NO. CV 11 6017716	:	SUPERIOR COURT
QUANTUM OF ELLINGTON II, LLC	:	JUDICIAL DISTRICT OF
	:	
v.	:	NEW BRITAIN
BD OF ASSESSMENT APPEALS OF ELLINGTON	:	JANUARY 17, 2014

NO. CV 12 6017717	:	SUPERIOR COURT
QUANTUM OF ELLINGTON II, LLC	:	JUDICIAL DISTRICT OF
	:	
v.	:	NEW BRITAIN
TOWN OF ELLINGTON	:	JANUARY 17, 2014

MEMORANDUM OF DECISION

The plaintiff, Quantum of Ellington II, LLC (Quantum), in the CV 116017716 appeal, alleges that, on the Grand List of October 1, 2010, the assessor for the town of Ellington (town) modified the original assessment of 109 units in a planned community organized under the Common Interest Ownership Act (CIOA)[1]. The plaintiff further alleges that the 109 units have not been constructed or declared pursuant to CIOA.

In paragraph 3 of its complaint, the plaintiff alleges that the town's assessor

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[1] General Statutes § 47-220, provides, in relevant part, as follows: "Creation of common interest community. (a) A common interest community may be created pursuant to this chapter only by recording a declaration executed in the same manner as a deed . . . ."

valued each of the 109 units on the assessment date of October 1, 2010 (related back from the date in July 2011), when the assessment was modified, as follows:

	Description	Appraised Value	Assessed Value
1.	Buildings	$ 0	$ 0
2.	Outbuildings	$ 0	$ 0
3.	Land	$42,500	$29,750

The plaintiff brings this appeal pursuant to General Statutes § 12-119 because it claims that it could not make a timely appeal of the assessor's July 2011 change in assessment to the board of assessment appeals (BAA) since the time to appeal, as provided in General Statutes § 12-111, had passed.[2]

In the CV 126017717 appeal, the plaintiff challenges the assessor's valuation as to 108 units in a planned community, claiming that none of the 108 units have been

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[2] General Statutes § 12-111 (a) provides, in relevant part, as follows: "Any person . . . claiming to be aggrieved by the doings of the assessors of such town may appeal therefrom to the [BAA]. Such appeal shall be filed, in writing, on or before February twentieth." Section 12-111 is the first step for a taxpayer challenging an assessor's determination of value for assessment purposes pursuant to § 12-117a. This first step is not required for a taxpayer who brings an appeal pursuant to § 12-119 since a taxpayer under such a claim may appeal directly to the Superior Court. The plaintiff here implies that § 12-119 is an alternative action to § 12-117a, when it is too late to present an appeal to the BAA. However, § 12-119 is not an alternative to § 12-117a. See Pauker v. Roig, 232 Conn. 335, 340-41, 654 A.2d 1233 (1995). Where an assessor makes an interim change in an assessment which prevents a taxpayer from timely making an appeal to the BAA, § 12-53a (d) provides relief by extending the appeal to the next succeeding BAA.

constructed or declared pursuant CIOA. The plaintiff alleges in count one therein that the assessor, as of October 1, 2011, valued the land of each unit at $42,500.

The plaintiff appealed the assessor's October 1, 2011 valuation to the BAA, which denied the appeal. The plaintiff brings this present appeal from the BAA's denial pursuant to General Statutes § 12-117a.

Both appeals were consolidated by the court pursuant to the plaintiff's motions to consolidate.

The plaintiff's appraiser, Arthur B. Estrada (Estrada), describes the subject property as follows:

"The property that is the subject of this valuation consists of the development rights to 105 condominium[3] units. The 105 units are part of a larger project that has been granted approvals to construct 123 units on the subject site. The parcel comprises a land area of 41.7 acres, more or less.

"The complex was originally conceived as an age-restricted condominium for

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[3] General Statutes § 47-202 (10) defines "condominium" as "a common interest community in which portions of the real property are designated for separate ownership and the remainder of the real property is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners." See also Declaration of Windermere Village, plaintiff's Exhibit 1, pp. 8-10, which provides that the unit owners have an undivided interest in the common elements, in compliance with the statute.

individuals 55 years and older. The developers of the project were granted approvals for the age-restricted complex on August 22, 2005. The approvals were modified in June 2011 and the complex is no longer age-restricted.

"At the present time, the complex includes 18 units that have been sold along with the partially completed infrastructure for these units. The remainder of the complex consists of vacant land." (Plaintiff's Exhibit 3, p. 5.)

The town's appraiser, Peter R. Marsele (Marsele), describes the subject property as follows:

"Subject property is located in a WCHZ Workforce Cluster Housing Zone. The property [was] changed to this zone to permit the development of 123 housing units to be known as 'Windermere Village'. The development was approved and construction of single family dwelling units are in progress in Phase 1. There are seven phases in the entire development. . . . There are no improvements on the land." (Defendant's Exhibit H, p. 8.)

Marsele further notes in his appraisal report that the "[t]he Highest and Best use of this property as unimproved under present zoning, is to continue the development as started and as approved by local zoning officials." (Defendant's Exhibit H, p. 8.) Marsele concludes that the fee simple value of the subject property, as of October 1, 2010, was $5,750,000. Marsele further notes that the subject property located in a WCHZ zone was

approved for 115 units. See defendant's Exhibit H, p. 5.

Estrada is of the opinion that the fee simple value of the subject property, as of October 1, 2010, was $1,725,000. In making his finding of value, Estrada recites that "[i]t is our opinion that a land residual method of valuation[4] is most applicable to the subject matter. This approach utilizes a land development model to identify the present worth of the projected benefits that would accrue to the buyer/developer. In our opinion, the criteria utilized in the land development model reflects reasonable projections of unit sale prices, absorption, estimated expenses and investor criteria, as of the valuation date. In addition, the assumptions and limiting conditions that are part of the analysis are reasonable as well. Based on the foregoing data and analysis, it is our opinion that the estimated [value] for the subject development rights is appropriate." (Plaintiff's Exhibit 3, p. 12.)

Contrary to Estrada basing his opinion of value on the land residual method, Marsele based his opinion of value using the market approach as applied to subdivisions of land. See defendant's Exhibit H, p. 6.

The plaintiff purchased the subject property containing 41.7 acres of land by deed

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[4] "The residual land value . . . can be found by estimating the value of the proposed use (land and improvements) and subtracting the cost of labor, capital, and entrepreneurial coordination expended to create the improvements." The Appraisal of Real Estate (12th Ed. 2001), p. 315.

dated April 23, 2007 and recorded in the town's land records for the consideration of $3,198,000. See defendant's Exhibit A.

The Declaration of Windermere Village, as an age-restricted active adult common interest community, was recorded in the town's land records on April 28, 2008 in Volume 392, p. 1,060. See plaintiff's Exhibit 1. This declaration recites, in Article IV, p. 8, that it is a common interest community that may contain up to a maximum of 124 units of which 123 units will be single-family residential units and one unit will be a community center.

Although both appraisers agree that the land is vacant, Estrada views the subject development as being more than just raw land. From Estrada's standpoint, the subject condominium project had gone through the process of being approved for the construction of condominium residential units, and therefore, the value of the land was in the developer's ability to construct and sell individual residential condominium units. In other words, on October 1, 2010, the value of the property subject to assessment was enhanced by the ability of the owner to market the right to build and sell condominium units for a profit. Because the land value was enhanced, Estrada turned to the income approach based upon the residual land value obtained through the use of a hypothetical situation that spanned eight years.

In the use of the income approach, Estrada notes that "[t]he Income Approach is

used to value vacant land that is approved for development or has defined potential for development. In this approach, the analyst/appraiser constructs a land development model that reflects the highest and best use of the property. The model identifies the potential income to be generated by the proposed development along with the costs/expenses, exclusive of land acquisition, to be incurred by the developer. The difference between the income and expenses is attributed to the land and this income is converted into a value estimate by means of a discounted cash flow [DCF] analysis." (Plaintiff's Exhibit 3, p. 7.)

As of October 1, 2010, the date of the town-wide revaluation, the subject development consisted of vacant land and the remaining development rights to 105 condominium units. See plaintiff's Exhibit 3, p. 2.

Since Estrada's process of valuation relies on the use of a hypothetical condition, it is necessary to define this concept. A hypothetical condition has been defined as "a condition, directly related to a specific assignment, which is contrary to what is known by the appraiser to exist on the effective date of the assignment results, *but is used for the purpose of analysis*." (Emphasis added.) Redding Life Care, LLC v. Redding, 308 Conn. 87, 107, 61 A.3d 461 (2013), citing Appraisal Standards Board, Appraisal Foundation, 2012-13 Uniform Standards of Professional Appraisal Practice [USPAP] (2012) p. U-3, available at http:/www.uspap.org.

In citing USPAP (2004 Ed., the Appraisal Foundation, p. 3), Estrada notes, similar

to Redding Life, that "[h]ypothetical conditions assume conditions contrary to known facts about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in an analysis." (Plaintiff's Exhibit 3, p. 3.)

Estrada's concept basically considers the existing vacant land as improved with development rights that grants to the owner of the land the right to construct and sell condominium units. In other words, this concept employs a hypothetical, in its analysis, that takes vacant land and theorizes that if the land were fully developed and sold as planned, the sale prices less the expenses to build 105 units would produce a profit that would enure to the benefit of the owner of the land. According to Estrada, this profit has a present market value, as of October 1, 2010, of $1,725,000. Thus, according to Estrada, a buyer on October 1, 2010 would pay $1,725,000 for the opportunity to build and sell 105 condominium units at Windermere Village.[5]

Marsele first notes that the assessor determined that, as of October 1, 2010, the subject property had an assessed value of $3,302,250. Although the assessor valued the land at $42,500/unit, Marsele concluded that the market value of the subject units would

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[5] It is difficult for the court to accept as credible Estrada's opinion of value at $1,725,000 given the fact that the plaintiff purchased the land in 2007 for $3,198,000. The land was thereafter improved at an additional cost to create a viable condominium project for development and the sale of units.

be $50,000/unit. Multiplying this amount by 115 units produces a fair market value for the subject at $5,750,000, as of October 1, 2010. See defendant's Exhibit H, p. 13.

Although Marsele was aware of Windermere Village being developed as a condominium project, he based his valuation of the subject property not on the highest and best use as a condominium project, but on the property consisting of subdivided lots as described in his selection of comparable sales. See defendant's Exhibit H, pp. 11-12. Marsele acknowledged in his testimony that it was not necessary for the lots used in his comparables to be condominiums.

Since the assessor did not testify at trial in this case, the court assumes that the assessor relied on the same method by which his appraiser, Marsele, employed to arrive at his opinion of value using lots in a subdivision.

Recognizing that Estrada based his finding of land value on a per unit value of the condominiums, it is necessary to resolve the difference between the assessor's use of 109 units; Estrada's use of 105 units and Marsele's use of 115 units. As previously noted, the Declaration of Windermere Village provided for the approval of 123 residential units and 1 unit for the community center.

Estrada testified that he assumed that 105 units were available for construction based upon information from the offices of the assessor and town clerk. Estrada's sales data for Windermere Village shows 18 unit sales (see plaintiff's Exhibit 3, p. 7), which if

deducted from a total of 123 units, would equal Estrada's use of 105 units. The sales data for Windermere Village shows that, of the reported 18 unit sales, only 8 units were sold as of the revaluation date of October 1, 2010 and the remaining 10 units were sold after the revaluation date of October 1, 2010. Therefore, it is more credible to use the 115 units relied on by Marsele.

A review of Estrada's Land Development Model shows a DCF analysis over an 8-year period for the present worth of the projected income stream**.** See plaintiff's Exhibit 3, p. 11. This present worth is based on the use of a discount rate of 20% for land development.[6] Using the DCF approach that relies on a hypothetical analysis to show the present worth of the subject's development rights, Estrada arrived at the value of $1,725,000. This value is based on Estrada's opinion that "the estimated value of the subject property reflects a rate of $16,429/unit." (Plaintiff's Exhibit 3, p. 12.)

Marsele's approach to value is based on the sale of subdivision lots relying on three sales, two of which are located in South Windsor and one sale located in Avon, which admittedly, is not in the same real estate market as the subject.

Recognizing that the subdivisions selected by Marsele are not condominium developments, the selections are not helpful in arriving at the subject's fair market value.

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[6] The Korpacz Real Estate Survey quotes discount rates for land development from 15% to 30%, with an average rate of 21.63%. See plaintiff's Exhibit 3, p. 10.

The subject is not a land subdivision that divides the land into separate salable building lots. It is in fact a development where the condominium owner owns the building which is used as a residence. "The Common Elements are owned by the Association." (Article IX, § 9.2 (a) of the Declaration of Windermere Village, plaintiff's Exhibit 1, p. 15.)

On the revaluation date of October 1, 2010, the subject's fair market value is based on (1) land that has been improved with the construction of some infrastructure and (2) the balance of the land consisting of development rights to build and sell 115 condominium units.

Marsele's selection of comparable sales does not address these issues. However, Estrada's analysis of a hypothetical (considering the total income to a market purchaser and the expenses related to the development) results in a present value under the DCF approach.

The court recognizes that Estrada's valuation is based on a hypothetical analysis involving a determination of the DCF approach for the sale of 105 units at $16,429/unit, and that this process is imprecise. Given all of the variables herein, the court finds that a fair resolution of the differences involved in this case regarding the fair market value of the subject, as it existed on October 1, 2010, is $3,450,000 (calculated at $30,000/units multiplied by 115 units).

In regard to the plaintiff's appeal CV 116017716, brought pursuant to § 12-119[7], the assessor's valuation appears to be based on the concept that Marsele considered in his appraisal report, namely, that the subject property consisted of subdivided lots rather than a condominium development. This position points out the problem in these two cases. First, the subject development is not a classic subdivision of land which is controlled by General Statutes § 8-25 (a), which provides, in relevant part, as follows: "No subdivision of land shall be made until a plan for such subdivision has been approved by the [planning] commission." Second, the subject property, presented as a condominium development, is governed by General Statutes § 47-204 (b) as to the method of assessment and taxation of condominiums and planned communities.

As the plaintiff properly points out, "[i]f a unit has not been declared it does not constitute a separate parcel of real property. On October 1, 2010, none of the separately assessed 109 'units' had been declared. . . . All that existed was the approval for the buildings and sale and ultimate declaration of these units." (Plaintiff's 10/25/13 post-trial

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[7] General Statutes § 12-119 provides, in relevant part, as follows: "When it is claimed that a tax has been laid on property not taxable . . . or that a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property, the owner thereof . . . may, in addition to the other remedies provided by law, make application for relief to the superior court . . . . [T]he Superior Court shall have power to grant such relief upon such terms and in such manner and form as to justice and equity appertains . . . ."

brief, p. 13.) See also Hartford/Windsor Healthcare Properties, LLC v. Hartford, 298 Conn. 191, 198-99, 3 A.3d 56 (2010) (claims that an assessor has misclassified property, thereby overvaluing it, comprise a category of appeals frequently pursued under the aegis of § 12-119); Pauker v. Roig, supra, 232 Conn. 345 (challenging property's assessment as subdivision lots instead of as an undivided parcel); Saybrook Point Marina Partnership v. Old Saybrook, 49 Conn. App. 106, 109, 712 A.2d 980 (challenging property's assessment as condominium when still legally apartment building on date of assessment), cert. denied, 247 Conn 904, 720 A.2d 515 (1998).

Since it appears that the assessor valued a parcel of land based on a concept of lots in a subdivision when, in fact, it was not, the plaintiff is entitled to relief.

It should be noted that the town acknowledges that the assessor's decision to divide the total assessment among the undeclared units was not appropriate: "[T]he Assessor changed her position to accommodate plaintiff's request knowing the technical assessment issue and believing plaintiff agreed the individual unit assessment was fairer to it . . . . Having been granted its request, plaintiff is now estopped from claiming the assessment of undeclared units was illegal. Clearly, plaintiff made a request that it knew did not comply with case law concerning assessment of undeclared condominium units and in reliance upon plaintiff's request and the underlying reasons for the request, the Assessor changed her position concerning the assessment of [the] plaintiff's properties by

revising her accounts and dividing the total assessment among the 114 undeclared but approved units." (Defendant's 10/24/13 post-trial brief, p. 5.)

As noted in Gianetti v. Rutkin, 142 Conn. App. 641, 656, 70 A.3d 104 (2013): "There are two essential elements to an estoppel – the party must do or say something that is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief, and the other party, influenced thereby, must actually change his position or do some act to his injury which he otherwise would not have done. . . . [Further] [i]t is the burden of the person claiming the estoppel to show that he exercised due diligence to ascertain the truth and that he not only lacked knowledge of the true state of things but had no convenient means of acquiring that knowledge."

Although the issue of estoppel came up peripherally in the town's post-trial brief, there is no merit to this claim. Neither the facts nor the elements of estoppel are present here to support a claim of estoppel.

Recognizing that valuation of real estate is not an exact science, see Carol Management Corp. v. Board of Tax Review, 228 Conn. 23, 39-40, 633 A.2d 1368 (1993), "[t]he trier of fact must arrive at his own conclusions as to the value of [the taxpayer's property] by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value, and his own general knowledge of the elements going to establish value . . . ." (Internal quotation marks omitted.) Xerox Corp. v. Board of Tax Review, 240 Conn. 192, 204, 690 A.2d 389 (1997).

As discussed above, the court finds that the true and actual value of the subject property, as of October 1, 2010, is $3,450,000.[8] Accordingly, judgment may enter in favor of the plaintiff, in both cases, sustaining the plaintiff's appeals, without costs to any party.

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Arnold W. Aronson
Judge Trial Referee

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[8] The first appeal brought pursuant to § 12-119, if successful, would require the court to "grant such relief upon such terms and in such manner and form as to justice and equity appertains . . . ." The relief granted here is to determine the present true and actual value of the subject property, as of October 1, 2010. See, e.g., Underwood Typewriter Co. v. Hartford, 99 Conn. 329, 336, 122 A. 91 (1923): "For the purpose of taxation no valuation of any taxable property except its present true and actual valuation is legal[.]" (Internal quotation marks omitted.)