Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-047

JANUARY TERM, 2018

Marjorie Johnston* v. City of Rutland	}	APPEALED FROM:
	}	
	}	Property Valuation and Review
	}	Division
	}	
	}	DOCKET NO. PVR 2015-17

In the above-entitled cause, the Clerk will enter:

Taxpayer appeals the 2015 valuation of her property in the City of Rutland by the Division of Property Valuation and Review (PVR). We affirm in part, but reverse and remand for the hearing officer to redetermine the value of taxpayer's homestead.

Taxpayer owns a parcel consisting of eight individual lots totaling 1.25 acres of land. Each lot is improved with either a one-family or two-family residential unit. In August 2013, PVR set the value of taxpayer's parcel, which then included seven of the eight lots, at $335,300. This valuation applied to tax years 2012, 2013, and 2014. See 32 V.S.A. § 4468. In January 2015, taxpayer purchased the eighth contiguous lot, 94 Library Avenue, for $9,900. In May 2015, the Rutland City Assessor notified taxpayer of a change in appraisal for her parcel. The assessor set the total value of the parcel at $525,600, and set the homestead and housesite values at $95,800.

Taxpayer grieved the change of appraisal to the Rutland City Assessor, who denied the appeal. Taxpayer appealed to the Board of Civil Authority. She authorized taxpayer's son, Mr. Johnston, to pursue the appeal on her behalf as her agent. The Board of Civil Authority affirmed the assessment in August 2015. Taxpayer then appealed to PVR.

A PVR hearing officer held an evidentiary hearing over four days in October and November 2016. Taxpayer argued that the fair market value of the property as of April 1, 2015 was $345,200, which equaled the value set by PVR in 2013 plus the price she paid for 94 Liberty Avenue, and presented evidence in support of her claim. In support of its assessment, the City presented a direct sales comparison analysis based on sales of three to five comparable properties for each of the eight lots in taxpayer's parcel.

The hearing officer found that taxpayer had overcome the presumption of validity that attached to the City's assessment by presenting admissible evidence. However, he determined taxpayer had failed to prove that her estimate of $345,200 was the best estimate of fair market value. Taxpayer's estimate used a form of the cost approach to value, which was based on Mr.

Johnston's opinion of the fair market value of each property. Mr. Johnston assigned different values than the listers for various inputs in the assessment, such as the quality and physical condition of the improvements. The hearing officer found that Mr. Johnston's opinion was insufficient to support taxpayer's estimate because he did not qualify as an expert in such matters. The hearing officer further found that the cost approach to value was generally less reliable than the direct sales comparison method for properties with older construction, such as the subject properties.

The hearing officer found that the highest and best use of the property was as eight individual improved lots with no potential for further development on any of the lots. It was unlikely that the parcel would sell as a single property, and selling the lots individually was legally, physically, and financially possible and provided maximum profitability. The hearing officer used the direct sales comparison approach to value the lots. He rejected some of the comparable sales offered by the City due to their different age, condition, or other factors. He concluded that the total fair market value of taxpayer's parcel was $416,700. He set the homestead and housesite value at $173,400. This represented the total of the listed values of the lots, minus the values of the single-family lots and the halves of the duplex lots that taxpayer used for rental purposes.

On appeal, a decision by the PVR hearing officer is presumed to be correct, and we will not set aside the hearing officer's findings unless they are clearly erroneous. Garbitelli v. Town of Brookfield, 2009 VT 109, ¶ 5, 186 Vt. 648. Taxpayer has the burden to show that the hearing officer's exercise of discretion was clearly erroneous. Id. Our review of legal conclusions, by contrast, is nondeferential and plenary. Barnett v. Town of Wolcott, 2009 VT 32, ¶ 5, 185 Vt. 627.

1. Mr. Johnston's Non-Party Status

We first consider taxpayer's argument that her son should have been granted party status in this appeal. As of April 1, 2015, taxpayer was listed as the owner of the eight lots in question. Taxpayer does not contend that Mr. Johnston owns record title to any of the lots that comprise her parcel. She appears to predicate her claim that Mr. Johnston is a party to these proceedings on two considerations: his purported interest in a perpetual lease in the lots, and his interest in two sheds on lots in the parcel. Neither of these considerations supports taxpayer's assertion that Mr. Johnson has party status in this appeal.

With respect to the claimed lease, taxpayer argues that she and Mr. Johnston executed a "Perpetual Lease Agreement" on December 31, 2015, that gave Mr. Johnston an interest in the lots themselves and purported to have retroactive effect to April 2005. The hearing officer found that the lease agreement had no effect on the 2015 assessment, because it was not recorded in the City land records until December 2015. We agree. The issue in this appeal is the value of the property as it stood on April 1, 2015. On that date, the purported lease agreement had not been recorded in the land records, and taxpayer was listed as the owner of the real property. Thus, the hearing officer was not required to assess the impact, if any, of the lease agreement on the valuation of the property. Taxpayer's argument that the lease, by its terms, has retroactive effect to April 2005 does not change our analysis. Taxpayer has not presented any legal authority permitting a person

to retroactively alter the ownership of property for tax purposes by subsequently recording a perpetual lease against that property, and we reject the argument that this can be done.

Although PVR found that Mr. Johnston owned 25% of a detached shed on the 50 Pine Street property, and 1% ownership of a shed on 60 Pine Street, PVR found that at least one of the sheds is classified as personal property and is not within the scope of the Town's assessment, and the other was assigned a value of $0 in the appraisal process. In the absence of any evidence that Mr. Johnston holds a record title interest in one or more lots on the parcel, his purported interests in two sheds are insufficient to support party status.[1]

2. Effect of 2013 PVR Decision on 2015 Valuation

Turning to the merits, we reject taxpayer's argument that the City was barred from reappraising her parcel in 2015 because the 2013 PVR decision was an "unappealed final order" and the purchase of 94 Library Avenue was not a material change to the parcel. This argument fails because the 2013 decision set the value of the property for tax years 2012, 2013, and 2014. See 32 V.S.A. § 4468 (providing that appraisal fixed by PVR "shall become the basis for the grand list of the taxpayer for the year in which the appeal is taken and, if the appraisal relates to real property, for the two next ensuing years" unless property is materially changed). The 2013 decision therefore did not govern tax year 2015, the year on appeal. The City could reappraise the property at that point even if no material change occurred. See Heindel v. Town of Grafton, 140 Vt. 147, 147 (1981) (explaining that town may reassess taxpayer's property after three-year freeze expires, so long as effect is not departure from uniform rate). Taxpayer has not shown that she was unfairly singled out or that her parcel was treated differently from other similar properties in the City in the 2015 valuation.

3. Valuing Multiple Lots on a Single Parcel

Taxpayer's claim that the hearing officer erred by valuing her property as individual lots instead of a single parcel is likewise unavailing. While all contiguous land and improvements in the same ownership must be listed as a single parcel in the grand list, see 32 V.S.A. § 4152(a)(3), it was not improper for the appraiser to assess the value of the individual component parts of the parcel in order to reach the overall value. The listed value of property must be based upon the fair market value, which in turn is based on the "highest and best use of the property." Zurn v. City of St. Albans, 2009 VT 85, ¶ 8, 186 Vt. 575; 32 V.S.A. § 3481. "The valuation of a parcel at its highest and best use may consist of distinct valuations of actual or potential lots within the parcel." Rasmussen v. Town of Fair Haven, 2016 VT 1, ¶ 10, 201 Vt. 88. The hearing officer found that the highest and best use of taxpayer's parcel was as eight individual lots, and thus assessed the value of each lot and added them together to reach an overall value for the entire parcel. This determination was not clearly erroneous. Taxpayer's assertion that this determination contradicted the 2013 PVR decision, which she claims "determined the highest and best use of [taxpayer's

[1] As a practical matter, Mr. Johnston's formal status is largely a moot point. He has been permitted, at taxpayer's request, to advocate for taxpayer at every stage in these proceedings.

property] was as one homestead," is simply incorrect, as no such determination appears in the 2013 decision.

4. Claimed Discovery Violations by the City

We decline to reverse on the basis of taxpayer's claim that the hearing officer should not have admitted the City's comparable sales data into evidence because the City "intentionally withheld timely access" to this information. She asserts that she objected at the hearing, and "[t]he PVR hearing officer noted mistakes were made by [the City assessor] but he still allowed the defective data to remain in the record." The partial transcript of the hearing provided by taxpayer does not include this alleged exchange, making it impossible for us to assess the validity of taxpayer's claim. It is therefore waived. See V.R.A.P. 10(b)(1).

5. Valuation of Recently Purchased 94 Library Avenue

We uphold PVR's valuation of 94 Library Avenue as a constituent part of the overall parcel. Taxpayer argues that the hearing officer should have accepted the $9,900 purchase price of 94 Library Avenue as the fair market value for that property rather than the $15,900 fair market value estimate based on the City's extrapolation of the salvage value of the lot derived from the rate of land value to building value on other properties in evidence. The hearing officer found that the property had been offered for sale by the bank for nearly a year when taxpayer purchased it, but that the purchase price did not establish fair market value because it was a cash sale in a foreclosure action, and not an arms-length transaction. On the record before the Court, we cannot say that this determination was clearly erroneous.[2]

Taxpayer is correct that ordinarily the best evidence of fair market value is a relatively contemporaneous arms-length sale. See Wilde v. Town of Norwich, 152 Vt. 327, 329 (1989) (noting that sale price is "strong, if not conclusive, evidence" of value of property for tax appraisal purposes); Royal Parke Corp. v. Town of Essex, 145 Vt. 376, 378-79 (1985) (explaining that where evidence proves an arms-length sale between willing buyer and seller "market value is perforce established for appraisal purposes"). However, "[w]hile an actual sale is strong evidence of fair market value, there may be situations where a court must look beyond a sale." Barrett/Canfield, LLC v. City of Rutland, 171 Vt. 196, 199 (2000). For example, we have affirmed a court's determination that a sale price at an auction following a foreclosure "made it a less reliable indicator of fair market value than the bank's own appraisal." See Vt. Nat'l Bank v. Leninski, 166 Vt. 577, 579 (1996) (mem.). PVR made findings to suggest that the sale was not an arms-length transaction. Although we agree with taxpayer that the fact that the sale was a cash sale does not in itself undermine the strength of the actual-sale price evidence, the portion of the transcript

[2] We acknowledge the City's concession on appeal that the City's understanding that taxpayer bought the property from the bank at an auction, rather than through an ordinary direct purchase, may be wrong. For the reasons set forth above, this concession does not substantially change our analysis.

provided by taxpayer does not include any discussion of the circumstances of the sale to enable this Court to determine whether PVR's finding is supported by other evidence. Moreover, the divergence between the sale price of the 94 Library Avenue lot and the assessed value taxpayer is appealing is minimal—$6,000 in the context of an overall valuation of $416,700. On this record, we cannot conclude that PVR's findings on this point are unsupported by the evidence, and must affirm.

6. Assignment of Homestead Value[3]

Most vexing is taxpayer's argument that the hearing officer erred by not treating her entire parcel, other than the portion being rented to tenants, as her homestead.[4] A taxpayer's "homestead" for purposes of the education property tax is defined as "the principal dwelling and parcel of land surrounding the dwelling, owned and occupied by a resident individual as the individual's domicile." 32 V.S.A. § 5401(7)(A). "Parcel" is defined in 32 V.S.A. § 4152(a)(3) as "all contiguous land in the same ownership, together with all improvements thereon." A homestead "may consist of a part of a multi-dwelling or multi-purpose building," and "also includes any other improvement or structure on the homestead parcel which is not used for business purposes." 32 V.S.A. § 5401(7)(C), (F). "A homestead does not include any portion of a dwelling that is rented

[3] Taxpayer also challenges the hearing officer's determination of her housesite value. However, other than asserting that because the property is less than two acres the housesite value is the same as the homestead value, taxpayer's arguments rely entirely on the statutes and regulations concerning homestead and not housesite. The "housesite" is relevant to determining an education tax payment or rebate under Chapter 154, Title 32. It is defined as "that portion of a homestead . . . which includes as much of the land owned by the claimant surrounding the dwelling as is reasonably necessary for use of the dwelling as a home, but in no event more than two acres per dwelling unit . . ." 32 V.S.A. S 6062(11); see also Homestead, § 1.5401(7)(g), n.2, Code of Vt. Rules 10 060 038, http://www.lexisnexis.com/hottopics/codeofvtrules ("Homestead Rule") (noting distinction between "housesite" and "homestead"). Because taxpayer's arguments concerning the hearing officer's assignment of her housesite value are inadequately briefed, we do not address them. Schnabel v. Nordic Toyota, Inc., 168 Vt. 354, 362 (1998) ("The Court will not search the record for errors inadequately briefed.").

[4] We summarily reject taxpayer's assertion that the listers were bound by her own assertion of the scope of her homestead in her homestead declaration. The applicable regulations contemplate that declaring a nonresidential property as a homestead will subject the filer to a penalty. See Homestead Rule § 1.5401(7)(a), (m) (disproving claim that taxpayer's own declaration is last word on matter). Moreover, the lister handbook cited in taxpayer's brief instructs listers to accept the taxpayer's declaration "unless you have evidence of a more appropriate methodology." We likewise reject taxpayer's apparent claim that the Vermont Constitution creates a two-acre "shield" for declared homesteads. This assertion, completely at odds with the definition of homestead in Vermont statutes and regulations, is likewise inadequately briefed.

and a dwelling is not a homestead for any portion of the year in which it is rented." Id. § 5401(7)(H).

The applicable tax regulations elaborate on these principles, and offer a series of examples to illustrate their operation. The regulations explain that the homestead parcel includes all land contiguous to the land surrounding the homestead dwelling and in the same ownership, together with improvements thereon, without an acreage limitation. See Homestead Rule § 1.5401(7)(g). Even if there are buildings or improvements on the contiguous land that are not themselves homestead property, the underlying land "is part of the homestead and will be taxed at the homestead tax rate." Id. There is no acreage limitation in a homestead. Id. So, for example, where a taxpayer lives in a dwelling on fifteen acres, five of which are improved with a commercial racetrack and stands, all fifteen acres of unimproved land are part of the taxpayer's homestead property, but the improvements on the five acres used for commercial purposes are not. Id. ex. 3.

Likewise, if two co-owners jointly own property with multiple homes, and one co-owner occupies one of the dwellings and the other lives out of state and rents the second dwelling to a third party, the resident homeowner's homestead property consists of the dwelling the resident occupies and all of the land. The second dwelling is not a homestead and is taxed at the nonresidential rate. Id. § 1.5401(7)(h) ex. 2. On the other hand, in that same example, if the non-resident co-owner uses the second house as a vacation house, and does not rent it to third parties or use it for commercial purposes, the second house, too, is classified as homestead property and taxed at the homestead rate. Id. ex. 3.

The record indicates that taxpayer leased portions of four of her buildings—110 Maple Street, and 49, 50, and 52 Pine Street—to tenants. Because 49 and 50 Pine Street are single-family homes, the hearing officer did not include any part of the value of those lots in taxpayer's homestead. The other two properties, 110 Maple Street and 52 Pine Street, are duplexes. Approximately one-half of each duplex is leased to tenants. The hearing officer accordingly treated half the value of the those lots as homestead property.

On appeal, taxpayer does not challenge the hearing officer's allocation of the improvements, i.e., the actual dwellings, on the other lots. But she contends that, in light of the above regulations, all of the land should be treated as homestead because all of the land underlying the various improvements is contiguous to the homestead dwelling. The City argues that the principles cited above do not extend to single-family homes on a parcel that are not the taxpayer's principal dwelling. The City urges this Court to affirm because the issue is not clearly addressed in the partial transcript provided by taxpayer on appeal, so we must presume that the hearing officer's conclusion was supported by the evidence. It further urges us to defer to the hearing officer's apparent but unspoken legal determinations that the unimproved land comprising a lot on which a single-family dwelling rented to a third party is situated is not included in the homestead parcel, even if on contiguous land under common ownership.

We decline to defer to the hearing officer's legal analysis because the decision below does not address the issue, and we have no way of determining the basis for the hearing officer's determinations. The hearing officer assigned as homestead property half of the total value of each

of the two improved multi-unit properties in which only one of two units was rented. He assigned no portion of the total value of the two rented single-family dwellings and accompanying lots to the homestead property. The basis for doing so, especially in light of Example 2 to Homestead Rule § 1.5401(7)(h), is unclear. We cannot discern whether this allocation arises from a legal determination by the hearing officer, or an assessment of unidentified evidence. Accordingly, we remand to the hearing officer for additional findings and conclusions. The hearing officer may alter the homestead determination on remand if warranted, or provide additional findings or analysis to support its initial conclusion.

We have considered taxpayer's remaining arguments and find them to be without merit.

Reversed and remanded for the hearing officer to address taxpayer's homestead valuation; in all other respects, affirmed.

BY THE COURT:

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice