

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Property Tax

WEST SIDE LUBE, INC.,)	
)	
Plaintiff,)	TC-MD 040417C
)	
v.)	
)	
WASHINGTON COUNTY ASSESSOR,)	
)	
Defendant.)	DECISION

Plaintiff appeals from an order of the county board of property tax appeals (board) for the 2003-04 tax year. Trial was held April 25, 2005. Plaintiff was represented by W. Scott Phinney, attorney at law, Lake Oswego, Oregon. Defendant was represented by Jacquilyn Saito-Moore, Assistant County Counsel, Washington County.

I. STATEMENT OF FACTS

The property at issue is a gas station and convenience store in Cornelius, Oregon, situated on a 1.52 acre lot zoned C-1 (general commercial). The convenience store has large walk-in coolers and freezers, multiple display stands and storage racks, and a complete deli and kitchen area with a drive-up window. (Ptf's Ex 7.) The fueling station has six double-sided fuel dispensers (12 fueling stands) on covered islands, double walled underground tanks, credit card readers, and alarm, safety, and surveillance systems. (*Id.*) There is also a 3000 square-foot lube and oil change center (Def's Ex A at 4) and a complete automated car wash facility with a 50 foot tunnel. (*Id.*) The structures were built in 1997 and the property opened for business that year.

Defendant set the real market value (RMV) at \$2,526,400, with \$422,430 allocated to the land and \$2,103,970 to the improvements. On appeal to the board, the RMV was reduced to \$1,669,070. The board sustained the land value and reduced the improvements to \$1,246,640.

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In its appeal to the Tax Court, Plaintiff requests a reduction in the RMV of the land and improvements to \$1,100,000. Defendant requests an increase in value to \$1,832,330.

(Def's Ex A at 3.) Plaintiff's case was presented through the testimony of two witnesses: Janet Zabeti (Zabeti), who purchased the property in July 2004 for \$1,100,000, and Roland Casad (Casad), a Business Broker in the Portland area specializing in closely held companies, who marketed the property for the seller. Testifying for Defendant were Roy Routledge (Routledge), Commercial Appraiser 2, and Steve Harris, Commercial/Industrial Supervisor, Washington County Assessor's office.

The property was initially listed in August 2003 for \$1.85 million by Casad. Casad marketed the property extensively. Casad's marketing included posting an advertisement on the Internet, running repeating Sunday advertisements in *The Oregonian*, transmitting targeted mailings to major and independent gas and convenience store operators in the region, and making personal contacts with area business and real estate brokers. (Ptf's Ex 1 at 1.) The price was lowered to \$1.6 million in the latter part of October 2003, after three months of unsuccessful marketing. Casad showed the property at least eight times, but there was little market interest. There were no offers at the asking price of \$1.85 or \$1.6 million. (*Id.*) One concern expressed by prospective buyers was that the business was not currently operating, and had been closed since June 2003. Another concern was with the amount of competition in the immediate area; there are six other stations, including a new ARCO with a convenience store, and a new Fred Meyer station just down the street. After three more months of marketing, the price was again lowered in February 2004, this time to \$1.1 million. Plaintiff received an offer of \$950,000 and countered at \$1.1 million. The prospective buyer let the counter-offer lapse. Plaintiff received other offers at \$550,000, \$750,000, and \$900,000, which were rejected. Sometime in February

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or March 2004, Plaintiff listed the property with another broker. The property eventually sold in July 2004 for \$1.1 million, after eleven months of market exposure. Casad was not the listing agent at that time.

The buyer, Zabeti, testified that she was looking for a gas station to purchase, but felt that the original asking price of \$1.85 million was too high. Zabeti owns gas stations in Oregon and Southern California, and has 22 years of experience in that business. Zabeti understood that previous owners had been unsuccessful in operating the subject property and believed that only the fueling station (sale of gas) would be profitable. Zabeti was only looking for gas pumps. Zabeti bought the property because of its favorable location – in spite of the fact that she believed the other buildings would lose money. For example, the property’s lube center faced competition from two Jiffy Lube Centers down the street. At the time of trial, Zabeti testified that she had recently cut back the hours of the deli operation and lube center, and would consider closing those businesses, but believes that it does not look good to have some buildings closed. Zabeti testified that she was operating as a Shell station because Chevron, who previously supplied fuel to the business, was no longer interested in supplying that location. Zabeti looked at other properties before purchasing the subject property.

Plaintiff’s appeal is based on the purchase price. Defendant submitted an appraisal report to support its value estimate. That appraisal considered the cost, income, and sales comparison approaches. However, at trial the court excluded Defendant’s income approach because the report did not include any information on the source of the market evidence used by Defendant to derive its rent, expenses, vacancy and credit loss, or capitalization rate. Additionally, the court granted Defendant’s trial request to exclude consideration of its sales comparison approach because of the appraisers’ failure to verify the comparable sales. Defendant is, therefore, left

with only its cost approach.¹ For that approach, Routledge and Harris used a computerized software program to determine the depreciated value of the convenience store (including the fast food restaurant and the fueling station), the lube and oil change building, the carwash building, and the yard improvements (paving, curbs, yard lights, and landscaping). The value of those improvements was added to the RMV of the land on the assessment and tax rolls. The appraisers valued the convenience store at \$500,761, the fueling equipment at \$518,180, the lube and oil change building at \$434,910, the carwash at \$242,520, and the yard improvements at \$63,830, for a total of \$1,760,201. The appraisers added the land value of \$422,430 to arrive at an indicated value of \$2,182,600 (rounded). (Def's Ex A at 13-16.)

II. ANALYSIS

Assessed value (AV) is the lesser of maximum assessed value (MAV)² or RMV. The issue in this case is the RMV for the 2003-04 tax year. The MAV is set at \$1,731,310. The current RMV, as set by the board, is \$1,669,070.

RMV is defined by statute as follows:

“Real market value of all property, real and personal, means the amount in cash that could reasonably be expected to be paid by an informed buyer to an informed seller, each acting without compulsion in an arm’s length transaction occurring as of the assessment date for the tax year.”

ORS 308.205(1)³

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¹ Defendant made the request to exclude the sales comparison approach after the court excluded its income approach. Defendant was, therefore, aware at that point its case hinged solely on the cost approach.

² MAV was established in Oregon for the 1997-98 tax year as 90 percent of the property’s tax year 1995-96 RMV, and is increased annually by no more than three percent. *See* Or Const, Art XI, § 11(1)(a) and (b); *see also* Or Laws 1997, ch 541, § 2.

³ All references to the Oregon Revised Statutes (ORS) are to 2001.

The assessment date for the tax year at issue is January 1, 2003. *See* ORS 308.007.

There was a sale of the subject property in July 2004 for \$1,100,000. Rutledge acknowledged on cross-examination that he considered Zabeti's purchase to be an arm's-length transaction. Other evidence supports that conclusion. However, Harris, one of Defendant's appraisers, opined that Plaintiff was not fully informed when selling the property because Casad did not demand an appraisal or a feasibility study before marketing the property. The court does not share Harris's opinion. The property was aggressively marketed for nearly a year by two different brokers, and the sale occurred only after a dramatic reduction in the asking price because of a lack of market response. Defendant believes the property is worth approximately \$2 million, but that opinion appears to overlook the fact that Casad initially listed the property for \$1.85 million and was unable to find a buyer. A reduction in the asking price to \$1.6 million was similarly unsuccessful in landing a buyer. In fact, there was no market interest above \$1.1 million.

The Oregon Supreme Court has stated that:

“[a] recent sale of the property in question is important in determining its market value. If the sale is a recent, voluntary, arm's length transaction between a buyer and seller, both of whom are knowledgeable and willing, then the sales price, while certainly not conclusive, is very persuasive of the market value.”

Kem v. Dept. of Rev., 267 Or 111, 114, 514 P2d 1335 (1973). The Court in *Kem* accepted the sale of the subject, which occurred nine months prior to the applicable assessment date. In this case, the sale occurred roughly 18 months after the January 1, 2003, assessment date. However, there is no evidence of a significant change in market conditions between the assessment date and the sale date. The Oregon Supreme Court has considered the question of how to evaluate a

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remote sale. After noting that a sale within a “reasonable” time of the assessment date is “very persuasive,” the court went on to say:

“Whether a transaction is so recent as to be persuasive of present value will depend upon the similarity of conditions affecting value at the time of the transaction and conditions affecting value at the time of the assessment. The interval between the transaction in the subject property sought to be introduced and the assessment date may be so great that it can be said as a matter of law that there was a change in conditions.⁹ However, where this determination cannot be made as a matter of law, reference must be made to the underlying conditions affecting value before such evidence can be rejected. These principles apply equally to transactions in the assessed property before and after valuation date.

⁹ See, e.g., *Oregon R. & N. Co. v. Eastlack*, 54 Or 196, 205, 102 P 1011 (1909).”

Sabin v. Dept. of Rev., 270 Or 422, 426-427, 528 P2d 69 (1974) (footnotes omitted). The textbook for the Appraisal Institute concurs, noting that a sale need not automatically be adjusted because of the passage of time. Appraisal Institute, *The Appraisal of Real Estate* 434 (12th ed 2001). The authors instruct that no adjustment is warranted unless market conditions have changed. *Id.*

The interval between the sale in this case and the assessment date is not so great as to be excluded as a matter of law because of a change in conditions. The sale in *Oregon R. & N.*, which was found by the *Sabin* court to be have been improperly considered by the lower court, occurred 12 to 15 years before the assessment date. The sale in this case is less than two years after the assessment date and, as the quoted language above from the *Sabin* case illustrates, the fact that the sale occurred after the assessment date does not preclude its consideration. *Sabin* involved two sales of a portion of the subject property, one more than a year before the January 1971 assessment date, and another in November 1972, nearly two years after the assessment date. *Sabin*, 270 Or at 426. The Supreme Court upheld the Tax Court’s determination to not consider the pre-assessment date sale in 1969 because of “conclusive”

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evidence of a dramatic rise in price between the sale and the assessment date. *Id.* at 427.

However, the Court overturned the Tax Court's exclusion of the November 1972 transaction because of an absence of evidence of a change in market conditions between the assessment date and the sale date. *Id.* at 427-28. The interval of time in this case, between the sale and the assessment date, is slightly less than the time involved in *Sabin* and there is no evidence of a change in market conditions in that timeframe. Given that the property was listed for a full year, beginning just eight months after the assessment date, the court finds the sale very persuasive of market value as of January 1, 2003. That sale suggest a value of \$1,100,000.

Defendant's case rests solely on the cost approach. Defendant's value estimate under that approach is \$2,182,600. The cost approach is generally used for new buildings or buildings under construction, where there is no income history or comparable sales. *Valley River Ctr. v. Dept. of Rev.*, 6 OTR 368, 377 (1976). Here, the property is six years old and there is a sale, not of a comparable property, but of the subject itself. When done correctly, the cost approach can be viewed as just one more sale "and should be accorded the same deference as any other recent sale of like property." *Id.* at 378, *citing* I Bonbright, *Valuation of Property* 144 (1937).

However:

"An estimate obtained by the Cost Approach may not reflect entirely the prevailing economic or market conditions. The cost of an improvement cannot be recovered in the market if there is no need for the improvement, if the property is not put to its highest and best use, if the structure is an overimprovement or of poor design, or if rentals are reduced due to economic conditions."

Multnomah County v. Dept. of Rev., 4 OTR 383, 389-90 (1971), *quoting* Friedman, *Encyclopedia of Real Estate Appraising* 67 (Rev & Enlarged Ed, 1970).

Some of the improvements in this case appear to not be needed or overimproved (the lube center and deli portion of the convenience store), which would explain the lax market response and the buyer's curtailment of operations extraneous to the fueling station.

Defendant's witnesses acknowledged that their value estimate under the cost approach was generated by a computer program. Routledge testified that his value was derived from the input of basic information on the subject property, including square footage, date of construction, number of pumps, and the applicable assessment date. Routledge acknowledged on cross-examination that he did not exercise any appraisal judgment in valuing the structures. That may be because the cost approach is typically applied only as a check on the estimates of value under the other approaches. *Multnomah County*, 4 OTR at 389. However, once consideration of the market and income approaches was removed, it became important not only that the cost approach have independent merit in this case, but that appropriate appraisal methodology was employed. That should include the application of appraisal judgment.

Harris testified that he was involved in Defendant's cost approach valuation, which was reportedly used to accommodate Plaintiff's concern that the appraisal not capture business value. Harris testified that he let the computer calculate the judgment he used in estimating the value. Harris, who repeatedly referred to the property as "distressed," further testified that the software does not account for the fact that the business was in trouble. Harris testified that the appraisal was a "best guess for a distressed property."

A key factor in determining the value of the property under the cost approach is the size of the structures. That is because regional cost figures are multiplied by building size to arrive at the depreciated cost new for a given structure.⁴ In responding to the efficacy of the cost approach in valuing the subject property, Zabeti, the buyer, testified that the size of the building is largely irrelevant. The value of a gas station is determined by location, potential volume, and competition. The history of the station is also important. Zabeti understood that, since 1997, the

⁴ Of course, other factors such as quality of construction and building features are included in the cost-new estimate.

subject property opened and closed four times due to bankruptcies. There is some factual disagreement as is to the property's history, but the parties do agree that there have been several operators and a foreclosure in the relatively short time the property has existed in its present form (since the buildings were constructed). The property's negative operating history produces an element of risk that may well have influenced the purchase price, but that factor would be known by any informed buyer and, therefore, would impact the value of the property.

In addition to the concerns outlined above, neither of Defendant's appraisers investigated the market to determine whether gas stations sell on a per-foot basis or whether, as Zabeti testified, the market is concerned with potential performance based on location, volume, and competition. Zabeti is an experienced operator and her testimony was both credible and logical. Moreover, Defendant's cost approach failed to adequately account for location. The Defendant's witnesses testified that the computer program would have generated the same value if the property had been located on a busy street in the nearby city of Portland in an area with little competition and a higher traffic count. Moreover, property in downtown Portland is generally more valuable because of a limit in supply. Another problem with Defendant's cost approach is that it values the lube building at \$435,000 (rounded); yet, Routledge testified on cross-examination that the lube center building was a negative factor. When pressed, Routledge explained that he added value for the lube center building because he "chose not to consider economic obsolescence." Routledge was unable to explain why obsolescence was not considered in his cost approach.

As the court in *Kem* noted, "[t]he various approaches to valuation, market data, cost, or income, are only the vehicles used to determine the ultimate fact – market value." 267 Or at 114. The court is left with the impression that Defendant's cost approach was unduly mechanical

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because the appraisers failed to evaluate the market for service stations with a convenience store, a carwash, and a lube building.

III. CONCLUSION

After reviewing the evidence, the court concludes that the sale price is clearly the best indicator of value for the subject property. Now, therefore,

IT IS THE DECISION OF THIS COURT that the RMV of the subject property as of January 1, 2003, was \$1,100,000.

Dated this _____ day of August 2005.

DAN ROBINSON
MAGISTRATE

If you want to appeal this Decision, file a Complaint in the Regular Division of the Oregon Tax Court, by mailing to: 1163 State Street, Salem, OR 97301-2563; or by hand delivery to: Fourth Floor, 1241 State Street, Salem, OR.

Your Complaint must be submitted within 60 days after the date of the Decision or this Decision becomes final and cannot be changed.

This document was signed by Magistrate Dan Robinson August 22, 2005. The Court filed and entered this document August 22, 2005.