Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-041

JUNE TERM, 2005

Poquette & Bruley, Inc.	}	APPEALED FROM:
	}	
	}	
v.	}	Property Valuation and Review Division
	}	
City of St. Albans	}	
	}	DOCKET NO. PVR 2003-76

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

Taxpayer Poquette & Bruley Partnership appeals from the state appraiser=s assessment of the value of its property. Taxpayer contends the appraiser erroneously relied on evidence not in the record or properly noticed. We agree, and therefore reverse and remand.

This is the second appeal in this matter. In Poquette & Bruley v. City of St. Albans, No. 2004-069 (Sept. 1, 2004) (unpub. mem.), taxpayer challenged the $687,800 value assigned by the appraiser to taxpayer=s two apartment buildings, contending that the appraiser had erred in: (1) rejecting taxpayer=s testimony as to the fair market value of the property, and (2) substituting its own values for repairs and utility expenses in place of those provided by taxpayer. We rejected the first argument, but found merit in the second. The record revealed that, in calculating fair market value under the so-called income approach, taxpayer had claimed expenses of $8141 B or 8.2% of income B for repairs, and expenses of $15,167 B or 15.3% of income B for utilities. The appraiser found that these were higher percentages than those normally incurred for single family residential units, and replaced them with figures equaling 5% of income for repairs ($4969) and 10% of income for utilities ($9939). We found the substitution to be troubling, however, observing that the appraiser had Aprovided no explanation as to why it is appropriate . . . to deduct a standard percentage of income for both repairs and utilities rather than the actual value of those repairs and utilities.@ Accordingly, we reversed the judgment and remanded for the appraiser Ato reconsider his valuation of taxpayer=s property after addressing the appropriateness of submitting standard percentages of income for repairs and utilities in calculating expenses under the income approach to valuation.@

In response to our remand, the appraiser issued a second, revised opinion setting forth an explanation for the decision to apply different figures from those submitted by taxpayer for the deduction of repair and utility expenses. The appraiser stated that

> when determining an estimate of Fair Market Value by income capitalization . . . [e]xpenses must be reflective of those for like kind properties in the market place. . . . In such instances, rents, expenses, etc that are known to be typical in the market place for like kind properties, must replace contract rents and/or actual expenses. The typical market rent, vacancy & credit loss, and expenses for various income producing properties is general knowledge among appraisers, brokers and other individuals in the appraisal community.

The appraiser further explained that in the absence of documentary evidence or expert testimony of typical expenses for like kind properties, Ageneral knowledge of what is appropriate must be relied upon.@ In that regard, the appraiser

noted that A[h]earing appeals on a continuing basis for the past ten years has provided me with that knowledge.@ The appraiser then proceeded to apply the same percentages for repair and utility expenses that he had applied in the first opinion, resulting in a similar assessed value. This appeal followed.

Under the Administrative Procedure Act, findings by the state appraiser must Abe based exclusively on the evidence and on matters officially noticed.@ 3 V.S.A. ' 809(g). The Act further provides that Anotice may be taken of generally recognized technical or scientific facts within the agency=s specialized knowledge,@ although the parties must be Anotified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed@ and must Abe afforded an opportunity to contest the material so noticed.@ Id. ' 810(4). Here, it is readily apparent that no evidence was presented to show that repair and utility expenses for like kind properties generally average five and ten percent of income, respectively, nor B assuming that the information could be judicially noticed B did the appraiser notify the parties that it intended to take judicial notice that this was typical of the market for like kind properties and afford them the opportunity to contest the point.

Nor did the appraiser inform the parties of the evidentiary basis for its fundamental assumption that, under an income approach to valuation, the expenses to be deducted must be based upon a general expense-to-income ratio rather than actual expenses, at least absent a showing that the actual expenses are atypical. Since the goal is to determine fair market value, i.e., the amount for which the property would actually sell under market conditions, it seems reasonable to conclude that actual expenses would be more relevant to market value than theoretical expenses. Thus, the appraiser should have given notice of his evidentiary basis for assuming the contrary, and should have afforded the parties an opportunity to contest that assumption.

Although, as the appraiser here noted, the Act provides that an Aagency=s experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence,@ id. ' 810(4) (emphasis added), the challenged findings here did not turn merely on the Aevaluation@ of otherwise properly admitted evidence but on substantive evidence allegedly within the agency=s Aspecialized knowledge.@ See In re Twenty-four Vt. Utils., 159 Vt. 339, 350 (1992) (Public Service Board=s recalculations of data based on its expertise Acrossed the line into evidence creation@ and thereby violated 3 V.S. A. ' 810(3), (4); In re Green Mountain Power Corp., 131 Vt. 284, 304-05 (1973) (Board erred in relying on its own knowledge that certain proposed rate schedules were below cost where it failed to notify parties of its intent to rely on the information and afford them an opportunity to contest it).

Accordingly, although we are reluctant to reverse and remand a second time, we conclude that the judgment must be reversed, and the matter remanded for the state appraiser to comply with the requirements of 3 V.S.A. ' 810.

Reversed and remanded for further proceedings consistent with the views expressed herein.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice