NO. CV 04 4000074S	:	SUPERIOR COURT
EXECUTIVE SQUARE LIMITED PARTNERSHIP	:	JUDICIAL DISTRICT OF NEW BRITAIN
V.	:	
TOWN OF WETHERSFIELD	:	JANUARY 4, 2006

MEMORANDUM OF DECISION

This is a real estate tax appeal concerning a 12-story housing complex with 240 one-bedroom units for low and moderate income elderly residents at 100 Executive Square, located on the easterly side of the Silas Deane Highway (Route 99), near the I-91 interchange in the town of Wethersfield (town). The subject complex is situated on 8.55 acres of land in a planned development elderly housing zone.

On October 1, 2003, the town conducted a town-wide revaluation pursuant to General Statutes § 12-62. The town's assessor valued the subject property at $20,510,000 with an assessed value of $14,357,000. Upon the plaintiff's successful appeal to the Board of Assessment Appeals (Board), the Board reduced the assessor's valuation to $14,357,142 and the assessed value to $10,050,000.

The plaintiff's appraiser, Richard A. Michaud (Michaud), valued the subject property, as of October 1, 2003, at $10,090,000 for its fee simple interest and at $13,600,000 for its leased fee interest. The town's appraiser, Robert J. Mulready

(Mulready), valued the fee simple interest of the subject property, as of October 1, 2003, at $15,830,608, rounded to $15,830,000.

Between 1982-1983, the subject complex was designed and constructed to serve as affordable housing for low and moderate income elderly residents. It continues to operate under a regulatory agreement with the Connecticut Housing Finance Authority (CHFA) which requires all tenants to be elderly and have income levels that are considered low and moderate. The subject complex has a historical vacancy rate of just 1% and a waiting list is maintained.

Each unit is 563 square feet containing one bedroom, living room, bathroom and kitchen. On the first floor of the subject complex, tenants have access to the management office, lounge, community room, mailboxes and restrooms. In the community room, there are tables and a large television as well as a kitchenette. There are approximately 150 parking spaces available.

There is a laundry room with washers and dryers on the second floor. The plaintiff and the machines' vendor share revenue from the tenants' use of the equipment. Four cell phone towers on the subject complex's roof generate additional revenue for the plaintiff.

The subject complex is fully equipped with fire alarms, a back-up generator and two passenger elevators. Although only the first floor has central air-conditioning, tenants can rent window units at a cost of $80 per month.

All tenants pay the same contract rent of $981 per month.[1] Mulready explains that the initial financing for the subject complex was a mortgage to CHFA "in the amount of $12,380,000 and the owners paid 11.5% interest from November 1, 1982 to August 1, 1984. Starting with August 1, 1984, and payable starting September 1, 1984, the rate dropped to 9.5% for a 30 year mortgage with level debt service of $107,948.84 per month. The mortgage is paid off in August 2014. The owners[,] according to CHFA, had 'defined equity' in the amount of $1,473,021 on which they are entitled to a 6% rate of return. This rate of return has not changed during the term of the agreement." (Defendant's Exhibit A, pp. 33-34.)

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[1] Mulready explains that the complex has "subsidized rents known as Section 8 [of the Housing Act of 1937, as amended; 42 U.S.C. § 1437f] housing project based revenue. Project based revenue means the revenue for Section 8 subsidies goes with the unit, not with the individual person through a voucher system. Any [sic] eligible person may apply for Section 8 housing with the management . . . . Subsidies are based on two criteria; the first criterion is the tenant pays 30% of their income and the remainder is paid for by [Housing and Urban Development] HUD. There are income limits that tenants may not exceed . . . . Rent . . . is established based on several criteria, to include the mortgage rate and required payment. Executive Square has a high interest mortgage relative to current subsidized market rentals currently available through Connecticut Housing Finance Authority (CHFA). The mortgage rate of 9.5% is also very high as compared to current free market mortgage rates. According to CHFA[,] there is no benefit in refinancing since the rental subsidies would drop accordingly with a refinancing. The current rents at Executive Square are approximately 140% of the market rents." (Defendant's Exhibit A, p. 33.)

To summarize:

- the subject complex is a housing project for low and moderate income elderly tenants who pay $981 per month to rent a one-bedroom apartment and
- the plaintiff is limited to yearly earnings of 6% of its original equity investment of $1,473,021 and pays debt service on a mortgage in the original principal amount of $12,380,000 with a 30-year term at an above-market interest rate of 9.5%.

"In [General Statutes] § 12-117a tax appeals, the trial court tries the matter de novo and the ultimate question is the ascertainment of the true and actual value of the [taxpayer's] property. . . . At the de novo proceeding, the taxpayer bears the burden of establishing that the assessor has overassessed its property. . . . Once the taxpayer has demonstrated aggrievement by proving that its property was overassessed, the trial court [will] then undertake a further inquiry to determine the amount of the reassessment that would be just. . . . The trier of fact must arrive at [its] own conclusions as to the value of [the taxpayer's property] by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value, and his own general knowledge of the elements going to establish value . . . ." (Citations omitted; internal quotation marks omitted.) United Technologies Corp. v. East Windsor, 262 Conn. 11, 22-23, 807 A.2d 955 (2002).

"The goal of property valuation is to determine the present true and actual value of

the subject property." (Internal quotation marks omitted.) First Bethel Associates v. Bethel, 231 Conn. 731, 738, 651 A.2d 1279 (1995). "General Statutes . . . § 12-62a (b) provides in relevant part that '[e]ach . . . municipality shall . . . assess all property . . . at a uniform rate of seventy per cent of present true and actual value . . . .'" Torres v. Waterbury, 249 Conn. 110, 119, 733 A.2d 817 (1999). General Statutes § 12-63 (a) provides, in relevant part, that "[t]he present true and actual value of all other property [i.e., other than farm, forest, or open space land] shall be deemed by all assessors and boards of assessment appeals to be the fair market value thereof and not its value at a forced or auction sale." "Fair market value is defined as the value that would be fixed in fair negotiations between a desirous buyer and a willing seller, neither under any undue compulsion to make a deal . . . . Uniroyal, Inc. v. Board of Tax Review, 174 Conn. 380, 390, 389 A.2d 734 (1978)." (Internal quotation marks omitted.) First Bethel Associates v. Bethel, supra, 231 Conn. 740 n.7. "That method of valuation, of course, presumes that a reasonable market for the property exists. Where this method is unavailable, however, other means are to be found by which to determine value." (Internal quotation marks omitted.) Aetna Life Ins. Co. v. Middletown, 77 Conn. App. 21, 35, 822 A.2d 330, cert. denied, 265 Conn. 901, 829 A.2d 419 (2003).

General Statutes § 12-63b (a) provides that "[t]he assessor or board of assessors in any town, when determining the present true and actual value of real property as provided

in section 12-63, which property is used primarily for the purpose of producing rental income . . . and with respect to which property there is insufficient data in such town based on current bona fide sales of comparable property which may be considered in determining such value, shall determine such value on the basis of an appraisal which shall include to the extent applicable with respect to such property, consideration of each of the following methods of appraisal: (1) Replacement cost less depreciation, plus the market value of the land, (2) the gross income multiplier method as used for similar property and (3) capitalization of net income based on market rent for similar property. The provisions of this section shall not be applicable with respect to any housing assisted by the federal or state government except any such housing for which the federal assistance directly related to rent for each unit . . . is no less than the difference between the fair market rent for each such unit . . . and the amount of rent payable by the tenant in each such unit." Subsection (b) of § 12-63b further provides that "[i]n determining market rent the assessor shall consider the actual rental income applicable with respect to such real property under the terms of an existing contract of lease at the time of such determination."

The central problem here, as recognized by both appraisers, is that there are no similar properties within which market rent can be used as a comparison to the subject property. For this reason, both appraisers employed the income capitalization approach

and declined to utilize the sales comparison approach or the cost approach.

The plaintiff argues that "real estate assessments are to be determined based on the property's market value, which is the price negotiated between two parties for the *fee simple estate*, not a leased fee value." (Emphasis in original.) (Plaintiff's Post-Trial Brief, p. 12.) If, however, the definition of market value is the price negotiated between two willing parties under no compulsion to make the deal, the subject complex would never qualify for sale on the market because it was not developed as marketable property. As the plaintiff's appraiser Michaud observed, "[t]he subject is regulated as affordable housing under guidelines established by the Connecticut Housing Finance Authority (CHFA). Executive Square was originally developed as a project-based, elderly, affordable housing complex. The CHFA operating agreement is unique to Executive Square's specific design criteria and financing structure at the time of its development in 1982/1983." (Plaintiff's Exhibit 1, p. 12.) In other words, the conventional apartment market cannot be utilized to develop market rents for the subsidized housing market.

Michaud, in arriving at the income generated by the subject, reduced the established rents from $981 per month to $800 per month, the figure he considered to be the market rent for unregulated apartments. Under Michaud's reasoning, the subject complex's specially-designed features for elderly residents would be upgraded and converted to larger-sized units equal to the comparables used to develop the $800 per

month market rent. However, this scenario is not practical given the restrictions presently in place.

The plaintiff argues that the subsidies built into the subject's rents are intangibles, and therefore, cannot be used to form a basis for the determination of market value. Furthermore, the plaintiff argues that if the subsidized rents cannot be used to determine market value, then an appraiser must look to the market for rental income pertaining to apartment buildings.

In this case, while the tenants receive subsidies, no part of their contract rent converts to an intangible asset, as suggested by the plaintiff. Furthermore, other jurisdictions have found that the contract rent should be used in determining the fair market value of government-subsidized rental property. See, e.g., Lake Cty. Bd. Of Rev. v. Prop. Tax App. Bd., 172 Ill. App. 3d 851, 527 N.E.2d 84, 86 (1988) (citing on page 88 therein to Executive Square Ltd. Partnership v. Board of Tax Review, 11 Conn. App. 566, 528 A.2d 409 (1987)).[2]

With this in mind, General Statutes § 8-216a (a) must be considered. The statute provides that "[t]he provisions of any other general statute or special act to the contrary notwithstanding, the present true and actual value of the real property classified as property used for housing solely for low or moderate-income persons or families pursuant

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[2] See also footnote four.

to section 8-215, on which rents or carrying charges are limited by regulatory agreement with, or otherwise regulated by, the federal or state government or department or agency thereof, shall be based upon and shall not exceed the capitalized value of the net rental income of the housing project. For purposes of sections 8-215, 8-216 and this section, such net rental income means the gross income of the project as limited by the schedule of rents or carrying charges, less reasonable operating expenses and property taxes."

When looking at the valuation of property, it is clear that § 8-216a trumps §§ 12-63 and 12-63b (a) with respect to the consideration of market rent and contract rent in determining fair market value. Clearly, a plain reading of key language in § 8-216a such as "to the contrary notwithstanding," "shall" and "shall not" shows a clear legislative intent[3] to exclude any other method of valuation for low and moderate income rental housing for the elderly.[4]

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[3] The court notes that "[a] fundamental tenet of statutory construction is that statutes are to be considered to give effect to the apparent intention of the lawmaking body. . . . The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. [General Statutes § 1-2z]." (Citation omitted; internal quotation marks omitted.) Carmel Hollow Associates Ltd. Partnership v. Bethlehem, 269 Conn. 120, 129, 848 A.2d 451 (2004).

[4] The plaintiff was unsuccessful in a prior appeal of the assessor's valuation of the subject complex on the Grand List of October 1, 1984. In that appeal, the appellate court affirmed the trial court's conclusion that the contract rent of the subject was equivalent to the

To determine the true and actual value of the subject complex on the revaluation date of October 1, 2003, § 8-216a directs the assessor to apply a capitalization rate to the net rental income of the subject. In developing the net rental income of the subject, a question arises as to how real estate taxes should be treated in the development of operating expenses.

Under one methodology, using the income capitalization approach at market, Michaud included real estate taxes of $419,791 as part of the operating expenses and excluded the real estate tax load adjustment from the capitalization rate.[5] As a result, Michaud calculated $10,090,000 as the fair market value of the fee simple interest as of October 1, 2003.

Michaud explained that "[t]he Income Approach was used to provide a market value under two scenarios: according to unrestricted market rents and the CHFA Agreement. The Income Approach considered the subject's contract rents and market rents, operating expenses and converted the cash flow into a present value by Direct

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market rent. See Executive Square Ltd. Partnership v. Board of Tax Review, supra, 11 Conn. App. 573. The court notes that § 8-216a was not referenced therein.

[5] Michaud used the amount of $419,791 for the tax due on the Grand List of October 1, 2002. This figure reflects an assessment of $12,042,200 and a mill rate of 34.86. The actual tax on the list of October 1, 2003 was $284,917.50 based upon an assessment of $10,050,000 and a mill rate of 28.35. See Plaintiff's Exhibit 1, p. 24; Defendant's Exhibit A, p. 13.

Capitalization and Discounted Cash Flow. Overall capitalization rates were justified by market transactions, investor surveys and from our conversations with professionals familiar with the Wethersfield real estate market. The Income Approach concludes with a leased fee value of $13,600,000 according to the CHFA Agreement, and $10,090,000 fee simple value based upon Market Rentals." (Plaintiff's Exhibit 1, p. 42.)

On the other hand, Mulready developed his operating expenses of the subject, as of October 1, 2003, by excluding real estate taxes from the operating expenses and including a real estate tax load of 2% (28.35 mills x 70% = 1.9845%, rounded to 2%) added to a capitalization rate of 9.67%, for a final capitalization rate of 11.67%. As a result, Mulready calculated $15,830,00 as the rounded fair market value of the fee simple interest of the subject complex, as of October 1, 2003.

Michaud developed his operating expenses by first reviewing the actual expenses of the subject between the years 2001 and 2003 and then comparing them with the histories of other apartment properties. In a similar fashion, Mulready compared the actual expenses of the subject with current expenditures in the market. However, as discussed above, § 8-216a controls here and directs that valuation be based upon the capitalization of the rental net income of the subject, not its market net income.

Mulready concluded that the effective gross income (EGI) of the subject, a combination of contract rent and other income, was $2,913,432, and that this amount was

close to the average effective gross revenue of the subject for the years 2001 through 2004 of $2,936,416.50. See Defendant's Exhibit A, p. 34. Mulready further concluded that the operating expenses of the subject for 2003, excluding real estate taxes, was $1,066,000 for a net operating income (NOI) of $1,847,432. Upon capitalizing NOI at 11.67%, Mulready calculated $15,830,00 as the rounded fair market value of the subject complex, as of October 1, 2003. All things considered, the court finds Mulready's analysis and conclusion of value to be more credible than Michaud's.

In reaching this final conclusion, it is apparent that:

> 1) the contract rent plaintiff receives cannot be compared to so-called market rent developed from the unregulated conventional apartment market;[6]
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> 2) the plaintiff does not benefit from the high contract rent because the plaintiff's income is limited to 6% of its investment;
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> 3) the excess income generated by the subject enures to the benefit of CHFA, which earns interest on its mortgage to the plaintiff that far exceeds the conventional mortgage market rate of interest and
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> 4) any excess income from the high contract rate is turned over to CHFA, not to the plaintiff.

See Defendant's Exhibit A, p. 36.

In any event, the valuation of the subject property, consistent with the provisions

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[6] As discussed above, Michaud found the market rent for unregulated apartment complexes to be $800 per month while Mulready found it to be $700 per month.

of § 8-216a, does not show that the plaintiff has been aggrieved by the action of the Board in reducing the assessor's valuation to $14,357,142. As discussed above, for the plaintiff to be successful in a real estate tax appeal, it must show aggrievement to prevail. See United Technologies Corp. v. East Windsor, supra, 262 Conn. 22-23. The court finds that the plaintiff has failed to show that it is an aggrieved party for the purposes of this appeal.

Accordingly, judgment may enter in favor of the defendant dismissing this appeal, without costs to either party.

Arnold W. Aronson
Judge Trial Referee