

PT 07-7

Tax Type: Property Tax

Issue: Educational Ownership/Use

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**COMMUNITY HIGH SCHOOL
DISTRICT 117,**

Applicant

v.

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

Docket No: 05-PT-0063

Real Estate Tax Exemption

For 2004 Tax Year

P.I.N.S 02-08-400-005 (part of)

02-08-400-006 (part of)

Lake County Parcels

Kenneth J. Galvin

Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Mr. Robert E. Swain and Ms. Sara Boucek, Hodges, Loizzi, Eisenhammer, Odick & Kohn, on behalf of the Board of Education of Antioch Community High School District No. 117; Mr. George Foster, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

SYNOPSIS:

This proceeding raises the issue of whether Lake County Parcels, identified by Property Index Numbers 02-08-400-005 (part of) and 02-08-400-006 (part of) (hereinafter the “subject property”), qualify for exemption from 2004 real estate taxes under 35 ILCS 200/15-35, in which “all property of schools, not sold or leased or otherwise used with a view to profit” is exempted from real estate taxation or 35 ILCS 200/15-135 in which all property of public school districts not leased by those districts or

otherwise used with a view to profit is exempt. The controversy arises as follows: On January 7, 2004, the Board of Education of Antioch Community High School District No. 117 (hereinafter "District 117") filed two Real Estate Exemption Complaints for the subject property with the Board of Review of Lake County (hereinafter the "Board"). The Board reviewed Antioch's complaints and subsequently recommended to the Illinois Department of Revenue (hereinafter the "Department") that a full year exemption be granted for the subject property. Dept. Ex. No. 1.

The Department rejected the Board's recommendation in two determinations dated July 14, 2005. The first determination (County Reference E-4591, Department Docket 04-49-375) was for Lake County P.I.N. 02-08-400-005 (part of) and the second determination (County Reference E-4592 and 4593, Department Docket 04-49-376) was for Lake County P.I.N. 02-08-400-005 (part of) and 02-08-400-006 (part of). Both determinations denied the exemption stating that "Applicant is not the owner of the property. Applicant is lessee of the property. No leasehold assessment has been made for the assessment year for which application has been made." Dept. Ex. No. 1.

On September 12, 2005, District 117 filed a request for a hearing as to the denial and presented evidence at a formal evidentiary hearing on August 1, 2006 with William Ahlers, Business Manager for District 117, presenting oral testimony. Following submission of all evidence and a careful review of the record, including the "Applicant's Post Hearing Memorandum of Law in Support of Application for Property Tax Exemption" ("App. Brief"), "Department's Memorandum in Response," and "Applicant's Post Hearing Reply Memorandum," it is recommended that the

Department's determinations denying property tax exemptions for the subject property be affirmed.

FINDINGS OF FACT:

1. Dept. Ex. No. 1 establishes the Department's jurisdiction over this matter and its position that the subject property was not in exempt use in 2004. Tr. pp. 7-8; Dept. Ex. No. 1.
2. District 117 has approximately 2,500 students in grades 9 through 12 and encompasses approximately 65 square miles including the Villages of Antioch, Lake Villa and Lindenhurst. Tr. pp. 9-11.
3. The subject property, consisting of 34-35 acres and known as the H.O.D. Landfill, was in use from 1963 through 1984. Waste Management of Illinois ("Waste Management") is the owner of the subject property. In 1998, the Environmental Protection Agency ("EPA") posted a "Notice of Record" detailing the proposed remedies necessary to correct the site including the collection of methane gas through extraction wells and burning it through a flare system. On August 17, 1998, Mr. Ahlers wrote to the EPA and suggested that the methane gas could be used to heat the boilers at Antioch Community High School ("Antioch"), which bordered the site. Tr. pp. 21-22, 57; App. Ex. Nos. 4 and 6.
4. On November 12, 2003, the EPA issued a "Ready for Reuse" certificate determining that the "H.O.D. Landfill Superfund Site is Ready for Recreational Use." The Certificate states that Waste Management "is responsible for ensuring that any limitations specified in the ROD [Record of Decision] or ESD [Explanation of

Significant Differences] that might be affected by a particular recreational use are complied with during the activity.” Waste Management has perpetual responsibility for ensuring that all remedies that had been put in place to make the landfill usable were maintained and monitored. Tr. pp. 22-24; App. Ex. Nos. 5 and 6.

5. Waste Management has to maintain a cap of hard clay over the landfill and make sure there is no seepage of materials from below the cap rising through the cap and keep water above the cap from seeping through the cap. The water creates leachate, a waste-water product, and restricts the speed of decay. Waste Management is also responsible for removing leachate from the landfill. Tr. pp. 25-26.
6. Waste Management laid underground pipes beneath the cap to collect methane. The methane pipes extend into the 34-35 acres of the subject property and an additional 40 acres to the east of the subject property, not at issue in this proceeding. Tr. pp. 46-47, 53-54, 58.
7. District 117 first started using methane gas for school use in December, 2003, when the EPA issued its “Ready for Reuse” determination. Waste Management monitors the methane wells on the subject property. District 117 erected a building on the southern part of the subject property where the methane is collected from the underground pipes. A drying compressor dries the methane. A pipeline runs under the road to Antioch, where there is a building that houses 10 microturbines and a heat compressor which converts the methane to energy, used to heat Antioch’s boilers and generate electricity. Tr. pp. 25-28, 56.
8. District 117 and Waste Management entered into a “Gas Site Lease Agreement” on August 15, 2003, for an initial lease period of 99 years at a “fixed rent” of \$1.00/year.

District 117 is responsible for all taxes, including property taxes, imposed on the property. Tr. pp. 34-37; App. Ex. No. 1.

9. The “Gas Site Lease Agreement” states that “lessee shall use the leased premises solely for the purpose of generating electrical energy, consuming and/or selling such energy to third parties, and heating the Antioch Community High School, all as more particularly set forth in the Gas Agreement.” Section 25 of the “Gas Site Lease Agreement” is entitled “Gas Agreement” and states that “Lessor and Lessee have entered into a certain Gas Agreement attached hereto as Attachment 3.” The following terms and provisions (*inter alia*) of the Gas Agreement are incorporated by reference into the Lease: Section 6.5 (“Seller’s Reserved Rights”); Section 6.6 (“Purchaser’s Reserved Rights”); Section 9.2 (“Seller’s Right to Terminate”); Section 9.3 (“Purchaser’s Right To Terminate”); Section 13.3 (Purchaser’s Obligations”). App. Ex. No. 1.

10. The final page of the “Gas Site Lease Agreement” is labeled “Attachment 3,” “Landfill Gas Purchase Agreement.” “Attachment 3,” “Landfill Gas Purchase Agreement” was not admitted into evidence. Attachment 1 (“Site Plan of Leased Premises”) and Attachment 2 (“Legal Description of Leased Premises”) were included with the “Gas Site Lease Agreement” and were admitted into evidence. App. Ex. No. 1.

CONCLUSIONS OF LAW:

An examination of the record establishes that District 117 has not demonstrated, by the presentation of testimony or through exhibits or argument, evidence sufficient to

warrant exempting the subject property from 2004 real estate taxes. Accordingly, under the reasoning given below, the determination by the Department that the subject property does not qualify for exemption should be affirmed. In support thereof, I make the following conclusions.

Article IX, Section 6 of the Illinois Constitution of 1970 limits the General Assembly's power to exempt property from taxation as follows:

The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes.

The General Assembly may not broaden or enlarge the tax exemptions permitted by the constitution or grant exemptions other than those authorized by the constitution. Board of Certified Safety Professionals v. Johnson, 112 Ill. 2d 542 (1986). Furthermore, Article IX, Section 6 does not in and of itself, grant any exemptions. Rather, it merely authorizes the General Assembly to confer tax exemptions within the limits imposed by the constitution. Locust Grove Cemetery v. Rose, 16 Ill. 2d 132 (1959). Thus, the General Assembly is not constitutionally required to exempt any property from taxation and may place restrictions on those exemptions it chooses to grant. Village of Oak Park v. Rosewell, 115 Ill. App. 3d 497 (1st Dist. 1983).

In accordance with its constitutional authority, the General Assembly enacted Section 15-35 and 15-135 of the Property Tax Code. Section 15-35 exempts "... all property of schools, not sold or leased or otherwise used with a view to profit." 35 ILCS 200/15-35. Applicant stated in its "Post-Hearing Memorandum of Law" that District 117 was seeking exemption from taxation for the subject property pursuant to 35 ILCS

200/15-35(b) and (c). App. Brief, pp. 8-9. 35 ILCS 200/15-35(b) exempts “property of schools on which the schools are located and any other property of schools used by the schools exclusively for school purposes...” and 200/15-35(c) exempts “property donated, granted, received or used for public school, college, theological seminary, university, or other educational purposes, whether held in trust or absolutely.” District 117 is also seeking exemption of the subject property pursuant to 35 ILCS 200/15-135 which states that “[A]ll property of public school districts or public community college districts not leased by those districts or otherwise used with a view to profit is exempt.”

The subject property, consisting of 34-35 acres, and comprising part of Lake County P.I.N.S 02-8-400-005 and 02-08-400-006, was known as the H.O.D. Landfill, and was in use from 1963 through 1984. Waste Management of Illinois is the owner of the subject property. In 1998, the Environmental Protection Agency (“EPA”) posted a “Notice of Record” detailing the proposed remedies necessary to correct the site including the collection of methane gas through extraction wells and burning it through a flare system. On August 17, 1998, Mr. Ahlers, Business Manager for District 117, wrote to the EPA and suggested that the methane gas could be used to heat the boilers at Antioch Community High School, which bordered the site. Tr. pp. 21-22, 57; App. Ex. Nos. 4 and 6.

On November 12, 2003, the EPA issued a “Ready for Reuse” certificate determining that the “H.O.D. Landfill Superfund Site is Ready for Recreational Use.” The Certificate states that Waste Management “is responsible for ensuring that any limitations specified in the ROD [Record of Decision] or ESD [Explanation of Significant Differences] that might be affected by a particular recreational use are

complied with during the activity.” Waste Management has perpetual responsibility for ensuring that all remedies that had been put in place to make the landfill usable were maintained and monitored. Tr. pp. 22-24; App. Ex. Nos. 5 and 6. Waste Management has to monitor the methane wells and ensure that they are at prescribed levels, has to maintain a cap of hard clay over the landfill and has to make sure there is no seepage of materials from below the cap rising through the cap and keep water above the cap from seeping through the cap. Tr. pp. 25-26.

Waste Management laid underground pipes beneath the cap to collect methane gas. The pipes extend into the 34-35 acres of the subject property, covering both P.I.N.S., and an additional 40 acres to the east of the subject property, which are not at issue in this proceeding. Tr. pp. 46-47, 53-54, 58. District 117 first started using methane gas for school use in December, 2003. Waste Management monitors the methane wells on the subject property. District 117 erected a building on the southern part of the subject property where the methane gas is collected from the underground pipes. A drying compressor dries the methane. A pipeline runs under the road to Antioch, where there is a building that houses 10 microturbines and a heat compressor which converts the methane gas to energy, used to heat Antioch’s boilers and generate electricity. Tr. pp. 25-28, 56.

An analysis of whether the subject property meets the requirements for exemption from property taxes for assessment year 2004 must begin with the question of whether the subject property is leased or otherwise used with a view to profit. Both 35 ILCS 200/15-35 and 35 ILCS 200/15-135 exclude from exemption property that is leased or otherwise used with a view to profit. District 117 is seeking exemption of the subject property under 35 ILCS 200/15-35(b) and (c) and 35 ILCS 200/15-135. In Swank v.

Department of Revenue, 336 Ill. App. 3d 851 (2d Dist. 2003), the court was asked to determine whether properties “used with a view to profit,” even if used for educational purposes, are entitled to tax exemption under section 200/15-35(b) and (c) of the Property Tax Code. “Stated another way,” does the “used with a view to profit” exclusion of section 35 ILCS 200/15-35 apply to properties falling within the parameters of section 15-35(b) and (c). *Id.* at 856. The Department’s position in Swank was that any property used with a view to profit, even if used for educational purposes, was excluded from the section 15-35 tax exemption. *Id.* at 857. The court held that section 15-35 excludes from tax exemption property held for profit, even if used for school purposes. The court stated explicitly that it declined “to extend tax exemption under section 15-35 to properties held for profit, even if they are used for educational purposes.” *Id.* at 863.

Section 15-135 of the Property Tax Code, which covers property of “public school districts” contains language similar to Section 15-35. According to Section 15-135, property of public school districts is exempt as long as it is “not leased by those districts or otherwise used with a view to profit.” Based on Swank, as discussed above, I conclude that property tax exemption under either Section 15-35 or 15-135 cannot be “extended” to properties of schools [35 ILCS 200/15-35(b)], property donated, granted, received or used for public schools [35 ILCS 200/15-35(c)], or property of public school districts (35 ILCS 200/15-135), even if these properties are used for educational purposes, if the property is leased or otherwise used with a view to profit.

District 117 has failed to prove that the subject property is not leased or otherwise used with a view to profit. District 117, as lessee, and Waste Management Illinois, as lessor, entered into a “Gas Site Lease Agreement” on August 15, 2003, for an initial lease

period of 99 years at a “fixed rent” of \$1.00/year. Tr. pp. 34-37. The “Gas Site Lease Agreement” states that “lessee shall use the leased premises solely for the purpose of generating electrical energy, consuming and/or selling such energy to third parties, and heating the Antioch Community High School, all as more particularly set forth in the Gas Agreement.” App. Ex. No. 1

Section 25 of the “Gas Site Lease Agreement” is entitled “Gas Agreement” and states that “Lessor and Lessee have entered into a certain Gas Agreement attached hereto as Attachment 3.” The following terms and provisions, *inter alia*, of the Gas Agreement are incorporated by reference into the Lease: Section 6.5 (“Seller’s Reserved Rights”); Section 6.6 (“Purchaser’s Reserved Rights”); Section 9.2 (“Seller’s Right to Terminate”); Section 9.3 (“Purchaser’s Right To Terminate”); Section 13.3 (“Purchaser’s Obligations”). The final page of the “Gas Site Lease Agreement” is labeled “Attachment 3,” “Landfill Gas Purchase Agreement.” “Attachment 3,” “Landfill Gas Purchase Agreement” was not admitted into evidence. Attachment 1 (“Site Plan of Leased Premises”) and Attachment 2 (“Legal Description of Leased Premises”) were admitted into evidence and are included at the end of the “Gas Site Lease Agreement.” App. Ex. No. 1.

It is unclear whether District 117 strategically or inadvertently omitted “Attachment 3,” “Landfill Gas Purchase Agreement,” from the record but its omission forces me to conclude that the subject property is leased or otherwise used with a view to profit. A plain reading of the terms used in the “Gas Site Lease Agreement” can only lead to the conclusion that District 117 is purchasing methane gas from Waste Management, and as such, the subject property is “leased” and “being used with a view to profit.” The

missing attachment is entitled “Landfill Gas Purchase Agreement.” The “Gas Site Lease Agreement” refers to the “Seller” and “Purchaser” of methane gas. There is simply no other way to interpret the terms “Landfill Gas Purchase Agreement,” “Seller” and “Purchaser” other than that District 117, as “Purchaser,” is purchasing methane gas from Waste Management, as “Seller.” If the “Landfill Gas Purchase Agreement” between the “Seller” and the “Purchaser” does not, in fact, constitute leasing and/or using the subject property with a view to profit, or if there is another interpretation to be accorded the terms “Purchaser” and “Seller” in the missing “Landfill Gas Purchase Agreement,” it was incumbent on District 117 to provide me with the testimony and documentation to support this position.

There was no testimony at the evidentiary hearing regarding the purchase of methane gas by District 117 from Waste Management. Mr. Ahlers was asked in direct examination whether any of the methane gas was “sold off to any parties” and whether “anybody else capture[s] methane off the site.” He responded “no” to both questions.” Tr. pp. 28-29. These questions, which refer to “any parties” and “anybody else” obviously do not address the question of whether District 117, itself, is purchasing methane gas from Waste Management. A “news release” from “RMT, Inc.” entitled “Landfill Microturbines Generate Power at Antioch Community High School,” dated November 6, 2003, states that a benefit of the methane gas energy system includes “lower energy costs for the high school.” App. Ex. No. 6. “Lower energy costs” implies that there are, in fact, energy costs for Antioch which again supports the conclusion that District 117 is purchasing methane gas from Waste Management. No financial information for Antioch or District 117 was admitted into evidence. The issue of whether District 117 was

purchasing methane gas from Waste Management was not discussed in District 117's Post Hearing Brief or Reply. No financial information for Waste Management was admitted into evidence and no representative from Waste Management testified at the evidentiary hearing.

Paragraph 8 of the "Gas Site Lease Agreement" states that "lessee shall use the leased premises solely for the purpose of generating electrical energy, consuming and/or selling such energy to third parties, and heating the Antioch Community High School, all as more particularly set forth in the Gas Agreement." App. Ex. No. 1. As discussed previously, the Gas Agreement was not admitted into evidence. A plain reading of Paragraph 8 indicates that District 117 has the option of consuming or selling the methane gas to third parties. The "news release" from "RMT, Inc." dated November 6, 2003, discussed above, states as follows: "The energy recovered from the microturbines will be used to heat and power the 262,000 square-foot school building. The system will produce enough power to satisfy demand for the equivalent of 120 homes. Any additional electricity not used at the high school will be sold to Com Ed."

It is unclear from the news release whether District 117 or Waste Management will be selling "additional electricity" to Com Ed. It is unclear whether "Com Ed" is one of the "third parties" referred to in Paragraph 8 of the "Gas Site Lease Agreement." There was no testimony at the evidentiary hearing regarding Paragraph 8 of the "Gas Site Lease Agreement," or the "third parties" referred to in Paragraph 8, or sales to "Com Ed." District 117 states in its "Post-Hearing Memorandum of Law" that the School District does not use the methane gas for any use other than to heat and light the high school. District 117 does not "sell the methane to third parties, or allow any parties to capture and

use the methane.” App. Brief. p. 6. This statement is inconsistent with Paragraph 8 of the “Gas Site Lease Agreement” and the news release. I conclude that if District 117 or Waste Management is not presently selling methane gas to third parties or “Com Ed,” Paragraph 8 of the “Gas Site Lease Agreement” gives them the right to sell methane gas at some future time. If this conclusion is incorrect, it was incumbent on District 117 to provide me with the testimony and documentation to support their position.

It must be noted here that 35 ILCS 200/15-35 and 35 ILCS 200/15-135 exclude from exemption property that is “leased or otherwise used with a view to profit.” The phrase “view to profit” does not require that there be a profit and it is irrelevant whether the lease actually generates a profit or loss. Village of Oak Park v. Rosewell, 115 Ill. App. 3d 497 (1st Dist. 1983). Paragraph 8 of the “Gas Sight Lease Agreement” permits either District 117 or Waste Management to sell “additional electricity” to third parties. Because there was no testimony or explanation of Paragraph 8 at the evidentiary hearing, I am forced to conclude that the selling of “additional electricity” constitutes use of the subject property with a “view to profit,” thereby excluding the subject property from exemption under 35 ILCS 200/15-35 or 35 ILCS 200/15-135.

District 117 provided lengthy arguments in their “Post-Hearing Memorandum of Law” and “Post-Hearing Reply Memorandum” that 35 ILCS 200/15-35(b) and (c) and 35 ILCS 200/15-135 do not require ownership by a school or a school district, respectively, to qualify for exemption, and “even if ownership were a requirement for exemption under § § 15-35(b), 15-35(c), or 15-135, the School District’s leasehold interest here would satisfy that requirement.” App. Brief, p. 13. The Department denied exemption for the two P.I.N.S comprising the subject property stating that “[A]pplicant is not the owner of

the property. Applicant is lessee of the property. No leasehold assessment has been made for the assessment year for which application has been made.” Dept. Ex. No. 1.

A leasehold assessment still cannot be made for the subject property because the entire lease is not in the record. Similarly, I cannot determine whether District 117 has sufficient incidences of ownership in the subject property without the entire lease being in the record. It is therefore unnecessary to determine whether 35 ILCS 200/15-35(b) or (c) or 35 ILCS 200/15-135 require ownership by a school or a school district, respectively, because the record in this case, incomplete as it is, is insufficient for me to conclude that District 117 owned the subject property. However, if ownership by a school or school district is required by the cited sections and if District 117 did have sufficient incidences of ownership in the subject property, Paragraph 8 of the “Gas Site Lease Agreement” and the news release from RMT indicate that District 117 is using the subject property with a “view to profit,” which, by itself, is sufficient to deny the exemption.

It is well established in Illinois that a statute exempting property from taxation must be strictly construed against exemption, with all facts construed and debatable questions resolved in favor of taxation. Gas Research Institute v. Department of Revenue, 154 Ill. App. 3d 430 (1st Dist. 1987). Moreover, the burden of proving the right to a property tax exemption is on the party seeking exemption, and courts have required such party to prove, by clear and convincing evidence, that it falls within the appropriate statutory exemption. Winona School of Professional Photography v. Department of Revenue, 211 Ill. App. 3d 565 (1st Dist. 1991). The level of proof contained in the record of the instant case does not satisfy the standard of clear and convincing evidence

that applies without exception in property tax cases. The omission from the record of the “Landfill Gas Purchase Agreement” and the absence of testimony on that issue and the issue of whether “additional electricity” is being resold by Waste Management or District 117 to third parties and/or “Com Ed” force me to conclude that the subject property is leased and otherwise used by Waste Management and District 117 with a view to profit, which would prevent the property from qualifying for exemption under either 35 ILCS 200/15-35(b) or (c) or 35 ILCS 200/15-135.

WHEREFORE, for the reasons stated above, it is recommended that the Department’s determination which denied the exemption from 2004 real estate taxes should be affirmed, and Lake County Parcels 02-08-400-005 (part of) and 02-08-400-006 (part of) should not be exempt from 2004 real estate taxes.

January 22, 2007

Kenneth J. Galvin
Administrative Law Judge