

STATE OF MICHIGAN
COURT OF APPEALS

BRANFORD TOWNE HOUSES COOP,

Petitioner-Appellant,

v

CITY OF TAYLOR and COUNTY OF WAYNE,

Respondents-Appellees.

UNPUBLISHED

April 19, 2007

No. 265398

Tax Tribunal

LC No. 00-090502

Before: Zahra P.J., and Bandstra and Owens, JJ.

PER CURIAM.

In this tax case, petitioner Branford Towne Houses Cooperative (Branford) appeals as of right an order and judgment assessing the true cash value of a housing cooperative for tax years 1984 to 2002. On appeal, Branford primarily challenges the tax tribunal's decision not to employ a certain valuation method (income capitalization) to assess the subject property. We affirm.

A Basic Facts and Proceedings

In its opinion and judgment, the tribunal summarized the basic facts and proceedings as follows:¹

The subject property is located within the City of Taylor and Wayne County, Michigan. The subject property is a multi-family housing complex, built in six phases during 1970 and 1971. The housing structures are one-and two-story townhouses. There are 39 buildings containing 369 townhouses. There are 54 one-bedroom townhouses, 248 two-bedroom townhouses, and 67 three-bedroom townhouses. Each townhouse has a basement. There is paved parking for the residents, however, there are no garages or carports. In addition to the housing structures, there is a maintenance garage, a community building/clubhouse and playground equipment.

¹ Neither party challenges the tribunal's summary.

All structures are located on two parcels of land: parcel nos. 60-38-99-0022-005 and 60-38-99-0030-002. Additionally, for tax years 1984-1999, the subject property includes one parcel of vacant land, consisting of 19.71 acres. In 1999, 15.257 acres of the vacant land was sold, and the remaining vacant land was split into two parcels: parcel no. 60-038-99-0030-706, consisting of .28 acres; and parcel no. 60-038-99-0030-705, consisting of 4.18 acres. Thus, for tax years 2000-2002, the subject property includes two parcels of vacant land. While the acreage reported by Petitioner and Respondent varied slightly, the Tribunal finds this variance insignificant.

Petitioner is a Michigan nonprofit corporation. Petitioner's purpose is to provide housing according to "a cooperative plan under the provisions of Section 98 through 109 and 117 through 132-A, Act No. 327 of the Public Acts of 1931, as amended." Petitioner provides cooperative housing, "in the manner and for the purposes provided in Section 236 of Title II of the National Housing Act, as amended." In other words, Petitioner provides cooperative housing for low-and moderate-income persons. To that end, Petitioner owns and operates the subject property.

Petitioner is owned by the members of the cooperative and only members of the cooperative may occupy the premises. According to the "Introduction-The Cooperative Housing Corporation, Branford Towne Houses Cooperative," "[t]he most important part of the cooperative is the individual member." To become a member, an individual or family must meet the income guidelines HUD.[] Prospective members must sign a subscription agreement. After it is determined that an individual, or family, is eligible for membership, the new member pays the "existing equity" on the unit. Members must enter into an "Occupancy Agreement," which defines a member's rights and obligations. Members in the cooperative are issued "membership certificates" as evidence of ownership. Membership gives the individual or family the right to occupy a townhouse unit. Members may sell their share in the cooperative and the right to occupy their unit. Members are responsible for electing a board of directors to govern Petitioner's affairs. The Board is composed of five people, the majority of whom must be members of the cooperative.

In addition to payment of the transfer price, members are required to pay a monthly "carrying charge." The amount of the carrying charge is approved by [The Dep't of Housing and Urban Development] HUD, pursuant to the regulatory agreements. While carrying charges are often referred to as rent, they are not the same. For example, the amount of rent charged typically includes a certain amount of landlord's profit. Because cooperatives are organized on a nonprofit basis, carrying charges do not include profit. According to Petitioner, carrying charges are a member's "fair share of operating costs of the property," including payment on the mortgages.

Petitioner obtained mortgage financing for the subject property through a federally subsidized housing program known as "Section 236" of the National

Housing Act of 1959, as amended. A separate mortgage was secured for each of the six phases of construction. Each mortgage has a 40 year term.

* * *

To obtain this financing, Petitioner was required to enter into regulatory agreements with HUD, which it did in 1970 and again in 1971. Petitioner, like other recipients of Section 236 financing, may not sell, dispose of or transfer the subject property without prior approval from HUD. Moreover, Petitioner may not prepay the mortgage obligation without prior approval from HUD. Because the parties were unable to locate a sale of a Section 236 property for which the 40 year mortgage restriction had not expired or find a property for which HUD had lifted its restrictions, the parties were unable to find sales of comparable Section 236 properties. [2005 WL 3360589, at pp 42-44 (Citations Omitted).]

In addition, the tribunal's opinion categorized the benefits and restrictions of cooperatives regulated by section 236 of the National Housing Act. See 2005 WL 3360589, at pp 42-44.

In 1984, Branford's predecessor in interest filed a petition with the tax tribunal against the City of Taylor challenging its assessment of real property taxes in regard to the subject property. The case was held in abeyance pending the Supreme Court's decision in *Meadowlanes Ltd Dividend Housing Assoc v City of Holland*, 437 Mich 473; 473 NW2d 636 (1991). Subsequently, the case was again held in abeyance pending this Court's decision in *Georgetown Place Co-op v City of Taylor*, 226 Mich App 33; 572 NW2d 232 (1997). The case was no longer held in abeyance after December of 2000.

The tribunal held ten days of hearings at which the parties presented their respective valuations. At the hearings, the parties submitted evidence in regard to the three "well recognized, traditional, and accepted methods for determining true cash value for purposes of taxation of real property: (1) market value as determined by comparable selling prices [sales comparison]; (2) reproduction cost less depreciation or the adjusted reproduction cost method [reproduction cost]; and (3) capitalization of income [income capitalization]. Michigan Civil Jurisprudence, Taxes, § 238.

The tribunal addressed the weight to be given each valuation method, stating:

While the sales [comparison method] is, in the instant case, a flawed method of valuation, after considering the appraisals, all of the facts and evidence and all relevant issues and arguments raised by the parties, the Tribunal concludes that the sales comparison method is the least flawed approach and that it provides the most accurate conclusion of the subject property's true cash value. As stated in the Findings of Fact section of this Opinion, the Tribunal utilized Petitioner's sales comparison approach, with several adjustments. [2005 WL 3360589, at p 83.]

The tribunal noted the following adjustments to Branford's sales comparison valuation:

In determining the subject property's value under the sales comparison approach, the Tribunal began with Petitioner's comparable sales. The Tribunal gave the greatest weight to comparable #2 because, like the subject property, it is a townhouse complex. Additionally, this is one of the same comparables relied on by Mr. Anderson [Respondents' assessor].

In using the sales comparable approach, the Tribunal made several changes to Mr. Tomlinson's [Branford's assessor] adjustments. First, the Tribunal finds that the garden-style apartments are inferior to townhouse-style units. Therefore, the Tribunal adjusted comparables #1 and #3 by +5% for property type because the se [sic] comparables s [sic] are garden-style apartments and not townhouses. . . . Next, the Tribunal changed Petitioner's adjustment for average unit size in recognition of the subject property's actual average unit size. Comparable #1 was adjusted by +5%, comparable #2 was adjusted by -5%, and comparable #3 was adjusted by +10%. Next, because Mr. Tomlinson's appraisal ends in the 1994 tax year, the Tribunal continued his adjustment for market conditions through the 2002 tax year. Finally, as previously discussed, the Tribunal found Petitioner's economic characteristics adjustment unsupportable. Therefore, this adjustment was eliminated.

* * *

Finally, because the discount analysis provided by each party is flawed, the Tribunal is left to weigh the positives and the negatives; the benefits and the restrictions of the financing and HUD agreements. Absent compelling evidence to the contrary, the Tribunal finds that the restriction prohibiting the sale, transfer or disposition of the subject property negatively impacts the value of the subject property and the remaining benefits and the restrictions are essentially equal and do not impact the value of the subject property. This finding is consistent with *Georgetown Place Cooperative v City of Taylor*, (Docket No. 89960, February 17, 1995). Further, because neither party provided credible evidence as to the amount of the discount for lack of marketability, the Tribunal finds that the 30% discount approved by the Court of Appeals in *Georgetown Place* is also applicable in the instant case. While the Tribunal believes that the amount of the discount should, in fact, decrease as the end of the agreement period nears, neither party provided evidence as to the rate at which the discount should decrease. Thus, the Tribunal is left to apply a 30% discount in each of the tax years at issue. [2005 WL 3360589, at p 62-63.]

B Standard of Review

Article 6, § 28 of the Michigan Constitution of 1963, specifically addresses the review of property tax valuation or allocation, and states that, “[i]n the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.” See also *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006). This Court reviews de novo questions of law, including statutory interpretation. *Id.* Also, factual findings are final if supported by “competent, material, and substantial evidence on the

whole record.” *Catalina Marketing Sales Corp v Dep’t of Treasury*, 470 Mich 13, 19; 678 NW2d 619 (2004).

Also, “[t]his Court reviews de novo questions of statutory interpretation. The primary goal of statutory interpretation is to give effect to the intent of the Legislature. In so doing, we examine the language of the statute itself. If the statute is unambiguous it must be enforced as written. *Saffian v Simmons*, ___ Mich ___; ___ NW2d ___ (2007), slip op at pp 4-5 (Citations omitted). “Only when the language is ambiguous should this Court engage in judicial construction or examine legislative history.” *City of Warren v City of Detroit*, 261 Mich App 165, 169; 680 NW2d 57 (2004).

C Analysis

Branford claims that the tribunal erred in failing to value the subject property using the income capitalization method based on actual income. We disagree.

While the phrase “present economic income” is defined in MCL 211.27(4) “for leased or rented property,” Branford, as a “nonprofit housing cooperative” is excluded from this definition. Branford, however, argues being excluded from MCL 211.27(4) as a nonprofit housing cooperative indicates that the Legislature intended its true cash value be assessed pursuant to the definition of “present economic income” as stated in *CAF Investment Co v State Tax Comm*, 392 Mich 442, 221 NW2d 588 (1974) (*CAF I*), and *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 302 NW2d 164 (1981) (*CAF II*), which would be based on Branford’s actual income.

We reject Branford’s claim that actual income must be used to assess the subject property as without merit. There is no indication that by excluding nonprofit housing cooperatives from MCL 211.27(4) the Legislature intended their true cash values be assessed pursuant to the definition of “present economic income” as stated in *CAF I* and *CAF II*. The most that can be gleaned from MCL 211.27(4) is that the Legislature either intended to clarify that nonprofit housing cooperatives were not “leased or rented property” under MCL 211.27(4), or that nonprofit housing cooperatives were not the form of “leased or rented property” to which the definition of “present economic income” in MCL 211.27(4) applied.

Further, MCL 211.27(1) does not require assessment based on a particular valuation method. MCL 211.27(1) states that, “in determining the true cash value, the assessor shall also *consider* the advantages and disadvantages of . . . present economic income of structures (Emphasis added). “Consider” is commonly defined as “to think carefully about, esp. in order to make a decision; contemplate; ponder.” Random House Webster’s College Dictionary, 2 ed. Case law verifies that no particular valuation method is required for real property assessments. Even the cases on which Branford heavily relies, *CAF I* and *CAF II*, state that: “there may be such facts, peculiar to the circumstances under consideration, as would indicate that the income capitalization approach is too speculative to be a reliable indicator of valuation. In such circumstances the tax assessor may base his assessment upon a more reliable method of valuation.” *CAF I*, *supra*, at 456; *CAF II*, *supra*, at 461.

Also, cases subsequent to *CAF I* and *CAF II* that have addressed the assessment of property financed through section 236 of the National Housing Act have stated that no particular valuation method must be used. In *Meadowlanes*, *supra*, the Supreme Court stated that “[t]he

Legislature did not direct that specific valuation methods be used.” *Id.* at 484. It further noted that the “task of approving or disapproving specific valuation methods or approaches has fallen to the courts.” *Id.* (Citation omitted.) This Court, in *Georgetown, supra*, which addressed housing cooperatives, paraphrased *Meadowlanes*, stating, “[t]here is no single correct approach to valuing federally subsidized real property.” *Id.* at 237. Indeed, the *Georgetown* court did not use the income capitalization valuation method to assess real property similar to the instant subject property. *Id.* at 237-238. Accordingly, Branford’s argument that the income capitalization method must be used to assess nonprofit housing cooperatives lacks merit.

In addition, Branford’s reliance on *CAF I* and *CAF II* is misplaced. As mentioned, in *CAF I* and *CAF II*, our Supreme Court held that the assessor improperly based the income capitalization method on market rent instead of actual income. Here, the tribunal did not employ the income capitalization method. Further, the subject properties in the instant case and *CAF I* and *CAF II* are markedly different. As the tribunal agreed:

[t]he income capitalization approach is typically used in market value appraisals of income producing properties In the income capitalization approach to value, an appraiser analyzes a property’s capacity to generate benefits (earnings) and converts these benefits into an indication of present value. Inasmuch as the property is subsidized, regulated and incorporated as a nonprofit cooperative corporation, which is prohibited from providing earnings, it is not a type that would attract an investor, nor could it be sold, assigned or conveyed for such use (or for any other purpose). [2005 WL 3360589, at p 32.]

We conclude that Branford failed to show that the tribunal erred in declining to employ the income capitalization method to assess the true cash value of the subject property.

Branford next argues that the tribunal “failed to follow the laws of mathematics.” Specifically, Branford argues that:

The tribunal claims to have based its determination of true cash value for each tax year on the sales comparables of Dan Tomlinson. The tribunal states, “[n]ext, because Mr. Tomlinson’s appraisal ends in the 1994 tax year, the tribunal continued his adjustment through the 2002 tax year.” Tomlinson testified that his adjustment for market condition was 3% per year.

In support of its contention, Branford presents a grid listing tax years 1984-1995, and the yearly percentage of increase for the combined parcels, which are consistently above 3 percent.

Generally, an issue is not properly preserved if it is not raised before and addressed and decided by the administrative tribunal. *Polkton Twp v Pellegroni*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Here, Branford did not raise this issue before the tribunal in a motion for reconsideration, and the tribunal did not address this claim of error. Accordingly, the issue is not properly preserved.

This Court’s “review is limited to determining whether a plain error occurred that affected substantial rights.” *In re Egbert R Smith Trust*, ___ Mich App ___; ___ NW2d ___ (2007), citing *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

“To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *In re Egbert R. Smith Trust, supra* (Citations omitted).

We conclude that Branford fails to establish plain error affecting substantial rights. Branford challenges the tribunal adjustments in years 1994-1995 to 2002, yet only presents its claim on the basis of previous tax years, 1984-1985 to 1993-1994. Thus, Branford has not presented facts to establish its claim. Further, Branford’s claim fails to consider that the tribunal indicated that it began its valuation relying on Tomlinson’s valuations, which ostensibly included the 3 percent market adjustment. If the tribunal then made the additional adjustments to Tomlinson’s valuations, it may account for the percentage increase that Branford challenges. Thus, Branford has not established plain error affecting its substantial rights.

Affirmed.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens