

NOT FOR PUBLICATION WITHOUT APPROVAL OF
THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY



Patrick DeAlmeida
Presiding Judge

R.J. Hughes Justice Complex
P.O. Box 975
Trenton, New Jersey 08625-0975
(609) 292-8108 Fax: (609) 984-0805

January 25, 2010

James L. Esposito, Esq.
DeCotiis, Fitzpatrick, & Cole, LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard, Suite 31
Teaneck, New Jersey 07666

Julia F. Moore
Deputy Attorney General
Division of Law
R.J. Hughes Justice Complex
P.O. Box 106
25 Market Street
Trenton, New Jersey 08625-1006

Re: City of Atlantic City v.
Director, Division of Taxation
Docket No. 017117-2009

Dear Counsel:

This letter constitutes the court's opinion after trial with respect to plaintiff's challenge to the Director, Division of Taxation's formulation of the school aid ratio for the City of Atlantic City for 2010. For the reasons explained more fully below, the City's challenge is accepted in part and rejected in part.

*

I. Findings of Fact and Procedural History

The court makes the following findings of fact based on the evidence and testimony introduced at a January 21, 2009, trial. The City presented testimony from an expert witness qualified to offer an opinion as to the real estate market in Atlantic City. The Director offered testimony from two employees who examined the circumstances of the relevant sales and formulated what would become the final determination of the Director establishing the school aid ratio for the City.

On or about October 1, 2010, the Director certified a table of equalized valuations to the Commissioner of Education for use in determining the amount of State school aid for school year 2010. See N.J.S.A. 54:1-35.1, et seq. In that document, the ratio set for the taxing district of the City of Atlantic City was 96.50%

The City filed a timely challenge to the Director's school aid ratio for the City. In a First Amended Complaint, the City contests the Director's treatment of three sales when calculating the ratio. The parties reached an amicable resolution with respect to one of those sales, the transfer of Block 604, Lots 1, 2 and 10 from The Miss America Organization to Reading 99, LLC. As a result, that sale is not before this court and is not addressed in this opinion.

At issue are the transfer of Block 299, Lot 5, (the "Boarding House Property") from Robert and Maria Stabinski to Westminster Property, LLC and the transfer of Block 156, Lot 34 (the "Gold Shop Property") from Margarita Manelis to Dimitios Lemoniotis, Eleni Lemoniotis, and Peter Vu.

The Boarding House Property

Robert and Maria Stabinski, a married couple, owned the property at 24 N. Pennsylvania Avenue. Maria Stabinski had primary responsibility for operating a boarding

house at that location. Robert Stabinski was not significantly involved in the couple's boarding house business. The Stabinskis purchased the property for \$475,000 in 2006 subject to a mortgage in the original principal amount of \$348,750.

The Stabinskis encountered marital difficulties. By August 2008 Maria Stabinski had left her husband and moved to Italy. Mr. Stabinski had no interest in assuming control of boarding house operations. In addition, by that time the Stabinskis had accumulated significant arrearages on the Boarding House Property mortgage.

The property was listed for sale through the multiple listing service on August 11, 2008, at an asking price of \$889,000. The property remained on the market for six months and the listing agent took typical steps to market the property.

On February 6, 2009, a contract for the sale of the property was executed. The agreed upon purchase price was \$450,000. As part of the agreement, the purchaser agreed to assume the Stabinskis' mortgage, including the arrearages, penalties and costs of approximately \$74,000 that had accumulated at that time.

The May 27, 2009, deed transferring the property is signed by Mr. Stabinski. In addition, the deed is signed on behalf of Mrs. Stabinski as follows "Maria Micela, f/k/a Maria Stabinski, by her attorney in fact, Robert Stabinski, by order of the court." The court order allowing Mr. Stabinski to sign on behalf of Mrs. Stabinski, who it appears was by that time his ex-wife, or at least using a different last name, was not admitted into evidence.¹

¹ Although the record contains evidence that Mrs. Stabinski, later Ms. Micela, moved to Italy, a "Seller's Residency Certification/Exemption" accompanying the May 27, 2009, deed, signed on Ms. Micela's behalf by Mr. Stabinski, states that she is "a resident taxpayer . . . of the State of New Jersey pursuant to N.J.S.A. 54A:1-1 et seq. and will file a resident gross income tax return and pay any applicable taxes on any gain or income from the disposition of this property." It is unclear from the record whether Ms. Stabinski had returned to New Jersey by May 27, 2009, or remained in Italy but had retained her New Jersey residency or whether the Certification is false. It is not necessary for the court to resolve those questions. The court finds as fact that Mrs. Stabinski left New Jersey by August 2008

A Loan Adjustment Agreement recorded with the deed establishes Westminster Property, LLC's assumption of the Stabinskis' mortgage. The agreement provides that the principal balance due on the mortgage, \$344,460.28 will be increased by \$74,039.72 "representing the amount of unpaid interest, late charges, fees and costs, and, if applicable, any advances for unpaid property taxes and/or insurance premiums" for a total unpaid principal balance of \$418,500. The interest rate on the mortgage was reduced from 11% to 6% and the parties agreed to a modified monthly payment amount and new maturity date. These changes were made "[d]ue to adverse economic circumstances" and to protect Westminster Property, LLC from "the possible foreclosure of the Loan" by the mortgagor.

The Director determined that this sale was not usable in determining the equalization table under the catchall provision of N.J.A.C. 18:12-1.1(a)26 as a sale "which for some reason other than specified in the enumerated categories [is] not deemed to be a transaction between a willing buyer, not compelled to buy, and a willing seller, not compelled to sell." The Director reasoned that Mr. Stabinski was compelled to sell the property because of the mounting arrears on the mortgage and sudden departure of his wife from the United States. In addition, the Director relied on the fact that Mr. Stabinski was forced to obtain a court order to act as Mrs. Stabinski's attorney in fact to execute the deed as evidence that forces other than market conditions influenced the sale and demonstrated that Mr. Stabinski was under unusual pressure to sell the property.

and her actions subsequent to that time required Mr. Stabinski to obtain a court order to transfer her interest in the Boarding House Property.

The Gold Shop Property

Margarita Manelis owned the property at 1721 Pacific Avenue, which contained a storefront space rented to a commercial entity.

On October 3, 2007, the City Council of Atlantic City adopted resolution No. 758 directing the Planning Board to conduct a preliminary investigation and public hearings on whether all or part of the properties located in an area bounded by the Boardwalk and Pacific Avenue qualified as an area in need of redevelopment pursuant to the New Jersey Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, et seq. The area identified by the City Council to be investigated for redevelopment was defined by block and lot number and specifically included the Gold Shop Property. Pursuant to the Resolution, the Planning Board conducted a series of public hearings commencing on December 19, 2007, and concluding on June 18, 2008. Ms. Manelis attended one or more of those hearings.

On July 16, 2008, the Planning Board issued a Resolution summarizing its findings from the public hearings and concluding that a majority of the study area, including the Gold Shop Property, which was named by block and lot, was in need of redevelopment within the meaning of N.J.S.A. 40A:12A-1, et seq. The Planning Board recommended to the City Council that a majority of the study area, including the Gold Shop Property, be determined to be a redevelopment area. Property within a redevelopment area is subject to condemnation by public entities for the purpose of redevelopment. N.J.S.A. 40A:12A-1, et seq.

At one of the Planning Board meetings regarding the potential redevelopment of the area, Ms. Manelis was approached by Mr. Vu, who operated a retail gold shop as a tenant in the building next to the Gold Shop Property. Mr. Vu and his partners offered Ms. Manelis \$1 million for her property.

On June 8, 2008, one month before the Planning Board's recommendation to the City Council, Ms. Manelis entered into a contract to sell the Gold Shop Property to Mr. Vu and his partners for \$999,990. The property was not listed for sale, was not advertised for sale and was not subject to the open market. Although neither party entered the sales contract into evidence, the City's expert witness, qualified to offer an opinion on the real estate market in Atlantic City, testified that he reviewed the contract in reaching his opinion and that the document stated that the Mr. Vu and his partners were obligated to purchase the property at the agreed upon price even if the property was designated as being within an area in need of redevelopment prior to the closing. The court accepts this testimony as an accurate description of the terms of the contract.

The record contains conflicting testimony regarding Ms. Manelis's motivation to sell the Gold Shop Property. Both the city's expert witness and an investigator for the State spoke with Ms. Manelis's attorney. They offered differing hearsay accounts of whether the potential inclusion of the property in an area in need of redevelopment influenced Ms. Manelis's decision to sell the property. The court determined at trial that the City's expert could testify as to the hearsay statement of Ms. Manelis's attorney because the expert relied on the hearsay statement in reaching his opinion. N.J.R.E. 703. The hearsay statement of Ms. Manelis's attorney to the State's investigator who examined the sale for the Director prior to reaching her decision was allowed into evidence as a factor upon which the Director relied in including the sale in the calculation of the equalization table. The court discounts both hearsay statements. This evidence is inherently unreliable. Ms. Manelis's attorney was unwilling to attend the trial and was not subpoenaed by either party, although the address of his law office was certainly readily available. The court's findings of fact, therefore, in no way are predicated at the statements of Ms. Manelis's counsel to either of the witnesses who testified at trial.

The property was transferred by deed on September 3, 2008. On that same day, the City Council adopted a resolution adopting, in part, the Planning Board's recommendation. The City Council designated as in need of redevelopment only those properties in the previously identified area owned by an entitled named Pinnacle. The remaining properties in that area, including the Gold Shop Property, "will be reviewed at a later date, pending review by the Planning and Development Committee and the Revenue and Finance Committee." In addition, the City Council named the City as the redevelopment entity for the area in need of redevelopment.

The Director included the sale of the Gold Shop Property in her calculation of the equalization table. The City contends that the sale should be excluded because it was not the result of exposure of the property to the market, because the seller was "substantially influenced by zoning changes, planning board approvals, variances or rent control subsequent to assessment and prior to the sale[,]" N.J.A.C. 18:12-1.1(a)24, and because the purchase was part of an assemblage. The City's assemblage argument is based on the fact that Mr. Vu and his partners were commercial tenants in the building next to the Gold Shop Property and expressed their intention to conduct business at the Gold Shop Property once the surrounding property was redeveloped into a casino. Apparently, Mr. Vu and his partners were of the opinion that the Gold Shop Property would not ultimately be included in the redevelopment area and would be located directly across the street from a new casino once the area was redeveloped.

II. Conclusions of Law

The Director's calculation of a school aid ratio is presumed to be correct "and shall not be revised or modified by the tax court unless the complainant district shall present proof that upon all the evidence available such ratio or ratios could not reasonably be justified." N.J.S.A. 54:51A-4c. "A municipality seeking the inclusion of a sale omitted by the Director in his study

bears a heavy burden of proof because the Director is vested with wide discretion in fashioning the annual table.” Township of Union v. Director, Div. of Taxation, 1 N.J. Tax 15, 17 (Tax 1980)(citing Town of Kearny v. Division of Tax Appeals, 35 N.J. 299, 304 (1961)).

The Boarding House Property

The City challenges the Director’s categorization of the sale of the Boarding House Property as not usable in the sales study. N.J.A.C. 18:12-1.1(a) enumerates thirty-three categories of sales that are not usable in determining the school aid ratio. Category 26 applies to sales “which for some reason other than specified in the enumerated categories are not deemed to be a transaction between a willing buyer, not compelled to buy, and a willing seller, not compelled to sell.” N.J.A.C. 18:12-1.1(a)26. N.J.A.C. 18:12-1.1(b) provides that sales falling within category 26, among other categories, “should generally be excluded but may be used if after full investigation it clearly appears that the transaction was a sale between a willing buyer, not compelled to buy, and a willing seller, not compelled to sell, with all conditions requisite to a fair sale with the buyer and seller acting knowledgeably and for their own self-interests, and that the transaction meets all other requisites of a useable sale.”

The non-usable “categories set forth in N.J.A.C. 18:12-1.1 are primarily designed to identify ‘sales that are unlikely to have involved arms-length bargaining and therefore are unlikely to have been made at fair market value.’” City of Atlantic City v. Director, Div. of Taxation, 24 N.J. Tax 1, 13 (Tax 2008)(quoting Borough of Englewood Cliffs v. Director, Div. of Taxation, 18 N.J. Tax 662, 669 (App. Div. 2000)). As the Supreme Court explained, “[g]enerally, sales are useable if they constitute an arms-length transaction that reflects the market value of the property.” 1530 Owners Corp v. Borough of Fort Lee, 135 N.J. 394, 398 (1994).

The court concludes that the Director can reasonably justify her decision to exclude the sale of Boarding House Property from her calculation of the school aid ratio. The evidence establishes that Mr. Stabinski was compelled by the sudden departure from the country of his wife, who operated the boarding house, as well as the mounting arrears on the mortgage, to sell the Boarding House Property. By the time that the Loan Adjustment Agreement was executed over \$74,000 in arrears had accumulated on a mortgage with a \$348,750 original principal balance. More than twenty percent of the original principal balance, which was reduced by just a few thousand dollars during the period of the Stabinskis' ownership of the property, was outstanding as overdue payments, penalties and costs. Although the record contains no evidence that a foreclosure was imminent, it is clear that Mr. Stabinski, who was uninterested in operating the boarding house, was unable to maintain the Boarding House Property and satisfy the financial obligations associated with it. This economic strain alone calls into question the seller's motivation.

In addition, Mrs. Stabinski's move to Italy and the couple's obvious marital difficulties cast doubt on Mr. Stabinski's motivation to sell the property. The fact that he had to obtain a court order to sign the deed on behalf of Mrs. Stabinski, who appeared at that time to have divorced Mr. Stabinski or at least adopted a different last name than him, supports the conclusion that forces other than market forces compelled the sale of the property.

At trial, the parties did not focus on whether Mrs. Stabinski was compelled to sell the property. The record suggests that her interest in the property was transferred without her participation or consultation. "[W]hen determining whether a sale constitutes a true market sale, a willing buyer and willing seller presupposes an informed buyer and seller." City of Atlantic City, supra, 24 N.J. Tax at 17 (citing U.S. Life Realty Corp. v. Township of Jackson, 9 N.J. Tax

66, 75 (Tax 1987)). Mrs. Stabinski's role in the transaction clearly was not that of a willing seller acting knowledgeably and for her own interest, as would justify inclusion of the sale under N.J.A.C. 18:12-1.1(b). This fact alone renders the Director's decision reasonably justified.

The Gold Shop Property

Category 24 of the regulation allows for the exclusion from the calculation of the school aid ratio of any sale that is "substantially influenced by zoning changes, planning board approvals, variances or rent control subsequent to assessment and prior to the sale." N.J.A.C. 18:12-1.1(a)24. The court concludes that the Director cannot reasonably justify her conclusion that the sale of the Gold Shop Property does not fall within this category of non-usable sales.

The court concludes that Ms. Manelis was substantially influenced to sell her property by what she perceived to be the impending inclusion of the Gold Shop Property in an area designated for redevelopment, and a consequent exposure to condemnation, through action of the Planning Board. As a result of these influences, the property was not exposed to the market and the sale price is an unreliable indicator of the fair market value of the property.

This conclusion is supported by the fact that Ms. Manelis accepted an unsolicited offer for the property at a public hearing before the Planning Board. Ms. Manelis did not negotiate with the buyer, settling for an amount \$10 less than the original offer. The property was not placed on the market, and the contract for sale included a provision binding the purchaser in the event that the property was included in the potential redevelopment area. The court cannot conclude that it was reasonable for the Director to disregard the role that the pending redevelopment plan, imminent Planning Board action, and probable subsequent condemnation by a redevelopment entity played in the sale of the Gold Shop Property. The court concludes, therefore, that the sale of the Gold Shop Property should have been excluded from the Director's

calculation of the school aid ratio for Atlantic City. Because the court concludes that the sale of the Gold Shop Property should have been excluded from the calculation of the school aid ratio under N.J.A.C. 18:12-1.1(a)24, the court need not address the City's argument that the sale represented an assemblage.

An Order effectuating this decision is enclosed.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Patrick DeAlmeida".

Patrick DeAlmeida, P.J.T.C.