THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Unpublished Opinion No. 2015-UP-303 (S.C. Ct. App. filed June 24, 2015)

Charleston County Assessor,...................................Petitioner,

v.

LMP Properties, Inc.,...Respondent.

RETURN OF RESPONDENT

Stanley C. Rodgers, Esquire
Law Office of Stanley C. Rodgers, LLC
101 Queen Street, Suite 200
Charleston, SC 29401
843-958-9881
scr@stanleyrodgers.com
S.C. Bar No. 64984

Attorney for Respondent

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QUESTION PRESENTED

Did the court of appeals err in holding substantial evidence supported the administrative law court's ruling that the use of the property as condominiums was not financially feasible as of the valuation date for the particular tax year and thus that use (as condominiums) could not be the highest and best use of the property for purposes of valuation?

QUESTION PRESENTED

Did the court of appeals err in holding substantial evidence supported the administrative law court's ruling that the use of the property as condominiums was not financially feasible as of the valuation date for the particular tax year and thus that use (as condominiums) could not be the highest and best use of the property for purposes of valuation?

STATEMENT OF THE CASE

This case concerns ad valorem real property tax valuation for Tax Year 2008 in Charleston County for 121 condominium units owned by a single entity, LMP Properties, Inc. ("Taxpayer"). The Charleston County Assessor ("Assessor") assessed each unit individually with a resulting total of $16,454,000. Record p. 423; Petitioner's Exhibit 9. Taxpayer sought review with the Charleston County Board of Assessment Appeals, which decided the individual assessments should be reduced such that the new total was $10,090,500. Record pp. 439-41; Respondent's Exhibit 1. Assessor requested a contested case hearing with the Administrative Law Court and sought to have Assessor's valuations deemed to be correct.

Following a two-day trial, the ALC ruled "[t]he property's fair market value must be based on the property's highest and best use on the valuation date, which in this case is December 31, 2003." Record p. 10. Because the property could not have been used as condominiums prior to March 2006 based on a restriction in the promissory note and mortgage secured by the property, the ALC concluded the hypothetical use as condominiums could not have been the highest and best use as of December 31, 2003. Therefore, the property had to be valued as apartments, and the parties agreed on the value ($8,565,000) of the property as apartments. Record p. 11.

The ALC acknowledged Taxpayer's other arguments:

> Furthermore, even if the Court accepted the Assessor's argument, which it does not, the Taxpayer asserts that the highest and best use for the property on the date proposed by the Assessor (December 31, 2007) is still

> as apartments. According to the Taxpayer's expert, the market for condominiums declined substantially in the time since the subject property was converted in April 2006, and in his opinion, the property could only be used as rental apartments on December 31, 2007. Not because of the legal impediment, but because of market conditions. He cites the vast difference in the number of units sold in 2006 as compared to the number of units sold in 2007 as support for his conclusion. However, because this Court has already found that the date for determining the highest and best use is as of December 31, 2003, it will not delve further into this argument.
>
> Relying on [Lindsey v. South Carolina Tax Commission, 302 S.C. 504, 397 S.E.2d 95 (1990)] as support, the Taxpayer additionally argues that the subject property should be valued according to their *use* (as apartments) rather than how they are *titled* (as condominiums). However, having found that the highest and best use of the property is as apartments rather than condominiums as urged by the Assessor, the Court finds it unnecessary to address Taxpayer's argument or Assessor's opposing argument.
>
> As a final argument, the Taxpayer disagrees with the Assessor's methodology for valuing the 121 units as individual condominiums. Specifically, the Taxpayer contends that the Assessor's conclusions as to value are unsound because they rest on a faulty foundation – some of the sales comparables selected are significantly different from the subject property. And even if the valuations did not suffer from this fundamental flaw, Taxpayer argues that the valuations should be rejected because the Assessor failed to factor in the impact of single ownership on the value of the 121 units. Again, based upon The Court's earlier finding that the highest and best use of the subject property is as apartments rather than condominiums, the Court finds it unnecessary to address the Taxpayer's final arguments, or Assessor's arguments in opposition.

Record pp. 10-11.

Assessor appealed. In a split decision, the Court of Appeals reversed. Charleston County Assessor v. LMP Properties, Inc., 403 S.C. 194, 743 S.E.2d 88 (Ct. App. 2013) (LMP I). The LMP I Court concluded "the appropriate date for determining the units' highest and best use is December 31, 2007." Id. at 200, 743 S.E.2d at 91. Because the

ALC's determination of fair market value was based on the determination of the property's highest and best use as of December 31, 2003 (the reassessment date), the LMP I Court reversed and "remand[ed] so that the ALC may address the parties' remaining arguments regarding valuation of the units." Id. at 201, 743 S.E.2d at 92.

The parties agreed on remand the ALC would decide the issues based on the evidence presented during the trial. Record p. 706. Following oral arguments, the ALC again ruled the value of the 121 condominium units for the 2008 Tax Year was $8,565,000. Record p. 668, introductory ¶ two.

First, the ALC found it was not financially feasible for the property to be used as condominiums as of December 31, 2007. Therefore, a proposed use as condominiums did not satisfy the Highest and Best Use Test for that date. That finding meant the use as apartments was the highest and best use as of December 31, 2007. The ALC noted the parties agreed on the valuation of the property as apartments: $8, 565,000. Record p. 675, ¶¶ 17-18.

Second, the ALC concluded valuing the 121 units as apartments was also required by the South Carolina Supreme Court's decision in Lindsey v. South Carolina Tax Commission, 302 S.C. 504, 397 S.E.2d 95 (1990). Record p. 678, ¶¶ 26.

Third, the ALC found the Assessor's proposed valuations of the individual condominiums should be rejected as not supported by the evidence. Record p. 678, ¶ 27 - 683, ¶ 47.

Assessor again appealed. In a per curiam, unpublished opinion, the Court of Appeals affirmed. Charleston County Assessor v. LMP Properties, Inc., Unpublished

Opinion No. 2015-UP-303 (filed June 24, 2015) (<u>LMP II</u>). Record p. 848.

> As to whether the ALC erred in finding condominiums were not the highest and best use of the Units, we find substantial evidence supports the ALC's finding that condominiums were not a financially feasible use of the Units. Specifically, LMP's expert's testimony supports the conclusion that – based on the depressed market for condominiums in Charleston in 2007 – condominiums were not a financially feasible use of the Units. Because condominiums were not a financially feasible use of the Units, condominiums could not be the highest and best use of the Units. Moreover, we find substantial evidence supports the ALC's finding that apartments were the highest and best use of the Units.

<u>Id</u>. at ¶ 2. Because of that ruling, the <u>LMP II</u> Court did "not reach the issue of whether the ALC improperly valued the Units when used as condominiums or whether the ALC erred in the application of the holding in <u>Lindsay</u>." <u>Id</u>. at ¶ 3.

ARGUMENT

THE ALC DID NOT ERR IN HOLDING SUBSTANTIAL EVIDENCE SUPPORTED THE ADMINISTRATIVE LAW COURT'S RULING THAT THE USE OF THE PROPERTY AS CONDOMINIUMS WAS NOT FINANCIALLY FEASIBLE AS OF THE VALUATION DATE FOR THE PARTICULAR TAX YEAR AND THUS THAT USE (AS CONDOMINIUMS) COULD NOT BE THE HIGHEST AND BEST USE OF THE PROPERTY FOR PURPOSES OF VALUATION.

A. Framework for Assessment of Real Property

Article X of the South Carolina Constitution provides the general framework for the assessment of property, and various statutes provide the specifics. Section 12-37-930 provides in part:

> All property must be valued for taxation at its true value in money which in all cases is the price which the property would bring following reasonable exposure to the market, where both the seller and buyer are willing, are not acting under compulsion, and are reasonably well informed of the uses and purposes for which it is

adapted and for which it is capable of being used.

S.C. Code Ann. § 12-37-930 (2014). Fair market value is the proper measure of value of real property for *ad valorem* taxation purposes. Lindsey v. South Carolina Tax Comm'n, 302 S.C. 504, 507, 397 S.E.2d 95, 97 (1990). The determination of fair market value is based on the determination of the highest and best use of the property. See id. at 507, 397 S.E.2d at 97.

The Appraisal Institute describes the methodology for determining a property's highest and best use:

> There are four tests that a property must meet before its highest and best use can be determined. The use must be physically possible, legally permissible, financially feasible, and maximally profitable (i.e., create the highest economic value). The appraiser must apply each of these tests and discuss each in the appraisal report to justify the ultimate opinion of highest and best use.

Appraisal Institute, Real Estate Valuation in Litigation 105 (2d ed. 1995).[1]

B. First Appeal

The issue in the first appeal was whether the ALC erred in deciding that December 31, 2003 was the critical date for determining the units' highest and best use. 403 S.C. at 196, 743 S.E.2d at 89. The LMP I Court stated:

> The parties and the ALC agreed that in order to calculate the property's fair market value, the property's highest and best use must first be determined, but disagree as to the date on which the highest and best use must be determined. LMP contends that Section 12-43-215 requires that the highest and best use must be determined as of December 31, 2003, the date

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[1] The LMP I Court noted that "[t]he parties do not appeal the ALC's reliance on this method of determining the highest and best use of the units." 403 S.C. at 198 n.1, 743 S.E.2d at 90 n.1.

> used for the last countywide reassessment program in Charleston County. However, we agree with the Assessor that the appropriate date for determining the units' highest and best use is December 31, 2007.

Id. at 200, 743 S.E.2d at 91.

C. Second (Present) Appeal

On remand, the ALC interpreted the court of appeals's opinion as requiring each step of the Highest and Best Use Test to be applied as of December 31, 2007. For each type of use (as condominiums for sale or as apartments for rent), that particular use must pass each step of the test to make it to the next step and ultimately to be considered as a candidate for the highest and best use. The ALC noted the parties agreed condominium units and apartment units were both physically possible as of December 31, 2007 and, therefore, both uses passed step one. Record p. 674, ¶ 11. The ALC then noted the parties agreed condominium units and apartment units were both legally permissible as of December 31, 2007 and, therefore, both uses passed step two. Record p. 674, ¶ 12.

Addressing step three of the Highest and Best Use Test, the ALC found that it was not financially feasible for the units to be used as condominiums as of December 31, 2007. Record p. 675, ¶ 17. Because the condominium use failed step three, that use was no longer a candidate for the highest and best use as of that date. The parties agreed the apartment use was financially feasible on that date and, therefore, the highest and best use of the property as of December 31, 2007 was as apartments. The ALC noted the parties essentially agreed on the fair market value of the units as apartments. Record p. 675, ¶ 18.

The court of appeals affirmed. The LMP II Court implicitly found the ALC had correctly concluded that all four steps of the Highest and Best Use Test had to be individually applied as of December 31, 2007. The LMP II Court explicitly found "substantial evidence supports the ALC's finding that condominiums were not a financially feasible use of the Units." Op. No. 2015-UP-303 ¶ 2. Thus, the use as condominiums could not be the Highest and Best Use as of December 31, 2007 because that particular use failed step three of the Highest and Best Use Test. Conversely, the use as apartments satisfied all four steps. Therefore, the use as apartments was the highest and best use, and the fair market value was to be determined based on that use.

D. Substantial Evidence Supports the ALC's Decision

The LMP II Court briefly referenced some of the evidence supporting the ALC's decision. A fuller description follows.

Ronald Follmann, a principal in Taxpayer, testified about the conversion of the property to condominium ownership by the filing of a master deed on April 27, 2006. Follmann testified that the lender had a presale requirement of forty units. Follmann testified he was only able to secure twenty-three presales, but the lender ultimately agreed to modify the presale requirement. Record p. 104; Transcript pp. 254-255. Follmann testified about the difficulties subsequently encountered in trying to sell condominium units. A chart was introduced showing the sales history:

2006:	44 units
2007:	13 units
2008:	0 units
2009:	1 unit

Record p. 665.

Taxpayer presented Frank Headley, an appraiser with over thirty years of experience, as an expert witness. Record p. 109; Transcript p. 273, lines 2-20. Headley was qualified as an expert by the ALC. Record p. 110; Transcript p. 280, lines 14-15. Headley testified Taxpayer's experience with trying to sell condominium units in 2006 and 2007 was hardly unique. Record p. 123; Transcript p. 329, line 17 - p. 331, line 23. Headley testified:

> In 2006, we didn't recognize the fact that it was going downhill.
>
> ...
>
> [W]hen the gentleman went to convert it, the market was going downhill, only he didn't recognize it and he was not alone in not recognizing it.

Record p. 124; Transcript p. 334, line 25 - p. 335, line 1; p. 333, lines 5-8.

Headley testified there were other failed condominium conversions in Charleston County during that timeframe. Record p. 123; Transcript p. 329, line 17 - p. 330, line 25. By the end of 2007, the trend was clear:

> And I did a lot [of] work down there, so, when we started getting into 2007, appraisers, I would call on and we'd share data and so forth. They would say boy, the condominium market, really (indicating) gone.

Record p. 124; Transcript p. 335, lines 7-11.

Headley testified it was not financially feasible for the property to be sold off as condominiums as of December 31, 2007. Record p. 123; Transcript p. 329, lines 10-14. Therefore, a proposed use as condominiums did not satisfy the highest and best use test as of December 31, 2007. Record p. 126; Transcript p. 342, line 19 - p. 347, line 3.

E. Assessor's Position was Correctly Rejected

Assessor appears to argue the individual steps of the Highest and Best Use Test should be applied as of different dates: Step 1 (legally permissible) and Step 2 (physically possible) as of 12/31/07; Step 3 (financially feasible) and Step 4 (maximally profitable) as of 12/31/03. Such an approach would allow a use to be valued for a particular tax year (here, 2008) that is neither the highest and best use on the valuation date (12/31/07) nor the highest and best use on the reassessment date (12/31/03). The ALC and the court of appeals rightly rejected such a schizophrenic approach. See New York Times Co. v. Spartanburg School District No. 7, 374 S.C. 307, 312, 649 S.E.2d 28, 30 (2007) ("We will reject a statutory interpretation that leads to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention."); Rhame v. Charleston County School District, 412 S.C. 273, 277, 772 S.E.2d 159, 161 (2015) (favoring "plain and common sense interpretation" of statute); Abraham v. Palmetto Unified School District No. 1, 343 S.C. 36, 48, 538 S.E.2d 656, 662 (Ct. App. 2000) (rejecting interpretation of statute "which leads to such an illogical conclusion").

CONCLUSION

The ALC's factual findings regarding financial feasibility are supported by substantive evidence. The ALC's application of the legal framework governing ad valorem taxation of real property is consistent with South Carolina statutory law and case law. The court of appeals did not err in affirming the ALC's decision. For the reasons stated, this Court should not grant Petitioner's Petition for a Writ of Certiorari.

October 13, 2015

Respectfully submitted,

LAW OFFICE OF
STANLEY C. RODGERS, LLC

Stanley C. Rodgers, Esquire
101 Queen Street
Charleston, SC 29401
843-958-9881
scr@stanleyrodgers.com
S.C. Bar No. 64984

Attorney for Respondent

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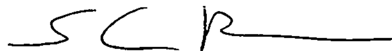
PROOF OF SERVICE

I certify that I have served the Return of Respondent on Petitioner Charleston County Assessor by depositing a copy of the same in the United States Mail, postage prepaid, on October 13, 2015, addressed to its counsel of record as follows:

Joseph Dawson, III, Esquire
Bernard E. Ferrara, Jr., Esquire
Bradley A. Mitchell, Esquire
Austin A. Bruner, Esquire
Johanna S. Gardner, Esquire
Charleston County Attorney's Office
4045 Bridge View Drive
North Charleston,SC 29405-7464

Law Office of Stanley C. Rodgers, LLC



Stanley C. Rodgers, Esquire
101 Queen Street
Charleston, SC 29401
843-958-9881
scr@stanleyrodgers.com
S.C. Bar No. 64984

Attorney for Respondent