

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Property Tax

LANE COUNTY ASSESSOR,)	
)	
Plaintiff,)	TC-MD 100131D, 100132D, 100133D
)	100134D
v.)	
)	
BABCOCK PROPERTIES, LLC,)	
)	
Defendant.)	
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LANE COUNTY ASSESSOR,)	
)	
Plaintiff,)	TC-MD 100137D, 100138D
)	
v.)	
)	
McDOUGAL BROS, INC,)	
)	
Defendant.)	DECISION

Plaintiff appeals the Lane County Board of Property Tax Appeals Orders, dated February 17, 2010, reducing the real market value of property identified as Accounts 0689602, 0689610, 0690832, 1764172, 0690824, and 1114683 (subject property) for tax year 2009-10. A trial was held in the Oregon Tax Courtroom, Salem, Oregon on February 8, 2011. David Sohm (Sohm), Registered Appraiser 3, Lane County Assessment and Taxation, appeared and testified on behalf of Plaintiff. David E. Carmichael, Attorney at Law, appeared on behalf of Defendants. Donald Gwyther (Gwyther), ASA, testified on behalf of Defendants.

Plaintiff's Exhibit 1 and Defendants' Exhibit A were received without objection.

I. STATEMENT OF FACTS

The subject property is six tax lots totaling 22.43 acres of land located in Lane County, "south along a railroad track west of Highway 99S" and on the "east side of Hampton Road."

(Ptf's Ex 1 at 7.) In his testimony, Sohm described the subject property as "less than five miles from the heart of Eugene." He concluded that the subject property's location creates "synergy with the metro area, creating demand that supports other uses." Sohm wrote that "[d]ue to the location and size, the physically possible legal use of the vacant site that would produce the highest value as of January 1, 2009 is estimated to be industrial development." (Ptf's Ex 1 at 11.) Gwyther testified that he agreed that if the subject property was vacant then "its highest and best use * * * is for industrial development." (Defs' Ex A at 52.) The parties agree that the neighborhood is "a mix of rural residences and industrial uses" including a former sawmill, log truck yard, offices, maintenance facilit[ies], a lumber wholesaler, manufacturing, and two auto recyclers. (Defs' Ex A at 30.) Gwyther testified that "[t]raditionally, this area has been dominated by the wood products industry. It has been noted that auto recycling is (*sic*) appears to be a growing industry in the area." (*Id.*) Sohm wrote that the current improved "use is consistent with the zoning. * * * [T]he existing use presents a physically possible, legally permitted, and financially feasible use of the property and is concluded to be representative of the highest and best use of the property as improved." (Ptf's Ex 1 at 10.) Sohm testified that the "current use is a reflection of the historical use." Gwyther testified that the highest and best use as improved of the subject property is a "chipping operation."

The subject property is improved and "support[s] a wood chipping operation." (*Id.* at 7.) "As currently configured the site is logically divided into two sections that could be separately developed." One section of the parcel "is asphalt paved and used in the wood chipping operation. The south section of the parcel * * * is used as storage yard." (*Id.* at 8.) Gwyther testified that potential "hydrocarbon contamination" on the subject property warrants "further investigation." (Defs' Ex A at 36.)

Sohm testified that in valuing the subject property as of January 1, 2009, the “market did not recognize the depth of the recession.” He reviewed the statutory definition of real market value, the statutory requirement to include site development costs in land values and the three approaches of valuation. Sohм testified that he used the sale comparison approach even though the sales were “limited in number.” He reviewed each of the five sales and two listings he selected as comparable to the subject property. (*Id.* at 13 – 22.) Sohм explained that he selected the two listings because there are few “large sites” in the immediate area like the subject property and one listed property had “a drainage channel and was low lying” like the subject property. Defendants pointed out that both listings were after the assessment date of January 1, 2009. Sohм testified that those listings reflect the “recession.” All of Sohм’s comparable sales were located “in a small area north of Eugene” with the exception of one sale in the Junction City area. Gwyther testified, stating that the location of Sohм’s comparables sales, specifically Awbrey Lane and Airport Road, is a different “market than Goshen,” where the subject property is located. He testified that Goshen does not have an airport, there is “not now and has not been any major development” in Goshen and there “are no ties to the west Eugene community.” Gwyther testified that west Eugene is “an established area with roads, curbs, and regular shaped parcels that are highly desirable.”

The parcel size of Sohм’s comparable sales ranged from 2 acres to 35 acres. (Ptf’s Ex 1 at 14 – 15.) None of the comparable sale prices were adjusted for time. One sale, comparable sale 3 (a 25 acre parcel), was not confirmed by Sohм. (*Id.* at 19.) Sohм described the buyers of

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comparable sales 4 and 5 as entering into the transaction with “assemblage motivation.” (*Id.* at 14 and 15.) Sohm concluded that “a value of \$1.08 per square foot or \$47,045 per acre is judged to be appropriate to Parcel 1 as of January 1, 2009. The indicated value for the 22.43 acre parcel is \$1,055,219. The allocation of the various sites is set forth in the table on the following page.” (*Id.* at 15.) Sohm testified that, because of location and proximity, he “really believes” that the subject property’s value is “higher than BOPTA” and “it needs to be recognized.” In response to questions, Sohm testified that he did not inspect the comparable sales properties and those properties he selected as comparable are located “10 to 15” or more miles from the subject property.

Gwyther testified that, in looking for comparable sales, he found that there was “little demand for rural industrial mill site.” He testified that he used sales of “similar properties in Douglas County, Linn County, and Polk County.” (Defs’ Ex A at 54.) Gwyther testified that he selected eight comparable sales, including the sale of Parcel 2¹ dated June 14, 2004. (*Id.*) Most of Gwyther’s comparable sales were improved properties, requiring an allocation of the sale price to land and improvements, and the date of sale ranged from February 2002 to June 19, 2007. (*Id.*) Sohm questioned Gwyther, asking why none of the comparable sale prices he selected were adjusted for time when, during the six year period represented by the sales, “there

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¹ Parcel 2 is owned by Defendants and the appeal of Parcel 2 (TC-MD 100136D) was heard with the above-entitled matters.

have been sufficient changes in prices in the Eugene area, ranging from 8 to 18 percent.”

Gwyther responded, stating:

“ The market for industrial zoned real estate in the area has always been one of which there [is] a limited supply of property available * * * and a limited demand as well. I would think that it is prudent to use sales data from earlier in this decade, from about 2001 to 2006, choosing to view any price increases that took place in the last few years as having been erased by the changes in global economy that took place recently.”

(Defs’ Ex A at 64.)

In response to questions, Gwyther testified, stating that in determining the allocation of sale price to land and improvements he “talked to a wide variety of people” and relied on his “experience as an insurance appraiser, having over the years seen a pattern of what people pay for these things.” He testified that he “did not deduct all site improvements” from the sale price allocated to the land. Gwyther was asked to read the following from Sohm’s appraisal report:

“The market extraction procedure involves analysis of improved sales. * *

* This technique is most applicable when

- “The contribution of improvements to the total property value is generally small and relatively easy to identify. (The technique is frequently used in rural areas.
- “The improvements are new, their value is known, and there is little or no depreciation from any causes.

(Ptf’s Ex 1 at 12.) Sohm pointed out that, contrary to the above guidelines, the “contribution of improvements to total property value” was substantial, “10 to 73 percent,” in many of Gwyther’s comparable sales.

Gwyther testified that all of the comparable sales occurred “when higher prices were paid for most real estate” and those higher prices do “not necessarily translate to rural industrial properties [because] mill sites did not ride the tide” of the real estate boom followed by the current fiscal downturn. He testified that there “is not enough demand for” mill properties.

Gwyther testified that the “most significant” sale was comparable sale 3, the sale of the subject property. That was “followed” by comparable sale 4, dated February 21, 2003, a “former veneer” facility on a 21.46 acre parcel in Creswell located close to the freeway with a railroad track and “similar terrain as the subject property,” and by comparable sale 8, dated February 18, 2002, a 10 acre unimproved parcel located “adjacent to the subject property.” Gwyther answered numerous questions about the comparable sales, noting that five of the comparable sales “were close to the subject property” and four “not so close.”

Gwyther testified that “[i]n general, there is a very limited market for this type of property, especially as of the effective date of this appraisal.” (Defs’ Ex A at 68.) He testified that “[a]ll of the sales except Sale 7 and 8 required allocations for items other than land, including buildings, site improvements, machinery and equipment.” (*Id.*) Gwyther testified in determining the real market value of the subject property he “broke down” the value based on the characteristics of the land “underneath the improvements.” Gwyther concluded “the fee-simple, Real Market Value as of January 1, 2009, for [the subject property] was \$270,000.” (*Id.*)

II. ANALYSIS

The issue before the court is the 2009-10 real market value of the subject property. “Real market value is the standard used throughout the ad valorem statutes except for special assessments.” *Richardson v. Clackamas County Assessor*, TC-MD No 020869D, WL 21263620, at *2 (Mar 26, 2003) (citing *Gangle v. Dept. of Rev.*, 13 OTR 343, 345 (1995)). Real market value is defined in ORS 308.205(1),² which reads:

“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.”

² References to the Oregon Revised Statutes (ORS) are to year 2007.

A. *Highest and Best Use*

The subject property is land. Land valuation is directly related to highest and best use analysis. Appraisal Institute, *The Appraisal of Real Estate* 361 (13th ed 2008). Highest and best use is defined³ as:

“[t]he reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.”

Id. at 278. A highest and best use analysis assists the appraiser "to interpret[] the market forces that affect the subject property and identify[y] the use or uses on which the final opinion of value [should be] based.” *Id.* at 139. “An appraiser determines the highest and best use of property by weighing market demand for the uses, products or services the property is designed to provide. That analysis focuses on the uses to which a property can most profitably be put.” *STC Submarine, Inc. v. Dept. of Rev. (STC Submarine)*, 13 OTR 14, 18 (1994).

Both Sohm and Gwyther concluded that the highest and best use for the subject property as vacant was industrial use. Sohm concluded that the highest and best use would be industrial development without specifying the uses associated with the development. He supports his conclusion, stating that “[d]ue to the location and size, the physically possible legal use of the vacant site that would produce the highest value as of January 1, 2009 is estimated to be industrial development.” (Ptf’s Ex 1 at 11.) Sohm does not present evidence in support of his conclusion other than the five comparable sales. “Highest and best use is not determined by ascertaining whether there are market transactions indicating a demand for a property. That

³ Oregon Administrative Rule 150-308.205-(A)(1) entitled Real Property Valuation for Tax Purposes states that:

“(e) ‘Highest and best use’ means 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. See *The Appraisal of Real Estate*, 12th edition (2001).”

analysis is too general. Rather, it is ‘[t]hat reasonable and probable use that will support the highest present value as of the date of the appraisal.’ ” *STC Submarine*, 13 OTR at 18 (citation omitted). “[A]ny projected highest and best use must be supported by market data as well as a detailed analysis.” *Multnomah County v. Dept. of Rev.*, 13 OTR 58, 64 (1994) (citation omitted). Sohm did not present an economic study, “weighing market demand for the uses, products or services the property is designed to provide.” *STC Submarine*, 13 OTR at 18. There is a lack of evidence comparing Sohm’s generic industrial use to the subject property’s current industrial use, including the cost to maintain the improvements or cure items of deferred maintenance, if any. There is no consideration of the cost to demolish or remodel the existing improvements.

In contrast, Gwyther concludes, as does Sohm, that the highest and best use of the subject property as improved is the continuation of its current use. Both appraisers’ reports reach the same conclusion. (Ptf’s Ex 1 at 11; Defs’ Ex A at 52.) There is no evidence that the subject property’s current industrial use does not represent its “highest present value.” *STC Submarine* at 18. There was no evidence that the current use was not viable and there is evidence that the subject property’s use could continue.

In determining whether the subject property's highest and best use is its current use, the first considerations are the tests of physical possibility and legal permissibility. Both parties agree that the subject property is zoned RI, Rural Industrial, and that Rural Industrial permits a number of industrial uses. The subject property’s current use is legally permissible. (Ptf’s Ex 1 at 10; Defs’ Ex A at 51.) Both parties agree that utility services, including water, electricity, and natural gas, are available and there are no topographical or other significant natural obstacles preventing industrial development or continuing the subject property’s current use. The subject property’s current use is physically possible.

There is no evidence showing that the value of the subject property as presently improved is less than the value of the subject property as unimproved. There is inadequate evidence for the court to conclude that the subject property's highest and best use as vacant is greater than its improved use. Based on the evidence presented, the court finds that the highest and best use of the subject property as improved is its current use as a chipping operation or similar industrial use.

B. *Valuation of Land*

There are three approaches of valuation (cost, income, and comparable sales) that must be considered in determining the real market value of a property even if one of the approaches is found to not be applicable. *See* ORS 308.205(2); OAR 150-308.205-(A)(2). In a case such as the one before the court, the comparable sales approach “may be used to value improved properties, vacant land, or land being considered as though vacant.” *Chambers Management Corp and McKenzie River Motors v. Lane County Assessor*, TC-MD No 060354D at 6 (Apr 3, 2007), citing Appraisal Institute, *The Appraisal of Real Estate* 335 (12th ed 2001).

Sohm relied on the comparable sales approach, stating that “[d]ue to the number of sales of similar industrial land in the relevant market area this approach is applicable to the subject warehouse with office.” (Ptf’s Ex 1 at 13.) He identified five sales as comparable. None of the sale prices was adjusted to the assessment date. Comparable sales 1 and 2 are parcels significantly smaller than the subject, comparable sale 3 was not confirmed, and the comparable sales 4 and 5 may not be arm’s length given the “assemblage motivation” of the buyers. Defendant challenged the location of all of Sohm’s comparable sales. Sohm presented two listings, one dated December 2008 and the other dated April 2010, to support his indicated value. Listings are generally recognized as the upper limit for most completed sale transactions.

In determining the subject property's real market value, Sohm ignored the chipping operation. Sohm's approach is contrary to ORS 308.235 which provides, in pertinent part, that:

“(1) Taxable real property shall be assessed by a method which takes into consideration:

“(a) The applicable land use plans, including current zoning and other governmental land use restrictions;

“(b) The improvements on the land and in the surrounding country and also the use, earning power and usefulness of the improvements, and any rights or privileges attached thereto or connected therewith; and

“(c) The quality of the soil, and the natural resources in, on or connected with the land, its conveniences to transportation lines, public roads and other local advantage of a similar or different kind.”

There is no evidence he considered “the use, earning power and usefulness of the improvements.” *Id.* Further, Sohm's method ignores the “contributory value of the existing improvements, and any possible alteration of those improvements are also important in determining the highest and best use and by extension in developing an opinion of the market value of the property.” *The Appraisal of Real Estate Institute* at 278.

C. *Burden of Proof*

“In all proceedings before the judge or a magistrate of the tax court and upon appeal therefrom, a preponderance of the evidence shall suffice to sustain the burden of proof. The burden of proof shall fall upon the party seeking affirmative relief * * *.” ORS 305.427.

Plaintiff must establish its claim “by a preponderance of the evidence, or the more convincing or greater weight of evidence.” *Schaefer v. Dept. of Rev.*, TC No 4530 at 4 (July 12, 2001) (citing *Feves v. Dept. of Rev.*, 4 OTR 302 (1971)). The court finds Plaintiff's evidence in support of its indicated value insufficient with respect to highest and best use and lacking in comparability to the subject property.

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III. CONCLUSION

After careful review of the evidence and testimony, the court concludes that Plaintiff failed to carry its burden of proof. Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff's appeal is denied.

Dated this ____ day of June 2011.

JILL A. TANNER
PRESIDING 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 Presiding Magistrate Jill A. Tanner on June 7, 2011. The Court filed and entered this document on June 7, 2011.