

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 2009-ALJ-17-0533-CC

Charleston County Assessor, Appellant,

v.

LMP Properties, Inc., Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the ALC err in concluding the court of appeals's decision in the prior appeal required all four steps of the highest and best use test to be applied as of December 31, 2007?
2. Did substantial evidence in the record support the ALC's finding that it was not financially feasible to use the units as condominiums as of December 31, 2007?
3. Did the ALC err in ruling the Lindsey case supported the conclusion the 121 units at issue should be valued in accordance with their use rather than in accordance with how they were titled?
4. Did substantial evidence in the record support the ALC's finding as to the value of the 121 units as condominiums as of December 31, 2003.

STATEMENT OF THE CASE

This case concerns ad valorem real property tax valuation in Charleston County for the 2008 tax year. The property at issue is 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.

The trial took place in the Administrative Law Court on August 24-25, 2010. By Final Order and Decision dated October 11, 2011, 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 Comm'n, 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).

The 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. The Court “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.

Following remand, the ALC held oral arguments on July 30, 2013. The parties agreed the ALC would decide the issues based on the evidence presented during the trial in 2010. Record p. 706, lines 3-23. By Final Order and Decision dated September 20, 2013, the ALC 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 Comm'n, 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 - p. 683, ¶ 47.

Assessor again appealed.

ARGUMENTS

1. THE ALC DID NOT ERR IN CONCLUDING THE COURT OF APPEALS'S DECISION IN THE PRIOR APPEAL REQUIRED ALL FOUR STEPS OF THE HIGHEST AND BEST USE TEST TO BE APPLIED AS OF DECEMBER 31, 2007.

I. Standard of Review

The Administrative Procedures Act provides the standard of review for an appellate court reviewing a decision of the ALC:

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if 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) (Supp. 2013). "The decision of the ALC should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." Sierra Club v. South Carolina Dep't of Health & Env'tl. Control, 387 S.C. 424, 431, 693 S.E.2d 13, 16 (Ct. App. 2010). "In determining whether the ALC's decision is

supported by substantial evidence, this court need only find, considering the record as a whole, evidence from which reasonable minds could reach the same conclusion that the ALC reached.” ESA Services, LLC v. South Carolina Dep’t of Revenue, 392 S.C. 11, 24, 707 S.E.2d 431, 438 (Ct. App. 2011). The appellate court “shall not substitute its judgment for that of the ALC as to findings of fact, [but] may reverse or modify decisions that are controlled by error of law or are clearly erroneous in view of the substantial evidence on the record as a whole.” Id. at 24, 707 S.E.2d at 438.

II. Highest and Best Use as of 12/31/07

A. Prior Appeal

The issue before this court in the prior appeal was whether the ALC erred in deciding that December 31, 2003 was the critical date for determining the units’ highest and best use. Charleston County Assessor v. LMP Properties, Inc., 403 S.C. 194, 196, 743 S.E.2d 88, 89 (Ct. App. 2013). The 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 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.

The three judge panel splintered on whether Section 12-43-215¹ was applicable in this case. Judge Williams wrote the majority opinion and stated in a footnote that he “question[ed] whether it applies in the instant case; nevertheless, because no party appealed the ALC’s ruling that Section 12-43-215 applies, this ruling is the law of the case.” 403 S.C. at 199 n.2, 743 S.E.2d at 91 n.2. Judge Pieper dissented, but agreed “the ALC’s application of Section 12-43-215, while incorrect, is the law of the case[.]” *Id.* at 202, 743 S.E.2d at 92. Chief Judge Few concurred with the decision to reverse the ALC, but disagreed that Section 12-43-215 was applicable. *Id.* at 201-02, 743 S.E.2d at 92. However, Chief Judge Few “agree[d] with Judge Williams that December 31, 2007, is the correct date for determining the highest and best use of the property.” *Id.* at 201; 743 S.E.2d at 92.

The court explained that while Section 12-43-215 was “silent on the date to be used for determining the highest and best use of the property[,] it cannot be read to mandate a diversion from the general rule that the use of the property is to be determined as of December 31st of the preceding year.” *Id.* at 200, 743 S.E.2d at 91. Because the tax

¹ Section 12-43-15 provides:

When owner-occupied residential property assessed pursuant to Section 12-43-220(c) is valued for purposes of ad valorem taxation, the value of the land must be determined on the basis that its highest and best use is for residential purposes. When a property owner or an agent for the property owner appeals the value of a property assessment, the assessor shall consider the appeal and make any adjustments, if warranted, based on the market values of real property as they existed in the year that the equalization and reassessment program was conducted and on which the assessment is based.

S.C. Code Ann. § 12-43-215 (2014).

year at issue was 2008, the date for determining the highest and best use was December 31, 2007.

B. Present Appeal

In considering the first issue before the court in the present appeal, we need to briefly review the laws governing the assessment of real property in South Carolina.

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. Linséy 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).²

Additionally, the Appraisal Institute defines highest and best use as follows: “The reasonably probable and legal use of vacant land or an improved property, that is legally permissible, physically possible, appropriately supported, financially feasible, and that results in the highest value.” Appraisal Institute, The Appraisal of Real Estate 278 (13th ed. 2008). This definition applies specifically to the use of the land. However, South Carolina law recognizes that in cases where a site has existing improvements on it, the highest and best use may be different from the existing use.

After stating “[r]eal property in South Carolina is assessed in accordance with the property’s highest and best use,” Assessor quotes these same provisions from the Appraisal Institute in Assessor’s brief. Appellant’s Brief p. 12. Where Assessor and Taxpayer part company is on whether each step of the highest and best use test must be applied as of December 31, 2007 (Taxpayer’s position), or whether steps one and two are to be applied as of December 31, 2007 while steps three and four are to be applied as of December 31, 2003 (Assessor’s position).

Assessor perhaps asserts this schizophrenic approach because Assessor introduced no evidence at trial regarding the financial feasibility or maximally profitable use of the units as of December 31, 2007. Rather, Assessor focused exclusively on determining and comparing the values of the units as condominiums for sale versus apartments for rent as of December 31, 2003. Assessor conceded as much in the hearing before the ALC

² This court noted in the prior appeal 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.

following remand: “The County in each instance, whether it’s apartment or condo, relied only on market data for 2003, nothing else.” Record p. 752, lines 4-7; p. 713, lines 4-5; p. 716, lines 3-10; p. 725, lines 25- p. 726, line 7.

On remand, the ALC interpreted the court of appeals’s decision to require 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 court noted the parties essentially agreed on the fair market value of the units as apartments. Record p. 675, ¶ 18.

The ALC’s approach after remand finds explicit support in the judges’ opinions in the prior appeal. Judge Williams’s opinion for the court plainly states “that the appropriate date for determining the units’ highest and best use is December 31, 2007.”

403 S.C. at 200, 743 S.E.2d at 91. Chief Judge Few plainly states in the concurring opinion that he “agree[s] with Judge Williams that December 31, 2007, is the correct date for determining the highest and best use of the property.” *Id.* at 201, 743 S.E.2d at 92. There is nothing in Judge Williams’s opinion or in Chief Judge Few’s concurring opinion (or in Judge Pieper’s dissenting opinion) to support the argument that the first two steps (physically possible and legally permissible) of the highest and best use test are to be performed as of a different date than the last two steps (financially feasible and maximally profitable). Assessor’s argument finds no support in this court’s prior opinion and should be rejected.

C. Proper Valuation Procedure in This Case

The proper procedure for assessing the property for the 2008 Tax Year is as follows:

- (i). Apply each step of the Highest and Best Use Test – as of December 31, 2007 – to both uses being put forward as candidates for the highest and best use as of December 31, 2007.
- (ii). Take the result of that process, which will be by definition the highest and best use of the property as of December 31, 2007, and then “make any adjustments, if warranted, based on the market values of real property as they existed in the year that the equalization and reassessment program was conducted and on which the assessment is based.” S.C. Code Ann. § 12-43-215 (2014). In Charleston County, “the year that the equalization and

reassessment program was conducted” was 2004, thus making December 31, 2003 the valuation date for comparison purposes.

- (iii). Because the use as condominiums did not pass step three (financial feasibility) of the Highest and Best Use Test as of December 31, 2007, the condominium use could not be the highest and best use as of that date. Thus, the value of the units as condominiums as of December 31, 2003 did not need to be determined. The use as apartments passed each step as December 31, 2007, became the highest and best use, and was the winning candidate requiring valuation.
- (iv). The parties agreed on the value of the property as apartments: \$8,565,000.

2. SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE ALC’S FINDING THAT IT WAS NOT FINANCIALLY FEASIBLE TO USE THE UNITS AS CONDOMINIUMS AS OF DECEMBER 31, 2007.

The determination of whether each step of the Highest and Best Use Test must be applied as of December 31, 2007 is a question of law. The determination of whether it was financially feasible to use the units as condominiums as of December 31, 2007 is a question of fact.

Ronald Follmann, a principal in Taxpayer,³ 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

³ Ronald Follmann is the President of LMP Properties, Inc. Follmann is also the President of Keystone Legends, Inc., a corporation existing under the laws of South Carolina. Keystone Legends, Inc. is the General Partner of Keystone Legends, I, L.P., LMP’s predecessor in title.

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.

The ALC found Taxpayer's actual experience in attempting to sell condominium units was relevant for determining the financial feasibility of the condominium use as of December 31, 2007. Taxpayer's conversion of the property from apartments for rent to condominiums for sale was stymied by the same negative economic forces that swamped the real estate market in general. Unfortunately, Charleston County and South Carolina were not immune from the real estate crisis that engulfed the country. The ALC found it was not financially feasible for the 121 units to be used as condominiums as of December 31, 2007. Because substantial evidence in the record supports the ALC's finding, the ALC's decision that the property's highest and best use as of December 31, 2007 was as apartments should be affirmed.

3. THE ALC DID NOT ERR IN RULING THE LINDSEY CASE SUPPORTED THE CONCLUSION THE 121 UNITS AT ISSUE SHOULD BE VALUED IN ACCORDANCE WITH THEIR USE RATHER THAN IN ACCORDANCE WITH HOW THEY WERE TITLED.

In Lindsey v. South Carolina Tax Comm'n, 302 S.C. 504, 397 S.E.2d 95 (1990), the supreme court considered a dispute involving the valuation of real property for the 1987 Tax Year. Forty-five units in a multifamily dwelling in Mt. Pleasant were owned individually by either Joseph Tamsburg, Robert Lane, or their partnership. The Charleston County Assessor valued the forty-five units by assessing each unit as a

separate townhouse. The taxpayers appealed to the Charleston County Board of Assessment Appeals and argued that the property should be valued together as an apartment complex. The Appeals Board rejected the taxpayers' argument as to how the units should be valued, but reduced the assessment on each unit. Id. at 506, 397 S.E.2d at 96.

The Assessor appealed to the South Carolina Tax Commission, who ruled the property should be assessed as an apartment complex. The Assessor appealed to the Circuit Court, who affirmed the Tax Commission's ruling. The Assessor then appealed to the South Carolina Supreme Court. Id. at 506, 397 S.E.2d at 96.

The taxpayers contended the forty-five units should be valued consistent with their use as an apartment complex. The Assessor countered that the units could not be assessed as one property because they were owned individually by different taxpayers. The supreme court rejected the Assessor's argument:

The record here includes evidence the units were individually deeded only to obtain financing which was otherwise not available. The units were contiguous and were operated by an apartment manager on a short-term rental basis. The operation was losing money but Taxpayers never attempted to sell the units individually because inferior locale, lack of amenities, and location of the forty-five units in a large apartment complex made them unmarketable as townhouses. Because there is substantial evidence supporting the Tax Commission's finding of fair market value based on the property's use as an apartment complex, we find no error.

Id. at 507-08, 397 S.E.2d at 97. The supreme court summed up the basis for its decision:

"Use and not title is the determining factor." Id. at 508, 397 S.E.2d at 97.

The Lindsey⁴ decision had a big impact in Charleston County. The Charleston County Assessor's Office has a written policy specifically addressing the impact of Lindsey. The Charleston County Assessor assigns a general use code and a parcel use code to properties to assist in the assessment process. One of the parcel use codes is for townhouses that will be valued as if they were apartments. The parcel use code (TWH-APTS) has this explanation in the policy document:

This parcel use class was prompted by an appeal known as Tamsb[u]rg. The court decision was very specific in [its] reasoning when granting apt status to individual units. Don't just code any group of townhouses or duplexes under one ownership to this Parcel Use Class. Before using this Class, read the case law, talk to Steve Everman or one of the Chief Appraisers. We get appeals based on this decision, it is important to use this parcel use class only when it is appropriate! The general use code will be TWH for these units.

Record p. 443; Respondent's Exhibit 3. More relevant to this case, the description of the parcel use code for condominiums that are assessed as apartments reads: "See TWH-APTS above. Rarely used, be careful when using. Gen Use = CNU[.]" Record p. 443.

Toy Glennon, the current Charleston County Assessor, testified that she participated in the creation of Respondent's Exhibit 3. Record p. 130; Transcript p. 360, lines 9-18. The Charleston County Assessor's Office does not affirmatively tell taxpayers who fall into the same category as those in Lindsey about the alternative assessment criteria based on use rather than title. Record p. 130; Transcript p. 359, lines 5-24. A taxpayer would have to file an appeal and demand the Lindsey treatment before the

⁴ John R. Lindsey was the Charleston County Assessor at the time. Joseph Tamsburg was one of the parties challenging the assessment. During the initial trial before the ALC in 2010 and during the hearing before the ALC in 2013, the parties usually referred to the case as the Tamsburg case.

Charleston County Assessor's Office would consider assessing a group of townhouses or condominiums as apartments. Record p. 130; Transcript p. 359, line 25 - p. 360, line 4.

Glennon testified she personally participates every time there is a decision about whether a property is going to receive the Lindsey treatment. Record p. 132; Transcript p. 365, lines 1-14.

Glennon defended the decision by her office not to give this Taxpayer the Lindsey treatment for the 121 units. She noted that the townhouses in Lindsey were platted individually to facilitate financing and had never been marketed for sale. Record pp. 135-136; Transcript p. 380, line 18 - p. 381, line 9. Although none of the 121 units at issue in the present case were ever marketed for sale, Glennon thought it significant that some of the original group of 200 units had been sold. Record p. 132; Transcript p. 366, line 22 - p. 367, line 15. Glennon also believed The Legends – unlike the property at issue in Lindsey – was in a desirable location. Record p. 136; Transcript p. 382, lines 2-11.

Glennon acknowledged there are condominium complexes in Charleston County that are assessed as if they were apartment complexes. Record p. 128; Transcript p. 349, lines 5-9. Sabal Palms, a 300 unit condominium complex, is one example. Glennon distinguished Sabal Palms by noting that while the owner of Sabal Palms had initially attempted to sell individual condominium units after converting from apartments, the owner had not been successful in selling any units. Record p. 128; Transcript p. 349, lines 10 - p. 350, line 13. In addition, Glennon testified The Legends is “very different” from Sabal Palms because “there are no leasing restrictions whatever at Sabal Palms.” Record pp. 136-37; Transcript p. 384, line 25 - p. 386, line 25. Glennon interpreted the

master deed for The Legends as prohibiting the rental of more than 100 units at any one time by anyone other than Taxpayer. Therefore, she concluded, the ability to rent the 121 units at issue was limited to Taxpayer and could not be passed from Taxpayer to a third party buyer if the units were sold in bulk. Record p. 137; Transcript p. 386, lines 1-20. As was demonstrated at trial, however, Glennon was mistaken in concluding the master deed for The Legends contained any such limitation. Record pp. 140-41; Transcript p. 397, line 1 - p. 401, line 21.

On remand, the ALC concluded “the 121 units at issue in this case are substantially similar to the forty-five townhouses at issue in Lindsey and should be assessed the same way.” Record p. 678, ¶ 26. The ALC noted the use of the 121 units had never changed – they had always been used as apartments. The ALC stated: “The only change with respect to these 121 units, and the change that triggered their reassessment by the Assessor as separate units to be valued individually, was a change in title – when the master deed was filed in April 2006.” Record p. 678, ¶ 26. Consistent with the declaration in Lindsey that “[t]itle, however, is not the determining factor in valuation,” 302 S.C. at 508, 397 S.E.2d at 97, the ALC found that the change in title did not trump the nonchange in use as the determining factor in valuation. The ALC concluded: “The property must be valued in accordance with its use as an apartment complex.” Record p. 678, ¶ 26. The ALC correctly concluded Lindsey served as an independent basis for finding the 121 units should be valued in accordance with their use as apartments.⁵

⁵ Assessor implies in its brief that Lindsey is no longer good law because the Lindsey Court’s reasoning cannot be reconciled with Section 12-43-215, which was enacted after Lindsey was decided. Assessor’s Brief p. 27 n.10. Assessor did not present

4. SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE ALC'S FINDING AS TO THE VALUE OF THE 121 UNITS AS CONDOMINIUMS AS OF DECEMBER 31, 2003.

Assessor called three of its employees to testify about their determination of the fair market value of the property as of December 31, 2003. All were appraisers. All gave expert testimony and were qualified by the ALC to do so. Gary James testified concerning the analysis he performed to determine the highest and best use of the 121 units as of December 31, 2003. He compared the value of the 121 units as apartments for rent with the value of the 121 units as individual condominiums for sale as of December 31, 2003. Record p. 78; Transcript p. 150, line 23 - p. 152, line 14. He based his valuation of the units as apartments on an analysis performed by Assessor employee Stephen Everman. James performed his own valuation of the units as condominiums. Finding the value based on the use as condominiums (\$13,800,000) to be higher than the value based on the use as apartments (\$8,565,000), James concluded the hypothetical use as condominiums had the highest value and therefore was the highest and best use. James then relied on appraisals of the individual units by Assessor employee Angela Sawadske and incorporated Sawadske's values of the individual units as the final assessments being put forward by Assessor. Record pp. 85-86; Transcript p. 178, line 17 - p. 182, line 12. The cumulative amount of Sawadske's valuations of the 121 units totaled \$16,454,000. Record p. 423; Petitioner's Exhibit 9; Record p. 96; Transcript p. 221, lines 7-17.

The ALC rejected Sawadske's valuations. A review of the law applicable to a

this argument to the ALC and, therefore, the argument is not preserved for appellate review.

fact-finder's role in this type of case is helpful in determining whether the ALC erred in doing so.

In a contested case before the ALC, the party contesting the decision of the county board of assessment appeal has the burden of proof. Here, Assessor requested the contested hearing, and therefore the burden of proving the correctness of the valuation it asserts is on Assessor. Reliance Insurance Co. v. Smith, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997). However, Assessor is aided by the presumption that an assessor's valuation is correct. South Carolina Tax Comm'n v. South Carolina Tax Board of Review, 278 S.C. 556, 562, 299 S.E.2d 489, 492-93 (1983); 84 C.J.S. Taxation § 410 (1954). Therefore, Taxpayer bears the burden of proving Assessor's valuation is incorrect. "Ordinarily, this will be done by proving the actual value of the property. *The taxpayer may, however, show by other evidence that the assessing authority's valuation is incorrect.* If he does so, the presumption of correctness is then removed and the taxpayer is entitled to appropriate relief." Cloyd v. Mabry, 295 S.C. 86, 88-89, 367 S.E.2d 171, 173 (Ct. App. 1988) (emphasis added).

Expert testimony by an appraiser is a typical way to prove a property's value. Of course, the trier of fact is not compelled to accept an expert's opinion, but may give it the weight the trier of fact determines it deserves. Florence County Dep't of Social Services v. Ward, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992). The trier of fact is free to accept or reject in whole or in part the testimony of an expert. See Sauers v. Poulin Brothers Homes, Inc., 328 S.C. 601, 605-606, 493 S.E.2d 503, 505 (Ct. App. 1997). The trier of fact may accept the testimony of one expert over another, one over many, or many

over one. Even when an expert's opinion is based on facts sufficient to form the basis for an opinion, it remains for the trier of fact to determine the probative value of the expert's opinion. Berkeley Elec. Co-op. v. South Carolina Pub. Serv. Comm'n, 304 S.C. 15, 20, 402 S.E.2d 674, 677 (1991). "The probative value of expert testimony stands or falls upon an evidentiary showing of the facts upon which the opinion is, or would most logically be, predicated." Ward v. Epting, 290 S.C. 547, 563, 351 S.E.2d 867, 876 (Ct. App. 1986).

The trier of fact must weigh and pass upon the credibility of the evidence presented. See South Carolina Cable Television Ass'n v. Southern Bell Tel. and Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). The trial judge who observes the witnesses is in the best position to judge the witnesses' demeanor and veracity and to evaluate their testimony. See, e.g., Church v. McGee, 391 S.C. 334, 343, 705 S.E.2d 481, 485-86 (Ct. App. 2011).

A careful analysis, therefore, of the data relied on by Sawadske was crucial in determining the reliability of her opinions. Rather than presenting evidence of the values of the individual units as condominiums as of December 31, 2003, Taxpayer chose to "show by other evidence that the assessing authority's valuation [was] incorrect." Taxpayer's chosen method was to subject Sawadske's testimony to thorough cross-examination. Assessor implies in its Brief this type of attack on the opinion testimony being offered by Assessor's employee was somehow illegitimate. Brief p. 23. But cross-examination is often the best way for a party to discredit the opponent's case and prove his own. See Simonds v. Simonds, 232 S.C. 185, 199, 101 S.E.2d 494, 501 (1957)

(“The power of cross-examination has been justly said to be one of the principal, as it is certainly one of the most efficacious, tests which the law has devised for the discovery of truth.”).

The ALC found Sawadske’s opinions as to the value of the individual units did not stand up to cross-examination. The cumulative value of the valuations by Sawadske for the 121 units totaled \$16,454,000. The ALC found the data on which Sawadske relied supported individual valuations totaling a significantly lower figure: \$10,859,917.⁶

Record p. 683, ¶ 47. The substantial evidence supporting the ALC’s finding is set forth in the ALC’s Order. Record p. 678, ¶ 27 - p. 683, ¶ 47; see Record pp. 51-57; Transcript p. 44, line 8 - p. 66, line 20.

The ALC also found “Sawadske’s valuation should be rejected for another reason: Sawadske failed to factor in the impact of single ownership on the value of the 121 units.” Record p. 682, ¶ 44. Relying on the principles discussed in The Appraisal of Real Estate published by the Appraisal Institute, the ALC concluded the proper valuation technique for the 121 units at issue required the individual unit valuations to be subjected to a discount sellout analysis to arrive at final values. The ALC noted Taxpayer’s expert had testified to the requirement (R. pp. 118-119) and his report illustrated the standard’s application (R. pp. 633-34) in this case. Record pp. 682-83, ¶¶ 44-45. The ALC applied the discount sellout analysis to the cumulative amount of Sawadske’s individual valuations and concluded after doing so the new cumulative value of the 121 units (\$7,384,744) was

⁶ Recall that the cumulative value found by the Charleston County Board of Assessment Appeals was \$10,090,500. Record pp. 439-441; Respondent’s Exhibit 1.

lower than the value as apartments (\$8,565,000). Record p. 683, ¶ 47. Thus, the analysis also supported the conclusion that the highest and best use of the 121 units as of December 31, 2003 was as apartments. Record p. 683, ¶ 47. Therefore, even if the condominium use survived the highest and best use test and was a viable candidate for valuation as of December 31, 2003, the highest and best use as of the earlier date remained as apartments valued at \$8,565,000. This conclusion is supported by substantial evidence in the record and should be affirmed.

CONCLUSION

For the reasons stated, this Court should affirm the ALC's decision.

June 10, 2014

Respectfully submitted,

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