

NOT FOR PUBLICATION WITHOUT APPROVAL OF
THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

Kathi F. Fiamingo
Judge



153 Halsey Street
Gibraltar Building –8th Floor
Newark, New Jersey 07101
(973) 648-2921 Fax: (973) 648-2149

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT
COMMITTEE ON OPINIONS

January 3, 2017

Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
25 Market Street
Trenton, NJ 08625-0006

Ellen Heine, Self Represented Litigant
211 E. 15th Street
Paterson, NJ 07524

Louis M. Flora, Esq.
Lavin & Associates
184 Main Street
Chester, NJ 07930

RE: Ellen Heine v. City of Garfield
Docket No. 014091-2014, 014190-2015

Gentlemen and Ms. Heine:

This letter opinion is issued pursuant to Rule 2:5-1(b) to amplify the court’s oral opinion of October 28, 2016, granting defendant’s motion to dismiss the above complaints pursuant to R. 4:37-2(b) for plaintiff’s failure to overcome the presumption of correctness of the assessments.

Plaintiff is the owner of the real property located at 519 Van Bussum Avenue, in the City of Garfield, Bergen County, New Jersey (the “subject property”). The subject property is also

known as Lot 19 in Block 202 on the official tax map of the City of Garfield (the “City”). For the tax years 2014 and 2015 the tax assessment for the property was as follows:

Land	\$104,000
Improvement	<u>\$ 96,000</u>
Total Assessment	\$200,000

The Chapter 123 average ratios for 2014 and 2015 were 98.41% and 98.56%, respectively, resulting in an equalized value of \$203,231 for 2014 and \$202,922 for 2015.¹ Plaintiff appealed both assessments to the Bergen County Board of Taxation (“BCBT”) which affirmed the assessments. Thereafter plaintiff timely appealed the judgments to the Tax Court.

The subject property is a two-family home. In or about September, 2010, the Fire Code Inspector employed by the City issued a Notice of Violations and Order to Correct in which plaintiff was cited for 11 fire code violations. Simultaneously, plaintiff was served with a Notice and Order of Penalty by the Construction Official. The essence of the Notice of Violations is that plaintiff was operating the subject property as a rooming house without the necessary required precautions applicable to rooming houses.²

Thereafter, sometime in 2011, the City put a lock on the door and boarded up the subject property to prevent access, as the subject property had been determined to be in an unsafe condition.

Plaintiff neither performed the repairs necessary to conform the subject property to the requirements of a rooming house, nor demonstrated to the Fire Code Official and the Construction Official that she intended to operate the property in a manner conforming to the intended and

¹ Plaintiff did not present evidence of the Chapter 123 ratios for the years under appeal and the court takes judicial notice of the same for the purposes of this decision.

² In September 2010, the Commissioner of the Department of Community Affairs found that the subject property was a “rooming house” and that plaintiff had no valid license to operate a rooming house. That decision was upheld by the Superior Court of New Jersey, Appellate Division in an unpublished decision entitled *Ellen Heine v. Department of Community Affairs, Bureau of Rooming and Boarding House Standards*, Docket No. A-2113-11T1.

authorized use of the subject property, that is, as a two-family residence. After the City placed a pad-lock on the subject property, plaintiff never contacted the Fire Code Official/Construction Code Official to request access to the subject property for the purpose of making repairs, nor did she contact the City for the purpose of obtaining a key to the lock placed on the door.³

At trial, plaintiff produced the Fire Code/Construction Code Official from the City of Garfield and the Tax Assessor of the City of Garfield who testified under subpoena from the plaintiff. She further offered the testimony of four fact witnesses including herself. Plaintiff produced no expert testimony on the matter of valuation of the subject property, nor did she produce any comparable sale data. The City produced no witnesses and at the close of plaintiff's case made a motion to dismiss plaintiff's complaint under R. 4:37-2(b) for plaintiff's failure to overcome the presumption of correctness of the assessment.

The City's Fire Code/Construction Official testified that in September 2010, a Notice of Violation and Order to Correct was issued citing plaintiff with a number of code violations. The essence of the Violations and Repair requirements was that plaintiff was operating the subject property as a rooming house which required certain safety precautions not otherwise applicable to one and two-family residences. He testified that if a condition constituted an imminent hazard it was required that the condition be abated within 24 hours or the property could not be occupied. Due to the imminent hazard posed by the failure of the subject property to feature certain of the safety precautions set forth in the cited violations, the subject property could not be occupied.

The City placed a lock on the door to the subject property in 2011 because people were breaking in to the residence and/or entering the building. A padlock was placed on the door in

³ Plaintiff engaged in various litigation with the City as a result of the subject property. A court ordered inspection of the subject property was undertaken sometime in 2015. Although plaintiff testified that judicial intervention was required to obtain an inspection of the subject property, the court finds that after the City placed its lock on the subject property plaintiff did not request access for the purpose of conducting repairs, inspecting the property for damage or to prepare an appraisal, to show the property for sale, or for any other purpose.

order to prevent access while the subject property was in an unsafe condition. There was evidence that individuals were accessing the subject property and bringing animals onto the property.⁴ The Official credibly testified that at no time after the Notices of Violations were issued was he notified that any repairs to correct the violations were effected nor did plaintiff or any other individual request access for the purpose of making repairs. He further testified that at no time after the Notices of Violations were issued was he notified that the subject property was being operated in a manner other than a rooming house or that plaintiff intended to utilize the property in such a manner. At no time after the Notices of Violations were issued did plaintiff contact the Fire Code/Construction Official regarding curing of any of the issues at the subject property noted in any of the Notices. At no time did the plaintiff contact the Official to discuss the possibility of utilizing the subject property as a one or two-family home. The Official did recall that in early January 2012, he was called to the subject property by the City Police because an individual was at the subject property. The official found plaintiff at the subject property with a generator. When questioned by the Official at the time, plaintiff advised him that she was at the subject property to “check for ghosts.” She did not indicate that she was making repairs, assessing the property for the purpose of making repairs, or for any other purpose, nor had she contacted the Official in advance of going to the subject property.

The Tax Assessor, also called as a witness by the plaintiff, testified that the Property Record Card for the subject property reflects that from at least 2010 until the present, the subject property was classified as a two-family residence. He did an exterior inspection of the subject property in or about 2012, but had not returned to the property since, nor had he ever inspected the interior. He was never requested to go to the subject property by the plaintiff or any other person. He did

⁴ One of plaintiff’s witnesses testified that at one point plaintiff may have had as many as 54 cats brought into the subject property.

not inspect, or attempt to inspect, the subject property as part of the subject appeals. He further testified that during the 2012 tax appeal at the BCBT he recommended that the assessed value of the improvement be reduced by \$75,000, resulting in the current assessment of the subject property at \$200,000.

Plaintiff's fact witness, Lance Haase, testified to an event which occurred in the spring of 2011 when he was on (but not inside) the subject property. At that time he was informed by a member of the City Police Department that he was required to leave the subject property. He further testified that he had been ordered off the subject property on multiple occasions when he was present to cut the grass and remove garbage that had been thrown onto it. He could not recall having ever been inside the property at any time.

Plaintiff's witness, Richard Holler, testified that he was also on the subject property in spring of 2011 and was told to leave the property by the City police. He was not allowed into the house. In 2015 he was present at subject property for purpose of participating in the court-ordered inspection of the subject property. The subject property was "messy". Prior to 2010-2011 he was often in the subject property. With the exception of the court-ordered inspection, he had only accessed the interior of the subject property after it had been boarded up through a cellar window. He did so to take a number of cats out of the subject property which plaintiff had placed there to be neutered and stored.

Plaintiff's third fact witness was also present during the court-ordered inspection which occurred in 2015. The subject property has been vandalized, including the utilities, and there was substantial interior damage. At some point the utilities, including the water, had been disconnected.

Plaintiff testified that she purchased the subject property in 2007 with the intention of residing there. She left the subject property in 2010 when the Notice of Violations and Order to

Correct were issued. She testified that she did not know that she was not allowed to access the subject property, although she was aware she could not reside in the subject property. She testified that she did not know about the subject property being boarded up until after the fact and a lien was placed on the subject property.

Plaintiff contended that the actions of the City denied her any economic use of the subject property. Her position was that the use of the subject property as a rooming house ceased when the occupants were forced to vacate in 2010. It was her position that she was uncertain what use was appropriate to determine value of the subject property. While she maintained that it was always her intention that the subject property be a one or two family residence, the City's determination that it was a "multi-family" property made it impossible for her to determine the correct use to obtain the necessary comparables for the subject property. She was, therefore, unable to present the court with any comparable sales.

Furthermore, plaintiff maintained that the City's effective condemnation of the subject property; the deteriorated condition of the subject property, her inability to determine its use, and the fact that the property was "closed" made finding comparable sales impossible; and that her inability to gain access to the property for any purpose made it impossible for her to have it appraised or to show it for sale. When specifically questioned by the court she alleged that she had requested access for the purpose of making repairs, but she was denied. She alleged that she requested access for the purpose of winterizing the subject property but that request was also denied.

She testified that although she never obtained any estimates to determine the costs to repair the subject property, those costs would exceed the value of the subject property and would not be cost effective. She conceded that the land at the subject property likely had value but had not undertaken any attempt to determine that value.

Plaintiff contends that the property is value-less because she is unable to use it as a direct result of the actions of the City. She presented no evidence of value for the reasons set forth above.

At the close of plaintiff's case, the City moved to dismiss the plaintiff's complaint for having failed to overcome the presumption of correctness of the assessment.

When confronted with a motion under R. 4:37-2(b), the court must be mindful of the principle that "original 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 presumption "attaches to the quantum of the tax assessment. Based on this presumption, the appealing taxpayer has the burden of proving that the assessment is erroneous." Pantasote Co. v Passaic, 100 N.J. 408, 413 (1985) (citing Riverview Gardens v. North Arlington Borough, 9 N.J. 167, 174 (1952)).

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." MSGW Real Estate Fund, LLC, supra, 18 N.J. Tax 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, supra, 18 N.J. Tax at 413 (quoting Aetna Life Ins. Co. v. Newark, 10 N.J. 99 (1952)). Therefore, at the close of plaintiffs' proofs, the court must be presented with evidence which raises a "debatable question as to the validity of the assessment." MSGW Real Estate Fund, LLC, 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 Props., 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 (2000)).

Based on those standards, it is clear that plaintiff has failed to overcome the presumption of correctness.

Even affording plaintiff all legitimate inferences plaintiff has provided no evidence “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.” Lenal Props., Inc. v. City of Jersey City, 18 N.J. Tax 405, 408 (Tax 1999), aff’d, 18 N.J. Tax 658 (App. Div. 2004), certif. denied, 165 N.J. 488 (2000). In fact, plaintiff provided no evidence of value and did not undertake any attempt to find value.

Plaintiff maintained that she could not determine value because she could not determine the use of the property. Plaintiff is, of course, correct that a determination of value of a property requires a determination of the highest and best use of the property. That is the first step in determining value.

For property tax assessment purposes, property must be valued at its highest and best use. Ford Motor Co. v. Township of Edison, 127 N.J. 290, 300-01 (1992). "Any parcel of land should be examined for all possible uses and that use which will yield the highest return should be selected." Inmar Associates Inc. v. Township of Edison, 2 N.J. Tax 59, 64 (Tax 1980). Accordingly, the first step in the valuation process is the determination of the highest and best use for the subject property.

American Cyanamid Co. v. Township of Wayne, 17 N.J. Tax 542, 550 (Tax 1998), aff'd, 19 N.J. Tax 46 (App.Div.2000). "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." 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); see also Gen. Motors Corp. v. City of Linden, 22 N.J. Tax 95, 107 (Tax 2005).

The definition of highest and best use contained in The Appraisal of Real Estate, a text frequently used by this court as a source of basic appraisal principles, has remained relatively constant for all of the years under appeal. Highest and best use is defined as:

The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value.

[Appraisal Institute, The Appraisal of Real Estate, 22 (13th ed. 2008).]

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., supra, 10 N.J. Tax at 161; see also The Appraisal of Real Estate at 279.

[Clemente v. Township of South Hackensack, 27 N.J. Tax 255, 267–268 (Tax 2013), aff'd o.b. 28 N.J. Tax 337 (App. Div. 2015).]

Plaintiff was cited for using the property as a rooming house without having first obtained a license or approval to do so and without having installed the necessary safety precautions applicable to such use. Plaintiff did not attempt to determine the highest and best use of the subject property maintaining instead that as a result of the actions of the City there was no use to which the property could legally be put and that there is no value to the property. The court finds plaintiff's argument to be specious. Plaintiff's alleged inability to utilize the subject property was due to her insistence in using the property in an illegal manner. "A highest and best use analysis is not based on value—in—use because the determination is a function of property use and not a function of a particular owner's use or subjective judgment as to how a property should be used."

Ibid.

The Fire Code and Construction Official testified that it was plaintiff's use of the property as a rooming house that necessitated the issuance of the Notice of Violations. He further testified credibly that if plaintiff had returned the property to its appropriate use as a one or two family home a number of the repairs listed in the Notice of Violation would not have been required. Plaintiff neither effected the repairs nor demonstrated to the City that she intended to use the property in a manner such that those repairs were not necessary. It was always within plaintiff's control to use the property in a legally permissible manner. It was not, as the plaintiff maintained, the actions of the City that prohibited her from using the subject property. The City instead prohibited plaintiff from using the property in an illegal and legally impermissible manner.

A highest and best use analysis requires that the use of the reviewed property be "legally permissible." "To apply the test of legal permissibility, an appraiser determines which uses are permitted by current zoning [and] which uses could be permitted if a zoning change were reasonable probable. . ." Appraisal Institute, The Appraisal of Real Estate, 338 (14th ed. 2014).

Plaintiff maintains that she was unable to determine the legally permissible use of the subject property and therefore she was unable to determine its highest and best use. Yet at no time did plaintiff refer to the uses permissible within the zone in which the subject property was located. Had she done so, the legally permissible use to which the subject property could be put would have been revealed to her.

Instead, plaintiff disingenuously asserted that the City's complaint that plaintiff was operating the property (illegally) as a rooming house somehow clouded the issue as how to determine the highest and best use of the subject property. Plaintiff was certainly aware that the illegal use to which she had put the property was not a permissible use, nor was it reasonably probable that the use would be made permissible. Her illegal and impermissible use of the subject

property had no bearing on the legally permissible use analysis which is the first step in the determination of the highest and best use of a property.

The court rejects plaintiff's arguments that the actions of the City made it impossible for her to utilize the subject property and that she was unable to value the subject property because of her inability to determine its highest and best use.

Furthermore, plaintiff conceded that the land at the subject property had value. that even if she were unable to determine the value of the improvement on the subject property, the land had value. Yet, plaintiff provided nothing to demonstrate the value of the land of the subject property. Even if the court were to accept the concept that court could bifurcate the City's assessment for purposes of determining the presumption of correctness, the court is not persuaded that the improvement on the subject property had no value.

In reaching its decision, the court found that the plaintiff's testimony that she requested access to the subject property for the purpose of determining value and making repairs was not credible.

The court finds that Plaintiff has provided no evidence sufficient to overcome the presumption of correctness of the assessment. Defendant's motion is granted. Plaintiff's complaints are dismissed and the assessments are affirmed.

Very truly yours,

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