STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

LOUIS ATKIN,

Petitioner, DECISION AND ORDER

v. INDEX No. 2004/08405
2003/08678
2002/08757

ASSESSOR AND THE BOARD OF
ASSESSMENT REVIEW OF THE TOWN
OF GREECE,

Respondent.

Prior to trial, Respondent moved to strike and preclude evidence of petitioner's appraisal of three contiguous tax parcels comprising industrial property located at 4777 Dewey Avenue in the Town of Greece. During trial, Respondent objected to admission of Petitioner's appraisal and moved to preclude the appraiser's testimony. At the close of Petitioner's case, Respondent moved to dismiss the petitions on the ground that Petitioner did not overcome the presumption of validity of the assessments with substantial evidence showing a valid dispute as to valuation. This decision rejects each application.

Respondent principally contends that Petitioner's appraiser did not appraise the three contiguous tax parcels separately, did not allocate clean-up costs to each of the three parcels separately, and that he cannot now move to amend or supplement his appraisal to meet these alleged deficiencies. Respondent's contention is based upon its reading of 22 N.Y.C.R.R. §202.59(h)

and (g)(2)-(3) together with a passage in City of New York v. Keeler, 237 N.Y. 332, 334 (1924)("validity of one assessment is independent of the validity of the other"), and the decisions in Matter of Stock v. Baumgarten, 211 A.D.2d 1008 (3d Dept. 1995); City of New York v. Assessors Town of Tompkins, 176 A.D.2d 44 (3d Dept. 1992); Alqonquin Gas Transmission Co. v. Williams, 104 A.D.2d 803 (2d Dept. 1984). Respondent gathers from these authorities an immutable rule that an appraisal which fails to separately assess each tax parcel must be excluded from evidence at trial no matter its probative value on the ultimate issue in these proceedings, i.e., "arriv[ing] at a fair and realistic value of the property involved." Matter of General Electric Co. v. Town of Salina, 69 N.Y.2d 730, 732 (1986)(quoting Great Atlantic & Pac. Tea Co. v. Kiernan, 42 N.Y.2d 236, 242 (1977)).

The language of neither RPTL §706(2) nor §202.59(g)(2)-(3) provides for such a result in so many words. Moreover, neither Matter of P.G.C. Associates, LLP v. Assessors Town of Riverhead, 270 A.D.2d 272 (2d Dept. 2000) nor Matter of Grandview Heights Association, Inc. v. Bd. of Assessors Town of Greece, 176 Misc.2d 901 (Sup. Ct. 1998) could have been decided as they were if Respondent's proposed reading of the statutes and case law stated applicable law. In P.G.C. Associates, the trial court "rejected both experts' reports on the ground that they did not contain separate appraisal reports for each of the eight parcels." Id.

270 A.D.2d at 273. Observing that "determination of market value is essentially a factual matter," the court found that the question "[w]hether to value an integrated multibuilding industrial property as a single entity or as an aggregate of several subdivided entities is essentially a factual determination of the most economically and physically feasible use of the property," and the court held that the trial court "improperly found that, since petitioner failed to produce any evidence of the value of each individual tax lot, it failed to overcome the presumption of validity that attaches to tax assessments." Id. 270 A.D.2d at 273 (emphasis supplied). Similarly, in Grandview Heights, "respondents argue[d] that petitioner's appraisal [wa]s flawed in that it fail[ed] to appraise each and every parcel at issue." Id. 176 Misc.2d at 905. The court held, however, that "on these facts where the theory of valuation (or lack of valuation) is well articulated and where appraising each parcel would be repetitious and redundant, the conclusions may be offered in one general report." Id. (citing 22 N.Y.C.R.R. 202.59(g)(3)). Accordingly, neither case could stand under the rule proposed by Respondent.

The point is that the matter cannot be determined as a matter of law. A court must review the circumstances addressed at the trial before it decides whether the property may be assessed as a single unit, as an integrated unit comprised of its

separate constituents, Matter of General Electric Co., 69 N.Y.2d at 732 ("aggregate of several subdivided entities"), or wholly individually. I am bound by the latest Court of Appeals decision on the subject, the parties not having cited a Fourth Department case on point (Matter of General Electric Co. was generated out of the Fourth Department). In any event, Matter of P.G.C. Associates and Matter of Grandview Heights is substantial authority contra to Respondent's position. So too is Matter of Ulster Bus. Complex LLC v. Town of Ulster, 293 A.D.2d 936, 938 (3d Dept. 2002), which ultimately discredited the appraisal "valu[ing] the site as a single unified property under single ownership," id. 293 A.D.2d at 939, but never suggested that the appraisal was inadmissible. Rather, the court underscored the holding of Matter of P.G.C. Associates that the question is one of fact, not law. Id. 293 A.D.2d at 939-40.

I also accept Petitioner's contention that this case is unlike Stock v. Baumgarten, 211 A.D.2d 1008 (3d Dept. 1995) and City of New York v. Assessors Town of Tompkins, 176 A.D.2d 44 (3d Dept. 1992). The latter case was an inequality case under RPTL §720(2) which, like City of New York v. Keeler, 237 N.Y. 332, 334, involved parcels "assessed separately . . . [because each] has a different ratio of assessment value to full value." City of New York v. Assessors Town of Tompkins, 176 A.D.2d at 47. As revealed in Petitioner's Reply Memorandum of Law in the trial

court in that case (reproduced at 2000 WL 35300946)(December 1, 2000), cases such as City of New York and Stock v. Baumgarten involved valuation of property, as in City of New York, within each of two school districts and several fire districts, which thus required separate assessed values to "accurately reflect only property located within the respective taxing jurisdiction." Id. 2000 WL 35300996 (Point II [C]). The petitioner in City of New York explicitly recognized the force of P.G.C. Associates, but distinguished it in part because "[t]he property in P.G.C. Associates is . . . located entirely within one town and one school district so the relative values that must be considered in the present case were not present in P.G.C. Associates." Id. 2000 WL 35300996 (Point II [C]). This case, by contrast, is governed by P.G.C. Associates.

Petitioner also makes a valid point that, given his expert proof that the marketability of each separate tax parcel is inextricably tied to the marketability of the others by reason of the contamination in the other parcels and DEC supervision of the site, and because his proof will show negative values for the combined lots, individual valuations would be an unnecessary "academic exercise" and there would be no value to allocate to each separate parcel. A similar consideration was at play in Matter of Grandview Heights, supra. Petitioner provided proof that these contiguous parcels have historically been used

together as a unified whole, that U.S. EPA and N.Y.S. DEC both regard the three parcels as a "single economic unit" such that "it is unlikely that the agencies would permit subdivision of any of the parcels and thereby permit separation of the economically valuable portion[s] of a parcel from the portion[s] requiring remediation." Dick Report, at 14-15, quoted in Foss Reply Affirmation dated Aug. 14, 2006, at ¶13. Dick testified at some length to the same effect. Although he was impeached somewhat by the fact of the subdividing off of what came to be known in the trial testimony as the carved out rectangular and donut hole areas, the timing of those subdivisions well pre-dated DEC's interest in the site by some 25 years. In any event, for the reasons stated below, consideration of the weight of Petitioner's evidence is not permissible at this stage. Accordingly, the question of severability of the parcels is one of fact under Matter of General Electric Co., 69 N.Y.2d at 731-32, and not one of law under the cases cited by Respondent.

In addition, Respondent's repeated objections to the admission of evidence concerning the cost to cure the contamination at the site have no merit. Respondent maintains that evidence of the remediation costs necessarily is tied to valuation of the parcels, and thus cannot be admitted into evidence independently of an appraisal report which complies with 22 N.Y.C.R.R. 202.59(g). Indeed, Respondent has characterized

the receipt of evidence independent of the appraisal as in the nature of sailing a rudderless ship. Finally, Respondent contends that the concept of substantial compliance with §202.59(g) is foreign to our law. On each point, the caselaw is squarely against Respondent.

First, the initial stage of a tax certiorari trial proceeds quite without consideration to the weight of the evidence. The court first must determine whether "petitioner demonstrate[s] the existence of a valid and credible dispute regarding valuation." FMC Corp. v. Unmack, 92 N.Y.2d 179, 188 (1998). "The ultimate strength, credibility or persuasiveness of petitioner's arguments are not germane during this threshold inquiry." Id. (adding that "the weight to be given to either party's evidence is not a relevant consideration at this juncture"). "[I]n answering the question whether substantial evidence exists (to rebut the presumption of validity of the assessment and thus demonstrate the existence of a valid and credible dispute regarding valuation], a court should simply determine whether the documentary and testimonial evidence proffered by petitioner is based on 'sound theory and objective data' . . . rather than on mere wishful thinking . . . 'bare surmise, conjecture, speculation or rumor.'" Id. (emphasis supplied)(quoting Matter of Commerce Holding Corp. 88 N.Y.2d 724, 732, and 300 Gramatan Ave. Assocs. v. State Div. Human Rights, 45 N.Y.2d 176, 180

(1978)). Under this regime, it would be odd to preclude petitioner from presenting any proof at this stage except upon the clearest authority. The idea is to take petitioner's proof, such as it is, and then determine whether he has met the "minimal threshold" of a genuine and valid dispute concerning valuation. Id. 92 N.Y.2d at 188. Any rejection of evidence which "entail[s] a weighing of the evidence" is not permitted at this stage. Matter of Century Realty v. Commissioner of Finance, 15 A.D.3d 652, 653-54 (2d Dept. 2005).

Quite apart from any valuation by petitioner's expert, the testimony of petitioner's environmental expert is clearly relevant. The Commerce Holding Corp. case prescribes that the court consider such factors as "the property's status as a Superfund site, the extent of the contamination, the estimated clean-up costs, the present use of the property, the ability to obtain financing and indemnification in connection with the purchase of the property, potential liability to third parties, and the stigma remaining after clean-up." Matter of Commerce Holding Corp., 88 N.Y.2d at 732. Unquestionably, Mr. Dick's testimony addresses these factors and cannot be excluded merely on the basis that his clean-up cost estimates are not, in his own testimony, tied to an accepted valuation methodology employed by a qualified appraisal expert. Similarly, Respondent's argument that the appraiser's testimony is inadmissible because there is

no overarching, or umbrella, professional discipline employed by Petitioner to tie in Dick's expertise to that of the appraiser must be rejected in light of the fact that the same "deficiency" was present in the Commerce Holding Corp. case. Kevin V. Recchia, Property Taxes: New York - Future Clean-Up Cost Reduced Value of Contaminated Realty, 7 J. Multistate Tax'n and Incentives 86 (1997)(1997 WL 1704572)(describing the proof in Commerce Holding: "owner's appraiser first valued the real estate as clean[,] [and then] [r]elying on testimony of a hydrogeologist, the appraiser determined a remediation cost, or 'cost to cure," . . . stated in present dollars").

But even if Respondent's argument that the appraisal is inadmissible had any merit, it is wrong to argue that evidence of contamination could not be received. Caselaw holds that a petitioner may satisfy his initial burden to show a genuine dispute regarding valuation quite without regard to an appraiser's report. In Matter of Gullo v. Seiman, 265 A.D.2d 656 (3d Dept. 1999), the appraisal report was held deficient yet petitioner was able to carry her burden with the testimony of the appraiser because the court determined that, notwithstanding the deficiencies, respondent was afforded an adequate opportunity to effectively prepare for cross-examination. Id. 265 A.D.2d at 657. See also, Matter of Golub Corporation/Price Chopper Operating Company, Inc. v. Assessor Town of Queensbury, 282

A.D.2d 962, 963 (3d Dept. 2001). Accordingly, the court would be bound to consider the evidence of remediation cost in any event. In Matter of Welch Foods v. Town of Portland, 187 A.D.2d 948 (4th Dept. 1992), it was held that "the nonappraisal evidence was sufficient to sustain petitioner's burden." Id. 187 A.D.2d at 948-49. Indeed, the court "agree[d] that the appraisal report contains numerous errors and deficiencies, [but found that] it substantially comports with the uniform rules." Id. 187 A.D.2d at 948 (emphasis supplied)(citing §202.59(g)(2)). Accordingly, each of Respondent's contentions identified above is without merit.

To be sure, Respondent's counsel made a substantial effort to impeach Mr. Dick and the appraiser at trial. He established that the site is not currently listed by the DEC in any of the five categories of contaminated sites maintained by that agency (although the expert insisted that the lack of a "finding" occurred by virtue of the DEC's Voluntary Cleanup Agreement ("VCA") and that Areas of Concern ("AOC") ##1-4 together with the DEC approved Work Plan constitute an implicit finding that the site represents a threat to health); that no court order exists directing the remediation; that there is no administrative consent agreement; that the only obligations on the landowner emanate from the VCA; that what remediation has occurred was performed by the Army Corps of Engineers at federal expense and

that Petitioner's engineering costs to date have been covered by environmental liability insurance; that the Army Corps has not refused to respond on any ground other than it has no current budget for the site (although the proof is that DEC will look to Petitioner as the responsible party in the absence of federal assistance at the site); that a refusal to enter into the VCA, or termination of the VCA, does not *automatically* mean that the site will be put on the DEC registry (albeit the DEC must then make a decision whether to list it and, according to Dick, has enough information now to list it as a Category 2 site threatening public health); that the notice in respect to the property filed in the County Clerk's office only mentions Parcel 2.1 (although this does not alter the expert's opinion that the VCA and site plan on file at DEC targets and therefore burdens all three parcels); that contaminated industrial properties at times do sell and not at rock bottom or "next to nothing" prices; that the marketability of an entire contaminated site is not always paralyzed by contamination on some portion of the site; that Exh. #8 does not show the present value of the remediation cost figures shown thereon (although the appraiser provided the same); that Petitioner is behind schedule on the work plan "in some respects" significantly and that this may skew the present value figure; that the work plan associated with the VCA is subject to change both in terms of scope and timing and is quite flexible,

also skewing present value figures; that at least AOC ##1, 2, 3, 5 (except in one respect), 9 (except with respect to Parcel 2.1), and 10, each, would have no physical impact on Parcel 2.2 and would "not likely" or "very not likely" affect what came to be described in the testimony as the southeast and northeast quadrants of Parcel 2.1 (although the expert maintained there would be, by virtue of DEC customary treatment of sites like these, a "transactional effect" thereon); that the contamination contemplated by AOC #7 concerning Building #1 is of a type frequently present in manufacturing facilities; that a number of the AOCs simply are only suggested by trace and other preliminary findings but have not at all been investigated yet by any party; that a prospective purchaser seeking to purchase any portion of the site most likely would not, or could not, be prevented from purchasing the same by the DEC (although the DEC must under the VCA be notified of the prospective transaction and the purchaser would have to gauge whether he or she could successfully remove the portion of the site targeted for purchase from administration of the VCA); and that there is no agreement not to subdivide contained in the VCA. There was also an effort to impeach the appraiser in areas that need not be further detailed here.

Whether this impeachment of Mr. Dick's and the appraiser's opinions ultimately was successful or instead did not materially impair their core opinions concerning the remediation costs and

ultimate value must await the second stage of a tax certiorari trial, i.e., whether petitioner ultimately has carried his burden on the valuation issue. Given that the court is disabled from considering the weight of petitioner's evidence when considering whether he has rebutted the presumption of validity of the assessments, I reserve any consideration of Respondent's impeachment efforts to the second stage of the trial. Matter of Century Realty v. Commissioner of Finance, 15 A.D.2d 652, 653-54 (2d Dept. 2005)(same evidence held sufficient to rebut presumption of validity and to present a valid dispute concerning value later held insufficient to carry petitioner's burden on ultimate valuation issue). I find that the evidence addressed by petitioner meets the "substantial evidence" standard for tax assessment cases, Matter of FMC Corp., 92 N.Y.2d at 188, and that the documentary and testimonial evidence is based on "sound theory and objective data." Commerce Holding Corp., 88 N.Y.2d at 732. That petitioner faces remediation costs at the site substantially reducing value is a matter not based "on mere wishful thinking," "'bare surprise, conjecture, speculation or rumor.'" Matter of FMC Holding Corp., 92 N.Y.2d at 188 (quoting 300 Gramatan Ave. Assoc. v. State Div. Human Rights, 45 N.Y.2d at 180). It is not necessary that Petitioner show that remediation be ordered by the court or an administrative agency in these circumstances. Bass v. Tax Com'n of City of New York, 179 A.D.2d

387 (1st Dept. 1992)(foreseeable cost to abate asbestos contamination may be considered)(cited with approval in Commerce Holding Corp., 88 A.D.2d at 732-33).

There was also during argument on the motion to strike petitioner's appraisal and during cross-examination of the appraiser a contention that, because the petitions themselves were directed to specific tax assessments made by the assessor to identified and discreet tax parcels, that the appraiser was thereby obligated to prepare reports directed to discreet tax parcels. No case is cited to support this independent proposition advanced by Respondent. On the contrary, "[t]he ultimate purpose of valuation, whether in eminent domain or tax certiorari proceedings, is to arrive at a fair and realistic value of the property involved, . . . not to arrive at a fair and realistic value of a reduction (or increase) of the assessment." Matter of Evans v. Bd. Ass'mt Town of Catskill, 284 A.D.2d 753, 755 (3d Dept. 2001)(emphasis supplied)(quoting P.G.G. Associates, 270 A.D.2d at 273). To be sure, RPTL Article 7 "empowers the court to reduce assessments [but only] 'as the value may appear,'" Id. 284 A.D.2d at 754 (quoting People ex rel. City of New York v. Keeler, 237 N.Y. at 334), thus underscoring that the ultimate inquiry is value of the property involved quite independent of the individual assessments across these parcels. The reference in Commerce Holding Corp. to flexibility of

approach thus is consistent with that court's prior precedents which hold, in a different context, that "'[p]ragmatism . . . requires adjustment when the economic realities prevent placing the properties in neat logical valuation boxes.'" Matter of Merrick Holding Corp. v. Bd. Ass. County of Nassau, 45 N.Y.2d 538, 542 (1978)(quoting G. R. F., Inc. v. Bd. Ass. County of Nassau, 41 N.Y.2d 512, 515)(adding that "categorization must yield to more exact means of arriving at value"), *quoted in* Commerce Holding Corp., 88 N.Y.2d at 731-32. See also, Matter of Great Atlantic & Pacific Tea Co., Inc. v. Kiernan, 42 N.Y.2d 236, 242 (1977)("ordinary or general rule should not blind us to the fact that the ultimate purpose of valuation, . . . , is to arrive at a fair and realistic value of the property involved"). Here, where there is alleged to be a dominant consideration affecting the value of each parcel, especially by reason of administrative action against all three and the unlikelihood of administrative severance or segregation by DEC (which is the only expert proof on the subject the court has in this trial), and the proof is not wholly conjectural, it must be considered. Matter of Grandview Heights, supra. Whether it ultimately has merit, or, to put it another way, whether the weight properly to be accorded to this evidence will carry Petitioner's ultimate burden, must await consideration during the second phase of the trial, i.e., after closing arguments and the submissions of the parties. In this

respect, of course, if the court were to find that consideration of remediation cost did not fully devalue the property taken as a whole as Petitioner maintains, thus leaving some value to be assessed as among the three parcels, there is nothing in the record which would permit a court to make an allocation of remaining value to each parcel, in which case Petitioner would not have carried his burden with respect to each petition in this consolidated trial. But if the court credits the expert proof as presented, it may grant the petitions in their entirety.

Accordingly, Respondent's motions identified above are denied, and the associated objections overruled.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: August 17, 2006
Rochester, New York