



DOMTAR AW LLC,

Petitioner,

vs.

Case No. 15CV222

STATE OF WISCONSIN
DEPARTMENT OF REVENUE,

Respondent.

DECISION AND ORDER

It seems most appropriate to begin by observing certain settled principles which courts' apply in this type of case. First among these is the presumption that the tax assessment is correct. The second is that the taxpayer has the burden of proof. If there is credible evidence that may in any reasonable view support the assessor's valuation, the valuation must be upheld. Finally, the Court gives deference to agencies, (in varying degrees), with respect to the agency's interpretation and application of statutes and rules. And finally, 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. If the finding is reasonable, it must be upheld. In sum, the taxpayer has a tall order to fill before it can upset the tax assessment imposed by the assessor.

The Petitioner, Domtar A. W., LLC, (hereafter "Domtar"), raises a number of issues which are secondary to the principal question raised. As before the Tax Appeal Commission, "the sole issue [here] was whether the highest and best use of the Port Edwards Mills site had changed to redevelopment." (See Decision and Order, at p. 11). Although other issues are raised

before this Court, (which are addressed below), the crux of this appeal centers on the consistent position advanced by the assessor and up to and accepted by the Commission that the highest and best use of this property was found to be “commercial/industrial/manufacturing/continued use as a pulp and papermaking plant.” In plain English, the assessor concluded that the Port Edward mill could still be marketed and used as a pulp and paper mill. Historically, that had been its highest and best use. (Commission finding at no. 34). As succinctly stated by Domtar in its brief, “...if 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.” (Brief at p. 38). Domtar argues that it closed the mill because it was not profitable to operate as a pulp and paper mill and that therefore in 2008 its highest and best use changed to redevelopment. The Commission concluded that there was credible evidence to support the assessments including the conclusion that the highest and best use was manufacturing/commercial/industrial/continued use as a pulp and papermaking plant.

An appraiser must consider various factors in the analysis of “highest and best use”. The determined use must be physically possible, legally permissible, financially feasible, and at its maximum profitability. *See Nestle USA, Inc. v. Wisconsin Dep’t. of Rev.*, 2011 WI 4, 331 Wis.2d 256, para. 27. According to the Property Assessment Manual, the “highest and best use” means “that which over a period of time produces the greatest net return to the property owner. That use must be legal, complementary, not highly speculative, and the property must also be marketable for that use.”

It appears that neither party argues that operation as a paper mill was not “legally permissible”. Furthermore, given the status of the plant in 2009 and the statement that it could be restarted, it also appears that the closing was not because continued operation was “physically

impossible”. On the contrary, except for the outdated technology which apparently was labor intensive, Domtar does not criticize the plant so much as to its operational aspect as it does given the economy of the paper making industry and in particular the higher costs associated with an apparently antiquated facility. Finally, assuming one comes to the conclusion that operating the mill is “financially feasible”; neither party suggests that there would be any other alternative to “maximize its profitability”. Instead, Domtar argues that because it was no longer profitable to operate the mill, it shut its doors and its “highest and best use” reverted to being developed for some other use.

The following salient facts appear undisputed. The Port Edwards mill was the worst performing mill owned by Domtar.¹ It was outdated². The paper industry has been in a decline since the 1990s. Domtar closed the mill and it never intended to reopen it or sell the mill to anyone else³ to use a paper mill.⁴

In arguing against the conclusion that the mill could no longer be profitable for paper making and that no other paper manufacturer, (or anyone), was interested in buying and running the mill, the respondent stresses the fact that Domtar was possibly motivated to exclude any interest in running the mill because it did not want a competitor to compete with it in its “wood basket”. Domtar’s operation manager for the plant testified that statements were made that Domtar was not going to sell to anybody who would draw from the “wood basket”, that it was not going to part with the adjoining hydroelectric plant which provided power to the mill and it

¹ According to Domtar it was losing \$10 million in cash annually.

² Moreover, according to Domtar it was too old, too small, used too much labor, and used aged technology.

³ Domtar points out that it did try to sell parts of the plant or sell the plant for a different industrial use. According to Domtar, paper companies do not ordinarily market their mills. Once it becomes known a mill is on the market, competitors approach the seller. No paper company made any inquiry to buy the mill to continue operating according to its present use.

⁴ According to Domtar other mills in Wisconsin closed and were sold for redevelopment. Domtar itself closed five mills since 2005. Closing paper mills requires significant work, including addressing environmental issues. Interest in the property was only from persons interested in redeveloping the property.

would not want any industry coming in to use the water from Nebco lake or discharge to the Wisconsin River. It is apparent that the Commission was faced with competing inferences. On the one hand, Domtar argued that its decision to close the mill signaled irrefutably that the future use of that property was no longer as a pulp and paper mill. After all, who has better information regarding financial feasibility than the very owner of the mill? On the other hand, the fact that Domtar never intended to allow any competitor to compete within its “wood basket”, that it did market or intend to sell the mill to a competitor, that it salvaged or sold the equipment for repurpose or profit, raised the inference not that the mill was “financially unfeasible”, but that for Domtar it was more profitable to consolidate its operation and limit competition. In this regard, the concept of “maximum profitability” is not exclusive to the current owner, but rather, to the market as a whole.

Domtar’s own appraiser wrote: “[f]rom the time of closure, Domtar had no intention of reopening the mill. In the summer of 2008, Domtar announced the permanent removal of certain capacity from the market, part of which was the capacity of the Port Edwards mill. The permanent removal of capacity indicates that Domtar’s intentions were not to operate the Port Edwards mill going forward.” (American Appraisal report at p. 19; Trial exhibit 15). Admittedly, around the time the mill closed the demand for paper had diminished. This would have been a factor in determining its continued use. More importantly, the fact that Domtar had sold most all the equipment and scavenged the rest, after closure meant that “it would be virtually impossible to rebuild the machines to operating condition.” (Id. at p. 20).

In its analysis of “highest and best use”, American Appraisal identified the two most salient facts in concluding the future for this property was development. As previously mentioned, demand for paper had dropped and paper mills in Wisconsin had closed. Domtar’s argument in this

appeal rests almost entirely on this assessment of the pulp and paper industry. But the other factor controlling the use of this property was Domtar's decision to remove the finishing equipment and scavenge what remained. Before the Commission the question was presented which of these factors controlled, for if it was the latter then but for Domtar's decision regarding the equipment, the mill could have continued as is. Implicit in this analysis is the argument that a taxpayer should not be rewarded with a lower tax assessment if it makes a business decision to shutter a plant so it could consolidate its operation, slice off parts of the integrated operation⁵, sell the equipment and scavenge what remained, increase profits and then argue nobody wanted to continue operating the subject property as a pulp and paper mill. After all, "market value" is in part defined as a condition where both the buyer and seller are typically motivated as part of an "open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus."

The question of whether the mill could still operate to produce pulp and paper is ultimately a question of fact in consideration of all circumstances, including whether the subject property was in a condition unaffected by "undue stimulus". In other words, the assessor examined the property not with regard to some economic stimulus imposed on the subject property unique to its then current owner. Instead, the assessor applying the Uniform Standards of Professional Appraisal Practice examined the property assuming the seller was motivated solely to maximize its profit from the sale of this particular piece of real estate. A reasonable interpretation of this voluminous record that Domtar's position was discounted because of the perception that those aspects of the market suggested by Domtar to militate in favor of a new use

⁵ Setting aside the difficulty in marketing a pulp and paper mill without including the hydroelectric plant that provides power, Wis. Stat. §70.995(4) gives the department of revenue the authority to include in the appraisal of the mill the attached hydroelectric facility even though it was owned by a different corporate entity. I conclude that the Commission did not err in its interpretation and application of this statutory provision in this matter

of the property as “redevelopment” were contrived by the company and not reflective of the real estate market in general.

Because this Court is required to uphold the Commission’s finding of fact if it is supported by substantial evidence, (*Nestle USA, Inc. v. Wisconsin Dep’t. of Rev.*, 2011 WI 4, 331 Wis.2d 256, para. 56), the question is whether there is sufficient evidence in this record to support the conclusion that the property could continue as a pulp and paper mill. To the extent that the Commission relied on the testimony of witnesses, their credibility and persuasiveness are for the Commission, not the courts, to determine. *Painter v. Dentistry Examining Bd.* 2003 WI App 123, 265 Wis.2d 248, para. 18. “In applying the credible evidence test to the findings of the agency, a reviewing court does not weigh conflicting evidence to determine which should be believed. If there is credible evidence to sustain the findings, irrespective of whether there is evidence that might lead to the opposite conclusion, a court must affirm.” *Id.*, citing *L & H Wrecking Co. v. LIRC*, 114 Wis.2d 504 (Ct. App. 1983).

Much like the question in *Nestle USA, Inc. v. Wisconsin Dep’t. of Rev.*, 2011 WI 4, 331 Wis.2d 256, the assessor, (and the Commission), had to find the mill was marketable according to its highest and best use. “The ‘marketable’ requirement for a subject property’s highest and best use stems from Wis. Stat. §70.32(1), which requires that property be assessed at the ‘full value’ the property could receive in a ‘private sale’.” *Id.* at para. 34. In this case, if there is no market for the property to sell as a pulp and paper mill, then the conclusion would be, under §70.32(1), invalid.

The Commission observed that at the time the Department of Revenue employee responsible for arriving at the 2009 assessment made his inspection, he came to the conclusion that at least for 2009, the highest and best use was as an operating pulp and paper mill because

the mill had not shut down entirely and was capable of being restarted within a month. (Commission's findings 24-25). For years 2010 and 2011 that conclusion remained unchanged in part because Richard Arnold, a property assessment specialist at the Department determined that the property was operationally ready and could still be used as a pulp and papermaking plant. (Id. at findings 25 & 35). In accepting these conclusions, the Commission observed that in "the testimony at trial by Mr. Maternowski, Mr. Kmetz, Mr. Arnold and Ms. Coulson, [each witness] explained that there were recent sales of comparable properties available at the time of the 2009 assessment." (Decision at p. 14). The Commission concluded that:

But the most important evidence supporting the Department's highest and best use determinations was the existence of recent sales of comparable properties. All of these sales occurred in Wisconsin, were subject to a Sales and Reconciliation report, and were used by the assessors as comparable sales. Thus, a market existed in Wisconsin for paper mills, although it was smaller than in years past. To adjust for this declining market, the Department of Revenue made a downward adjustment as part of its valuation. All of this is credible evidence which supports the correctness of the assessments.

Id. a p. 15.

In its reply brief filed in this action Domtar concluded that "[t]his case boils down to one fundamental question, that is, for purposes of determining a property's market value for property tax purposes under Wis. Stat. Section 70.32, is it necessary to analyze the market conditions for that particular property in determining its 'highest and best use...'. Domtar argues that "the only evidence as to market conditions for the subject property as of the assessment dates was evidence produced by Domtar's witnesses" who, according to Domtar, testified as to "the complete lack of demand for the subject property for use as a paper mill...". According to Domtar, just because other mills have sold, does not mean the Port Edwards mill could or would continue as a paper mill.

Domtar is correct in that the law requires the assessor to assess a particular piece of property and in doing so consider that particular property, not a hypothetical market.⁶ The record shows there was an appraisal of the subject property. Just because there is a difference in the conclusion drawn from the market analysis does not mean the appraiser ignored the particulars regarding the subject. Indeed, the existence of the comparable sales established the fact that paper mills were being sold and bought and by and through a market comparison, adjustments were made to those sales to make the sales “comparable”. The comparable sales approach requires an assessor to consider sales of “reasonably comparable” properties. See Wis. Stat. §70.32(1).

As for the other “issues” regarding the dam, the inclusion of other property owned by another corporation or the question of a “retrospective” appraisal, this Court nonetheless concludes that the respondent acted according to law and its decision is supported by the substantial evidence in the record. The burden to overcome the presumption of correctness is on Domtar which had the challenge of presenting “significant contrary evidence”, (*Nestle USA* at para 23, emphasis added), to undermine the conclusion that the subject property could still be marketed and used as a pulp and paper mill.

The record confirms the attributes suggested by Domtar contributing to what it suggests as the obsolescence of the subject property. Accepting that there was a high cost to operate the mill, the sulfite process was outdated, and a declining demand for paper products combined with increase foreign competition, that does not necessarily mean the sales of other paper mills were

⁶ I also agree with Domtar in its defense of its appraisal as being “retrospective”. The date an appraisal is performed is not important as long as the appraisal clearly sets forth the “date of evaluation”, (see e.g. Wis. Stat. §32.09(1); see also *Schey Enterprises, Inc. v. State*, 52 Wis. 2d 361, 190 N.W.2d 149 (1971).) What might be problematic in retrospective appraisals is the correctness of an assumption that the property when appraised is in substantially the same condition as it was on the date of valuation. Because this Court affirms the decision below, it need not address the alleged deficiencies in Domtar’s appraisal regarding whether or not it considered the same set of improvements as were present in 2009-2011 or whether or not Domtar’s appraisal should have included the value of the hydroelectric facility.

not “comparable”. It only means that the appraiser should consider adjustments to make those sales probative of the fair market value of the subject property being appraised.

The Court’s decision in *Nestle USA, Inc. v. Wisconsin Dep’t. of Rev.*, is instructive in this regard, but it is not dispositive, at least as to Domtar. In that case Nestle built a special purpose facility designed to produce basically one product. The appraiser “could find no sales of comparable powdered infant formula production facilities in the United States.” *Id.* at para. 12. Other sales of less-specialized food processing plants were determined not to be sufficiently comparable. Thus, in *Nestle*, the appraiser still concluding the facility’s highest and best use was continuing to produce infant formula nonetheless used the cost approach to estimate its fair market value. In *Nestle*, the dispute was over the method of the appraisal, not that the Nestle plant was not marketable according to its present use. Conversely, in this case, the appraisal found “comparable sales” and after making adjustments, (including a final downward adjustment by the respondent), using the sales comparison approach determined the value of the subject property in the amount to which Domtar now objects. Just because property may no longer be “desirable”, (Domtar reply brief at p. 3) does not change the use, only possibly that its value diminishes due to external obsolescence.

Therefore, after a review of the record now having been presented to this Court, I find there is substantial evidence in the record to support the respondent’s decision. Based on this evidence, I conclude that Domtar has failed to prove that a reasonable trier of fact could not have reached the finding of fact as to the highest and best use of the subject property as a pulp and paper mill, especially given that all available inferences from that evidence are drawn in favor of upholding the decision now under review.

The Department's assessment is affirmed. The petition is dismissed.

Dated this 10th day of July, 2015.
BY THE COURT:



Frank D. Remington, Judge
Circuit Court Branch 8

This is a final decision for purposes of appeal.

cc: Atty. Clayton Kawski
Atty. Joseph Pickart