2-7-2013

Ashton Urban Renewal Agency v Ashton Memorial Respondent's Brief Dckt. 40348

IN THE SUPREME COURT OF THE STATE OF IDAHO

ASHTON URBAN RENEWAL AGENCY, an independent public body corporate and politic, Petitioner/Respondent, v. ASHTON MEMORIAL, INC., an Idaho corporation, doing business as ASHTON LIVING CENTER, Respondent/Appellant.	Supreme Court Docket No. 40348-2012 Fremont County Docket No. 2012-58

RESPONDENT'S BRIEF

Appealed from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Fremont
Honorable Gregory W. Moeller, District Judge, Presiding

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STATEMENT OF THE CASE

A. Nature of the Case

Petitioner/Respondent Ashton Urban Renewal Agency (the "Agency") generally agrees with Respondent/Appellant Ashton Memorial, Inc.'s description of the Nature of the Case except as set forth herein. Respondent Ashton Memorial, Inc., doing business as the Ashton Living Center (the "Ashton Living Center"), owns real and personal property in Fremont County, which is located within an urban renewal/revenue allocation area. In 2011, the Ashton Living Center applied for a property tax exemption for the 2011 tax year pursuant to Idaho Code § 63-602C. The Agency protested the exemption application by appealing to the Fremont County Board of Equalization ("BOE") on the grounds and for the reasons that the Ashton Living Center did not qualify for property tax exemption. The BOE voted to approve a full tax exemption. The Agency timely appealed the BOE decision to the Idaho Board of Tax Appeals ("BTA"). On November 29, 2011, the BTA, without a hearing, issued its Final Order Dismissing Appeals concluding the Agency was not a "person aggrieved" under Idaho Code § 63-511 and, therefore, did not have standing to pursue the appeals. The BTA then denied the Agency's Motion to Reconsider. The Agency timely appealed the BTA's decision on standing to the District Court of the Seventh Judicial District of the state of Idaho, in and for the County of Fremont (the "District Court"). The District Court, based upon the record created before the BTA, concluded the Agency met the qualifications of an aggrieved party and that the Agency had standing to appeal the tax exemption. The District Court remanded the matter back to the BTA for further

consideration on the merits. The Ashton Living Center appeals the District Court's decision on standing.

B. Statement of Facts

The Agency generally agrees with Ashton Living Center's Statement of Facts except as set forth herein. The Agency is a duly created urban renewal agency authorized to transact business and exercise the powers granted by the Idaho Urban Renewal Law of 1965, title 50, chapter 20, Idaho Code, as amended (the "Law") and the Local Economic Development Act, title 50, chapter 29, Idaho Code, as amended (the "Act"). Pursuant to the requirements and procedures set forth in the Law and Act, the City Council of the city of Ashton determined a certain geographic area to be a deteriorated area or deteriorating area and adopted Ordinance No. 376 on December 21, 1996, approving the Ashton Urban Renewal Plan (the "Plan"), which included a revenue allocation provision as authorized by the Act. The Ashton Living Center facility was built in the urban renewal/revenue allocation area in 2002.

Revenue allocation provides an income stream to the Agency and allows the Agency to fund improvements in the urban renewal/revenue allocation area as authorized by the Plan, the Law, and the Act. Once the geographic boundary of the urban renewal/revenue allocation area is established, the county assessor "freezes" the assessed value of the real property within that area, which is referred to as the base assessment roll. *See* I.C. § 50-2903(4). As the Agency and others invest in the area, the property values rise. The increase in value over the base is referred to as the increment value. *See* I.C. § 50-2903(10). The property taxes collected on the increment

value go to the Agency in the manner set forth in Idaho Code § 50-2908.[1] Unlike a city or highway district, the Agency does not have the authority to levy property taxes. Any significant decrease of the assessed values of any properties within an urban renewal/revenue allocation area directly impacts the Agency's revenue stream and, potentially, the Agency's outstanding obligations.

The property at issue, specifically parcel numbers PPA00090254050 (the "Personal Property") and RPA00090254050 (the "Real Property") are located within the urban renewal/revenue allocation area. (BTA R., p. 36, ¶3.)[2] As a function of how revenue allocation is allocated to the Agency under the Act, most of the property taxes collected on the Real Property and Personal Property would go to the Agency as opposed to the overlapping taxing districts (e.g., city, county, school district, highway district).[3] (*Id.*) Property tax exemption on the Real Property and Personal Property directly and immediately impacts the Agency's statutory revenue stream, which is shown as follows:

The 2009 assessed values for the Ashton Living Center property were $132,937 for the Personal Property and $2,653,350 for the Real Property. (BTA R., p.36, ¶4(a).) There were no 2010 and 2011 assessments on the Real Property and Personal Property due to exemptions; therefore, a 2011 estimate of property value is projected based on the 2009 property values. (BTA R., p. 36, ¶4(b).) Assuming the Personal Property depreciates at a rate of 2% per year, the

[1] The property taxes collected on the base value go to the overlapping taxing districts based on the individual taxing district's levy rate.
[2] The representations contained in the Affidavit of Harlan W. Mann are uncontested.
[3] This is due to the fact a great majority of the assessed value of the Real Property and all of the Personal Property is allocated to the increment value, not the base value. (BTA R., p. 36, ¶3.) The Plan stated the base assessment value of the entire revenue allocation area as $12,000. (*Id.*)

2011 projected value for the Personal Property is $127,673. (BTA R., p.36, ¶4(c).) Assuming no change in value for the Real Property, the 2011 projected value for the Real Property remains $2,653,350. (BTA R., p. 36, ¶4(d).) The total projected 2011 value of the Real Property and Personal Property is $2,781,023. (BTA R., p. 36, ¶4(e).) The 2011 net levy rate for the revenue allocation area, which includes the Real Property and Personal Property, is 0.015633479. (BTA R., p. 36, ¶4(f).) As a result, the estimated Agency revenue from the 2011 estimated assessment of the Real Property and Personal Property is $43,477.06.[4] (BTA R., p. 37, ¶4(g).)

Due to the allowance of the exemption on the Real Property and Personal Property, the Agency has lost revenue for the 2012 fiscal year[5] in the amount of $43,477. (BTA R., p. 37, ¶5.)

Incremental value for 2011, as reported by Fremont County and the Idaho State Tax Commission, for the entire Ashton Urban Renewal Plan area, valuing the exempt property at zero, is $2,270,027. (BTA R., p. 37, ¶6.) The 2011 revenue that will be generated from the taxable properties, and will be received by the Agency in its 2012 fiscal year, is $35,488 [$2,270,027 x 0.015633479]. (*Id.*)

If the Real Property and Personal Property were not exempt from taxation, the 2012 projected revenue to the Agency from revenue allocation would be $78,965 [$35,488 + $43,477]. (BTA R., p. 37, ¶7.) Therefore, revenue from the Real Property and Personal Property would be approximately 55% of the Agency's projected revenue, or stated differently, the BOE's decision

[4] The total projected 2011 value of $2,781,023 multiplied by the net levy rate of 0.015633479 equals $43,477.06.
[5] The Agency's fiscal year is from October 1, 2011, through September 30, 2012. Revenue based on the 2011 assessed values is not received by the Agency until 2012.

to approve Ashton Living Center's request for an exemption has resulted in a 55% decrease in revenue for the Agency. (BTA R., p. 37, ¶8.)

It is important to note, the Agency received property taxes collected on the increment value from the Real Property and Personal Property from approximately calendar years 2003 through 2010[6], and relied on and budgeted for the receipt of those funds.

C. Course of Proceedings

The Agency generally agrees with Ashton Living Center's Course of Proceedings except as set forth herein. On or about January 19, 2011, the Ashton Living Center filed two Fremont County Tax Exemption Short Form Applications with the Fremont County Board of Commissioners seeking property tax exemption for tax year 2011 on the Personal Property and the Real Property. (BTA R., pp. 6, 14.) On June 27, 2011, the Agency filed two Board of Equalization Appeal Form Owner's Statements protesting the grant of a property tax exemption on the Real Property and the Personal Property. (BTA R., pp. 7-9, 15-16.) On July 8, 2011, the Fremont County Commissioners, sitting as the BOE, approved a full tax exemption for the tax year 2011 for the Personal Property and the Real Property pursuant to Idaho Code § 63-602C. (BTA R., pp. 5, 13.) On August 9, 2011, the Agency timely filed its BTA Property Tax Appeal Forms with the Fremont County Auditor asserting the Real Property and Personal Property do not qualify for property tax exemption pursuant to Idaho Code § 63-602C. (BTA R., pp. 2-3, 10-11.)

[6] The BOE granted property tax exemption to the Ashton Living Center for calendar years 2010 and 2011.

On or about September 21, 2011, the BTA sent the Agency's counsel a letter acknowledging receipt of the Notices of Appeal and further indicating hearings would be scheduled within the next 90 days. (BTA R., p. 18.) On October 5, 2011, Ashton Living Center filed an Answer and Notice of Appearance asserting the Agency lacked standing to pursue the appeal. (BTA R., pp. 19-20.)[7] On November 29, 2011, without a hearing, the BTA entered its Final Order Dismissing Appeals, concluding the Agency was not a person aggrieved under Idaho Code § 63-511 and did not have standing to pursue the appeals. (BTA R., pp. 22-25.) The Agency filed its Motion to Reconsider the Final Order Dismissing Appeals Entered November 29, 2011, supported by a memorandum and the Affidavit of Harlan W. Mann. (BTA R., pp. 26-38.) On December 28, 2011, the Ashton Living Center filed its Response to Memorandum in Support of Motion to Reconsider the Final Order Dismissing Appeals Entered November 29, 2011. (BTA R., pp. 39-44.) The Agency filed its reply memorandum on January 3, 2012. (BTA R., pp. 46-53.)

Despite the Fremont County Assessor and the Fremont County Prosecutor receiving copies of all documents filed with the BTA[8], a representative of Fremont County[9] did not appear

[7] The Answer and Notice of Service were not served on Agency's counsel.

[8] As required by I.C. § 63-511, the Agency timely filed its BTA Property Tax Appeal Forms with the Fremont County Auditor. (BTA R., pp. 2-3, 10-11.) A copy of the letter from Susan Renfro, the BTA Director and Clerk to the Board, to the Agency's counsel was also sent to the Fremont County Assessor, the Fremont County Auditor, and the Fremont County Prosecutor. (BTA R., p. 18.) Ashton Living Center sent its Answer and Notice of Appearance to the Fremont County Auditor, the Fremont County Assessor, and the Fremont County Prosecuting Attorney. (BTA R., p. 20.) The BTA's Final Order Dismissing Appeals was mailed to the Fremont County Assessor and the Fremont County Prosecuting Attorney. (BTA R., p. 25.) The Fremont County Assessor and the Fremont County Prosecuting Attorney also received copies of the parties' briefing on the Agency's motion to reconsider. (BTA R., pp. 27, 34, 38, 44, and 53.) Finally, the Fremont County Assessor and the Fremont County Prosecuting Attorney received a copy of the BTA's Order Denying Reconsideration. (BTA R., p. 56.)

before the BTA and did not file any briefing on the standing issue. Without a hearing, the BTA issued its Order Denying Reconsideration on January 5, 2012. (BTA R., pp. 54-56.)

The Agency timely appealed the BTA's decision to the District Court. (BTA R., pp. 59-63.) As the issue before the District Court was statutory interpretation, the parties did not present additional evidence and relied solely on the BTA record.[10] The standing issue was briefed and oral argument occurred on June 26, 2012. (*See* R., pp. 27-87, 90-91.) The District Court provided the parties with time to submit additional authorities, after which the District Court took the matter under advisement on July 3, 2012. (*See* R., pp. 92-99.) On August 10, 2012, the District Court entered its Decision on Review concluding the Agency had standing to appeal the tax exemption as an aggrieved party and remanded the matter to the BTA for further consideration on the merits. (R., pp. 100-112.) The Ashton Living Center appealed the District Court's decision on September 18, 2012. (R., pp. 113-116.)

ARGUMENT

A. Standards of Review

The Agency generally agrees with Ashton Living Center's statement regarding the standard of review and only adds the following context. The Order Governing Procedure on Review entered by the District Court on April 2, 2012, established the briefing schedule. (R., pp. 24-25.) As the issue before the District Court was statutory interpretation, the parties did not

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[9] Idaho Code § 63-511 and the IDAPA provisions governing proceedings before the BTA do not identify Fremont County as a party to the proceedings before the BTA. Further, the statutes and rules provide no guidance on who from the County would appear: the Fremont County Auditor, the Fremont County Assessor, or the Fremont County Prosecuting Attorney.

[10] Procedurally, this is a deviation from the method of review set forth in Rule 84(e) of the Idaho Rules of Civil Procedure and Idaho Code § 63-3812, which contemplates that review of this matter should have been *de novo*. *See* I.R.C.P. 84(e) and I.C. 63-3812.

object to solely relying on the BTA record.[11] The District Court reviewed the standing issue *de novo*. (*See* R., pp. 100-112.)

B. The Agency Has Standing as a "Person Aggrieved" under Idaho Code § 63-511.

1. The Agency is a "person aggrieved."

Idaho Code § 63-511(1) provides an appeal from a decision of the county board of equalization "may only be filed by the property owner, the assessor, the state tax commission or by a person aggrieved when he deems such action illegal or prejudicial to the public interest." (Emphasis added.) "Person aggrieved" is not a defined term under title 63, Idaho Code, and the use of this term in this statutory provision has not been further explained and/or interpreted by case law. Under title 63, Idaho Code, "person" is broadly defined and means "any entity, individual, corporation, partnership, firm, association, limited liability company, limited liability partnership or other such entities as recognized by the state of Idaho." I.C. § 63-201(18). The Agency, as an entity of statutory creation, is an "independent public body corporate and politic" and is, therefore, a person within the meaning of the statute. *See* I.C. § 50-2006(a).

In interpreting a statute similar to Idaho Code § 63-511, the Idaho Supreme Court analyzed the meaning of "aggrieved," stating:

> Broadly speaking, a party or person is aggrieved by a decision when, and only when, it operates directly and injuriously upon his personal, pecuniary, or property rights.

[11] In the Decision on Review, the District Court stated: "Here apparently because this matter is primarily an issue of statutory interpretation, neither party sought to present additional evidence and based their arguments entirely on the agency record." (R., p. 103.) Procedurally, this is a deviation from the method of review set forth in Rule 84(e) of the Idaho Rules of Civil Procedure and Idaho Code § 63-3812, which contemplates that review of this matter should have been tried on a new record. *See* I.R.C.P. 84(e) and I.C 63-3812.

> . . . To render a party aggrieved by an order, so as to entitle him to appeal therefrom, the right invaded must be immediate, not merely some possible, remote consequence, or mere possibility arising from some unknown and future contingency; although it has been held that an immediate pecuniary damage is not always prerequisite to the right of appeal.

Application of Fernan Lake Village, 80 Idaho 412, 415, 331 P.2d 278, 279 (1958), *citing* 4 C.J.S. Appeal and Error § 183 b, pp. 559 and 561.[12] Further, the Court in *Fernan Lake* cited to a long-standing test for determining whether a party is aggrieved: "Would the party have had the thing if the erroneous judgment had not been entered? If the answer be yea, he is a party aggrieved." *Id.* at 415, 331 P.2d at 279-280, *citing State v. Eves*, 6 Idaho 144, 148, 53 P. 543, 544 (1898). The answer to this question is undoubtedly yes: had the BOE properly denied the request for property tax exemption, the Agency would have been statutorily entitled to revenue allocation funds in the estimated amount of $43,477 pursuant to Idaho Code § 50-2908. (BTA R., pp. 36-37.) As set forth in great detail in the Statement of Facts, the immediate consequence of the exemption on the Agency could not be more direct or immediate; but for the exemption, the Agency would receive approximately $43,477.06 in revenue allocation funds. (BTA R., p. 37.) The Agency has suffered pecuniary harm by the decision granting Ashton Living Center property tax exemption. (BTA R., pp. 35-38.) Further, it is undisputed that but for the exemption, the Agency would receive the property taxes collected on the increment value from

[12] The meaning of "aggrieved" as described in *Fernan Lake* is also consistent with the definition of "aggrieved party," which means "[a] party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment. — Also termed *party aggrieved; person aggrieved.*" Black's Law Dictionary (9th ed. 2009), party.

the Ashton Living Center property pursuant to Idaho Code § 50-2908. The impact of the exemption on the Agency could not be more immediate.

Ashton Living Center's argument that the granting of the exemption cuts off the Agency's entitlement to the property taxes on the increment only weighs in favor of a finding that the Agency is a "person aggrieved." It was the granting of the exemption that caused the pecuniary harm to the Agency. Ashton Living Center cannot argue that even without the granting of the exemption, the Agency would not be entitled to funds. It is uncontested that if the Ashton Living Center is found to be a taxable property, then the Agency would receive the property taxes on the increment value from that property. *See* I.C. § 50-2908.

Ashton Living Center's argument that an urban renewal agency will never have standing to contest the improper granting of property tax exemption on a property within a revenue allocation area pursuant to certain language in Idaho Code § 50-2908 is without merit and is not the standard. Idaho Code § 63-511(1) provides an appeal from a decision of the County board of equalization may be filed by a "person aggrieved when he deems such action illegal or prejudicial to the public interest." It cannot be that injured urban renewal agencies do not have a remedy. The impact of exemptions, especially those that might not be proper, is devastating. To assert an agency lacks standing to oppose the granting of a property tax exemption is simply inaccurate and is contrary to the language in Idaho Code § 63-511(1). The Ashton Living Center fails to identify who would constitute a "person aggrieved" and essentially requests this language be read out of the statute, which is contrary to the principles of statutory construction. *See State v. Mercer*, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006) ("In determining the ordinary meaning

of a statute 'effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant.' ").

It is important to consider the Agency established the revenue allocation area in 1996. The new Ashton Living Center facility was built in the revenue allocation area in 2002. The Ashton Living Center was aware it was building in the revenue allocation area. The Ashton Living Center was not exempt and paid property taxes for calendar years 2002 through 2009[13]. The Agency relied on and budgeted for receipt of those funds. The Agency had a realistic expectation of continued receipt of those funds.

The Agency meets the requirements of a "person aggrieved" as that term is further defined in *Application of Fernan Lake Village* and *State v. Eves*. *Application of Fernan Lake Village*, 80 Idaho 412, 415, 331 P.2d 278, 279 (1958) and *State v. Eves*, 6 Idaho 144, 148, 53 P. 543, 544 (1898). The Agency has suffered immediate pecuniary harm due to the improper granting of the property tax exemption, which is sufficient to provide the Agency with standing to contest the granting of the property tax exemption.

2. The substantial decrease to the Agency's revenue caused by the exemption is "prejudicial to the public interest" under Idaho Code § 63-511(1).

As identified by the District Court in its Decision on Review, the Idaho Legislature has made certain findings identifying the public policy considerations regarding the role of urban renewal:

[13] The BOE granted property tax exemption to the Ashton Living Center for calendar years 2010 and 2011. As the Agency is not provided notice of exemption applications and/or assessment appeals impacting properties within the revenue allocation area, the Agency was not aware of the exemption granted to the Ashton Living Center in 2010 until it received its funds in 2011.

> It is hereby found and declared that there exist in municipalities of the state deteriorated and deteriorating areas (as herein defined) which constitute a serious and growing menace, injurious to the public health, safety, morals and welfare of the residents of the state; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime, constitutes an economic and social liability imposing onerous municipal burdens which decrease the tax base and reduce tax revenues, substantially impairs or arrests the sound growth of municipalities, retards the provision of housing accommodations, aggravates traffic problems and substantially impairs or arrests the elimination of traffic hazards and the improvement of traffic facilities; and that the prevention and elimination of these conditions is a matter of state policy and state concern in order that the state and its municipalities shall not continue to be endangered by areas which are focal centers of disease, promote juvenile delinquency, and consume an excessive proportion of its revenue because of the extra services required for police, fire, accident, hospitalization and other forms of public protection, services and facilities.
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> ...
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> It is further found and declared that the powers conferred by this act are for public uses and purposes for which public money may be expended as herein provided and the power of eminent domain and police power exercised; and that the necessity in the public interest for the provisions herein enacted is hereby declared as a matter of legislative determination.

(I.C. § 50-2002; *see also* R., pp. 106-107.)

The public has an interest in seeing the Plan implemented by the Agency. Any substantial impact to an Agency's source of revenue may jeopardize funding of projects outlined in the Plan, which constitutes prejudice to the public interest. Further, an improperly granted property tax exemption is "prejudicial to the public interest" as exemptions are not favored under the law. I.C. § 63-511. "Idaho case law requires that all tax exemption statutes be strictly and narrowly construed against the taxpayer, who must show a clear entitlement, and in favor of the

state. Courts may not presume exemptions, nor may they extend an exemption by judicial construction where not specifically authorized." *Ada County Assessor v. Roman Catholic Diocese of Boise*, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993). Additionally, "[t]ax exemptions exist as a matter of legislative grace, epitomizing the antithesis of traditional democratic notions of fairness, equality, and uniformity." *Id.* at 429, 849 P.2d at 102. It is in the interests of the public to make sure the proper process is used in analyzing a request for property tax exemption.

The Agency contends the BOE erroneously granted the exemption to Ashton Living Center, which ultimately resulted in the Agency's loss of revenue. The Agency further contends the Ashton Living Center failed to clearly establish a right of exemption. An appeal regarding the granting of a property tax exemption, while contemplated by the statute and rules, appears to be unusual. *See* Idaho Code § 63-511(1) and (4); *see also* IDAPA 36.01.01.046.02(c). However, it is in the public's interest to challenge circumstances where an exemption may have been improperly granted, especially as the nature of an exemption takes value from the tax rolls.

3. The Agency's interests are unique and are not adequately protected by others.

The Agency agrees with the District Court's analysis of Ashton Living Center's contention that the Agency's interests are adequately protected by others. (R., pp. 108-109.) Idaho Code § 63-511 states an "appeal may only be filed by the property owner, the assessor, the state tax commission or by a person aggrieved when he deems such action illegal or prejudicial to the public interest." I.C. 63-511. The Agency's interests are not protected by the Fremont County Assessor or the State Tax Commission ("STC"). In fact, the Fremont County Assessor and the STC do not have any incentive to act on behalf of the Agency. There is no statutory or

common law obligation imposed on the Fremont County Assessor or the STC to protect the interests of the Agency. The Agency also notes this appeal is not based on a valuation issue, which would concern the Fremont County Assessor. Furthermore, "[i]n determining the ordinary meaning of a statute effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant." *State v. Mercer*, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006), *citing In re Winton Lumber Company,* 57 Idaho 131, 136, 63 P.2d 664, 666 (1936) (emphasis added). Ashton Living Center's interpretation of Idaho Code § 63-511 attempts to read the "person aggrieved" language out of the statute. The statute does not state only the property owner, the assessor, or STC has standing to appeal.

It is unrealistic to assume the STC monitors every exemption filing in each county. More specifically, the statutes grant authority to Fremont County to determine whether an entity is entitled to an exemption under I.C. § 63-602C; the statutes do not contemplate review by the STC. Further, to require the Agency to go through the Fremont County Assessor or STC is not required or anticipated by Idaho Code § 63-511, and the Fremont County Assessor and the STC have no obligation to pursue the Agency's claims.

The implication of Ashton Living Center's argument is that an agency impacted by an improper decision of a county board of equalization has no remedy, which is not supported by Idaho Code § 63-511 or Idaho case law. The Agency has independently met the standing requirements of a person aggrieved and, therefore, has standing to appeal.

Under the facts and circumstances of this case, the Agency is not similarly situated to the other taxing districts and is primarily impacted by the exemption. Unlike taxing districts, urban

renewal agencies have no authority to levy taxes and are unable to minimize or mitigate the reduction to their revenue stream. Additionally, the Ashton Living Center was constructed in the revenue allocation area in 2002, approximately six (6) years after the area was established, rendering any increase in value to the ground and the value of all personal property to be allocated to increment value, which derivative funds ultimately flow to the Agency. The overlapping taxing districts are impacted minimally as they are only entitled to proceeds from the levy on the base value.

C. The District Court Correctly Held That Denial of Standing to the Agency Violates the Constitutional Principles of Due Process and Equal Protection.

Contrary to the assertions of the Ashton Living Center, the Agency is an "independent public body corporate and politic," which is "entirely separate and distinct from the municipality." Idaho Code § 50-2006(a) and (b)(3). It is well established that an Agency is not the alter ego of a city. *See Urban Renewal Agency of City of Rexburg v. Hart*, 148 Idaho 299, 222 P.3d 467 (2009); *see also Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972). The Idaho Supreme Court has also held that an Agency is not a subdivision of the state within the meaning of Article VIII, §§ 3 and 4 of the Idaho Constitution. *See Yick Kong*, 94 Idaho at 882, 499 P.2d at 581. The Agency lacks the authority to levy taxes and, therefore, is unable to mitigate the loss of revenues stemming from the transfer of the Ashton Living Center property to exempt status. If the Agency is unable to challenge the BOE's grant of property tax exemption to the Ashton Living Center, then there is no way to test the merits of whether the exemption was properly made, and the BOE's decision on the issue is final and not subject to any review. *See Independent School Dist. No. 1 v. Common School Dist. No. 1*,

56 Idaho 426, 55 P.2d 144 (1936) (Court held districts that did not receive their proportionate share of funds could maintain an action against the district which received more than its share, in part concluding that if a district cannot prosecute such an action, then there would be no way to correct the wrong or misapplication of funds). As set forth in great deal above, the Agency had a continued expectation that it would receive revenues from the increment value of the Ashton Living Center. The only method for recovery of the lost revenue is through an appeal. The Agency is not an agent of the State, and the Agency agrees with the District Court's analysis of this issue concluding the Agency is entitled to due process and equal protection.

D. The District Court Had Proper Jurisdiction over this Matter.

The Agency properly perfected its appeal by timely filing its petition for judicial review with the District Court. Rule 84(b)(1) of the Idaho Rules of Civil Procedure states, in pertinent part:

> Judicial review is commenced by filing a petition for judicial review with the district court, and the petitioner shall concurrently serve copies of the notice of petition for judicial review upon the agency whose action will be reviewed and all other parties to the proceeding before the agency (if there were parties to the proceeding). Proof of service on the agency and all parties shall be filed with the court in the form required by Rule 5(f).

Pursuant to the language of the Rule, the only jurisdictional requirement to perfecting an appeal is to timely file a petition for judicial review. Any failure to serve is not a jurisdictional defect. This interpretation is supported by Rule 84(n) of the Idaho Rules of Civil Procedure, which states:

> **(n) Effect of Failure to Comply With Time Limits.** The failure to physically **file** a petition for judicial review or cross-petition for

> judicial review with the district court within the time limits prescribed by statute and these rules shall be jurisdictional and shall cause automatic dismissal of the petition for judicial review upon motion of any party, or upon initiative of the district court. **Failure of a party to timely take any other step in the process for judicial review shall not be deemed jurisdictional**, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review.

Further, Fremont County has not suffered any prejudice from its lack of participation in the appeal of the standing issue to the District Court. In determining whether the Ashton Living Center was entitled to an exemption, the BOE was sitting in a quasi-judicial capacity. The BOE ultimately granted the exemption. (BTA R., pp. 5, 13.) The Agency timely and properly appealed the BOE's decision to the BTA by filing the forms provided by the BTA with the Fremont County Auditor. (BTA R., pp. 2-3, 10-11.) It is questionable as to whether the County is a proper party to the appeal before the BTA as the merits of the appeal will be determined by whether the Ashton Living Center factually meets the requirements for charitable exemption. The Ashton Living Center carries the burden on proving entitlement to an exemption. *Appeal of Evangelical Lutheran Good Samaritan Soc. (Good Samaritan Village)*, 119 Idaho 126, 129, 804 P.2d 299, 302 (1990) (additional citation omitted) (The burden is on the claimant taxpayer to clearly establish a right of exemption and the terms of the exemption must be so specific and certain as to leave no room for doubt). Therefore, the Ashton Living Center is the real party in interest. Under the facts and circumstances of this case, it would be odd to have the appellate body be a party to the appeal. The statutes and rules do not mandate the County be a party, and in fact, it is challenging to even identify who would represent the County before the BTA and/or

the District Court. This case is clearly distinguishable from the situations where either the County or the taxpayer is challenging valuation or when a taxpayer is challenging the denial of an exemption.

Additionally, despite notice, a representative of Fremont County never appeared before the BTA and, therefore, was never a party to the proceedings before the BTA. I.R.C.P. 84(b). As required by I.C. § 63-511, the Agency timely filed its BTA Property Tax Appeal Forms with the Fremont County Auditor. (BTA R., pp. 2-3, 10-11.) A copy of the letter from Susan Renfro, the BTA Director and Clerk to the Board, to the Agency's counsel was also sent to the Fremont County Assessor, the Fremont County Auditor, and the Fremont County Prosecutor. (BTA R., p. 18.) Ashton Living Center sent its Answer and Notice of Appearance to the Fremont Count Auditor, the Fremont Count Assessor, and the Fremont County Prosecuting Attorney. (BTA R., p. 20.) The BTA's Final Order Dismissing Appeals was mailed to the Fremont County Assessor and the Fremont County Prosecuting Attorney. (BTA R., p. 25.) The Fremont County Assessor and the Freemont County Prosecuting Attorney also received copies of the parties' briefing on the Agency's motion to reconsider. (BTA R., pp. 27, 34, 38, 44, and 53.) Finally, the Fremont County Assessor and the Freemont County Prosecuting Attorney received a copy of the BTA's Order Denying Reconsideration. (BTA R., p. 56.) Based on the foregoing, Fremont County was aware of the standing issue and had an opportunity to appear before the BTA; as a result, Fremont County was not a proper party to the appeal to the District Court.

The standing argument was raised by the Ashton Living Center before the BTA, and the issue was fully briefed by the Agency and the Ashton Living Center on the Agency's motion for

reconsideration. The only issue on appeal to the District Court was standing. Again, there was no prejudice to the County as the issues regarding standing were fully briefed by the Ashton Living Center, the real party in interest. Furthermore, should this Court determine standing exists, the matter will be remanded back to the BTA for further consideration on its merits should the County want to appear on that issue.

The County never sought to intervene in the appeal, and the Ashton Living Center never moved to have the County added as a party. As any failure to serve is not a jurisdictional issue, it is an issue that should have been raised below. Ashton Living Center's failure to raise this issue below constitutes waiver of this argument on appeal. *See Kirkman v. Stoker*, 134 Idaho 541, 544, 6 P.3d 397, 400 (2000), *citing Ramerth v. Hart,* 133 Idaho 194, 197, 983 P.2d 848, 851 (1999).

The case relied on by the Ashton Living Center is distinguishable on its facts as the statutes specifically authorizing appeal required 1) filing in a specific location; or 2) that an "[a]ppeal shall be taken by serving a notice of appeal upon the director of the department of water resources . . . ." *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 433-434, 546 P.2d 382, 388-389, fn. 4 (1976). The *Briggs* case did not interpret I.R.C.P. 84.

In summary, any failure by the Agency to serve a copy of its petition for judicial review appealing the BTA's decision on standing on the County is a non-jurisdictional matter. The Ashton Living Center was required to raise this issue before the District Court. By failing to do so, the Ashton Living Center has waived this issue on appeal to this Court.

CONCLUSION

For the reasons set forth in the briefing, the District Court's Decision on Review should be affirmed.

DATED this 27th day of February 2013.

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of February 2013, I caused a true and correct copy of the foregoing document to be served as follows:

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