STATE OF MICHIGAN

COURT OF APPEALS

ABERDEEN OF BRIGHTON, L.L.C., Petitioner-Appellee,	UNPUBLISHED October 16, 2012
v	No. 301826 Michigan Tax Tribunal
CITY OF BRIGHTON, Respondent-Appellant.	LC No. 00-345517

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Respondent City of Brighton (the city) appeals as of right the Tax Tribunal's December 3, 2010, opinion and judgment. In its opinion and judgment, the Tax Tribunal found that for tax years 2008, 2009, and 2010, the highest and best use of 72 units owned by petitioner Aberdeen of Brighton, LLC (Aberdeen) was an apartment complex, rather than individual condominium units, and that the proper method of valuation was the income approach. The Tax Tribunal also awarded costs to Aberdeen. We affirm.

The city argues that the Tax Tribunal erred when it concluded that Aberdeen's unilateral decision to transform 72 condominium units into an apartment complex was determinative of the proper method of assessment when the city never approved the conversion and the apartment complex violates the R-4 zoning ordinance. Based on its finding that the highest and best use of the 72 parcels was an apartment complex, the Tax Tribunal determined that the income approach was the proper method to value the 72 units.

"In the absence of fraud, review of a decision by the Tax Tribunal is limited to determining whether the tribunal erred in applying the law or adopted a wrong principle; its factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record." *Mich Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994). "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 353; 483 NW2d 416 (1992).

Property is to be assessed at 50 percent of its true cash value. MCL 211.27a(1). "True cash value," which has been defined by the Legislature in MCL 211.27(1), is synonymous with "fair market value." *President Inn Props, LLC v Grand Rapids*, 291 Mich App 625, 637; 806 NW2d 342 (2011). To determine a property's true cash value, the property must be assessed at

its highest and best use. *Huron Ridge LP v Ypsilanti Twp*, 275 Mich App 23, 33; 737 NW2d 187 (2007). The highest and best use "means the most profitable and advantageous use the owner may make of the property even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use." *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 633; 705 NW2d 549 (2005) (quotation omitted). A highest and best use is one that is legally permissible, financially feasible, maximally productive, and physically productive. *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 285; 730 NW2d 523 (2006).

The Tax Tribunal found that the highest and best use of the 72 units was an apartment complex. It did so because the 72 units, having been withdrawn from the master deed, were incapable of being sold as condominium units, because the economic conditions made it financially infeasible for Aberdeen to build the 72 units as condominium units in 2006 and to return the 72 units to the master deed at any time before February 2011, and because the 72 units as an apartment complex did not violate the city's R-4 zoning ordinance.

The city does not challenge the Tax Tribunal's statement that the 72 units were incapable of being sold as condominium units. The city also does not contest the Tax Tribunal's finding that to build and sell the 72 units as condominium units was not financially feasible. It only disagrees with the Tax Tribunal's statement that there is no violation of the R-4 zoning ordinance when the 72 units are valued as an apartment complex. According to the city, the Tax Tribunal's decision to value the 72 units as an apartment complex created an illegal nonconforming use.

In December 2007, Aberdeen requested a split of the 21-acre tract. The city's deputy planner testified that, if the tract was split as requested by Aberdeen, there would be a violation of the R-4 zoning ordinance. She explained that the proposed lots for the 72 units did not conform to the density and setback requirements of the R-4 zoning ordinance. Consequently, the lot split was denied. However, the deputy planner also testified that as long as the 21-acre tract remained one lot and the 120 tax identification numbers remained with the units, there was no violation of the R-4 zoning ordinance.[1]

In its opinion and judgment, the Tax Tribunal did nothing more than determine the true cash value of the 72 units. It did not order a lot split, it did not alter the applicable density and setback requirements, and it maintained the 120 tax identification numbers. Accordingly, based on the deputy planner's testimony, we find no merit to the city's argument that the Tax Tribunal created an illegal nonconforming use when it determined that the highest and best use of the 72 units was an apartment complex.

[1] The city argues that had Aberdeen requested approval of a site plan that consisted of 48 condominium units and a 72-unit apartment complex, approval would have been denied. However, neither the city's assessor nor the deputy planner testified that had Aberdeen submitted a site plan that designated the 72 units as an apartment complex, rather than as condominium units, the city would not have approved the site plan.

The city also argues that the Tax Tribunal's decision to value the 72 units as an apartment complex violates the Condominium Act. Under the Condominium Act, MCL 559.101 *et seq*., property taxes are to be assessed against individual condominium units. MCL 559.231(1).

A "condominium project," which is defined as "a plan or project consisting of not less than 2 condominium units established in conformance with this act," MCL 559.104(1), is established upon the recording of a master deed. MCL 559.172(1). A "condominium unit" is "that portion of the condominium project designed and intended for separate ownership and use, as described in the master deed . . . ." MCL 559.104(3). A "master deed" is "the condominium document recording the condominium project to which are attached as exhibits and incorporated by reference the bylaws for the project and the condominium subdivision plan for the project." MCL 559.108. A "condominium project" may be a "contractible condominium project," MCL 559.133, which is defined as "a condominium project from which any portion of the submitted land or buildings may be withdrawn in accordance with this act," MCL 559.105(1).

Aberdeen recorded the master deed in February 2005. On December 20, 2006, Aberdeen recorded the second amendment to the master deed, which withdrew the 72 units from the master deed. The second amendment to the master deed was effective the date it was recorded. See MCL 559.191(1). Accordingly, as of December 20, 2006, the 72 units, although not yet built, were no longer "condominium units." The 72 units were no longer described in the master deed as part of the condominium project that was designed and intended for separate ownership. MCL 559.105(3). Because the 72 units are not condominium units, the Condominium Act does not require that property taxes be assessed against them as individual units.[2]

The city also argues that the Tax Tribunal's decision to value the 72 units as an apartment complex violates the rule that individual parcels of property must be separately valued and assessed. In *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 632; 462 NW2d 325 (1990), the Supreme Court stated, "As a general rule, different parcels of land in the same ownership are to be regarded as separate units for tax purposes and, as such, must be separately valued and assessed." However, the Court also stated that actual facts must be a significant consideration in the valuation of property. *Id.* at 638.

The actual facts of the present case are that, unlike the 100 lots in *Edward Rose Bldg Co* which were marketed by the petitioner as individual lots, the 72 units were not marketed by Aberdeen as individual condominium units. In fact, the 72 units could not be sold as condominium units because, as previously established, the units, having been withdrawn from

[2] The city, in response to any argument by Aberdeen that the Condominium Act does not apply to the 72 units, counters with "the fact that each of the 72 units still have individual tax ID numbers, that Aberdeen failed to reassemble the individual parcels by securing land division approval and is in violation of the City's zoning regulation mitigates against any claim that [Aberdeen] is entitled to having its property valued en masse." However, the city does not expand the argument and cites no supporting authority. Accordingly, the argument is abandoned. See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

the master deed, were not condominium units. Thus, to separately value and assess the 72 units as condominium units would be contrary to the actual facts and inconsistent with the highest and best use of the 72 units, as found by the Tax Tribunal. Accordingly, the Tax Tribunal's decision to value the 72 units is not contrary to the *Edward Rose Bldg Co* decision.

The city further argues that the Tax Tribunal's decision to value the 72 units as an apartment complex violates the constitutional requirement of uniformity. It contends that the true cash value of the 72 units must equal the true cash value of the 48 condominium units because the 72 units are physically indistinguishable from the condominium units.

Const 1963, art 9, § 3, requires the uniform ad valorem taxation of real property. *WPW Acquisition Co v City of Troy*, 250 Mich App 287, 296; 646 NW2d 487 (2002). The purpose of the uniformity requirement is to ensure equal treatment to similarly situated taxpayers. *Taylor Commons v City of Taylor*, 249 Mich App 619, 626; 644 NW2d 773 (2002). A property's value must be assigned on the basis of the property's true cash value, and two identical lots, which are available for the same use, must be equally taxed. *Edward Rose Bldg Co*, 436 Mich at 640-641.

Here, the 72 units may be physically indistinguishable from the 48 condominium units, but they do not have the same ultimate use. The 48 condominium units may be owned and sold as individual units. See MCL 559.161. However, as previously established, the 72 units are not condominium units because they were withdrawn from the master deed. Accordingly, the present case does not present a situation where two identical units, available for the same ultimate use, were not equally taxed. The Tax Tribunal's decision to value the 72 units as an apartment complex does not violate the constitutional requirement of uniformity.

We affirm the Tax Tribunal's decision that the highest and best use of the 72 units was an apartment complex. The city has not shown that the Tax Tribunal, in reaching this decision and thereby rejecting the city's argument that the 72 units must be valued as individual condominium units, erred in applying the law, adopted a wrong principle, or relied on factual findings that were not supported by competent, material, substantial evidence. *Mich Bell Tel Co*, 445 Mich at 476. The city makes no argument that, even if the highest and best use of the 72 units was an apartment complex, the Tax Tribunal erred in using the income approach to determine the true cash value of the units or erred in its findings of the true cash value of the 72 units for the relevant tax years. Accordingly, we also affirm the true cash value of the 72 units as determined by the Tax Tribunal.

Finally, the city argues that the Tax Tribunal erred in awarding costs to Aberdeen. According to the city, its defense was not frivolous because the State Tax Commission upheld its residential classification of the 72 units.

The Tax Tribunal Rules govern practice and procedure before the Tax Tribunal. TTR 111(1). TTR 145 addresses the awarding of costs:

> (1) The tribunal, may, upon motion or upon its own initiative, allow a prevailing party in a decision or order to request costs.
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> * * *

(4) Costs may be awarded to a prevailing party only when provided for by the tribunal in a decision or order.

The term "may" is permissive and is indicative of discretion. *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 740 NW2d 734 (2007).

We decline the city's invitation to hold that the Tax Tribunal may only award costs under TTR 145 if the requesting party shows good cause or the action or defense was frivolous.[3] The rules of statutory construction apply to administrative rules. *Attorney General v Lake States Wood Preserving, Inc*, 199 Mich App 149, 155; 501 NW2d 213 (1993). If a rule is clear and unambiguous, judicial interpretation is neither required nor permitted, *id.*, and the rule must be enforced as written, *Jaguar Trading Ltd Partnership v Presler*, 289 Mich App 319, 323; 808 NW2d 495 (2010). If we were to hold that costs may only be awarded under TTR 145 if the requesting party shows good cause or the action or defense was frivolous, we would be reading into an unambiguous rule a provision that is not included in the rule's plain language. Such action is contrary to the rules of statutory construction. See *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

Here, the Tax Tribunal exercised its discretion, which it recognized it had, and awarded costs to Aberdeen. It explained that while it was generally hesitant to award costs, it had "carefully considered this case in totality" and awarded costs "because Respondent failed to properly consider Petitioner's Second Amendment to the Master Deed as removing the 72 units from the Condominium project, and continued to value the property as condominiums, which they clearly were not . . . ." The Tax Tribunal correctly stated that the 72 units were not condominium units. In addition, the Tax Tribunal's finding that the city failed to properly consider the second amendment to the master deed is supported by the evidence. The city's assessor acknowledged that Aberdeen filed the second amendment to the master deed and that the amendment withdrew the 72 units from the master deed. Because the Tax Tribunal did not err in applying the law and did not adopt a wrong principal, and because its factual findings were supported by competent, material, and substantial evidence, we affirm the award of costs to Aberdeen. *Mich Bell Tel Co*, 445 Mich at 476.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra

[3] In one case, provided to us by the city, the Tax Tribunal held that the requesting party must show good cause to justify an award of costs under TTR 145 and then it refused to award costs to the petitioner because the respondent's defenses were not frivolous. See *President Inn Props, LLC v Grand Rapids*, unpublished opinion of the Tax Tribunal, issued September 17, 2009 (MTT Docket No. 310739), affirmed and remanded 291 Mich App 625 (2011). However, we are not bound by the decisions of the Tax Tribunal. *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 544; 656 NW2d 215 (2002).