STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. SUPERIOR COURT

(FILED: December 13, 2013)

LAURENCE F. WHITTEMORE, III, and KATHLEEN M. WHITTEMORE	:	
V.	:	**C.A. No. WC-2011-0252** **C.A. No. WC-2012-0105** **C.A. No. WC-2013-0152** **(Consolidated)**
CHARLES E. VACCA, in his capacity as Tax Assessor for the Town of Westerly	:	

DECISION

K. RODGERS, J. This matter is before this Court on an appeal from decisions of the Board of Tax Review (Board) of the Town of Westerly (Town) with respect to the Town's tax assessment of real property owned by Laurence F. Whittemore, III and Kathleen M. Whittemore (the Plaintiffs or Whittemores), and located at 5 Manatuck Avenue, Westerly, Rhode Island (5 Manatuck or the Property), as of December 31, 2009, December 31, 2010, and December 31, 2011. The matters were consolidated and, following a trial without the intervention of a jury, this Court requested the parties to submit post-trial briefs. Having reviewed said briefs, this Court will now render a Decision.

Jurisdiction is pursuant to G.L. 1956 § 44-5-26. For the reasons set forth herein, judgment shall enter for Plaintiffs on all three appeals.

I

Findings of Fact

Upon assessing the credibility of the witnesses, weighing all the evidence presented, and considering the undisputed facts as submitted by the parties, this Court makes the following findings of fact.

In or around 2005, after spending many summers vacationing in the Weekapaug area of Westerly with extended family, the Whittemores decided to find a place of their own in the exclusive and highly sought-after Watch Hill neighborhood—largely to spend quality time with their teenage children before the children grew older and went off on their own. Plaintiffs' search took place over a number of years to no avail until the late spring of 2008 when the Whittemores' realtor informed them that 5 Manatuck would soon be listed on the Multi-State Listing Service,[1] with an asking price of $7.85 million. The Property is slightly over an acre in size, has ocean views, and is approximately a 100-yard walk to a nearby beach. The home situated on the Property is a relatively new construction, two-story house consisting of 9 rooms, 6 bedrooms, and 6.5 bathrooms. The Whittemores learned that the Property is subject to a view easement in favor of a nearby property that limits expansion of the house, has no garage, and is prone to flooding during rainy weather. Nevertheless, these drawbacks were not enough to stop the highly-motivated Whittemores from pursuing the Property while it was pocket listed.

After coming to terms with the owner to buy the property for $7.1 million, the parties signed a purchase and sale agreement in June of 2008. Pls.' Ex. 1. The Whittemores' ability to close the sale, however, was soon threatened by the financial

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[1]It was explained at trial that the offer of real estate for sale prior to its appearance on this Multi-State Listing Service (MLS) is known as "pocket listing."

collapse in the fall of 2008, as they had intended to sell stock to finance a large portion of the purchase price. Fortunately, the seller agreed to take back a note as temporary financing to facilitate the closing, which took place on October 9, 2008. Ultimately, Washington Trust Company (Washington Trust) agreed to provide the primary financing and took a first mortgage on the Property. In connection with that mortgage, Washington Trust sought and obtained two appraisals of the property—one from AppraiseRI and another from the Newport Appraisal Group—which estimated the market value for 5 Manatuck in October 2008 at $6.9 million and $6.5 million, respectively. Def.'s Exs. K, L.

The Whittemores' financing, however, was not the only thing threatened by the 2008 financial collapse. The collapse also stifled the national and state housing markets in general and the upscale Watch Hill market in particular. Following the 2008 financial collapse, there was a dearth of sales of luxury property in Watch Hill for several years. In the midst of it all, the Town was statutorily required to conduct a town-wide revaluation of real estate tax assessments as of December 31, 2009. See § 44-5-11.6(a)(2)(i).

In determining the assessed value of real estate, or fair market value, it is incumbent on the local tax assessor to be aware of the circumstances surrounding the sale of real estate. For instance, real property conveyed to family members would likely not be considered an arm's length transaction or a sale at fair market price. Similarly, other transactions may be influenced by the motivation of the buyer, the seller, or both, and therefore may not reflect the fair market value of the property. Such transactions may be

considered "outliers," and are generally not considered when determining the fair market value of property.

The financial collapse and the consequent housing market crash, which has since come to be known as the Great Recession,[2] contributed to a general decrease in tax assessments throughout Westerly in general and Watch Hill in particular between December 31, 2006 and December 31, 2009.[3] By way of example, three homes in the immediate vicinity of the Property, located at 8 Manatuck Avenue, 15 Ocean View Highway, and 17 Ocean View Highway, decreased in value by 5.9%, 7.8% and 7.7%, respectively. See Pls.' Exs. 4, 19, 21. The average decrease in the tax assessments of these three properties is 7.1%.

In stark contrast to these three neighboring properties, the tax assessment on Plaintiffs' Property increased. As of December 31, 2006, Plaintiffs' Property had been assessed at $5,260,900, but that value rose to $5,976,600 as of December 31, 2009.

[2]Much has been written and will continue to be written about this economically devastating event in our nation's history. While the cause and effects of the Great Recession were not a focus of this trial, it is noteworthy that Stephen O. McAndrew, a local real estate appraiser and broker, on cross-examination, testified about the formulation of bank appraisals in real estate transactions before and after the housing market crash. Specifically, when asked if bank appraisals "generally come out at the purchase-and-sale price," he responded that the "new regulations" address this concern that the objectivity is removed when an appraiser is provided with the purchase price. Presumably, then, the "new regulations" were designed to reign in unsupported bank appraisals and wildly excessive market values by not making the "target number" available to the appraiser.

[3] Because municipalities are statutorily bound to conduct a town-wide revaluation every three years, and because the tax assessments are only updated every year in which a full revaluation is not being conducted, it is commonplace for municipalities to carry over tax assessments in the intervening years. Defendant, Charles E. Vacca, the Town's Tax Assessor, confirmed that such is the practice in Westerly, unless there are changes in the physical condition of the property in the intervening years, namely, as of December 31, 2007 and as of December 31, 2008. Therefore, the relevant assessments to compare are those as of December 31, 2006 and those as of December 31, 2009.

When Laurence F. Whittemore, III learned of the tax assessment as of December 31, 2009, he requested, and was granted, an informal meeting with the Town's Tax Assessor, Charles E. Vacca (Vacca), which took place in or about March or April 2010. At that meeting, Plaintiff Laurence F. Whittemore, III argued the assessment was excessive. In response, Vacca subsequently lowered the assessment from $5,976,600 to $5,905,000, which still resulted in a 12.2% increase from the assessment as of December 31, 2006. The basis for this reduction was never explained to Plaintiffs or to this Court. Notwithstanding this relatively minor reduction, Plaintiffs still believed the assessment was in excess of the fair market value of the Property. Vacca declined to lower the assessment any further.

Thereafter, Plaintiffs engaged Stephen O. McAndrew (McAndrew), a local real estate appraiser and broker, to help contest the assessment as of December 31, 2009. McAndrew performed his own appraisal of 5 Manatuck but, because there were no comparable sales that took place in Watch Hill during the 2009 tax year, he utilized three sales outside Watch Hill—one in Jamestown, another in the Shelter Harbor neighborhood of Westerly, and another in Newport. Pls' Ex. 2. All three sales occurred within upscale, seaside resort communities and were close in time to the date of assessment as of December 31, 2009. Additionally, all the properties utilized by McAndrew share features similar, if not superior, to 5 Manatuck. For example, all properties lie within walking distance from the shoreline, with the Jamestown and Shelter Harbor properties each having direct water access and docks. The Jamestown and Shelter Harbor properties both offer spectacular ocean views, as does 5 Manatuck.

In his appraisal, McAndrew also commented on the state of the real estate market in Watch Hill. He noted that, as of 2009, and into 2010, Watch Hill was reflecting stabilized levels of value for homes $1.5 million and below, but declining values for homes exceeding $1.5 million. He opined the decline in the area was estimated on an annual basis to be 6%, and that the increase in the December 31, 2009 assessment of 5 Manatuck from December 31, 2006 was "unprecedented in the market place." Based on the "weighted average" of the comparable sales and the general market conditions in Westerly and Watch Hill, McAndrew estimated the Property's market value at $4.9 million as of December 31, 2009.

Armed with McAndrew's appraisal, the Whittemores filed their appeal of the assessment as of December 31, 2009 with Vacca on October 27, 2010. Pls.' Ex. 6. Vacca denied the appeal on November 23, 2010, Pls.' Ex. 7, prompting an appeal to the Board of the Town on December 17, 2010. Pls.' Ex. 8. The Board refused to change the assessment via a letter dated April 8, 2011. Pls.' Ex. 9. As such, on April 20, 2011, the Whittemores filed their first petition with this Court. See Complaint, C.A. No. WC-2011-0252.

The tax assessment on the Property as of December 31, 2009, in the amount of $5,905,000, carried forward to the assessment as of December 31, 2010, and another round of appeals ensued. On October 7, 2011, McAndrew, on behalf of the Whittemores, filed a sworn return and appeal to Vacca, supporting the same $4,900,000 value as his earlier assessment. Pls.' Ex. 11. On November 2, 2011, Vacca again refused any relief on Plaintiffs' appeal, as did the Board on January 26, 2012. Pls.' Exs. 12, 13, 14. The

Whittemores then filed a petition with this Court on February 16, 2012, challenging the assessment as of December 31, 2010. See Complaint, C.A. No. WC-2012-0105.

When the tax assessments were updated as of December 31, 2011, Vacca again assessed the Property at $5,905,000. The assessment resulted in another round of appeals, which both Vacca and the Board denied. Pls.' Exs. 15, 16, 17. McAndrew received notice of the Board's denial on February 15, 2013. Pls.' Ex. 18. The Whittemores filed their third petition with this Court on March 15, 2013. See Complaint, C.A. No. WC-2013-0152.

Although Plaintiffs have challenged the tax assessments on the Property, they have continued to pay all real estate taxes on the Property when due.

All three matters were consolidated and heard before this Court, without the intervention of a jury, on April 10, 11, and 12, 2013.

II

Presentation of Witnesses

At trial, Plaintiffs presented three witnesses in their case-in-chief: Laurence F. Whittemore, III, McAndrew, and Vacca. Vacca also testified in Defendant's case-in-chief, as did Stephen L. Ferreira (Ferreira), the Eastern New England District Manager for Vision Appraisal Technology, who was directly involved in the Town's 2009 revaluation process, and David B. Thompson (Thompson), a certified residential real estate appraiser and Senior Appraiser for the Town. The Court notes at the outset that each of the witnesses before the Court appeared to be credible, prepared, and well-spoken. Thus, the Court's findings herein are not based upon any one witness lacking in

credibility. Additionally, each of the real estate appraisers were qualified experts in their field.

A

Areas of General Agreement

There were several important facts with which the witnesses agreed. First, Laurence F. Whittemore, III readily admitted he and his wife significantly overpaid for the Property when they bought it in 2008, in part because they sensed time slipping away from them and, consequently, their ability to spend time with their teenage children before they were off to college and beyond. Vacca confirmed that he considered the $7.1 million purchase price on the Property to be in excess of its market value at the time of the sale, an "outlier," and not to be considered in determining the Property's tax assessment as of December 31, 2009. Ferriera also agreed the $7.1 million purchase price on the Property rendered it an outlier.

Similarly, the witnesses agreed the $6 million purchase price of 7 Manatuck in April 2008 was also overpriced. The purchasers of that property, located next door to Plaintiffs' Property, immediately gutted the interior and spent in excess of $1.1 million to reconstruct and/or renovate. McAndrew and Vacca agreed the purchase price of 7 Manatuck did not reflect an arm's length transaction. McAndrew commented that the $6 million purchase price, like Plaintiffs' $7.1 million purchase price, was "aggressive." Vacca concluded 7 Manatuck was "a bit of an outlier." Notwithstanding that 7 Manatuck was sold at a price above its fair market value, the two appraisals conducted at the request of Washington Trust both utilized the April 2008 sale of 7 Manatuck as one of the comparable sales. See Def.'s Exs. K, L.

Finally, the witnesses agreed that, in the absence of significant adjustments, the Watch Hill real estate transactions that occurred prior to the Great Recession should not serve as comparables when assessing the Property as of December 31, 2009. McAndrew asserted that transactions in 2008 were too remote in time to serve as comparables at all. Vacca went so far as to consider the other two real estate transactions used as comparables in the appraisals conducted at the request of Washington Trust, located at 11 Spray Rock Road and 6 Aquidneck Avenue, and testified that an immediate adjustment of a 6% annual decrease (or 0.5% for each month between the sale date and the December 31, 2009 assessment date) must be calculated as an "adjustment for time." See Def.'s Exs. K, L. While McAndrew was not asked, Vacca further rejected the use of a fourth comparable in one of the appraisals conducted at the request of Washington Trust. See Def.'s Ex. K. That transaction, involving 2 Overlook Drive, was documented as having a "pending" purchase price of $6.9 million as of October 21, 2008, the date of that appraisal. Id. Vacca confirmed, however, that 2 Overlook Drive was sold on December 22, 2008, for significantly less—$5.5 million. See Pls.' Ex. 27.

B

Disputed Areas Among Experts

The crux of the disagreement as between the competing experts centers on the propriety of using the following categories of information in determining the Property's assessed value as of December 31, 2009: (1) the three comparable sales outside of Watch Hill; (2) the decrease in the assessments of 8 Manatuck, 15 Ocean View Highway and 17 Ocean View Highway from 2006 to 2009; and (3) the appraisals performed by

Washington Trust, which reflect purchase prices of Watch Hill properties prior to the Great Recession.

1

Use of Comparable Sales Located Outside Watch Hill

McAndrew concluded that, without any comparable sales in Watch Hill close in time to the assessment date of December 31, 2009, he would look elsewhere to other luxury home sales in seaside communities. He chose Shelter Harbor, Jamestown and Newport, communities similar to Watch Hill, with common characteristics such as neighborhood, water views, access to nearby bathing beaches, condition, design, and overall appeal. While McAndrew admitted that Watch Hill is an upscale community with many amenities and luxuries superior to those in comparable sale properties, he opined that none of the comparables suffer from "locational obsolescence," meaning that, like Watch Hill, they will remain upscale, seaside resort communities that will not lose their residential character. He testified to utilizing a "paired sales analysis"[4] to adjust for differences such as lot size, condition, living area, and time of sale, but did not make any adjustments for the different locations of the comparables. After calculating the adjustments for each property, he concluded that the purchase price of the East Shore Road, Jamestown property was $4.6 million and its gross adjusted sale price was roughly $4.98 million; that the purchase price of the Donizetti Road property in Shelter Harbor was $5.25 million and its gross adjusted sale price was roughly $5.1 million; and that the

[4] "'A "paired sale" analysis is a comparison of two or more pieces of property that, with one exception, have the same characteristics. A comparison of their value (sale price) identifies the effect, if any, that the one different characteristic has on the market value of the property.'" Collin County v. Hixon Family P'ship, Ltd., 365 S.W.3d 860, 872 (Tex. App. 2012) (quoting Boswell v. Brazos Elec. Power Coop., Inc., 910 S.W.2d 593, 604 n.6 (Tex. App. 1995)).

purchase price of the Gooseneck Cove Lane, Newport property was $4.0 million and its gross adjusted sale price was roughly $4.8 million. See Pls.' Ex. 2. McAndrew testified that the "weighted average" of these properties leads to the conclusion that the fair market value of 5 Manatuck as of December 31, 2009 is $4.9 million. Id. McAndrew did not describe how this "weighted average" was calculated, but simply stated that he "tr[ies] to look at the strengths and weaknesses of each property."

Ferreira testified that Watch Hill is a premier location, which may only be compared to Ocean Road or Bellevue Avenue in Newport. Thus, he rejected the use of McAndrew's three comparables, finding that the Jamestown property is not located in the nicer Beavertail and/or Fort Wetherall sections of Jamestown, and that Shelter Harbor is inferior in appeal to Watch Hill. He was unfamiliar with the Newport property McAndrew had reviewed and the road on which it is located, Gooseneck Cove Lane.

Vacca, as Tax Assessor, was quite familiar with the Shelter Harbor property that McAndrew utilized and testified that he believed the $5.25 million purchase price of that property in March 2010 was below fair market value because a previous owner had committed suicide on or about the property. Vacca was unfamiliar with the Jamestown and Newport properties compared by McAndrew.

Finally, Thompson, who not only serves as the Town's Senior Appraiser but also is a certified real estate appraiser who conducts appraisals for individual property owners outside of Westerly, opined that he would not utilize real estate transactions outside of the subject property's location because location is more important than the date of the sale. While not offering which comparables he would, in fact, utilize to appraise the Property as of December 31, 2009, he concluded that he would use transactions in the

same location—i.e., Watch Hill—even if such transactions were more remote in time from the effective date of the appraisal.

2

Use of Neighboring Properties and the General Market Decline

McAndrew testified that, as a licensed real estate appraiser, he has knowledge and expertise as to the specific neighborhood of Watch Hill, as well as the real estate market in general. McAndrew's testimony focused primarily on the declining real estate market and corresponding "trend." The crux of his argument was that the market had declined at a rate of 6% annually in or around the time of the revaluation, and Vacca failed to make the corresponding adjustment to the property value for 5 Manatuck. Notably, the average rate of decline in the tax assessments of three properties in the immediate vicinity of the Property, 8 Manatuck Avenue, 15 Ocean View Highway, and 17 Ocean View Highway, from 2006 to 2009, is 7.1%. See Pls.' Exs. 4, 19, 21.

Vacca explained that the revaluation assessment is intended to estimate the market value of real estate throughout the Town, as compared to an appraisal which attempts to calculate the fair market value of an individual parcel of real estate at a particular point in time. With regard to the assessment of 8 Manatuck, Vacca testified there were no comparable sales of waterfront properties and, therefore, from 2006 to 2009, he had no sales available "to defend that $8.8 million assessment," and therefore the assessment was decreased. Similarly, as to 15 Ocean View Highway and 17 Ocean View Highway, the more heavily travelled road that Manatuck runs off of but in the same block, Vacca testified there was also a paucity of sales to justify carrying their respective assessments over from 2006 to 2009. He testified that if he "can't support the

assessment, it will go down." Vacca compared the attributes of each of these three properties, all in the immediate vicinity of Plaintiffs' Property, and found each of these to be superior to the Property.

Notwithstanding this general decline in assessments of these nearby properties, and admittedly excessive purchase price of 7 Manatuck prior to the Great Recession, Vacca justified his $5,905,000 assessment of the Property by utilizing 7 Manatuck, which had also been a pocket listing and is located next door to the Property, as the "best comparable for 5 Manatuck."

Ferreira, the Eastern New England District Manager for Vision Appraisal Technology who was involved in the 2009 revaluation process in the Town of Westerly, explained the various factors, data, and information that are compiled in order to do a town-wide assessment of property. He noted how various factors such as views, neighborhoods, landscaping, etc. are used in determining an assessment and explained the meaning of the various entries on the tax cards used in the Town. See, e.g., Pls.' Exs. 3, 4, 21, 26, 27; Def.'s Ex. F. He confirmed that location "plays a big role in an assessment." He further testified that sales are the basis for the model that is used for the revaluation, and that the assessors are "constantly checking whether the model is working" because "sales is the best indicator of fair market value." From this model, and the median ratio of the proposed assessment to the sales price, it can be determined whether a property is an outlier. Thus, according to Ferriera, it is the pattern of sales that determines if a transaction is an outlier, and not the motivation of a particular buyer and/or seller.

After identifying the general mathematic principles employed in the revaluation process, he did not disagree with McAndrew's conclusion that there had been a 6% decline in fair market values of properties in general. However, Ferreira disputed simply applying a 6% discount to all properties in the Town because the Town is comprised of diverse communities which are affected by the marketplace differently.

In reviewing the tax cards prepared by his company for each of the properties in the immediate vicinity of the Property, Ferriera acknowledged the decrease in each of the assessments, but concluded that 8 Manatuck, 15 Ocean View Highway and 17 Ocean View Highway were all superior properties to Plaintiffs' Property.

3

Use of 2008 Appraisals

While both McAndrew and Vacca questioned the use of comparables in each of Washington Trust's two appraisals, Vacca nonetheless concluded the values contained in those assessments "affirmed" his belief that he had properly assessed 5 Manatuck at $5,905,000. Although he claims he did not specifically rely on the AppraiseRI and Newport Appraisal Group appraisals in calculating the Property's tax assessment as of December 31, 2009, he testified that, to the extent these appraisals were relied upon, "they were skewed upward."

III

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure provides that, "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). In a non-jury

trial, "'the trial justice sits as a trier of fact as well as law.'" Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). "'Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.'" Id. (quoting Hood, 478 A.2d at 184). It is well established that "assigning credibility to witnesses presented at trial is the function of the trial justice, who has the advantage of seeing and hearing the witnesses testify in court." McBurney v. Roszkowski, 875 A.2d 428, 436 (R.I. 2005) (citations omitted). The trial justice may also "'draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations.'" DeSimone Elec., Inc. v. CMG, Inc., 901 A.2d 613, 621 (R.I. 2006) (quoting Walton v. Baird, 433 A.2d 963, 964 (R.I. 1981)).

Furthermore, "[w]hen rendering a decision in a non-jury trial, a trial justice 'need not engage in extensive analysis and discussion of all evidence. Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.'" Parella, 899 A.2d at 1239 (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998) (citation omitted)). The trial justice need not "'categorically accept or reject each piece of evidence in his [or her] decision for [the Supreme] Court to uphold it because implicit in the trial justices [sic] decision are sufficient findings of fact to support his [or her] rulings.'" Notarantonio v. Notarantonio, 941 A.2d 138, 147 (R.I. 2008) (quoting Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 102 (R.I. 2006)).

IV

Analysis

The Whittemores argue that the tax assessment as of December 31, 2009, and as carried through to December 31, 2010 and December 31, 2011, is in excess of the actual full and fair cash value of 5 Manatuck. In sum, they assert that Vacca arbitrarily applied local sales data resulting in an assessment that was disproportionate to other real property in the Watch Hill neighborhood where the Property is located.

Section 44-5-26 of the Rhode Island General Laws provides that "[a]ny person aggrieved on any ground whatsoever by any assessment of taxes against him or her in any city or town" may appeal the assessment to the tax assessor, the local tax board of review, and ultimately to the Superior Court. See Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 278 (R.I. 2011). The right to appeal to this Court, however, is limited by §§ 44-5-15 and 44-5-16, which require the taxpayer to submit a sworn account by March 15th of each year. It is undisputed that the Whittemores did not submit a sworn account by the March 15th deadline for any year in which they are challenging Vacca's assessment. As such, before proceeding, this Court must first address the threshold issue of whether the Whittemores' failure to file a sworn account precludes this Court from reaching the merits of the Whittemores' appeals.

A

Failure to File a Sworn Account

Vacca contends the Whittemores did not satisfy the requirements of § 44-5-15, which provides in pertinent part as follows:

> "**44-5-15. Notice of assessors' meetings—Notice by taxpayer of intent to bring in account.** Before assessing

> any valuations, the assessor shall cause printed notices of the time and place of their respective meetings to be posted . . . The notices require every person and body corporate liable to taxation to bring in to the assessors at the time they may prescribe a true and exact account of all the ratable estate owned or possessed by that person or body, describing and specifying the value of every parcel of the real estate as of December 31 in the year of the last update or revaluation and personal estate as of December 31 of the tax year . . . If any person or body corporate liable to taxation files with the assessors, on or before January 31 next following the date of assessment, a written notice of that person's or that body's intention to bring in an account, the person or body corporate may bring in to the assessors the account at any time between March 1 and March 15 next following the date of assessment . . . In case any person or body corporate fails to file any intention, that person or that body is deemed to have waived that person's or that body's right to file the account."

Section 44-5-16 further addresses the account-filing requirement and provides in relevant part as follows:

> "**Oath to account brought in—Remedies after failure to bring in account—Effect on proration.** (a) Every person bringing in any account shall make oath before some notary public or other person authorized to administer oaths . . . that the account by that person exhibited contains . . . a true and full account and valuation of all the ratable estate owned or possessed by him or her; and whoever neglects or refuses to bring in the account, if overtaxed, shall have no remedy therefor, except as provided in §§ 44-4-14, 44-4-15, 44-5-26—44-5-31, and 44-9-19—44-9-24."

While timely filing of the sworn account described in §§ 44-5-15 and 44-5-16 is a condition precedent "that must be met to invoke the jurisdiction of the court[,]" a plaintiff's failure to file an account does not necessarily preclude this Court from hearing a tax abatement case on the merits. Harvard Pilgrim Health Care of New England, Inc. v. Rossi, 847 A.2d 286, 289 (R.I. 2004); Landfill & Res. Recovery, Inc. v. Gelinas, 703 A.2d 602, 604 (R.I. 1997). Importantly, this powerful limitation does not apply if the

taxpayer appeals an assessment that increased from the prior year. Section 44-5-31 provides in relevant part:

> "**Judgment where taxpayer has not filed account.** If the taxpayer has not filed an account, and if on the trial of the petition, either with or without a jury, it appears: (1) That his or her real estate has been assessed at a value in excess of the value at which it was assessed on the last preceding assessment day, whether then owned by him or her or not, and that the real estate has been assessed, if assessment has been made . . . at a uniform percentage of full and fair cash value, at a percentage in excess of the uniform percentage . . . . [T]he court shall give judgment for the petitioner for the sum by which he or she has been so overtaxed . . . ."

Additionally, like any condition precedent which "'must be pleaded and must be called to the attention of the trial justice prior to trial in accordance with Rule 9(c) of the Superior Court Rules of Civil Procedure[,]'" the defense may be waived if it is not raised before the trial justice in a timely manner. Harvard Pilgrim Health Care, 847 A.2d at 289-90 (quoting Granoff Realty II Ltd. P'ship v. Rossi, 833 A.2d 354, 359 (R.I. 2003)); Landfill & Res. Recovery, 703 A.2d at 604.

1

The 2009 Appeal

In this case, Vacca increased the Whittemores' assessment from $5,260,900 as of December 31, 2008,[5] to $5,905,000 as of December 31, 2009. It is undisputed that the Whittemores never filed their intent to bring in the sworn account required by § 44-5-15 in any year, nor that they ever timely filed a sworn account. Nevertheless, § 44-5-31 permits this Court to proceed to the merits of the Whittemores' 2009 appeal because Vacca increased Plaintiffs' December 31, 2009 assessment over "the value at which it

[5] Likewise, the $5,260,000 assessment was effective as of December 31, 2006 and as of December 31, 2007. See fn.3, supra.

was assessed on the last preceding assessment day[,]" which was December 31, 2008. As a result, the Whittemores' failure to file an account by March 15, 2010 does not bar them from challenging the December 31, 2009 assessment on grounds of over-taxation.

2

The 2010 and 2011 Appeals

As noted above "'like any condition precedent, [failure to file a sworn account] [] must be pleaded and must be called to the attention of the trial justice prior to trial and in accordance with Rule 9(c) of the Superior Court Rules of Civil Procedure.'" Harvard Pilgrim Health Care, 847 A.2d at 289-90 (quoting Granoff Realty II, Ltd., 833 A.2d at 359). "Failure to plead this affirmative defense or to raise the issue before the trial justice in a timely manner constitutes a waiver of this defense." Landfill & Res. Recovery, 703 A.2d at 604.

In the instant matter, Vacca did not raise the Whittemores' failure to provide a sworn account in 2010 until the account filed by the Whittemores relative to the December 31, 2010 assessment was introduced into evidence. At that point, Vacca testified, over the Whittemores' objection, that the Whittemores had filed it well after March 15, 2011. Afterward, however, Vacca did not move to amend his answer to include the defense after this testimony was presented. As such, because Vacca failed to raise the defense in a timely manner, he is deemed to have waived it in regard to the 2010 appeal.

In addition to having waived the Whittemores' failure to provide a sworn account in 2010, Vacca is nonetheless estopped from asserting the defense as to both 2010 and 2011 because he failed to utilize the required application form for appeals. Section 44-5-

26(b) requires Vacca to utilize a particular application form for appeals to the assessor and to the local board of assessment review, stating in part that "[t]he application shall be in the following form . . ." The statutory form has a section titled "TAXPAYER INFORMATION ABOUT APPEAL PROCEDURE[,]" that includes "FILING AN ACCOUNT":

> "Rhode Island General Laws Section 44-5-15 requires the annual filing of a true and exact account of all ratable estate owned or possessed by every person and corporate body. The time to file is between December 31, and January 31, of intention to submit declaration by March 15. Failure to file a true and full account, within the prescribed time, eliminates the right to appeal to the superior court, subject to the exceptions provided in Rhode Island General Laws Section 44-5-26(b). No amended returns will be accepted after March 15th. Such notice of your intention must be sent by certified mail, postage prepaid, postmark no later than 12 o'clock midnight of the last day, January 31. No extensions beyond March 15th can be granted. The form for filing such account may be obtained from the city or town assessor." Id.

The Town tax assessor's office utilized two different forms for appeals—one when appealing to the assessor, and another when appealing to the board of assessment review. See Pls.' Exs. 6, 8, 11, 13, 15, 17. None of the forms meet the requirements set out in § 44-5-26(b), namely, that it inform taxpayers that state law requires "the annual filing of a true and exact account of all ratable estate owned or possessed by every person and corporate body" and that "[t]he time to file is between December 31, and January 31, of intention to submit declaration by March 15." The forms also fail to inform taxpayers that "[f]ailure to file a true and full account, within the prescribed time, eliminates the right to appeal to the superior court[.]" See § 44-5-26(b).

In order for equitable estoppel to apply, the following elements must be established:

> "'first, an affirmative representation or equivalent conduct on the part of the person against whom the estoppel is claimed which is directed to another for the purpose of inducing the other to act or fail to act in reliance thereon; and secondly, that such representation or conduct in fact did induce the other to act or fail to act to his injury.'" Providence Teachers Union v. Providence Sch. Bd., 689 A.2d 388, 391-92 (R.I. 1997) (quoting Lichtenstein v. Parness, 87 R.I. 135, 138, 99 A.2d 3, 5 (1953)).

A municipality may be estopped from denying that its acts induced detrimental reliance, as long as its acts were not clearly ultra vires. Tech. Investors v. Town of Westerly, 689 A.2d 1060, 1062 (R.I. 1997).

In the instant matter, a review of the prerequisites to appeal a tax assessment reveals a complicated, cumbersome procedure with many pitfalls for unwary taxpayers. The General Assembly acknowledged and provided for this when commanding local assessors to utilize a specific application form that sets out in detail the procedure for contesting a tax assessment from start to finish. To that extent, § 44-5-26(b) imposes a statutory duty on Vacca to inform taxpayers, like the Whittemores, that they must file a sworn account by March 15, and that failure to do so will negatively impact their ability to contest their tax assessments. Taxpayers, like the Whittemores, should be able to rely on the presumption that Vacca performed his job properly, which includes advising them in each appeal application that they must file a sworn account each year by March 15. This Court finds that the failure to provide the statutorily-required forms lured the Whittemores into a false sense of security and, as a result, they failed to meet the March 15th deadline. As such, this Court finds that Vacca's failure to provide the statutorily-

required forms estops him from arguing that the Whittemores' tax appeals should be dismissed for failure to file a sworn account. For these reasons, this Court will proceed to the merits of all three of the Whittemores' tax appeals.

B

The 2009 Revaluation

Section 44-5-12(a) of the Rhode Island General Laws provides that "[a]ll real property subject to taxation shall be assessed at its full and fair cash value, or at a uniform percentage of its value, not to exceed one hundred percent (100%), to be determined by the assessors in each town or city . . . ." The Rhode Island Supreme Court has defined "'full and fair cash value' as fair market value." Nos Ltd. P'ship v. Booth, 654 A.2d 308, 310 (R.I. 1995). "[F]air-market value" means '"that price the property would probably bring in a transaction in a fair market between a willing seller and a willing buyer."' Ferland Corp. v. Bouchard, 626 A.2d 210, 215 (R.I. 1993) (quoting Rosen v. Restrepo, 119 R.I. 398, 400, 380 A.2d 960, 961 (1977)). A local tax assessor, in determining fair market value, '"is not bound by any particular formula, rule or method . . . to ascertain the fair market value of real estate."' Ferland Corp., 626 A.2d at 215 (quoting Kargman v. Jacobs, 113 R.I. 696, 704, 325 A.2d 543, 547-48 (1974)). Furthermore, '"tax assessors are entitled to a presumption that they have performed their acts properly until the contrary is proven."' Harvard Pilgrim Health Care, 847 A.2d at 288 (quoting Willow St. Assocs. LLP v. Bd. of Tax Assessment Review, 798 A.2d 896, 899-900 (R.I. 2002)). Thus, "[i]f the taxpayer . . . claims that the assessor used an inappropriate fair market value . . . the burden will be on the taxpayer to present evidence of fair market value." Nos Ltd. P'ship, 654 A.2d at 310. When assessing the evidence relating to fair market

value, this Court "can accept the property valuation of one set of experts and reject that of another set of experts . . . ." Kargman, 122 R.I. at 735, 411 A.2d at 1334.

It is undisputed that Watch Hill is an exclusive, highly sought-after neighborhood and that, at the time of the full revaluation in 2009, there was little movement in the market following the financial collapse and housing market crash in October 2008. As a result, there were few Watch Hill properties that sold at or near the time of December 31, 2009. Vacca justified the lack of comparable sales of waterfront properties as a basis for decreasing the assessment on the nearby 8 Manatuck property as of December 31, 2009. Similarly, as to the nearby 15 Ocean View Highway and 17 Ocean View Highway properties, Vacca testified that there was also a paucity of sales to justify carrying their respective assessments over from 2006 to 2009. Accordingly, the assessments for all three properties decreased based upon the general downward adjustment of sale prices for all properties in this time period—by an average of 7.1 %.

These three properties, all in the immediate vicinity of Plaintiffs' Property, provide some evidence of the general decline in property values in Watch Hill. Additionally, the testimony of McAndrew, Vacca and Ferreira confirms the impact that the Great Recession had on property values in the Town. Most importantly, in discussing the comparable sales from 2008 as used in the two appraisals requested by Washington Trust, Vacca immediately deducted from the sales price 6% annually, or 0.5% for each month between the sales date and the effective date of the assessment, December 31, 2009. This specific testimony and the calculations offered by Vacca further support a finding that the Watch Hill properties were generally subject to a 6% annual decline in fair market value.

Notwithstanding the lack of sales to support the assessments of 8 Manatuck, 15 Ocean View Highway, and 17 Ocean View Highway, and the general decline in each of these assessments, the assessment for 5 Manatuck increased by 12.2% from December 31, 2006 to December 31, 2009. While all the witnesses agreed the $7.1 million purchase price the Whittemores paid was an outlier and not indicative of market value, McAndrew and Vacca also agreed that 7 Manatuck's $6 million sales price was an outlier. Yet, Vacca still concluded the "best comparable" for 5 Manatuck was 7 Manatuck, which also increased in its assessment by roughly $1.5 million (after expending over $1.1 million in renovations immediately after it sold). Thus, Vacca used one outlier to justify an increased assessment on another outlier, while never using either the 5 Manatuck sale price nor the 7 Manatuck sale price in assessing the nearby 8 Manatuck, 15 Ocean View Highway, and 17 Ocean View Highway properties. This Court finds Vacca's reliance on the 7 Manatuck purchase price—acknowledged by him to be an outlier and not reflective of fair market value—in justifying an increase in the assessment of 5 Manatuck, but not considered in assessing 8 Manatuck, 15 Ocean View Highway, or 17 Ocean View Highway, was arbitrary and erroneous. Conversely, this Court finds Vacca's decrease in the assessments of 8 Manatuck, 15 Ocean View Highway and 17 Ocean View Highway, averaging 7.1%, but increasing the Property's assessment, was also arbitrary and erroneous.

Similarly, Vacca's belief that the higher appraisals performed for Washington Trust affirmed his $5.9 million assessment, is unpersuasive. The appraisals performed by AppraiseRI and the Newport Appraisal Group, which valued 5 Manatuck at $6.9 million and $6.5 million in October of 2008, respectively, relied on 7 Manatuck, as well as two

other Watch Hill properties that sold on March 17, 2008 and December 19, 2007, sales which occurred well before the market collapse in the fall of 2008. Def.'s Exs. K, L. One of the appraisals also relied upon a pending sale that ultimately sold for a drastically reduced sum than what was reported in the appraisal. Def.'s Ex. K. Vacca acknowledged the inaccuracy of these appraisals, noting that to the extent he relied on these appraisals, "they were skewed upwards." Finally, as the real estate market bubble burst at or about the time Plaintiffs closed on the Property, the new financing regulations had not yet been developed, which ultimately served to address the concern that the objectivity is taken out of an appraisal when the appraiser is provided the purchase price of the subject property. The Court infers from this testimony that prior to the Great Recession, appraisers lacked objectivity in completing an appraisal for a financial institution because they were provided the "target number," i.e., the sale price. For these reasons, this Court entirely disregards the usefulness of either of the October 2008 appraisals requested by Washington Trust, as Vacca should have done as well.

Finally, Vacca's earlier reduction in Plaintiffs' assessment following the March or April 2010 informal meeting with Laurence F. Whittemore, III, further demonstrates the arbitrary nature of the process. There was no specific basis presented to Plaintiffs or to this Court explaining how and why Vacca willingly reduced the Property's assessment from $5,976,600 to $5,905,000. Absent an articulable basis for this specific amount, the Court is left to speculate what component of the detailed tax card prepared by Vision Appraisals was erroneous, or what other basis justified this particular relief.

In sum, Vacca's justification in assessing nearby properties at lower amounts based on the paucity of sales should have also been applied to 5 Manatuck. Indeed, it

was inconsistent and arbitrary for him to increase the Property's assessment in light of lowering other assessments in the same area based upon a general decline in the market; a decline that is undisputed by experts for both sides. In doing so, Vacca failed to perform his duties properly. Harvard Pilgrim Health Care, 847 A.2d at 288.

For all of these reasons, this Court finds that Plaintiffs have sustained their burden of proving by a preponderance of the evidence that Vacca assessed the 5 Manatuck Avenue property in excess of its full and fair cash value.

C

Damages

While Plaintiffs have met their burden of showing that the Property was assessed at more than its full and fair cash value, this Court is not persuaded that the full and fair cash value is $4.9 million. McAndrew's use of comparables outside Watch Hill is questionable. McAndrew admitted that Watch Hill has many amenities and luxuries superior to those in the comparable sale properties, but did not make any adjustment to compensate for the location in his report. Ferreira testified that only Ocean Drive and Bellevue Avenue in Newport are comparable to Watch Hill. He also testified that Shelter Harbor is certainly inferior to Watch Hill in its housing types, beach access, and amenities. This sentiment was reiterated by Defendant's final expert, Thompson, who testified that, based on his experience, he could not envision using comparables in the locations chosen by McAndrew. As such, this court rejects the methodology utilized by McAndrew in coming to the $4.9 million appraisal for 5 Manatuck.

Given the credible testimony by McAndrew and Vacca, which was not disputed by Ferreira, the real estate market sustained a general, annual decline of 6%. Having

found that the tax assessment on the Property exceeded fair market value, but rejecting the manner in which Plaintiffs' expert calculated fair market value, this Court finds the appropriate measure of damages for this outlier is a 6% decrease from the previous assessed value. This methodology is further buttressed by the average rate of decline in assessments of nearby, albeit relatively superior, properties, which was 7.1% from the previous assessed values.

As Plaintiffs have already paid the illegal tax assessed by the Tax Assessor, this Court must "give judgment . . . for the sum by which [Plaintiff] has been so overtaxed, or illegally taxed, plus the amount of any penalty paid on the tax, with interest from the date on which the tax and penalty were paid and costs." Sec. 44-5-30. Based on the above determination, Plaintiffs' Property for each year as of December 31, 2009, 2010 and 2011, should have been $4,945,246, rather than $5,905,000, or a difference of $959,754 each year. Plaintiffs overpaid on each of its quarterly tax payments for the years 2010, 2011 and 2012, based on this $959,754 annual over-assessment. As such, Plaintiffs are now entitled to damages to recover those overpayments, with 12% statutory interest accruing as of the dates each of those quarterly tax payments were made.

V

Conclusion

For all these reasons, this Court finds that Defendant assessed the Property, located at 5 Manatuck Avenue in Westerly, Rhode Island, at an amount above its full and fair cash value as of December 31, 2009, as of December 31, 2010, and as of December 31, 2011, all in violation of § 44-5-12(a). As such, Plaintiffs are entitled to damages in the amount of quarterly real estate taxes that were overpaid for the years 2010, 2011, and

2012, based on the annual over-assessed amount of $959,754, plus 12% statutory interest accruing as of the dates each of those quarterly tax payments were made.

Counsel for Plaintiffs shall prepare a judgment consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	Laurence F. Whittemore, III et al. v. Charles E. Vacca, in his capacity as Tax Assessor for the Town of Westerly
CASE NOS:	C.A. No. WC-2011-0252 C.A. No. WC-2012-0105 C.A. No. WC-2013-0152
COURT:	Washington County Superior Court
DATE DECISION FILED:	December 13, 2013
JUSTICE/MAGISTRATE:	Kristin E. Rodgers
ATTORNEYS:	
For Plaintiffs:	Kelly M. Fracassa, Esq.
For Defendant:	Michelle A. Buck, Esq.