11-1398

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

POPE PROPERTIES/CHARLESTON
LIMITED LIABILITY COMPANY,
Petitioner,

v.

Civil Action No.: 11-AA-42
Judge Louis H. Bloom

THE HONORABLE PHYLLIS GATSON,
in her capacity as Kanawha County Assessor,
Respondent.

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FINAL ORDER DENYING PETITION FOR APPEAL

On August 18, 2011, came the petitioner, Pope Properties/Charleston Limited Liability Company ("Pope Properties"), by counsel, Mark A. Sadd and James C. Stebbins of Lewis Glasser Casey & Rollins, PLLC, and The Honorable Phyllis Gatson, in her capacity as Kanawha County Assessor ("Kanawha County Assessor"), by counsel, Stephen C. Sluss of the Kanawha County Assessor's office and Karen Tracy McElhinny of Shuman McCuskey & Slicer, PLLC, for oral argument on Pope Properties' Petition for Appeal. Upon review of the administrative record below, the parties' legal memoranda filed herein, and the applicable law, the Court is of the opinion that Pope Properties' Petition for Appeal should be denied, based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Pope Properties owns 79 condominium units that are located in Country Club Village Apartments, a multi-unit building in Kanawha County. February 22, 2011, Hearing Transcript ("Hr. Tr."), p. 8.

2. The relevant part of the multi-unit building in question is organized under W.Va. Code § 36A-6-7, *et seq.*, as condominium units. Hr. Tr., p. 20. The condominium complex includes 102 condominium units. *Id.* Pope Properties is the fee simple owner of 79 units in this condominium complex while other individuals own the remaining units. Hr. Tr., p. 21.

3. Pope Properties currently rents the 79 units to others for residential purposes. Hr. Tr., p. 21. Pope Properties' condominium units at issue in this appeal have been valued as individual units by the Kanawha County Assessor's Office for many years, ever since the declaration of condominium was put on record. Hr. Tr., p. 56.

4. On February 22, 2011, Pope Properties came before the Kanawha County Commission, sitting as the Board of Review and Equalization ("Board"), to challenge the Kanawha County Assessor's assessment of those 79 condominium units. Pope Properties allege that the Kanawha County Assessor should have valued the condominium units using the income approach instead of the market data approach because Pope Properties considers the condominiums to be apartments, because Pope Properties rents the condominiums to third parties as residential tenants. Hr. Tr., generally.

5. At the underlying hearing, Pope Properties' counsel presented testimony from Steven Holmes, an appraiser who performed a verbal appraisal of Pope Properties' condominium units, but failed to provide the Board or the Kanawha County Assessor with a complete copy of the materials he considered in his appraisal. Hr. Tr., pp. 34-94. Instead, Mr. Holmes presented a computer printout showing present value calculations using one year on income and expenses, but he could not produce the raw data or the documents from which he gleaned the one year's worth of information. Hr. Tr., pp. 34-94, 88-91, 95-99, 141-145.

6. The Uniform Standards for Professional Appraisal Practice (USPAP) were made part of the record below, by agreement, and all parties agreed that they govern the appraisal in this matter. Hr. Tr., pp. 152-153; Exhibit 7.

7. Mr. Holmes failed to comply with the USPAP because he did not have a signed certification for his appraisal and he did not give the appraisal with sufficient information to enable the users of the appraisal to understand the report properly. Hr. Tr., pp. 34-94, 164-165; Exhibit 7.

Additionally, Mr. Holmes admitted that he was only alerted the day before the hearing to the fact that he would testify and give an oral appraisal. Hr. Tr., p. 105.

8. Mr. Holmes admitted that there were three sales within the 2008 to 2010 time period that involved one and two-bedroom units in the same complex that were similar to those owned by Pope Properties, but rejected those as comparable sales based solely on the fact that they were occupied by the owners and were not rented out immediately prior to their sales. Hr. Tr., pp. 52-53. Mr. Holmes admitted that these three units were nearly identical to those at issue and that they sold in 2008 to 2010 for $64,000, $78,000, and $70,000. Hr. Tr., p. 52. Further, Mr. Holmes admitted that those three comparable sales would provide a fair market value to value a single condominium. Hr. Tr., pp. 52-53.

9. The only reason presented by Mr. Holmes as to why he "suspected" that the value of the owner-occupied condominium units would be different than the identical units that had been rental property is that "if you put all seventy-nine units on the market at the same time, I suspect that the value of the units individually would change." Hr. Tr., p. 45. However, neither Pope Properties nor its retained appraiser presented any testimony suggesting that there is any statute or regulation that would have forced Pope Properties to sell all seventy-nine units as a collective unit, instead of separately. Hr. Tr., generally. Furthermore, Mr. Holmes could not cite any literature, appraiser's guide, statute, regulation, or other example that would support his opinion that you should look at the seventy-nine units combined when valuing them instead of looking at one single unit. Hr. Tr., p. 67.

10. After considering the cost approach, the income approach, and the market data approach, the Kanawha County Assessor used the direct sales comparison or market data approach because, in reviewing the information available, as well as, looking at treatment of other condominium complexes within the county, the Assessor deemed the market data approach the most appropriate methodology. Hr. Tr., pp. 112, 119, 123; Order of Board, ¶ 4.

11. Stephen Duffield, the Chief Deputy for the Kanawha County Assessor's office, testified that the Assessor's Office, in using the market data approach, considered the sales of three condominium units located in the same complex that are similar, if not identical to the subject 79 units in size and age. Hr. Tr., p. 139. Based upon the market data approach, for the 2011 tax year, the Kanawha County Assessor appraised each of Pope Properties' 16 one-bedroom condominiums to be $63,700 and each of its 63 two-bedroom condominiums to be $70,000. Hr. Tr., p. 54.

12. Pope Properties admitted there would be nothing stopping it from repudiating the condominium declaration for these units, other than if the other owners of condominiums in that same complex refused to agree. Hr. Tr., p. 129.

13. After considering the testimony presented by both parties and evaluating specifically which of the three assessment methodologies listed in West Virginia CSR § 110-1P-2.2.1 is appropriate, the Board determined that the Kanawha County Assessor did not abuse her discretion in selecting the market valuation approach. Order of Board, ¶ 7.

CONCLUSIONS OF LAW

1. "The burden of proof is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous." *Western Pocahontas Properties v. County Comm'n*, 189 W.Va. 322, 330, 431 S.E.2d 661, 669 (1993)(internal citations omitted); Syl. pt. 3, *State ex rel. Prosecuting Attorney of Kanawha County v. Bayer Corp.*, 223 W.Va. 146, 148, 672 S.E.2d 282, 284 (2008). Furthermore, the assessment and methodology of the assessor are presumed to be correct. *Bankers Pocahontas Coal Co. v. County Court*, 135 W.Va. 174, 62 S.E.2d 801 (1950)(overruled on other grounds).

2. Under W.Va. Code § 36A-7-1, each condominium unit and its proportionate undivided interest in the common elements shall be assessed and taxed for all purposes as a separate parcel of real estate entirely independent of the building or property of which the unit is a part.

3. A condominium is:

> A common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interest in the common elements is vested in the unit owners.

W.Va. Code § 36B-1-103(8). Thus, there is a legal distinction between a "condominium" and an "apartment." Pope Properties' 79 units are condominiums and not apartments.

4. The Tax Commissioner permits assessors to select any one of the following three methods to value commercial real property for *ad valorum* taxation purposes: (1) the income approach; (2) the cost approach; or (3) the market data approach. *Stone Brooke v. Sissini*, 224 W.Va. 691, 699, 688 S.E.2d 300, 308 (2009). There is no legal requirement that any one particular method be use, but only that the appraiser is to use the most accurate form of appraisal, when possible. *Id.* W.Va. C.S.R. § 110-1P-2.2.2.

5. Under W.Va. C.S.R. § 110-1P-2, "the appraised value (market value) of commercial and industrial real property is the price at or for which the property would sell if it was sold to a willing buyer by a willing seller in an arms-length transaction...." *See also* W.Va. Code § 11-1A-3(i). The regulation goes on to state that consideration of arms-length sales data of similar properties is the primary factor to consider. W.Va. C.S.R. § 110-1P-2.1.1.

6. The regulation also states that, for real property used for commercial or industrial purposes, the appraisal shall consider the following factors:

a) The location of such property;
b) Its site characteristics;
c) The ease of alienation thereof...;
d) The quantity of size of the property and the impact which its sale may have upon surrounding properties;
e) If purchased within the previous eight years, the purchase price thereof and the date of each such purchase;
f) Recent sale of, or other transactions involving, comparable property;
g) The value of such property to its owner;
h) The condition of such property;
i) The income, if any, which the property actually produces and has produced within the next preceding three (3) years;

j) And any commonly accepted method of ascertaining the market value of any such property...

W.Va. C.S.R. § 110-1P-2.1.1 (1991). However, unlike asserted by Pope Properties, it was not mandatory for the Kanawha County Assessor to consider the above factors in this case because the condominiums are residential and not commercial or industrial, and "consider" is not synonymous with "use". *See In Re: Tax Assessment Against American Bituminous Power Partners, LP*, 208 W.Va. 250, 256, 539 S.E.2d 757, 763 (2000). Also, based on the testimony below, the Kanawha County assessor did consider the other approaches, as well as other factors contained in W.Va. C.S.R. § 110-1P-2.1.1, before ultimately determining that the market data approach was the appropriate method to use to value the 79 condominiums. Furthermore, W.Va. Code § 36A-7-1, *supra*, mandates that each condominium unit must be assessed and valued as a separate unit and not as a proportion of the whole building.

7. The Kanawha County Assessor had more than ample evidence that the market data approach was appropriate. The Assessor had the sales prices of nearly identical units in the very same building in unforced sales during an arms-length transaction between willing buyers and sellers to use in determining the value of Pope Properties' property.[1] Therefore, the Court concludes that Pope Properties' failed to demonstrate by clear and convincing evidence that the Kanawha County Assessor erroneously valued the subject 79 condominium units and that the Assessor properly exercised her discretion in using the market data approach to value said units. Accordingly, the Court concludes that the Board's Order should be affirmed.

[1] The Court finds no merit to the Pope Properties' argument that the three sales of the comparable units are inapplicable because they are owner-occupied, or Class II. The Court concludes that the only difference between Class II and Class III properties is whether they are owner-occupied or not owner-occupied, which only affects the tax rate and does not affect the value. *See* W.Va. Code § 11-8-5 ("Classification of property for levy purposes").

DECISION

Based on the foregoing, the Court does hereby **ORDER** that Pope Properties' Petition for Appeal is **DENIED** and that the Board's Order is **AFFIRMED**. There being nothing further, the Court does further **ORDER** that the above-styled action be **DISMISSED** and **STRICKEN** from the docket of this Court. The objections of any party aggrieved by this Order are noted and preserved.

The Clerk is **DIRECTED** to send a certified copy of this Order to all counsel of record at the following addresses:

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

ENTERED this 19 day of September, 2011.

Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS:
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS [illegible]
DAY OF [illegible]
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA