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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

KATHI F. FIAMINGO
JUDGE

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RE: Raceway Realty, LLC v. Branchburg Township
Docket Nos. 009944-2015, 010501-2016, and 012258-2017

Counsel:

This letter constitutes the court's opinion after trial in the above-referenced matter challenging the assessments of plaintiff's property for tax years 2015 through 2017. For the reasons stated below, the assessments are affirmed.

I. Procedural History and Factual Findings

The court makes the following findings of fact based on the evidence and testimony offered at trial in this matter. The property in question is designated as Block 52 Lot 8 on the official tax map of Branchburg Township and is more commonly known as 1004 Route 202, Branchburg, NJ 08876 ("subject property"). The subject property is operated as a gas station, convenience store and service garage. It consists of 1.43 acres of land and is improved with a 1,740 square foot

structure containing a service garage with three bays, two restrooms, and a convenience store. In addition, the subject property has a canopied pump island and three underground storage tanks with the capacity to hold 8,000 gallons of fuel each.

The building on the subject property was built in 1979, and renovated in 2005. There have been no substantial additions or expansions to the improvements on the subject property, although the three underground storage tanks for motor fuel were replaced in 2017. Those tanks, together with the fueling pumps and associated equipment are considered personalty and are not included in the valuation of the real property.

The subject property is located in the R/S-2 (retail/service) zone of Branchburg Township. The subject property's current use is a pre-existing legal non-conforming use.[1] It conforms with all the bulk requirements in the R/S-2 district and the minimum lot size requirement of 60,000 square feet.

For each of the years under appeal, the subject property was assessed as follows:

Land:	$ 662,900
Improvements:	$ 277,100
Total:	$ 900,000

The average ratio of assessed to true value, commonly referred to as the Chapter 123 ratio, for the Township of Branchburg (herein "defendant" or "Township") for the years in question were listed by the State of New Jersey Department of the Treasury, Division of Taxation as follows:

Tax Year 2015	95.86%
Tax Year 2016	94.87%
Tax Year 2017	96.85%

[1] Automotive service stations are a conditional permitted use within the R/S-2 district. The conditional use is allowed if the property is not adjacent to a residential zone or use. However, the subject property is adjacent to a residential zone or use, and therefore violates the condition. Such use is allowed in the instant case because it is a pre-existing legal non-conforming use.

The Township contends that it conducts annual district wide assessments and that, pursuant to N.J.S.A. 54:51A-6(d), the Chapter 123 ratio is inapplicable. Although plaintiff contests the applicability of the foregoing exception to the application of the Chapter 123 ratios for annual district wide assessments such as those made by the Township for the years at issue, the parties agreed to defer the question until after the court made a determination of value.

Plaintiff appealed the assessments for the years in question to the Somerset County Board of Taxation, which dismissed each of the appeals without prejudice due to pending appeals in the tax court. Plaintiff thereafter timely appealed to the Tax Court challenging the assessments on the subject property for the tax years 2015, 2016, and 2017. The Township filed timely counterclaims for each of those tax years.

At trial plaintiff presented testimony from the Township's appraiser and from an appraisal expert. The Township presented the testimony of its appraisal expert. Both appraisers were accepted without objection. The experts' conclusions as to value were as follows:

Valuation Date	Plaintiff's Conclusion	Defendant's Conclusion
October 1, 2014	$680,000	$1,120,000
October 1, 2015	$680,000	$1,115,000
October 1, 2016	$680,000	$1,125,000

II. Testimony of the Experts

A. Plaintiff's Expert's Testimony

Plaintiff's expert testified that in reaching his conclusion of value he considered six properties as comparable to the subject property. Gross adjustments to the comparable properties ranged from 10% to 17%. Adjustments for location; lot size; condition; and gross building area were made. Plaintiff's expert confirmed five of the comparable sales with a participant, but was

unable to confirm the sixth sale. Plaintiff's expert indicated he did not give much weight to this sale.

Plaintiff's expert made a 5% downward location adjustment to three of his comparable sales to adjust for the comparable property's "superior" location on either a corner lot, or a lot with access to two streets. The expert testified that he determined the 5% adjustment through a "paired sales" analysis of comparable sales one and five.

Plaintiff's expert made adjustments to all of the comparable sales for lot size. The expert testified that this adjustment was made on the basis of what he determined was "typical" floor to area ratio ("FAR") for a gas station – 5%. The expert testified that he made this determination based on his analysis of "comparable facilities" over the years, but provided no details as to the facilities examined or the specifics of such analysis which supported the 5% conclusion.

The expert then testified that he considered any lot size in excess of the 5% FAR as surplus. That is, the subject property's FAR was calculated at 34,800 square feet (1740 square feet building size/.05 = 34,800); the surplus land of the subject was then determined to be 27,491 square feet (62,291 square feet less the FAR of 34,800.) To the extent a comparable sale property's lot size was larger than the subject property, the expert made two adjustments: $5.00 per square foot to adjust for the difference in FAR between the subject and the comparable sale property and $1.00 per square foot to account for surplus lot size.

The expert testified that he arrived at his adjustment of $5.00 per square foot of excess FAR based on yet another paired analysis of comparable sales two and four. However comparable sale four was also adjusted for location which was applied because it was located on a corner lot, and comparable sale two was adjusted for its lack of a canopy.

The expert justified the $1.00 per square foot adjustment for surplus land based on his belief that anything in excess of the FAR was unusable and, therefore, had nominal value. No further analysis for the amount of this adjustment was provided.

Plaintiff's expert made a condition adjustment based on whether the comparable property had a canopied fuel island. He determined that an average canopy costs $26.75 per square foot. Based on this data obtained from Marshall & Swift the expert determined that the value of the canopy at the subject property was $40,000 and he made an adjustment in that amount for each of the comparable properties that did not have a canopy. He did not, however, make an adjustment for any of the comparable properties which featured a canopy that was larger or smaller than the subject property, nor did he make any adjustment for the actual condition of any building on the comparable sale properties as compared to the condition of the building on the subject property.

Plaintiff's expert also made an adjustment of $100.00 per square foot based on the difference between in size of structures on the subject and on the comparable sale properties. Plaintiff's expert utilized Marshall and Swift to determine the adjustment of $100.00 per square foot.

The expert made an $88,000.00 "condition" adjustment to comparable property three because of its "all retail" condition. He testified that comparable sale three was a gas station with a Dunkin'[2] described in his report as a "café", but no service garage. The expert testified that he made this adjustment based on a "paired sales analysis of all comparables" and concluded a 10% adjustment was appropriate. No further explanation as to how the expert made this adjustment was provided.

[2] Formerly "Dunkin' Donuts."

Effective cross-examination revealed that although the sales of gas stations usually include the pumps, which are personalty, he made no adjustments to adjust the sales price by any amount of personalty, nor does it appear that he requested that information when verifying the sales with the participants.

B. Defendant's Expert's Testimony

Like plaintiff's expert, defendant's expert utilized the sales comparison approach to determine the value for the subject property. Defendant's expert utilized seven comparable sale properties in reaching his conclusions of value. Gross adjustments made by defendant's expert ranged from 20% to 147% and included adjustments for FF&E; improvements; location; condition; surplus land; and lot size.

Defendant's expert made gross adjustments of 66% or more for six of seven of the defendant's comparable properties. Comparable two had a gross adjustment of 66%, comparable three had a gross adjustment of 147%, comparable four had a gross adjustment of 106%, comparable five had a gross adjustment of 75%, comparable six had a gross adjustment of 80%.[3]

Defendant's expert made a 20% gross adjustment to the remaining comparable, comparable sale one. With respect to this comparable sale, defendant's expert made an adjustment of $200,000 for included personalty. The expert based this adjustment on the "depreciated value of the service station furniture, fixtures, and equipment included in the sale, which is primarily the underground storage tanks and dispensing systems of lines, pumps and nozzles. These adjustments are based on discussions with buyers, sellers, brokers and Marshall Valuation cost data." The expert did not verify what personalty was included in this sale, or provide any specific information

[3] Comparable sale seven had gross adjustments of 107%, including an arbitrary adjustment of 2.5% per year to account for the fact that the sale price had been negotiated nine year before the date of sale.

as to any of the discussions he had in arriving at the adjustment. With the exception of the foregoing explanation, the expert did not provide any factual basis for the methodology by which the adjustment of $200,000 was obtained. The assessor marked the sale non-usable, NU-23 (Sales of commercial or industrial real property, which include machinery, fixtures, equipment, inventories, licenses, or goodwill when the values of such items are indeterminable. N.J.A.C. 18:12-1.1 (23)).

Additionally, the expert acknowledged that the sale of a gas station selling "branded" gas such as Exxon, generally includes a branded gas agreement which among other things obligates the purchaser agrees to buy its gasoline exclusively from the seller. There is nothing in the record to determine whether, or if, such a branded supply agreement, affects the value. The court notes that the expert confirmed the sale only with the tax assessor, and did not speak with any of the participants in the sale.

II. Conclusions of Law

A. Presumption of Validity

The court's analysis begins with the well-established 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). As Judge Kuskin explained, our Supreme Court has defined the parameters of the presumption as follows:

> 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. The presumption in favor of the taxing authority can be rebutted only by cogent evidence, a proposition that has long been settled. The strength of the presumption is exemplified by the nature of the evidence that is required to overcome it. That evidence must be "definite, positive and certain in quality and quantity to overcome the presumption."

> [Ibid. (quoting Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985)(citations omitted)).]

The presumption of correctness arises from the view "that in tax matters it is to be presumed that governmental authority has been exercised correctly and in accordance with law." Pantasote, supra, 100 N.J. at 413 (citing Powder Mill, I Assocs. v. Township of Hamilton, 3 N.J. Tax 439 (Tax 1981)); see also Byram Twp. v. Western World, Inc., 111 N.J. 222 (1988). The presumption remains "in place even if the municipality utilized a flawed valuation methodology, so long as the quantum of the assessment is not so far removed from the true value of the property or the method of assessment itself is so patently defective as to justify removal of the presumption of validity." Transcontinental Gas Pipe Line Corp. v. Township of Bernards, 111 N.J. 507, 517 (1988)(citation omitted).

"In the absence of a R. 4:37-2(b) motion . . . the presumption of validity remains in the case through the close of all proofs." MSGW Real Estate Fund, LLC, supra, 18 N.J. Tax at 377. In making the determination of whether the presumption has been overcome, the court should weigh and analyze the evidence "as if a motion for judgment at the close of all the evidence had been made pursuant to R. 4:40-1 (whether or not the defendant or plaintiff actually so moves), employing the evidentiary standard applicable to such a motion." Ibid. The court must accept as true the proofs of the party challenging the assessment and accord that party all legitimate favorable inferences from that evidence. Id. at 376 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 535 (1995)). In order to overcome the presumption, the evidence "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.), certif. denied, 165 N.J. 488 (2000)).

In the instant case the defendant made a motion to dismiss for failure to overcome the presumption of correctness at the end of the plaintiff's case. The court found that if accepted as true, the opinion of plaintiff's expert created a debatable question regarding the correctness of the assessments in each tax year sufficient to allow the court to make an independent determination of the value of the subject property. Therefore, the court denied defendant's motion.

The court's inquiry, however, does not end there. Concluding the presumption of validity has been overcome does not equate to a finding by the court that the assessments are erroneous. Once the presumption has been overcome, "the court must then turn to a consideration of the evidence adduced on behalf of both parties and conclude the matter based on a fair preponderance of the evidence." Ford Motor Co. v. Township of Edison, 127 N.J. 290, 312 (1992). The court must be mindful that "although there may have been enough evidence [presented] to overcome the presumption of correctness at the close of plaintiff's case-in-chief, the burden of proof remain[s] on the taxpayer throughout the entire case…to demonstrate that the judgment under review was incorrect." Id. at 314-15 (citing Pantasote Co., 100 N.J. at 413). Only after the presumption is overcome with sufficient evidence at the close of trial must the court "appraise the testimony, make a determination of true value and fix the assessment." Rodwood Gardens, Inc. v. City of Summit, 188 N.J. Super. 34, 38-39 (App. Div. 1982)(citations omitted).

B. Highest and Best Use

In determining the market value of a property, the court must first find the highest and best use of that property. See Ford Motor Co. v. Township of Edison, 127 N.J. 290, 300-01 (1992). 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 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., 10 N.J. Tax at 161; See also, The Appraisal of Real Estate at 279. Implicit in this analysis is the assumption that the proposed use is market-driven; in other words, that it is determined in a value-in-exchange context and that there is a market for such use. WCI-Westinghouse v. township of Edison, 7 N.J. Tax 610, 616-617 (Tax 1985), aff'd o.b. per curiam, 9 N.J. Tax 86 (App. Div. 1986)… Further, the "actual use is a strong consideration in the analysis. Ford Motor Co., 10 N.J. Tax at 167.
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> Clemente v. Township of South Hackensack, 27 N.J. Tax 255, 267-269 (Tax 2013), aff'd o.b. 28 N.J. Tax 337 (App. Div. 2015):

After engaging in the required analysis plaintiff's expert concluded that the highest and best use of the subject property was its current use, which he described as a "retail fueling station with a service garage."

Defendant's expert testified that that the highest and best use is the "current or expanded use." Although defendant's expert testified that the expansion of a pre-existing non-conforming use is disfavored, he believed that an expansion "could be" permitted by the Board of Adjustment. A proposed use must not be remote, speculative or conjectural. See Cherry Hill, Inc. v. Tsp. of Cherry Hill, 7 N.J. Tax 120, 131 (Tax 1984), aff'd, 8 N.J. Tax 334 (App. Div. 1986). Property should be assessed in the condition in which it is utilized and the burden is on the person claiming otherwise to establish differently. Berkeley Develop. Co. v. Berkeley Heights Tp., 2 N.J.Tax 438 (Tax 1981). "If a party seeks to demonstrate that a property's highest and best use is other than its current use, it is incumbent upon that party to establish that proposition by a fair preponderance of

the evidence. Clemente v. Tp. of South Hackensack, 27 N.J. Tax 269 (citing Penns Grove Gardens, Ltd. v. Boro. of Penns Grove, 18 N.J. Tax 253, 263 (Tax 1999). With the exception of the expert's unsupported belief an expansion "could be" permitted after an appropriate application, defendant provided no evidence that an expansion of, or change in, the subject property's non-conforming use would be its highest and best use. The court find that the current use of the subject property as a gas station, service garage and convenience store is its highest and best use.

C. Valuation Methodology

> "There are three traditional appraisal methods utilized to predict what a willing buyer would pay a willing seller on a given date, applicable to different types of properties: the comparable sales method, capitalization of income and cost." Brown v. Borough of Glen Rock, 19 N.J. Tax 366, 376 (App. Div. 2001), certif. denied, 168 N.J. 291, 773 A.2d 1155 (2001) (internal citation omitted)). The "decision as to which valuation approach should predominate depends upon the facts of the particular case and the reaction to these facts by the experts." Coca-Cola Bottling Co. of New York v. Neptune Township, 8 N.J. Tax 169, 176 (Tax 1986) (citing City of New Brunswick v. State Div. Tax Appeals, 39 N.J. 537, 189 A.2d 702 (1963)); see also WCI-Westinghouse, Inc. v. Township of Edison, 7 N.J. Tax, 610, 619 (Tax 1985), aff'd, 9 N.J. Tax 86 (App. Div. 1986). However, when the proofs submitted in support of one approach overshadow those submitted in support of any other approach, the court may conclude which approach should prevail. See ITT Continental Baking Co., supra, 1 N.J. Tax 244; Pennwalt Corp. v. Township of Holmdel, 4 N.J. Tax 51 (Tax 1982).
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> [VBV Realty, LLC v. Scotch Plains Tp., 29 N.J. Tax 548, 558-59 (Tax 2017)]

Both experts utilized the sales comparison approach in reaching their conclusion of value.

III. Discussion

The sales comparison approach derives an opinion of market value "by comparing properties similar to the subject property that have recently sold, are listed for sale, or are under contract." Appraisal Institute, The Appraisal of Real Estate 377 (14th ed. 2013). The sales

comparison approach involves a "comparative analysis of properties" and requires the expert to focus on the "similarities and differences that affect value…which may include variations in property rights, financing, terms, market conditions and physical characteristics." Id. at 378. "When data is available, this [approach] is the most straight forward and simple way to explain and support an opinion of market value." Greenblatt v. Englewood City, 26 N.J. Tax 41 (Tax 2011)(citing Appraisal Institute, The Appraisal of Real Estate 300 (13th ed. 2008)).

Under the sales comparison approach, market value is obtained "by comparing properties similar to the subject property that have recently sold, are listed for sale, or are under contract." Appraisal Institute, The Appraisal of Real Estate, 377 (14th ed. 2013). Using various analysis techniques such as "paired data analysis, trend analysis, statistics, and other techniques" the appraiser focuses on similarities and differences that affect value . . . which may include variations in property rights, financing terms, market conditions and physical characteristics." Id. at 378.

The weight afforded to an expert's testimony relative to adjustments "depends upon the facts and reasoning which form the basis of the opinion. An expert's conclusion can rise no higher than the data providing the foundation (citation omitted). If the bases for the adjustments are not made evident the court cannot extrapolate value." Inmar Associates v. Edison Township, 2 N.J. Tax 59, 66 (Tax 1980). "Without explanation as to the basis, the opinion of the expert is entitled to little weight in this regard." Dworman v. Tinton Falls, 1 N.J. Tax 445, 458 (Tax 1980) (citing to Passaic v. Gera Mills, 55 N.J. Super. 73 (App. Div. 1959), certif. denied, 30 N.J. 153 (1959)). For an expert's testimony to be of any value to the trier of fact, 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). When "an expert offers an opinion without providing specific underlying reasons . . . he ceases to be an aid to the trier of fact." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App.

Div. 1996). An expert witness is required to "give the why and wherefore of his expert opinion, not just a mere conclusion." Ibid.

"It is well settled in the realm of tax appeals that an expert's reliance on subjective measures for calculation and application of adjustments is unacceptable." Greenblatt v. Township of Englewood, 26 N.J. Tax 41, 55 (Tax 2012) ("adjustments must have a foundation obtained from the market" with an "explanation of the methodology and assumptions used in arriving at the [] adjustments []" otherwise they are entitled to little weight). In Dworman v. Borough of Tinton Falls, 1 N.J. Tax 445, 458.

Here plaintiff's expert failed to provide adequate support for his adjustments. The lot size and "condition" adjustments were based on faulty paired sales analyses. "Paired data analysis is based on the premise that when two properties are equivalent in all respects but one, the value of the single difference can be measured by the difference in price between the two properties." The Appraisal of Real Estate, 398 (14th ed. 2013). "Paired data analysis should be developed with extreme care to ensure that the properties are truly comparable." Id. The expert's paired sales analysis here is highly questionable. Prior to "isolating" the location adjustment for sales one and five, the expert made adjustments to both comparable sales for lot size. In both cases the lot sizes of the comparable sale properties were substantially smaller than the subject property lot size; comparable sale one was 55% smaller than the subject property and comparable sale five was 44% smaller than the subject property. Moreover, the lot size adjustment made by the expert suffered from a lack of objective support, thus making the paired sales analysis, and therefore the adjustment for location, lacking in support.

The condition adjustment for comparable sale three was not supported with any data. Further as this comparable had no service garage component and featured a "café" which the

subject property does not, the use of this "comparable" sale, as comparable, is suspect in and of itself. All of plaintiff's expert's comparable sales suffer from a lack of any adjustment for the inclusion of any personalty in the sales prices. Thus, the court rejects the conclusions of value reached by plaintiff's expert.

Defendant's expert's conclusion of value is also rejected. With the sole exception of one comparable sale, defendant's expert made adjustments ranging from 66% to 147%. Such significant adjustments demonstrate a formidable lack of comparability. See Pansini Custom Design Associates, LLC v. City of Ocean City, 407 N.J. Super. 137, 148 (App. Div. 2009) ("Adjustments to sales of a large magnitude 'vitiate' comparability"); 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 incomparable to the subject property and not probative of its true value). The court therefore rejects six of the seven comparable sales as uncomparable.

As to the final comparable sale, although defendant's expert's adjustment was a modest 20%, that comparable sale is also unreliable. As noted, this sale was marked as non-usable by the tax assessor due to the inclusion of assets other than the real property in the sales price. N.J.A.C. 18:12-1.1(a) provides that such sales are not to be utilized for purposes of determining the "assessment-sales ratios" for purposes of the Chapter 123 adjustments. While that warning may not require an exclusion of the sale as a comparable for appraisal purposes, an examination of that sale must be undertaken in order to determine how the inclusion of the non-realty assets affected the sales price. No such examination was undertaken by defendant's expert. Defendant's expert instead adjusted based on his general discussions with "owners" and others that his adjustment "seemed" to be the number that was the "general average" for personalty. He did not speak with any participant in this sale, but applied this "average" of "$200,000 to $300,000" in reaching this

adjustment. Such a determination is not support for the adjustment to this comparable sale. Further, as acknowledged by the expert, there was no attempt to determine if the sale included any agreement for the purchase of Exxon gas, or the affect, if any, such agreement would have on the purchase price. Thus, the court rejects defendant's expert's conclusions of value.

IV. Conclusion

The court is mindful of its obligation "to apply its own judgment to valuation data submitted by experts in order to arrive at a true value and find an assessment for the years in question." Glen Wall Associates v. Wall. Twp., 99 N.J. 265, 280 (1985) (citing New Cumberland Corp. v. Roselle Borough, 3 N.J. Tax, 345, 353 (Tax 1981)). To enable the court to make an independent finding of true value, credible and competent evidence must be adduced in the trial record.

The court's independent determination of value must be based "on the evidence before it and the data that are properly at its disposal." F.M.C. Stores Co. v. Morris Plains Borough, 100 N.J. 418, 430 (1985). Here, the court concludes, that neither expert provided sufficient credible evidence from which it can determine the fair market value of the subject property. Thus the court is left without sufficient credible and competent evidence from which a determination of value can be made.

For the foregoing reasons, the court affirms the assessment, and dismisses plaintiff's complaints and defendant's counterclaims.

Very truly yours,

/s/ Kathi F. Fiamingo

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