

STATE OF MINNESOTA
COUNTY OF WASHINGTON

TAX COURT
TENTH JUDICIAL DISTRICT
REGULAR DIVISION

The Shoppes of Woodbury Village,
Petitioner,

**ORDER DENYING
MOTION FOR AMENDED FINDINGS**

vs.

File Nos. CX-07-2880
CV-08-1506
CV-08-5768

County of Washington,
Respondent.

Dated: March 5, 2010

The Honorable Kathleen H. Sanberg, Judge of the Minnesota Tax Court, heard this Motion for Amended Findings on December 29, 2009, at the Minnesota Tax Court courtroom 210, Minnesota Judicial Center, St. Paul, Minnesota.

Larry D. Martin, Attorney at Law, L.D. Martin & Associates, Ltd., represented the Petitioner.

Jim Zuleger, Assistant Washington County Attorney, represented the Respondent.

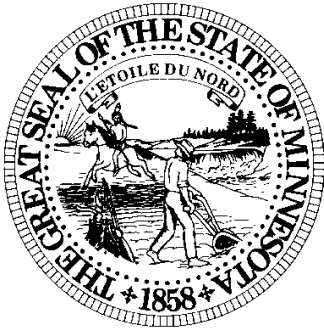
The Court, having heard and considered the evidence and upon all of the files, records and proceedings herein, now makes the following:

ORDER

1. Petitioner's Motion for Amended Findings of Fact or a New Trial is hereby denied.

2. The Decision dated November 12, 2009, is hereby corrected by deleting the following sentence from page 4: “Here, Petitioner presented sufficient evidence, through the testimony of its appraiser, to rebut the presumption.”

IT IS SO ORDERED.



BY THE COURT,

Kathleen H. Sanberg, Judge
MINNESOTA TAX COURT

DATED: March 5, 2010

MEMORANDUM

The Shoppes of Woodbury Village (“Petitioner”) moves for Amended Findings of Fact or New Trial regarding the Findings of Fact, Conclusions of Law and Order for Judgment dated November 12, 2009 (“Decision”). This is a property tax valuation case regarding a multi-tenant shopping center at 7455 Currell Boulevard, Woodbury, Minnesota (“Subject Property”) for the assessment dates January 2, 2006, 2007 and 2008. After trial and post trial briefing, we found that Petitioner had failed to establish that the Subject Property was overvalued. Thus, we found in favor of Washington County (“Respondent”) and affirmed the assessments. We turn to the statutes and rules.

Statutes and Rules

Petitioner brings its Motion under Minnesota Rules of Civil Procedure 52.02, which states the following:

Upon motion of a party served and heard not later than the times allowed for a motion for new trial pursuant to Rule 59.03, the court may amend its findings or make additional findings, and may amend the judgment accordingly if judgment has been entered. The motion may be made with a motion for a new trial and may be made on the files, exhibits, and minutes of the court. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Minn. R. Civ. P. 52.02.

Rule 52.02 is designed to allow the trial court to clarify, correct, or expand its findings. It is not to be used to seek reconsideration of the court's ruling on the findings. Rather, "[t]he purpose of a motion for amended findings 'is to permit the trial court a review of its own exercise of discretion.'" The hearing on a motion for amendment of findings is limited to the evidence on the trial record. The court may not hear new evidence or otherwise go outside the record made at trial.

A new trial may be granted, pursuant to Minnesota Rules of Civil Procedure 59.01, if:

(f) Errors of law occurring at the trial, and objected to at the time or, if no objection need have been made pursuant to Rules 46 and 51, plainly assigned in the notice of motion;

(g) The verdict, decision, or report is not justified by the evidence, or is contrary to law; . . .

Minn. R. Civ. P. 59.01(f) and (g).

An error of law must be prejudicial as well as erroneous before a new trial can be granted. Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error.

We first address an issue raised by Respondent. In property tax cases, the assessor's estimated market value is *prima facie* valid. Petitioner may overcome this presumption by introducing credible evidence as to the subject property's market value. After considering all the evidence, the Court makes a determination based on the preponderance of the evidence. Here, Respondent argues that the Court erred in disallowing the testimony of its expert and erred by affirming the County's assessment. Respondent points out that the Decision, on page 4, stated that Petitioner had overcome its *prima facie* case by the testimony of Petitioner's expert. Thus, according to Respondent, we must allow further testimony to establish value. We agree that an error was made, but we disagree on the course to be taken. The statement that Petitioner had overcome its *prima facie* case was in error. That the statement was an error is clear from our analysis and ultimate conclusion, as stated on page 4:

As discussed above, all of Mr. Boris's approaches were significantly flawed. We cannot arrive at a conclusion of value for the Subject Property using Mr. Boris's analysis. Here, Petitioner has failed to meet its burden of proof to establish that the Subject Property was over-assessed. Thus, we affirm the Washington County Assessor's estimated market value for January 2, 2006, January 2, 2007, and January 2, 2008.

We, therefore, correct the Decision by deleting the following sentence from page 4: "Here, Petitioner presented sufficient evidence, through the testimony of its appraiser, to rebut the presumption."

We turn to Petitioner's arguments on valuation.

Valuation

This is a valuation case and thus, we considered the three traditional approaches (cost, sales, and income) to determine market value as outlined in Equitable Life Assurance Society v. Ramsey County.¹ Using the different traditional approaches to determine value creates a more reliable final measure. The relative weight to be placed on each of the three traditional approaches to value depends on the nature of the property and the reliability of the data in the particular case. The Minnesota Supreme Court has repeatedly recognized that:

[r]eal estate appraisal is at best an imprecise art, and a tax court proceeding is not high-low arbitration where the decision-maker must choose the figure submitted by one or the other party. The Tax Court brings its own expertise and judgment to the hearing, and its valuation need not be the same as that of any particular expert as long as it is within permissible limits and has meaningful and adequate evidentiary support.

Petitioner's Arguments

Petitioner contends that the Court made seven errors in rendering its Decision pertaining specifically to the income approach to valuation. We will address each argument in turn.

Argument 1

Petitioner first argues that Mr. Boris properly excluded older leases from his market rent analysis. We disagree. There was no evidence that the three excluded leases were below market rates. They should have been included in the analysis. Excluding them artificially lowered the value in the income approach.

¹ 530 N.W.2d 544, 552 (Minn. 1995).

Argument 2

Petitioner's second argument is that Mr. Boris properly consulted with co-workers regarding trends in the market place and leases that they had observed. Petitioner argues that it is proper for an appraiser to conduct interviews with other professionals to confirm evidence relied upon in an appraisal or to confirm trends in the market place. While discussions with others may be appropriate to *confirm* trends, this is not what Mr. Boris did. Rather, he relied on his informal hallway discussions to *establish* the trends. Tr. at 98. He drew his equity rate from talking to investment brokers in his office. Tr. at 141. He did not testify about when these discussions took place or who he talked to. We were left in doubt as to whether the data was at market levels or was reliable. Ultimately, when included with the other flaws in Mr. Boris' analysis, we were left questioning his credibility.

Argument 3

Petitioner next argues that Mr. Boris' analysis of the vacancy of the Subject Property is not significantly flawed. Again, we disagree. Mr. Boris used a stable 10% vacancy rate for each assessment year, which is contradicted by his firm's report, the Collier's Market Report. The Collier's Report states that the vacancy rate was dropping in Washington County and was 11.2% in 2006, 8.4% in 2007 and 6.2% in 2008. Ex. 1 at 155. Further, Mr. Boris' rate was based on an "influx of new supply" of properties. These were retail properties that were either in the planning stages or under construction. Contrary to Petitioner's argument, these are not properly included in a vacancy rate as discussed in the Decision. The Court's rejection of Mr. Boris' conclusion is supported by the evidence.

Argument 4

Next Petitioner asserts that because Mr. Boris' lease evidence is taken from the Subject Property and the neighboring shopping center, the lease comparables are necessarily comparable. It is true that property next to or near the subject property should be considered in gathering comparables. Location alone, however, does not make a property a reliable comparable for a valuation analysis; it is only one factor. An appraiser must also look at other variables, such as the size, use, and age of the comparable leased property in determining whether the two properties are sufficiently similar to be used in establishing a value for a subject property. For example, a Super Target store would not be a good comparable for a nearby dry cleaner, because size and use are significantly different, even though both are retail. Here, some of the leases used by Mr. Boris were of significantly larger properties with uses that differed markedly from the Subject Property. Gold's Gym was over 20 times larger than the unit size in the Subject Property and The Tile Shop was approximately 18 times larger. Tr. at 254, 260.

Argument 5

Petitioner's fifth argument is that the capitalization rate ("cap rate") in the appraisal is derived from market evidence, is not distorted and is supported by other accepted market observations. We disagree. Mr. Boris' cap rate is contradicted by his own firm's market research, which he did not dispute. Tr. at 269. The cap rate selected by Mr. Boris was based on retail centers all of which were located outside of Washington County, even though there was data

available about retail centers located in Washington County. Further, the retail centers relied on by Mr. Boris were at least ten years older than the Subject Property (which was built in 2001 and was five years old on the first assessment date). Our finding that the cap rate was distorted is supported by the record. This argument has no merit.

Argument 6

Petitioner next argues that Mr. Boris' appraisal incorporates expense evidence that is consistent with market evidence and is supported by the actual expenses of the Subject Property. While the expenses taken from the Minnesota Leasing Guide by Mr. Boris may be supported by the actual expenses, his failure to use the actual expenses cast doubt on the reliability of his analysis under the income approach. Tr. at 153. See, The Appraisal of Real Estate, 459, 465 (13th ed. 2008).

Argument 7

Petitioner's last argument is that the addition of 50 basis points to the cap rate is an appropriate adjustment to reflect the market's attitude toward the risk associated with the burden imposed on a property with a petroleum line easement. We disagree. Mr. Boris provided no evidence to support this adjustment and admitted that he could not quantify his adjustment for the petroleum line easement. Tr. at 193.

Respondent's Renewed Argument Regarding the County Assessor

The Court excluded the testimony and appraisal report of Robin Nelson, Washington County Commercial Assessor, as a violation of Minn. Stat. § 270.41,

subd. 5. The plain meaning of the statute prohibits a licensed assessor from making appraisals or preparing an appraisal report for property within that assessor's jurisdiction except under limited circumstances. Ms. Nelson testified that the appraisal was not part of her assessment. Preparation of the appraisal did not fall within any of the limited circumstances. Thus, the Court properly excluded the appraisal and expert testimony.

Conclusion

Petitioner re-argues the same facts and same points of law considered by the Court in its Decision. We note that the determination of a fair market value is a quintessential question of fact requiring the Court to evaluate conflicting evidence and testimony and differing expert opinions. In making its original determination, the Court carefully reviewed the appraisal and evidence along with the testimony of Petitioner's expert. Our finding that Mr. Boris' income approach was fatally flawed has ample evidentiary support. We find no error of fact or law requiring a new trial or amended findings, except for the correction discussed above. We, therefore, deny Petitioner's Motion.

K. H. S.