VIRGINIA:

IN THE FAIRFAX CIRCUIT COURT

TYSONS CORNER HOTEL PLAZA LLC, Petitioner, vs. FAIRFAX COUNTY, Respondent.	Case No. CL 2021-0017755

MEMORANDUM OPINION

THIS MATTER CAME BEFORE THE COURT following a six (6) day bench trial beginning on May 2, 2023. Petitioner, Tysons Corner Hotel Plaza LLC, challenges property tax assessments for the years 2018, 2019, and 2020 by Respondent, Fairfax County.

At the conclusion of Petitioner's evidence Respondent moved to strike the evidence. The Court took the matter under advisement but ultimately overruled the motion. At the conclusion of Respondent's evidence, the Motion to Strike was reasserted. At the court's request, the parties filed post-trial briefs addressing Respondent's Motion to Strike as well as closing arguments.

Respondent renewed its and filed a Motion to Strike and Post-Trial Brief on May 19, 2023, and Petitioner filed a Post-Trial Closing Brief on the same day.

The Court extends its regrets for the delay in issuing this decision. The presentation of the evidence at trial, the arguments presented by counsel, and the closing briefs were all excellent and provided the Court with clear guidance on the decision to be issued. The brevity of this decision at the end of the summer is a concession the Court is unable to issue a decision as thorough and detailed as the parties presented at trial and under their post-trial briefs. Despite the thoroughness and lingering concerns of disparate treatment, the Court finds in favor of the County.

Summary of Analysis

Respondent's Motion to Strike asks this Court to assess whether the Petitioner has failed to prove that: (1) Petitioner's expert, Mr. David Lennhoff's, use of "proxy rent" has any foundation in market evidence or accepted appraisal and market practices; (2) the County violated generally accepted appraisal practices ("GAAP"), procedures, rules, and standards; (3) the use of mass appraisal indefensibly inflated the hotel's value; or (4) the County's assessments were nonuniform.

The Court agrees with the County's closing arguments and rejects Mr. Lennhoff's self-selected methodology for appraising the fair market value of real property. The Court found Mr. Lennhoff's explanation lacking credibility, in part, because his opinion relied on speculative hypotheticals and was supported mostly by the expert's own teachings at his institution. Overall, the Court perceived his testimony to be an opinion or methodology presented by *ipse dixit*.

Here, in deciding whether the County's valuation approach is flawed, the Court was asked by the Petitioner to substitute in an expert's developed methodology which depended on hypotheticals and proxy rents as a reliable form of removing business' intangible value from the value of the real property. The use of hypotheticals and assumptions while ignoring available data extended to applying a different and inapplicable method – a costs approach – as a means of "checking" the accuracy of using the business enterprise valuation approach. Using hypotheticals to support an approach which relies on hypotheticals and then using an inapplicable methodology to "check" assumed conclusions eliminated any sense that the opinion was reliable.

Moreover, there were other instances when the opinion was inherently incredible including the expert's dismissal of the value of a plaza and walkway that allow for the movements of pedestrians from a nearby subway, adjoining parking lot, past the hotel's restaurant – known as

the Bush and Barrell – and into and back from the Tysons Corner Mall. This challenges what the owners of the hotel believed added value to the property, and it implicitly challenges the assumption that location can often drive real property values.

Added to the blanket rejection of the plaza, the expert kept referencing a hotel restaurant as being a "loss leader" for most hotels. The Court found this wholesale elimination of an element of the improvement on real property as unpersuasive as the suggestion that a named restaurant would perform demonstrably better than the existing restaurant. Consequently, whether a restaurant offering a well-known name – such as Jose Andres – or any other restaurant, such as Bush & Barrell would produce markedly different results gives no consideration to the location of the property, especially its proximity to the Mall and public transportation, and the growing density surrounding the property.

Moreover, the comparison between two hotel properties, the Marriott Courtyard having the Flemings' Steakhouse located in the same building and the Petitioner – Hyatt Regency – with the Bush and Barrell, did not reveal a nonuniform assessment. The Marriott Courtyard has a separate food service in the Bistro servicing the dining requirements of hotel guests. The Petitioner – Hyatt Regency – does not rely on Flemings Steakhouse to provide breakfast services.

The Court takes judicial notice that Flemings is a high-end steakhouse with seemingly no affiliation with a Marriott Courtyard. The Bush and Barrell attracts guests of the hotel along with foot traffic from the Mall and subway making it appropriate to include the revenue generated on the site under an income and expense report.

Overall, the Court concludes that Petitioner has not met their burden with respect to overcoming the statutorily afforded presumption of correctness on behalf of the County, and that Respondent's Motion to Strike should have been granted.

There are two sets of evidence this Court heard but either could not receive or did not consider heavily in reaching its decision here. The first set of evidence is that the tax imposed upon the property at issue was substantially higher than other hotel properties in the vicinity. There is apparently a report that records income and costs of other properties that Petitioner had offered; however, the report could not be admitted as constituting hearsay.

The Court is concerned whenever there is a claim of disparate treatment, and it is understandable that competitors are unwilling to share information concerning their past and ongoing financial performance. Nonetheless, differences in taxing are not enough.

The second set of evidence indicated that the other Member or Owner of the Petitioning Taxpayer, an Alaskan Permanent Fund Corporation ("APFC"), had reported the value of the property to the government and as part of its duties to inform its stakeholders. Ultimately, while the evidentiary issue was interesting, the Court concluded that how a part owner of an LLC valued real property was not determinative of whether the County's methodology was correct or whether the tax assessments were applied uniformly. If this matter is taken up on appeal, this is an evidentiary issue of first impression that should be addressed.

When considering a motion to strike at the conclusion of a trial, the court must consider all the evidence, including evidence presented by the defendant. *Williams v. Condit*, 265 Va. 49, 52 (2003). Even when a defendant moves to strike at the conclusion of plaintiff's case and such

motion is taken under advisement, the court is "required to consider all the evidence that has been admitted before ruling on the motion." *Id.* at 52.

Virginia taxing authorities must assess real estate at its fair market value. *See McKee Foods Corp. v. Cnty. of Augusta*, 297 Va. 482, 495 (2019) *citing* Va. Const. art. X, § 2. When a petitioner seeks relief from real property taxes, there is a presumption that the valuation determined by the assessor is correct. Va. Code § 58.1-3984(B). The taxpayer bears the initial burden of proof to rebut such presumption and show by a preponderance of the evidence that either "(1) the property has been valued at more than its fair market value, or (2) that that the assessment is not uniform in its application." § 58.1-3984(B); *McKee Foods*, 297 Va. at 499.

If the taxpayer proves either, then they must also prove that "the assessment was not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations...." § 58.1-3984(B); *McKee Foods*, 297 Va. at 499.

Unrebutted testimony does not automatically overcome the presumption. Such a rule would render meaningless the concept of the presumption of correctness. The conclusory opinion as to the value of the property does not produce credible evidence upon which the presumption is overcome especially when the methodology is flawed.

As between the two competing experts concerning the appropriateness of the methodology applied by the Petitioner's expert, the Court found the County's expert credible. Reliance on the hotel's integrated hotel management agreement, along with the elevated plaza, painted for the Court a far more reliable explanation as to why the property situated where it is situated would have a higher value than another well-known, high-end brand – the Ritz Carlton – which is located

at a different site and is an older property. Although the Petitioner describes the Ritz Carlton as a property "across the street" – it is in an entirely different space which the Court notices as "Tysons Galleria." It is not just "across the street" and it is not the modern-designed space that the Hyatt Regency presents.

As between the two experts, the Court received a thorough explanation of what has been described as the "Rushmore" method – a method that the Petitioner's expert challenged in terms of its suitability or the accuracy by which the method is applied. There were objections raised to the mass appraisal method used by the County, but no credible argument except to say that because the Petitioner's expert had valued the property substantially lower than the County – by applying his self-professed singular method of removing intangible value in appraising hotel property – then by definition the County's method violated general accepted accounting principles.

It is not uncommon for the Court to receive competing and contradicting expert opinions. In sifting through competing opinions, the Court must often, in its role as factfinder, decide which is more credible and then, if necessary, come to its own conclusion based on all the evidence presented on the value of the property.

Under the analysis here, however, it is not enough that the expert disagrees. Instead, the Petitioner must show that the County violated a prescribed rule or standard. To meet this threshold, the Petitioner's expert must be credible. For example, where one expert would place a value to account for "brand affiliation" deduction from the income method and another explains that deduction of management fees is sufficient to account for the added value of a brand, the Court would appear to be placed in the position that either may be acceptable or must decide which is more credible. However, the exception to the balancing exercise of the Court's fact-finding

function is when the percentage attributed by the Petitioner's expert presents itself as an arbitrary percentage – a rounded off percentage figure with no credible explanation why another number would not be as or more appropriate.

The difficulty in determining the fair market valuation of some hotel properties comes from the lack of comparable sales and a reliable use of the costs approach. Indeed, there can be only one approach for some hotel properties – the income approach. Using an income approach, Mr. Lennhoff has developed a new theory which he now teaches to others as superior; nevertheless, this new theory fails to persuade the Court that the other approach is thus flawed and should be replaced by Mr. Lennnhoff's new theory.

This case presents the unspoken issue of whether the County, to defend its assessment, must call upon a competing expert to offer a competing valuation of the taxed property. Although at the commencement of the trial, the Court had assumed this would be necessary, upon considering the evidence presented by the Petitioner's expert, the Court concluded that it was unnecessary to do so because the Court did not have two credible opinions to consider or even one credible testimony to weigh in the absence of a contradicting opinion.

Objections and arguments presented regarding the County's accounting methodology were answered in the County's closing brief; however, the Court further notes that such inconsistencies struck the Court as immaterial to the dispositive issues to be decided in this case. The Court finds no violation of GAAP.

It is altogether a remarkable position for the Court to find itself that despite the quality of the arguments presented by Petitioner's legal team the factual predicate upon which the arguments rested proved to be lacking.

Conclusion

FOR REASONS STATED, the Court finds that it should have granted the Respondent's Motion to Strike at the conclusion of the evidence. This matter is set on the Court's Friday, September 1, 2023 – 10:00 a.m. docket for entry of the Order.

Counsel for Respondent will kindly prepare an Order and circulate the draft to be endorsed by all parties with objections noted, if needed. This Memorandum Opinion should be referenced as adopted and incorporated in the Final Order, but it does not have to be made an actual attachment. AND THIS MATTER IS CONTINUED.

ENTERED this 9 day of August 2023.

John M Tran

JUDGE, Fairfax Circuit Court

Pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the Court dispenses with the endorsement of this Order