ANATOMY OF A TAX DEFENSE:
International Paper v. Isle of Wight

VIRGINIA ASSOCIATION OF ASSESSING OFFICERS
69TH EDUCATION SEMINAR
CHARLOTTESVILLE, VIRGINIA
JULY 25, 2024

Andrew R. McRoberts, Esquire
amcroberts@sandsanderson.com
(804) 783-7211

Sands Anderson

DISCLAIMER

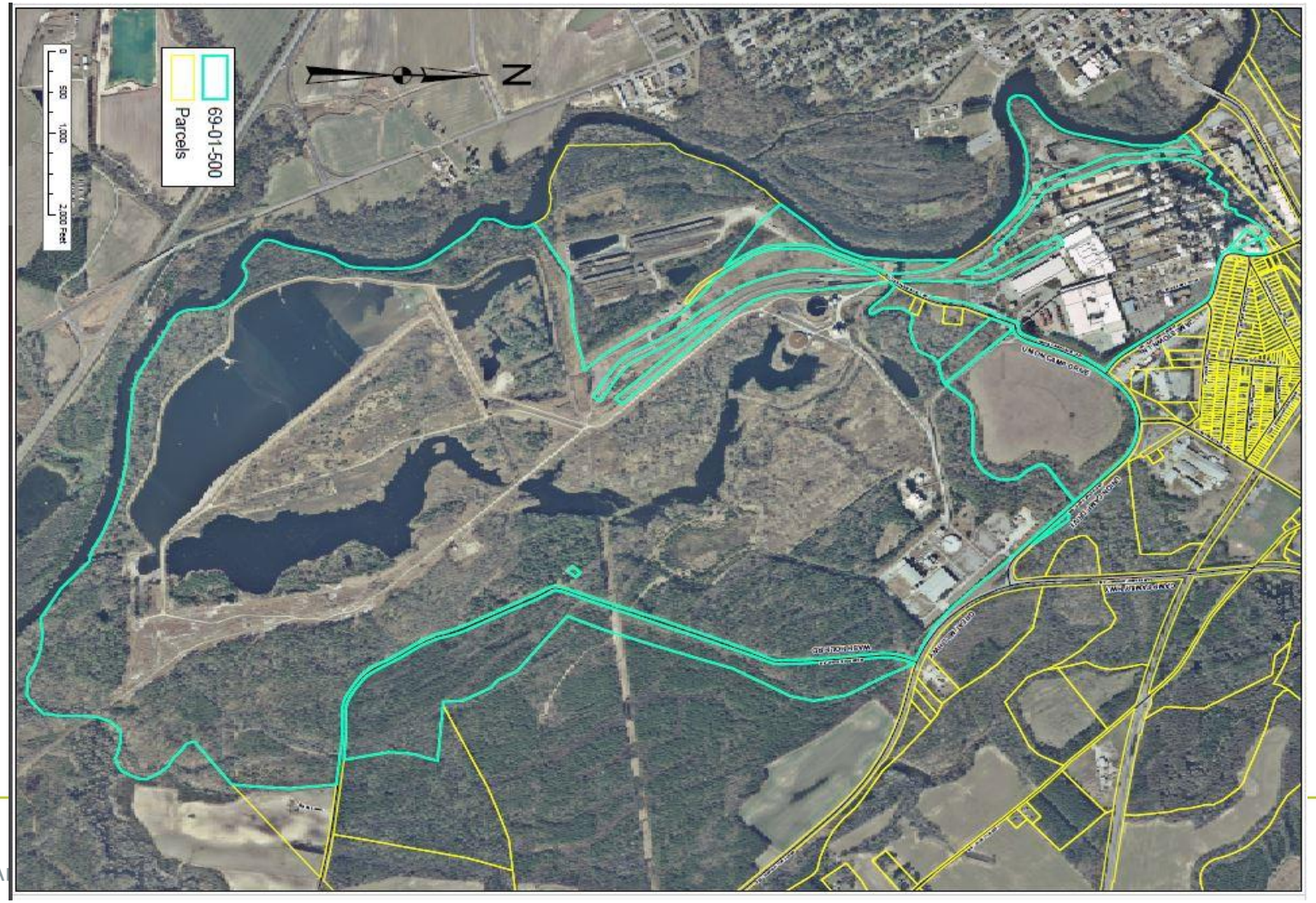
Remember: We are providing information.
We are not providing legal advice.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW -- Background

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW -- Background



Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW -- Background

- Isle of Wight County reassesses real estate on a 4-year "fiscal year" cycle. General reassessment of real propery last completed effective July 1, 2011.

- Reassessment by Board of Assessors (Citizen Board appointed by governing body) as permitted by statute, with the assist from an outside appraisal firm that develops an opinion of value using mass appraisal.

- County appraisal firm visited plant on site visit, but relied almost exclusively on existing County property cards for description of improvements. Interviewed the plan manager. Sought but could not find comparable sales. Determined that income approach inappropriate, even though a portion of plant was leased to a tissue company (ST Tissue). Used Cost Approach.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW -- Background

- International Paper (IP) filed several lawsuits for relief from tax assessments for its real property (Real Estate Tax) and Machinery and Tools (M&T Tax) over many years. Both litigated at same time, in same court with same judge.
- The M&T cases were ultimately unsuccessful and resulted in two different appeals to the Virginia Supreme Court. However, the Real Estate cases were a different story.
- First Complaint on real property assessment filed June 30, 2015 for four previous tax years (2011-12, 2012-13, 2013-14, and 2014-15). Isle of Wight levies taxes its real estate on a fiscal year basis.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW -- Background

- Met the statutory limitation provided in the statute allowing the cause of action (waiver of sovereign immunity), Virginia Code § 58.1-3984, which allows taxpayer suit against the assessing authority (County) for current and previous three tax years.
- Odd "fiscal year" assessment cycle is, in fact, authorized by law, and as it turned out, adopted by uncodified ordinance of the IOW County BOS. Proved to be an interesting issue at trial as we walked the judge through the ordinance adoption procedure, and the Court accepted that not every ordinance must be codified.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW -- Background

- County filed its Answer denying the assessment was in excess of fair market value or was manifestly in error.
- In M&T case, original taxpayer counsel had attempted administrative appeal with appraisal report. Commissioner of the Revenue wrote letter saying he would be reviewing appraisal. After filing of lawsuit shortly thereafter, COR wrote to taxpayer's counsel saying he was terminating his administrative review because when a lawsuit was filed, the assessment was solely a judicial matter, citing an older case in which the Va. Supreme Court had ruled no remand was proper as remedy in circuit court assessment challenge. (Applicable here?)
- County began discovery in February 2016 with Interrogatories and Request for Production of Documents. Inquiry into the specific allegations of the Complaint, basis for those allegations, potential

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW -- Background

- County engaged an appraiser to assist with valuation issues, discovery, and provide expert testimony. Where does one find someone experienced in valuing an enormous paper plant? Engaged an experienced commercial and industrial general appraiser/MAI from nearby Virginia Beach.
- IP hired new, additional counsel from major firm. Original counsel stayed on in some more limited capacity.
- Pretrial Scheduling Order in standard form entered on March 25, 2016. Set discovery cutoff, deadline to identify experts and their opinion, deadline to file exhibits, etc., all based on trial date and counting backwards.
- IP began its discovery of County on April 22, 2016, with Interrogatories and Request for Production of Documents.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW -- Background

- IP took deposition of lead appraiser for outside appraisal firm who assisted in general reassessment. Admitted mass appraisal did not consider three approaches to value. "We just used the cost approach."
- Virginia Supreme Court opinions are quite clear about the consideration and application or proper rejection of the three approaches to value.
- A tax assessor's valuation is ordinarily presumed to be correct. Va. Code § 58.1–3984(B). However…

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW -- Background

- Where feasible, a tax assessor should use all three of the common valuation approaches when calculating the assessment: cost approach, income approach, and comparable sales approach. *See Keswick Club, L.P. v. County of Albemarle*, 273 Va. 128, 137, 639 S.E.2d 243, 248 (2007). The assessor's valuation is entitled to the presumption of correctness only if each approach was "consider[ed] and properly reject[ed]." *Id.*
- Virginia Supreme Court holds this is a fundamental error, and locality loses its presumption of correctness. Three approaches to value also mandated by Uniform Standards of Professional Appraisal Practice (USPAP).

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW -- Background

- Strategy Session: How to deal with the loss of presumption of correctness? First, relax. It happens. Other options (besides panicking):
  - Settlement. If the likely evidence of FMV and the assessment are not too far apart, the parties could use this sort of moment to settle.
  - Get yourself a good appraiser. MAI. That is what we did here. If MAI comes up with values supporting assessment, this could win at trial. West Creek on Taxpayer's Burden to win on FMV evidence alone: The evidence of FMV substantially exceeds the assessment.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW -- Background

- Strategy Session: How to deal with the loss of presumption of correctness? More options:
  - Get the Court to strike the taxpayer expert as inadmissible, or disregard his or her values because not credible. West Creek on Taxpayer's Burden to prove FMV: Because 58.1-3984 says the taxpayer must show the assessment exceeds FMV, the taxpayer must necessarily prove the FMV. We tried to do this here.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW -- Background

- IP also deposed the Commissioner of the Revenue, though primarily on the M&T assessment, for which he was the assessing authority.
- IP moved to consolidate the Real Estate and M&T cases and schedule trial. Strategic issue, could have gone both ways, since reasons for and reasons against. Supported in end.
- At hearing held in May 2016, court agreed to consolidate cases, and set trial for four days beginning on February 21, 2017.
- Mandatory Pretrial Conference held on January 6, 2017.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- Failure of outside mass appraiser to use all three approaches to value.
- Whether the Board of Assessors adopted or utilized his values. Citizen board, after all; did not necessarily have to use the outside appraiser's values.
- Mass appraisal in general reassessment and appropriateness for unique special use property like paper plant.
- Lack of licensure of outside appraiser for outside appraisal firm assisting board of assessors to perform a commercial appraisal.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- What is the effective date of valuation for reassessment (July 1, 2011, general reassessment date), and for subsequent tax years (‘12-‘13, ‘13-‘14, ‘14-‘15)? Elkwood Downs case (WD VA BANKR.) versus Martinsville case (VA SUPREME COURT).
  - Legal issue, and remains so.
- Accuracy of property card, factual errors in outside appraisal firm’s work, factual errors in both expert appraisers’ appraisals another issue.
- Factual errors on County side were thought initially to be relatively minor.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- Later learned that IP expert appraiser # 1 missed whole buildings (some quite large and newer) due to split appraisal team and failure to accurately identify the subject property. Fundamental error.
- One of the first tasks of the appraiser, after receiving the assignment and confirming the scope of work, is to “identify the property.”

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- Under Virginia law, fundamental factual error does not go to weight, but rather makes expert testimony opinion of value inadmissible. *Countryside Corp. v. Taylor*, 263 Va. 549, 553, 561 S.E.2d 680, 682 (2002) ("Expert testimony is admissible in civil cases to assist the trier of fact, if the testimony meets certain fundamental requirements, including the requirement that it be based on an adequate factual foundation. *See* Va. Code §§ 8.01–401.1 and 401.3; *Lawson v. Doe*, 239 Va. 477, 482–83, 391 S.E.2d 333, 336 (1990); [etc.].

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- Expert testimony is inadmissible if it is speculative or founded on assumptions that have no basis in fact. *See Gilbert v. Summers*, 240 Va. 155, 159–60, 393 S.E.2d 213, 215 (1990); [etc.].
- Additionally, expert testimony is inadmissible if the expert fails to consider all the variables that bear upon the inferences to be deduced from the facts observed. *Griffin v. The Spacemaker Group, Inc.*, 254 Va. 141, 146, 486 S.E.2d 541, 544 (1997) (cited authority omitted).").

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- "In order to satisfy the statutory requirement of showing that real property is assessed at more than its fair market value, see Code § 58.1–3984(A), a taxpayer must necessarily establish the property's fair market value." *West Creek Associates, LLC v. County of Goochland*, 276 Va. 393, 417, 665 S.E.2d 834, 847 (2008) (my case!).
- Taxpayer must typically have expert testimony to prove fair market value, since valuation of land is a matter of application of professional rules and regulations (e.g., USPAP and other appraisal standards) to facts.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- To succeed on a claim for overvaluation of property for tax purposes, taxpayer plaintiffs must provide an expert opinion as to the fair market value of the property. *Galloway v. County of Northampton*, 299 Va. 558, 562–63, 855 S.E.2d 848, 850 (2021)(real pty)(my case!); *Western Refining Yorktown v. County of York*, 292 Va. 804, 818, 793 S.E.2d 777 (2016)(M&T).

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- We anticipated this would become largely a battle of the experts, without a presumption of correctness.
- So, striking their expert, or confirming a broad range of value with our expert, became the primary goal.
- As is typical in these lawsuits, the assessment and the appraisers were way, way apart.
- Also, a very large disparity in values of expert witnesses.
- Lots of money at stake.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- County Real Estate Assessments at issue:
  - 2011-12 $102,840,900
  - 2012-13 $93,620,600
  - 2013-14 $93,617,600
  - 2014-15 $93,617,600

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- These assessed values not likely presumed correct, due to outside appraiser not considering all three approaches to value.
- But these values did set the bar on what the parties were fighting about, and comparison of these values to the expert appraisers was important. Taxpayer must prove assessment significantly exceeded evidence of FMV.
- County planned to defend the assessment by introducing a consistent expert opinion.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- Taxpayer MAI expert appraiser # 1 opined to these values using the market and cost approaches:
- 2011-12: $26 million ($76 plus million below assessment)
  - Approx. $500,000 at stake, plus 10% interest per annum
- 2012-13: $26 million ($67 plus million below assessment)
  - Approx. $435,000 at stake, plus 10% interest, per annum
- 2013-14: $26 million ($67 plus million below assessment)
  - Approx. $489,000 at stake, plus 10% interest, per annum
- 2014-15: $18 million ($67 plus million below assessment)
  - Approx. $569,500 at stake, plus 10% interest, per annum

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- Comparing the taxpayer's expert's values to assessment results in this:
  - A total at stake, with potential interest which was accruing at 10% per annum:
  - Well over $2 million.
- A lot for a rural Virginia county.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- County MAI Appraiser had an opinion of value using the cost that largely supported the assessment amount.
- He developed the income approach using the ST Tissue lease and other lease data from the market, which more than supported his final conclusion of value, but did not rely on it.
- He also developed a sales comparison approach, but felt that it was unreliable due to the lack of sales of truly comparable properties (how many operating paper plants are sold in USA)?

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

County MAI 2011-12: $120,700,000

About $19 m above assessment, $95 m above taxpayer expert.

County MAI 2012-13: $120,500,000

About $26 m above assessment, $94 m above taxpayer expert.

County MAI 2013-14: $119,500,000

About $25 m above assessment, $93 m above taxpayer expert.

County MAI 2014-15: $117,900,000

About $24 m above assessment, $91 m above taxpayer expert.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- County strategy was to rely on supporting County MAI values, while attacking the taxpayer expert.
- Curve ball thrown at us about a week before trial.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- In week leading to trial, client COR identified a fundamental error in property card – the acreage in property card was way WAY off.
- Since the assessment was already likely erroneous, this might have had little impact on the case.
- However, here, the acreage on the property card was relied on not only by outside mass appraiser and Board of Assessors, but also by the two expert appraisers
- NO ONE identified the subject property accurately.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- Strategy session – What to do?
  - Move to amend the MAI expert's opinion a week before trial?
  - Move for continuance of trial?
  - Keep quiet?

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- Our strategy was not to amend our expert's testimony. Likely, it would have been untimely under pretrial scheduling order, and likely objectionable.
- We decided not to move for continuance due to the significant error. Given that IP's expert had made the very same mistake (relying on the erroneous acreage on property card) likely we could have gotten agreement to do so.
- So, we KEPT QUIET.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- WHY?
- Given the statutory presumption of correctness of assessment and the burden on the taxpayer to prove fair market value, so long as the taxpayer makes the fundamental error in its case at trial FIRST, it doesn't matter if our expert makes the same error LATER in the case.
- In fact, it doesn't matter if the assessment itself is clearly erroneous, IF the taxpayer cannot prove the FMV.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- Lastly, we identified another fundamental error in the appraisal of the taxpayer's expert appraiser – the valuation completely missed some major buildings, some quite large and valuable.
- IP's expert appraiser had utilized a team approach to value the large plant. Lead appraiser had visited the older part of the plant on site visit; another appraiser had visited the newer part of the plant.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

- Fundamental lack of communication between the IP appraisal teams, resulting in many missed buildings.
- Interesting error also, since the property card contained these buildings, and the appraiser relied on the card for the acreage,
- We also believed that this led to appraiser over-estimating the depreciation/age of the buildings, since she only saw the older part (some in the process of being demolished) and many newer buildings missed.

Sands Anderson

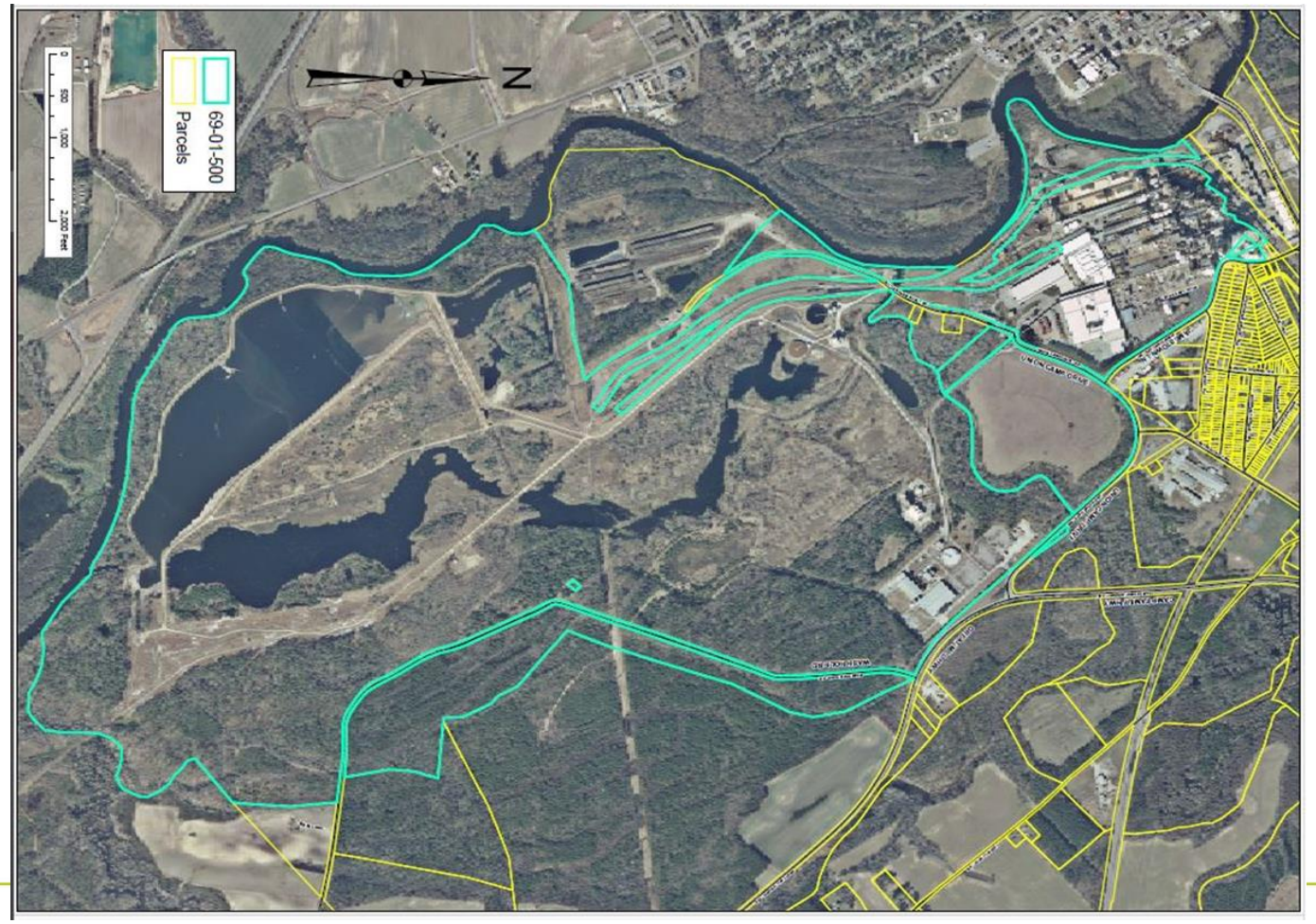
Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Issues in Case



Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Trial

- IP plant manager testified about the property.
- IP expert appraiser testified about her opinion of value. We battled over several issues on cross-examination:
  - Non-comparable market sales. Special use, owner-occupied, rarely sold type of property. No true comps.
  - Unrealistic depreciation in cost approach, e.g., drop in ream paper sales
  - Appraiser claimed low cost indication was supported by those same non-comparable market sales.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Trial

- Practice Chat: These two points of dispute, comparable sales and depreciation are common.
  - In cost approach, the depreciation to improvements can reduce value far more significantly than any other factor than perhaps original cost or land value in cost approach. Can be a large percentage deduction.
    - Physical – the hand of time, wear and tear
    - Functional – is it up to date, currently demanded design and construction, is it wrong size for current needs?
    - Economic – external pressures, strikes, changes in market

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Trial

- In the market approach, an utter lack of comparability in chosen sales can reduce value far more significantly than any permissible adjustment, and can even mask the lack of needed adjustments.
- In special use, owner-occupied, rarely-sold properties like this one, the market approach is difficult to develop, and likely should not be relied upon if developed.
- Here, IP appraiser used vacant, distribution or warehouse type properties. Few to none were heavy manufacturing.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Trial

- The big dispute developed on IP appraiser's failure to identify certain significant buildings on the site.
- IP expert basically refused to admit she missed building, though obvious to everyone (including the Court) that she had.
- Fight went on to 6pm and court took a break.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Trial

- County counsel developed strategy overnight to get appraiser to admit she missed some major buildings, did not therefore know the value of the property assessed.
- Failing that, goal was to get Court to intervene.
- Plan was to move to strike the appraiser's testimony as inadmissible because of this fundamental factual error. Basically, a West Creek, Countryside approach – take out the expert, kill the plaintiff's case.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW – Trial

- First thing in the morning, however, IP nonsuited the real estate case. A voluntary dismissal of lawsuit.
- We were unable to object since, under Virginia law, a plaintiff has the right to voluntarily dismiss its suit once at any time before fact finder retires or the court rules. First case over with nonsuit requested by plaintiff.
- Never got to the County's side of case, or even to the issue of acreage. Never had to get to the bottom of our other criticisms, or our motion to strike plaintiff's expert or case.

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- IP promptly refiled a second Complaint for same tax years, plus additional accrued tax years, 2015-16 and 2016-17. We answered. We all agreed the discovery from the first trial would be good for second case also to streamline case.
- Legal issue on legal effect of nonsuit and whether the statutory limitation was stayed by the pendency of the prior suit or not, and whether the taxpayer got 6 months to refile as provided by the rules for a nonsuit in the case of a statute of limitations.

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- County position was the limitation in 58.1-3984 is part of the cause of action, and a limited waiver of sovereign immunity. It is not a statute of limitations that is external to the cause of action. Similar rulings on the 15.2-228530 days to challenge a zoning decision.
- IP Position was the limitation in 58.1-3984 is a traditional limitations period that is expressly extended by a subsection of the nonsuit statute, just as in “every other nonsuit.”

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- Hearing: Trial court disagreed with County's position on this. We felt that this ruling was in error since there is a legal distinction under Virginia law between a statute of limitations to bar a common law claim (2 years to file any tort, for example), and a grant of a right combined with a period of time within which to file to vindicate that right.
- No appellate law on this: Is 58.1-3984(A) limitation a SOL extended by nonsuit, or part of the cause of action/waiver of sovereign immunity as with 15.2-2285(F)?

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- IP identified new appraisal expert/MAI, perhaps fearing credibility issues from the last case and the big missing buildings and resulting nonsuit.
- Experienced, credible industrial MAI appraiser, and good on the stand also.
- We deposed him, and prepared to go to trial.
- First expert had been engaged by original counsel. New "big firm" counsel chose this second expert, who was quite competent.

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- Appraisal expert # 2 opined to the following values:
- 2011-12: $21,400,000 (Approx. $81m below assessment)
- 2012-13: $21,800,000 (Approx. $71m below assessment)
- 2013-14: $22,500,000 (Approx. $71m below assessment)
- 2014-15: $22,900,000 (Approx. $71m below assessment)
- 2015-16: $22,300,000 (Approx. $70m below assessment)
- 2016-17: $23,700,000 (Approx. $70m below assessment)

Together with interest, well over $4 million tax dollars at stake at trial for a rural Virginia county.

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- Importantly, second expert appraiser ALSO relied on the property cards for the acreage which was (again) wildly wrong.
- Ironically, in discovery, IP had provided us plats the company had in its files that showed the correct acreage.
- Strategy Session: What to do NOW?
- We had the same answer: Stay quiet.

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- Practice Point: We instructed our appraiser to use the same acreage as the property card. Given that instruction from the client, he was comfortable doing this.
- Our appraiser produced largely the same appraisal, same approaches to value, and same acreage error, adding in the two new tax years.
- Ethics Question: Would you be comfortable doing this? Or not?

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- County kept its same expert appraiser, using the same approaches as to value. Opined values for the six years at stake in second trial:
- 2011-12: $120,700,000 (About $19 million above assessment)
- 2012-13: $120,500,000 (About $26 million above assessment)
- 2013-14: $119,500,000 (About $25 million above assessment)
- 2014-15: $117,900,000 (About $24 million above assessment)
- 2015-16: $112,300,000 (About $19 million above assessment)
- 2016-17: $109,800,000 (About $17 million above assessment)

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- Potentially, an extra $1 million in RE taxes owed if IP prevailed, given these values.
- Over $5 million at issue, given the vast difference between two experts.

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- They say that, in every war, we fight anew the last war.
- Here, given the fights over the accuracy of the property cards and thus the factual foundation of the appraisers on both sides, both sides worked hard to improve its factual foundation to avoid a repeat of what happened to IP's first expert.
- County expert revisited and IP expert visited property, and reworked identification of improvements at plant. Both sides very accurate on improvements this time. IP's new appraisal expert did not miss a single building!

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- The ticking time bomb was the acreage error, which IP's new expert also made.
- For some unknown reason, despite the over-the-top time spent on the new appraisals to avoid missing buildings or improvements, the new IP expert relied on the acreage on the property card, just like the first IP expert.
- And this is despite the fact that IP new the correct acreage, and was in possession of the plat to prove it, and indeed, had produced the plat to us in discovery.

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- Rather than have our appraiser testify about the acreage, which would have meant he needed to correct his appraisal and allow IP a chance to rebut with expert testimony (perhaps with an amended appraisal fixing the acreage issue), we engaged a surveyor to nail down the acreage for this case.
- Strategically, the surveyor was told to not contact the taxpayer and not set foot on the property.
- So, how did he do his survey?

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- Surveyor used VDOT monuments, deeds and plats recorded in courthouse, and other information off-site to prepare the survey.
- Aware that his work COULD potentially be used by the trial court to "adjust" the appraisal evidence and fix values. In the event the trial court was inclined to lower the assessment, we also limited the surveyor's scope of work.
- We asked surveyor to JUST do enough work to prove acreage in the property card (and used by both experts) was dead wrong. But the surveyor was told to not determine what the acreage was and not to develop an opinion as to the correct acreage.

Sands Anderson

Anatomy of an Assessment Defense: Second Suit

- Surveyor was designated as a rebuttal expert, and so under pretrial scheduling order, not disclosed until 45 days before trial. Under pretrial scheduling order, IP expert due 90 days to trial – County expert due 60 days to trial – Rebuttal experts of both sides due 45 days to trial.
- As a result, acreage issue “time bomb” exploded 45 days before trial with no ability of IP to identify a new expert or to address the acreage issue in any way. IP had already used the one nonsuit provided by law in the last lawsuit.

Sands Anderson

Anatomy of an Assessment Defense: Second Trial

- Trial # 2 proceeded routinely.
- Plant manager testified again.
- Appraiser #2 testified. We quietly confirmed the acreage used in his appraisal report and his reliance on that acreage for his value. We attacked minor errors in improvements list.

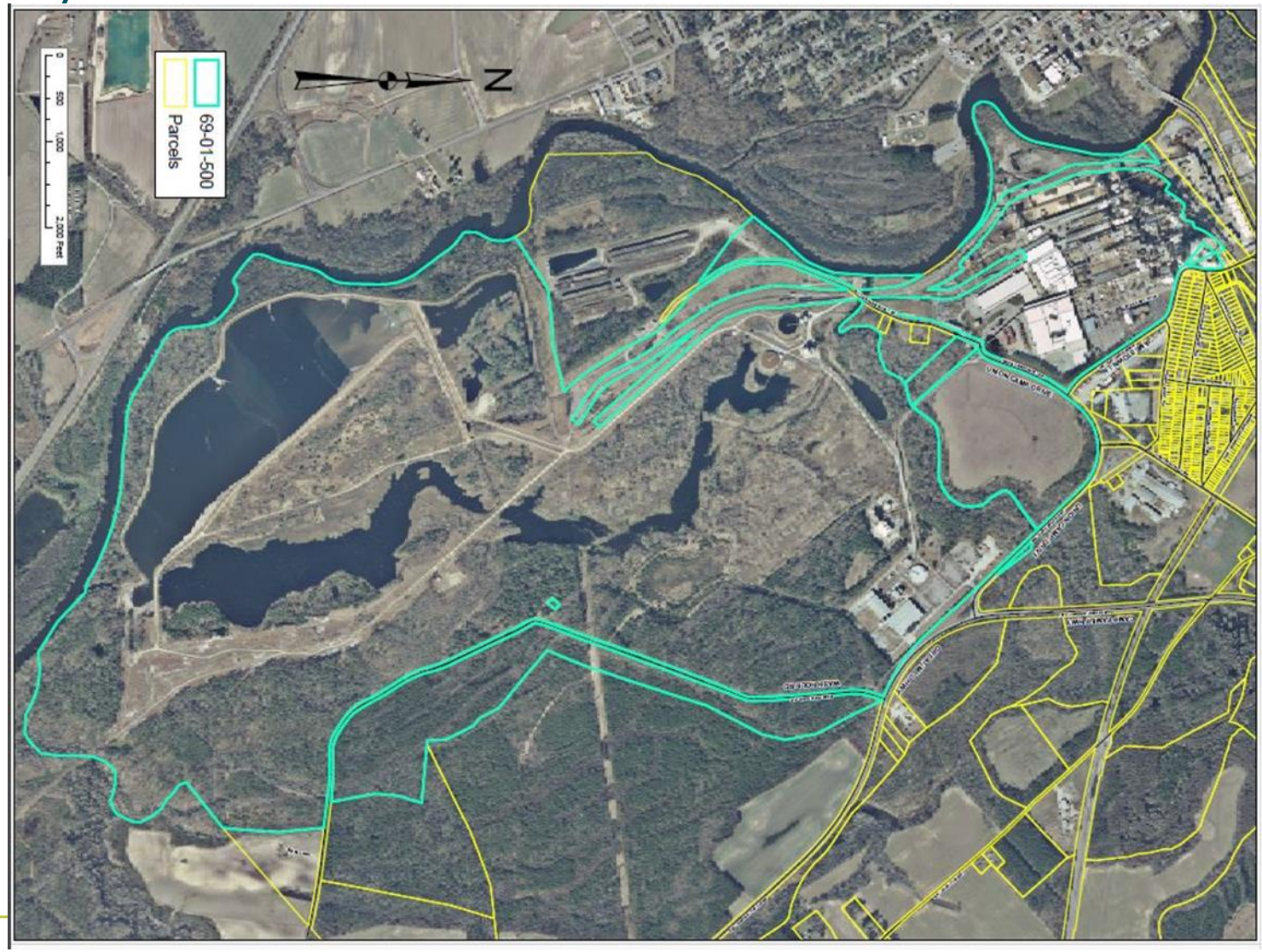
Sands Anderson

Anatomy of an Assessment Defense: Second Trial

- We also attacked the second IP appraiser over what we described as misidentification of the highest and best use of a substantial part of the acreage.
- Yes, it seemed agricultural – was not, really. We asserted that it was future industrial property, in reserve.
- Evidence showed that as IP needed another building, it built it on site, since plentiful acreage was available. Not mere "Ag" acreage.

Sands Anderson

Anatomy of an Assessment Defense: Second Trial



Sands Anderson

Anatomy of an Assessment Defense: Second Trial

- So, moved to strike the expert and/or IP case in chief on these bases. If the expert had been stricken, we would have won the case right then and there.
- But the Court denied motions to strike.
- We moved on to … for the first time in two trials … the County's case.

Sands Anderson

Anatomy of an Assessment Defense: Second Trial

- In County's case, County expert appraiser testified as to opinion of value. None of cross examination landed a blow. Not even as to acreage. IP knew it was vulnerable on acreage issue.
- One reason there was fewer disagreements over the experts this time is both sides' experts relied on cost approach. So no fight over the market approach or non-comparable sales.
- But, as seemingly always, there was a big fight was over depreciation in the cost approach, in both functional obsolescence and economic obsolescence.

Sands Anderson

Anatomy of an Assessment Defense: Second Trial

- IP expert identified substantial functional and economic obsolescence under the theory that ream paper production – what the plant used to do – was out of date. Plant had been closed years before as a result, and reopened with lesser scope and value. He asserted the plant was largely obsolete, too large, so substantial deductions needed.
- On face, sounds reasonable. But, we asserted, this did not fit the facts.

Sands Anderson

Anatomy of an Assessment Defense: Second Trial

- County expert appraiser and counsel were asserted that the functional and economic obsolescence was largely addressed by (1) leasing large parts of plant to a tissue manufacturer, ST Tissue, and (2) retooling plant for IP to produce fluff paper (for diapers, hygiene products, etc.).
- With large parts of the plant leased to ST Tissue, much of extra SF largely absorbed. IP's new product, fluff paper, increasingly valuable in marketplace. We had evidence of fluff paper plants being recently built new in Arkansas and other places. Evidence of County showed the demand for fluff paper was growing (diapers, tissue, hygiene products, etc.).

Sands Anderson

Anatomy of an Assessment Defense: Second Trial

- Where now is the functional & economic obsolescence?
- Our expert testified functional reduced significantly and economic eliminated.
- This issue could have gone down to a battle of the experts, or to the discretion of the Court to make a factual determination on the evidence.

Sands Anderson

Anatomy of an Assessment Defense: Second Trial

- Fortunately, we did not have to only rely on our expert on this.
- Our argument was helped by a key document (we called it the "smoking gun") prepared by International Paper itself. IP's own white paper evaluating how well IP had succeeded in retooling and changing the approach to its Franklin plant by shifting from ream paper production to fluff paper production.
- So successful, IP wrote, that it was repeating the same strategy in a plant in North Carolina.

Sands Anderson

Anatomy of an Assessment Defense: Second Trial

- Massively undercut IP expert appraiser's theory on major deductions from value – economic and functional obsolescence – and supported our expert.
- We felt confident that the Court would eventually have disregarded a good portion of the IP expert's functional and economic obsolescence in its verdict, given IP's admissions in the "smoking gun."
- But we never learned if Court would accept this or not.

Sands Anderson

Anatomy of an Assessment Defense: Second Trial

- We next put our expert surveyor on the stand.
- As instructed, surveyor testified clearly, fully that the acreage on the property card and relied on by all experts was incorrect.
- He explained his methodology, and how absolutely certain he was that the acreage on the property card, adopted by the IP appraiser (and ours), was fundamentally flawed and way, WAY off.
- But, also as planned, surveyor was unable – even upon urgent questioning from court – to testify to what the correct acreage was. He had no survey plat. Beyond his scope of work.

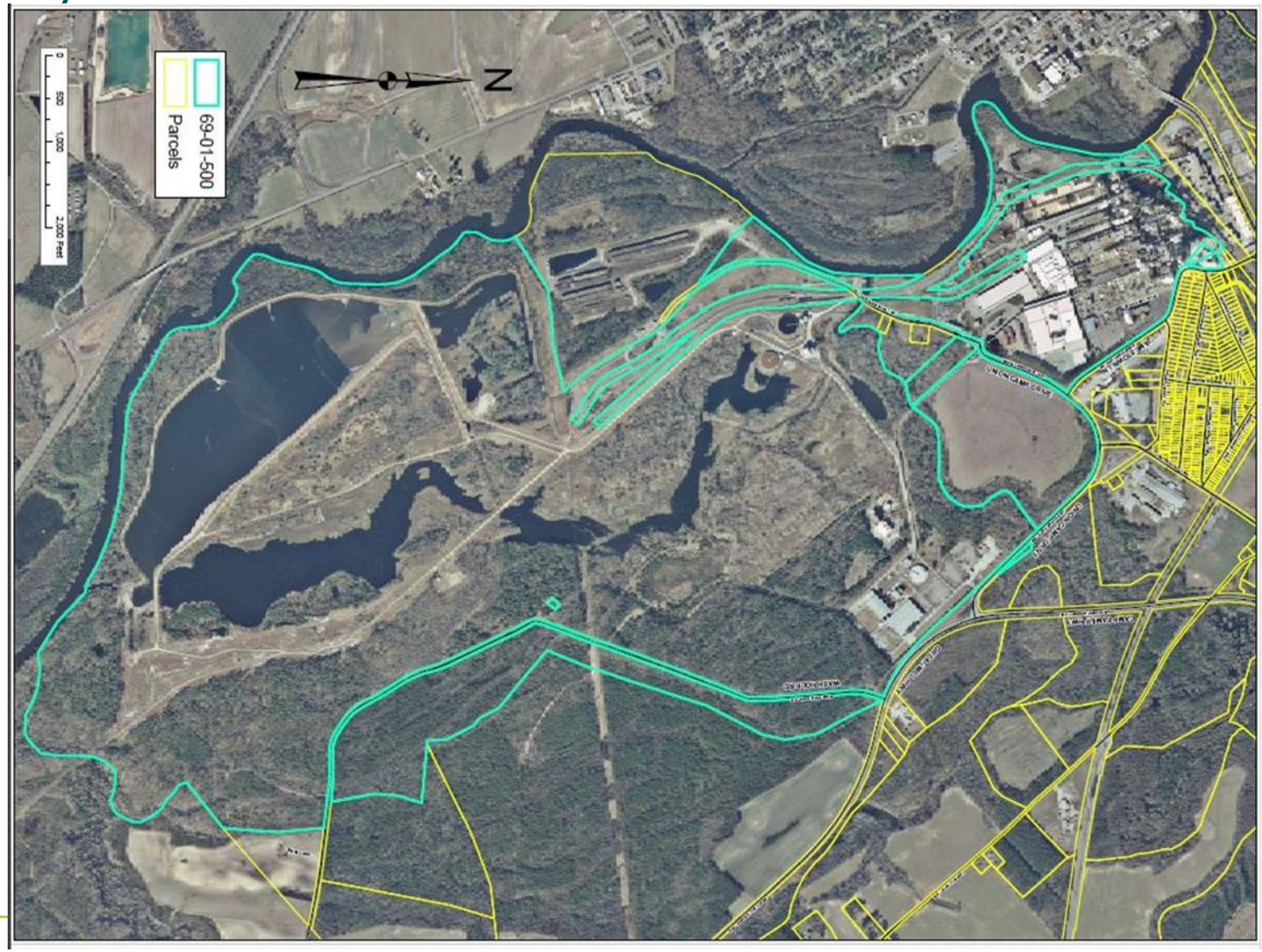
Sands Anderson

Anatomy of an Assessment Defense: Second Trial

- After closing arguments, court ruled from the bench on real estate assessments. Case decided on taxpayer's failure to carry its burden of proof to prove the fair market value. West Creek Associates.
- Even without a presumption of correctness, the taxpayer must prove the fair market value. Taxpayer did not; the County's expert did not help IP since he had been the same error on acreage.
- Localities have no burden to prove assessment was correct, so it did not matter that our expert had made the same acreage error.

Sands Anderson

Anatomy of an Assessment Defense: Second Trial



Sands Anderson

Anatomy of an Assessment Defense: Second Trial

- Trial court explained in his ruling: The assessment was clearly in error, but without taxpayer proving the acreage, its opinion evidence was also severely in error. And the court lacked enough information to determine acreage or correct the errors in the taxpayer's expert opinion.
- Without taxpayer proof of fair market value, case dismissed.
- IP did not appeal to the Virginia Supreme Court, likely due to massive clearly-proven errors by its expert and little argument it had met its burden.
- Case over.

Sands Anderson

Anatomy of an Assessment Defense: IP Takeaways

- Preserve the presumption of correctness if you can. If you cannot, do not panic.
- Try to develop the three approaches to value, yes, even in a mass appraisal. And if you cannot, or deem it unreliable, keep a record of why, and disregard it as unreliable.
- Analyze your assessment's factual foundation. Double check that property card, especially on high value properties likely to end in litigation. Confirm the property and improvements. Do not rely on property card.

Sands Anderson

Anatomy of an Assessment Defense: IP Takeaways

- Likewise, analyze the factual foundation of your locality's experts. Essential for admissibility, but can also affect and harm credibility.
- Be aware of the strengths and weaknesses of the cases of both taxpayer and locality. They are both there.
- Apply the likely evidence to the law regarding assessments, experts, etc. and help plan your trial strategy.
- Remember what I call "paths to victory." The more paths, the better. Increases odds. Here, we had multiple possible ways to win. Did not win some of them. Only needed to win one.

Sands Anderson

Anatomy of an Assessment Defense: IP v. IOW County

Thanks for your time and attention!

Sands Anderson

Questions?

Thank you for your time!

Andrew McRoberts, Esquire
amcroberts@sandsanderson.com
(804) 783-7211

Sands Anderson PC
919 East Main Street, Suite 2300
Richmond, VA 23219

Sands Anderson