STATE OF MICHIGAN

COURT OF APPEALS

KOHL'S DEPARTMENT STORES, INC.,

Petitioner-Appellant,

v

CITY OF KENTWOOD,

Respondent-Appellee.

UNPUBLISHED
June 17, 2004

No. 246963
Michigan Tax Tribunal
LC No. 00-247577

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Petitioner appeals as of right a decision of the Michigan Tax Tribunal concerning an appeal of respondent City of Kentwood's assessment of the ad valorem property tax against real property owned by petitioner. We affirm.

Petitioner first argues that the doctrine of laches should be applied to invalidate the tax tribunal's decision because the decision was not issued until 35½ months after the hearing. "A taxpayer wishing to invoke the doctrine of laches to invalidate a decision of the tax tribunal because of a lengthy delay between the hearing on the taxpayer's petition and the ultimate decision of the tax tribunal is required to present a showing of actual prejudice." Michigan Pleading and Practice, § 60.23, p 334; see also *Master Craft Engineering, Inc v Dep't of Treasury*, 141 Mich App 56, 65; 366 NW2d 235 (1985). Petitioner argues that it suffered prejudice because Judge Karen B. McComb, who issued the final judgment, did not preside over the original hearing and did not hear live testimony or view the demeanor of the witnesses. However, Judge McComb viewed the videotaped proceedings and was able to "weigh the presentation of evidence and the demeanor of the witnesses against the facts presented." *Id.* at 65. Petitioner has not demonstrated the requisite prejudice necessary to warrant invoking the doctrine of laches to invalidate the tax tribunal's decision.

Petitioner also argues that the tax tribunal's delay in issuing a decision violated MCL 24.285, which provides in pertinent part:

> A final decision or order of an agency in a contested case *shall be made, within a reasonable period*, in writing or stated in the record and shall include findings of fact and conclusions of law separated into sections captioned or entitled "findings of fact" and "conclusions of law", respectively.

The term "reasonable" is not defined in the statute. However, because petitioner has failed to demonstrate any prejudice from the delay, we need not determine the reasonableness of the delay. *Master Craft, supra* at 65.

Petitioner next argues that the tax tribunal violated MCL 24.281(1), which provides in pertinent part:

> When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the official who are to make the decision.

Specifically, petitioner argues that because Judge McComb did not "hear the case" or "read the record," and because the decision adversely affected petitioner, the tax tribunal erred when it failed to serve a proposed decision on the parties. The phrase "read the record" is not defined in the statute. Remaining mindful of our goal of ascertaining and giving effect to the Legislature's intent, while reasonably construing the statutory language and keeping in mind the purpose of the statute, *Rose Hill Center, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997), we do not believe the Legislature intended that the phrase "read the record" be construed so narrowly as to exclude viewing a videotape of the hearing. Further, MCL 24.286 provides that "oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party . . ." Therefore, the Administrative Procedures Act contemplates that hearings are to be recorded, and that a tribunal may review the record, including the oral record, when making a determination on a particular case. The tax tribunal did not violate MCL 24.281(1) by failing to issue a proposed order because it had "read the record" by viewing the videotaped hearing, reading the appraisers' reports, and reviewing the appraisers' hearing exhibits, in accordance with the rule.

Petitioner further contends that the tax tribunal's valuation of the subject property was not supported by competent, material, and substantial evidence.

The tax tribunal's assessment will not be subject to attack by this Court unless fraud, error of law, or adoption of the wrong principles is shown. Const 1963, art 6, § 28; Const 1963, art 9, § 3; *Presque Isle Harbor Water Co v Presque Isle Twp*, 130 Mich App 182, 189; 344 NW2d 285 (1983). Review of the tax tribunal's decision requires this Court to inquire whether there was competent, material, and substantial evidence to support that decision. The absence of such evidence or the adoption of a wrong principle constitutes an error of law that compels reversal. *First City Corp v Lansing*, 153 Mich App 106, 112; 395 NW2d 26 (1986).

It is well settled that the tax tribunal "is under a duty to apply its expertise to the facts of a case in order to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances." *Great Lakes Division of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 389; 576 NW2d 667 (1998). While the burden of proof is on the petitioner to establish the true cash value, the tax tribunal has a duty to make its own, independent determination of true cash value. *Id.* Further, the tax tribunal is not bound to accept the parties' theories of valuation. It may accept one theory and

reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination of true cash value. *Id*. at 389-390. This Court has explained:

> The three most common approaches for determining the true cash value are the capitalization-of-income approach, the sales-comparison or market approach, and the cost-less depreciation approach. However, variations of these approaches and entirely new methods may be useful if found to be accurate and reasonably related to fair market value. Regardless of which approach is used, the value determined by the Tax Tribunal must be the usual price for which the property would sell. [*Id*. at 390 (internal citations omitted).]

Here, both parties agreed that the capitalization of income approach was the most reliable indicator of the value of the subject property. Petitioner now takes specific issue with the percentage of sales utilized to determine market rent under the capitalization of income approach: petitioner believes that 2% was the appropriate figure to employ, whereas the tax tribunal agreed with respondent that 2.5% was the appropriate figure to employ when calculating market rent. The tax tribunal discussed the percentage figures proffered by Laurence G. Allen, appraiser for petitioner, and Deborah K. Ring, appraiser for respondent:

> The Tribunal agrees with both parties that the income approach provides the most reliable indicator of value for the subject property. Based upon our analysis and evaluation of the evidence, the Tribunal concludes that Mr. Allen's income valuation approach provides the most accurate and reliable indication of the market value of the subject property with the following two adjustments: First, the market rent of the subject property is that amount established in Ms. Ring's appraisal. Mr. Allen's comparable leases, as discussed in this opinion, *supra*, do not give a reliable indicator for market rent. His use of sales figures consisting of mainly previous year's totals is inappropriate. The percentage factor of 2.00% is not wholly supported by his analysis. Ms. Ring's use of current sales and the use of a 2.50% factor are supported by the evidence and accepted by the Tribunal. Second, the capitalization rate used for tax year 1998 is 9.50%, rather than 10%. The propriety of this cap rate is reflected in the evidence introduced in both appraisals.

Petitioner classified Kohl's as a "discount department store," and as such, believed 2% to be the appropriate percentage of sales to determine market rent, based on Dollars & Cents of Shopping Centers: 1997, Table F – Detailed Tenant Information Tables for U.S. Regional Shopping Centers. Respondent classified Kohl's as a "department store," and as such, believed 2.5% to be the appropriate percentage of sales to determine market rent, as being between the 2% median and the 3% upper decile.

Petitioner takes issue with Ring's comparison of Kohl's to other anchor stores in the adjacent mall to determine market rent based on percentage of retail sales. However, the tax tribunal specifically commented on Ring's mischaracterization of Kohl's as being "in" Woodland Mall, and stated that it was "dubious as to whether Ms. Ring's comparison of the Kohl's store to stores located in the Woodland Mall, such as Sears and J.C. Penney, is proper analysis."

Petitioner also takes issue with respondent's characterization of Kohl's as a "department store," as opposed to a "discount department store." However, the tax tribunal specifically commented that it "question[ed] Ms. Ring's classifying the subject property as a 'department store' for purposes of determining market rent," where "in all other aspects of the appraisal and in testimony, Ms. Ring classifies the subject property as a 'discount department store'."

The tax tribunal acknowledged that Kohl's was not located "in" Woodland Mall, as stated by respondent, and that it was a "discount department store," contrary to respondent's characterization of it as a "department store." However, the tax tribunal "still [found] support for Ms. Ring's determination of market rent for the subject property." The tax tribunal reasoned:

> Based on Kohl's sales figures, the subject property enjoys exceptional sales volume. While the table introduced into evidence (via Respondent's appraisal) from The Dollars and Cents of Shopping Centers: 1997 only gives a median rate for the category of "discount department store," other categories demonstrate that stores within the upper decile typically pay a higher rate of percentage rent. *See* R-2, p. 33. Furthermore, the information contained within the summary of Kohl's leases throughout Michigan reflect that the typical rent as a percentage of sales for these store is approximately 2.50%. *See* Respondent's Post Hearing Brief, pp. 13-14. As such, Respondent has demonstrated that its use of 2.50% as a percentage of sales to determine market rent is supportable.

The tax tribunal then concluded that "Allen's percentage factor of 2.00% was not wholly supported by his analysis," whereas "Ring's use of current sales and the use of a 2.50% factor [were] supported by the evidence." The tax tribunal's decision was supported by competent, material, and substantial evidence.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette