



STATE TAX COMMISSION OF MISSOURI

HY-VEE INC.,) Appeal No. 21-32125
) Parcel/Locator No. 14-315-00-02-021.00
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Complainant(s),)
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v.)
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)
TRACY BALDWIN, ASSESSOR,)
CLAY COUNTY, MISSOURI,)
Respondent.)

DECISION AND ORDER

Hy-Vee Inc. (Complainant) appeals the Clay County Board of Equalization's (BOE) decision determining the true value in money (TVM) of the subject commercial property as of January 1, 2021, was \$9,000,000. Complainant did not produce substantial and persuasive evidence of overvaluation. The BOE's decision is affirmed.¹

Complainant was represented by counsel, Michael LeVota. Respondent was represented by counsel, Lucas Wallingford. The evidentiary hearing was conducted on August 18, 2022, via WebEx.

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.

FINDINGS OF FACT

1. Subject Property. The subject property is an owner occupied, built-to-suit grocery store. The subject is located at 109 N. Blue Jay Dr., Liberty, Clay County, Missouri. The property includes a single-tenant retail/grocery store building containing approximately 87,870 square-feet of gross building area and net rentable area located on a tract of land containing approximately 8.35 acres. The improvements were constructed in 2010. The subject includes approximately 282 striped parking spaces for a ratio of 3.2 spaces per 1,000 square feet of gross building area. The improvements are rated as average to good quality, Class C, Supermarket. As of January 1, 2021, the subject was 100% owner-occupied by Hy-Vee Grocery.

2. Respondent and the BOE. Respondent classified the subject property as commercial and determined the TVM on January 1, 2021, was \$11,727,200. The BOE classified the subject property as commercial and independently determined the TVM on January 1, 2021, was \$9,000,000.

3. Procedural History and Evidentiary Objections.

The SHO issued various pre-trial discovery orders regarding dismissal, compelling answers and requests for sanctions.² Prior to the Evidentiary Hearing, counsel for

² Respondent filed a Motion to Compel Complainant's responses to Respondent's First Interrogatories and Request for Production of Documents. Complainant filed no response to the Motion, but filed a Motion for Continuance. The SHO entered an Order to Enforce Discovery, granting Complainant until April 22, 2022, to fully comply with any discovery that was in the Motion to Enforce and granted both parties until April 22, 2022, to complete the Initial Disclosures. The Order included language regarding Sanctions for willful failure to comply under 12 CSR 30-3.060. On May 18, 2022, Respondent filed a Motion for

Respondent filed written objections to the admission of all of Complainant's exhibits on the ground that Complainant had failed to comply with the Hearing Officer's scheduling order. The Hearing Officer noted the objections and took them under advisement for ruling with the Decision. During the Evidentiary Hearing, when Complainant offered their exhibits for admission into the record, counsel for Respondent renewed the objection and asked for a continuing objection to the admission of Complainant's exhibits. Respondent argued that Complainant violated the scheduling orders by failing to file discovery responses, thereby precluding the admission of non-disclosed evidence and any exhibits utilizing such information to determine overvaluation. In response, counsel for Complainant argued that all of Complainant's exhibits had been provided timely and they provided their answers as attachments to their responses. The Hearing Officer issued an interlocutory ruling allowing the introduction and admission of Complainant's exhibits subject to the continuing objection and any specific objections Respondent might make with regard to individual exhibits and given that Complainant's witness' live testimony

Sanctions. A hearing was held on the Motion for Sanctions on June 10, 2022. At the hearing, Respondent argued the discovery information was filled out by a third party who cannot know the answers and is without the ability under Missouri law to answer questions that must be answered by the party alone under Rule 57. Complainant argued that the person acted as a third party agent in answering the questions and as an authorized agent of Complainant, was in compliance with the rules. Between May 26, 2022, and June 18, 2022, Complainant submitted various supplemental responses, updating the discovery. The SHO overruled Respondent's Motion for Sanctions finding Complainant's delay was not deliberate. The Respondent was granted until August 10, 2022, to amend any exhibits based on the late submissions of Complainant and until August 17, 2022, to amend any rebuttal evidence, surrebuttal evidence, and objections.

would be subject to cross examination. The Hearing Officer reserved a final ruling on Respondent's continuing objection for the Decision and Order.

Additionally, at the hearing, Mr. Scaletty was recalled by Complainant to present rebuttal testimony following Respondent's case-in-chief. Respondent objected to any new testimony by Mr. Scaletty citing improper procedure to allow presentation of new information at this stage of the hearing. Respondent's objection was taken with the case and Complainant's appraiser did testify regarding his compliance with USPAP standards.

In proceedings before the STC, the admission or exclusion of evidence is within the Hearing Officer's discretion. The STC, an administrative tribunal, like the trial court, has considerable discretion in the admission or exclusion of evidence. *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 114 (Mo. banc 2015). Although technical rules of evidence are not controlling in administrative hearings, fundamental rules of evidence apply. *Homa v. Carthage R-IX School District*, 345 S.W.3d 266, 282 (Mo. App. S.D. 2011); see also *Luscombe v. Missouri State Bd. of Nursing*, 2013 WL 68899 (Mo. App. W.D. 2013) at *13. When a proper objection is made and preserved, statements in violation of evidentiary rules do not qualify as competent and substantial evidence to support an agency's decision. *Homa*, 345 S.W.3d at 282, quoting *Dorman v. State Bd. of Registration for Healing Arts*, 62 S.W.3d 446, 454 (Mo. App. W.D. 2001). However, Section 536.070(7) allows an administrative tribunal to receive proffered evidence into the record regardless of the merit of any evidentiary objections:

Evidence to which an objection is sustained shall, at the request of the party seeking to introduce the same, or at the instance of the agency, nevertheless be heard and preserved in the record, together with any cross-examination with respect thereto

and any rebuttal thereof, unless it is wholly irrelevant, repetitious, privileged, or unduly long

“Reception of hearsay or other inadmissible evidence does not dictate a reversal unless there is not sufficient competent evidence to sustain the decision.” *Homa*, 345 S.W.3d at 282 (quotation omitted).

In this case, Respondent’s continuing objections were grounded on a procedural error by Complainant that essentially created a violation of evidentiary rules, i.e., the failure to file discovery responses pursuant to the deadline set by the scheduling order left the exhibits at trial without foundation for their admission, making them hearsay. However, after reflecting upon the arguments of the parties and examining the evidence as it was presented under interlocutory order, the facts establish that Respondent was in fact provided with Complainant’s timely submitted exhibits in the months leading up to the evidentiary hearing and was granted an additional 30 days after review of Complainant’s exhibits to re-submit their own exhibits and written direct testimony. Respondent was also afforded the opportunity to conduct cross-examination of the witness for Complainant and to present their own testimony evidence in rebuttal. Consequently, Respondent was not prejudiced by Complainant’s technical non-compliance with the scheduling order. Respondent’s second objection to the presentation of rebuttal testimony is overruled as Respondent was given the opportunity to cross-examine the witness. Consequently, in light of all of this information and in the interest of fairness to both parties, Respondent’s written objections and the continuing objection to Complainant’s evidence are hereby overruled.

4. Complainant’s Evidence. Complainant submitted the TVMs of the subject properties on January 1, 2021, was \$6,100,000. Complainant presented Written Direct testimony (WDT) of Thomas Scaletty and the following Exhibits, which are entered into evidence to be given the weight deemed appropriate.

Exhibits	Description	Ruling
A	WDT Thomas Scaletty	Admitted
B	Appraisal Report Scaletty	

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 the sales comparison and income approaches to estimate the TVM in fee simple of the subject property on January 1, 2021. (Exhibit B) Mr. Scaletty testified the most weight should be given to the Sales Comparison Approach (75%) with support from the Income Approach (25%). Mr. Scaletty testified that he did not develop a cost approach.

Regarding the sales comparison approach, Mr. Scaletty testified the categories of sales for comparison in an analysis of this type includes built-to-suit/leasebacks, second generation leased fee sales, and fee simple sales. His report explains the decision to exclude built-to-suit and leasebacks as comparables, is because the “nature of these sales reflect decreasing sale prices and increasing capitalization rates as the remaining lease term declines”. (Exhibit B at 50-52). He testified that these comparable 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 than fee simple, so in turn, too many

adjustments would need to be made to the comparables, making the results unreliable. (Exhibit B) He testified a comparable of a built-to-suit/leaseback would not be used “where the purchase price is a direct reflection of the income stream guaranteed by the tenant in place and is opposite of what a fee simple interest is”, therefore; in his opinion, those sales would be irrelevant to his current assignment. (Exhibit B) Regarding second generation leased fee sales, Mr. Scaletty testified if the tenant leases the space “as is” and makes no upgrades or alterations, a sale in this category may provide a good indication of the market value for the real estate. (Exhibit B)

Regarding fee simple sales, Mr. Scaletty testified that these represent the best way to estimate market value, and these transactions involved properties that were vacant at the time of their sale or were vacated by the seller for occupancy by the buyer. (Exhibit B) Mr. Scaletty testified he considered nine verified sales of properties in Nebraska, Kansas, Iowa and Missouri. His sales grid made adjustments to each property for differences in time/market conditions, age/condition, building size, and location. (Exhibit B at 57-58) Mr. Scaletty found an adjusted average of \$70.00 per square-foot market rent. (Exhibit B at 57-58) Multiplied by the subject property’s building area of 87,870 square-feet, his sales comparison approach TVM was \$6,150,000 (rounded).

Regarding the income approach, Mr. Scaletty testified that second generation lease properties were the appropriate comparables for this type of comparison and utilized six rent comparables within all appraisals submitted for these parcels. The rent comparables are all located in and around the greater Kansas City area. Mr. Scaletty testified he confirmed lease information through brokers and market participants. 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. His final valuation was \$5,940,000 (rounded), in which he utilized a direct capitalization rate of 8.5%. (Exhibit B at 74)

Mr. Scaletty testified that he did not use the lease for the subject in his income approach. His report included no income history or contract rents for the subject property as “no income history was available” and “as of the effective appraisal date, the subject property was 100% owner-occupied”. (Exhibit B at 60) As such, there was no current lease for him to review. Further he concluded that even if he had the information, owner occupant leases are not “arm’s length” transactions and therefore not useful to him in determining income. (Exhibit A and B)

5. Respondent's Evidence. Respondent submitted the TVMs of the subject properties on January 1, 2021, was \$7,967,000. Respondent submitted WDT of Grant Knauff and the following Exhibits:

Exhibit	Description	Ruling
1	Property Record Card and Cost Approach Report	Admitted
2	Appraisal Of Grant Knauff (Amended)	Admitted
3	WDT of Grant Knauff	Admitted
4	Rebuttal WDT of Grant Knauff	Admitted

Mr. Knauff testified he is a commercial real estate appraiser employed by Clay County, with about 7 years’ experience. Mr. Knauff testified he authored a valuation report, which utilizes the cost and sales comparison approaches to value the subject property.

(Exhibit 2) Mr. Knauff did not rely on the income approach to value the subject property, although it was developed.

Mr. Knauff's cost approach used three land comparables to find a land value. He utilized Marshall Valuation Service (MVS), which is a proven national cost service, to value the improvements. (WDT and Exhibit 2) He testified he deducted depreciation that he itemized by all causes. Mr. Knauff testified he estimated the contributory value of the site improvements, which components constitute the contributory value of the improvements, then the land value was added for a value indication via the cost approach.

In the sales comparison approach, Mr. Knauff used three comparables. Mr. Knauff chose economically similar comparables to the subject property verified by MLS or the County. (WDT and Exhibit 2) He utilized sales data in and around the Kansas City market area for comparison. (Exhibit 2) He testified he chose large free standing retail stores as comparables, making adjustments for property characteristics including age and quality of construction. (Exhibits 2) Mr. Knauff's comparables have the same or very similar highest and best use to the subject property. (Exhibit 2)

6. 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.

7. Value. The TVM of the subject property on January 1, 2021, was \$9,000,000.

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). "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.* 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. *Aspenhof Corp. v. State Tax Commission*, 789 S.W. 2d 867, 869 (Mo. App. 1990).

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 TVMs for the subject properties.

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. Complainant argues the comparables should attempt to exclude built-to-suit or sale leaseback sales. However, if the appraiser determines dollar adjustments are warranted for property rights, financing terms, conditions of sale, or market conditions, those adjustments are to be made. Mr. Scaletty rejected the use of sale leasebacks or built-to-suit properties to compare with the subject properties and, in so doing, 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 each of the subject properties. 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 properties doesn't equate to evidence. The present record contains no evidence to support the theory. In sum, 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.

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. "Any property that has the potential to generate income can be valued under the income capitalization approach." Appraisal Institute, *The Appraisal of Real Estate* 441 (14th ed. 2013). The concept of "fair market value is a hypothetical metric that asks what price an informed buyer and an informed seller would agree on when neither must act, but both are willing." *Grantson v. Langenbach*, 599 S.W.3d 167, 183 (Mo. banc 2020). 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. But, no evidence was presented that Complainant did supply its appraisers with income and expenses from which the subject property's actual NOI could be calculated. This preference to use hypothetical information (pro forma) over actual income history for the subject property diminishes the credibility of Mr. Scaletty's income approach. (Exhibit B at 60) 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. There was no substantial or persuasive evidence to support Complainant's TVM under the income approach.

In an STC hearing, Respondent "shall not advocate nor present evidence advocating a valuation higher than that value finally determined by the assessor or the value determined by the BOE, whichever is higher, for that assessment period." Section 138.060.1. If Respondent introduces "evidence indicating a higher value than the value

finally determined by the assessor or the value determined by the board of equalization ... such evidence will only be received for the purpose of sustaining the assessor's or board's valuation, and not for increasing the valuation of the property under appeal." 12 CSR 30-3.075(1).

Respondent's Exhibit 2 concludes the market value of the subject property is higher than the value determined by the Respondent or the BOE. Respondent, however, did not advocate a value higher than that determined by the BOE. Exhibit 2 is admissible as evidence for sustaining the value assigned by the BOE. 12 CSR 30-3.075(1).

CONCLUSION AND ORDER

The BOE decision is AFFIRMED. The TVM of the subject property on January 1, 2021, was \$9,000,000.

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 Clay 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 September 29, 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 September 29, 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