

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 14-1-15 Rdev

RUTLAND EYE PHYSICIANS, LLC

FILED

v.

JAN 06 2016

TOWN OF RUTLAND BCA

VERMONT SUPERIOR COURT
RUTLAND

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This property tax appeal came before the Court for a final hearing on December 2, 2015. Appellant's Member Eitan Sobel was present on behalf of Appellant/Taxpayer Rutland Eye Physicians, LLC, a limited liability company, which was represented by Attorney William J. Bloomer. Attorney F. Rendol Barlow represented the Town of Rutland.

At the end of the hearing, the date of December 12, 2015 was set as the deadline for filing proposed findings of fact and legal memoranda. The date was subsequently extended to December 23, 2015. On December 11, Attorney Bloomer sought to withdraw based on the representation that his client wished to file its own post-trial memorandum. The Court denied the motion in an entry order of December 17, 2015 and stated that it had not read Mr. Sobel's memorandum. The Town filed its Proposed Findings of Fact and Conclusions of Law on December 14, 2015. On December 22, 2015, Attorney Bloomer filed a Renewed Motion to Withdraw, stating again that Appellant's two members wished to submit their own memorandum. On the same day, the two members of Appellant LLC filed a Motion to allow them to appear as non-attorney representatives for the purpose of filing a memorandum and simultaneously filed a lengthy memorandum. For the reasons stated in separate Entry Orders, the Court declined the motions and has not read the second memorandum submitted by Appellant's members.

Appellant challenges the Town's April 1, 2014 assessment of its property at 91 U.S. Route 7 South in the Town of Rutland, which is a .48-acre parcel with a one-story building that was formerly a branch bank building. The Town's Board of Civil Authority set the assessment at \$376,000. The Town now seeks an assessment value of \$250,000 and an equalization ratio of 100%. Appellant's position is that its value is \$150,000 based on the sale price for which Appellant bought it on March 13, 2014. Appellant claims an equalization ratio of 91.93%.

Findings of Fact

The property consists of a .48-acre parcel of land with frontage on Route 7 South in Rutland, which is the “premier” busy commercial area of greater Rutland. The 887 square foot building was built as a branch bank. It has two curb cuts on Route 7 South. The property is served by a well for water and on-site septic, although municipal water and sewer are available. There is a sizeable land area behind the building that is available for parking or other uses. The building was well built and well maintained and needing only minor repair for window trim. It has central air conditioning. The ground level is at street grade. It has a vestibule and entrance to a main lobby. The floor was in very good condition. It has a private office, a semi-private area, and a drive-up window. It has a full basement with bathroom. While suitable for branch banking, there is no evidence that its design was only usable for that purpose.

The former owner is TD Bank, a large banking organization with branches in many states. It had three branches in Rutland for some time, including one it operated on this property. It continues to have two branches in Rutland. In January of 2011, it closed this branch, and put the property on the market within a month. A For Sale sign was placed on the property, visible to drivers on Route 7, the main north-south artery through Rutland. Eitan Sobel, member of Appellant LLC, drove along Route 7 South daily on his way to work at the Rutland Regional Medical Center. For two years, he saw the For Sale sign continuously on the property. The property was vacant and unused throughout that period. The property did not sell. Mr. Sobel then called the telephone number on the For Sale sign and thereby made contact with the realtor who was operating out of Pennsylvania. A prior potential buyer had made an offer that had been withdrawn. He began negotiations, and purchased the property on March 13, 2014 in the name of Appellant, the LLC of which he and his wife are the members. The purchase price was \$150,000. After purchase, Appellant rented it out to commercial users, first one and now another. Neither tenant has used it for banking purposes.

Each year, the Vermont Tax Department Division of Property Valuation and Review (“PVR”) conducts studies in which it compares actual real property sales to listed values of those properties in order to develop an equalization ratio for each town to adjust assessments to make them fair for purposes of the statewide education tax. PVR personnel meet with the listers to determine which sales might be outliers that should not be used in the study. When PVR personnel saw the TD Bank-to-Rutland Eye Physicians LLC sale, it sent a form to the parties to the sale to verify sales information.

TD Bank returned the form and answered all the questions. Its representative verified that the buyer and seller were not family members or close friends; it did not involve a trade, like kind exchange, or debt payment; the buyer did not rent or occupy the

property before the sale; the buyer did not already own adjoining property; no back taxes or lot rent or liens were included in the sales price; no major changes were made to the property just before sale; the seller did not provide financing; the seller felt that the sale price reflected a fair market value at time of sale; no personal property was included in the sale price; and the final sales price was the result of negotiating the price. TD Bank answered one question by stating that it got an appraisal before putting the property on the market, and the appraised value was \$376,000.

After meeting with the listers, PVR excluded the sale from the equalization study. No one from PVR testified, so it is not known whether the exclusion was based solely on the discrepancy between the appraisal and the sales price, or whether it was based largely on other information and opinions from the listers. In any event, based on excluding the sales information, PVR initially determined the Town's equalization ratio for commercial property to be 91.93% and its overall ratio to be 97.71%. The Town appealed the equalization decision and PVR held a hearing. At the conclusion of the hearing in April of 2015, PVR granted the Town's appeal and recalculated the commercial equalization ratio based on adjusting the sales price of an entirely different property (Red Roof Inn). The outcome was that PVR increased the Town's commercial property equalization ratio for 2014 to 100% and the Town's overall equalization ratio to 100.31%.

Appellant argued that the equalization ratio should be 91.93% because that is the figure published for 2014 by PVR in its Annual Report for Fiscal Year 2015, prepared January 1, 2015, but the credible evidence is that the final figures for both the 2014 Rutland commercial property and overall property equalization ratios are 100% if rounded to the nearest whole number. This was the result of the appeal to PVR that was not concluded until April of 2015, after the date of publication of the report.

The property was initially listed in the 2014 grand list at \$535,000. Appellant, who had bought it three weeks before the valuation date for \$150,000, grieved, and the listers lowered the assessment to \$419,800. On appeal to the BCA, the assessment was lowered to \$376,000. The factors relied on by the BCA were "the pre-sale appraisal, the good condition of the building, and the lack of challenge to the grand list value by the seller."

Howard Burgess is an experienced Lister in Rutland and has been familiar with the real estate market over many years. He testified that his opinion is that the value of the property as of April 1, 2014 was \$250,000.¹ He placed little weight on the sales price

¹ It is unknown whether this opinion was reached before or after the listers determined a value of \$419,800 or the BCA put a value of \$376,000 on the property. Mr. Burgess was one of two listers at the BCA hearing. At that time, the listers defended the value of \$419,800 they had placed on the property at the grievance to the listers.

because he concluded that TD Bank did not use an experienced local realtor familiar with commercial property values in the Rutland community, and because it could not be sold to another bank. He also concluded that it was in the nature of a liquidation sale by a large company looking to rid itself of surplus assets.

Thomas Vickery, the Town's expert, is an experienced self-employed appraiser with various certifications and much experience with municipal assessments. He has historic familiarity with the Rutland market and assessments. His opinion is that the building is a special purpose building for use as a bank branch, and that the highest and best use of the property is for the building to be demolished so that the property can be used for a different, non-bank commercial use that uses available municipal water and sewer facilities rather than the present on-site systems.

He placed little weight on the sales price for the following reasons: because the listing realtor was from Pennsylvania, the property was not fully exposed to the local real estate market or available to be marketed by local brokers; it is a special purpose building whose seller would not permit it to be sold for its special purpose so it could not be expected to sell for full value; and it is common for large companies that are divesting themselves of unwanted real estate assets to sell them at less than fair market value just to get rid of them. Thus, he did not use the sales price but did an independent analysis.

Mr. Vickery identified three comparable sales that he used to analyze and develop an opinion of value for the subject property:

#1) 257 North Main Street; .5-acre lot sold in March of 2014 for \$307,000

It was improved with an old car wash at the time of sale that had been there a long time and was demolished after the sale, but the buyer owns several other car washes and plans to construct a new one there. It is served by municipal water and sewer. It is a corner lot in a less desirable location than the subject property. Mr. Vickery made adjustments to the sales price based on the differences in features and his analysis indicates a value for the subject property of \$338,400.

#2) 93 Woodstock Avenue; .88-acre lot sold in March of 2013 for \$325,000

It was improved with a minimart/gas station at the time of sale that was demolished after the sale and replaced with a new Dunkin Donuts. It is served by municipal water and sewer. It is a corner lot in a less desirable location than the subject property. Mr. Vickery made adjustments to the sales price based on differences in features and his analysis indicates a value for the subject property of \$236,000.

#3) 450 Holiday Drive; .5-acre lot sold in March of 2010 for \$400,000

It was a vacant lot when sold and remains so. It is just off Route 7 South, and is served by municipal water and sewer. It is comparable in size and terrain. It is served by a traffic light, which improves its desirability. Mr. Vickery made adjustments to the sales price based on differences in features and his analysis indicates a value for the subject property of \$250,000.

Mr. Vickery placed most emphasis on sale #2 and reconciled the adjusted values of all three properties at an indicated value for the subject property of \$250,000. He placed little weight on the actual sales price.

The Town's current proposed value is based on a highest and best use as a vacant parcel with good road frontage for commercial development and based on the assumption that the present building would be demolished and a new building constructed that uses municipal water and sewer. It would cost approximately \$50,000 for a new hookup from the subject property to municipal water and sewer. All of the Town's three comparables are properties that were sold with buildings that were in fact demolished to make way for construction of a new use, or already vacant.

Appellant relies on the sales price. Its position is that the property had been on the market for over two years during which time it was advertised for sale by a For Sale sign that was visible on a busy road and included a phone number that provided access to a realtor for the seller who was ready and willing to facilitate negotiations. Appellant's evidence is that the price was negotiated according to usual business practices, that there was nothing about the relationship of the parties to the sale that was not arms-length, and that the date of sale is very close to the valuation date, less than three weeks prior to the valuation date of April 1, 2014.

The sales price so close to the valuation date is extremely strong evidence of fair market unless the evidence shows that the price reflects circumstances that interfere with the normal operations of the market. Mr. Vickery's written report, Exhibit H1, sets forth the standard very clearly:

Market Value is defined as the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: (1) buyer and seller are typically motivated; (2) both parties are well-informed or well advised, and each acting in what he or she considers his or her own best interest; (3) a reasonable time is allowed for exposure in the open market; (4) payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and (5) the price

represents the normal consideration for the property sold and unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

The Town's witnesses argue that circumstances of the sale mean that the sales price has virtually no value in determining fair market value. They did not offer evidence of any adjustments to the sale price to reflect specific features of the sale, but rejected the sales price outright, and offered into evidence opinions of market value derived independently of the sales price.

The opinion of the Town's principal expert witness was that the highest and best use of the property is to demolish the building and use the lot for future development. The basis for that opinion is unclear, since the property was in very good condition and although built for use as a branch bank, there was no evidence that it is not suitable for other commercial uses. In fact, since the sale, it has been rented to two different commercial tenants. The evidence of proceedings before the BCA (Exhibit A) do not reflect that at that time, the Town argued that the highest and best use was to create a vacant lot.

There are several additional problems with the Town's evidence. First, the Court is indirectly asked to infer from the fact that PVR treated the sale as an outlier that the sales price did not reflect market value. The Court does not find that to be a reasonable inference. PVR based its decision on information and opinions from the listers given at the time PVR did its equalization study. It is unknown to this Court what such information and opinions were and whether or not they were reliable. That PVR reached a conclusion then based on information before it at the time does not require this Court to adopt the conclusion it reached based on unknown information given at a different time and for a different purpose. At the time, the listers' opinion of value was \$419,800. The BCA set the value at \$376,000 but the Town now supports \$250,000, indicating that there were either changes in the listers' opinions over time or different opinions among listers and other Town officials. Thus it is not reasonable for this Court to accept without examination the PVR conclusion that the sale was an "outlier" that did not represent market value. This Court must make its own decision based on the evidence presented at the hearing in this case.

It can be inferred from the discrepancy between the \$376,000 appraisal referred to on the PVR Sales Verification Form and the \$150,000 sales price that the sales price was too low to represent market value. However, the Court cannot give much evidentiary value to the fact that there was a \$376,000 appraisal obtained by TD Bank before it put the property on the market in 2011. Exactly when it was done, and what the market conditions were at the time, is not in evidence. It could have been years before, in which case its evidentiary value would be low. In any case it must have been done before 2011 when the property was put on the market, which is three full years before the valuation

date. Moreover, the person who prepared the appraisal did not testify so the Court cannot evaluate the appraiser's credentials or the relevance or reliability of his or her work as it relates to value on April 1, 2014. In short, the \$376,000 value from TD Bank's prior appraisal has very little evidentiary value for the Court in this hearing in determining the value as of April 1, 2014.

On the other hand, only five months after the sale, the TD Bank representative answered questions on the PVR Sales Verification Form (Exhibit B) that, except for the appraisal issue, raised no other yellow or red flags at all indicating that the sale was not an arms-length market transaction. Most importantly, the seller's representative answered "yes" to the questions, "Was the final sales price the result of negotiating the price?" and "Do you feel that the sale price reflected a fair market value at time of sale?" This is weighty evidence supporting the position that the property was sold under circumstances of a regular market transaction. There is no reason to think that the bank's representative had any incentive to give inaccurate information in response to questions from the Department of Taxes about a sale of property in which it no longer had any interest; there is no evidence that the answers would have consequences for the bank.

Both Town witnesses minimized the effect of the sales price on the grounds that the realtor who marketed the property was not a local Rutland realtor and thus would not have had familiarity with local property values or connections with local investors. However, the evidence shows that the property was sufficiently exposed to the local market to attract the interest of anyone interested. There was a For Sale sign on it for a period of two years, making the availability of the property known to all who traveled on the busiest road in the busiest commercial part of Rutland for a lengthy period of time. The sign included accurate contact information for the realtor with authority on behalf of the seller such that negotiations could begin, as they did when Mr. Sobel contacted him. This is not a situation in which the fact that the property was on the market was hidden and unavailable to potential buyers in the Rutland market.

There is no requirement that either buyers or sellers need to have specific local knowledge in order to negotiate a price that represents an agreed-upon sales price, as long as the property is exposed on the market for a reasonable period of time and neither party is under pressure to sell or buy or unless there are other factors suggesting that normal market forces are not present. Moreover, the seller was not the realtor but TD Bank, which has long operated two branches (formerly three) in Rutland. Market values are created by the transactions of persons who participate in the market with sufficient time and knowledge. The Court does not find persuasive the argument that because the realtor was physically located out of state, the seller, a sophisticated banking corporation with long ties to the Rutland community, sold the property for a price that it would not have agreed to if its realtor were local. There is no evidence to support that opinion.

The Town's witnesses also found the sales price to have minimal value on the grounds that the property could not be sold to another bank. The only evidence on that issue is the testimony of the former manager of the TD Bank branch operated on the property that she was aware that when the bank sold properties, it generally required that the property not be used as a bank for a period of a few years. She did not know if that was the case with this sale. No evidence was introduced to show that this property was subject to such a restriction such that the sales price would not reflect the full value of the property. The parties had full opportunity for discovery, and no evidence, such as a deed or witness testimony, was introduced to show such a restriction, or if so, what it was. The exact restriction, if any, and length of time would be important in determining the difference between the sales price and unrestricted value.

The Court cannot conclude from the former manager's testimony that the sales price reflected a term of sale that means that the sales price should be ignored. While it can be inferred from her testimony that such a term might have been included, taking all circumstances into account, it can also be inferred that because the property had been on the market for such a long time without selling, TD Bank did not require such a term because the purpose of it was largely unnecessary due to the passage of time. (Three out of five years had passed without the property being used as a bank.) There is simply no evidence that was admitted that suggests that the sales price should be disregarded for this reason.

The BCA relied in part on the circumstance that TD Bank had not grieved the prior assessment of the property, finding "[t]hat is good indication that the former owner agreed with the higher grand list value." This Court does not find that inference sufficient reason to disregard the sale price. It could well have been in TD Bank's interest to allow a high value to stand in order to seek to obtain a high price upon sale while avoiding costs of grievance and appeal. The reason for TD Bank's non-appeal is unknown, but the fact that it did not appeal does not provide a basis for minimizing the evidentiary value of the actual sales price.

Finally, the Town argues that the sales price should be disregarded because it represented a liquidation price at which TD Bank wished to get rid of unwanted property. The evidence is not strong enough to support that as a reason to ignore the sales price. The Town sought to admit evidence to that effect through Mr. Vickery, but because it would have been inadmissible hearsay, any such testimony is not in evidence.² Moreover, admitted evidence supports the opposite conclusion. First is the fact that the property was

² The Court sustained Appellant's objection to the final paragraph in Mr. Vickery's written report, Exhibit H1, because it contained inadmissible hearsay. By agreement stated on the record, Exhibit H1 was admitted with the final paragraph crossed out, and the Court stated that it would not read the final crossed-out paragraph. The Court has not read it.

on the market for at least two years. This provided ample opportunity to test the market and sell at a higher price if the market warranted it. Second, the Sales Verification Form, completed by TD Bank only five months after the sale, reflects the opposite position on behalf of the seller, who affirmed that the price was a result of negotiations and that it reflected fair market value at the time of sale. This is the evidence before the Court. Mr. Vickery may have obtained other information that he used in his analysis, but there are no facts in evidence to support the proposition that the sales price represented a duress or liquidation sale.

Having analyzed all of the evidence and arguments based on that evidence, the Court finds that the highest and best use of the property as of April 1, 2014 was for commercial purposes utilizing the existing well-built and well-maintained building. Demolishing the building and replacing it was an alternate option. The Court finds that the sale that took place three weeks before the valuation date was an arms-length sale that took place after the property had been reasonably exposed in the market place for a significant period of time, and that there is no credible evidence that the price reflected circumstances that interfered with the normal operation of the market. The sales price is the best indicator of the fair market value of the property on the valuation date.

Conclusions of Law

The fair market value of a property reflects its “highest and best use.” *Scott Const., Inc. v. City of Newport Board of Civil Authority*, 165 Vt. 232, 235 (1996). In determining a property’s highest and best use, appraisers must consider its “potential and prospective” uses. 32 V.S.A. § 3481(1). “The highest and best use of property has generally been construed to refer to ‘the value of the property for its most profitable, likely, and legal use.’” *Scott*, 165 Vt. at 235 (quoting D. Stockford, *Property Tax Assessment of Conservation Easements*, 17 B.C.Env’tl.Aff.L.Rev. 823, 827 (1990)). Because appraisers must project how a property could be used in the future, the highest-and-best-use analysis depends on market and legal assumptions. *See Zurn v. City of St. Albans*, 2009 VT 85, ¶ 9, 186 Vt. 575.

“When a taxpayer grieves [a tax] assessment to the state appraiser, there is a presumption that the town’s assessment is valid.” *Vanderminden v. Town of Wells*, 2013 VT 49, ¶ 8, 75 A.3d 598. “This is a bursting bubble presumption; if the taxpayer presents any evidence that his property was appraised above fair market value, then the presumption disappears, and ‘it is up to the town to introduce evidence that justifies its appraisal.’” *Id.* (quoting *Adams v. Town of West Haven*, 147 Vt. 618, 620 (1987)).

In this case, the Town’s current proposed value is lower than the value determined by the BCA. The Court nonetheless applies the bursting bubble presumption to the Town’s current proposed assessment value of \$250,000. This value is premised on a

highest and best use designation as a vacant lot following demolition of the existing building.

Appellant has introduced sufficient evidence to overcome the presumption that attaches to the Town's value. First, the existing building was used for commercial purposes both before and after the sale on March 13, 2014, showing that actual market forces supported use of the existing building rather than demolition and creation of a vacant lot. This was sufficient to overcome the presumption with respect to highest and best use. In addition, Appellant introduced evidence of an actual sale of the property less than three weeks before the valuation date. This was sufficient to overcome the presumption with respect to fair market value.

While the Town had the responsibility to present evidence in support of its value, the burden of persuasion remained with Appellant throughout the hearing, and never shifted to the Town. See *Kruse v. Town of Westford*, 145 Vt. 368, 371–73 (1985). It became the responsibility of the Court to make a *de novo* determination of both highest and best use and the fair market value of the property. 32 V.S.A. § 4467. The goal is to ensure that property owners pay their fair share of the tax burden based on the potential of their property. *Zurn*, 2009 VT 85, ¶ 9.

The fair market value of a property is defined as “the price which 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 which combine to give property a market value.” 32 V.S.A. § 3481(1). “Common sense and practical everyday business experience are [tax appraisers’] best guides” for determining a property’s fair market value. *Potter v. Town of Clarendon*, 118 Vt. 278, 281 (1954).

Appellant has met the burden of persuasion on the issue of highest and best use. Appellant as a participant in the Rutland real estate market purchased the property and used its existing building and facilities to rent it to commercial tenants. While the Town’s expert based his opinion solely on a highest and best use designation as a vacant lot following building demolition, there were insufficient reliable facts to support that portion of his opinion.

Appellant has met the burden of persuasion on the issue of fair market value. For the reasons set forth in the Findings of Fact, the Court has found that the sales price of the March 13, 2014 sale is the best evidence of fair market value of the property on the valuation date.

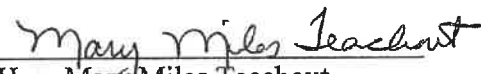
Appellant has not met the burden of persuasion on the issue of equalization ratio. The Town's evidence supporting the final 100% equalization ratio applicable to this property for the tax year 2014 has not been overcome by the Appellant's evidence.

For the foregoing reasons and pursuant to 32 V.S.A. § 4468, the fair market value for the property for 2014 is \$150,000. The equalized value is also \$150,000.

ORDER

The assessment value for Appellants' property for 2014, 2015, and 2016 is \$150,000, subject to other terms of that statute that may affect the 2015 and 2016 values.

Dated at Rutland, Vermont this 5th day of January, 2016.


Hon. Mary Miles Teachout
Superior Court Judge