TAX COURT OF NEW JERSEY

Kathi F. Fiamingo
Judge

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THE TAX COURT COMMITTEE ON OPINIONS

August 31, 2016

William DiSenso
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Wyckoff, New Jersey 07481

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Re: William DiSenso v. Wyckoff Township
Docket No. 014165-2015

Messrs. DiSenso and Marchese:

This letter constitutes the court's opinion following trial in the above-referenced matter challenging the 2015 tax year assessment on plaintiff's single-family residence. For the reasons stated more fully below, the judgment entered by the Bergen County Board of Taxation is affirmed.

I. Procedural History and Factual Findings

The court makes the following findings of fact and conclusions of law based on the evidence and testimony offered at trial in this matter.

William DiSenso ("plaintiff") is the owner of the single-family home located at 50 Ravine Avenue, in the Township of Wyckoff, County of Bergen and State of New Jersey. The property is identified on the tax map of the Township of Wyckoff as Block 498, Lot 48.01 (the "subject property"). For the 2015 tax year, the subject property was assessed as follows:

*

Land:	737,000
Improvements:	94,000
Total	831,000

The Township of Wyckoff ("Township" or "defendant") instituted a district-wide revaluation for the 2015 tax year. Thus, the average ratio for the 2015 tax year was 100%. See N.J.S.A. 54:51A-6(d). (By its own terms Chapter 123 does not apply in a revaluation year. Campbell Soup Co. v. Camden City, 16 N.J. Tax 219, 227 (Tax 1996).

Plaintiff filed a petition of appeal challenging the 2015 tax year assessment on the subject property with the Bergen County Board of Taxation, which reduced the assessment on the subject property to $794,000. Plaintiff subsequently filed a timely appeal of the county board judgment with the Tax Court. The Township did not file a Counterclaim.

The matter was tried to conclusion on August 18, 2016. At trial, only plaintiff offered the testimony of a State of New Jersey certified general real estate appraiser, who was accepted without objection as an expert in the field of real estate valuation (the "expert").[1] The expert prepared an appraisal report, which was admitted into evidence without objection. Plaintiff also offered brief testimony at trial. The Township did not offer any testimony nor did it present an expert opinion at trial.

The court finds that the subject property is a two-story "Cape Cod" style single-family home, built approximately 95 years ago. The home consists of a total of six rooms, including two bedrooms and one full bathroom, an unfinished basement containing 702 square feet, and a detached one-car garage. While in average condition, the kitchen and bathrooms are dated being original to the home.[2] There is a mixture of knob and tube wiring and modern wiring within the

[1] While not objecting to the expert's qualifications as a New Jersey Certified Residential Real Estate Appraiser, the defendant noted that the expert had never before testified in the New Jersey Tax Court.

[2] While plaintiff's expert testified that the kitchen and bath were original to the home, the report states that the "dated" kitchen and bath were 50 years old.

subject property, insulation is minimal, there is no closet in one bedroom and a very small closet in the second bedroom, in keeping with the age of the home. The gross living area of the subject property is 1,483 square feet.

The subject property is located in an R-15 zone, requiring a minimum lot size of 15,000 square feet and 100 feet of frontage. Although the subject property consists of approximately 1.29 acres, more than three times the minimum lot size required, it has only 139 feet of frontage along Ravine Avenue, thus requiring a variance to be subdivided into conforming lot(s).

The subject property is adjacent to the Ravine Avenue Tributary to the Goffle Brook. Although located in a 500-year floodplain, it is not in any FEMA designated flood zone.

II. Plaintiff's Proofs

Plaintiff's expert testified that he relied on six "comparables" in reaching his conclusion of value. His main "concern" in selecting those comparables was the square footage of the home and the size of the lot. He conceded that the lot size, especially in relation to the relatively small size of the home, was "extraordinarily large." He further indicated that the home, being a small two-bedroom, had limited appeal.

Plaintiff's expert testified that he encountered difficulty in finding comparable sales with similar lot size as most of the properties conformed to the minimum 15,000 square foot requirement of the R-15 zone. The expert testified that one comparable, although almost double the size of the subject property, was chosen because it was similar in lot size.

The comparable sales chosen by the expert all occurred within a ten-month period preceding the valuation date and the sales prices ranged from a high of $640,000 to a low of $325,000. The adjusted sales prices ranged from $505,000 to $346,750. He reached a conclusion of value of $470,000.

The expert made gross adjustments to each of his comparable sales, ranging from 33% to 48%. Those adjustments included 5% for "location appeal;" $2 per square foot for difference in lot size; $50 per square foot for gross living area differences; $5,000 per bedroom/full bathroom; $2,500 per half bath; 10% for condition (good/renovated); $5,000 for deck/patio/porch; $25,000 for pool; $5,000 for full basement; $2,500/$5,000 for semi/fully finished basement; 5% for "Interior Detriments/Adversities;" and .4% per month for "Negative Market Trend Adjustment."

With the exception of the gross living areas of the properties compared, which the expert's report indicates were based on "assessor data," questioning of the expert revealed that all of sales data used in his appraisal report was collected solely from the MLS. The expert did not confirm any of the sales or their details with anyone familiar with the transactions.

The expert testified that he made a "location adjustment" to account for the "external inadequacies" of the subject property, including the "flooding" conditions. When questioned as to how he arrived at the adjustment, the expert conceded there was no data in the report to support his adjustment. He determined that a 5% adjustment for these inadequacies was appropriate based on his experience. Similarly, he made a 10% adjustment for the condition of the property, because it "made sense . . . based on [his] experience." No data was provided to support the value ascribed to the condition adjustment. The expert also testified that the 5% adjustment made for "detriments/adversities" (the original kitchen and bath, knob and tube wiring and asbestos wrapped pipes), was based on "total experience." No market data or analysis was provided in the report or in the testimony for any of the adjustments made by the expert. Plaintiff's expert justified the lack of supporting data in his report by indicating that the appraisal was a "summary report."

On cross-examination the expert conceded that the appraisal report did not include a highest and best use analysis of the subject property. While maintaining that he did, in fact,

perform such an analysis, the expert testified that his assignment was to appraise the property "AS IS," in its current use for the purposes of a tax appeal and not to determine the uses to which the property could be put.

While recognizing that the lot was over-sized and thus might have use as a "knock down" property in an affluent community like Wyckoff, he testified that he only considered the present "AS IS" use of the property because his "assignment" was what "mattered." In the expert's opinion, what the subject "was" is the highest and best use of the property "in agreement with the assignment [he] was given," which was to appraise the property AS IS for tax appeal purposes.

Following the testimony of plaintiff and his expert, the Township moved to dismiss plaintiff's complaint pursuant to R. 4:37-2(b). The Township presented no evidence on its own behalf.

II. Conclusions of Law

When confronted with a R. 4:37-2(b) motion, the court must be mindful of the principle that "[o]riginal 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 appealing taxpayer has the burden of proving that the assessment is erroneous." Pantasote Co. v. City of Passaic, supra, 100 N.J. 408, at 413 (1985) (citing Riverview Gardens v. North Arlington Borough, 9 N.J. 167, 174 (1952)). The evidence must be "definite, positive and certain in quality and quantity to overcome the presumption." MSGW Real Estate Fund, LLC. v. Borough of Mountain Lakes, supra, 18 N.J. Tax at 373.

The "presumption is not simply an evidentiary presumption serving only as a mechanism to allocate the burden of proof. It is, rather, a construct that expresses the view that in tax matters, it is to be presumed that governmental authority has been exercised correctly and in accordance

with law." Id. at 374 (citing Powder Mill, I Assocs. v. Hamilton Township, 3 N.J. Tax 439 (Tax 1981)). "The presumption of correctness . . . stands, until sufficient competent evidence to the contrary is adduced." Little Egg Harbor Township v. Bonsangue, 316 N.J. Super. 271, 285–86 (App. Div. 1998). A taxpayer can only rebut the presumption by introducing "cogent evidence" of true value. That is, evidence "definite, positive and certain in quality and quantity." MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, supra, 18 N.J. Tax at 413 (quoting Aetna Life Ins. Co. v. Newark, 10 N.J. 99 (1952)). Therefore, at the close of plaintiff's proofs, the court must be presented with evidence that raises a "debatable question as to the validity of the assessment." MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, supra, 18 N.J. Tax at 376.

The court, in evaluating whether the evidence presented meets the "cogent evidence" standard, "must accept such evidence as true and accord the plaintiff all legitimate inferences which can be deduced from the evidence." Id. at 376 (citing Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995)). However, the evidence presented, when viewed under the Brill standard "must be 'sufficient to determine the value of the property under appeal, thereby establishing the existence of a debatable question as to the correctness of the assessment.'" West Colonial Enters, LLC v. City of East Orange, 20 N.J. Tax 576, 579 (Tax 2003) (quoting Lenal Properties, Inc. v. City of Jersey City, 18 N.J. Tax 405, 408 (Tax 1999), aff'd, 18 N.J. Tax 658 (App. Div. 2000), certif. denied, 165 N.J. 488). "Only after the presumption is overcome with sufficient evidence . . . must the court 'appraise the testimony, make a determination of true value and fix the assessment.'" Greenblatt v. Englewood City, 26 N.J. Tax 41, 52 (Tax 2011) (quoting Rodwood Gardens, Inc. v. City of Summit, 188 N.J. Super. 34, 38–39 (App. Div. 1982)). If the court concludes that evidence sufficient to overcome the presumption of validity attached to the

tax assessment has not been presented, judgment must be entered affirming the assessment. Ford Motor Co. v. Township of Edison, 127 N.J. 290, 312 (1992).

"Whenever a market value opinion is developed, highest and best use analysis is necessary." Appraisal Institute, The Appraisal of Real Estate, 42 (14th ed. 2013); see also Ford Motor Co. v. Township of Edison, 127 N.J. 290, 300–01 (1992). "Even the simplest valuation assignments must be based on a solid understanding of . . . the highest and best use of the real estate." The Appraisal of Real Estate, supra, at 41 (14th ed. 2013). At a fundamental level, the value of a parcel of land is dependent upon use and should therefore "be examined for all possible uses" and the use "yield[ing] the highest return should be selected." Inmar Associates Inc. v. Township of Edison, 2 N.J. Tax 59, 64 (Tax 1980) (citing The Appraisal of Real Estate, supra, at 43 (7th ed. 1978)). As Judge Andresini cogently explains in Clemente v. Township of South Hackensack, 27 N.J. Tax 255, 267–68 (Tax 2013),

> the first step in the valuation process is the determination of the highest and best use for the subject property. (citing American Cynamid Co. v. Township of Wayne, 17 N.J. Tax 542, 550 (Tax 1998)). The concept of highest and best use is not only fundamental to valuation but is a crucial determination of market value. This is why it is the first and most important step in the valuation process. (citing Ford Motor Co. v. Township of Edison, 10 N.J. Tax 153, 161 (Tax 1988), aff'd o.b. per curiam, 12 N.J. Tax 244 (App. Div. 1990), aff'd, 127 N.J. 290 (1992)). The definition of highest and best use contained in The Appraisal of Real Estate, supra, at 333 (14th ed. 2013), has remained relatively constant . . . Highest and best use is defined as:
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> > The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value.
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> > [The Appraisal of Real Estate, supra, at 279 (13th ed. 2008)]
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> 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. Ford Motor Co. v. Township of Edison, supra, 10 N.J. Tax at 161; see also The Appraisal of Real Estate, supra, at 279 (13th ed. 2008).

Although the "actual use is a strong consideration," a property's "[h]ighest and best use is not determined through subjective analysis by the property owner." Id. at 268 (citing The Appraisal of Real Estate, supra, at 279 (13th ed. 2008)). The analysis relates to the physical attributes of the real estate, and its physical use "should not be confused with the motivation of owners or users." The Appraisal of Real Estate, supra, at 334 (14th ed. 2013). A proper determination requires a thorough analysis of the supply and demand of potential alternative uses of the property being valued. See id. at 269.

Here, plaintiff's expert testified that the highest and best use of the subject property was "AS IS" as currently improved as a single-family residence. Through cross-examination, however, the expert revealed that he did not consider the four elements of highest and best use because his report is a "summary report" and that his "assignment" was to complete an "AS IS" appraisal for "tax appeal" purposes. The only support provided by the expert for his conclusion of highest and best use may be found in an excerpt from his appraisal report, which provides "[b]ased in (sic) zoning regulations and the make-up of the subject neighborhood, the subject's present use as a single family dwelling is considered it's (sic) highest and best use."

Implicit in the analysis of highest and best use is that the determination arises from the judgment and analytical skill of the appraiser—i.e. the appraiser's opinion. See Clemente v. Township of South Hackensack, supra, 27 N.J. Tax at 271 (quoting Linwood Properties, Inc. v. Borough of Fort Lee, 7 N.J. Tax 320, 217 (Tax 1985)). It does not follow, however, "that a mere opinion of highest and best use is acceptable." Id. at 271 (quoting Greenblatt v. Englewood City, supra, 26 N.J. Tax 54–55 (Tax 2010)). Various legally permissible uses must be tested in order to determine which use produces the highest value. See id. at 271–72 (citing The Appraisal of Real Estate, supra, at 279 (13th ed. 2008)). The subject property is located on a large piece of property

in a single-family residential zone that would legally permit a much larger single-family home to be built. Because of its small size, "dated" condition and limited updates, plaintiff's expert in fact admitted during his testimony that "the property . . . is not totally desirable in the market" and that the subject had "limited appeal." Yet he did not consider any other use of the subject property, such as a property fit for knock down or reconstruction because his was a "summary appraisal" report and to do so was not within his assignment.

The plaintiff's expert's failure to engage in any meaningful review of the subject property's highest and best use renders the appraisal opinion suspect as lacking the foundation upon which that opinion should be based.

Furthermore, plaintiff's expert testified that he did not consult with any participants in any of the comparable sale transactions and that he relied exclusively on the MLS for all information utilized in preparing his appraisal report and forming his opinion of market value. The Appraisal Institute has cautioned appraisers that while "the [multiple listing] service will contain fairly complete information about these properties, including descriptions and brokers' names . . . details about a property's square footage, basement area, or exact age may be inaccurate or excluded." The Appraisal of Real Estate, supra, at 119 (14th ed. 2013). The property listings on most local real estate MLS websites also typically include disclosures regarding the accuracy of the information available. For example, the Garden State MLS, LLC website contains the express disclosure that the "information [is] deemed reliable but [is] not guaranteed." The rationale behind such disclosure is practical—the information comprising these websites may be reported by unidentified and sometimes unsophisticated third parties and may therefore be inaccurate or speculative. Thus, the reliability of the information relied upon by the expert in reaching his conclusions is suspect.

In addition, plaintiff's expert's adjustments lack any basis upon which this court can determine credibility. Substantially all of the adjustments were based on the expert's experience. While the court does not doubt that plaintiff's expert may have performed a significant number of appraisals upon which he could properly determine that an adjustment might be necessary, he provided no data and no testimony to support the amount of the adjustments made or the reliability/credibility of such adjustments.

The extent of those adjustments in the aggregate, ranged from 33% to 48% on a gross basis, and leads this court to question the comparability of the properties. "[D]ifferences between a comparable property and the subject property are anticipated. They are dealt with by adjustments recognizing and explaining these differences, and then relating the two properties to each other in a meaningful way so that an estimate of the value of one can be determined from the value of the other." U.S. Life Realty Corp. v. Jackson Township, 9 N.J. Tax 66, 72 (Tax 1987). However, the degree of gross adjustments can have a material bearing upon the comparison of the properties. "Adjustments to sales of a large magnitude 'vitiate comparability.'" Pansini Custom Design Associates, LLC v. City of Ocean City, 407 N.J. Super. 137, 148 (App. Div. 2009) (quoting Global Terminal & Container Services. v. City of Jersey City, 15 N.J. Tax 698, 704 (Tax 1996));see also Congoleum Corp. v. Township of Hamilton, 7 N.J. Tax 436, 451 (Tax 1985) (concluding that adjustments must be sufficiently supported by objective data); M.I. Holdings v. City of Jersey City, 12 N.J. Tax 129, 137 (Tax 1991) (concluding that gross adjustments of 42% to 63% were incompatible to the subject property and not probative of its true value). Even most "comparable" of the sales utilized by plaintiff's expert required a gross adjustment of 33% and was a property containing a ranch style home almost double the size of the subject property.

"[B]eing qualified as an expert is but the first part of accepting an expert's opinion." Greenblatt v. Englewood City, supra, 26 N.J. Tax at 54. Qualification may be based upon the expert's knowledge, skill, training, or experience. However, qualifying an individual as an expert does not translate into acceptance by the court of the testimony of the expert. In order for an expert's opinion to be meaningful to the trier of fact, it must be based upon credible facts and data. As set forth in Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002):

> In addition to determining whether a witness is qualified to testify as an expert, the trial court must also decide the closely related issue as to whether the expert's opinion is based on facts and data. Biunno, Current N.J. Rules of Evidence, comment 2 on N.J.R.E. 702 (2002). As construed by applicable case law, N.J.R.E. 703 requires that an expert's opinion be based on facts, data, or another expert's opinion, either perceived by or made known to the expert, at or before trial. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981); Nguyen v. Tama, 298 N.J. Super. 41, 48–49 (App. Div. 1997) . . . The rule requires an expert to "give the why and wherefore" of his opinion, rather than a mere conclusion. Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996), certif. denied, 145 N.J. 374 (1996).
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> [See Greenblatt v. Englewood City, supra, 26 N.J. Tax at 54.]

While the facts and data upon which the expert bases his or her opinion need not be admissible, they must be of a type "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." N.J.R.E. 703. In order for an expert's testimony to be of any value it must have a proper foundation. See Peer v. City of Newark, 71 N.J. Super. 12, 21 (App. Div. 1961), certif. denied, 36 N.J. 300 (1962).

Taking all of the testimony and evidence presented by the plaintiff into account, the court finds that plaintiff failed to present sufficient competent evidence to overcome the presumption of correctness. Plaintiff's expert's reliance on the MLS as the sole source of data, and his failure to support any of his adjustments with any objective data put before this court leads to only this result.

III. Conclusion

Plaintiff has failed to present sufficient competent and reliable evidence of the true market value of the subject property and thereby failed to overcome the required presumption of validity that attaches to the judgment of the county board of taxation. The court affirms the judgment entered by the Bergen County Board of Taxation.

Very truly yours,

s/ Kathi F. Fiamingo
Hon. Kathi F. Fiamingo, J.T.C.