

STATE OF MICHIGAN
COURT OF APPEALS

ROSEVILLE TOWNHOUSE COOPERATIVE,

Petitioner-Appellant,

UNPUBLISHED
September 16, 2014

v

CITY OF ROSEVILLE,

No. 303816
Tax Tribunal
LC No. 00-269701

Respondent-Appellee.

Before: FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

This case involves property tax assessments for a nonprofit housing cooperative owned by petitioner Roseville Townhouse Cooperative in the city of Roseville. Petitioner appeals as of right from the Michigan Tax Tribunal’s final opinion and judgment, which adopted the proposed decision of the hearing referee who conducted an evidentiary hearing on the petition to dismiss the case on the ground that that the Tax Tribunal’s authority was not properly invoked. The hearing referee concluded that petitioner’s “evidence is insufficient to meet its primary burden to go forward with competent evidence to establish the true cash value of the subject property and . . . [p]etitioner cannot meet the ultimate burden of persuasion as required by MCL 205.727(3).” We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND AND PROCEDURAL HISTORY

Petitioner is a nonprofit corporation formed in 1964 for the purpose of constructing a nonprofit housing cooperative under § 221(d)(3) of the National Housing Act, 12 USC 17151(d)(3), to provide housing for individuals with moderate income through membership in the corporation.¹ The members receive stock shares of the corporation and make payments based on budgeted, annual expenses. As part of this federal program, the housing cooperative was also subject to a regulatory agreement, which ended in 2005.

¹ A cooperative constructed under § 221(d)(3) is subsidized by receiving below-market interest rate financing and mortgage insurance. *Georgetown Place Coop v City of Taylor*, 226 Mich App 33, 36; 572 NW2d 232 (1997).

Petitioner initially filed this action in the Tax Tribunal in July 1999 to challenge the assessed and taxable values of the property for tax year 1999. The case was held in abeyance while other cases involving nonprofit cooperative housing were resolved. Petitioner filed various motions to amend the petition to add additional tax years through 2010.

During the evidentiary hearing, the hearing referee concluded that petitioner's capitalization-of-income approach for valuing the property was not relevant and granted respondent's motion to strike documents pertaining to the approach. The hearing referee also concluded that the testimony of Ernest Gargaro, which petitioner had introduced in support of its valuation approach, was not relevant. The hearing referee found that genuine issues existed regarding whether the assessments could be supported by the sales approach to valuation used by respondent, but then later granted respondent's motion to dismiss after concluding that petitioner's "evidence is insufficient to meet its primary burden to go forward with competent evidence to establish the true cash value of the subject property and that Petitioner cannot meet the ultimate burden of persuasion as required by MCL 205.737(3)." Petitioner did not file exceptions to the hearing referee's proposed order, which the Tax Tribunal adopted as its final decision.

II. STANDARD OF REVIEW

Under Const 1963, art 6, § 28, "[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." The Tax Tribunal is required to review a hearing officer's proposed decision de novo.² *President Inn Props, LLC v City of Grand Rapids*, 291 Mich App 625, 635-636; 806 NW2d 342 (2011). The Tax Tribunal commits an error of law where its "decision is not supported by competent, material and substantial evidence on the whole record." *Forest Hills Coop v City of Ann Arbor*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 305194 and 306479, issued June 12, 2014), slip op at 6, lv pending. If there is no factual dispute or allegation of fraud, an appellate court limits its review to whether the Tax Tribunal made an error of law or adopted a wrong principle. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527-528; 817 NW2d 548 (2012). Issues of statutory construction are reviewed de novo. *Id.* at 528.

III. ORDER OF DISMISSAL

Petitioner argues that the Tax Tribunal committed an error of law and adopted a wrong principle by concluding as a matter of law that the net income of a federally regulated nonprofit

² Pursuant to MCL 205.726, "a proposed decision of a hearing officer or referee shall be considered and decided by 1 or more members of the tribunal." Former Tax Tribunal Rule (TTR) 101(1)(f), Mich Admin Code, R 205.1101(1)(f), provided that "'hearing officer' means an administrative law judge who is authorized to hear any matter assigned by the tribunal as provided in section 26 of the act." Effective March 20, 2013, the Tax Tribunal Rules were revised and set forth in Mich Admin Code, R 792.10201 *et seq.* The former rules in Mich Admin Code, Rule 205.1111 *et seq.*, were rescinded.

housing cooperative can never be a reliable indicator of true cash value. Substantively, however, petitioner presents several legal questions that go beyond the scope of the stated issue. We also note that petitioner failed to preserve these questions by filing exceptions to the hearing referee's proposed decision with the Tax Tribunal. *Forest Hills Coop*, ___ Mich App at ___, slip op at 5. But because a question of law has been raised for which the necessary facts have been presented, we shall consider petitioner's arguments. *Id.*

Preliminarily, we reject petitioner's suggestion that a nonprofit housing cooperative's actual income must be considered in determining the true cash value of the property, at least for those tax years where the cooperative was federally regulated.³ True cash value generally means fair market value. *Forest Hills Coop*, ___ Mich App at ___, slip op at 6; *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 434; 830 NW2d 785 (2013); see also MCL 211.27 (1). The highest and best use of property is a concept fundamental to a determination of true cash value because it recognizes that "the use to which a prospective buyer would put the property will influence the price that the buyer would be willing to pay for it." *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 408; 576 NW2d 667 (1998).

MCL 211.27(1) lists several factors that must be considered by an assessor in determining true cash value, including the "present economic income of structures." Based on this Court's decision in *Forest Hills Coop*, ___ Mich App at ___, slip op at 13, actual income, and not the statutory definition of "present economic interest" in former MCL 211.27(4),⁴ is a consideration because the property in this case, like the housing cooperative constructed under § 236 of the National Housing Act at issue in *Forest Hills Coop*, is not "leased or rented property," regardless of whether it was subject to federal regulations.

Nonetheless, the Tax Tribunal's duty is to determine a valuation approach that most accurately reflects the property's value. *Forest Hills Coop*, ___ Mich App at ___, slip op at 6. No particular valuation method is required. *Id.*, slip op at 14; see also *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 484; 473 NW2d 636 (1991) ("[t]he Legislature did not direct that specific methods be used"). Therefore, the Tax Tribunal was not required to use actual income or, more particularly, to apply a capitalization-of-income approach using actual income to determine value in this case.

Turning to petitioner's claim that the Tax Tribunal incorrectly determined that the net income of a federally-regulated nonprofit housing cooperative is never a reliable indicator of true cash value, we find no basis for relief. Although the hearing referee broadly stated conclusions

³ The time for determining a property assessment is December 31 of the year immediately preceding the tax year. MCL 211.2(2). The assessed value of property is generally 50 percent of its true cash value. See MCL 211.27a(1); *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 416; 576 NW2d 667 (1998). The taxable value of property reflects limits on property tax increases established by Proposal A of 1994, which amended Const 1963, art 9, § 3. *Mich Prop, LLC*, 491 Mich at 528-529.

⁴ Subsection (4) of MCL 211.27 was redesignated as subsection (5) by 2013 PA 162.

regarding the net income of federally-regulated nonprofit housing cooperatives, it is clear that the hearing referee considered petitioner's specific evidence regarding its actual income and expenses in reaching his decision. Considered as a whole, it is apparent that the hearing referee's reliability assessment was actually directed at the capitalization-of-income approach presented by petitioner.

The traditional capitalization-of income approach to value "measures the present value of the future benefits of property ownership by estimating the property's income stream and its resale value (reversionary interests) and then developing a capitalization rate which is used to convert the estimated future benefits into a present lump-sum value." *Meadowlanes Ltd Dividend Housing Ass'n*, 437 Mich at 485 n 20. The underlying premise of this approach is that the property's value relates to how much the property can earn, and not the owner's occupancy of the property. *Forest Hills Coop*, ___ Mich App at ___, slip op at 10, citing *Antisdale v City of Galesburg*, 420 Mich 265, 276-277 n 1; 362 NW2d 632 (1984).

The hearing referee found that petitioner's approach treated the property as "a conventional apartment complex that happens to charge below market rates, that incurs atypically high operating expenses, and that is required to maintain larger than typical reserve accounts." The hearing referee also determined that petitioner was inappropriately treating the property as investment property. Because the hearing referee did not merely hold as a matter of law that net income is an unreliable indicator of value, but rather found its use in petitioner's particular proposed capitalization-of-income approach to be unreliable, we conclude that the petitioner has not established any basis for relief based on the hearing referee's findings. Regardless of whether some form of valuation could be crafted to use net income as a reliable value-influencing factor, the hearing referee did not commit an error of law or adopt a wrong principle in concluding that petitioner's particular valuation approach did not do so. "It is the Tax Tribunal's duty to determine what approaches are useful in providing the most accurate valuation under the individual circumstances of the case." *Meadowlanes Dividend Ltd Housing Ass'n*, 437 Mich at 485.

Nonetheless, we agree with petitioner that dismissal was improper for the failure of its proofs. We do not agree with petitioner that the dismissal order constituted an implicit affirmance of the assessment for each tax year. Under former TTR 111(4), Mich Admin Code, R 205.1111(4), now R 792.10215, where an applicable rule does not exist, the Michigan Court Rules and the Administrative Procedures Act, MCL 24.271 to 24.287, govern. Former TTR 247(4), Mich Admin Code, R 205.1247(4), now R 792.10231(4), provided that the "[f]ailure of a party to properly prosecute the appeal, comply with these rules, or comply with an order of the tribunal is cause for dismissal of the appeal or for the scheduling of a default hearing for the respondent." Further, this Court has long recognized that the Tax Tribunal is empowered to dismiss a petition for failure to comply with a tribunal rule or order. *Stevens v Bangor Twp*, 150 Mich App 756, 761; 389 NW2d 176 (1986).

Under MCR 2.504(B)(3), unless otherwise specified in the order of dismissal, an involuntary dismissal operates as an adjudication on the merits unless the dismissal is for lack of jurisdiction or the failure to join a party under MCR 2.205(B). Because this case was not dismissed for lack of jurisdiction, it operates as an adjudication on the merits. See *Makowski v Towles*, 195 Mich App 106, 108; 489 NW2d 133 (1992) (a dismissal ordered on motion of a

party after judicial consideration may operate as an adjudication on the merits). Whether the Tax Tribunal committed an error of law depends on whether dismissal was a lawful disposition for the failure of petitioner's proofs.

In this regard, we note that while the Tax Tribunal's final judgment states that the hearing referee's "determination that the Tribunal's authority was not properly invoked is supported by the applicatory statutory and case law," the hearing referee's substantive decision was based on the burden of proof imposed on a petitioner, and not some procedural deficiency such as a failure to file a valuation disclosure. The hearing referee rejected petitioner's valuation approach and struck petitioner's evidence in support of that approach as irrelevant. The hearing referee then stated that "[p]etitioner's evidence is insufficient to meet its primary burden to go forward with competent evidence to establish the true cash value of the subject property and that Petitioner cannot meet the ultimate burden of persuasion as required by MCL 205.737(3)."

The hearing referee committed an error of law in concluding that dismissal was a proper disposition for the failure of petitioner's proofs. MCL 205.737(3) provides that "[t]he petitioner has the burden of proof in establishing the true cash value of property." At the same time, "[a] proceeding before the tribunal is original and independent and is considered de novo." See MCL 205.735(2) (proceedings commenced before January 1, 2007) and MCL 205.737a(2) (proceedings commenced after December 31, 2006). These provisions have been reconciled and construed as imposing a burden on the petitioner to establish true cash value, while at the same time imposing a duty on the Tax Tribunal to independently determine true cash value. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 409. As this Court explained in *President Inn Props, LLC*, 291 Mich App at 631:

The burden of proof encompasses two concepts: "(1) the burden of persuasion, which does not shift during the course of the hearing; and (2) the burden of going forward with the evidence, which may shift to the opposing party." *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 354-355; 483 NW2d 416 (1992). Nevertheless, because Tax Tribunal proceeding are de novo in nature, the Tax Tribunal has a duty to make an independent determination of true cash value. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 409. Thus, even when a petitioner fails to prove by the greater weight of the evidence that the challenged assessment is wrong, the Tax Tribunal may not automatically accept the valuation on the tax rolls. *Id.* at 409. Regardless of the method employed, the Tax Tribunal has the overall duty to determine the most accurate valuation under the individual circumstances of the case. *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 485-486, 502; 473 NW2d 636 (1991).

It has also been stated that this burden of proof requires the petitioner to "prove by the greater weight of the evidence that the disputed assessment was too high based on the Tax Tribunal's findings of true cash value." *Forest Hills Coop*, ___ Mich App at ___, slip op at 7. Where the respondent attempts to establish a true cash value that is higher than the original assessment, the Tax Tribunal may impose a burden of proof on the respondent to establish that the original assessment was too low. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 409 n 409 n 5. And in making its determination of true cash value, the Tax Tribunal considers both

the burden of proof and the reliability and weight of the evidence presented to it. *Id.* at 410. The Tax Tribunal may reject both parties' theories of valuation. *Id.* at 406. It may also "adopt the assessed valuation on the tax rolls as its independent finding of true cash value when competent and substantial evidence supports doing so, as long as it does not afford the original assessment presumptive validity." *Pontiac Country Club*, 299 Mich App at 435-436. If the petitioner's proofs fail, the Tax Tribunal is still required to make an independent determination of true cash value. *Jones & Laughlin Steel Corp*, 193 Mich App at 355.

In this case, petitioner did go forward with evidence to present its valuation approach. The hearing referee's decision to strike the valuation evidence as irrelevant, after finding it to be an unreliable indication of value, was authorized by former TTR 283(1), Mich Admin Code, R 205.1283(1) [now R 792.10255(5)], which permits the tribunal to exclude "irrelevant, immaterial or unduly repetitious evidence." But the Tax Tribunal did not make a determination of the true cash value of the property. Although the hearing referee found "genuine issues as to whether the current assessments are supported by the sales approach," the issue was never resolved. Thus, we conclude that the Tax Tribunal committed an error of law by adopting the hearing referee's proposed order to dismiss the petition without any independent determination of true cash value. Accordingly, we reverse the order of dismissal and remand for further proceedings. If necessary, the Tax Tribunal may reopen proofs to make legally supported determinations regarding the true cash value of the property and any related issues for the relevant tax years. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 433.

IV. EXPERT TESTIMONY

Petitioner also argues that the Tax Tribunal committed an error of law and adopted a wrong principle by refusing to allow its expert witness, Daniel Tomlinson, to offer testimony regarding capitalization rates to support its capitalization-of-income approach, or to at least rebut the capitalization rates used in respondent's capitalization-of-income approach. We note again that petitioner failed to preserve this issue by filing exceptions to this decision by the hearing referee. *Forest Hills Coop*, ___ Mich App at ___, slip op at 5. But review is appropriate to the extent that a question of law has been raised for which the necessary facts have been presented. *Id.*

The hearing referee determined that "[t]he testimony of Mr. Tomlinson, even if admissible under TTR 283(3), is not relevant, and, therefore, shall be excluded under TTR 283(1)." As indicated earlier, former TTR 283(1) permits the Tax Tribunal to exclude "irrelevant, immaterial, or unduly repetitious evidence." Because the hearing referee did not commit an error of law or adopt a wrong principle in determining that petitioner's valuation approach was unreliable and irrelevant, we conclude that the decision not to allow Tomlinson to provide testimony in support of the capitalization rates used in the valuation does not constitute an error of law or adoption of a wrong principle.

And while respondent also prepared a capitalization-of-income approach to value,⁵ the hearing referee found that respondent adopted a sales-comparison approach as support for its ultimate contention of value and that there were genuine issues regarding whether this approach, with appropriate discounts, could support the assessments. We find nothing to indicate that the hearing referee found that respondent's proposed capitalization-of-income approach to value the property had any greater reliability than petitioner's approach. In light of this record, petitioner has not demonstrated any relevant rebuttal purpose of Tomlinson's testimony. Therefore, we find no basis for relief. Const 1963, art 6, § 28; *Mich Props, LLC*, 491 Mich at 527-528.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Elizabeth L. Gleicher

/s/ Amy Ronayne Krause

⁵ Although the city assessor's testimony at the evidentiary hearing indicated that an income approach was used for assessment purposes and the ALJ found evidence tending to show that the current assessments were based on an income approach, we note that respondent's valuation disclosure contains values under the capitalization-of-income approach that differ from the assessment amounts.