THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 12-ALJ-17-0343-CC
Appellate Case No. 2013-002218

Richland County Assessor.....Respondent,

v.

James M. Hull, d/b/a Hull Storey Gibson Companies, LLC.....Appellant.

REPLY BRIEF OF APPELLANT

RECEIVED
DEC 23 2013
S.C. SUPREME COURT

Timothy E. Madden
S.C. Bar No. 11786
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 10084
Greenville, South Carolina
(864) 250-2267

Matthew W. Matson
Pro hac vice
GA Bar No. 812044
1190 Interstate Parkway
Augusta, Georgia 30909
706/434-1743

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Appellant adopts and incorporates by reference the Statement of the Case and Facts presented in its Initial Brief. The factual history discussed below is limited to reply to the issues raised in the Respondent's Brief.

The subject property was marketed by Colliers and exposed to the market for over four years prior to Taxpayer's acquisition. (Tr. p.99:11-24) In May of 2009, the grantor Crescent Resources ("Crescent") sought final offers based on the significant amount of interest in the property. (App. Ex. 3 p.5) After extensive negotiations and marketing, Crescent decided to sell the property through an auction in August 2009. (App. Ex. 3 pp.8-9) Crescent had the opportunity to cancel the contract if they were not satisfied with the sales price prior to bankruptcy or at the bankruptcy auction sale. (Tr. p.100:7-17) Crescent's sale was safeguarded by the procedures of the bankruptcy code and specifically stated in its Reservation of Rights some of those safeguards:

> "The Debtors reserve the right to (i) determine in their reasonable discretion which bid is the highest or best bid and (ii) reject, without liability, any offer that the Debtors in their reasonable discretion deem to be (x) inadequate or insufficient, (y) not in conformity with the requirements of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, or procedures set forth therein or herein, or (z) contrary to the best interests of the Debtors and their estates. The selection of a Successful Bidder shall be within the reasonable business judgment of the Debtors." (App. Ex. 3 p.9)

Crescent sold the entire subject property (both parcels together in one sale) for $1,975,000 to Taxpayer. (App. Ex. 3 pp.10-13) According to Assessor's witnesses, there were no subsequent sales of similar acreage tracts in 2009 or 2010. (Tr., p.31:15-21)

STANDARD OF REVIEW

"Tax appeals to the ALC are subject to the Administrative Procedures Act." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 73, 716 S.E.2d 877, 880 (2011). Final decisions of an administrative law judge are reviewed in accordance with the provisions of S.C. Code Ann. §1-23-610. Relief from the decision is appropriate where "the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. §1-23-610(B). A reviewing court is not required to give any deference to the lower court when deciding questions of statutory interpretation which are questions of law. *CFRE,* 395 S.C. at 74, 716 S.E.2d at 880.

The appellate court's review of the ALC's order must be confined to the record. S.C. Code Ann. §1-23-610(B). In *Smith v. Newberry County Assessor*, the Assessor argued that when the taxpayer presented additional evidence at the ALC, the proceeding should have been remanded to the County Board of Appeals. *Smith v. Newberry Cnty. Ass'r.*, 350 S.C. 572, 576-577 (Ct. App. 2002). The Court found that the Assessor did not object to the admission of the evidence or ask the ALJ to remand, which acted as an

election to forgo the remand. *Id.* The Court further found that the evidentiary issue was not preserved on appeal because of Assessor's failure to object at the ALC.

Likewise, at the ALC hearing in the case at bar, Assessor did not object to Taxpayer's admission of evidence about the sale of the property. (*See generally* Tr.) Taxpayer's witnesses James Hull and Wayne Grovenstein testified as to the lengthy marketing of the property by the seller, the significant negotiations that went into the sales transaction, the safeguards set forth in a bankruptcy sale which ensured the goal of a fair market value sale, and other testimony regarding their knowledge of the property and surrounding market. (Tr., pp. 82-100, 107-122)

Assessor now seeks to introduce evidence, through its brief, that Crescent Resource (the seller of the property) was compelled to sell this property. Br. of Res. at 19. Assessor did not present such evidence at the ALC. Assessor's witnesses could not have provided such testimony because they did not investigate the sale and that statement is simply not true. Assessor's brief makes generalizations about Chapter 11 bankruptcies, but does not cite any of the details of the bankruptcy orders in Crescent's case. Br. of Res. at 19-20. This parcel represented a very small part of Crescent's overall holdings. The unrefuted evidence presented at trial is that Crescent's sale of the property through a bankruptcy auction following lengthy exposure to the market was an arms' length transaction without compulsion from anyone. (Tr., pp.82-100, 107-122)

ARGUMENT

I. Respondent Richland County Tax Assessor should not have maintained its presumption of correctness while also having the burden of proof.

In order to contest a property tax assessment made by a county tax assessor, a taxpayer must appeal to the county board of assessment appeals. *See* S.C. Code Ann. §§12-60-2520(C)(4) & 12-60-2540 (2012). An Assessor's value is presumed correct until the taxpayer has shown the valuation is incorrect, whereupon the presumption is removed, and the taxpayer is entitled to appropriate relief. *Cloyd v. Mabry*, 295 S.C. 86, 367 S.E.2d 171 (Ct. App. 1988); 84 C.J.S. *Taxation* §537 (1954); 84 C.J.S. *Taxation* §520 (2010). A taxpayer must go before the county board of assessment appeals in order to appeal a property tax valuation set by the county assessor. *S.C. Code Ann.* §12-60-2540 (stating where a taxpayer fails to file a protest and to attend the conference with the county board of assessment appeals, the action will be dismissed.) The taxpayer must exhaust his prehearing remedies as a condition precedent to being granted a contested case hearing. *Id.* Therefore, the county board of assessment appeals hearing is a mandated part of the appeals process.

At the county board of assessment appeals—the beginning of the appeals process—the Assessor's value had a presumption of correctness. *See Cloyd.* When the taxpayer proved that valuation to be incorrect the presumption was removed. *Id.* The *South Carolina Revenue Procedures Act* (S.C. Code Ann. Title 12, Chapter 60) is want of any reference that a taxpayer should have to twice overcome an assessor's presumption of correctness. Without a specific reference that the Assessor should maintain its presumption of correctness throughout the appeals process, the Assessor should not

reclaim its presumption of correctness once it is removed. The ALC held in its Conclusions of Law para. 10 that "[a]n Assessor's valuation is presumed correct and the property owner bears the burden of proving that the Assessor's determination is not correct (citation omitted)."

Respondent points to *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 489 S.E.2d 674 (1997) and *S.C. Tax Comm'n v. S.C. Tax Bd. of Review,* 278 S.C. 556 to support its argument that the Assessor held the burden of proving the valuation of the subject property while maintaining a presumption that Assessor's valuation of the subject property was correct. *See* Br. of Res. pp.28-29. Respondent does not explain how this application works in practice and seeks to confuse the issue with its citation to *Reliance*. It is simply beyond reason that a party may have the burden of proving anything when he begins with a presumption that what he seeks to prove is correct. In Respondent's proposed scenario there is no burden on the Assessor at all.

Respondent and Appellant agree that the Assessor had the burden of proof at the contested case hearing before the Administrative Law Court. *See* Br. of Res. p.27; Br. of App. p.17. Assuming arguendo neither party presented evidence at the hearing, because Assessor had the burden of proof, judgment should be rendered for Taxpayer. However, under Respondent's interpretation if neither party presented evidence even though Assessor maintained the burden of proof, the presumption of correctness afforded to Assessor would necessitate judgment for Assessor.

The cases and statutes referenced by Appellant and Respondent should not be read to render the county board of assessment appeals—a necessary step in the appeals process—as devoid of any meaning. If the Court adopts Respondent's position that the

Assessor maintains a presumption of correctness after the Board of Assessment Appeals has rejected the Assessor's value, the holding will do just that. If the legislature had intended such a result, it could have left the requirement of attending a board of assessment appeals hearing out of the statute, which it did not choose to do. The ALC's decision that the Assessor maintained the presumption of correctness improperly burdened the taxpayer and Taxpayer was harmed by ALC's improper conclusion.

II. The evidence which was before the ALC established that the sale of the subject property met the elements of S.C. Code Ann. §12-37-930.

A. Appellant presented independent evidence of fair market value, yet Respondent chose to ignore that evidence in its analysis of valuation.

Respondent claims in argument II.C. of its brief that, "Taxpayer presented no independent evidence of fair market value of the subject parcels." Yet Respondent refers to "Taxpayer's proposed additional comparable sales, and Taxpayer's proposed adjustment's (sic) to Assessor's comparable sales." Br. of Res. p.18:9-10. Whether or not Respondent agrees with this evidence, Taxpayer did present independent evidence of fair market value in its analysis of comparable sales, equity, and the circumstances of the sale of the subject property.

Taxpayer's witness, James Hull, determined the value of the subject property by analyzing some of the same comparable sales that Assessor used and used additional sales in his analysis. (Tr. pp.110-116) Mr. Hull owns the property through SC Bypass, LLC, and despite Assessor's contentions, Mr. Hull is competent to testify regarding its value. *See Gauld v. O'Shaugnessy Realty Co.,* 380 S.C. 548 at 560 (Ct. App. 2008). The unrefuted testimony established that Mr. Hull has been involved in the real estate business for over 40 years. (Tr. pp.105-106) He performs valuation work every day in

his field and stated that "appraisal valuation is a foundation piece for any real estate activity." (Tr. p.106:15-20) Mr. Hull has been involved in several other real estate transactions in the immediate vicinity and is very familiar with the market for commercial real estate in this particular area of Richland County. (Tr. pp.107:15 – 109:15) Assessor does not agree with Taxpayer's analysis of the evidence and accordingly claims that Taxpayer has not presented any evidence. The suggestion that Mr. Hull's testimony lacks probative value because he no longer performs third-party appraisals is disingenuous. Where a third-party appraisal of the property would estimate the price at which a sale of property would bring, Mr. Hull's testimony is more probative because it supports what price the sale of the property actually brought following lengthy exposure to the market which was fairly negotiated and at arms' length, in the instant case. Further, the record reflects that Mr. Hull has been admitted as an expert witness in the field of valuation of commercial properties in courts in South Carolina, North Carolina, Georgia and Tennessee. (Tr. p.112:11-16) When Assessor had the opportunity to object to Hull's testimony or cross-examine him, Assessor chose not to do so. (*See generally* Tr.) Assessor now takes the position that his testimony is not credible because he no longer performs third-party fee appraisals, while suggesting that Mr. Hull's license was "surrendered." Br. of Res. p.31 FN 20. In reality, Mr. Hull did not keep up his appraisal license because he no longer accept fees from third parties to tell them what their property is worth, but rather uses his appraisal skills to purchase and sell properties. (Tr. p.112:16-21)

Further the idea that Mr. Hull's appraisal used the same properties that Assessor used (as well as others) would support Mr. Hull's valuation analysis. It stands to reason

that the same or similar sales would be used in examining the same subject property, especially when there were no other large tract sales in 2009 (the year of valuation) or the following year. (Tr. pp.76, 149)

B. The evidence presented regarding the sale of the property and the safeguards of a bankruptcy sale established that the seller was not compelled to sell the property.

Taxpayer also presented ample evidence of the facts and circumstances leading up to the sale of the property which included evidence about the negotiations and eventual sale. (Tr. pp.83-85, 88-94; App. Ex. 3) That evidence supported Taxpayer's assertion that the sale was an arms' length bona fide transaction. Taxpayer submits that Assessor's remarks in its Brief regarding bankruptcy are not specific to the sale of the subject property, were not used in Assessor's analysis of the sale, were not presented in the form of admissible evidence before the ALC, and are based on speculation rather than fact or law. *See* Br. of Res. pp.18-20. Assessor paints the picture of a liquidation sale on the frontsteps of the courthouse. In reality, the grantor, Crescent Resources had more than $1 billion of assets at the time of the sale. Assessor explains Crescent's bankruptcy as due to "unsustainable capital structures." Br. of Res. p.19. The sentence to which Assessor refers in Taxpayer's Ex. 3 page 7 also states, "[T]he real estate industry has faced unprecedented economic challenges." This is the crux of the case, though Assessor unsurprisingly fails to mention it. The problem with the Assessor's approach to valuing the subject property is that Assessor fails to fathom that the sales price of the subject property represents fair market value following the greatest commercial real estate value decline in a generation. Rather than the Assessors contention that the sale of the subject property in 2009 is an outlier of the market for similar land established from older sales,

the sale price of the subject property in 2009 established the new market value for similar properties in the area going forward.

Through its brief, the Assessor attempts to support the idea that the subject sale was a forced sale using its newfound understanding of bankruptcy. Br. of Res. pp.19-20. Assessor is careful not to use the term short sale, but repeatedly and without any evidence of same states that Crescent was compelled to sell the property in an attempt to categorize the transaction in such a manner. The procedures set forth in a bankruptcy sale are used to maximize the debtor estate; it is not simply a means to get a property off of the debtor's books.

Assessor's witness Mr. Fancey testified he did not understand that Crescent had a right to reject the sale, did not know if they would have to sell the property, did not know how many parties were in involved in the bidding procedure, was not aware of the prior negotiations, and is not aware of the powers of a bankruptcy judge. (Tr. pp.158-159) The assumptions and contentions which Assessor now puts forth are not supported by any of Assessor's evidence at the ALC hearing. In contrast, the Assessor's witnesses admitted that the sale of the subject property satisfied every single element of §12-37-930 to establish a sale as representing fair market value. (Tr., pp.49:22-25, 50:4-15) The witnesses testified that they nonetheless concluded that the sale did not represent fair market value, and repeated that incorrect conclusion over and over. He also testified that there were no other similar sales in 2009 or 2010, and thus incorrectly determined that the sale did not represent the market value.

CONCLUSION

For the reasons set forth above and previously more fully in Appellant's brief, with the support of the record hereto, Appellant respectfully renews its request that this Court remand this case with instruction.

Respectfully submitted, this 19 day of December, 2013.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Timothy E. Madden, SC Bar No. 11786
E-Mail: tim.madden@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Matthew W. Matson
Pro hac vice
GA Bar No 812044
1190 Interstate Parkway
Augusta, GA 30909
(706) 434-1743

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Case No. 12-ALJ-17-0343-CC
Appellate Case No. 2013-002218

RECEIVED
DEC 23 2013
S.C. SUPREME COURT

Richland County Assessor.....Respondent,

v.

James M. Hull, d/b/a Hull Storey Gibson Companies, LLC.....Appellant.

PROOF OF SERVICE

I certify that I have served the REPLY BRIEF OF APPELLANT on Richland County Assessor by depositing a copy of it in the United States Mail, postage prepaid, on December 19, 2013, addressed to its attorneys of record, John M.S. Hoefer, 930 Richland St., P.O. Box 8416, Columbia, South Carolina, 29202, and Malane S. Pike, P.O. Box 729, White Rock, South Carolina 29177.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Timothy E. Madden, SC Bar No. 11786
E-Mail: tim.madden@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

Matthew W. Matson
Pro hac vice
GA Bar No 812044
1190 Interstate Parkway
Augusta, GA 30909
(706) 434-1743

Attorneys for Appellant

Greenville, South Carolina

Dec 19, 2013