NO. CV11 6011082S	:	SUPERIOR COURT
KOHL'S DEPARTMENT STORES INC.	:	JUDICIAL DISTRICT OF
	:	NEW BRITAIN
v.		
TOWN OF FAIRFIELD	:	FEBRUARY 7, 2014

MEMORANDUM OF DECISION

This is a real estate tax appeal brought by the plaintiff, Kohl's Department Stores, Inc. (Kohl's), challenging the valuation placed upon its real estate by the assessor for the town of Fairfield (town) for the revaluation year of October 1, 2010. Count one of the appeal, challenging the valuation, was brought pursuant to General Statutes § 12-117a. Count two, brought pursuant to General Statutes § 12-119, claims that the assessor disregarded the provisions of the statutes in making a manifestly excessive valuation of the taxpayer's property.

The plaintiff has failed to present any evidence to support its claim in count two and has failed to brief its claim for relief pursuant to count two. Where an appellant, such as the plaintiff in this case, fails to brief its claim that the assessor disregarded the statutory provisions related to the assessment of real property, the general rule is that the appellant has abandoned its claim. See Harris v. Bradley Memorial Hospital & Health Center, Inc., 306 Conn. 304, 319, 50 A.3d 841 (2012), cert. denied, 133 S. Ct. 1809, 185 L. Ed. 2d 812 (2013).

For the Grand List of October 1, 2010, the town's assessor valued the plaintiff's department store property located at 290 Tunxis Hill Road at $14,121,800. The plaintiff's appraiser, John Leary (Leary), concluded that the fair market value of the subject property, as of October 1, 2010, was $6,000,000. The town's assessor also valued real property located at 160 Greenfield Street, across the street from the department store, at $453,800.

The town's appraiser, Patrick J. Wellspeak (Wellspeak), for the purpose of valuation, combined 290 Tunxis Hill Road and 160 Greenfield Street as one taxable property. Wellspeak valued the subject premises, as of October 1, 2010, at $12,100,000.

Wellspeak described both properties as follows:

"[T]he subject property represents two nearby sites that have operated as a single economic unit for over 40 years. The first property is a 6.85-acre site situated on the westerly side of Villa Avenue, the southerly side of Greenfield Street and the northerly side of Tunxis Hill Road. This property is improved with a single-tenant, discount department store that was constructed in 1964 and renovated and expanded over the years. This building is considered to be in average to good condition for the existing use and it also has re-use potential for multi-tenant occupancy.

"The second property is a 1.06-acre site used for supplemental parking to support 290 Tunxis Hill Road. This property is situated on the northerly side of Greenfield Street.

As noted this property has been used to support the improved property across the street and essentially the two nearby sites have operated as a single economic unit for over 40 years. As a result we will refer to 290 Tunxis Hill Road and [160] Greenfield Street as the subject property."

(Defendant's Exhibit A, introductory letter.)

Leary presents a slightly different description of the subject property:

"The property consists of two parcels of land in the southeast section of . . . Fairfield near the Bridgeport city line.

"The parcel at 290 Tunxis Hill Road ('Main Parcel') is a 6.85-acre site in the DZD zone with access points on Tunxis Hill Road, Villa [Avenue] and Greenfield Street. In addition, the site enjoys a ground lease for parking purposes over 0.09 acre along the Tunxis Hill Road frontage from the State of Connecticut Department of Transportation. The site is improved with a one-story, masonry discount department store constructed in 1964 with a gross leasable area ('GLA') and gross building area ('GBA') of 99,570 [SF]. The store was originally built for Arlan's, a Bridgeport-based retailer, and subsequently occupied by Caldor. Kohl's acquired this Caldor lease as part of a package acquisition in 1999-2000 during its entry into the Connecticut market. The lease was assigned to Kohl's by Tunxis Associates and commenced in early 2000 with a modified term through August 2020. The store interior was renovated to Kohl's specifications in 1999-2000, but is oversized for the typical Kohl's store in the 80,000-85,000 [SF] range. Some areas of the stock room at the rear of the store are prone to wetness during rain storms because of the site topography.

"The parcel at 160 Greenfield Street ('Support Parcel') is a 1.06-acre site in the DCD zone on the north side of the street opposite the Greenfield Street frontage of the Main Parcel that is paved and intended for use as employee and overflow parking. Store management indicated that the support parcel is seldom used during the course of the year."

(Plaintiff's Exhibit 1, introductory letter.)

The subject property is owned by Tunxis Associates. In 1999, Kohl's acquired a leasehold interest in the subject property from The Caldor Corporation that was in bankruptcy. The lease that Kohl's acquired was part of a package acquisition of 33 Caldor stores in the New York, New Jersey and Connecticut area through Bankruptcy Court proceedings. The lease acquired by Kohl's from Caldor included two renewal options that would extend the term of the lease until August 31, 2018. As noted by Wellspeak, "Kohl's renegotiated the rent and extended the lease until August 31, 2020. The terms of this lease are considered to be below market and were impacted by the original lease with Caldor." (Defendant's Exhibit A, introductory letter.)

Defendant’s Exhibit B is a lease modification agreement between Tunxis Associates and Kohl’s dated February 20, 1999, which recites that if the Caldor lease is assigned to Kohl’s, the lease will be modified as follows:

“Commencing on the date of assignment of the Lease to Kohl’s, and continuing through February 29, 2000, the minimum rental per annum shall be at the rate of $302,000 per annum. . . . Commencing on the earlier of March 1, 2000 or the New Deal Date, and continuing through February 28, 2010, minimum rental per annum shall be at the rate of $525,000. . . . Commencing on March 1, 2010 and continuing through August 31, 2020, minimum rental per annum shall be at the rate of $625,000. . . .”

Plaintiff’s appraiser, Leary, relying on the cost approach and the income approach, determined that the fair market value of the subject property, as of October 1, 2010, was $6,000,000, less than half of what the assessor determined the fair market value of the subject should be at $14,121,800. Leary, in his testimony and in his appraisal report, plaintiff’s Exhibit 1, presented the following arguments to support his valuation:

1. The Kohl’s store, at 99,570/SF, is oversized given the trend in the market to reduce space in retail stores, such as the subject, to approximately 55,000 SF.

2. The subject building, constructed in 1964, is at the end of its useful life. The 46-year-old building has a remaining life of about ten years.

3. The location of the subject is near the city line of Bridgeport, implying a negative connotation to the location.

4. The location of the receiving and shipping portion of the building is located near the front of the building. It is common for shopping centers to have receiving and shipping in the rear.

5. Periodic flooding occurring at the rear of the building results from drainage problems. Therefore, store inventory must be kept off the floor on pallets.

6. The total accrued depreciation attached to the subject property is 80% considering that the economic life of the building will end in 2020, when the Kohl's lease expires.

7. The economy was still in recession in 2010. The negative trend began in 2007 and is called "the Great Recession."

8. The location of a nearby car wash hinders the visibility of the subject to oncoming traffic.

Wellspeak, the town's appraiser, concluded that there was a lack of sales in Fairfield County comparable to the subject. He relied on the cost approach and the income approach to arrive at the fair market value of the subject, as of October 1, 2010. In contrast to Leary, who viewed the subject in a negative light, Wellspeak found the following benefits to the subject:

1. The subject property does not look like a rundown building which would attract deep discount stores like Ocean State Job Lot. Renovations have been made over the years that include a new facade and interior improvements, roof replacements in 2004 and 2007 and the installation of solar panels in 2013.

2. Although the subject is located near the Bridgeport city line, the nearby area of Bridgeport is one of the nicest neighborhoods in the city with mainly single-family homes.

As Wellspeak noted: "[T]he neighborhood is not as strong a retail location as the Black Rock Turnpike and U.S. Route 1 near and including Fairfield Center. However, it is located in a densely developed area and it represents a unique opportunity to buy or lease a large block of space in a region where such spaces are extremely rare. The neighborhood would not support the $20 (plus) per square foot net rents associated with premier large spaces in Fairfield County. However, its characteristics are certainly better than the $8 to $10 per square foot net rents associated with industrial spaces." (Defendant's Exhibit A, p. 11.)

3. Kohl's is a high-end discount department store. It is at a higher level than Walmart or Target.

4. Although traffic is important, it is more important to fast food stores than the subject.

5. The town has excellent transportation characteristics with Interstate I-95 and the Merritt Parkway (Route 15) within reasonable proximity to the subject. In addition, U.S. Route 1 intersects with Tunxis Hill Road a short distance away from the subject property.

6. Fairfield is a desirable suburban community that borders Bridgeport, Easton, Weston, Long Island Sound and Westport. Fairfield is an affluent, well-populated town with restricted zoning and higher priced land. The median household income for Fairfield County was $103,754, compared to $64,321 for the rest of the state. See defendant's Exhibit A, p. 9.

7. Kohl's lease from Tunxis Associates was at a below-market rate because it was never placed on the open market. The terms of the lease were based on negotiations that took place in bankruptcy proceedings that extended the 1999 lease from Caldor to Kohl's through August 31, 2018 (and further extended to August 31, 2020).

Both appraisers concluded that the highest and best use of the subject property, as of the date of revaluation, was its continued use as a Kohl's department store. This conclusion is about the only thing that the appraisers agreed upon. The issue here is which appraiser's opinion is most credible.

In dealing with the issue of credibility, common sense comes into play. See L & R Realty v. Connecticut National Bank, 53 Conn. App. 524, 535-36, 732 A.2d 181, cert. denied, 250 Conn. 901, 734 A.2d 984 (1999) ("In considering the evidence introduced in a case, [triers of fact] are not required to leave common sense at the courtroom door . . . nor are they expected to lay aside matters of common knowledge or their own observations and experience of the affairs of life, but, on the contrary, to apply them to the facts in hand, to the end that their action may be intelligent and their conclusions correct.") (Internal quotation marks omitted.)

As an example of a lack of common sense, Leary noted that the subject building was near the end of its life use with ten years to go before it becomes worthless. Yet, Leary used the cost approach to value the subject property when he determined that there was an 80% depreciation of the building due to the fact that the building was approaching its end use. On this point, the court in Corbin Russwin, Inc. v. Berlin, Superior Court, judicial district of New Britain, Docket No. CV 98 0492452 (July 7, 2000), rejected the appraiser's use of a 70% depreciation factor using the cost approach noting that "[t]he cost approach is generally most applicable in valuing new or relatively new construction when improvements represent the highest and best use of the site . . . and no functional or external obsolescence is evident." (Internal quotation marks omitted.)

The town's appraiser, Wellspeak, also considered the cost approach in his valuation of the subject, describing it as follows:

"The Cost Approach is based on the premise that a prudent purchaser would not pay more for a property than the cost to acquire the land and develop improvements of similar utility in a timely manner. Within this section, we will estimate the fee simple market value of the land as though vacant; estimate the replacement cost of the building and site improvements; estimate applicable soft costs and entrepreneurial profit; and deduct any accrued depreciation affecting the real estate."
(Defendant's Exhibit A, p. 24.)

It is interesting to note that Wellspeak considered, as did Leary, the subject building as over improved and that a more typical-sized building would be approximately 80,000 SF instead of the present 99,570 SF. However, computing his replacement cost new at \$7,650,000, Wellspeak used the 99,570-SF building at \$76.95/SF, not the typical-sized building at 80,000/SF.

Wellspeak, using Marshall Valuation Service, and assuming the land to be vacant, arrived at the cost to build a replacement for the subject. Here, Wellspeak fell into the same credibility problem as did Leary. Wellspeak determined that the existing building had a 50-55% depreciation and the site improvements had a 75% depreciation factor. See defendant's Exhibit A, p. 29. None of these figures generate confidence that the use of the cost approach to value the subject building is credible.

In addition to the cost approach, both appraisers used the income capitalization approach to value the subject property. As to the income approach, Leary had concluded that "the lower end of the income capitalization approach value range at contract rent, and the upper end of the income capitalization approach value range at market rent, provide the basis for an appropriate single indication of value for the property as of the effective date of appraisal." (Plaintiff's Exhibit 1, p. A-28.)

Leary further noted that "[t]he base rent for the first ten years of the lease was $525,000/year, payable monthly. In 2010, the base rent for the second ten years of the lease kicked in at $625,000 per year. This was the rent in effect on October 1, 2010. The lease also contained a percentage rent clause based on 2.0% of annual sales in excess of $20,000,000. No percentage rent has been paid by Kohl's during the life of the lease. . . ." (Plaintiff's Exhibit 1, p. A-24.)

According to Leary, the annual rent of $625,000 equates to a contract rent level of $6.28/SF of GBA ($625,000 divided by 99,570/SF). Leary concluded that market rent for the subject store, as of the effective date of the appraisal, was between $5.00 to $5.50/SF of GBA. See plaintiff's Exhibit 1, p. A-26. In other words, Leary concluded that the contract rent was higher than market rent.

Contrary to Leary's contract rent based upon the lease payments, Wellspeak, on the other hand, rejected the use of the contract rent with the following comment: "The terms of this lease are considered to be below market and were impacted by the original lease with Caldor. As the tenant benefits from a favorable leasehold position valuing the property subject to contract rents would not be appropriate for assessment purposes as it would only capture a portion of the total bundle of rights. Rather the fee simple interest is being valued using market rent for the space." (Defendant's Exhibit A, p. 18.) Wellspeak concluded that, based on his research, the market rent for the subject is $11/SF on an absolute net basis. See defendant's Exhibit A, p. 20.

Relevant to the issue in this case, is General Statutes § 12-63b (b) which provides that "in its use as a factor in any appraisal with respect to real property used primarily for the purpose of producing rental income, the term 'market rent' means the rental income that such property would most probably command on the open market as indicated by present rentals being paid for comparable space. In 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."

Two key elements of § 12-63b (b) are market rent and actual rental income generally referred to as "contract rent." In other words, an assessor in determining the fair market value of income producing real estate is required by this statute to "consider *both* [1] net rent for comparable properties, and [2] the net rent derived from any existing leases on the property . . . . Moreover, if the property is devoted to the use for which it is best adapted and is in a condition to produce or is producing its maximum income, the actual rental is a very important element in ascertaining its value." (Emphasis in original; internal quotation marks omitted.) Pilot's Point Marina, Inc. v. Westbrook, 119 Conn. App. 600, 603-604, 988 A.2d 897 (2010).[1]

In the present action, Leary treated the rental income from the Caldor-Kohl lease as the maximum income that the subject property could produce. On the contrary, Wellspeak considered the rental payments from the Caldor-Kohl lease at something less than the subject property's maximum income. Recognizing that Kohl's acquired the

---

1 In its post-trial brief, p. 10, the plaintiff notes that Leary, using the income capitalization approach based on contract rent, arrived at a value range of $6,100,000 to $6,600,000 for the property. As the plaintiff further noted, Leary also developed the value of the subject property using market rent independently. The goal of an assessor, in dealing with income producing property, is to arrive at "market rent" which means the rental income that such property would most probably command on the open market as indicated by considering the net rent derived from existing leases and present rental being paid for comparable space. See First Bethel Associates v. Bethel, 231 Conn. 731, 740-41, 651 A.2d 1279 (1995). In other words, both contract rent and market rent must be considered together, not separately, in arriving at, what the assessor must consider, "market rent." Id., 741.

Caldor lease from negotiations in Caldor's bankruptcy proceeding, it is more credible to accept Wellspeak's opinion that the Kohl's lease was obtained at below market rental rates and continued with the negotiated lease extensions up to 2020 when the lease comes to an end.

Leary's survey of market rent considered rental property taken over by deep discount stores like Ocean State Job Lots. Wellspeak's opinion, that Kohl's is more on par with a department store/discount store above the level of a Target store or a Walmart store, is the more credible.

As the court initially stated, the issue in this case is one of credibility. Weighing the income approach developed by both Leary and Wellspeak, Wellspeak's analysis is the more credible. It is, therefore, more appropriate to accept Wellspeak's valuation of the subject property, as of October 1, 2010, at $12,100,000. In "cases in which the taxpayer *has* met his initial burden of proving overvaluation . . . we have noted the trial court's discretionary authority to find value and have declined to assign presumptive validity to the town's assessment figure." (Emphasis in original.) Ireland v. Wethersfield, 242 Conn. 550, 558, 698 A.2d 888 (1997).

Since Wellspeak's valuation of $12,100,000 is approximately $2,000,000 below the assessor's valuation of $14,121,800, this difference substantiates the plaintiff's claim that it was aggrieved by the assessor's valuation placed upon the subject property, as of October 1, 2010.

With the court's finding of value of the subject property, as of October 1, 2010, at $12,100,000, judgment may enter in favor of the plaintiff, sustaining its appeal, without costs to either party.

Arnold W. Aronson
Judge Trial Referee