STATE TAX COMMISSION OF MISSOURI

PTI FEDWALKO LLC KOHLS,	)	Appeal No. 21-52001
	)	Parcel/locator No(s): 10-01-11-0002-000-045.012
	)	
	)	
Complainant(s),	)	
	)	
v.	)	
	)	
CHRISTOPHER ESTES,	)	
ASSESSOR,	)	
COLE COUNTY, MISSOURI,	)	
Respondent.	)	

DECISION AND ORDER

PTI Fedwalko LLC Kohls (Complainant) appeals the Cole County Board of Equalization's (BOE) decision determining the true value in money (TVM) of the subject commercial property as of January 1, 2021. Complainant did not produce substantial and persuasive evidence of overvaluation. The BOE's decision is affirmed.[1]

Complainant was represented by counsel, Ryan Mason. Respondent was represented by counsel, John Ruth. The evidentiary hearing was conducted on June 16,

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[1] Complainant timely filed a complaint for review of assessment. The State Tax Commission (STC) has authority to hear and decide Complainant's appeal. Mo. Const. art. X, Section 14; section 138.430.1, RSMo 2000. All statutory citations are to RSMo 2000, as amended.

2022, via WebEx. Post hearing briefs and responses were submitted and received into the record.

FINDINGS OF FACT

1. Subject Property. The subject property is located at 715 Stoneridge Parkway, Jefferson City, Cole County, Missouri. The parcel number is 10-01-11-0002-000-045.012.

2. Property Descriptions. The subject property is an owner occupied, built-to-suit retail store. The subject is improved with a one-story approximately 88,554 square-foot, big-box single-tenant retail building, located on approximately 9.42 acres of land. Of that total gross building area, approximately 80,706 square-feet is retail space, with the remaining 7,848 square-feet is a combined office and storage spaces, and 7,187 square-feet is storage mezzanine. The site has approximately 510 feet of frontage along Stoneridge Parkway. The improvements were constructed in 2007. As of January 1, 2021, the subject was 100% occupied by Kohl's.

3. Respondent's Motion to Strike Complainant's Post Hearing Reply Brief.

An Order Setting Post-Hearing Briefing Schedule was issued by the SHO setting dates for the simultaneous filing of opening briefs and response briefs. Respondent timely filed an initial brief. Complainant timely filed a response brief. Respondent filed a Motion to Strike Complainant's response. Respondent argued "By not filing an opening brief, Complainant chose not to participate in briefing, which it stated to the Hearing Officer in July 2022 was not worthwhile, and therefore waived its right to file a response brief." (Motion at 2) Complainant filed their Suggestions in Opposition to the Motion to Strike. The Motion to Strike is overruled. The SHO has considered Respondent's argument that it would be unfair to allow Complainant to file a responsive brief given Complainant's failure to file an opening brief. However, Complainant bears the burden of proof in this appeal and both parties were provided with the same opportunity to file post-hearing opening briefs and response briefs. To the extent Complainant responded to the opening brief of Respondent, the legal argument within will be considered and given the weight deemed appropriate.

4. Respondent and the BOE. Respondent assessed the subject property and determined the TVM on January 1, 2021 was $6,704,600. The BOE classified the subject property as commercial and independently determined the TVM on January 1, 2021, was $6,704,600.

5. Complainant's Evidence. Complainant submitted the TVM of the subject property on January 1, 2021 was $5,327,000. Complainant presented Thomas Scaletty's Written Direct testimony (WDT) and Summary Appraisal Report identified as Exhibit A. Respondent's written objections are overruled. Complainant's Exhibits are entered into evidence to be given the weight deemed appropriate.

Complainant presented testimony from witness Thomas Scaletty, an MAI designated commercial real estate appraiser with approximately 30 years of appraisal experience. Mr. Scaletty composed an appraisal report for Complainant in which he developed sales comparison, cost, and income approaches to estimate the TVM in fee simple of the subject property on January 1, 2021. Mr. Scaletty weighted the Sales Comparison Approach 75%, the Income Approach 25%, and the Cost Approach 0% when estimating the market value. (Exhibit A) Mr. Scaletty testified that he did not develop a cost approach. Mr. Scaletty testified he arrived at a final reconciled opinion of value of $5,050,000.

Regarding the sales comparison approach, Mr. Scaletty testified he chose nine comparables. Regarding the State Tax Commission's guidelines, he testified he utilized page 95 of the Assessor's Manual "gross annual rental income which the property would be capable of producing if it were vacant and available for occupancy at the time of appraisal" and "the fee simple definition from the Appraisal institute", determines his analysis is consistent with the State's request. (Tr. 11:00). He excluded built-to-suit and leasebacks because the nature of these sales reflect decreasing sale prices and increasing capitalization rates as the remaining lease term declines. (Exhibit A). He testified that these sales are not indicative of an investment in a fee simple estate in the subject, because sale leaseback transactions may have purchase prices that are significantly higher, so too many adjustments would need to be made and make the transaction unreliable as a comparable. (Exhibit A) He testified a comparable of a built-to-suit where the purchase price is a direct reflection of the income stream guaranteed by the tenant in place and "don't represent the market rental rate for the property", and for sales leaseback, they are "generally viewed as a financing vehicle and not fee simple because the sale is based on financing", therefore; in his opinion, those sales would be inappropriate. (Tr. 18:00) Regarding fee simple sales, Mr. Scaletty testified that these represent the best way to estimate market value, and these transactions involving properties that were vacant at the time of their sale or were vacated by the seller for occupancy by the buyer. (Exhibit A)

Mr. Scaletty testified he considered nine verified sales of regional properties in Missouri and surrounding states. Sales 8 and 9, were both occupied at the time of sale, but he testified the leases were set to expire or the current occupant was to vacate the property upon termination of the lease. (Tr. 36:00) Prior to adjustments, the comparable sales price range was $39.62 to $92.13 per square-foot. (Exhibit A) Following adjustments for differences in time/market conditions, age/condition, building size, and location, the improved sales indicate a narrowed value range for the subject from $45.58 to $79.35 per square-foot. (Exhibit A) Relying on this data, the Mr. Scaletty estimated the retrospective market value for the subject, as of January 1, 2021, equal to $58.00 per square-foot. (Exhibit A) The TVM under sales comparison was $5,120,000 (calculated at $58.00 per square-foot x 88,219 square-feet = $5,116,702, rounded). (Exhibit A) His reliance on this approach was 75% of the final valuation. (Exhibit A)

Regarding the income approach, Mr. Scaletty testified that second generation leased properties were the appropriate category of comparables for this approach. Mr. Scaletty testified that he did not use the lease for the subject property in this approach, nor did he review it, but its terms were summarized on page 56. He did not rely on the terms of the subject property's lease, as "this build-to-suit lease rate is above market" and "tenant pays an above market rate for a turn-key lease that provides a prototype building allowing for economies of scale in the overall company"; therefore not useful in determining income. (Exhibit A at 56-57)

He utilized eight rent comparables located in Kansas and Missouri. Following adjustments for differences in lease terms, age/condition, location, etc., he calculated a lease rate range for each property and calculated a NOI to arrive at a capitalization rate. Mr. Scaletty calculated a lease rate range between $5.00 and $13.00 per net rentable square-foot. (Exhibit A) Relying on the data, he estimated a typical market lease rate of $6.00 per square-foot. (Exhibit A) After expenses, Mr. Scaletty found a NOI of $4.94 per square-foot. (Exhibit A) Mr. Scaletty estimated an adjusted direct capitalization rate of 9.00% and found a projected net operating income for the subject property of $435,978, which reflects the stabilized income potential for the first year of the projections. (Exhibit A) His reliance on this approach was 25% of the final valuation. (Exhibit A) His TVM under the income approach was $4,840,000.

Mr. Scaletty's cost approach found a TVM of $4,980,000, which he determined as the depreciated replacement cost new. (Exhibit A) He did not give any weight to this approach, although developed.

6. Respondent's Evidence. Respondent submitted the TVM of the subject property on January 1, 2021, of $7,850,000. Respondent submitted WDT of Robert E. Norris and Exhibit 1 Appraisal Report. Mr. Norris testified he is an Independent Appraiser and Owner of The Nunn Company, LLC, in Jefferson City, Missouri, with more than 40 years' experience appraising residential, commercial and utility property in Missouri. Mr. Norris testified Exhibit 1 utilizes the all three approaches to value, but ultimately gives most emphasis to the income approach to value the subject property with consideration given to the sales comparison and cost approaches. (WDT and Exhibit 1 at 72) Respondent's appraiser reached a reconciled TVM under all three approaches of $7,850,000.

For the cost approach, Mr. Norris used the five land comparable sales, making various adjustments to find a land value for the subject property. He utilized Marshall Valuation Service (MVS), which is a proven national cost service, to value the subject property's improvements. (WDT and Exhibit 1) Mr. Norris testified he estimated the replacement cost new of the improvements and the accrued depreciation, then the land value. His overall TVM under the cost approach was $8,700,000.

For the sales comparison approach, Mr. Norris used four comparables. Mr. Norris chose economically similar comparables to the subject property. (WDT and Exhibit 1) He utilized sales data in and around subject market area for comparison. (Exhibit 1) Mr. Norris's comparables have the same or very similar highest and best use to the subject property. (Exhibit 1) He testified his value range to be $85 to $92.25 per square-foot, to develop a TVM of $7,525,000 to $8,175,000. (WDT and Exhibit 1)

Mr. Norris' income approach considered the rental data of the subject property. He noted that rental data for big-box retail facilities was somewhat limited, but "current leases and listings suggest that rents for similar facilities range from $6.00 to $10.00 per square foot (on a triple net or absolute basis)" and the subject property's "current rental rate as found in the lease table was $9.45 per square foot (the 2007 and 2058 rates reflect a partial year occupancy). (Exhibit 1 at 55-57) He analyzed sales and recent listings of leased Kohl's store properties and the capitalization rates for seven other retail properties. (Exhibit 1 at 58) He considered data from national sources, using a band-of-investment model, finding loan parameters based on RealtyRates.com (4th Quarter 2020) survey of free-standing retail properties. (Exhibit 1 at 59) In arriving at a conclusion, Mr. Norris considered: "(1)

the risk associated with each property type in the materials consulted; (2) that capitalization rates remained relatively stable over the period analyzed; (3) the financial strength of Kohl's as well as other tenants in the comparables cited; and (4) the good location of the subject property, and the strong tenants of the adjoining properties". (WDT at 11) His overall capitalization rate loaded with the effective tax rate yielded a range of 9.9281% to 10.4281%. (WDT) Mr. Norris placed the most emphasis on the Income Approach because in his opinion, "the property type is typically acquired for its ability to generate a reliable income stream", leading him to a conclusion of a TVM range of $6,850,000 to $7,200,000 (Exhibit 1 at 72)

7. Evidence of New Construction & Improvement. There was no evidence of new construction and improvements from January 1, 2021, to January 1, 2022. Section 137.115.1.

8. Value. The TVM of the subject property on January 1, 2021, was $6,704,600.

CONCLUSIONS OF LAW

1. Assessment and Valuation

Pursuant to Article X, Sections 4(a) and 4(b), Mo. Const. of 1945 real property and tangible personal property is assessed at its value or such percentage of its value as may be fixed by law for each class and for each subclass. Article X, Sections 4(a) and 4(b), Mo. Const. of 1945. Commercial real property is assessed at 32% of its TVM as of January 1 of each odd-numbered year. Section 137.115.5(1)(c). "True value in money is the fair market value of the property on the valuation date, and is a function of its highest and best use, which is the use of the property which will produce the greatest return in the reasonably near future." *Snider v. Casino Aztar/Aztar Mo. Gaming Corp.*, 156 S.W.3d 341, 346 (Mo. banc 2005) (internal quotation omitted). The fair market value is "the price which the property would bring from a willing buyer when offered for sale by a willing seller." *Mo. Baptist Children's Home v. State Tax Comm'n*, 867 S.W.2d 510, 512 (Mo. banc 1993). Determining the TVM is a factual issue for the STC. *Cohen v. Bushmeyer*, 251 S.W.3d 345, 348 (Mo. App. E.D. 2008). The "proper methods of valuation and assessment of property are delegated to the Commission." *Savage v. State Tax Comm'n*, 722 S.W.2d 72, 75 (Mo. banc 1986).

"For purposes of levying property taxes, the value of real property is typically determined using one or more of three generally accepted approaches." *Snider*, 156 S.W.3d at 346. The three generally accepted approaches are the cost approach, the income approach, and the comparable sales approach. *Id.* at 346-48; *see also St. Louis Cty. v. Sec. Bonhomme, Inc.*, 558 S.W.2d 655, 659 (Mo. banc 1977). The comparable sales approach "is most appropriate when there is an active market for the type of property at issue such that sufficient data are available to make a comparative analysis." *Snider*, 156 S.W.3d at 348. For this reason, the comparable sales approach is typically used to value residential property. "The comparable sales approach uses prices paid for similar properties in arms-length transactions and adjusts those prices to account for differences between the properties." *Id*. at 347-48 (internal quotation omitted). "Comparable sales consist of evidence of sales reasonably related in time and distance and involve land comparable in character." *Id*. at 348.

The income approach "is most appropriate in valuing investment-type properties and is reliable when rental income, operating expenses and capitalization rates can reasonably be estimated from existing market conditions." *Snider*, 156 S.W.3d at 347. "The income approach determines value by estimating the present worth of what an owner will likely receive in the future as income from the property." *Id*. "The income approach is based on an evaluation of what a willing buyer would pay to realize the income stream that could be obtained from the property when devoted to its highest and best use." *Id*. (internal quotation omitted).

2. Evidence

The hearing officer is the finder of fact and determines the credibility and weight of the evidence. *Kelly v. Mo. Dep't of Soc. Servs., Family Support Div.*, 456 S.W.3d 107, 111 (Mo. App. W.D. 2015). The finder of fact in an administrative hearing determines the credibility and weight of expert testimony. *Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 632 (Mo. banc 2012). "It is within the purview of the hearing officer to determine the method of valuation to be adopted in a given case." *Tibbs v. Poplar Bluff Assocs. I, L.P.*, 599 S.W.3d 1, 9 (Mo. App. S.D. 2020). The hearing officer "may inquire of the owner of the property or of any other party to the appeal regarding any matter or issue relevant to the valuation, subclassification or assessment of the property." Section 138.430.2. The Hearing Officer's decision regarding the assessment or valuation of the property may be based solely upon his inquiry and any evidence presented by the parties, or based solely upon evidence presented by the parties. *Id*.

3. Complainant's Burden of Proof

The BOE's valuation is presumptively correct. *Rinehart v. Laclede Gas Co.*, 607 S.W.3d 220, 227 (Mo. App. W.D. 2020). To prove overvaluation, a taxpayer must rebut the BOE's presumptively correct valuation and prove the "value that should have been placed on the property." *Snider*, 156 S.W.3d at 346. The taxpayer's evidence must be both "substantial and persuasive." *Id.* "Substantial evidence is that evidence which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case on the fact issues." *Savage*, 722 S.W.2d at 77 (internal quotation omitted). Evidence is persuasive when it has "sufficient weight and probative value to convince the trier of fact." *Daly v. P.D. George Co.*, 77 S.W.3d 645, 651 (Mo. App. E.D. 2002); *see also White v. Dir. of Revenue*, 321 S.W.3d 298, 305 (Mo. banc 2010) (noting the burden of persuasion is the "party's duty to convince the fact-finder to view the facts in a way that favors that party"). A taxpayer does not meet his burden if evidence on any essential element of his case leaves the STC "in the nebulous twilight of speculation, conjecture and surmise." *See, Rossman v. G.G.C. Corp. of Missouri,* 596 S.W.2d 469, 471 (Mo. App. 1980).

4. Complainant Did Not Prove Overvaluation.

Complainant did not produce substantial and persuasive evidence of the alleged TVM for the subject property. Respondent although not required, presented evidence that supports the BOE's values, specifically under their income approach.

The comparable sales approach was utilized as Complainant's primary approach to value (75% weight). The evidence in the record indicates Complainant's appraiser excludes built-to-suit or sale leaseback sales as comparables. By rejecting the use of sale leasebacks or built-to-suit comparables, Complainant did not develop an accurate measure for the market value. Complainant presented no substantial and persuasive evidence indicating the property rights cannot be adjusted properly under USPAP standards or appraisal practice to the subject property. If the appraiser determines dollar adjustments are warranted for property rights, financing terms, conditions of sale, or market conditions, those adjustments can and should be made. Respondent's brief persuasively argues, "Complainant's definition of "fee simple" is based on an appraisal industry-specific definition (Tr., pp.7-8), not Missouri law as it relates to ad valorem taxation. {…} Because Scaletty's entire appraisal is based on an incorrect understanding of the property interest he is appraising, it is not credible and is unreliable." (Respondent Assessor's Brief at 4) The theory that a leased property is encumbered, and therefore not a preferable comparable is unpersuasive, is speculative, and not a methodology utilized in Missouri Courts to value property.

Courts have addressed a leasehold's non-impact on the transferability of a fee simple estate, stating, "Cases and treatises frequently describe a conveyance of real estate subject to a leasehold estate as a conveyance of a 'remainder' interest, *notwithstanding that fee simple title is what is conveyed.*" *Cooper v. Ratley*, 916 S. W.2d 868, 870 n. 3 (Mo. App. 1996) (emphasis added). The STC has recently decided *St. Louis BOA Plaza, LLC, et al. v. Stephen Conway, Assessor, City of St. Louis*, 17-20066, 17-20067, and 17-20068 (2019) and the Commission, in affirming the decision of the hearing officer, stated:

> "The assessor values property in fee simple interest. An estate in fee simple is ownership of all the rights in a property. A lease conveys property rights to another. The tenant receives a leasehold interest that allows the tenant the right to use and occupy the property under conditions. *The fee ownership remains with the owner of the property.* For ad valorem purposes, the property to be assessed consists of the

> land and improvements and the possessory interests in the property. Section 137.115.1 RSMo. In most cases, the value of the leased fee and the value of the leasehold should approximate the value of the fee simple unencumbered by a lease." (emphasis added).

"While the Commission has some discretion in deciding which approach best estimates the value of a particular property," the Commission's choice of valuation approach "must comply with the law, and once the Commission decides to use a particular approach, it must apply that approach properly and consider all relevant factors." *Parker v. Doe Run Co.*, 553 S.W.3d 356, 360 (Mo. App. S.D. 2018). To assume that a vacant property is the best or most accurate measure for a value of the subject property doesn't equate to evidence. The present record contains no evidence to support the theory. The record indicates a lack of sufficient comparable sales for Complainant. There was no substantial or persuasive evidence to support Complainant's TVM under the sales comparison approach.

The income approach "is most appropriate in valuing investment-type properties and is reliable when rental income, operating expenses and capitalization rates can reasonably be estimated from existing market conditions." *Snider*, 156 S.W.3d at 347. "When applying the income approach to valuing business property for tax purposes, it is not proper to consider income derived from the business and personal property; only income derived from the land and improvements should be considered." *Id*.

Mr. Scaletty determined there is sufficient market-based income data for retail properties to estimate the potential NOI of the subject property and utilize the income approach. “One way to estimate fair market value is with an income approach capitalizing the income the real property could generate. *Snider*, 156 S.W.3d at 347. Mr. Scaletty’s income approach did develop a value by superimposing a market-based “potential” NOI and capitalization rate on the subject’s real estate to estimate the TVM. Mr. Scaletty’s finding of value is ultimately not persuasive due to the lack of comparables that truly parallel the subject property’s potential income. Further, Respondent’s appraiser used the subject property’s current lease to develop a market rental range, while Complainant did not. The fact that Complainant favors the use of “projected” numbers to develop rental rates is speculative and not persuasive evidence of market value. Respondent’s brief persuasively argues the legal foundation for Mr. Scaletty’s approach is not appropriate in Missouri and stated:

> An approach like Scaletty’s that contract rent cannot be considered hypothesizes an unrealistic market because it assumes properties subject to a long-term lease are suddenly available to rent at some lower rate. (*601 Metropolitan Square*, 2021 WL 6112850 at 11). The fact that Complainant’s appraiser refused to consider this relevant market data in his appraisal means that the Commission cannot base its decision on the Scaletty appraisal. *601 Metropolitan Square*, 2021 WL 6112850 at *7, *citing Snider v. Casino Aztar/Aztar Mo. Gaming Corp.*, 156 S.W.3d 341, 348 (Mo. banc 2005) (stating that the Commission “cannot base its decision on opinion evidence that fails to consider information that should have been considered under a particular valuation approach”). (Respondent Assessor’s Brief at 7)

Respondent’s argument is well taken. There was no substantial or persuasive evidence to support Complainant’s TVM under the income approach under current Missouri law.

Respondent’s evidence presented under the income approach persuasively supports the BOE’s values. Although not required given the burden of proof, Respondent presented exhibits and testimony that support the BOE's valuation of the subject property. Respondent did advocate for an increase in value, but also presented a range of values to which the income approach could apply. The lower end of this range is similar in value to the BOE's finding of TVM (only an approximate $150,000 difference). This fact serves to uphold the BOE's conclusions. No persuasive or substantial evidence was presented to rebut the BOE's determination of value.

CONCLUSION AND ORDER

The BOE decision is AFFIRMED. The TVM of the subject property, as of January 1, 2021, was $6,704,600.

Application for Review

A party may file with the Commission an application for review of this decision within 30 days of the mailing date set forth in the certificate of service for this decision. The application "shall contain specific detailed grounds upon which it is claimed the decision is erroneous." Section 138.432. The application must be in writing, and may be mailed to the State Tax Commission, P.O. Box 146, Jefferson City, MO 65102-0146, or emailed to Legal@stc.mo.gov. A copy of the application must be sent to each person listed below in the certificate of service.

Failure to state specific facts or law upon which the application for review is based will result in summary denial. Section 138.432.

Disputed Taxes

The Collector of Cole County, as well as the collectors of all affected political subdivisions therein, shall continue to hold the disputed taxes pending the possible filing of an application for review, unless said taxes have been disbursed pursuant to a court order under the provisions of section 139.031.

SO ORDERED July 14, 2023.
STATE TAX COMMISSION OF MISSOURI

Erica M. Gage
Senior Hearing Officer
State Tax Commission

Certificate of Service

I hereby certify that a copy of the foregoing has been electronically mailed and/or sent by U.S. Mail on July 14, 2023, to:

Complainant(s) and/or Counsel for Complainant(s), the County Assessor and/or Counsel for Respondent and County Collector.

Stacy M. Ingle
Legal Assistant