STATE OF MICHIGAN

COURT OF APPEALS

CONCORD CONSUMER HOUSING, Petitioner-Appellant,	UNPUBLISHED February 11, 2014
v	No. 311930 Michigan Tax Tribunal
TOWNSHIP OF BROWNSTOWN, Respondent-Appellee.	LC No. 327270

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

PER CURIAM.

Petitioner appeals by right from the Final Opinion and Judgment issued by the Michigan Tax Tribunal ("the Tribunal") on July 30, 2013. Tribunal adopted the Proposed Opinion and Judgment of the administrative law judge (ALJ) assigned to this matter, and thereby rejected petitioner's theory that the subject property is required to be valued using only the direct capitalization of income approach, concluded that the appropriate valuation method was a combination of the cost plus depreciation approach and the sales comparison approach, and determined the true cash value (TCV), the state equalized value (SEV), and the taxable value of the subject property for the tax years 2006 through 2011. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Petitioner is the owner of the subject property, a federally-regulated, non-profit residential housing cooperative located within defendant's borders. Petitioner appealed respondent's assessment of the TCV and taxable value of the subject property to the Tribunal for the tax year 2006, and amended it to include subsequent tax years. In support its appeal, petitioner advanced the theory that valuation of the subject property should be based on the actual income generated by the property. Respondent moved the Tribunal for summary disposition on the ground that petitioner's valuation theory could not be used to value the subject property, and therefore petitioner could not meet its burden of going forward with the evidence.

The ALJ partially granted respondent's motion for summary disposition. The ALJ rejected petitioner's proposed valuation method, holding that "[p]etitioner's flawed income approach is of no evidentiary value" and that petitioner had "failed to demonstrate the existence of a genuine issue of material fact with regard to its alleged approach to value." The ALJ thus granted summary disposition, pursuant to both MCR 2.116(8) and (10), on petitioner's main

valuation claim. However, the ALJ found disputed facts with regard to respondent's evidence, and thus did not dismiss petitioner's case.

A hearing was held before the Tribunal on respondent's valuation method. Petitioner was allowed to admit evidence related to respondent's sale comparison and cost plus depreciation approaches, and allowed to cross-examine respondent's witnesses. Petitioner presented no witnesses or additional evidence. Respondent presented testimony from the tax assessor who assessed the property, as well as the appraiser that prepared the appraisal used in the assessment of the property from tax year 2008 onward.

Following the hearing, the ALJ issued a Proposed Opinion and Judgment, holding:

> Based upon a review of the valuation evidence submitted by Respondent, it is determined that the true cash, state equalized, and taxable values of the subject property for 2008, 2009, 2010, and 2011 should be revised based on a combination of the cost and sales approaches in Respondent's appraisal. As indicated above, the values for tax years 2006 and 2007 are most accurately reflected by the original assessments, as evidenced by the property record card and the testimony provided during the hearing.

The Proposed Opinion adjusted the assessed values for tax years 2008 through 2011 downward from the values originally assessed by respondent, based on the value determination in the appraisal provided. Petitioner filed no exceptions to the Proposed Opinion, and the Tribunal adopted the Proposed Opinion in its Final Opinion and Judgment. This appeal followed.

II. STANDARD OF REVIEW

"This Court's ability to review decisions of the Tax Tribunal is very limited." *President Inn Properties, LLC*, 291 Mich App 625, 630; 806 NW2d 342 (2011). "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." Const 1963, art 6, § 28.

In *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 366, 388-389; 576 NW2d 667 (1998), this Court stated:

> While this Court is bound by the Tax Tribunal's factual determinations and may properly consider only questions of law under this section, a Tax Tribunal decision that is not supported by competent, material, and substantial evidence on the whole record is an "error of law" within the meaning of Const 1963, art 6, § 28. *Oldenburg v Dryden Twp*, 198 Mich App 696, 698; 499 NW2d 416 (1993); *Kern v Pontiac Twp*, 93 Mich App 612, 620; 287 NW2d 603 (1979). Substantial evidence must be more than a scintilla of the 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, 352-353; 483 NW2d 416 (1992). "Substantial" means evidence that a reasonable mind would accept as sufficient to support the conclusion. *Kotmar, Ltd v Liquor Control Comm*, 207 Mich App 687, 689; 525 NW2d 921 (1994).

We review de novo the Tribunal's grant of summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

III. ANALYSIS

"A proceeding before the Tribunal is original and independent and is considered de novo." MCL 205.735(2). Thus, the Tribunal "has a duty to make its own independent determination of true cash value." *Great Lakes Div of Nat'l Steep Corp*, 227 Mich App at 389. "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 case value." *Id*. at 389-390. "In the Tax Tribunal, a property's assessed valuation on the tax rolls carries no presumption of validity." *President Inn Properties*, 291 Mich App at 640. "Regardless of the method employed, the Tax Tribunal has the overall duty to determine the most accurate valuation under the individual circumstances of the case." *Id*. at 631.

The Michigan Constitution provides for the taxation of property assessed at not in excess of 50 percent of its TCV. Const 1963, art 9, § 3. "'[T]rue cash value' means the usual selling price at the place where the property to which the term is applied at the time of assessment, being the price that could be obtained for the property at private sale . . . ." MCL 211.27(1). TCV is synonymous with "fair market value." *President Inn Properties*, 291 Mich App at 350.

A petitioner seeking revaluation of assessed property must meet his or her burden of proof, which encompasses both the burden of going forward with the evidence and the ultimate burden of persuasion. *Jones & Laughlin Steel Corp*, 193 Mich App 348, 355; 483 NW2d 416 (1992). In *Jones & Laughlin Steel Corp*, this Court stated explicitly:

> The Tribunal further erred in failing to make an independent determination of the true cash value of the property. The Tribunal apparently believed that no such determination was necessary after it concluded that petitioner had failed to meet its burden of proof and dismissed petitioner's appeal. The Tribunal correctly noted that the burden of proof was on petitioner, MCL 205.737(3). This burden encompasses two separate concepts: (1) the burden of persuasion, which does not shift during the course of the hearing, and (2) the burden of going forward with the evidence, which may shift to the opposing party. The Tribunal's decision, however, seems analogous to the entry of a directed verdict upon the failure of a plaintiff's proofs. To the extent this analogy may be accurate in this case, the entry of judgment against petitioner for its failure to provide sufficient evidence was erroneous because, while petitioner may not have met its burden of persuasion, it did meet its burden of going forward with evidence. [*Id*.].

In the instant case, petitioner first argues that the Tribunal erred in granting partial summary disposition to respondent on the issue of petitioner's valuation evidence, because "there is always a genuine issue of material fact regarding the validity of each party's data, as well as the appropriateness of each party's methodology." Petitioner essentially claims that summary disposition regarding a party's valuation evidence is never appropriate in proceedings before the Tribunal. Such a conclusion is not supported by Michigan law.

The Michigan Tax Tribunal rules specifically allow the Tribunal to "exclude irrelevant, immaterial, or unduly repetitious evidence." Mich Admin Code R 792.10255(5). Further, it is well-settled that the Tribunal may grant or deny summary disposition to a party, and may grant partial summary disposition on the issue of valuation. See *Huron Ridge LP v Ypsilanti Twp*, 275 Mich App 23, 25-26; 737 NW2d 23 (2007). Finally, as stated, petitioner bears the initial burden of coming forward with the evidence. *Jones & Laughlin Steel Corp*, 193 Mich App at 355. Although the Tribunal still has the duty to make an independent determination of the TCV of the property, *id*., it is not precluded from dismissing a party's evidence as irrelevant or immaterial. *Id*., see also Mich Admin Code R 792.10255(5). We therefore decline to reverse the Tribunal on the grounds that it lacked the power to exclude petitioner's valuation evidence.

Turning to the substance of the Tribunal's ruling, petitioner argues that the Tribunal erred in excluding petitioner's valuation approach as irrelevant. We disagree.

> There are three traditional methods of determining true cash value, or fair market value, which have been found acceptable and reliable by the Tax Tribunal and the courts. They are: (1) the cost-less-depreciation approach, (2) the sales-comparison or market approach, and (3) the capitalization-of-income approach. Variations of these approaches and entirely new methods may be useful if found to be accurate and reasonably related to the fair-market value of the subject property. It is the Tax Tribunal's duty to determine which approaches are useful in providing the most accurate valuation under the individual circumstances of each case. Regardless of the valuation approach employed, the final value determination must represent the usual price for which the subject property would sell. [*Meadowlanes Ltd Dividend Housing Assoc v City of Holland*, 437 Mich 473, 484-485; 473 NW2d 636 (1991). See also *President Inn Properties*, 291 Mich App at 639.]

Petitioner argues that MCL 211.27(4)[1] required the Tribunal to consider the actual income and expenses of a nonprofit housing cooperative to determine its TCV. At the time of the Tribunal's decision, MCL 211.27(4) provided:

> As used in subsection (1), "present economic income" means for leased or rented property the ordinary, general, and usual economic return realized from the lease or rental of property negotiated under current, contemporary conditions between parties equally knowledgeable and familiar with real estate values. The actual income generated by the lease or rental of property is not the controlling indicator of its true cash value in all cases. This subsection does not apply to property subject to a lease entered into before January 1, 1984 for which the terms of the lease governing the rental rate or tax liability have not been renegotiated after December 31, 1983. This subsection does not apply to a nonprofit housing cooperative subject to regulatory agreements between the state or federal

[1] The relevant subsection is now MCL 211.27(5). See MCL 211.27, as amended by 2013 PA 162, effective date Nov 12, 2013. The text of the subsection has not changed. *Id*.

> government entered into before January 1, 1984. As used in this subsection, "nonprofit cooperative housing corporation" means a nonprofit cooperative housing corporation that is engaged in providing housing services to its stockholders and members and that does not pay dividends or interest upon stock or membership investment but that does distribute all earnings to its stockholders or members.

It is undisputed that petitioner is a "nonprofit housing cooperative subject to regulatory agreements between the state or federal government entered into before January 1, 1984." Petitioner argues that the above statutory language excluding nonprofit housing cooperatives from the applicability of MCL 211.27(4), and thus from its definition of "present economic income," indicates that the Legislature intended that the TCV of such a cooperative be assessed relative to its "actual income." Petitioner bases this conclusion on *CAF Investment Co v State Tax Comm*, 392 Mich 442; 221 NW2d 588 (1974) (*CAF I*), and *CAF Investment Co v Saginaw Twp*, 410 Mich 428; 302 NW2d 164 (1981) (*CAF II*). In *CAF I* and *CAF II*, our Supreme Court held that the phrase "economic income" as used in MCL 211.27 means actual income, specifically actual rental income. See *CAF I*, 392 Mich at 454; *CAF II*, 410 Mich at 457-458.

Subsequent to the *CAF* decisions, the Michigan Legislature amended MCL 211.27(4) (now (5)) to, among other things, add the current definition of "present economic income" and prohibit the use of actual income as a controlling indicator of TCV. See 1982 PA 539, effective March 30, 1983. Soon after, the Legislature again amended this subsection to exclude certain nonprofit housing cooperatives. See 1983 PA 254; effective December 29, 1983.

Petitioner urges this Court to derive from the above actions evidence of legislative intent to use the actual income approach to value nonprofit housing cooperatives. We find this contention to be without merit. The exclusion of nonprofit housing cooperatives from MCL 211.27(4) does not indicate that the Legislature intended that their TCVs be assessed according to the definition of "present economic income" stated in *CAF I* and *CAF II*. Rather, the most that can be reasonably drawn from the Legislature's language is that the Legislature simply intended that nonprofit housing cooperatives were not subject to the definition of "present economic income" as used in MCL 211.27(4).

Further, MCL 211.27 requires the assessors to "consider" many factors in determining TCV, including "present economic income." MCL 211.27(1). It does not *require* the assessor to use a particular valuation method. Even in *CAF I* and *CAF II*, our Supreme Court noted that in some circumstances the income capitalization approach would not be the most reliable means of valuing an income-producing property, and that in those circumstances a more reliable method of valuation should be used. *CAF I*, 392 Mich at 456; *CAF II*, 410 Mich at 461. Subsequent to the *CAF* cases, our Supreme Court and this Court have affirmed that no particular valuation method must be used in valuing nonprofit housing cooperatives subject to federal regulation. See *Meadowlanes Ltd Dividend Housing Assoc*, 437 Mich at 484 ("The Legislature did not direct that specific valuation methods be used."); *Georgetown Place Cooperative v City of Taylor*, 226 Mich App 33, 46-47; 572 NW2d 232 (1997) ("There is no single correct approach to valuing federally subsidized real property."). We therefore decline to hold that the Tribunal was required to use the income capitalization approach using actual income to value the subject property.

Finally, petitioner argues that even if the Tribunal was not *required* to adopt its valuation approach, it failed in its duty to make an independent valuation by erroneously concluding that prior case law forbade it from considering the income capitalization approach. Petitioner claims that the ALJ and the Tribunal "labor[ed] under the mistaken impression that prior decisions determining the true cash value of non-profit residential cooperatives, each with different sets of facts, and each assessed with differing valuation methodologies are *stare decisis*." Petitioner's contention lacks merit.

It is clear that the ALJ conducted a thorough review of petitioner's evidence, including reference to prior Tribunal cases and cases from this Court. The ALJ stated:

> The valuation method chosen must reflect the behavior and motivations of buyers in the subject's market. "Income-producing real estate is typically purchased as an investment, and from an investor's point of view earning power is the critical element affecting property value." Appraisal Institute, *The Appraisal of Real Estate* (Chicago: 12th ed, 2001), p 471. The income method in its various forms "consider [sic] anticipated future benefits and estimate their present value." *Id*. The income method should be applied to simulate investor motivations. *Id*., 473. There is no evidence that the subject property or any unit in the subject property would be acquired by an investor for its income-producing capacity or for investment purposes. It is concluded that the income approach using actual rents and expenses as advanced by Petitioner is not applicable to the subject property.

The ALJ further concluded that "the property is more like owner-occupied condominium units than a rental complex. . . . There is no demonstrable relationship between the NOI [net operating income] of a nonprofit housing cooperative and the "true cash value" of the property within the meaning of MCL 211.27(1).

The ALJ then conducted a review of similar Tribunal opinions and decisions of this Court, and determined that, inter alia, this Court's decision in *Georgetown Place Cooperative*, 226 Mich App at 53 (affirming the Tribunal's decision that the income approach was not an appropriate valuation method for a nonprofit cooperative) and our Supreme Court's decision in *Meadowlanes Ltd Dividend Housing Assoc*, 437 Mich at 503 (holding that the valuation of a nonprofit housing cooperative without consideration of the value of the federally subsidized mortgage was in error), as well as this Court's unpublished decision in *Branford Towne Houses Cooperative v City of Taylor*, unpublished opinion per curiam of the Court of Appeals, decided April 19, 2007 (Docket No. 265398), unpub op at 5 (upholding the Tribunal's decision to decline to employ the income capitalization method to assess the TCV of a nonprofit housing cooperative), as well as numerous post-*Meadowlanes* Tribunal decisions, supported his holding that "[i]t can be concluded as a matter of law that Petitioner's approach does not produce a more

accurate or credible estimate of TCV than the values on the record cards, which are supported by a fully developed, recognized approach to value: the cost less depreciation approach."[2]

Thus, rather than shirk its duty to render an independent determination of value, the Tribunal thoroughly considered, and rejected, petitioner's valuation approach.[3] We find no error of law in the ALJ's conclusion, in light of both the ALJ's reasoning and the reasoning of other cases that considered the valuation of similar properties. Nothing in Michigan law or statute required the Tribunal to essentially duplicate the ALJ's conclusions at the valuation hearing. As stated, the Tribunal possesses the authority to exclude irrelevant or immaterial evidence. Mich Admin Code R 792.10255(5). Thus, we find no error of law in the Tribunal's rejection of petitioner's proposed method of valuation.

Affirmed.

/s/ Mark T. Boonstra
/s/ E. Thomas Fitzgerald

[2] Unpublished opinions of this Court are not binding, but may be persuasive authority. MCR 7.215(C)(1).

[3] It is worth noting that the ALJ, and the Tribunal, did not fully accept respondent's proposed valuations for tax years 2008 through 2011, but rather lowered the assessed value based on evidence presented by Respondent.