water for industrial purposes, including irrigation (limited to 5,000 gallons per day).

Department of Ecology information and resources
Following the Hirst Decision, the Washington State Department of Ecology (DOE) provided additional information regarding building permits and wells on their website.

The following is from DOE's website:

> *A recent Washington State Supreme Court decision has changed how counties decide to approve or deny building permits that use wells for a water source.*
>
> *A reliable, year-round supply of water is necessary for new homes or developments. Before the Oct. 6, 2016 court decision, many counties relied on what the Department of Ecology said about whether year-round water was available in their area.*
>
> *This court decision changes that – counties now have to make their own decisions about whether there is enough water, physically and legally, to approve a building permit that would rely on a well.*
>
> *Ecology is providing assistance to counties to help them understand what areas might be affected by the court decision.*

The DOE has also published a brochure for individuals seeking to have a well drilled which can be found on their website; https://fortress.wa.gov/ecy/publications/documents/1711001.pdf. Prior to the Supreme Court's decision, the DOE supplied the guidelines for drilling wells in each county. The Court decision now requires each county to make their own water availability decisions.

Where can I get information about actions my county is taking?
Most counties are administering the Hirst Decision through their Planning Department, Health Department, or Department of Community Development. Some counties have already established guidelines in response to the decision, and other counties are still studying the issue and formulating guidelines. If you have questions, you should contact your county regarding how they are implementing the Court's decision.

How does the Hirst Decision impact assessed value?
County assessors are still required to value all real and personal property at 100 percent of a property's market value as defined by Washington law and rule. Many county assessors have asked, "What is the market value of land, which currently does not have a well, in light of the Hirst Decision?" The answer is: "Whatever the market will pay for such land."

True and Fair Value – RCW 84.40.030 defines the duty of the assessor as:

> *"All property shall be valued at one hundred percent of its true and fair value in money and assessed on the same basis unless specifically provided otherwise by law."*

The WAC further defines;

> *"True and fair value" in terms of willing buyers and sellers; "….is the amount of money a* ***buyer*** *of property willing but not obligated to buy would pay a seller of property willing but not obligated to sell, taking into consideration all uses to which the property is adapted and might in reason be applied." [WAC 458-07-030(1), emphasis added]*

Fair market transactions

The emphasis added to the word "buyer" for purposes of this discussion is to clarify that a fair market transaction requires willing buyers and sellers. The purchaser's perspective must be considered. The questions every county assessor should ask when valuing real property for tax purposes are: *What would this particular property likely sell for if it became available for sale on the open market? What would a likely buyer offer for this property given its condition, location, current market conditions or any restrictions that are placed on it?*

Washington statutory and appellate court case law provide a basis to recognize the many differences that affect any property's market value. The Washington State Supreme Court states *in Pier 67, Inc. v. King County* 78 Wash. 2d 48 (1970):

> *"In measuring fair market value and complying with the mandate of the statutes, the assessor has a number of appraisal methods at his disposal. Normally a taxable property is appraised by a number of methods and the results of each are collated into a single figure representing the assessed value. ...*

Additionally, in *Cascade Court Limited Partnership v. Noble*, 105 Wash. App. 563, 20 P. 3d 997 (2001), the court stated:

> *"Thus, when determining market value, the Assessor must consider all factors that can, within reason, affect the price in negotiations between a willing buyer and a willing seller. This includes "restrictions which may arise from zoning regulations* ***or other legal limitations on the use of land.****"* (Emphasis added.)

Legal limitations on the use of land can include self-imposed deed restrictions by a seller, or long-term leases locked in at below-market rates, or restrictions written into a deed about how the property can be used, or any consideration that a "willing buyer" might consider prior to making a willing and unforced open market offer.

Government restrictions on drilling wells imposed by a county or the state, can also affect market valuations. The question to be asked is how a government restriction imposed by the Hirst Decision affects the price buyers are willing to offer?

Highest and best use

To determine the market value of property, assessors must consider prices sellers are able to sell for, and prices buyers are willing to pay for, given the unique circumstances of each property. A typical purchaser will not pay any more for a property than the benefits they could expect to receive from such a purchase. For instance, if an unimproved property is limited to accessing water through a private well, then a potential purchaser would consider that fact in a potential sales offer.

RCW 84.40.030 (3) (a) instructs county assessors to consider the effects of government restrictions on a property's value.

> *(3) The true and fair value of real property for taxation purposes (including property upon which there is a coal or other mine, or stone or other quarry) must be based upon the following criteria:*
> *(a) Any sales of the property being appraised or similar properties with respect to sales made within the past five years. The appraisal must be consistent with the comprehensive land use plan, development regulations under chapter 36.70A RCW, zoning, and* ***any other governmental policies or practices in effect at the time of appraisal that affect the use of property****, as well as physical and environmental influences.* ***An assessment may not be determined by a method that assumes a land usage or highest and best use not permitted, for that property being appraised, under existing zoning or land use planning ordinances or statutes or other government restrictions.*** [Emphasis added.]

WAC 458-07-030 (3) defines market value and the term “highest and best use:”

> *(3) **True and fair value—Highest and best use.** Unless specifically provided otherwise by statute, all property shall be valued on the basis of its highest and best use for assessment purposes. Highest and best use is the most profitable, likely use to which a property can be put. It is the use which will yield the highest return on the owner's investment. Any reasonable use to which the property may be put may be taken into consideration and if it is peculiarly adapted to some particular use, that fact may be taken into consideration. Uses that are within the realm of possibility, but not reasonably probable of occurrence, shall not be considered in valuing property at its highest and best use.*

This rule makes it clear that uses within the realm of possibility, but not reasonably probable of occurrence, shall not be considered in valuing property at its highest and best use. This means that **if an owner of unimproved property applies for a well permit and is denied access to water, then the highest and best use of the subject property has likely changed.** From a practical viewpoint the functional use, and therefore the highest and best use, has changed due to the water well restriction.

Example 1
A vacant and unimproved lot is denied a well permit. The question that should be asked by the appraiser is, “what could the property be used for if access to water is denied?” Is the property automatically worthless in this example? The answer is unclear. The assessor must evaluate the property’s highest and best use and should consider alternative uses that are physically possible, appropriately supported, financially feasible, and that results in the highest value. For example, the land could be used for a parking lot, or sold to a neighboring owner as extra land.

Selling the land to a neighbor is an example of plottage, which is defined as, “The increment of value created when two or more sites are combined to produce greater utility.” *Dictionary of Real Estate Appraisal*. 4th Ed. For example, assume that four-acre and five-acre land parcels are selling for $80,000 and $100,000 respectively. The incremental value one acre adds to a four acre home site is $20,000.

Whatever the case, **the assessor needs market sales data to determine the valuation of land that cannot access water due to the Hirst Decision.**

Example 2
A property owner applies for a well permit. The county authority permits them to drill a well but is asking for several requirements or conditions to be met before a permit is issued. The conditions include a hydrology study and a drainage plan or a septic plan. The property owner then spends $20,000 to meet the requirements, after which their well permit is approved. In this example a likely initial valuation would be: market price less cost to cure. If market value is $100,000, and the cost to cure is $20,000, it is reasonable for the assessor, in the lack of demonstrable market data, to adjust the initial assessment by $20,000 and assess the property at $80,000. However, future assessments of this property should reflect going prices for similar land, because the deficiency that led to the reduction has been cured.

Appealing assessed value
Property owners who do not agree with the assessed value of their property continue to have the same rights to appeal their value to county boards of equalization, the Washington State Board of Tax Appeals, and Superior Court.
Under Washington state law, assessors enjoy a rebuttable presumption that the assessed value of property is correct. RCW 84.40.0301 provides that:

> *Upon review by any court, or appellate body, of a determination of the valuation of property for purposes of taxation, it shall be presumed that the determination of the public official charged with the duty of establishing such value is correct but this presumption shall not be a defense against any correction indicated by clear, cogent, and convincing evidence.*

This standard of proof does not change under the Hirst Decision. To overcome the assessor’s statutory presumption of correctness, taxpayers must present clear, cogent, and convincing evidence that the assessed value does not represent market value for the property being appealed. Since the statute was enacted, the Washington Supreme Court has interpreted this law in three cases, the most recent of which is the case of *Weyerhaeuser Company v. Easter*, 126 W. 2d 370 (1995).

In *Weyerhaeuser Company v. Easter*, the court clarified the taxpayer's burden under the law for challenging an assessor's valuation. The taxpayer meets the burden of proof when he or she has proved by clear, cogent, and convincing evidence that the assessor has made an error, and that a "correction" to the valuation is required to reach market value. Such proof overcomes the presumption of correctness in favor of the taxpayer.

The taxpayer does not need to show that the assessor's error was grossly inequitable, palpably excessive, or fundamentally wrong. The taxpayer only has to prove that the assessed value is not correct. **With respect to government restrictions, taxpayers must demonstrate through clear, cogent, and convincing evidence how the government restriction affects the market value of the property, and that a correction is necessary.**

Conclusion: Government restrictions such as the Hirst Decision can have significant impacts on the assessed value of property. However, it is important to ensure that requests to reduce property valuations are properly supported and documented. The Department of Revenue advises that county assessors not make broad based adjustments to properties and instead ensure property owners are providing documentation to support their positions.

Questions: If you have questions or need additional information, please contact the Property Tax Division at (360) 534-1400.