

TAX COURT OF NEW JERSEY

CHRISTINE M. NUGENT
JUDGE



153 Halsey Street
Gibraltar Building - 8TH Floor
Newark, New Jersey 07101
(973) 648 – 2098 Fax: (973) 648-2149

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Eileen Toll, Esq.
Schneck Law Group LLC
301 South Livingston Avenue
Livingston, New Jersey 07039

Charles Blau, Esq.
Blau & Blau
P.O. Box 50
Springfield, New Jersey 07081

Re: WKJ Realty Co. Inc. v. Township of West Orange
Docket Nos. 018909-2011; 011067-2012; 009312-2013

Dear Ms. Toll and Mr. Blau:

This is the decision of the court following trial conducted in the above matters challenging the assessments on plaintiff's property for tax years 2011, 2012 and 2013. For the reasons set forth more fully below the court affirms the assessments.

I. Findings of Fact and Procedural History

During all years at issue plaintiff was the owner of commercial property located at 456 Eagle Rock Avenue, West Orange, also known as Block 153.14, Lot 33.01 ("subject property" or "Subject"). The assessment was set in 2011 by a municipal-wide revaluation conducted in West Orange and remained unchanged for tax years 2012 and 2013.

2011, 2012, 2013 Assessment

Land	295,300
Improvement	157,300
Total	452,600

Since 2011 is a revaluation year the equalized assessed value of the subject property for 2011 is \$452,600. (Chapter 123 does not apply when evaluating an assessment made as the result of a municipal-wide revaluation.) In 2012, the Chapter 123 ratio for West Orange is 91.52%, resulting in an equalized assessed value of \$494,537 ($\$452,600 / .9152 = \$494,537$), with the corresponding common level range between 77.79% and 100%. The Chapter 123 ratio for West Orange is 95.46% for 2013, resulting in an equalized assessed value of \$474,125 ($\$452,600 / .9546 = \$474,125$), with the corresponding common level range between 81.14% and 100%.

Plaintiff appealed the 2011, 2012 and 2013 assessments with the Essex County Board of Taxation where judgments affirming the assessments were issued. For each tax year, a timely complaint was filed in this court, with no counterclaim asserted by West Orange (“defendant”). In challenging the assessments plaintiff produced a state certified General Real Estate Appraiser at trial, who qualified without objection as an expert, where he testified about his written report and conclusions of value. Defendant did not present witness testimony but relied on the presumptive validity of the assessments. The court’s findings are based on the testimony and documents admitted at trial.

The physical attributes of the subject property are comprised of land and improvements. The land covers 13,125 square feet, level in topography and rectangular in shape. Improvements include a one-story, 1,500 square foot building containing two retail units, one measuring 850 square feet and the other measuring 650 square feet, with a large paved rear yard that accommodates approximately ten parking spaces.

The subject property is zoned B-2 business which permits retail uses. It is located at the corner of Woodhull Avenue and Eagle Rock Avenue, one block off of the intersection of Eagle

Rock Avenue and Prospect Avenue, a very favorable retail location in West Orange. Surrounding properties contain retail uses such as a Whole Foods store and a CVS store recently constructed on a former restaurant site. The subject property is accessible from intrastate highway 280. Specifically, its location one block from the intersection of Eagle Rock Avenue and Prospect Avenue in West Orange gains access from the Prospect Avenue exit off of Route 280 westbound, located several blocks from the property. The improvement fronts Eagle Rock Avenue.

On the relevant valuation dates two retail tenants, a Sushi take-out restaurant and a dry cleaner, occupied the subject property. (The dry cleaner occupied the larger space.) The expert reported that the dry cleaner tenant paid rent at \$34.59 per square foot for all years relevant to the appeals. He reported that the other tenant, Kim's Sushi, paid \$36.92 per square foot for tax years 2011 and 2012, and \$38.77 per square foot for tax year 2013.

In reaching his value conclusion, the expert relied on eight retail leases to arrive at a proposed market rent of \$20.00 per square foot for the subject property for all years under appeal. Utilizing the income approach to value, which the court will further discuss, the expert concluded a value of \$295,000 for tax year 2011 and \$290,000 for tax years 2012 and 2013 for the subject property.

II. Findings of Law

(i) Presumption of Validity

“Original assessments and judgments of county boards of taxation are entitled to a presumption of validity.” MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998). The presumption of correctness arises from the view “that in tax matters it is to be presumed that governmental authority has been exercised correctly and in

accordance with law.” Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985) (citing Powder Mill, I Assocs. v. Township of Hamilton, 3 N.J. Tax 439 (Tax 1981)); see also Byram Twp. v. Western World, Inc., 111 N.J. 222 (1988) and City of Atlantic City v. Ace Gaming, LLC, 23 N.J. Tax 70, 98 (Tax 2006).

The burden is on the appealing party to overcome the presumption and prove that the assessment is erroneous. “The presumption in favor of the taxing authority can be rebutted only by cogent evidence []. The strength of the presumption is exemplified by the nature of the evidence that is required to overcome it. That evidence must be ‘definite, positive and certain in quality and quantity to overcome the presumption.’” Pantasote Co., *supra*, 100 N.J. at 413 (quoting Aetna Life Ins. Co. v. City of Newark, 10 N.J. 99, 105 (1952)).

The court must accept as true the proofs of the party challenging the assessment and accord that party all legitimate favorable inferences from that evidence. MSGW Real Estate Fund, LLC, *supra*, 18 N.J. Tax at 376 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 535 (1995)). If the court determines that sufficient evidence to overcome the presumption has not been produced, the assessment shall be affirmed and the court need not proceed to making an independent determination of value. Ford Motor Co. v. Township of Edison, 127 N.J. 290, 312 (1992); Global Terminal & Container Serv. v. City of Jersey City, 15 N.J. Tax 698, 703-704 (App. Div. 1996).

The court concludes that plaintiff produced sufficient evidence to overcome the presumption of validity attached to the county board judgments and the assessments on the subject property after affording plaintiff all reasonable inferences. Plaintiff produced an expert who relied on the rent paid for retail properties located in surrounding western Essex County, as adjusted, formed a conclusion of market rent, and used an accepted approach to value by which

he formed an opinion of value well below the equalized assessed value of the subject property for all tax years under appeal.

The court's analysis of the evidence then begins with an examination of the expert's highest and best use conclusion for the subject property. Highest and best use is defined as, "[t]he reasonably probable use of property that results in the highest value." Appraisal Institute, The Appraisal of Real Estate 332 (14th ed. 2013). "The highest and best use analysis requires sequential consideration of the following four criteria, determining whether the use of the subject property is: 1) legally permissible; 2) physically possible; 3) financially feasible; and 4) maximally productive." Clemente v. Township of South Hackensack, 27 N.J. Tax 255, 268 (2013), aff'd, No. A-6222-12T1, 2015 N.J. Super. Unpub. LEXIS 263 (App. Div. February 12, 2015) (citing Ford Motor Co. v. Township of Edison, 10 N.J. Tax 153, 161 (Tax 1988)). Highest and best use analysis is the first step in the appraisal process.

In this case the expert's opinion of highest and best use, "as vacant," is "for development of the highest density possible, in accordance with the market demand for retail space." His conclusion of the subject property "as improved" is for continued use as retail space, on which basis he valued the property.

In preparation of his appraisal, the expert elected to restrict his investigation of market conditions and limited his examination of highest and best use. That method was reflected in the written "Scope of Work" section where the report type itself was listed as "limited." According to the expert, his conclusion of value was based on "a limited analysis of market conditions" and "a limited analysis of highest and best use" as well the inspection consisting solely of the subject property's exterior.

Defendant suggested that the “limited highest and best use analysis” employed by the expert increased the likelihood that he had erred in his conclusion and that the expert’s failure to consider land sales in the area may have further contributed to that result. While acknowledging that sufficient evidence of value was not offered to warrant increasing the assessment,¹ evidence of local land values should raise a concern about the validity of the expert’s highest and best use analysis, according to defendant.

On cross-examination defendant pointed to the recent sale of land located on the same block as the subject property, as well as the site of a former restaurant property recently sold and redeveloped, neither of which were considered by the expert in his analysis of highest and best use.² Evidence of the land sales and of the recently constructed replacement uses were omitted from the expert’s highest and best use analysis but the expert was familiar with the fact that the properties had been recently sold.

An expert must investigate market conditions in reaching a determination of highest and best use. Clemente v. Township of South Hackensack, *supra*, 27 N.J. Tax at 255. As defendant suggests, in this instance a sale of the subject property might yield a greater return than the present retail use (or the property as improved). However, the court is mindful that property is to be assessed in the condition in which it is held and the burden to bring forth the necessary proofs

¹ The court notes that defendant provided a lease for a retail property in West Orange but did not present a witness to authenticate the lease which precluded the court from considering the evidence, except to the extent it impeached the expert’s testimony. The court did not rely on the lease in reaching its decision.

² SR-1A forms related to two property sales were produced and relied on by defendant in this regard. The data revealed the following information: 1) a parcel measuring approximately 59,000 square feet in size situated next to the subject (on the same Block 153.14 as the subject) sold in October 2010 for \$1,800,000 (or \$30.00 per square foot of land) and 2) a second parcel located across Woodhull Avenue from the subject property measuring 2.28 acres, the site of the former restaurant known as Pal’s Cabin on which a CVS was constructed, sold on March 19, 2014 for \$7,620,000, (or \$76.51 per square foot of land).

falls to the party alleging a different highest and best use. Highview Estates v. Borough of Englewood Cliffs, 6 N.J. Tax 194, 201 (Tax 1983).

In support of his highest and best use conclusion, the expert found the small subject property size a distinguishing factor in relation to the adjacent parcels recently sold and redeveloped, and concluded that based on its ability to generate rental income, the building adds value to the subject property. Indeed, the subject property achieved significant rents. The court accepts the expert's highest and best use as improved.

In reaching his value conclusion the expert considered all three methods of valuation, (sales, cost, and income approach) and selected the income approach. The income approach is the preferred method of estimating the value of income producing property, Parkway Village Apartments Co. v. Township of Cranford, 108 N.J. 266, 269 (1987), and the court accepts it as the most appropriate method to value the subject property. "The income capitalization approach to value consists of methods, techniques and mathematical procedures that an appraiser uses to analyze a property's capacity to generate benefits (i.e., usually the monetary benefits of income and reversion) and converts these benefits into an indication of present value." The Appraisal of Real Estate, *supra*, 439.

Use of the income analysis required the expert to arrive at an economic rent as of the relevant assessing date, also known as "market rent" or "fair rental value." Parkway Village Apartments, *supra*, 108 N.J. at 270. Since fair rental value or market rent may differ from actual rent "[c]hecking actual income to determine whether it reflects economic income is a process of sound appraisal judgment applied to rentals currently being charged for comparable facilities in the competitive area." Parkway Village Assocs. v. Borough of Collingwood, 62 N.J. 21, 30 (1972).

To arrive at market rent the expert relied on eight retail property leases in an area comprised of six towns he identified as western Essex County: Montclair, Cedar Grove, Fairfield, Caldwell, Livingston, Nutley and Verona.³ As noted, he concluded a market rent of \$20.00 per square foot for all years under appeal.

While none of the properties were located in West Orange, in the expert’s opinion all of the towns shared the same “population density and general values of property” as West Orange and thereby represented the subject property’s competitive market. The properties selected by the expert varied in size from 814 square feet to 1,600 square feet, but there was no identification of the leased retail uses. More problematic to the court is the theory the expert used to define the subject market which measured miles apart. While a shopping center or mall would be part of a broader competitive market, the subject property as a small stand-alone retail property competes with similar type local properties located in closer proximity. And specific to the facts, the record does not support a finding that comparable properties more proximate to the subject property were difficult to locate or that a shortage of local retail properties existed in West

³ The expert relied on the properties listed below in reaching his conclusions of value for the years under appeal. (The range of adjusted values for 2011 was \$16.91 to \$21.76 per square foot; \$15.26 to \$22.42 per square foot for 2012; and \$18.00 to \$19.43 per square foot for 2013.) In formulating the ranges the expert discarded a comparable which rented at the highest price per square foot among all properties he initially selected, but stated was unsure as to why he omitted it from his analysis.

2011	2012	2013
195 Bellevue Ave., Montclair	195 Bellevue Ave., Montclair	198 Stevens Ave., Cedar Grove
479-1 Pompton Ave., Cedar Grove	406 Bloomfield Ave., Caldwell	406 Bloomfield Ave., Caldwell
435 Hollywood Ave., Fairfield	435 Hollywood Ave., Fairfield	534 Bloomfield Ave., Verona
24 Little Falls Rd., Fairfield	113 South Livingston Ave., Livingston	113 South Livingston Ave., Livingston

Orange during the relative valuation dates. The court is not persuaded that the area selected serves as the competitive market for the subject property.

Even assuming that the competitive market is properly defined, testimony revealed the expert's overall unfamiliarity with the relevant properties, which concerns the court. In analyzing the comparable properties selected, physical characteristics including location, size, access, utility/parking and age/condition of the comparable properties' were aligned with the Subject in the expert's adjustment grids. Before such a comparison can be made the expert must be familiar with the subject property. "An important part of every appraisal is the description of the type, quality and condition of the building [] on the site and the analysis of the structure's design. The process of analyzing the building improvements encompasses three interrelated tasks: [s]ite visit; [b]uilding description; [d]escription and analysis of architectural style and functional utility." The Appraisal of Real Estate, *supra*, 219. Moreover, "[c]areless or inadequate inspection of the physical characteristics and features of the subject and comparable properties can create difficulties for an appraiser in the later phases of the appraisal. [] Accurate building descriptions are essential to all valuation assignments" Ibid.

While familiarity with the subject property is elemental to the task of selecting the properties considered to be comparable, it was apparent at trial that the expert had limited knowledge of the Subject. For example, he incorrectly identified the property's retail uses testifying on several occasions that a shoe store or shoe repair occupied one of the units, rather than the dry cleaner tenant. The record also lacks any evidence about the condition of the improvement's interior as well as the inside finishes since the expert did not inspect the interior of the subject property. Regarding his exterior inspection, the expert explained that "he saw" the

property on a date several weeks before the trial. There were no measurements taken of the Subject improvements.

A view of the subject from across the street in a photograph taken by the expert provided the only evidence of the subject property's appearance. The building's description, including the age, structural materials, and exterior finish was lacking. Nonetheless, based on an exterior "inspection" the building condition was reported as "average." The nature of the testimony leads the court to question whether the exterior inspection was limited to a distant view of the subject property.

Likewise, there was no inspection conducted of the interior or exterior of the comparable properties. The expert relied on photographs contained in the Multiple Listing Service ("MLS"), (which he viewed but did not provide in his report), along with his "knowledge of the general location of each property," resulting in his *assumption* that the properties were comparable to the Subject.

The expert acknowledged that visibility and traffic volume are factors important to retail property value, and acknowledged the busy nature of the subject property area, posited by defense counsel as arguably "the best location in West Orange." In response, the expert testified that all of the comparable property locations are similar to the Subject, being retail uses in "high traffic areas." The testimony was contradicted by effective cross-examination. A photograph was produced depicting the Cedar Grove property surrounded by houses, located in a residential area.⁴ Similarly, the expert was unaware of the Livingston property location and only learned through cross-examination that it was situated in a strip mall. He was also unsure of its actual

⁴ In addition, the expert adjusted the comparable downward 5% for condition based on its appearance in the photograph alone, because he found that it depicted an improvement which appeared to be a "newer" space than the subject property. He also acknowledged that the he was unaware of when the photograph was taken.

location, whether the building fronted the street like the Subject or whether it was located at the rear of the shopping area. With regard to the Montclair property, the expert identified Bloomfield Avenue as the best commercial street in the town, but did not select a comparable property in that location. To justify his choice he testified that the “whole town” of Montclair enjoys “heavy” auto and foot traffic, thereby, he found it similar to the subject property.

The expert was also unfamiliar with the subject leases. Even basic details such as the subject lease terms were not provided. Information about the lease agreements was limited to the amount of rent paid. In fact, the rents reported by the expert for the Kim’s Sushi lease were discredited on cross-examination. Where the expert reported rents for Kim’s Sushi in the amount of \$36.92 per square foot for tax years 2011 and 2012, and \$38.77 per square foot for tax year 2013, the lease revealed that the rent increased every six months during the relevant time period. The lease set the rent for the first half of 2011 at \$36.92 per square foot and increased to \$37.84 for the second six months. The rent remained at that level for the first half of 2012, then increased to \$38.76 through the end of 2012. The pattern continued for the first six months of 2013 and the rent then increased to \$39.69 for the last six months of the year.

Moreover, it is well settled that actual income is a significant factor into the inquiry of economic income, and therefore a key factor in the value of the property. Glenn Wall Associates v. Township of Wall, 99 N.J. 265, 274 (1985). While the expert testified that he “analyz[ed]” the current rents at the subject property, no such analysis was provided to the court. Moreover, it appears that any analysis undertaken would have involved incorrect data, at least as to the rent for the subject restaurant lease.

As for the comparable leases, other than the address and size, they were identified by lease start date and term (for two leases no term was provided), lease type (modified gross or net)

and price per square foot of rented area. The parties to the leases were not identified and no effort was made to verify the information gathered from the MLS listings through any of the market participants. Nonetheless, the expert reported that the transactions were all arms-length.

The expert never reviewed the comparable leases, and neither the lease documents nor lease abstracts were provided to the court, and he was unsure whether the comparable rents increased or remained flat over the lease terms. In his adjustment grid lease comparable expenses were reported as “similar” to those of the subject leases but no basis for the conclusion was offered in the report or at trial. Rather the expert testified that he was unaware of the actual costs associated with the comparable properties *i.e.* insurance, property taxes, utilities, interior and exterior maintenance and repairs, yet he adjusted the modified gross leases downward 5%. There was no indication what expenses were paid by the tenant or by the landlord or whether any extraordinary expenses like tenant improvements were incurred.

At trial the expert disputed the importance that verifying data serves in formulating a reliable property appraisal. In the expert’s view, it is reasonable for the court to “assume that his opinion represents market rent for property in this area” even if the underlying data is incorrect. But the law does not support that assertion. In that regard, verification of the information relied on by the expert is crucial. “The determination of the evidential value and weight to be given to the testimony of [] experts is for the trier of the facts and this weight depends upon their candor, intelligence, knowledge, experience, and especially upon the facts and reasoning which are offered as the foundation of their respective opinions.” Coastal Eagle Point Oil Co. v. Township of West Deptford, 13 N.J. Tax 242, 299-300 (Tax 1993).

Due to the expert’s unfamiliarity with the relevant properties and corresponding leases, there was insufficient support offered for the expert’s analysis of market rent. As such, the

expert's opinion of market rent is rejected by the court. Here, where the conclusion of market rent proves to be unreliable the expert's analysis under the income approach lacks adequate support for the ultimate value conclusion and warrants dismissal of the complaint where no other method of valuation was employed to appraise the property.

Despite the court's findings, the expert's analysis of the capitalization rate requires brief comment. In arriving at a capitalization of rate of 7.5% for all years under appeal, the expert relied on two surveys and the band of investment technique, affording them all equal weight. The survey data revealed that capitalization rates were falling between 2010 and 2013, yet the expert's rate did not vary from one year to the next.

Equity rate rates were also falling for the same period according to the studies reported by the expert. Despite that, he arrived at a flat 9% equity rate for all years under appeal. The expert testified that investors make decisions based on the age, location, and condition of the property which he found to be average for the subject property, yet he did not select the average equity rate among those he examined. Instead the equity rate selected for use in the band of investment technique was higher than all but one of the survey rates listed in his report (he reported the highest as 9.3% in 2010, and the lowest as 7.2% in 2012). He considered his selected 9% rate to be reasonable since the subject property is "small" and has "only two tenants." In his opinion "the number of tenants [at the subject property] in this case has to represent an element of risk," but there was no support for his conclusion. As further justification for the higher equity rate he testified that upon driving by the subject property he found it to be 50% vacant, yet he presented no evidence that the property had any vacancy issues, and he testified it was 100% occupied on the valuation dates, all of which leads the court to question the reliability of the equity rate and overall capitalization rate selected by the expert.

It is well settled that the probative value of an expert's opinion depends entirely on the supportive facts and reasoning offered. Kearny Leasing Corp. v. Township of Kearny, 6 N.J. Tax 363, 376 (Tax 1984), aff'd o.b. 7 N.J. Tax 665 (App. Div. 1985) certif. denied, 102 N.J. 340 (1985). Stated otherwise, [a]n expert's conclusion rises no higher than the data which provide the foundation." City of West Orange v. Goldman, 2 N.J. Tax 582, 588 (Tax 1981) (citations omitted).

The court concludes that plaintiff has failed to prove by a preponderance of the evidence that the assessments are incorrect. While the court is mindful of its obligation to apply its expertise to the evidence and arrive at the value of the subject property, Ford Motor Co., supra, 127 N.J. 290, the court is unable to do so based on a record that lacks competent, reliable evidence from which that value can be ascertained.

The Clerk of the Tax Court is directed to enter Judgment affirming the assessments in accordance with the opinion of the court.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'C. Nugent', written in black ink.

Christine Nugent