CV 126021301	:	SUPERIOR COURT
FLYERS THREE CORP.	:	JUDICIAL DISTRICT OF
	:	NEW BRITAIN
v.		
CITY OF GROTON	:	AUGUST 27, 2015

MEMORANDUM OF DECISION

The plaintiff, Flyers Three Corp., brings this tax appeal contesting the valuation of its real estate by the assessor for the town of Groton (town) on the Grand List of October 1, 2011 and subsequent tax years. The subject property is a self-storage facility located at 451 Bridge Street. The operative complaint is a six-count Fourth Amended Appeal, dated February 18, 2014: counts one, three and five are brought pursuant to General Statutes § 12-117; counts two, four and six are brought pursuant to General Statutes § 12-119.

The subject property contains 5.39[1] acres and is located in a heavily-concentrated commercial zoning district (CB-15). The subject site originally contained a two-story building constructed in the 1970s known as the Grossman lumber building. The building spanned over 35,000 square feet (SF) of gross building area (GBA). See plaintiff's

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The acreage includes 1.74 acres of wetlands that was purchased to meet zoning requirements for the construction of the second self-storage building. See plaintiff's Exhibit 2, p. 19.

Exhibit 2, p. 27.

The plaintiff purchased the subject property in 1996, remodeled the building in 1999 by adding more than 16,000 SF, and converted it into a 751-unit self-storage facility with both interior access climate-controlled units (728 units) and exterior access non-climate controlled units (23 units). In the year 2000, the plaintiff added an additional 4,500 SF to create a stand alone one-story self-storage building to the rear of the original building. The newer structure has 39 exterior accessed non-climate controlled units. The total GBA of the two buildings was 108,924 SF. However, the total net rentable area is 80,376 SF.

This building has an exterior of primarily concrete cinder blocks and prefabricated metal. The interior of the building includes a lobby, a retail area, surveillance system, a wet sprinkler system and elevators leading to hallways with timed lighting to provide access to the storage units. There is also a rear loading dock and an unoccupied apartment in the Grossman building.

The town's assessor determined that the fair market value of the subject property, as of the revaluation year of October 1, 2011, was $4,920,500. See plaintiff's Exhibit 7. The plaintiff's appraiser, Robert Silverstein (Silverstein), was of the opinion that the fair market value of the subject property, as of October 1, 2011, was $4,000,000.[2] See

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[2] "At trial, after receipt of more recent info concerning deferred expenses, Mr. Silverstein

plaintiff's Exhibit 2, p. 60. The town's appraiser, Patrick Lemp (Lemp) was of the opinion that the fair market value of the subject property, as of October 1, 2011, was $4,925,000. See defendant's Exhibit B, p. 1.

Both appraisers were of the same opinion that the highest and best use of the subject premises, as of October 1, 2011, was its continued use as a self-storage facility. Both appraisers also used the sales approach and the income capitalization approach for their analysis in reaching the fair market value of the subject, as of the revaluation date of October 1, 2011. However, both appraisers considered the income approach to be more reliable than the sales approach.

Using the comparable sales approach, Silverstein considered five sales (see plaintiff's Exhibit 2, pp. 33-42) occurring in various locations in Connecticut, but excluded any sales in Fairfield County as he concluded that New London County had markedly different conditions. Four out of the five sales used by Silverstein were small local stand alone facilities attractive to local buyers. Sale five contained 458 self-storage units having climate-controlled spaces, four elevators and a wet sprinkler system. It consisted of two buildings with two stories each, for a total of 64,810 SF of GBA and 54,550 SF of rentable space. See plaintiff's Exhibit 1, p. 45. Sale five sold on December 18, 2008 for $3,792,000 or 58.51/SF of GBA. See plaintiff's Exhibit 2, p. 45.

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revised his determination of [fair market value] to $3,940,000." (Plaintiff's 6/8/15 post-trial brief, p. 2.)

Silverstein, using the comparable sales approach, was concerned about the competition for self-storage units in the area. See plaintiff's Exhibit 2, p. 32. He noted that within a five-mile radius, there were nine self-storage facilities with 4,500 self-storage units. In addition, the subject's second-story layout in the Grossman building was not desirable since self-storage facilities are typically one-story. For example, Silverstein noted that the subject's second-story in the Grossman building was only 50% occupied.

Based upon a comparison of the five sales to the subject, Silverstein concluded that the fair market value of the subject was $3,900,000 or $36/SF of GBA. See plaintiff's Exhibit 2, p. 46.

Lemp concluded that the subject's fair market value, as of October 1, 2011, was $4,675,000, by relying on four sales:

1. 82 Fair Street, Norwalk, Connecticut
2. 44 Calef Highway, Lee, New Hampshire
3. 201 Concord Street, Pawtucket, Rhode Island
4. 2 Delta Drive, Pawtucket, Rhode Island

See defendant's Exhibit B, p. 38.

Lemp's analysis requires large adjustments of the comparables in order to equate to the subject property. As an example, Lemp adjusted sale one by a downward adjustment of 60%; an upward adjustment of 30% for sale two and an upward adjustment by 50% of sale three. All these adjustments reflect the difficulty in finding sales that are truly comparable to the subject as a tool to find fair market value.

In conducting his valuation process using the market sales approach, Lemp valued the "leased fee estate of the subject[.]" (Defendant's Exhibit B, p. 36.) He describes a "leased fee interest" as "[a]n ownership interest held by a landlord with the rights of use and occupancy conveyed by lease to others. The rights of the lessor (the leased fee owner) and the lessee are specified by contract terms contained within the lease." (Defendant's Exhibit B, p. 7.)

Contrary to Lemp's understanding that the valuation of the subject property should be on a leased fee estate, § 12-62a (b) requires that "[e]ach municipality shall assess all property for purpose of the local property tax at a uniform rate of seventy percent of the present and true and actual value, as determined under [§] 12-63."

General Statutes § 12-63 (a) provides as follows: "The present true and actual value of all other property[3] shall be deemed by all assessors . . . to be the fair market value thereof and not its value at a forced or act auction sale." The reference to fair market value of property has been interpreted to mean the determination of the fee simple estate value which would include the value of a leasehold estate. See Sheridan v. Killingly, 278 Conn. 252, 263 n.9, 897 A.2d 90 (2006).

Both appraisers, Silverstein and Lemp, recognize the subject property as income-

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[3] Not land classified as farm land pursuant to § 12-107c, as forest land pursuant to § 12-107d, as open space land pursuant to § 12-107e or as maritime heritage land pursuant to § 12-107g.

producing property since the main focus of the plaintiff's use of the subject is to rent or lease self-storage units to the public. It was difficult for the appraisers to find sales that were truly comparable to the subject and that would not require large adjustments to the selected sales. For this reason, both appraisers considered the income approach to be more meaningful. Although Lemp described the property rights to be appraised as a "leased fee estate" (see defendant's Exhibit B, p. 1), a review of his appraisal report clearly indicates that his valuation of the subject property, by both the sales comparison approach and the income approach, was based on fee simple market value.[4]

In regard to the valuation of rental income-producing property, General Statutes § 12-63b (a) provides, in relevant part, as follows: "The assessor . . . in any town, at any time, when determining the present true and actual value of real property as provided in [§] 12-63, which property is used primarily for the purpose of producing rental income . . . 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

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"Although the appraiser's use of the term 'lease fee title' was unusual and, perhaps, semantically misleading, the report clearly defined that term as meaning nothing more than 'ownership of the land, improvements, and all of the rights normally acquired by ownership.' Semantics aside, there is no difference between the definition of 'lease fee title' as used in the report and defined therein and the definition of a fee simple estate, which the report defined as '[a]bsolute ownership unencumbered by any other interest or estate . . . ." Grossomanides v. Wethersfield, 33 Conn. App. 511, 513-14, 636 A.2d 867 (1994).

of appraisal: (1) Replacement cost less depreciation, plus the market value of the land, (2) capitalization of net income based on market rent for similar property, and (3) a sales comparison approach based on current bona fide sales of comparable property."

As previously noted, both appraisers turned to the capitalization of net income approach to value as they recognized the limitations on the sales comparison approach. Silverstein chose the direct capitalization method noting that direct capitalization "best measures market behavior. It is developed by capitalizing the forecast net operating income by a market derived overall rate of capitalization." (Plaintiff's Exhibit 2, p. 47.) Lemp describes the income capitalization approach as follows: "The Income Capitalization Approach is a valuation technique through which projected future benefits attributable to real estate are converted to a present value indication. The estimate of market value of the subject property by the Income Capitalization Approach is conducted through direct capitalization of a stabilized operating statement." (Defendant's Exhibit B, p. 39.) The key elements in both Silverstein's and Lemp's understanding of the Income Capitalization Approach is that the fair market value of the subject is derived by capitalizing the net operating income of the subject.

As noted in PJM & Associates, LC v. Bridgeport, 292 Conn. 125, 139, 971 A.2d 24 (2009):

"The income capitalization approach to value consists of methods, techniques, and mathematical procedures that an appraiser uses to analyze a property's capacity to generate benefits (i.e., usually the monetary benefits of income and reversion) and convert these benefits into an indication of present value. . . . Under this method, § 12-63b (a) requires the use of market rent as the indicator of income. General Statutes § 12-63b (b) defines market rent as the rental income that [rental] 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. Market rent under § 12-63b (b) thus is calculated by examining the (1) net rent for comparable properties, and (2) the net rent derived from existing leases on the property." (Citations omitted; internal quotation marks omitted.)

Both Silverstein and Lemp reported that the revenue for the subject for years 2009 through 2011, obtained from the plaintiff's Profit and Loss Statements, were as follows:

2009	$846,706
2010	$871,462
2011	$802,866

See plaintiff's Exhibit 2, p. 47.

In the development of the potential gross income (PGI) of the subject as of October 1, 2011, Lemp arrived at $1,071,040, whereas Silverstein's PGI was $1,182,229 (see plaintiff's Exhibit 2, p. 54), a difference of $111,189. In the development of their

PGI, Silverstein and Lemp disagree on whether or not income received from U-Haul, a truck rental business, was to be included in the plaintiff's PGI. Silverstein excluded this income because he believed that it was unrelated to the real estate.[5] However, Lemp included the income as part of his PGI.

Lemp testified that in his long experience dealing with the valuation of self-storage facilities, the market players always considered revenue from truck rental companies as part of the income related to the real estate. Lemp referred to this type of revenue as "sticky income." The court agrees with Lemp that generating income from allowing U-Haul to place its rental trucks on the property of the plaintiff can be considered income related to the real estate. See, e.g., Pilot's Point Marina, Inc. v. Westbrook, 119 Conn. App. 600, 603, 988 A.2d 897 (2010).

Disregarding the dispute between appraisers on the treatment of income from U-Haul, the plain fact is that both are very close to what they consider to be the PGI. The presentation by Silverstein gave a very detailed explanation of how he arrived at his PGI for the first floor interior, second floor interior, exterior access and outside on-site-

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"The business also operates a U-Haul rental service. About five vehicles are typically on the site and are parked in the public access parking lot along Bridge St. Due to the access rights of the abutters over the subject site, and the location of these parking spaces between Bridge Street and those access drives, these spaces are not usable as additional outside on-site rental storage areas. As will be explained in the income approach, the commission income attributable to the truck rentals is not income to the real property." (Plaintiff's Exhibit 2, p. 26.)

storage. He arrived at a total PGI of $1,182,229. See plaintiff's Exhibit 2, p. 52. Although Silverstein stated that he excluded the U-Haul income as unrelated to the real estate, he did account for income from interior access and outside on-site storage which demonstrates why Silverstein's PGI is higher that Lemp's PGI of $1,071,040.

Lemp's vacancy and credit loss of 25% was based on "historical data and market saturation." (Defendant's Exhibit B, p. 41.) Silverstein's vacancy and credit loss of 35% resulted from a detailed review of vacancies over a period of three years and a review of the subject's competition in the area to arrive at a credible foundation for his analysis of this element of the income approach.

Defendant's Exhibit Z shows Silverstein's determination of total expenses as $272,213 and Lemp's total expenses at $243,269, a difference of approximately $29,000. The major differences are in reserves where Silverstein was at $23,053 and Lemp at $8,072, and in Payroll where Silverstein was at $50,000 and Lemp was at $60,000. Although Lemp has more experience in valuing self-storage units, in a close call, credit has to be given to Silverstein's determination of expenses. Although our goal is fair market value, actual income and expenses are important elements in determining value. On this basis, the court concludes that the total operating expenses to be used in the income approach is $272,213.

In arriving at an overall capitalization rate of 9.5%, Silverstein noted: "The rate calculated by the band of investment, 9.21%, is at the low end of the range indicated by the market, but above the national average as reported by PWC [f/n/a the Korpacz survey]. In comparison to the local comparables, the subject is generally superior in condition and of superior quality, and is operating on a stabilized basis. However, in comparison to the nationwide averages, the subject is generally inferior due to the continuing reductions in regional employment caused by the slow recovery from the recession in relation to many areas of the country, and the lower demand for the second floor units." (Plaintiff's Exhibit 2, p. 58.) Silverstein's cap rate of 9.5% is more attuned to the local economy than Lemp's cap rate of 8.5% which Lemp considered from a relatively small sample of sales. See defendant's Exhibit B, p. 44.

In the process of arriving at a capitalization rate under the Income Approach, property taxes are "not deducted as an operating expense since the intended use of the appraisal is to establish value for use in determining the appropriate tax burden. Therefore, the effective tax rate, which is the product of the town's tax rate for the 2011 Grand List times the assessment rate (70% of market value on the date of valuation), is added to the cap rate." (Plaintiff's Exhibit 2, p. 58.)

Using the cap rate of 0.0950 plus a tax load (0.70 x .02637) 0.0185, the result is a tax-loaded cap rate of 0.1135. See plaintiff's Exhibit 2, p. 58.

Taking the PGI of $1,182,229 reduced by a vacancy/collection rate of 35%

($413,780) minus operating expenses of $272,213 results in net operating income (NOI) of $496,236. Dividing the NOI by the overall cap rate of 11.35% results in a capitalized value of $4,372,123. Since both appraisers acknowledged that deferred maintenance of the subject should be accounted for and deducted from the capitalized value of $4,372,123, deducting deferred maintenance of $380,000, results in a final valuation of $3,992,123 (rounded to $4,000,000). See plaintiff's Exhibit 2, p. 59.

No evidence was introduced during the course of the trial to address the plaintiff's counts brought pursuant to § 12-119 which requires a showing that the assessor did something illegal. See Redding Life Care, LLC v. Redding, 308 Conn. 87, 105, 61 A.3d 461 (2013).

Lastly, the plaintiff claims that the 10% penalty imposed by the assessor increasing the assessment on the Grand Lists of October 1, 2012 and 2013 pursuant to § 12-63c (d) was unreasonable, arbitrary and improper. See plaintiff's 6/8/15 post-trial brief, p. 14.

Section 12-63c (a) provides, in relevant part, that "[i]n determining the present true and actual value in any town of real property used primarily for purposes of producing rental income, the assessor . . . may require in the conduct of any appraisal of such property pursuant to the capitalization of net income method, as provided in [§] 12-63b, that the owner of such property annually submit to the assessor not later than the first day of June . . . the best available information disclosing the actual rental and rental-related income and operating expenses applicable to such property. Submission of such information may be required whether or not the town is conducting a revaluation of all real property pursuant to [§] 12-62.

Section 12-63c (d) provides, in relevant part, as follows: "Any owner of such real property required to submit information to the assessor in accordance with subsection (a) of this section for any assessment year, who fails to submit such information as required under said subsection (a) or who submits information in incomplete or false form with intent to defraud, *shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year*." (Emphasis added.)

The plaintiff poses the issue here as follows: "[W]here the town has no intention of performing such an evaluation and indeed fails to do so, to penalize a taxpayer for not having submitted the Income and Expense information is improper and is not authorized by the statute. In addition, because the Town is not using the income and expense information in years when it is not performing an appraisal based on income capitalization, the Town has not been harmed or disadvantaged in any way by not receiving the income and expense data. . . ." (Plaintiff's 6/8/15 post-trial brief, p. 15.)

The plaintiff's point is that § 12-63c restricts the assessor to requiring the filing of an Income and Expense statement only to the time that the assessor was conducting an appraisal pursuant to the capitalization of net income method. As noted in PJM & Associates, LC v. Bridgeport, 292 Conn. 139, the statute "*expressly [provides]* that the assessor may require the submission of such report 'annually . . . .' General Statutes § 12-63c (a). This court simply cannot interpret the statute as *if* it limits the assessor's authority to request reports to revaluation years when the statute plainly provides otherwise." (Emphasis in original.) Similarly to § 12-55, § 12-63c grants broad authority to the assessor, in his or her role as a watchtower, to require a taxpayer of rental income-producing property to file an Income and Expense statement annually. See, e.g., Matzul v. Montville, 70 Conn. App. 442, 451, 798 A.2d 1002, cert. denied, 261 Conn. 923, 806 A.2d 1060 (2002). Under these circumstances, the assessor was authorized to require the filing of an Income and Expense statement by the plaintiff, and therefore, the assessor did not act unreasonably, arbitrarily or improperly.

Accordingly, as to the issue of valuation, judgment may enter in favor of the plaintiff, sustaining its appeal, without costs to either party. As to the issue of the penalty, the plaintiff's request for an abatement is denied.

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Arnold W. Aronson
Judge Trial Referee