

STATE OF MICHIGAN
COURT OF APPEALS

EASTWICK SQUARE TOWNHOUSE
COOPERATIVE,

UNPUBLISHED
August 12, 2014

Petitioner-Appellant,

v

No. 309538
Tax Tribunal
LC No. 00-269883

CITY OF ROSEVILLE,

Respondent-Appellee.

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Petitioner is a cooperative residential housing complex located in Roseville, Michigan. Petitioner initiated this action in 1999 to challenge its 1999 property tax assessment, and later was allowed to add challenges to the assessments for tax years 2000 to 2011. In an order dated February 25, 2011, a hearing referee rejected petitioner's proposed income-capitalization approach to valuation and, accordingly, granted partial summary disposition to respondent with respect to petitioner's claims based on that approach, without prejudice to petitioner offering other competent evidence of value to challenge the disputed assessments. Later, after petitioner failed to come forward with additional evidence or a different legal theory with respect to valuation, the hearing referee granted respondent's motion for dismissal. The Tax Tribunal later issued a final opinion and judgment adopting the referee's proposed order as its final decision. Petitioner appeals as of right. We affirm.

Petitioner owns a housing development built between 1964 and 1966, consisting of 19 buildings and 100 individual one- and two-bedroom townhouse-style apartments. The development was originally intended to provide housing for low-income residents and was subsidized by the federal government with a 40-year low interest loan that expired in 2005.

Petitioner's valuation disclosure included proposed true cash values for each tax year in question based on petitioner's proposed "income valuation approach," under which petitioner calculated the development's annual revenue, deducted its expenses to arrive at a net operating income for each tax year, and then made adjustments by factoring in a "capitalization rate." Petitioner's proposed true cash values of the property for the tax years at issue were substantially lower than respondent's assessed values. Petitioner's proposed values ranged from a low of \$194,493 in 2008 to a high of \$752,108 in 2002.

Respondent considered both a sales-comparison approach and an income approach to valuation and concluded that the sales-comparison approach was the most reliable indicator of value for the property. Respondent's valuations ranged from \$1,934,000 in 1999 to \$3,650,000 in both 2006 and 2007.

Respondent moved to preclude petitioner from relying on or offering evidence based on its proposed income approach to valuation because that method is based on the investment value of property, which respondent argued was inappropriate for petitioner's property because of the federal subsidies petitioner received and the nonprofit, regulated nature of the development. The hearing referee agreed with respondent and barred petitioner from relying on its proposed income-capitalization approach to valuation. The referee granted partial summary disposition to respondent under MCR 2.116(C)(10) with respect to petitioner's claims based on its proposed income-capitalization approach, but ruled that petitioner would be "permitted the opportunity to go forward with competent admissible evidence to prove that the subject property has been assessed in excess of 50% of TCV [true cash value]."

When it became apparent at a later hearing that petitioner did not intend to offer additional evidence with regard to valuation, the hearing referee granted respondent's motion to dismiss. The hearing referee's proposed order states:

The Tribunal's Order entered February 25, 2011, partially granted summary disposition, dismissing Petitioner's main legal theory that the income approach to value must be applied using the actual income and expenses of a nonprofit housing cooperative. That Order left open the possibility that Petitioner could present evidence at the hearing to meet its burden of proof based on other evidence in the record, such as by demonstrating flaws or inaccuracies in the property record cards. At the hearing, Petitioner made it clear that its case rested entirely on the proofs and legal theory in its valuation disclosure, which the Tribunal had previously found to be inadequate as a matter of law in this and other cases. . . .

Upon consideration of the Tribunal's Orders entered February 25, 2011 (Order Partially Granting Respondent's Motion for Summary Disposition and Order Granting Respondent's Motion to Strike Certain Testimony and Documentary Evidence), the record of the November 22, 2011 hearing, the pleadings, legal briefs, arguments made in open court, and the entire case file, it is determined 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).

The Tax Tribunal later issued an order adopting the hearing referee's proposed order as its final decision.

I. THE INCOME-CAPITALIZATION APPROACH

Petitioner first argues that the Tax Tribunal erred in ruling that it was not permitted to prove the true cash value of its property using the income-capitalization approach. We find no error.

Our review of Tax Tribunal decisions is limited, As summarized in *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010):

The standard of review of Tax Tribunal cases is multifaceted. If fraud is not claimed, this Court reviews the Tax Tribunal's decision for misapplication of the law or adoption of a wrong principle. We deem the Tax Tribunal's factual findings conclusive if they are supported by "competent, material, and substantial evidence on the whole record." But when statutory interpretation is involved, this Court reviews the Tax Tribunal's decision de novo. [Citations omitted.]

In this case, the tribunal determined that respondent was entitled to partial summary disposition under MCR 2.116(C)(10). The tribunal's decision to grant summary disposition is subject to de novo review. *Briggs Tax Serv*, 485 Mich at 75. A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

MCL 205.737(1) provides that "[t]he tribunal shall determine a property's taxable value pursuant to section 27a of the general property tax act, 1893 PA 206, MCL 211.27a." The tribunal is required to select the most accurate valuation method under the circumstances of the individual case. *Antisdale v City of Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984); see also *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 353; 483 NW2d 416 (1992).

In *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 389-390; 576 NW2d 667 (1998), this Court explained:

The Tax Tribunal is under a duty to apply its expertise to the facts of a case in order to determine the appropriate method of arriving at the true cash value of property, utilizing an approach that provides the most accurate valuation under the circumstances. *Antisdale v City of Galesburg*, 420 Mich 265, 277; 362 NW2d 632 (1984); *Jones & Laughlin Steel Corp, supra* at 353. True cash value is synonymous with fair market value. *Id.* The burden of proof is on the petitioner to establish true cash value. *Id.* However, proceedings before the Tax Tribunal are original and independent and are considered de novo pursuant to MCL 205.735(1) The Tax Tribunal has a duty to make its own, independent determination of true cash value. *Oldenburg [v Dryden Twp, 198 Mich App 696,] 699; [499 NW2d 416 (1993);] Teledyne Continental Motors v Muskegon Twp, 163 Mich App 188, 193; 413 NW2d 700 (1987).* The Tax Tribunal is not bound to accept the parties' theories of valuation. It may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in

arriving at its determination of true cash value. *Jones & Laughlin Steel Corp*, *supra* at 356.

The three most common approaches for determining true cash value are the capitalization-of-income approach, the sales-comparison or market approach, and the cost-less-depreciation approach. *Id.* at 353. However, variations of these approaches and entirely new methods may be useful *if found to be accurate and reasonably related to fair market value*. *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland*, 437 Mich 473, 485; 473 NW2d 636 (1991). Regardless of which approach is used, the value determined by the Tax Tribunal must be the usual price for which the property would sell. *Id.*; *Samonek v Norvell Twp*, 208 Mich App 80, 84; 527 NW2d 24 (1994); *Jones & Laughlin Steel Corp*, *supra* at 353; see also MCL 211.27 The task of approving or disapproving specific valuation methods or approaches has fallen to the courts because the Legislature did not direct that specific methods be used. *Meadowlanes Ltd Dividend Housing Ass'n*, *supra* at 484. [Emphasis added.]

We conclude that the Tax Tribunal did not err in determining that petitioner's proposed income-capitalization approach was not an accurate method for valuing petitioner's property.

Petitioner contends that no prior published decision from either this Court or the Michigan Supreme Court precludes the tribunal from considering the income-capitalization approach in cases involving federally subsidized housing cooperatives and that MCL 205.737(1) required the tribunal to consider all cases individually. Initially, we note that in *Meadowlanes*, 437 Mich at 494-501, the Michigan Supreme Court held that subsidies received from the federal government for low-income housing were properly considered when valuing property for tax purposes. That decision effectively overruled this Court's earlier decision in *Pinelake Housing Co-op v City of Ann Arbor*, 159 Mich App 208, 222, 226-228; 406 NW2d 832 (1987), which held that federal subsidies are not subject to property taxes and therefore approved use of the income-capitalization method for determining the value of a housing cooperative. See also, generally, *Forest Hills Co-op v Ann Arbor*, ___ Mich App ___; ___ NW2d ___; 2014 WL 2619586 (2014), slip op at 14-16.

In *Georgetown Place Co-op v City of Taylor*, 226 Mich App 33, 46-47; 572 NW2d 232 (1997), this Court, citing *Meadowlanes*, 437 Mich at 502, held that the tribunal did not err in relying on a market-sales approach to value subsidized property when "[t]here is no single correct approach to valuing federally subsidized real property." This Court stated:

After rejecting the cooperative approach to valuation, the *Meadowlanes* Court directed that the three traditional approaches and variants thereof should be used in valuing the property both as private apartments and as federally subsidized housing. *Id.* Other approaches are also acceptable if they are demonstrated to be accurate and reasonably related to the fair market value of the subject property. *Id.* "[T]he final estimate of true cash value must represent the physical real estate and all the interests, benefits, and rights inherent in ownership of the subject real property." *Id.* [*Georgetown Co-op*, 226 Mich App at 47.]

Petitioner argues that the tribunal should not have rejected its proposed income-capitalization approach for use in cases involving subsidized housing. It is clear that the tribunal is obligated to determine which approach is most “accurate and reasonably related to fair market value” for each individual property. *Great Lakes Div of Nat’l Steel Corp*, 227 Mich App at 390. In *Meadowlanes*, the Court described the sales-comparison approach as follows:

The sales-comparison approach indicates true cash value by analyzing recent sales of similar properties, comparing them with the subject property, and adjusting the sales price of the comparable properties to reflect differences between the two properties. [*Meadowlanes*, 437 Mich at 485 n 19.]

The Court explained the income-capitalization approach as follows:

The income-capitalization approach 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. [*Id.* at 485 n 20.]

Although petitioner correctly asserts that neither this Court nor the Michigan Supreme Court have expressly rejected the income-capitalization approach as a permissible valuation method for determining the true cash value of federally subsidized property, that does not compel a conclusion that the tribunal erred in ruling that the income-capitalization approach was not an appropriate valuation method in this case. See *Forest Hills Co-op*, slip op at 14, 16. The tribunal considered petitioner’s proposed income-capitalization approach and determined that it failed to accurately account for the fair market value of petitioner’s property because it was based on reduced rental payments, not market rental rates, to determine the property’s income-producing value, resulting in an undervaluation of the property. The tribunal rejected the income-capitalization approach because it concluded, in part, that this method would be appropriate only for property intended to be purchased for its income-producing capacity. The tribunal also rejected petitioner’s argument that MCL 211.27(4)¹ required the tribunal to consider the income approach for valuing petitioner’s property. The applicability and effect of that statute is addressed in section III, *infra*. The tribunal observed that petitioner’s approach resulted in significantly different and inconsistent values for different years, ranging from \$194,493 in 2008 to \$752,108 in 2002.

In sum, the tribunal independently considered petitioner’s proposed income-capitalization approach to valuation and provided appropriate reasons for why it would not accurately and reasonably reflect the fair market value of petitioner’s particular property. Petitioner has not shown that the tribunal erred in rejecting its proposed income-capitalization approach to valuation.

¹ As amended by 2013 PA 162, effective November 12, 2013, subsection (4) of MCL 211.27 has been redesignated as subsection (5). For consistency, we use the designation (4) in this opinion.

II. DISMISSAL

Petitioner argues that the tribunal had a duty to independently determine the fair market value of its property and therefore erred when it granted respondent's motion to dismiss the action, thereby effectively "rubberstamp[ing]" the previously assessed values. We disagree.

As previously indicated, MCL 205.737(1) requires the tribunal to determine a property's taxable value pursuant to MCL 211.27a. The tribunal must determine the most accurate valuation method under the circumstances of each case. *Antisdale*, 420 Mich at 277. In the order rejecting petitioner's proposed income-capitalization approach, the referee discussed petitioner's burden to establish true cash value and the tribunal's own responsibility to make an independent determination of such value, stating:

The burden of proof in a tax matter encompasses two concepts: "(1) the burden of persuasion, that does not shift during the course of the hearing, and (2) the burden of going forward with the evidence, that may shift to the opposing party." *Great Lakes Division of National Steel Corp v city [sic] of Ecorse*, 227 Mich App 379, 408-409; 576 NW2d 667 (1998). While the property tax act imposes a burden on the plaintiff to establish a true cash value, it also imposes a duty on the Tax Tribunal to make an independent determination of such value. *Id.* At [sic] 410. However, the Tax Tribunal's duty to make its own independent determination of true cash value arises only when the plaintiff has met its burden of going forward with evidence. *Id.* at 410.

The Tribunal also has a duty to select the most reliable approach to value. The above analysis demonstrates that the Tribunal has determined that the sales approach, with an appropriate discount for lack of marketability, is the most reliable approach under similar facts.

In the order granting partial summary disposition, the referee ruled that while respondent was entitled to partial summary disposition with respect to petitioner's claims under its proposed income approach to valuation, petitioner should be permitted an opportunity to offer other competent evidence of value. The referee stated:

Although Petitioner has failed to go forward with competent evidence to support its contentions of value by its income approach, and Petitioner's valuation approach fails to state a claim upon which relief can be granted, there appears to be admissible evidence that could be offered to prove that the current assessments are based upon an invalid approach to value. There appear to be fact issues pertaining to the sales comparison approach. Petitioner's witness list includes Respondent's assessor and others who may have personal knowledge of the method by which the current assessments were established and alternative theories which may support the current assessments. Petitioner shall be permitted the opportunity to go forward with competent, admissible evidence to prove that the subject property has been assessed in excess of 50% of TCV.

As the party appealing its tax assessments, petitioner had the burden of establishing the true cash value; indeed, in *Jones & Laughlin*, 193 Mich App at 354-355, this Court explained that the burden of proof in challenging a property assessment is on the petitioner and that this burden consists of both the burden of persuasion and the burden of going forward with evidence. The burden of persuasion always remains with the petitioner, while the burden of going forward with evidence can switch to the opposing party. *Id.* Here, the tribunal dismissed this action because petitioner was unable to come forward with any evidence challenging the disputed assessments after the tribunal had rejected petitioner’s income-capitalization approach to valuation.

We reject petitioner’s suggestion that the tribunal was required to independently determine the true cash value of its property when petitioner failed to come forward with competent evidence challenging the assessed values of the property. We agree with respondent that such an interpretation of MCL 205.737(1) would essentially obligate the Tax Tribunal to hire its own appraiser. Instead, the tribunal’s obligation to make an independent assessment of true cash value is triggered only when the petitioner first meets its burden of going forward with evidence in support of its claim that the assessment is inaccurate. The tribunal cannot be expected to make an independent determination of true cash value where it has no competent evidence on which to base such a determination, except that provided by respondent.

The tribunal reviewed the merits of petitioner’s challenge and concluded that petitioner’s proposed valuation method was inapplicable as a matter of law as applied to petitioner’s property. The tribunal did not blindly accept respondent’s assessment—it simply never reached the point where it could evaluate competing evidence from both sides and independently determine the true cash value of petitioner’s property on the basis of the evidence presented. Respondent’s assessment was allowed to stand because petitioner did not come forward with either competent evidence or a valid legal theory in support of its challenge to the assessment. We find no error with respect to this issue.

III. MCL 211.27(4)

We reject petitioner’s argument that the Tax Tribunal incorrectly interpreted MCL 211.27(4). Petitioner contends that this statute required the tribunal to consider petitioner’s actual income and apply the income approach in determining the true cash value of petitioner’s property.²

MCL 211.27(1) provides generally that “true cash value” means the usual selling price of property at the time of assessment, “being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale.” The statute allows an assessor to consider the “present economic income of structures”

² Petitioner also mentions “a sales analysis using transfer values” but does not adequately develop this argument on appeal. See *Mudge v Macomb*, 458 Mich 87, 105; 580 NW2d 845 (1998). At any rate, we note that in *Forest Hills Co-op*, slip op at 17-18, this Court affirmed the tribunal’s rejection of a “transfer value” approach.

and the “present economic income of land if the land is being . . . put to income producing use . . .” MCL 211.27(4) provides:

As used in subsection (1), “present economic income” means for leased or rented property the ordinary, general, and usual economic return realized from the lease or rental of property negotiated under current, contemporary conditions between parties equally knowledgeable and familiar with real estate values. The actual income generated by the lease or rental of property is not the controlling indicator of its true cash value in all cases. This subsection does not apply to property subject to a lease entered into before January 1, 1984 for which the terms of the lease governing the rental rate or tax liability have not been renegotiated after December 31, 1983. *This subsection does not apply to a nonprofit housing cooperative subject to regulatory agreements between the state or federal government entered into before January 1, 1984. As used in this subsection, “nonprofit cooperative housing corporation” means a nonprofit cooperative housing corporation that is engaged in providing housing services to its stockholders and members and that does not pay dividends or interest upon stock or membership investment but that does distribute all earnings to its stockholders or members.* [Emphasis added.]

We find no merit to petitioner’s argument that MCL 211.27(4) required the tribunal to use the income-capitalization approach in determining true cash value. The Michigan Supreme Court stated in *Meadowlanes*, 437 Mich at 484, that “[t]he Legislature did not direct that specific [valuation] methods be used.” In addressing housing cooperatives, this Court has stated that “[t]here is no single correct approach to valuing federally subsidized real property.” *Georgetown Co-op*, 226 Mich App at 46-47. Indeed, the income-capitalization method was not used to value the real property in *Georgetown Co-op*, which involved property similar to petitioner’s property. Petitioner’s argument that MCL 211.27(4) *requires* use of the income-capitalization method to value nonprofit housing cooperatives lacks merit. See *Forest Hills Co-op*, slip op at 13-14.

IV. PARTIAL UNCAPPING OF TAXABLE VALUE

Petitioner lastly argues that the Tax Tribunal erred by failing to address the partial uncapping of the taxable value of petitioner’s property based on transfers of some of the 100 individual units during the relevant tax years.

Under the state constitution, local government entities are prohibited from increasing the taxable value of a parcel of property each year beyond a specified percentage cap if the property has not changed hands. Const 1963, art 9, § 3. However, when property changes hands, the taxable value may be “uncapped.” *Id.* A transfer of ownership includes “[a] conveyance of an ownership interest in a cooperative housing corporation, except that portion of the property not subject to the ownership interest conveyed.” MCL 211.27a(6)(j).

The uncapping issue was identified as a potential issue during preliminary proceedings in this case. The tribunal directed the parties to exchange information specifying the transfer of ownership interests for each tax year at issue and the methodology used for calculating allocated values for purposes of determining taxable values. However, there is no indication that either

party later pursued the uncapping issue. At the final hearing, the parties were asked to “state on the record what the posture of this case is” and neither party indicated that the issue of partial uncapping remained an issue in the case. Because the issue was not pursued below, the necessary factual record was never developed, thereby preventing this Court from addressing or deciding the issue. We therefore conclude that petitioner waived the partial uncapping issue by failing to pursue the issue before the Tax Tribunal. See, generally, *Wayne Co v Mich State Tax Comm*, 261 Mich App 174, 198; 682 NW2d 100 (2004).

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter