Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-066

OCTOBER TERM, 2019

Nordic Holsteins LLC* v. Town of Charlotte	}	APPEALED FROM:
	}	
	}	Property Valuation and Review
	}	Division
	}	
	}	
	}	DOCKET NO. 2018-1

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

Appellant challenges the determination of the fair market value (FMV) of property it withdrew from the Current Use Program. We affirm.

The record reflects the following. In July 2004, appellant purchased a large tract of land in Charlotte for $775,000 (referred to as SP2). The property was improved by a single-family dwelling and miscellaneous farm buildings. Some of the property was enrolled in the Vermont Use Appraisal Program, referred to as the Current Use Program. See generally 32 V.S.A. §§ 3751-3763. Among other purposes, the Current Use program is designed to "encourage and assist the maintenance of Vermont's productive agricultural and forestland," "prevent the accelerated conversion of these lands to more intensive use by the pressure of property taxation at values incompatible with the productive capacity of the land," and "achieve more equitable taxation for undeveloped lands." Id. § 3751. Under the program, lands actively devoted to agricultural use or as managed forestlands are valued for taxation purposes at their use value rather than their market value. See id. § 3752(12) (defining "use value appraisal" to mean, "with respect to land, the price per acre which the land would command if it were required to remain henceforth in agriculture or forest use," and "[w]ith respect to farm buildings, . . . zero percent of fair market value").

When land is withdrawn from the Current Use Program, it is taxable at its full FMV. "Fair market value is determined by using the highest and best use of the property, which is the value of the property for its most profitable, likely, and legal use." Hoiska v. Town of E. Montpelier, 2014 VT 80, ¶ 7, 197 Vt. 196 (quotation omitted); see also 32 V.S.A. § 3481(1)(A) (stating that FMV reflects "price that the property will bring in the market when offered for sale and purchased by another, taking into consideration all the elements of the availability of the property, its use both potential and prospective, any functional deficiencies, and all other elements such as age and condition that combine to give property a market value"). As a penalty, withdrawn land is also subject to a tax of "10 percent of the full fair market value of the changed land." 32 V.S.A. § 3757(a). "If changed land is a portion of a parcel, the fair market value of the changed land [is] the fair market value of the changed land as a separate parcel, divided by the common level of appraisal." Id.

The land at issue here is part of a subdivision, which was approved by the Town Planning Commission on March 1, 2018. The subdivision consists of three lots: a 71.18-acre parcel (Lot 1), which would remain as open land, and two single-family residential lots: a 17.35-acre parcel (Lot 2), and a 7.59-acre parcel (Lot 3). At the time the subdivision was approved, the planning commission found that about 13 acres of the subdivided land were enrolled in the Current Use Program, and that, as part of the proposed subdivision, a portion of that acreage would need to be removed from the program. The planning commission found that applicant had obtained permits for a water supply and wastewater systems to be constructed upon Lots 2 and 3. Access to Lot 3 and Lot 2 was available from a curb cut, already approved, at the boundary of Lot 1 and another parcel that fronted Hinesburg Road. The associated shared-access driveway to the properties would traverse the existing north-south oriented farm access road that ran along the western tree line of the road-frontage parcel and Lot 3 and continued into the wood line near the central northern boundary of Lot 2. In May 2018, appellant sold Lots 2 and 3 with the deeded access from Hinesburg Road and the wastewater and potable water supply permits for $475,000.

One month prior to the sale, on April 2, 2018, appellant filed notice that it was withdrawing some of its property (referred to as "SP1") from the Current Use Program. This is the property at issue here. SP1 is an 11.94-area area that is part of Lots 2 and 3. The remaining property, "SP2," consists of 274.71 acres of land improved with a single-family dwelling and miscellaneous farm buildings. Appellant did not contest the valuation of SP2. The town listers determined the FMV of SP1 was $91,880. The Town's Board of Civil Authority affirmed this valuation on appeal. Appellant then appealed to the Property Valuation and Review Division of the Vermont Department of Taxes, arguing that the FMV of the withdrawn parcel should be $26,850. Following a de novo appeal, a hearing officer determined the FMV of SP1 to be $91,880.

As indicated above, the hearing officer found that the approved subdivision referenced above created two single-family residential building lots with a permitted wastewater system and potable water supply. SP1 comprises the westerly portion of Lots 2 and 3. Approximately 5 acres of the withdrawn land, nearly square in shape, comprises the westerly portion of Lot 3 that provides a building site. The remaining acreage is the westerly portion of Lot 2. The northern boundary of SP1 is accessed from Hinesburg Road via a 50-foot right-of-way and an approximately 740-foot utility easement.

The hearing officer found that the highest and best use of SP1 was for single-family residential development. He explained that the property was located in a rural area of Charlotte with access via a right-of-way and there were approved permits for water and wastewater. Single-family residential properties and dairy farms were the primary uses of properties in the immediate area. There was a demand for single-family residential building lots in town as evidenced by appellant's sale of Lots 2 and 3 for $475,000, as well as the sale of three unimproved lots, 8.2 acres for $135,000, 10.83 acres for $203,500, and 14.01 acres for $285,000.

The hearing officer rejected appellant's argument that the highest and best use of SP1 was as an add-on parcel of land to adjoining acreage. It was unpersuaded by appellant's assertion that SP1 was landlocked. In support of its position, appellant cited an example provided in a Vermont Department of Taxes fact sheet. In the example, the property in question had no deeded access or road included in the withdrawal. The hearing officer noted that the example was merely a guideline and found the example inapplicable here. He reasoned that the example would be appropriate if SP1 had been withdrawn from the CUP prior to the subdivision approval, but that was not the case here. Access, a utility easement, and a permit for a wastewater disposal system and drilled water supply for SP1 were all present prior to appellant's withdrawal notification on

April 2, 2018. The hearing officer also rejected appellant's assertion that because the lot had an irregular shape, a building permit would not be approved. He further found that the acreage was larger than what was required for a residential building lot, and that setback requirements could be met.

The Town determined the listed value for SP1 using the cost approach and it estimated FMV by equalizing that listed value. The hearing officer found the Town's methodology appropriate and persuasive. He added that the fact that Lots 2 and 3 were sold for $475,000 in an arms-length transaction was strong evidence that the FMV of $91,880 for 11.94 of the 24.94 acres was reasonable. The unadjusted sales prices of three land sales lent further support to the FMV as found. It thus determined that the FMV of SP1 was $91,880. This appeal followed.

Appellant maintains that the hearing officer failed to value the property as a "separate parcel" consistent with the law and guidance provided by the Tax Department. Appellant acknowledges that the land is part of an approved subdivision with access and utilities, but states that these components are not physically on the land being withdrawn and thus, should not be considered. It contends that the hearing officer should have determined that SP1 was landlocked and had no access to utilities and water. Appellant again relies on the Tax Department fact sheet in support of its position.

"On appeal to this Court, the decision by the [hearing officer] will be deemed presumptively correct and [his or her] findings will be conclusive if they are supported by the evidence." Garbitelli v. Town of Brookfield, 2009 VT 109, ¶ 5, 186 Vt. 648 (quotation omitted). An appellant has the burden "to demonstrate that the [hearing officer]'s exercise of discretion was clearly erroneous." Id.

Appellant fails to meet its burden here. The hearing officer evaluated SP1 as a separate parcel and its determination of FMV is supported by the evidence. As indicated above, FMV is governed by the "highest and best use" of the property. Zurn v. City of St. Albans, 2009 VT 85, ¶ 8, 186 Vt. 575. A determination of FMV "takes into account all the elements of the property's availability, its use, potential or prospective, and all other elements . . . which combine to give property a market value." Barrett v. Town of Warren, 2005 VT 107, ¶ 6, 179 Vt. 134 (quotation omitted); see also 32 V.S.A. § 3481(1)(A). "All of the elements, tangible and intangible, that combine to give real property fair market value are subject to property tax." Barrett, 2005 VT 107, ¶ 11. "The key inquiry is whether those intangible factors are so intimately intertwined with the real property that the property would not function without them." Id. (quotation omitted).

The hearing officer did not err in considering that the withdrawn land clearly had the benefit of a deeded right-of-way and permits in place authorizing a stand-alone wastewater system and a stand-alone water supply. These elements, as reflected in the subdivision map, are intimately intertwined with this property. Indeed, almost half of the land in question represents the building site for Lot 3. The remaining land is part of Lot 2. SP1 comprises an integral part of two lots that have been approved as single-family residential lots and it was appropriate to value them this way. See Bd. of Assessment Appeals of State of Colo. v. Colorado Arlberg Club, 762 P.2d 146, 152 (Colo. 1988) (recognizing that "reasonable future use" of property is "relevant to the property's present market value").

We are not persuaded by appellant's arguments to the contrary. First, as set forth above, the hearing officer considered only the value of the 11.94 acres at issue, including assessing if the land was accessible. Assuming arguendo that the "basic guidelines for estimating value for [Land Use Change Tax] purposes" provided by the Tax Department is binding, as appellant asserts, the

hearing officer acted consistently with that guidance here. As for the example on which appellant relies, the fact sheet in which it is contained clearly states that it "is intended to provide an overview only" and that "Vermont tax statutes, regulations, Vermont Department of Taxes rulings, or court decisions supersede information provided in this fact sheet." The example is not controlling and, in any event, does not involve the same facts that are present here. The land here is undisputedly benefited by an access road and water/sewer permits. Finally, this case is not like Hoiska v. Town of E. Montpelier, 2014 VT 80, 197 Vt. 196, cited by appellant. We held there that the state appraiser erred in concluding that a property owner "legally subdivided her land by procuring a survey, not filed in the land records, that include[d] a line purportedly dividing the lot into two parcels." Id. ¶ 1. We find nothing in the holding of Hoiska that assists appellant here.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Brian L. Burgess, Associate Justice (Ret.),
Specially Assigned