Property Valuation Topics

Volume XIII / Issue 2
Summer 2010

Visit our website:
www.pullcom.com

PULLMAN & COMLEY, LLC ATTORNEYS AT LAW

Is Real Estate Construction in Progress (CIP) Exempt?

In a tax appeal decision about the impact of a stipulated judgment on the right of the assessor or the property owner to challenge the stipulated value before the next revaluation, Judge Trial Referee David W. Skolnick appears to have dropped a major bomb. JTR Skolnick held that the Guilford assessor could not place the value of a property under construction (CIP) on the grand list.

The issue centered around Connecticut General Statutes §12-53a(a) which require assessors to place completed new real estate construction on the grand list from the date the certificate of occupancy is issued or the date on which the property is used for its intended purpose on a prorated basis. JTR Skolnick then went on to hold that an assessment of CIP as of any October grand list date prior to completion was precluded – even though there is no language in this statute that so states.

For decades, Connecticut assessors have been valuing CIP under the general authority granted to them by Connecticut General Statutes § 12-64. This statute requires every interest in real estate to be assessed unless otherwise exempted. Indeed, most professionals practicing in the property valuation area remember that the public act from which Section 12-53a(a) was codified was enacted to accelerate the assessment of completed construction – rather than to exempt CIP. Many contractors and developers, prior to the enactment of the statute, would deliberately wait to obtain a certificate of occupancy until a few days after October 1. Their building or project thus would not be considered complete as of the October 1 assessment date and the assessor would have to wait almost a year to place it on the grand list as a completed project.

It would appear that the remedial objective of Section 12-53a(a) has been misconstrued. An appeal is pending from Judge Skolnick's ruling.

Evans v. Town of Guilford, Superior Court at New Haven, Docket No. CV 064021995, December 29, 2009.

For further information, please contact Elliott B. Pollack at 860.424.4340 or ebpollack@pullcom.com.

"Author" of Fraudulent Appraisal is Penalized

Abraham Breuer wished to refinance certain properties in Vernon, Connecticut, that were mortgaged to A. Edward Ducharme. After so informing Ducharme, Breuer requested that he release the Vernon mortgages in return for mortgages on property in Highland Falls, New York.

Breuer sent Ducharme an "appraisal" which, according to Judge Trial Referee Joseph J. Purtill's decision, "included photographs purporting to show the (New York) property . . . and other properties listed as comparable sales all indicating that the (New York) property would be sufficient in value to provide security…"

JTR Purtill found that the "appraisal" was a fraud and that "the photographs which purported to show the (New York) property were, in fact, not photographs of that property." Apparently, the (New York) property was actually worth much less

than the purported "appraisal " would have indicated.

Ducharme relied on the false appraisal and released his mortgages on the Vernon properties. He was further defrauded when Breuer deprived him of the promised mortgage on the New York property.

As a result of these unscrupulous activities, a substantial default judgment, attorney's fees and punitive damages were awarded against Abraham Breuer.

While Breuer's fraud was evident, it is surprising that the plaintiff failed to independently confirm the value of the proposed replacement real estate security and simply relied on the phony "appraisal" furnished by his debtor.

Aside from being amazed at Ducharme's remarkable naïveté, the obvious lesson here is that lenders commission their own appraisals; they do not and should never allow the borrower to obtain this crucial expert input. Banks order their appraisals from a panel of experts deemed reliable and honest; private investors should do the same.

Ducharme v. Breuer, Superior Court, Judicial District of New London, Docket No. CV-09-5010093 (January 12, 2010).

For further information, please contact Tiffany G. Kouri at 860.424.4360 or tkouri@pullcom.com.

Is a PILOT Assessment a Tax, Special Assessment – or None of the Above?

Cass D. Vickers, state tax counsel for the Institute for Professionals in Taxation, presents this intriguing question in the April 2010 *IPT Tax Report*. The city of London, Ohio, created a tax increment financing (TIF) district. TIF financing frequently produces, as here, increases in taxes due to property value growth, the taxes from which are used to pay for certain improvements. Here, a sanitary sewer line was installed in the TIF district to benefit all properties within it.

Under its lease for commercial retail space constructed within the TIF district, the Sherwin-Williams Company was responsible for *ad valorem* taxes and the landlord was responsible for special assessments.

When the landlord billed the TIF-PILOT payments it made to Sherwin-Williams, the famous paint manufacturer claimed they were special assessments – not taxes.

The litigation went well for the landlord in the trial court but not in the Ohio Court of Appeals for the 12th District. The Appellate Court ruled that payments should not be treated as taxes if not paid in to and used as general revenue . . . If TIF payments are reasonably calculated to retire the underlying bond obligations they should not be characterized as taxes.

Conceding the reasonableness of this approach, Mr. Vickers nevertheless observes that "the simple fact of drawing the boundaries of a TIF (or other special assessment) district does not, standing alone, conclusively establish that all improvements made within those boundaries directly benefit all properties (and no others) within the district." In this case, Sherwin-Williams had sufficient evidence to blunt the landlord's collection appeal.

Had the lease between the parties not drawn a distinction between taxes and special assessments, perhaps this result would have been different.

Chu Brothers Tulsa Partnership, PLL v. The Sherwin Williams Company, 2010 WL 764208 (2010).

For further information, please contact Gregory F. Servodidio at 860.424.4332 or gservodidio@pullcom.com.

Technical Venue Issue Discussed

The city of Bristol owns real estate located in the Town of Harwinton valued by the Harwinton assessor at over $25 million.

Bristol's challenge to the assessment was filed in the Judicial District of New Britain wherein Bristol is located. Harwinton, where Bristol's land is located, is located within the Judicial District of Litchfield.

Did Bristol stumble by filing the case in the wrong court? This was the issue addressed recently by Judge Trial Referee Arnold W. Aronson.

While noting that the tax appeal statute requires the litigation to be filed in the judicial district where the property is located, Judge Aronson had to address Bristol's reliance on another statute which permits an action to be brought in a judicial district where either the plaintiff or the defendant resides.

Relying on a 2005 Supreme Court decision, he concluded that a statute applying to a particular subject matter prevails over the general venue statute and, therefore, Bristol's action should have been brought in the Litchfield Judicial District.

Notwithstanding, for technical procedural reasons not likely of interest to *Property Valuation Topics* readers, Bristol's effort to terminate the litigation was rejected.

Bristol v. Harwinton, Docket No. CV 09 4021684 (October 30, 2009).

Recession Appraising Considered

Three holders of the MAI designation, who recognize that appraising "has never been more difficult," discuss how to carry out their valuation assignments in a terrible down economy in the Q3 2009 issue of *Valuation* magazine.

One expert offers the possibility of broadening the time frame and geographic area within which comparable sales are being sought. "While making sense of less-than-ideal data can be difficult," the writers note, "market research from interviewing brokers, bankers, sellers, buyers and other appraisers" may be of assistance.

Attorney Notes

Department members Laura A. Bellotti and Gregory F. Servodidio addressed attendees at a Lorman seminar in Glastonbury on April 20. Their topics were *ad valorem* exemptions and "Dos and Don'ts on Appealing a Personal Property Assessment."

◆ ◆ ◆ ◆

Members of Pullman & Comley's Property Valuation practice have published a series of articles in *The Commercial Record*, including department chair Elliott B. Pollack's article "Revaluation Intervals." His commentary, "USPAP in the Courts – Does It Matter?" appeared in the June edition of *IPT Reporter*.

PULLMAN & COMLEY, LLC ATTORNEYS AT LAW

Visit our website: **www.pullcom.com**

Property Valuation Topics

850 Main Street
Bridgeport, CT 06604
Phone: (203) 330-2000
Fax: (203) 576-8888

90 State House Square
Hartford, CT 06103
Phone: (860) 424-4300
Fax: (860) 424-4370

107 Elm Street, 4th Floor
Stamford, CT 06902
Phone: (203) 324-5000
Fax: (203) 363-8659

50 Main Street
White Plains, NY 10606
Phone: (914) 682-6895
Fax: (914) 682-6894

A member of American Property Tax Counsel

Volume XIII / Issue 2
Summer 2010
Visit our website: ***www.pullcom.com***

PULLMAN & COMLEY, LLC ATTORNEYS AT LAW

850 MAIN STREET P.O. BOX 7006 BRIDGEPORT, CT 06601-7006

Eminent Domain Reporter

Volume III / Issue 1
Summer 2010

Visit our website:
www.pullcom.com

PULLMAN & COMLEY, LLC ATTORNEYS AT LAW

Supreme Court Upholds Disputed Highest and Best Use Determination

The long-running saga triggered by the town of Branford's taking of a 77-acre parcel of vacant land in 2004 was finally resolved by the Connecticut Supreme Court in a series of three decisions issued on the same day this past February. In the first of the three decisions, the Supreme Court upheld the trial court's highest and best use determination for the taken property as well as the resulting value conclusion. Thus, the $1,167,800 in compensation initially paid by the town was found to have been properly increased by the trial judge to $4.6 million.

The history of attempts to develop the taken property actually date back much further to 1988 when the town first approved a site plan application for the site. This application contemplated its development with 298 residential condominium units, a community building and a nine-hole golf course. The approval for residential use was granted even though the site was zoned industrial.

While that project was never built, a subsequent optionee of the property submitted a plan for a 268-unit development with a golf course in 2001. Although the optionee received permits for its site plan from the Branford Inland Wetlands Commission and the U. S. Army Corp of Engineers, its application was ultimately rejected by Branford's zoning commission.

This rejection prompted the optionee to come back in 2003 with a proposal to develop the site with affordable housing units. While that affordable housing application was pending, the town decided to use eminent domain to acquire the property. The taking occurred in January 2004 and the affordable housing application was subsequently denied. Both the owner of the site and the optionee filed appeals with the court seeking review of the adequacy of the $1,167,800 offered by the town as just compensation.

At trial, the judge heard testimony from three appraisers about the highest and best use of the site as well as its market value. Both of the appraisers for the condemnees concluded that the highest and best use of the property on the date of taking was for residential development. This determination produced market values via the sales comparison and development approaches to value that ranged between $6.1 million and $6.9 million.

In stark contrast, the town's appraiser determined that the highest and best use of the property was for it to remain vacant and undeveloped. This conclusion was the basis of a $770,000 market value determination made by the town's appraiser via the sales comparison approach.

After hearing all of the evidence and inspecting the property, the trial judge concluded that the highest and best use of the site was for residential development. Having reached this conclusion, he went on to determine that the condemned property had a market value of $4.6 million as of the date of taking.

Not surprisingly, the town vigorously challenged the trial court's highest and best use determination on appeal. It pointed out that the property was zoned industrial at the time of the taking. As a result, it argued that it was not reasonably probable as of the date of taking that a zone change could have been obtained that would permit residential development. In its view, this argument was buttressed by changes made by the town to its zoning regulations after receiving the affordable housing application for the site, changes which made its residential development even less likely.

Interestingly, the trial judge did not explicitly rule that it was reasonably probable that the optionee of the property could obtain a zone change from industrial to residential, thereby clearing the way for the residential development of the site. Nevertheless, the Supreme Court reviewed the trial court's extensive analysis in its decision and determined that a finding of reasonable probability was implicit in the trial court's conclusions. The property's desirability for residential development, as well as various governmental approvals in support of residential development plans dating as far back as 1988, were factors that allowed the Supreme Court to rule that the trial judge's "underlying, implicit determination" that the optionee would have been able to obtain all of the necessary zone changes and approvals to permit residential development was not clearly erroneous, based on the record in the case.

This detailed analysis of the trial record prompted the

Supreme Court to make an important point in a footnote to its decision. The Supreme Court observed that Branford correctly stated the accepted legal principal that land taken by eminent domain should be valued based on its zoning at the time of the taking. Under the factual circumstances of this particular case, however, the court ruled that the subject property should be valued based on its zoning at the time the affordable housing application was filed. You will recall that after that application was submitted, the town changed its zoning regulations to make the residential development of the property even more difficult. The Supreme Court apparently viewed with suspicion the timing of those zoning changes in determining that they could essentially be ignored when analyzing the highest and best use of the property.

The town also attempted to get the Supreme Court to reverse the trial court's highest and best use conclusion by arguing that it should have made a determination that the optionee could have successfully appealed the denial of its affordable housing application through the courts. The Supreme Court declined to accept this argument. It observed that the trial court's opinion was entirely silent on the issue. As a result, it was not a factor for the trial court in reaching its highest and best use determination. Since there was ample evidence in the trial record to support that determination, it was not necessary to consider whether an appeal of the denial of the affordable housing application could have been successful.

In conclusion, this decision represents an important analysis of the interplay between zoning regulations and the actions of land use agencies on the one hand and the determination of the highest and best use of a piece of condemned property on the other.

Town of Branford v. Santa Barbara, 294 Conn. 785 (2010).

If you have questions or comments, please feel free to contact Gregory F. Servodidio at 860.424.4332 or gservodidio@pullcom.com.

Inverse Condemnation Claims Against Power Company Rejected

In an effort to update Connecticut's aging electricity grid, the Connecticut Light & Power Company (CL&P) received state approval to erect larger towers and string more powerful transmission lines within an easement area it had owned for many years. These activities prompted five residential property owners in the town of Orange to sue CL&P for overburdening its easement, trespass, private nuisance and inverse condemnation. Their basic theory was that CL&P's activities had a significant negative impact on the market value of their properties, entitling them to compensation.

By means of a motion for summary judgment, CL&P attempted to have the inverse condemnation claims removed from the litigation. Inverse condemnation is a cause of action against an authority with eminent domain powers, brought by a private property owner whose property has allegedly suffered significant harm from the actions of the authority in the absence of an actual taking. Under Connecticut case law dating back nearly 20 years, the Supreme Court has set the bar very high for property owners to prevail on such a claim. They must prove that there has been "substantial interference" with their property which has destroyed its value, or that their use or enjoyment of the property has been substantially destroyed.

The plaintiffs in this case attempted to clear that high hurdle by alleging that their properties had suffered a substantial decrease in market value because of public fears associated with high voltage power lines. Unfortunately for them, their allegations were not sufficient to meet their burden. As a result, the court agreed with CL&P that the inverse condemnation aspect of the case should be removed.

CL&P also attempted to weaken the remaining aspects of the plaintiffs' case dealing with the alleged overburdening of the easement, trespass and private nuisance. The court rejected CL&P's efforts, leaving open the possibility that the homeowners could obtain some compensation for the activities in the easement areas.

Passariello v. Connecticut Light & Power Company dated March 31, 2009, Superior Court, Judicial District of Waterbury, Docket No. X-06-CV-075005753S.

If you have questions or comments, please feel free to contact Laura A. Bellotti at 860.424.4309 or lbellotti@pullcom.com.