IN THE COURT OF APPEALS OF IOWA

No. 3-546 / 12-1526
Filed October 2, 2013

HY-VEE FOOD STORES, INC., and DAVIS-HV, L.L.C.,
Plaintiff-Appellants,

vs.

CARROLL COUNTY BOARD OF REVIEW,
Defendant-Appellee.

Appeal from the Iowa District Court for Carroll County, Thomas J. Bice, Judge.

Hy-Vee Foods Stores, Inc. and Davis-HV, LLC challenge a property tax assessment. **AFFIRMED.**

Douglas R. Oelschlaeger and Drew Cumings-Peterson for Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellants.

John C. Werden, Carroll County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Doyle, J., and Goodhue, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

VAITHESWARAN, P.J.

This appeal raises a challenge to a property tax assessment.

I. Background Facts and Proceedings

Hy-Vee Foods Stores, Inc. and Davis-HV, LLC (Hy-Vee) operate a grocery store in Carroll, Iowa. Hy-Vee challenged the Carroll County Assessor's 2011 tax assessment valuing the property at $2,500,000. Pursuant to a state equalization order, that value was increased to $2,650,000. *See* Iowa Code § 441.47 (2011). Hy-Vee appealed the assessment to the Carroll County Board of Review. The board left the assessment intact, concluding the "[t]axpayer failed to provide sufficient evidence to prove the allegations contained in the protest."

Hy-Vee appealed again to the district court. *See id.* § 441.38. After taking additional evidence as statutorily authorized, the court reduced the assessed value to $2,450,000. This appeal followed.

II. Analysis

On appeal, Hy-Vee contends the district court should have reduced the assessed value of the property to $1,500,000. Our review of this issue is de novo. *See Compiano v. Bd. of Review*, 771 N.W.2d 392, 395 (Iowa 2009).

Before reaching the merits, we will address a board argument concerning the burden of proof. Generally, the burden is on the taxpayer to prove one of the statutory grounds for protest by a preponderance of the evidence. Iowa Code § 441.21(3); *Compiano*, 771 N.W.2d at 396. However, if the taxpayer

> offers competent evidence by at least two disinterested witnesses that the market value of the property is less than the market value determined by the assessor, the burden of proof thereafter shall be

> upon the officials or person seeking to uphold such valuation to be assessed.

Iowa Code § 441.21(3).

The board argues Hy-Vee did not offer "competent" evidence to shift the burden. "Evidence is competent under the statute when it complies with the statutory scheme for property valuation for tax assessment purposes." *Compiano*, 771 N.W.2d at 398 (citation and quotation marks omitted). That scheme defines a property's actual value as its market value and requires the assessor to use sales of comparable property in determining market value, if that sales data is available. Iowa Code § 441.21(1)(b). "[M]arket-value testimony by a taxpayer's witnesses under a comparable-sales approach is 'competent' only if the properties upon which the witnesses based their opinions were comparable." *Soifer v. Floyd Cnty. Bd. of Review*, 759 N.W.2d 775, 782 (Iowa 2009). The issue of comparability is left to the sound discretion of the trial court, with the focus on whether the testimony from the two disinterested witnesses was admissible on the question of value rather than on whether the testimony was credible. *Id.* at 783–84.

Hy-Vee offered the opinions of two valuation experts, which the district court admitted and considered on the merits. While the board denigrates the substance of their valuation opinions and their choice of certain comparable properties, it does not seriously dispute that the experts followed the statutory scheme for valuing property for tax assessment purposes. We will not unduly lengthen this opinion by analyzing each comparable sale used by Hy-Vee's experts. Suffice it to say the evidence proffered by their experts was admissible,

the experts were "competent," and the experts shifted the burden of proof to the board. We turn to the evidence presented by the board's three valuation experts.

1. Robert Ehler. Ehler used a comparable sales approach to value Hy-Vee's Carroll store at $2,520,000. He considered ten properties located in various parts of Iowa and Minnesota and concluded that the most probable sale price for Hy-Vee's property would be $55.50 per square foot.[1] Hy-Vee attacks Ehler's opinion on several fronts.

First, Hy-Vee notes that Ehler used sales in remote areas. However, "comparable" sales are not limited to the same geographic region. *Carlon Co. v. Bd. of Review*, 572 N.W.2d 146, 150 (Iowa 1997).

Hy-Vee also contends Ehler considered "business sales with an unsupported allocation to personal property and intangibles." Hy-Vee is correct that our assessment statute "does not allow certain intangibles to be included in the valuation." *Merle Hay Mall v. City of Des Moines Bd. of Review,* 564 N.W.2d 419, 423 (Iowa 1997) (citing Iowa Code § 441.21(2) (1993)). But the assessor is not required to disregard all intangibles. *Id.* Hy-Vee's broad assertion that all personal property and intangibles must be excluded from the valuation is not supported by statute or case law.

That said, it is difficult to discern from Ehler's documentation of comparable sale #4 whether impermissible intangibles were included in the sale price. This stands in stark contrast to his documentation supporting other sales;

[1] Ehler did not use the $55.50 figure to arrive at his final valuation but instead multiplied the square footage of Hy-Vee's property by $55.75. Had he used $55.50, his valuation figure would have been approximately $12,000 less. Hy-Vee does not take issue with this discrepancy.

there Ehler took pains to identify whether the sale price included the value of personal property or intangibles. Indeed, in one transaction, Ehler found that the sale price of the operating grocery store included an allocation to personal property, and he discounted the sale price by that amount. In light of Ehler's overall attention to this factor, and absent evidence or argument that comparable sale #4 was inappropriately inflated, we decline to discredit Ehler's testimony on this basis.

Hy-Vee next asserts that Ehler "insist[ed] [on] using only grocery stores sold for continued use as grocery stores." Hy-Vee is correct that the use to which comparable properties are put need not be identical to the use of the assessed property. *See Soifer*, 759 N.W.2d at 785. "Nonetheless, a difference in use does affect the persuasiveness of such evidence because 'as differences increase the weight to be given to the sale price of the other property must of course be correspondingly reduced.'" *Id.* (quoting *Bartlett & Co. Grain v. Bd. of Review*, 253 N.W.2d 86, 93 (Iowa 1977)). Under this principle, Ehler's selection of properties that continued to operate as grocery stores enhances rather than undermines the persuasiveness of his evidence. Indeed, in focusing on facilities that matched Hy-Vee's business, Ehler satisfied his obligation to "classify property according to its present use and not according to its highest and best use." Iowa Admin. Code r. 701-71.1(1).

Hy-Vee also argues that Ehler "did not adjust any of his comparable sales for the Great Recession." Ehler addressed this issue, testifying that his company tracked annual sales in the more rural areas and found no "significant downturn in the value of commercial properties."

Hy-Vee raises several other critiques of Ehler's opinion. We find them either unsupported by the record or unpersuasive.

2. Kyran Cook. The board's second witness, Kyran Cook, valued the property at $2,620,000 using a sales comparison approach. Again, Hy-Vee complains that Cook did not account for the effect of the 2008 recession. In fact, Cook considered this factor and, like Ehler, concluded the recession did not have a large impact on Carroll.

Hy-Vee also criticizes Cook's upward adjustments based on vacancy factors at the time of sale. As noted above, however, an assessor is obligated to consider conditions as they are. *Id.* Cook explained the adjustments as follows:

> It is reasonable to expect an occupied building to sell for more than a vacant building provided the building is owner-occupied or the leases on the buildings are at or near market value. The subject is currently occupied and is fully utilized by the occupants.

We find this explanation reasonable and decline to discredit Cook's testimony on the basis of this factor. Notably, one of Hy-Vee's experts also used vacant properties in his comparable sales analysis.

Finally, Hy-Vee takes issue with Cook's mention of sale-leaseback transactions. Because Cook's reference appears under his income rather than comparable sales analysis, it does not compromise his comparable sales valuation.

3. Kevin Pollard. The board's third expert, Kevin Pollard, assigned a value of $2,450,000 to Hy-Vee's property, which is the same value assigned by the district court. Hy-Vee takes issue with his valuation on many of the same grounds raised above. One additional ground bears mention.

Hy-Vee contends Pollard used "gross adjustments of up to 84%" on comparable properties, which called into question the similarity of those properties. On our de novo review, we are not persuaded that Pollard's adjustments rendered the properties dissimilar, as Hy-Vee contends.

Hy-Vee's remaining criticisms of Pollard's evidence have either been addressed in evaluating the evidence of the other two experts or are unpersuasive.

In the end, the district court found the board's experts "more credible and supportable based on the record made." We give weight to this credibility finding. Iowa R. App. P. 6.904(3)(g). Based on their opinions, we conclude the board satisfied its burden of establishing that its valuation was not excessive.

As for the figure adopted by the district court, we recognize it was $200,000 less than the board's figure, as adjusted by the state equalization order. However, the valuation found support in Pollard's opinion. For that reason, we conclude the valuation was equitable.

In reaching this conclusion, we have considered the fact that the district court examined the replacement cost of the property, a factor that is appropriate only if the sales comparison approach fails. *See* Iowa Code § 441.21(2). We are not convinced this reference requires reversal because the court ultimately arrived at a valuation figure grounded in the comparable sales analyses of the board's experts.

We have also considered Hy-Vee's remaining criticisms of the district court opinion. Because our review requires an independent analysis of the

record, we find it unnecessary to address specific language used by the district court.

We affirm the district court's valuation of Hy-Vee's Carroll property.

AFFIRMED.