

TAXPAYERS' ADVOCATE

P.E. Pennington & Company, Inc.
15 Years of Providing Property Tax Solutions

Dallas, Texas

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IMPORTANT UPCOMING TEXAS TAX DATES

NOTICE OF LITIGATION WITH APPRAISAL DISTRICTS:

FILING SUIT: Within 45 days of receipt of the ARB Order/Determining Protest

TAX RATES SET: Generally September-October

TAX BILLS MAILED: Generally October-November

JANUARY: Assessment Date January 1

JANUARY 31: Last day for payment of taxes:
• before they become delinquent
• for property subject to litigation
• for property subject to protest

JANUARY 31: Last day to file motion to correct an incorrect appraisal

APRIL 15: Rendition Due Date

TAX ROLL CERTIFICATION: Generally July-August

Legal News Update

March 15, 2002

Dallas, Texas

A recent Dallas Court of Appeals case that addresses the application of Section 25.25 (c) (3) to interstate allocation cases. In *Corsicana Co. v DCAD*, the court confirmed that a challenge based on interstate allocation could not be brought as a challenge of property that “does not exist in the form or at the location described in the appraisal roll.”

While the Dallas Courts have consistently taken a very narrow view of 25.25 motions, other courts (namely Houston) have allowed very broad challenges under that provision. With this case, along with *Titanium Metals* and the recent *Bunn v Bexar CAD* case, it will become much more difficult to argue any change to “value” based upon a 25.25 claim, unless it is truly a duplicate account, a clerical error or there is absolutely no property at the location.

That being said, I believe that interstate allocation issues have the potential of being raised outside the bounds of the Texas Tax Code, since they are based on United States Commerce Clause protection. There is case law that indicates that tax challenges based on constitutional concerns cannot be limited by the Tax Code.

Submitted by:
Jason C. Marshall
Winstead Sechrest & Minick

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PROPERTY TAX APPEAL ISSUES

By PAUL PENNINGTON

Assessment Date: Why is the assessment date of January 1 important?

The facts of the appeal:

The appeal involved an upscale high rise apartment complex, which had not reached stabilized occupancy after a year and a half. The appraisal district staff and I agreed that the project's construction cost would be the best way to value the subject property. An agreement was reached but not executed, awaiting the property owner's approval. Shortly thereafter the owner approved agreed upon valuation. The district however decided to decline any written settlement statement based on the fact that they discovered the subject property had been placed under contract to sell as reported in the May issue of a local business journal. The property owner confirmed that the property had gone under contract after January 1, 2002, but had not closed. Further, the closing date had been pushed back several times and it seemed most likely the soonest the property would close would be in late June or early July 2002. The district staff stated that they would recommend to the Appraisal Review Board (ARB) the original proposed value of approximately \$91 million rather than the project's cost of approximately \$79 million.

The issues involved in the appeal were as follows:

1. The proposed buyer intended to change the use of the subject property from a 600-unit apartment complex to a 600-unit condominium complex.
2. There had been a previous offer in 2001 from a very large national multi-family company, which had offered to purchase the subject for approximately \$72 million, but had not been accepted by the owner. However, on the surface, the offer suggested that the subject's market value might have been something less than its construction cost during tax year 2001. This point raises the Principle of Substitution, that is to say, the price to purchase the land site and construct the improvements of a property based on the cost approach versus, would a knowledgeable buyer purchase an existing property of equal utility based on the sales comparable approach.
3. After consultation with the property owner and their attorney, it was agreed that all of the issues should be brought to the attention of the ARB. However, the overriding issue was to be valuing the property "as is" as of the assessment date of January 1, 2002. To support our position to the ARB, the following points from the Texas Property Tax Code, court cases, The Twelfth Addition of the Appraisal of Real Estate, and USPAP were used:
 - a) The Texas Property Tax Code Section 23.01 states that; *"Except as otherwise provided by this chapter, all taxable property is appraised at its market value as of January 1."* The Code is effectively saying that the appraisal district must take a

snapshot of a property as of January 1 and determine its market value at that point in time. This is noteworthy because questions regarding contracts, leases, and sales should not be considered after the first of the year.

- b) *"Except as statutorily provided, circumstances occurring after January 1 cannot be taken into account for property tax purposes."* *City of Heath v King.*
"We must note that property should be assessed at its value as of January 1st, and that circumstances developing or taking place subsequent to January 1st cannot be considered." *-Lo-Vaca Gathing Co. v Matagorda County*
- c) The Appraisal of Real Estate, Twelfth Edition, "Date of the Opinion of Value," states that; "The date of the opinion of value must be specified because the forces that influence real property value are constantly changing. Although conditions observed at the time of the appraisal may persist for a considerable time after that date, an opinion of value is considered valid for only the exact date specified."
- d) USPAP Statement of Retrospective Value Opinions states that; "In the absence of evidence in the market that data subsequent to the effective date were consistent with and confirmed market expectations as of the effective date, the effective date should be used as the cut-off date for data considered by the appraiser."

During the ARB hearing the staff continually asked for the contract price being offered on the subject property, which in fact was approximately \$91 million. The property owner's attorney stated that a contract price entered into after the assessment date was not relevant. Further, pointing out that it was unfair to hold a property at a higher value strictly based on the fact that it might sell at some point during 2002. Rather the relevant issue was, what were the existing facts as of the assessment date. Both the staff and the consultant had agreed that based on the property's poor performance the project's cost was the best indication of value.

The ARB agreed and the value was lowered to the project's construction cost of approximately \$79 million.

Arguing that a recent purchase price is not the correct market value. (Fair & Equal Treatment)

The issues involved in the appeal were as follows:

In March of 2001 a Dallas metroplex multi-family property was purchased for \$20 million. Investors assumed that the operating expenses would remain relatively the same after the purchase date of the subject. The appraisal district picked up the deed activity and raised the subject's value from approximately \$18 million to \$20 million. Additionally, the owner failed to protest the property timely and was forced to file late appeals based on

Section 41.411 of the Texas Property Tax Code for failure to deliver notice to the new owner. This appeal was denied by the ARB. A second appeal was filed under Section 25.25(d) to correct an error to the appraisal roll based on our opinion that the subject was over-valued by more than one third. The ARB granted a hearing based on the second motion. The owner and consultant decided to pursue the appeal based on Section 41.43, Protest of Inequality of Appraisal. The ARB granted the hearing based on the aforementioned motion.

There were several issues involved in the appeal:

1. They had anticipated the Net Operating Income (NOI) was \$1,822,128, however, the taxes from an increased 2001 valuation would result in an NOI of \$1,670,704. The subject was purchased on an overall capitalization rate (cap rate) of 9.11%. However, if the 9.11% cap were used on the actual NOI the value generated from this calculation would indicate a value of \$18,339,231.
2. Can an increased tax burden affect the market value of a property? We contended it could and according to a recent issue of *Tierra Grande, Journal of the Real Estate Center at Texas A&M University*, our opinion was confirmed. The article titled "Property Tax Increases Hit Home" by Charles E. Gilliland, indicates that growing property taxes are having an effect, *"In the long run, competitive pressures limit an owner's ability to pass the tax to the end users.....Despite that appearance, markets for investment capital again return the tax burden to the property owner. Investors consider the return an investment will generate before they commit capital. Property owners selling real estate must lower the asking price to compensate for the added tax burden."*
3. Finally, the appraisal district apparently was involved in "sales chasing", based on the fact the value of the subject was increased due to deed activity and that competing comparable properties were not raised in value for tax year 2001. An appraisal was commissioned by the owner and consultant to determine the correct 2001 value on the subject based on Section 41.43, Protest of Inequality of Appraisal. Said appraisal indicated a fair and equitable value of \$16,255,396.

The ARB considered all of the issues noted above and ruled to sustain the district's value of \$20 million. The ARB ruling was appealed to district court and the 2001 appraised value was reduced to \$17,350,000, based on all of the issues raised above.

Appealing Low Income Multi-Family Tax Credit Properties.

The facts of the appeal:

The subject property is a newly constructed low income tax credit multi-family property, which provides affordable

housing to qualified persons for senior assisted living. By agreement, the owner was required to have a non-profit partner that provides social services to the tenants. The subject was allocated low-income housing tax credits. These credits were first authorized by The Low Income Housing Tax Credit Program (LIHTC), created by the Tax Reform Act of 1986, and made permanent by the August 1993 tax legislation as contained in Internal Revenue Code Section 42.

Tax credits are simply an avenue for the private sector to purchase ten years of tax credits to reduce an investor's federal income tax liability at a discounted price. The capital raised by the sale of tax credits are converted into equity thus resulting in less debt and more affordable rents on LIHTC properties. Without raising of the tax credit capital funds to fill the gap between the loan and equity gap, tax credit properties would not be built.

The guidelines for the subject property require that 100% of a property's units be occupied by households whose annual earnings do not exceed 60% of the area median income, as determined by HUD. Furthermore, the owner must enter into an agreement with a non-profit partner to provide social services to the tenants. If, at the end of the 15-year deed restricted period, the property owner decides to sell the subject, they must offer the right of first refusal to the non-profit partner. The purchase price would be one dollar over the amount of outstanding debt on the subject.

The issues involved in the appeal were as follows:

1. The district's proposed valuation of \$16,636,650 failed to recognize the subject as a deed restricted tax credit multi-family complex. The district ignored Section 23.21 (Property Used to Provide Affordable Housing). *"In appraising real property that is rented or leased to a low-income individual or family meeting income-eligibility standards established by the owner of the property under regulations or restrictions limiting to a percentage of the individual's or the family's income the amount that the individual or family may be required to pay for the rental or lease of the property, the chief appraiser shall take into account the extent to which that use and limitation reduce the market value of the property."*
2. The property owner agreed to commission a fee appraisal to establish the market value of the subject as of January 1, 2002. The appraisal report concluded that the market value of the subject was \$6,475,000 as of the assessment date.
3. The subject property did not have a stabilized income as of the first of the year as it was still in a lease-up phase.

The ARB was informed of all of the aforementioned issues and accepted the staff's recommendation to value the property at \$7,000,000, which was the indicated stabilized value estimated in the appraisal report. The ARB decision has been appealed to district court for tax year 2002 based on the fact that the ruling was based on a future value and not the market value indicated in the appraisal as of January 1, 2002.

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A-1 Transmissions
 AA Applicators (WMB Properties)
 Kenneth Abbott(Corporate Square)
 A & J Foods, Inc. (Wendy's)
 Algonquin Realty, Inc.
 Alloy Casting Co., Inc.
 Arlington Senior Housing, LP
 Asel Art Supply, Inc.
 Aysha Foods, Inc.(Jack in the Box)
 Fred W. Baccus
 Barry Real Estate Companies
 BBT Corporation
 Helen Biderman
 Fred Brodsky Company
 Brookhollow National Bank
 Cadence Capital Group, Inc.
 Capstone Real Estate Services, Inc.
 Carleton Residential Properties
 Donald & Carolyn Caver
 CCI Manufacturing, Inc.
 CCISTech, Inc.
 The CEI Group
 Centaur Holding, Inc.
 Central West Motor Stages, Inc.
 Cherry Hill Apartment Partners
 Chuy's Comida Deluxe, Inc.
 CL&H Properties, Inc.
 CNC Realty Co.
 Columbia Residential
 Cornerstone Realty Income Trust
 Corr-Wood Manufacturing, Inc.
 Sam Croom
 Crosstimbers Capital, Inc.
 Dallas Aircraft Services, Inc.
 George H. Davis III
 Denton Village East Apts. L.P.
 Michael E. Dyer Family, Ltd.

Edgewood Manor Senior Apts.
 eXegemics, Inc.
 First Gulf Development Corp.
 Flexlink Automation, LP
 Frontline Property Management
 Garland Steel, Inc.
 James S. Garvey
 Ali Gaziani
 The Genesis Real Estate Group
 Glorious Sun Property Mgmt.
 Greenway Investment Company
 Greenville Senior Housing, L.P.
 Randall Grubbs, Attorney at Law
 Grinnan Companies
 Harper House, Inc.
 Hines Place Properties
 Bernard Hirsh Trustee
 The Hodges Companies, Inc
 Hoss Equipment Company
 HSR Plaza, Inc.
 Housewright Company
 Ibrahim Investment Corporation
 International Isotopes Idaho, Inc.
 JaGee Real Properties, LP
 R. E. James Gravel Co.
 Abdul Jitpuri (Convenient Stores)
 Mohammed I. Jitpuri (Restaurants)
 Kaizen Foods, Inc. (Burger Kings)
 K & D Leasing Company
 Ameer A. Khan
 Kiest Townhomes L.P.
 Jerry Kissick
 Lake Cities Polaris & Maxum Boat
 Roger Lawler
 Thomas J. Lenihan
 Loma Alta Corporation
 Lone Star Container Corporation

Magellan Property Management
 Mann Arr, Inc. (Jack in the Box)
 Matthews Southwest
 McElreath Family Ltd. Partnership
 Medoff Family Trust
 MHMR Senior Housing, L.P.
 MilesTek, Inc.
 Milliners Supply
 Millennium Motor Cars
 Russell Minton
 Miranda Partners, L.P.
 Mobius Investments, LLC
 Monsouni, Inc.
 P. O' B. Montgomery & Co.
 Vincent Moran (CDP Corporation)
 James & Marian Moseley
 Manucher Nazarian, M.D.
 Norstar
 Oasis Car Wash, Inc.
 Paccar Leasing Company
 Pace Realty Corporation
 Pacitex Management
 Pappasito's Restaurants
 Paragon Industries, Inc.
 Natvarlal Patel
 Perfect Technology Center, LP
 Pegasus Transportation Group, Inc.
 Piper Weatherford Company
 G. M. Pointer Trust
 Progressive Marketing, Inc.
 Richard J. Ranger
 Puppe, Inc.
 RBI Concepts, Inc.
 Red Steel Company
 Clifton Reeder
 James K. Reeves

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 Sammons Enterprises, Inc.
 Sante Rehabilitation Group
 Saturn Square Realty Corporation
 Sharp Westover Hills, L.P.
 Gary Shultz
 Sierra Management Company.
 Silver Tree Partners
 A. C. Smith Properties
 Judith O. Smith Mortgage Group
 Southwest Housing Management
 Spring Creek Co. (Restaurants)
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 Susman Development Company
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 Texas Hampton LLC
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 Tyson Management
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