

BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)
THE CITY OF CHEYENNE FROM)
A VALUATION DECISION OF THE) Docket No. **2011-25**
LARAMIE COUNTY ASSESSOR)
2011 PROPERTY VALUATION)

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

APPEARANCES

Daniel E. White, City Attorney, and John H. Ridge, Assistant City Attorney, appeared on behalf of the City of Cheyenne. (City of Cheyenne).

Mark T. Voss, Laramie County Attorney, appeared on behalf of Brenda Arnold, Laramie County Assessor (Assessor).

STATEMENT OF THE CASE

The Laramie County Board of Equalization (County Board) filed a petition pursuant to Rules, Wyoming State Board of Equalization, Chapter 2, § 36, requesting the State Board hear and determine the appeal by the City of Cheyenne of the Assessor's denial of its request for tax exemption and assessment of certain property owned by it. In accepting the requested certification, the State Board acts as the finder of fact rather than as an intermediate level of appellate review. *Wyo. Stat. Ann. § 39-11-102.1(c)*. Compare Rules, Wyoming State Board of Equalization, Chapter 2 and Rules, Wyoming State Board of Equalization, Chapter 3. *Laramie County Board of Equalization v. Wyoming State Board of Equalization*, 915 P.2d 1184, 1188 (Wyo. 1996); *Union Pacific Railroad Company v. Wyoming State Board of Equalization*, 802 P.2d 856, 859 (Wyo. 1990). The State Board granted certification by order dated June 17, 2011, and considered the matter in the same manner as an initial appeal filed pursuant to Rules, Wyoming State Board of Equalization, Chapter 2.

The State Board, consisting of Chairman Steven D. Olmstead, Vice Chairman Deborah J. Smith, and Board Member Paul Thomas Glause, held an evidentiary hearing January 11, 2012, at which time the parties presented testimony and exhibits.

JURISDICTION

Within 30 days after the date or postmark date of an assessment schedule, whichever is later, objections to local assessments must be filed with the county assessor indicating why the assessment is incorrect. *Wyo. Stat. Ann. §39-13-109(b)(i)*. The City of Cheyenne's assessment schedule was mailed April 18, 2011. [Ex. 500]. The City of Cheyenne filed a formal request for an exemption from taxation on May 6, 2011. [Ex. 501]. The Assessor denied City of Cheyenne's request for an exemption on May 9, 2011. On May 19, 2011, the City of Cheyenne filed a separate notice of appeal from the Assessor's denial of its exemption request. [County Board Record]. The City of Cheyenne's initial request for exemption constituted a timely appeal of the assessment, and the State Board has jurisdiction to hear and decide this matter.

CONTENTIONS AND ISSUES

The City of Cheyenne identified one mixed issue of law and fact in its Preliminary Statement:

[W]hether the Windmill Property "is used primarily for a governmental purpose."

[*Preliminary Statement of the City of Cheyenne*, p. 4].

The Assessor identified one issue in her Closing Statement:

Was the Assessor's decision denying the City of Cheyenne's request for tax exemption of the subject property, in accordance with law, arbitrary, capricious, an abuse of discretion, or supported by substantial evidence in the record?

[*Laramie County Assessor's Closing Statement*, p. 4].

The ultimate issue the State Board must decide may be stated as follows:

Was the City of Cheyenne Windmill Property used "primarily" for a "governmental purpose" and thus tax exempt under the applicable provisions of the Wyoming Constitution, Wyoming statutes and Wyoming Department of Revenue Rules?

The State Board concludes the City of Cheyenne's Windmill Property did not meet the criteria for tax exemption.

FINDINGS OF FACT

1. The City of Cheyenne is a Wyoming city. [*Preliminary Statement of the City of Cheyenne*, p. 3; *Laramie County Assessor's Preliminary Statement*, 5-6].
2. In 1948 the United States Congress authorized the Administrator of Veterans' Affairs to convey a large parcel of land, referred to as "Section 28," within the boundaries of the Veterans' Administration Center, to the City of Cheyenne to maintain a public park and golf course. *Act of June 29, 1948, ch. 729, Pub. L. No. 831*. [Ex. 107, 108, 115; Tr. p. 77].
3. In 1957 Congress amended the 1948 law. The restrictions on the use of the "Section 28" land was changed from "a public park and golf course" to "such purposes as will not, in the judgment of the Administrator of Veterans Affairs or his designate, interfere with the care and treatment of patients of the Veterans Administration Center, Cheyenne, Wyoming." *Act of June 15, 1956, Pub. L. No. 588*. [Ex. 109; Tr. pp. 78-79].
4. Since the City of Cheyenne's acquisition, portions of "Section 28" have been devoted to public uses including East High School, Okie Blanchard Stadium, Cheyenne Little Players Theater, the Cheyenne compost facility, Prairie View Golf Course, Powers baseball field, Converse Softball Complex, a large drainage easement and facility for flood control, a portion of the Greenway, Cahill Park and the Cahill Soccer Complex. [Ex. 100, 101, 115; Tr. pp. 60-70, 75-78].
5. Another portion of the "Section 28" property, at the center of this controversy, remained undeveloped. The property consists of approximately 23.22 acres located at the southeast corner of the intersection of Dell Range Boulevard and Windmill Road in Cheyenne. The property was platted by the City of Cheyenne on October 11, 2010, as Lot 2, Block 1 of the Windmill Road Second Filing, City of Cheyenne, Laramie County, Wyoming. [Ex. 101, 104, 114, 503, 504, 508; Tr. pp. 22-23, 63-65]. The parcel, referred to by the parties as the Windmill Property or the Menards Property, is referred to in this opinion as the Windmill Property.
6. In addition to the restriction placed on the use of the Windmill Property by Congress, *supra* ¶ 3, it and other property owned by the City of Cheyenne were further encumbered by a condition of a Land and Water Conservation Fund grant received by the City of Cheyenne through the Wyoming Recreation Commission in 1986. The restriction, referred to as a 6(f) boundary, was imposed to protect designated lands within the boundary, including the

Windmill Property, for outdoor recreation pursuant to section 6(f)(3) of the Land & Water Conservation Fund Act. [Ex. 116; Tr. pp. 79-81].

7. Additional restrictions on the use of the Windmill Property included its P-Public zoning and its designation in PlanCheyenne, the City of Cheyenne master land use plan, as open space and community parks. [Ex. 102, 104, 511].

8. At some point in 2006 or 2007 the City of Cheyenne began a four-and-a-half-year process to remove the restrictions on the use of the Windmill Property to facilitate its sale for commercial development. [Tr. pp. 82, 106-107, 111-112, 155, 178].

9. The city of Cheyenne contacted the Administrator of Veteran Affairs and negotiated the release of all restrictions on 55 acres of the "Section 28" property, including the Windmill Property. The Release of Restriction on Use, executed on December 17, 2008, removed the restrictions on the use of the Windmill Property, provided any disposition, development or use of the property would "meet all VA requirements for beneficial health care delivery to VA patients." [See *supra* ¶ 3; Ex. 510; Tr. pp. 91-92].

10. The City of Cheyenne also contacted the Wyoming Department of State Parks and Cultural Resources in 2008 and requested permission to substitute other more suitable property for the Windmill Property thereby removing the Section 6(f) use restriction from the Windmill Property. The August 27, 2008 letter from the City of Cheyenne described the purpose of the proposed substitution as follows:

Reason – When the property to be converted [Windmill Property] was first encumbered under Section 6(f) city leaders envisioned Cheyenne growing in a different way. The subject property is now in the heart of the commercial/retail area of the city. The subject property fronts the busiest street in Wyoming (Dell Range Boulevard) and is isolated from all residential areas. There is a small under-utilized park (Cahill Park) east of the subject property. Cahill Park will not be affected by the proposed conversion, however, there is no reason to develop recreation facilities on the subject property. Additionally, the sale of the subject property will improve Cheyenne City parks. All funds from the sale will remain with the Parks & Recreation Department to improve existing facilities (i.e. Cheyenne Botanic Gardens, South Cheyenne Community Park Youth Activity Center) and to assist in the development of future parks in Cheyenne (i.e. South Cheyenne Community Park, Saddle Ridge Park, etc.).

[Ex. 110; Tr. pp. 82-84, 100-105, 110-112]. The City of Cheyenne's request represented the Windmill Property had "limited benefit for outdoor recreation use" and provided "very little

recreational opportunity.” [Ex. 110; Tr. p. 103]. The restriction was subsequently removed. [Tr. pp. 88-89, 92].

11. The City of Cheyenne also filed an application to modify PlanCheyenne. The application summary listed the existing use of the Windmill Property as “Vacant/undeveloped” and the proposed land use as “General Commercial as permitted in CB [Community Business] zoning.” The Summary stated:

The City of Cheyenne has initiated this Land Use Plan map amendment as part of an effort to prepare approximately 28 acres of City owned land for commercial development at the southeast quadrant of Dell Range Boulevard and Windmill Road. In addition to the Land Use Plan map amendment the parcel will also be platted and the zone changed to CB-Community Business from P-Public.

[Ex. 102, p. 10; Tr. p. 154].

12. The application also contained a number of findings of the City of Cheyenne staff, including the following:

This piece of undeveloped property [Windmill Property] has not been part of the City’s Parks and Recreation development plans and would otherwise remain underutilized. The potential for this property to be part of the tax base is a benefit to the community.

* * *

Dell Range Boulevard is a high volume principal arterial with a high predominance of commercial activity. The addition of additional commercial activity would appear to be compatible in this area. The proposed change would still retain significant open space in the area which will continue to benefit the surrounding area in a fashion similar to what exists today.

* * *

The addition of the commercial property will add to the property tax base and potentially the sales tax base.

[Ex. 102, pp. 11-12].

13. The Windmill Property – Future Land Use Plan map Amendment (City) Summation further stated:

Restrictions Lifted: At this point in time there are no Federal restrictions on the land being considered from commercial development. In the past land uses

on this land have been limited to park and recreational uses by the Veterans Administration (VA) and the Federal Department of Interior (DoI). The VA originally placed restrictions on this property now owned by the City which limited the uses. In March of 2007 those restrictions were removed from the property. In April of 2009 the DoI accepted the City's proposal to remove restrictions on the 28 acres of land at the corner of Windmill Road and Dell Range Boulevard. The restrictions had been related to Federal moneys used for park development in area. (Emphasis in original).

[Ex. 102, p. 11].

14. The Cheyenne City Council adopted the resolution amending the PlanCheyenne Land Use Map on September 28, 2009, changing the designation of the Windmill Property from the Parks and Open Space land use category to the Community Business land use category. Resolution No. 5162, City of Cheyenne, September 28, 2009. [Ex. 102, pp. 3-4]. The purpose of the amendment was to prepare the Windmill Property for commercial development. [Tr. p. 155].

15. The City of Cheyenne also undertook the steps to subdivide and plat a portion of "Section 28," including the Windmill Property. The process included changing the zoning, and the preparation of a Traffic Impact Analysis, Preliminary Stormwater Management Plan and final plat. [Ex. 103,105, 106, 503; Tr. pp. 126-128, 169-170, 173, 175176, 179-180].

16. The Traffic Impact Analysis prepared for the City of Cheyenne Urban Planning Office by Felsburg Holt & Ullevig of Colorado was completed and submitted in May of 2009. [Ex. 105]. The Summary and Recommendation stated: "This site is planned to contain approximately 250,000 square feet of retail space." [Ex. 105, p. 28; Tr. pp. 174-175].

17. The Preliminary Stormwater Management Plan for the Windmill 2nd Filing prepared for the City of Cheyenne Urban Planning and City of Cheyenne Engineering Services by BenchMark Engineers, P.C. of Cheyenne was submitted on June 1, 2009. [Ex. 106]. It indicated the Windmill Property was "being considered for future commercial or 'big-box' development." [Ex. 106, p. 192; Tr. pp. 176-177].

18. The Cheyenne City Council passed a resolution on October 26, 2009, authorizing the Mayor and City Clerk to execute a final plat for Windmill Road Second Filing when the Community Facility Fees were paid in full. [Ex. 103]. The Final Plat was filed almost a year later on October 11, 2010. [Ex. 503, Tr. p. 23].

19. Finally, the Cheyenne City Council passed an ordinance on November 9, 2009, formally changing the zoning classification of the Windmill Property from P-Public district to CB-Community Business district. [Ex. 104, 504, Tr. p. 135].

20. The removal of the VA restrictions and Department of Interior section 6(f) restrictions, the change in PlanCheyenne, the zoning change and the preparation and filing of a final plat were undertaken by the City of Cheyenne so that the Windmill Property could be marketed and sold. [Tr. pp. 89, 104-107, 111-112]. By removing the restrictions and completing the steps leading to the filing of the final plat, the City of Cheyenne complied with the requirements imposed on developers of land in Cheyenne and was entitled to develop the property. [Tr. pp. 116-123, 126-128, 173, 178-180].

21. Witnesses for the City of Cheyenne described the Windmill Property as open space “left natural for people to go do natural type activities in; like bird watching, walking, things of that nature.” [Tr. pp. 59-60]. Additional activities observed occurring on the Windmill Property included mountain bike riding, walking dogs, sledding, watching air shows (when the air show was at the airport), flying a kite and hitting golf balls. [Tr. pp. 69, 71-72]. The City of Cheyenne placed signs prohibiting four-wheel driving and mud bogging and limited access by placing a fence on the east side of the property. [Tr. pp. 112-113].

22. Maintenance by the City of Cheyenne for the Windmill Property included snow plowing and mowing of the Greenway, spraying for noxious weeds, trash pickup when needed, and watering trees along the main roads. [Tr. pp. 72-73]. A portion of the Greenway across the Windmill Property, however, was not included in the final plat, leaving it to the site plan approval process and the City of Cheyenne sidewalk requirements to protect future public use. [Tr. 156-157].

23. The public created a roadway shortcut and temporary parking areas on the Windmill Property for the Cahill Park soccer complex, which the City of Cheyenne subsequently maintained. [Tr. pp. 65-67]. No reservation or easement for the shortcut or temporary parking was included by the City of Cheyenne in the final plat of the Windmill Property. [Ex. 100, 503; Tr. pp. 98-99].

24. Brenda Arnold, the Laramie County Assessor testified. She has held the office of Assessor since January 1995. She has been a certified Wyoming tax appraiser since 1989 and is accredited by the the International Association of Assessment Officers. [Tr. p. 21].

25. The Assessor mailed the City of Cheyenne a 2011 Assessment Notice for the Windmill Property on April 18, 2011. The Assessor valued the Windmill Property at \$3,133,390, with an estimated property tax of \$21,135 based on the prior year’s tax levy. [Ex. 500; Tr. pp. 22, 25].

26. The Assessor's decision to assess the Windmill Property was based on two facts:
- A. The passage by the City of Cheyenne of Ordinance Number 3876 changing the zoning of the Windmill Property effective on the filing of its plat, *supra* ¶ 19 [Ex. 503; Tr. pp. 23, 26, 36]; and
 - B. The Recording of the final plat for the Windmill Property on October, 11, 2010. *Supra* ¶¶ 15-18, [Tr. pp. 23, 26, 36].

27. The Assessor's decision was based on her interpretation of Wyoming Statutes section 39-11-105(a)(v), exempting municipal property used primarily for a governmental purpose, and Chapter 14, section 18 of the Wyoming Department of Revenue's Rules related to Property Exemption Standards, requiring a specific use to qualify for the exemption. In the Assessor's opinion, neither ownership of the property nor stated objectives is sufficient to justify an exemption; actual and immediate use of the property consistent with the applicable exemption standard was required. The mere holding of property by a municipality for future or prospective use is not sufficient. [Tr. pp. 24-25].

28. After the City of Cheyenne received the assessment notice for the Windmill Property, it filed a Property Tax Exemption Application with the Assessor. The City of Cheyenne's May 6, 2011, application stated the Windmill Property was:

[u]ndeveloped open public space and public access to Cahill Park. At this time, the City's use of the land is subject to the requirement that any disposition, development, or use of the property will meet all VA (Veterans Administration[]) requirements for beneficial health care delivery to VA patients.

[Ex. 501]. The Assessor denied the exemption request by letter dated May 9, 2011.

29. The Assessor completed additional research related to the Windmill Property after receiving the City of Cheyenne's Property Tax Exemption Application. [Tr. p. 26]. She found a request for economic development proposals, characterized by her as similar to a marketing document, on the City of Cheyenne's website. The opening statement of the Request for Economic Development Proposals stated "[t]he City of Cheyenne is accepting proposals for the purchase and development of a 28-acre parcel of City-owned property." The Request confirmed the information she relied on in assessing the Windmill Property and the Assessor's understanding of the substantial investment of time and effort by the City of Cheyenne to change the property's characteristics. [Ex. 508; Tr. pp. 31-35].

30. It was the Assessor's opinion the Windmill Property was vacant open space. She did not have personal knowledge of the use of the Windmill Property. She considered public

access or use irrelevant to her determination that the Windmill Property was taxable. [Tr. pp. 36-39].

31. Any portion of the Conclusions of Law: Principles of Law or the Conclusions of Law: Application of Principles of Law set forth below which includes a finding of fact may also be considered a Finding of Fact and, therefore, is incorporated herein by reference.

CONCLUSIONS OF LAW

Applicable Law

32. The Wyoming Constitution provides for property tax exemptions:

The property of the United States, the state, counties, cities, towns, school districts and municipal corporations, when used primarily for a governmental purpose, and public libraries, lots with the buildings thereon used exclusively for religious worship, church parsonages, church schools and public cemeteries, shall be exempt from taxation, and such other property as the legislature may by general law provide.

Wyo. Const., art. 15, § 12.

33. The property tax exemption for property of a city or town is further addressed by Wyoming Statutes:

(a) The following property is exempt from property taxation:

* * *

(v) Property of Wyoming cities and towns owned and used primarily for a governmental purpose including:

(A) Streets and alleys and property used for the construction, reconstruction, maintenance and repair of streets and alleys;

(B) Property used to furnish sewer and water services;

(C) City or town halls, police stations and equipment, traffic control equipment, garbage collection and disposal equipment and lands and buildings used to service and repair the halls, stations or equipment;

(D) Parks, airports, auditoriums, cemeteries, golf courses, playgrounds and recreational facilities. Any charges for the use

of the facilities shall not exceed the cost of operation and maintenance to qualify for the exemption;

(E) Personal property used exclusively for the care, preservation and administration of city or town property;

(F) Parking lots operated on a nonprofit basis.

Wyo. Stat. Ann. § 39-11-105(a)(v).

34. Both the constitutional and statutory provisions require municipal use of a property to be “primarily” for a “governmental” purpose. The Wyoming Supreme court has defined “primarily” as follows:

The term “primarily” has an ordinary and obvious meaning in the law. “Primarily” means “of first importance” or “principally.” *Malat v. Riddell*, 383 U.S. 569, 572, 86 S.Ct 1030, 1032, 16 L.Ed.2d 102 (1966). *Accord Hibernian Soc. v. Thomas*, 282 S.C. 465, 319 S.E.2d 339, 342-343 (1984) (applying this definition to ad valorem tax exemption statute). The term “primarily” may also be synonymous with “essentially” or “fundamentally” in some circumstances. *Board of Governors v. Agnew*, 329 U.S. 441, 446, 67 S.,Ct. 411, 414, 91 L.Ed. 408 (1947); *Brennan v. Harrison County, Mississippi*, 505 F.2d 901, 903 (5th Cir.1975).

* * *

The purpose of such an exemption is to prevent an escalating spiral of unnecessary taxation and administrative costs with no benefit to the public.

State Board of Equalization v. City of Lander, 882 P.2d 844, 850 (Wyo. 1994).

35. Wyoming Statutes further provide:

(b) Basis of tax. The following shall apply:

* * *

(ii) All taxable property shall be annually valued at its fair market value. Except as otherwise provided by law for specific property, the department shall prescribe by rule and regulation the appraisal methods and systems for determining fair market value using generally accepted appraisal standards;

Wyo. Stat. Ann. § 39-13-103(b)(ii).

36. Chapter 14 of the Wyoming Department of Revenue (Department) Rules provides assessors with guidance in determining whether property owned by a municipality is exempt from property taxation.

Section 2. Considerations.

(a.) For county assessed property, county assessors are responsible for making the initial determination of exemption.

(i) For publicly owned property the assessor begins with the legal presumption the property is exempt.

* * *

Section 4. Publicly owned property - W.S. 39-11-105(a)(i)-(vi).

(a.) Publicly owned property is not, per se, exempt from taxation. The property is exempt only "when used primarily for a governmental purpose."

(b.) The phrase "governmental purpose" cannot be precisely defined. The following considerations should be evaluated:

(i) If a service or function is obligatory (one the governmental entity must perform as a legal duty imposed by statute), the function is governmental and the associated property is exempt.

(ii) If a service is rendered gratuitously, supported by taxes, and for the public welfare or enjoyment generally, the property associated with providing such service is exempt.

(iii) W.S. 39-11-105(a)(v) specifically identifies certain municipal property which is exempt (used primarily for a governmental purpose).

(iv) W.S. 39-11-105(a)(i)(A)-(E) and (ii)(A)-(D) identify specific uses of federal and state property which are not exempt (not used for governmental purposes).

(v) Property owned by a governmental entity acting in its proprietary capacity is not exempt, (e.g. where a city enters the field of private competitive business for profit or into activities which may be and frequently are carried on through private enterprises).

(vi) Governmental property subject to the payment of service (user) fees is not exempt unless the specific use is provided by statute (e.g., public sewer and water services).

(A.) Municipally-owned electric utility plants are proprietary functions supported by service fees. The function is not specifically recognized a[s] exempt by statute.

(B.) Limited property associated with a municipally-owned utility used to light streets, direct traffic and light city offices, is exempt as a service for the public welfare generally. Such property of the municipal plants is exempt.

Rules, Wyoming Department of Revenue, Chapter 4, §§ 2(a)(i), 14(a) & 14(b)(i)-(vi) (Effective 05/21/2008).

37. The Department of Revenue's rules also address the exemption of undeveloped, unconstructed or unused property.

Section 16. Undeveloped, unconstructed or unused property.

(a) For exemptions requiring a specific use to qualify, neither ownership of the property nor stated objectives of the entity's organization is sufficient. To justify an exemption, actual and immediate use of the property consistent with the applicable exemption standard is required. The mere holding of the property by an entity for future or prospective use is not sufficient.

(b) An exemption may be granted once construction or use commences consistent with the exempt purpose.

Rules, Wyoming Department of Revenue, Chapter 14, § 16 (Effective 05/21/2008).

38. The Department is required to confer with, advise and give necessary instructions and directions to the county assessors as to their duties, and to promulgate rules and regulations necessary for the enforcement of all tax measures. *Wyo. Stat. Ann. § 39-11-102(c)(xvi) & (xix)*. In particular, except as provided by law for specific property, the Department "shall prescribe by rule and regulation the appraisal methods and systems for determining fair market value using generally accepted appraisal standards." *Wyo. Stat. Ann. § 39-13-103(b)(ii)*.

39. A county assessor has a corresponding duty to annually value property within the assessor's county, and in doing so to "[f]aithfully and diligently follow and apply the orders, procedures and formulae of the department of revenue or orders of the state board of equalization for the appraisal and assessment of all taxable property." *Wyo. Stat. Ann. § 18-3-204(a)(ix)*.

40. Administrative rules have the force and effect of law. *Wyo. Dep't of Revenue v. Union Pacific Railroad Co.*, 2003 WY 54, ¶ 18, 67 P.3d 1176, 1184 (Wyo. 2003); *Painter v. Abels*, 998 P.2d 931, 939 (Wyo. 2000). "The rules of statutory interpretation also apply to the interpretation of administrative rules and regulations." *State by and through Wyoming Department of Revenue v. Buggy Bath Unlimited, Inc.*, 2001 WY 27, ¶ 6, 18 P.3d 1182, 1185 (Wyo. 2001).

41. The State Board is required to "[d]ecide all questions that may arise with reference to the construction of any statute affecting the assessment, levy and collection of taxes, in accordance with the rules, regulations, orders and instructions prescribed by the department." *Wyo. Stat. Ann. § 39-11-102.1(c)(iv)*.

42. The statutory valuation date for Wyoming property is January 1 of each year, and all taxable property must be valued and assessed for taxation in the name of the owner of the property on that date. *Wyo. Stat. Ann. § 39-13-103(b)(i)*.

43. The Wyoming Supreme Court has set the standards that apply when analyzing the exemption of a municipality's property:

[¶10] Although under Title 39, taxation of property is generally the rule, the exemptions provided for by § 39-11-105(a)(v) require that we apply the rule that where the established policy of the state is to exempt publicly owned property, the burden is placed on the taxing authority to establish taxability. *City of Cheyenne v. Bd. of County Comm'rs of the County of Laramie*, 484 P.2d 706, 708-09 (Wyo. 1971). The mere ownership of property by a town does not exempt the property; it must also be used primarily for governmental purposes. *Id.* at 709. When a town uses the property in a proprietary manner, the property is not exempt from taxation. *Town of Pine Bluffs v. State Board of Equalization*, 79 Wyo. 262, 288, 333 P.2d 700, 710 (Wyo. 1958). The taxable status of property owned by a governmental entity must be determined as a question of fact by the use made of the property. *City of Cheyenne v. Sims*, 521 P.2d 1347, 1349 (Wyo. 1974).

[¶11] We have recognized that the term "used primarily for a governmental purpose" is difficult to define but have found that it applied to buildings leased to profit-making corporations although located upon a municipally owned and operated airport. *City of Cheyenne v. Bd. of Cty. Comm'rs of Laramie Cty.*, 484 P.2d at 709. There, we said that the mere fact that the city accomplishes such use through a lessee or receives rent in return for such use is not controlling. *Id.* We later decided that "[w]here the primary and principal use to which property is put is public, the mere fact that income is incidentally derived from it does not affect its character as property devoted to a public use, so as to prevent its being exempt from taxation." *State Bd. of Equalization v. City of Lander*, 882 P.2d 844, 850 (Wyo. 1994).

* * *

[¶ 13] The statutory exemptions provided for in § 39-11-105(a)(v) are not limited to those explicitly stated. By the statutory use of the term "including" the legislature intends to include other purposes even though not specifically enumerated. *See City of Cheyenne v. Bd. Of Cty. Comm'rs of Laramie Cty.*, 484 P.2d [706] at 708.

In Re Deromedi, Hot Springs Assessor, 2002 WY 69, ¶¶ 10-11, 13, 45 P.3d 1150, 1153-1154 (Wyo. 2002)(footnote omitted); *See In Re Town of Thermopolis*, 2002 WY 70, ¶¶ 13-14, 45 P.3d 1155, 1160 (Wyo. 2002).

44. An entity’s “stated intentions for the property, coupled with rental payments, are not sufficient to comply with the Wyoming Constitution's mandate that the property be used primarily for a governmental purpose.” *Oakley, Fremont County Assessor v. Fremont County Community College Dist.*, 2010 WY 106, ¶ 17, 236 P.3d 1004, 1008 (Wyo. 2010).

45. “[I]t is a fundamental rule of statutory interpretation that all portions of an act must be read in *pari materia*, and every word, clause, and sentence must be construed so that no part is inoperative or superfluous.” *Deloges v. State ex rel. Wyo. Workers’ Compensation Division*, 750 P.2d 1329, 1331 (Wyo. 1988) *quoted in State ex rel. Workers Safety Div. v. Singer*, 211 WY 57, ¶ 12, 248 P.3d 1155, 1159 (Wyo. 2011). In deciding this matter, it must be presumed the Legislature did not intend futile things. *Hamlin v. Transcon Lines*, 701 P.2d 1139, 1142 (Wyo. 1985). *See also, TPJ v. State*, 2003 WY 49, ¶ 11, 66 P.3d 710, 713 (Wyo. 2003).

46. Comprehensive planning and zoning have been described by the Wyoming Supreme Court as follows:

[¶8] Zoning is a planning tool that must be used in accordance with a comprehensive plan. *Wyo. Stat. Ann. § 15-1-601(d)(i)* (LexisNexis 2001); 1 Young, *supra*, § 1.13 at 19.

Comprehensive zoning consists of the division of the whole territory of a municipality into districts, and the imposition of restrictions upon the use of land in such districts. * * * [Zoning regulations] permit a municipality to apply constant and consistent pressure upon landowners to the end that land use will be guided by the community plan and the public interest.

1 Young, *supra*, § 1.13 at 20 (footnote omitted). Municipal zoning in Wyoming contemplates the division of a town into districts, with uniform regulations within each district. *Wyo. Stat. Ann. § 15-1-601(b) and (c)*. We have described zoning as “the process that a community employs to legally control the use which may be made of property and the physical configuration of development upon the tracts of land located within its jurisdiction.” *Ford*, 924 P.2d at 94. Zoning ordinances may regulate both the nature of the land usage and the physical dimension of uses, including height, setbacks, and minimum areas. *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 726 (Wyo.

1985), *appeal dismissed*, 476 U.S. 1110 (1986). The comprehensive plan is the policy statement; the zoning ordinances are what have the force and effect of law. *Ford*, 924 P.2d at 95.

Snake River Brewing v. Town of Jackson, 2002 WY 11, ¶¶ 7–8, 39 P.3d 397, 402–403 (Wyo. 2002).

47. The burden of proof is on the assessor to establish municipal property is taxable:

Section 3. Burden of proof.

* * *

(b.) For publicly owned property, the burden is on the taxing authority to establish taxability.

Rules, Wyoming Department of Revenue, Chapter 14 § 3 (Effective 05/21/2008); *see Rules, Wyoming State Board of Equalization, Chapter 2, § 20*.

Discussion

48. The Wyoming constitution exempts specified property from taxation, and broadly authorizes the legislature to provide for the exemption of other property. Property owned by a municipality is exempt only if it is used “primarily” for a governmental purpose. *Wyo. Const., art. 15 § 12, supra ¶ 32; Wyo. Stat. § 39-11-105(a)(v), supra ¶ 33*.

49. The Department’s Rules “provide a reference to accepted definitions, procedures and criteria for the exemption from assessment and taxation of real and personal property,” and to serve “as a ready reference to commonly encountered problems.” *Rules, Wyoming Department of Revenue, Chapter 14, § 1 (a), (b)*. The Rules are binding on the Assessor, and have the status of law. The Department’s rules generally echo Wyoming case law. *In Re Deromedi, Hot Springs Assessor*, 2002 WY 69, 45 P.3d 1150 (Wyo. 2002); *In Re Town of Thermopolis*, 2002 WY 70, 45 P.3d 1155 (Wyo. 2002); *State Bd. of Equalization v. City of Lander*, 882 P.2d 844 (Wyo. 1994); *City of Cheyenne v. Bd. of County Comm'rs of the County of Laramie*, 484 P.2d 706 (Wyo. 1971); *Town of Pine Bluffs v. State Board of Equalization*, 79 Wyo. 262, 333 P.2d 700 (Wyo. 1958). *Supra* ¶¶ 34, 36-37, 40, 43-45.

50. In determining whether or not a municipality’s property is exempt from taxation, the Assessor “begins with the legal presumption the property is exempt.” *Supra* ¶¶ 36, 43.

51. The Department’s Rules describe considerations typically involved in determining whether a property should be exempt:

- (i) Ownership of the property;
- (ii) Use of the property; and/or
- (iii) Type of property.

Rules, Wyoming Department of Revenue, Chapter 14, § 2 (c). Exemptions are typically framed in terms of ownership, *e.g.*, Wyo. Stat. Ann. § 39-11-105(a)(xviii), (xxi), (xxii), (xxxvi), (xxxvii); use of property, *e.g.*, Wyo. Stat. Ann. § 39-11-105(a)(vii), (xx); type of property, *e.g.*, Wyo. Stat. Ann. § 39-11-105(a)(x), (xii), (xv); or some combination of ownership, use, and type, *e.g.*, Wyo. Stat. Ann. § 39-11-105(a)(iii), (iv), (v), (xiv), (xxvii), (xxxv).

52. The Board has followed authorities applying similar standards by looking at both the ownership of the property and the use of the property: “[e]ligibility for exemption is determined by examining the use to which the property is put, not the character of the owner.” *Wes Brandt Foundation, Inc. v. Carper*, 652 P.2d at 567. While it goes without saying municipal ownership is required, the exemption of Wyoming Statutes section 39-11-105(a)(v) focuses on use of the property “primarily” for a “governmental purpose.” Municipal ownership or stated intentions alone are not enough to qualify for the property tax exemption. *Supra* ¶¶ 32-33, 37, 43-44.

53. The City of Cheyenne’s Windmill Property does not fall clearly within the requirement of use “primarily” for a “governmental purpose” found in the applicable rules and case law. As the Wyoming Supreme Court has noted “the term ‘used primarily for a governmental purpose’ is difficult to define.” *In Re Deromedi, Hot Springs Assessor*, 2002 WY 69, ¶ 11, 45 P.3d 1150, 1154, *supra* ¶ 43. The descriptions of the property’s use contained the City of Cheyenne’s written documents are not consistent with the testimony offered at the hearing. *Compare* ¶¶ 10-13 with ¶¶ 21-22, *supra*.

54. If the Windmill Property’s “primary” purpose was recreation, none of the changes undertaken by the City of Cheyenne would have been necessary. The property was zoned P-Public, with VA and Department of Interior restrictions limiting its use to recreational purposes would have qualified for the municipal tax exemption. *Supra* ¶¶ 4, 6-7.

55. However, there was a fundamental change in the nature of the Windmill Property over a four-and-a-half year period. The property went from an undeveloped, underutilized, vacant parcel with limited benefit for outdoor recreational use and no reason to develop recreational facilities, to a platted parcel, zoned CB-community business ready for sale and commercial development. It went from a parcel with significant restrictions on use to a parcel ready for sale and development. *Supra* ¶¶ 8-20, 46.

56. The descriptions of the Windmill Property and expressed rationale for removing the use restrictions on the property memorialized in the City of Cheyenne's documents reflected a primarily non-governmental purpose, commercial real estate development, rendering the Windmill Property taxable. *Supra* ¶¶ 10-13, 16-17.

57. As a further and separate basis for our decision, the Board concludes the Department's standard related to undeveloped property applies. *Rules, Wyoming Department of Revenue, Ch. 14 § 16(a), supra* ¶ 37. The principle of immediate use for the exempt purpose is illustrated by Section 6(b) of the Department's Rules, which provides that "lots adjacent to a church building which are not reasonably needed for the convenient enjoyment of the building as a church are not exempt." *Rules, Wyoming Department of Revenue, Ch. 14, § 6(b), supra* ¶ 37. The City of Cheyenne's own statements regarding the Windmill Property clearly establish the Windmill Property was neither being used nor reasonably needed for any governmental purpose consistent with Wyoming Statutes section 39-11-105(a)(v). *Supra* ¶¶ 10-13, 28.

58. The anecdotal evidence offered at the hearing of use of the Windmill Property by some members of the public without any significant governmental involvement, *supra* ¶¶ 21-22, did not establish a primary use consistent with governmental purpose. *Supra* ¶ 44. Observations of members of the public on the Windmill Property is not the equivalent of "governmental use."

59. The City of Cheyenne changed the nature of the property from undeveloped, underutilized vacant land to commercial real estate. By the changes to PlanCheyenne and the zoning, the policy of the city and the nature of the land and its uses were changed. *Supra* ¶¶ 11-14, 19. The Windmill Property became a piece of commercial real estate and the City of Cheyenne became a competitor in the commercial real estate market.

60. The Board is mindful that the purpose the exemption for municipal property is to prevent an escalating spiral of unnecessary taxation and administrative costs with no benefit to the public. *Supra* ¶ 34. However, the grant of an exemption under the facts of this case would put the City of Cheyenne at a competitive advantage over other commercial real estate developers and would contravene the rule requiring a statute not be read so as to render any part inoperative or superfluous. *Supra* ¶ 45.

61. The City of Cheyenne was in the same position as other entities seeking a tax exemption based on an intended use of vacant property. The City argued that because its property was open and used by the public, it was entitled to an exemption from taxation. We can readily imagine other entities making a similar argument when it holds land available for development or sale. In either case, the Department's Rules require the assessor and the State Board to regard land holding "for future or prospective use" as insufficient to qualify

property for a property tax exemption. Rules, Wyoming Department of Revenue, Chapter 14, § 16(a), *supra* ¶ 37.

62. In reaching these conclusions, the Board finds support in the record for the Assessor's description of the property as vacant commercial property. The actual and immediate use of the property, best described by the City's own documents as "isolated," "of limited benefit," "[v]acant/undeveloped," was merely being held by the City of Cheyenne without any real "governmental purpose" or positive action to render it suitable for recreational activities. *Supra* ¶¶ 10-12, 28. The Board further finds the minimal actions of the City in maintaining the shortcut and parking areas established by the public, and the other limited maintenance activities insufficient to qualify as "primarily" a "governmental purpose," particularly in light of the absence of any protection for the Greenway, shortcut or parking areas in the final plat for the Windmill Property. *Supra* ¶¶ 22-23.

63. The City of Cheyenne provided no case law allowing an exemption for vacant land merely held by a municipality, nor does the State Board believe such cases would be particularly useful in light of the clear statutory requirement that the property be "used for a governmental purpose." Mere ownership of property by a municipality is not sufficient in and of itself to qualify for the property tax exemption. *Supra* ¶¶ 37, 43.

64. The County Assessor's analysis of the facts was consistent with the Department of Revenue Rules and applicable statutes. Like the County Assessor, the State Board finds there is no constitutional, statutory, or regulatory provision which expressly exempts lands held by a municipality primarily for sale for commercial development. *Wyo. Const., art. 15, § 12; Wyo. Stat. Ann. § 39-11-105(a); Rules, Wyoming Department of Revenue, Chapter 14. Supra* ¶¶ 32-33, 36-37.

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ORDER


IT IS THEREFORE HEREBY ORDERED the decision of the Laramie County Assessor to assess City of Cheyenne's Windmill Property for 2011 is **affirmed**.

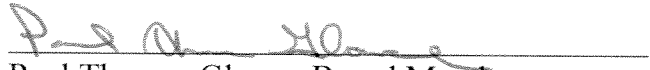
Pursuant to Wyo. Stat. Ann. §16-3-114 and Rule 12, Wyoming Rules of Appellate Procedure, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days of the date of this decision.

DATED this 19th day of September, 2012.

STATE BOARD OF EQUALIZATION


Steven D. Olmstead, Chairman


Deborah J. Smith, Vice-Chairman


Paul Thomas Glause, Board Member

ATTEST:


Jana R. Fitzgerald, Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day September, 2012, I served the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER** by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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