STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

JC PENNEY CO., INC.,

Petitioner,

v.

NATHAN GABBERT, ASSESSOR, AND THE BOARD OF ASSESSMENT REVIEW OF THE TOWN OF HENRIETTA, MONROE COUNTY, NEW YORK,

Respondent.

DECISION AND ORDER

Ind # 2002/8793
2003/8106
2004/8373
2005/8302

Whether the Reproduction Cost Less Depreciation Method Necessarily must be a Part of the Anyalsis

Respondent contends that, by virtue of Matter of G.R.F., Inc. v. Bd. Assessors Nassau Co., 41 N.Y.2d 512 (1977), petitioner's appraisal is unreliable because it failed to account for an adjustment to the sales comparison and income capitalization approaches by factoring in a cost approach to valuation. But the cited case only held that, on the facts there presented, which involved a recently constructed Gimbels anchor store (built in 1962; assessments at issue 1963-1972), it was appropriate for Supreme Court to "reac[h] an adjustment by . . . [using two otherwise 'incompatible theories of valuation,' i.e., the income capitalization approach proffered by petitioner and the reproduction cost theory proffered by the Town] as a factor in a balancing analysis" to arrive at a "pragmatic" assessment of value. Id. 41 N.Y.2d at 514. Furthermore, the court held that "such combinations" of "what are on their face incompatible theories of valuation . . . should be avoided where possible," id. 41 N.Y.2d at 515 (emphasis supplied), except that it may be "acceptable" in an "exceptional case" only when the party advancing the "exception . . . demonstrate[s] [it] to be legitimate in economic theory." Id. 41 N.Y.2d at 515.

Here, we are confronted with, as petitioner contends, a 20 year old property with the obvious signs of obsolescence despite some renovations, a significant distinction from the Gimbels case, which cannot be accounted for by the cost approach. Id. 41 N.Y.2d at 514 ("ignores entirely factors like functional obsolescence"). In the circumstances, respondent has not "demonstrated . . . [the] legitima[cy] in economic theory," id. 41 N.Y.2d at 515, of the use of the cost approach for any other purpose than "to set a ceiling on valuation." Id. 41 N.Y.2d at 514. It is, accordingly, not necessary to reach petitioner's alternate contention that use of the cost approach recently has been totally "eschewed . . . except for properties qualifying as 'specialties.'" Matter of Saratoga Harmen Racing, Inc. v. Williams, 91 N.Y.2d 639, 643 (1998). It is sufficient to observe that respondent had the burden to demonstrate the appropriateness of the cost approach's use for valuation, even in part, as an "exception" to the general rule, G.R.F., 41 N.Y.2d at 515, and it failed to do so. We are not here faced, as the court was in G.R.F., with single incompatible theories of valuation proffered by each side. Petitioner has adjusted the income capitalization approach with a comparable sales approach which, on the record before the court, is, for the reasons stated below, suitable for arriving at valuation of this 20 year old anchor department store.

Respondent's additional objection is that the economic considerations which produce sales and/or leases to anchor tenants substantially cheaper to them than sales or leases to the so-called in-line stores throughout the rest of a large shopping mall make them distressed sales/leases inappropriate for comparison purposes. This contention is without merit. The phenomenon is common, Alvin O. Benton, MAI, and James D. Vernor, MAI, PhD, Seeking Equity in the Ad Valoren Taxation of Anchor Department Stores, The Appraisal Journal 1, 2 (January 1997), and so long as the appraiser/assessor considers that the "symbiotic relationship between the center's developer/manager and the tenants results in a unified economic entity that generates income and creates value," and provides for a "plausible metho[d]" of "allocation . . . to a unitary asset in the hands of multiple owners," the appraiser/assessor will "ensure equity among the participants in the shopping center venture." James D. Vernor, MAI, PhD and Joseph Rabianski, PhD, Shopping Center Appraisal and Analysis, at 279, 280 (Appraisal Institute 1993). In New York, the Court of Appeals has prescribed the allocation in a manner which permits the appraiser/assessor to "reflec[t] . . . the increased rental value of the shopping center property other than the Flagship Store" occasioned by the differing marquee value "presumably, in the tax assessment of the whole shopping center property." G.R.F., 41 N.Y.2d at 514. Respondent has not shown that the Town failed to make the "presumed" allocation as among the anchor tenants and the in-line tenants, and therefore its objection to petitioner's use of comparable anchor store lease/sales without adjustment for the cost approach loses force.

The same approach to allocation was approved in Matter of Merrick Holding Corp. v. Bd of Assessors County of Nassau, 45 N.Y.2d 538 (1978), albeit in the context of a consolidated proceeding challenging the assessment of a large 29 acre shopping center complex owned by the developer (not the stores) which took into account, under the income capitalization method, leasehold bonuses "reflect[ing] the difference between the rentals payable to Merrick under long-term leases with three major tenants and the appreciably higher market rental value of the leased spaces." Id. 45 N.Y.2d at 541. The Court of Appeals upheld the use of the leasehold bonuses, but cautioned that, "in arriving at the value of the entire property, if Merrick's leases with its lesser tenants were at above market rents those should be offset against the below market rentals received from the three Flagship tenants." Id. 45 N.Y.2d at 545. The case was remanded for specific findings whether indeed the in-line tenants were charged above market rents and whether, "if so, the extent of such excess counterbalanced the below market stream of income that flowed from the three major leases to which the bonuses were applied." Id. 45 N.Y.2d at 545. Implicit in this discussion, of course, is recognition of the fact that the taxing authority cannot, at least under the income capitalization approach, insist on market rental comparables for the anchor stores while at the same time capitalizing the developer/owner's income on the basis of above market rents charged for the in-line stores.

In summary, respondent states flatly in its post-trial brief, referring to G.R.F., because the "Court of Appeals has upheld the use of . . . a blend of the cost approach and the income capitalization approach" for valuation of anchor department stores, that "this method of valuation, as contained in the Bruckner Appraisal, must be followed." For the reasons stated above, and for the additional reasons stated below in connection with respondent's other compartmentalized objections to petitioner's sales comparison and income capitalization analysis, this position is without merit. Additionally, for these same reasons, and particularly because respondent's appraiser relied on G.R.F. for the general proposition that it is always appropriate to employ a blended cost/income capitalization approach in the anchor store context, without recognizing that such an approach is the exception and "should be avoided where possible," and without even attempting to "demonstrat[e] . . . [the] legitimac[y] in economic theory" of such a blended approach in the circumstances of the case, the Bruckner Appraisal must be rejected as unreliable to the extent it employs a blended analysis employing the cost approach.

The difficulty the cited cases present for this case is that, in Merrick Holding Corp., the petitioner/owner was the developer which received rentals from the anchor and in-line mall stores, whereas in this case Marketplace Mall is divided up into taxable parcels owned by the anchor and in-line stores themselves. The desire to equalize by offsets as between anchor and in-line stores can be accomplished in a consolidated proceeding by the common landlord/owner petitioner seeking a reassessment of the entire facility as in Merrick Holding Corp. But here such equalization by offset is impossible because the proceeding is brought by only one of four anchors and no proof was presented by either side of the entire shopping center's valuation, or the allocation, if any, made by the assessor as between anchors and in-line stores. This is a common problem identified in the authoritative literature on the subject. James D. Vernor, MAI, Ph.D and Joseph Rabinski, Ph.D, Shopping Center Appraisal and Analysis, at 279 (Appraisal Institute

1993)(notwithstanding that "[a]ll the parts are essential and none can be appropriately valued separately[,] ["]nevertheless, property tax law assigns parcel identification to individual parts or owners"). Furthermore, petitioner cannot be faulted for having failed to produce such evidence because petitioner's subpoena of the assessor for that very information was quashed at respondent's behest at the outset of the trial T.M. 4-9, and esp. 6, lines 8-9. As alluded to above, respondent has adduced no proof that the allocation of value as between the anchor and in-line stores at Marketplace was other than was presumed in the cited cases and contemplated in the available literature on the subject.

Accordingly, I find that Schwaner's use of Regional Shopping Center Anchor Department Stores for comparable sales and leases is considerably more reliable as a basis for the respective sales comparison and income capitalization approaches than Bruckner's inexplicable and unadjusted use of either Free Standing Big Box stores or so-called Big Box stores coupled with another store, despite his acknowledgment in his appraisal and in his testimony that the highest and best use of the subject property was as a regional mall anchor store. T.M. 165-66, 167. I say inexplicable because Bruckner attempted a rationale for his choice of comparables in his testimony, but his explanation lacked credibility and in some instances was contrary to settled appraisal principles. E.g., T.M. 142-43 ("I felt it more appropriate to look at freestanding buildings which are not encumbered by the same issues that anchor store buildings are encountered with respect to that relationship we've been talking about here between the mall developer and the anchor department store.") See Commerce Holding Corp. v. Board of Assessors, 88 N.Y.2d 724, 729 (1996)("In view of this market-oriented definition of full value, the assessment of property value for tax purposes must take into account any factor affecting a property's marketability"); Vernor and Rabianski, supra, at 276-80; Benton and Vernor, supra, Seeking Equity in the Ad Valoren Taxation of Anchor Department Stores, The Appraisal Journal 1, 2-4 (January 1997)(faulting the assessor for failing to consider highest and best use as mall anchor store and stating that proper appraisal theory "means that the assessors should not dismiss leases, operating agreements, and other factors that could enhance or reduce the utility and value of the site"). See Matter of City of New York (Jomar Real Estate Corp., 94 A.D.2d 724 (2d Dept. 1983). Nor is the comparables selection made by Schwaner, who has considerable experience in valuing/appraising shopping center malls and anchor department stores in particular, to be faulted by reason of their location, especially in view of the national market at issue here. Benton and Vernor, supra, at 2 ("sales comparison approach used sales data for similar department store sales, but the appraiser had to search outside the local market to find comparable property sales”); FMC Corp. (Peroxygen Chemicals Div.) v. Unmack, 92 N.Y.2d 179, 189 (1998)(“Comparable properties may even lie outside of the local market of the subject property when evidence indicates that a broad regional market exists”); Matter of Great Atlantic & Pacific Tea Co., Inc. v. Kiernan, 42 N.Y.2d 236, 241-42 (1977)(“broad regional market”). See also, W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 512 (1981)(upholding an appraisal of leased premises based on “the rent which a national chain store would agree to pay on a percentage lease”). Cf., Saratoga Harness Racing Inc. v. Williams, 91 N.Y.2d 639 (1998). Nor are the age of the lease transactions troublesome because Schwaner found, in testimony that I credit, that lease rates have been stable since the 1980s, and that, if any trend is at play, it is downward by reason of the growing competition for the so-called big box power centers. Schwaner Report, at 60-72, and esp. 66.

Accordingly, I adopt and incorporate by reference petitioner’s post-trial Proposed Findings of Fact and Conclusions of Law, which is signed herewith with initialed edits.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: June 27, 2007
Rochester, New York