COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1744 **Cir. Ct. No. 2015CV222**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DOMTAR A. W., LLC,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN DEPARTMENT OF REVENUE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Domtar A.W., LLC, challenges the Department of Revenue's 2009, 2010, and 2011 tax assessments for property that Domtar owned in those years and, up until 2008, used as an operational paper mill. We refer to this property as the "mill property." The Tax Appeals Commission upheld the

department's assessments, and the circuit court affirmed the commission. Domtar argues that the commission erred in determining that the highest and best use of the mill property in 2009, 2010, and 2011 was as an operational pulp and paper mill. We disagree. We also reject an argument that Domtar makes relating to a hydroelectric facility on adjacent property. We affirm.

Background

¶2 Domtar is a pulp and paper manufacturer that acquired the mill property in 2001, and announced closure of the mill in 2008. Domtar continued to operate another nearby paper mill, and moved some of the mill property equipment to the other, still-operating mill.

¶3 For the years 2009, 2010, and 2011, the department assessed the mill property based on a determination that its highest and best use for those years was as an operating pulp and paper mill. The total assessed value for the property was approximately $14.9 million for each year.[1]

¶4 Domtar sought commission review of the department's assessments, claiming that, after the mill property closed in 2008, the highest and best use of the property was for redevelopment. Based on this proposed redevelopment use, Domtar's appraiser valued the mill property at $2.3 million for 2009, 2010, and 2011.

¶5 The commission upheld the department's assessments. And, as noted, the circuit court upheld the commission's decision.

[1] Domtar informs us that, as of 2013, most of the mill property has been sold.

Discussion

Standards Of Review

¶6 We review the commission's decision, not the circuit court's decision. ***DOR v. A. Gagliano Co.***, 2005 WI App 170, ¶7, 284 Wis. 2d 741, 702 N.W.2d 834. Although we are not bound by the commission's legal conclusions, we apply one of three levels of deference to those conclusions: great weight deference, due weight deference, or no deference. ***DOR v. Caterpillar, Inc.***, 2001 WI App 35, ¶6, 241 Wis. 2d 282, 625 N.W.2d 338. Here, as we shall see, the level of deference does not matter. Even giving it no deference, we would uphold the commission.

¶7 As to the commission's fact finding, we apply the "substantial evidence" standard, "affording significant deference to the agency's findings." ***Milwaukee Symphony Orchestra, Inc. v. DOR***, 2010 WI 33, ¶31, 324 Wis. 2d 68, 781 N.W.2d 674. "Substantial evidence does not mean a preponderance of evidence. It means whether, after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact." ***Id.*** "An agency's findings of fact may be set aside only when a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence." ***Id.***

Highest And Best Use

¶8 Domtar argues that the commission erred in determining that the highest and best use of the mill property in 2009, 2010, and 2011 was as an operating pulp and paper mill. So far as we can tell, this determination was a factual one. Domtar, however, does not challenge the commission's express or

implied findings of fact as unsupported by evidence. Rather, Domtar argues that the commission misapplied applicable case law, namely, ***Nestlé USA, Inc. v. DOR***, 2011 WI 4, 331 Wis. 2d 256, 795 N.W.2d 46, and considered irrelevant evidence. We disagree that the commission misapplied ***Nestlé*** or considered irrelevant evidence.

¶9 Our analysis begins with a summary of the most pertinent portions of ***Nestlé***. The court in ***Nestlé*** explained that, consistent with the Wisconsin Property Assessment Manual, property must be assessed at its highest and best use. ***Id.***, ¶27. "The subject property's highest and best use is 'defined as that use which over a period of time produces the greatest net return to the property owner.'" ***Id.*** (quoting the Assessment Manual). According to ***Nestlé***, determining highest and best use involves a four-part test. *See* ***id.***, ¶¶27, 33. The contemplated use must be: 1) legal, 2) complementary, and 3) not highly speculative, and 4) the property must be marketable for the use. *See* ***id.***

¶10 We pause here to acknowledge an inconsistency that the parties do not explain and that, so far as the briefing before us reveals, does not end up mattering. Domtar and the department, in briefing on appeal, rely primarily on ***Nestlé***, which contains the four-part test we have just summarized. Domtar's briefing, however, states the applicable test differently than ***Nestlé***. Domtar, consistent with the commission's decision, tells us that the test is whether a proposed use is 1) physically possible, 2) legally permissible, 3) financially feasible, and 4) maximally profitable. The pertinent inconsistency is that, in this formulation of the test, marketability is not an expressly listed factor. Regardless, it is clear to us that the parties' central dispute is over the commission's finding that the mill property was marketable as an operational pulp and paper mill in 2009, 2010, and 2011. We perceive no other serious dispute here as to the highest

and best use issue.[2] In the remainder of this opinion, we will ignore the inconsistent formulations of the test and focus, as do the parties, on the marketability requirement under ***Nestlé***.

¶11 As Domtar points out, the court in ***Nestlé*** reaffirmed case law stating that an assessment cannot be based on an "imaginary" buyer or "hypothetical" market for a given use. *See* ***id.***, ¶34. However, the market in question need not be especially extensive or strong. A "limited" or "narrow[]" market can be sufficient. *See* ***id.***, ¶¶40, 49, 56-57. Thus, in ***Nestlé***, the supreme court unanimously *rejected* a taxpayer's argument that the absence of recent comparable sales of powdered infant formula plants barred a finding of marketability for such plants. *See* ***id.***, ¶¶35-37, 40-41, 43, 57-58.

¶12 Here, the commission's determination that the mill property was marketable as an operating pulp and paper mill was based on further findings of fact, including, as most pertinent here, a finding that recent comparable sales of paper mills existed in Wisconsin. The commission acknowledged that the market was smaller than in past years, but recognized that, under ***Nestlé***, the reduced market did not bar a finding of marketability. The commission also found that, even though Domtar had closed the mill in 2008 and moved some equipment to Domtar's other mill site, the condition of the mill property was such that it could again have become operational as a pulp and paper mill in the 2009, 2010, and 2011 tax years.

[2] Domtar baldly asserts that the department's assessment failed to take into account financial feasibility and maximum profitability, but all of Domtar's more specific arguments regarding highest and best use appear to relate to the commission's marketability finding.

¶13 Domtar argues that the commission misapplied ***Nestlé*** by relying on comparable sales to determine marketability instead of using other approaches to determine marketability. Domtar argues that, under ***Nestlé***, comparable sales are irrelevant to the highest and best use determination, and are instead relevant only to calculate value *after* the highest and best use has already been determined. We disagree.

¶14 We see nothing in ***Nestlé*** that supports Domtar's asserted limitation on considering comparable sales. On the contrary, ***Nestlé*** implies, quite logically, that comparable sales will often be among the best evidence that a market *does* exist for a given use. *See* ***id.***, ¶¶34-40 & n.14. As already indicated, the taxpayer in ***Nestlé*** argued that it was the *absence* of such sales that precluded a marketability finding. *See* ***id.***, ¶35.

¶15 Domtar argues that the commission also erred in considering evidence that Domtar's failure to attempt to sell the mill property was motivated by a desire not to sell the property to a competitor. As with the comparable sales evidence, Domtar argues that such evidence is irrelevant. We again disagree. This evidence indicating the possible reason for the absence of a sale, along with other evidence indicating that Domtar took actions that may have negatively affected the mill property's marketability as a pulp and paper mill, tended to rebut Domtar's claim that there was no market for the mill property as an operating mill.

¶16 To the extent that Domtar may mean to make other arguments relating to highest and best use, those arguments boil down to an assertion that the evidence of non-marketability was stronger than the evidence of marketability. This assertion is not persuasive given our deferential standard of review to the commission's findings of fact. The issue is not whether the commission could

have or should have made a different finding. The question is whether the finding the commission made is supported by the record.

¶17 To sum up so far, we conclude that the commission did not err in determining that the highest and best use of the mill property was as an operational pulp and paper mill. In at least one place in its briefing, Domtar appears to concede that such a conclusion should bring our analysis to an end. Domtar states: "[I]f the Court were to conclude that the property's highest and best use was as an operating pulp and paper mill, it should affirm the Department's assessments." However, elsewhere in its briefing Domtar appears to suggest that there is an additional issue relating to whether an adjacent hydroelectric facility adds value to the mill property or, perhaps, whether Domtar's tax on the mill property effectively included a tax on a portion of the hydroelectric facility that Domtar does not own. Giving Domtar the benefit of the doubt, we will assume that this issue remains a live issue, and turn now to discuss it.

Hydroelectric Facility

¶18 It is undisputed that the hydroelectric facility is adjacent to the mill property, and that the hydroelectric facility is not owned by Domtar but by a related entity called Domtar Wisconsin Dam Corporation. In broad strokes, Domtar appears to argue that the commission erroneously interpreted WIS. STAT. § 70.995(4) to allow the department, in assessing Domtar's mill property, to consider portions of the hydroelectric facility property.[3] For the reasons that follow, we reject this argument.

[3] The statute provides, in pertinent part, that "the department … shall have sole discretion for the determination of … what description of real property or what unit of tangible (continued)

¶19 Beyond the summary just provided, we have difficulty understanding Domtar's argument relating to the hydroelectric facility. To begin, we are uncertain what factual premises Domtar is working from. On the one hand, Domtar appears to assert that the commission required that some "undefined value" be added to the mill property based on the hydroelectric facility. On the other hand, Domtar seems to assert—inconsistently, so far as we can tell—that the commission allowed the department to tax Domtar exactly $65,042 for buildings associated with the hydroelectric facility that Domtar does not own. Domtar provides no record citations for this $65,042 figure and, so, we are uncertain where it comes from. And, Domtar provides no further clear factual context for the significance of this figure.

¶20 Because Domtar's factual assertions fail to make clear precisely what assessment error Domtar is claiming, we could end our analysis here. "The [department]'s assessment is entitled to a presumption of correctness which may be overcome only if the challenging party presents significant contrary evidence." ***Nestlé***, 331 Wis. 2d 256, ¶23. That said, we will again give Domtar the benefit of the doubt and comment briefly on what we suspect Domtar is arguing.

¶21 Domtar might mean to argue that the value of the mill property cannot be increased by the existence of an adjacent facility that Domtar does not own. If this is Domtar's argument, Domtar provides no factual or legal support for it, and we reject the argument on that basis. We additionally reject the argument

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personal property shall constitute 'the property' to be included for assessment purposes, and … may include in a real property unit, real property owned by different persons." WIS. STAT. § 70.995(4). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

because it is obvious that a property's value is sometimes positively affected by beneficial features of adjacent property.

¶22 If Domtar instead means to argue that the department directly taxed Domtar for property Domtar does not own, Domtar's briefing fails to demonstrate that this is factually true. Thus, we reject that argument.

¶23 Finally, we agree with the department that Domtar fails to address a number of the commission findings of fact that seemingly intertwine with any cogent developed argument regarding the hydroelectric facility. Those findings include the following:

- "Historically, the Department had included the hydroelectric facility as part of the [mill property] assessment ...."
- "In fact, Domtar itself had previously reported the hydroelectric facility as part of the [mill property] ...."
- "Originally, Domtar brought appeals for the adjacent property as well but withdrew [those] appeal[s], accepting the low tax assessment which excluded the hydroelectric plant [from that property]."
- "If its arguments held in the instant case, the taxpayer would avoid tax on the hydroelectric plant entirely through lawyerly manipulation of parcels on appeal."

Domtar's failure to meaningfully address these findings is an additional, independent reason why we reject Domtar's argument regarding the hydroelectric facility property.

Conclusion

¶24 For the reasons stated above, we affirm the circuit court's order upholding the commission's decision.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.