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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

VILLA SAN CLEMENTE LLC,

Plaintiff and Appellant,

v.

COUNTY OF ORANGE,

Defendant and Appellant.

G045984

(Super. Ct. No. 30-2010-00339719)

O P I N I O N

Appeals from a judgment and an order of the Superior Court of Orange County, Franz E. Miller, Judge. Affirmed.

Cahill, Davis & O’Neill, C. Stephen Davis, and Andrew W. Bodeau for Plaintiff and Appellant.

Nicholas S. Chrisos, County Counsel and Laurie A. Shade, Deputy County Counsel for Defendant and Appellant.

Plaintiff Villa San Clemente LLC (Villa) brought suit against defendant County of Orange (the County) for a tax refund on property taxes collected on 59.168 acres of land (the property) Villa owns in Orange County after the Assessment Appeals Board No. 1 (assessment appeals board, or board) assessed the property at \$78,547,385. The assessor's expert and Villa's expert both used the same method of assessing the value of the property, comparable sales, but arrived at different results. The trial court denied Villa relief on two of its arguments, but remanded the matter to the board to consider Villa's claim that construction costs for building a bridge on the property and a freeway off-ramp, as well as certain other costs of developing the property, reduce the valuation of the property. Villa appeals, contending the assessor's method of assessing the value of the property was flawed in that certain downward adjustments were required, but not made, and a portion of the expense of building a mandated parking structure should have been deducted.

The trial court awarded Villa \$70,806.71 in attorney fees under Revenue and Taxation Code section 1611.6.<sup>1</sup> The County cross-appealed, contending the court should have awarded substantially less.

For the reasons that follow, we affirm the judgment and the order awarding Villa \$70,806.71 of the requested \$108,453.75 in attorney fees.

## I

### FACTS

In 1999, Villa arranged to purchase 13 parcels of real property consisting of 59.168 acres in San Clemente for approximately \$20 million. The plan was to develop the property into a mixed high-end residential and commercial property development with a manufacturer's outlet mall, entertainment center, hotel, and conference center. Portions of the property overlook the Pacific Ocean. The sale was not completed until

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<sup>1</sup> All statutory references are to the Revenue and Taxation Code unless otherwise stated.

May 11, 2006, due to delays in obtaining development permits from the California Coastal Commission. By that time the purchase price was adjusted to \$25.7 million. It is undisputed the purchase price did not reflect the fair market value of the property. The assessor initially enrolled the property as having a value of \$100,933,000.

Villa filed applications to change the assessments. At the hearing before the appeals assessment board, the County presented an adjusted assessment value of \$78,547,385, calculated at \$35 per square foot on approximately 51 and a half buildable acres. The adjusted value did not include the cost of any infrastructure required to be built on the property.

Villa and the County each used five comparable sales in an effort to reach a fair market value for the property. Of the five comps used by each side, four were the same. Al Saguero of the assessor's office testified on behalf of the County. The first comp property he used is located on the corner of Sunflower and Highland in Costa Mesa. South Coast Home Furnishings was later built on the property. That property is substantially smaller than Villa's, is irregularly shaped, and was purchased in August 2005 for \$29 million. Saguero said that piece of property has inferior ingress and egress, describing it as "just awful." After adjustments, the first comp property was assessed at \$35.02 a square foot.

The second comp is located on the corner of Irvine Center and Lake Forest in Irvine. That commercially zoned property sold in November 2005 for \$29,650,000, or \$37.09 per square foot. It too, is substantially smaller than Villa's property, but Saguero felt it was a superior piece of property. Because property in Irvine tends to sell for more, Saguero made a five percent adjustment on the property.

The third comp is a Costco site on the corner of Katella and Walker in Cypress. Also smaller than Villa's property, it sold for \$18.8 million in September 2004. Adjusting for time and the inferiority of the property (including its irregular shape) compared to Villa's property, the price per square foot was set at \$30.08.

The fourth and fifth comps are part of the District Development in Tustin. The first was purchased for \$70 million in November 2004. It is slightly larger than Villa's property. After adjusting for the older sale, the property adjusted out to \$31.90 per square foot. The last is a Costco and gas station site. Substantially smaller than Villa's property, this site sold in October 2005 for \$23.5 million. After adjusting for the time of that sale, Saguero adjusted price to \$35.44 per square foot.

None of the comps had a hotel or meeting center on the premises. Using the above comparable sales, Saguero arrived at \$35 per square foot for the recommended value of Villa's property. He said the accepted value would require considering certain infrastructure costs. Although smaller lots have sold at a premium in the past — i.e., for a higher price per square foot over larger pieces of property — Saguero stated it is very rare to have parcels over 10 acres in Los Angeles or Orange County, so a downward adjustment on a large piece of property is not warranted in this instance. He said a different result may be called for in the Inland Empire or somewhere else where large pieces of property are not rare. Saguero did not believe the requirement that Villa build a parking structure called for an adjustment. It was apparent he concluded the parking structure was an enhancement to the property.<sup>2</sup>

### *Villa's Evidence*

Wells Fargo Bank retained Keith A. Strohl of Walden-Marling, Inc. to appraise the property at a time when Wells Fargo was considering financing the property. Strohl's evaluation was made in September 2005, not May 2006, the date Villa became the owner of the property. Strohl said he worked independently of Villa in deciding the property's appraised value. The assessor's appraiser and Strohl each used the comparable sales method of valuating the property. Strohl said he and Saguero used

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<sup>2</sup> A member of Villa's team acknowledged the parking structure would enhance the property to the extent it permits development of the planned square footage.

similar data. In fact, Strohl used four of the County's five comparable sales. He also used a comp for a piece of property in Riverside County and conceded that property was "the weakest" of the comps. He used the Riverside County property due to its size. Because Strohl's evaluation was made in September 2005, he admitted his evaluation (\$61.7 million) would have to be adjusted. However, Strohl did not give an estimate of the fair market value of the property as of May 2006. He did not do so because he had not been contracted to make that evaluation.

Strohl's first comparable property was the fourth property used by the assessor. He considered this comp to be one of the best, based on size of the property and the large scale development of the required infrastructure.

Strohl said he did not agree with the assessor's refusal to make an adjustment based on the fact that Villa's property is larger than most of the comps used by the parties. Strohl believed a downward adjustment should have been made on Villa's property based on its larger size.

With respect to the requirement that Villa build a parking structure to support the 600,000 square feet of proposed space, Strohl testified a downward adjustment should also be made as none of the comparable sales required the building of such a parking structure and Villa would be unable to build out the property to its designed square footage without building the parking structure. He said an adjustment should be made, but not a "dollar-for-dollar" deduction for the cost of building the garage since the structure benefits Villa. Strohl said because the cost of building the parking structure increased since his 2005 evaluation, his assessed value would have to be reduced.

Additionally, Villa urged the board to make adjustments based on the cost of building the infrastructure necessary to support the development. According to Villa's tax agent, the original developer, SunCal, was going to incur improvement costs of approximately \$22.3 million. The improvements included building a bridge over a

canyon on the property and building a freeway off-ramp.

### *The Board's Decision*

The board found Villa's property, portions of which overlook the Pacific Ocean, consists of 59.168 gross acres with an estimated 51.488 buildable acres (2,242,817 square feet) after adjustment for nonbuildable hillsides, and was purchased on May 11, 2006. The property was a planned mixed high-end and commercial development purchased to develop a manufacturers' outlet mall, entertainment center, hotel, and conference center. The property was also intended to have a parking structure and four restaurants.

The board found the purchase price of \$25.7 million was not the fair market value of the property. It also found the parking structure would be an enhancement, adding value to the property, because without it Villa would be unable to develop 600,000 square feet of commercial space. It further found the property in south Orange County to be "prime commercial property," rents in the area were increasing and few large-scale parcels of land were available because of high level development activity in the real estate market. As a result, the board found the assessor's comparative sales valuation and the adjustments made by the assessor were not flawed, and the fair market value of the property was \$78,547,385, the amount established by the assessor. The board did not address the issue of adjustments for the cost of building the bridge, the freeway off-ramp, and other development costs.

### *The Superior Court Action*

After the board's decision, Villa filed an action in the superior court for a refund of taxes wrongfully collected on the property in the 2006-2007 tax year. The trial court found in favor of the County to the extent it upheld the board's ruling upholding the assessor's initial \$78.5 million valuation of the property. However, the court remanded

the matter to the board to consider Villa's costs for building a bridge on the property, as well as the as a freeway off-ramp and other finishing costs. The court found Villa was entitled to its costs and attorney fees.

Villa thereafter filed a motion for attorney fees pursuant section 1611.6. Although Villa sought \$108,453.75 in fees, the court awarded \$70,806.71, finding the hourly rate was reasonable given the attorneys' "expertise, but the hours expended are excessive considering that expertise, and the use of block billing in up to four to seven hour blocks makes it impossible for the court to determine whether the time was well spent. Further, Villa . . . was successful only on a portion of its claims, requiring a reduction to ensure attorney fees are only awarded 'for the services necessary to obtain proper findings.'"

Pursuant to Villa's unopposed request, we take judicial notice (Evid. Code, § 452) of the fact that after judgment was entered in this matter, the assessment appeals board accepted a stipulation between Villa and the assessor, reducing the enrolled values of Villa's 13 parcels of property for the 2008 and 2009 tax years.

## II DISCUSSION

### A. *Villa's Appeal*

The trial court upheld the board's determination, rejecting Villa's contention that the board erred in failing to make an adjustment to the assessed value based on the large size of the property (i.e., that it was entitled to a discount because of the large size) and failed to make an adjustment for a percentage of the cost of building a parking structure on the property, although the court also remanded the matter to the board to consider adjusting the value based on certain costs of developing the property. Villa contends the assessor's valuation of its property was arbitrary, the result of an "illegal methodology," and not supported by substantial evidence.

### 1. *Standard of Review*

The assessor and Villa both used the comparable sales method of determining the value of the property at issue. Four of the five comparable sales used by the parties were the same. When the comparable sales method is used, adjustments may be required to be made to the value of the property based on differences between the comparable properties and the property to be valued. Villa's argument that the board erred in reaching the value of the property boils down to this: In considering the comparable sales, the board did not make the adjustments to the value of the property Villa's expert made. However, as Villa's tax agent, Sean Kelley, acknowledged at the hearing before the board, adjustments made in comparing properties "are subjective."

Contrary to Villa's assertion, this case does not involve a situation where the "validity of a method of valuation" used by the assessor is challenged, requiring de novo review. (*County of Orange v. Orange County Assessment Appeals Bd.* (1993) 13 Cal.App.4th 524, 529-530.) Comparable sales, the method used by the assessor and Villa, is the preferred method for determining the fair market value of property. (*Farr v. County of Nevada* (2010) 187 Cal.App.4th 669, 686.) The gist of Villa's argument is the assessor did not make the downward adjustments Villa asserts should have been made. There is no evidence the assessor did not *consider* the issue of adjustments regarding the relative size of the comp properties and the restriction placed on Villa to build a parking structure. Rather, the assessor concluded adjustments were not called for based upon the facts in this case.<sup>3</sup> (Cal. Code Regs., tit. 18, § 4, subd. (d) [assessor to "[m]ake such allowances *as he deems appropriate* for differences between a comparable property at the

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<sup>3</sup> Specifically, the assessor concluded no adjustment was required based on the size of Villa's property due to the rarity of large pieces of property in Orange County. The assessor made no adjustment for the cost of building the required parking structure because rather than being a detriment, the assessor found the parking structure was a benefit. Villa's expert, Strohl, agreed the parking structure benefited the property, although he favored adjusting the value by approximately 15 percent of the cost of building the structure.

time of the sale and the subject property”] italics added; see *Farr v. County of Nevada*, *supra*, 187 Cal.App.4th at p. 686 [record must show the assessor’s explanation for making or not making adjustments].) Thus, the present case is materially different from *Main & Von Karman Associates v. County of Orange* (1994) 23 Cal.App.4th 337, where the assessor purportedly used the comparable sales method of valuation, but made *no* adjustments based on a belief section 4 of title 18 of the California Code of Regulations was merely a guideline the assessor was not required to follow. (*Id.* at pp. 340-341.)

Because both parties used the comparable sales method of valuating the property, the assessor did make certain adjustments based on the comparable sales, and Villa’s complaint is the assessor erred in failing to make other adjustments, we apply the substantial evidence standard of review. “When a taxpayer challenges an assessment on the ground that a ‘valid method’ has been ‘erroneously applied,’ the trial court reviews the record that was before an assessment appeals board and may overturn its decision only if the board’s decision was not supported by substantial evidence. [Citation.]” (*Georgiev v. County of Santa Clara* (2007) 151 Cal.App.4th 1428, 1437.) The same test is used on appeal. (*Freeport-McMoran Resource Partners v. County of Lake* (1993) 12 Cal.App.4th 634, 640.) Thus, factual determinations made by the board are entitled to deference and are upheld if supported by substantial evidence. (*Cochran v. Board of Supervisors* (1978) 85 Cal.App.3d 75, 80.)

## 2. *The Board’s Findings Are Supported by Substantial Evidence*

Section 4 of title 18 of the California Code of Regulations states the preferred method of valuating property is by reference to sales prices “[w]hen reliable market data are available.” When using sales of comparable pieces of property, the assessor must “[m]ake such allowances *as he deems appropriate* for differences between a comparable property at the time of sale and the subject property on the valuation date, in physical attributes of the properties, location of the properties, legally enforceable restrictions on the properties’ use, and the income and amenities which the properties are

expected to produce.” (Cal. Code Regs. tit. 18, § 4 subd. (d), italics added.)<sup>4</sup> This provision is at the heart of this appeal. Villa argues the assessor was required as a matter of law to make adjustments between the comparable sales and Villa’s property. The County asserts the assessor must consider adjustments, but the only adjustments required are those the assessor deems appropriate. The County has the better argument.

The assessor used the appraisal method set forth in the California Code of Regulations, title 18, section 4. This was the same appraisal method used by Villa. In fact, four of the five properties used as comps by the assessor and Villa were the same. The additional comp used by Villa was a piece of property in Riverside County, a property Villa’s expert conceded was the weakest of the comps.

The assessor made adjustments based on the comps. The first comp was adjusted to an assessed value of \$35.02 a square foot after considering the property’s inferior ingress and egress and its substantially smaller size, irregular shape, and the time since its purchase in 2005. The second comp was adjusted to an assessed value of \$37.09 a square foot because though it was substantially smaller than Villa’s property, the second comp was found to be a superior piece of property. The third comp, also smaller was adjusted for the time of the sale, its inferior location and its irregular shape. The fourth comp involved a property slightly larger than Villa’s and was adjusted to \$31.90 a square foot. The fifth comp, a property adjacent to the fourth comp, was adjusted to \$35.44 a square foot. The assessor assessed Villa’s property at \$35 a square foot before consideration of infrastructure costs, because land prices were escalating since the sales of some of the comps.

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<sup>4</sup> We grant Villa’s request to take judicial notice (Evid. Code, § 452) of portions of the *Assessors’ Handbook* and *Assessment Appeals Manual* published by the State Board of Equalization. We deny the request as to the May 29, 2003 letter to Assessors, No. 2003/09, from the State Board of Equalization.

The board upheld the valuation finding the property, part of a mixed high-end residential and commercial development, was purchased in May 2006 to build 600,000 square feet of commercial space including a manufacturer's outlet mall, four restaurants, hotel, conference center and a parking structure. The board held the assessor met its burden of prove on the issue of the fair market value of the property, having rejected the purchase price as the fair market value.<sup>5</sup> The board also found Villa would be unable to build out the property to support a 600,000 square foot commercial space without a parking structure. It concluded the parking structure added value to the property and is not a detriment, making a downward adjustment unnecessary. The board also rejected the notion the assessor was required to make a downward adjustment based on the fact Villa's property is larger than all but one of the assessor's comps. It found the fair market value as determined by the assessor was supported by Villa's admission there was a "high demand for similar property types" at the time of its appraisal and the lack of any indication that demand abated by May 2006. Substantial evidence supports the findings.

Villa argues the assessor was required to make a downward adjustment based on the smaller size of the comps; that a discount must be given to larger purchases. We agree with the assessor's conclusion, however, that when an area has been built out to such an extent large pieces of property are rare, a downward adjustment on a larger piece of property is not required. When there is a large supply of an item, a discount for a large purchase has its merits. But when the supply is severely limited, the value of a large amount of the item remains higher.<sup>6</sup> As the assessor noted, Orange County does not have the large open space available, unlike in the Inland Empire.

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<sup>5</sup> Villa agrees it purchased the property below the fair market value.

<sup>6</sup> One of the rules of supply and demand is that when the supply decreases and the demand remains constant, higher prices result.

Neither was a downward adjustment required for the parking structure, as a negative restriction on the property. Construction of the parking garage means less land devoted to parking and more land devoted to the planned commercial development, including a hotel, something none of the comps had. It was not unreasonable for the board to conclude the parking structure would be an enhancement to the property, not a detriment. Accordingly, we find substantial evidence supports the board's decision and the trial court did not err in so holding.

### *B. Attorney Fees*

The trial court remanded the matter to the assessment appeals board to consider making adjustments based on certain development expenses the board did not consider. As a result, the board's initial action was deemed arbitrary and capricious, entitling Villa to recover reasonable attorney fees. (§ 1611.6.) Villa's amended memorandum of costs requested \$108,453.75 in attorney fees. The trial court awarded \$70,806.71. The County appealed the award. It did not contend below, and does not contend here, Villa is not entitled to attorney fees. The County's contention is the amount of fees awarded Villa is excessive. The County argues the trial court abused its discretion in setting the amount of attorney fees to be awarded, allegedly because the court did not follow the letter of the law and its findings are not supported by substantial evidence.

We review the trial court's award of attorney fees for an abuse of discretion. (*Serrano v. Stefan Merli Plastering Co., Inc.* (2011) 52 Cal.4th 1018, 1025-1026.) "The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' [Citations.]" (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.)

Government Code section 800 authorizes the recovery of attorney fees in a civil action to review a determination of any administrative proceeding, but limits the award to no more than \$100 an hour and a total of \$7,500. (Gov. Code, § 800, subd. (a).) Section 1611.6 authorizes the award of attorney fees if the court finds the county board's findings are "so deficient that a remand to the county board is ordered to secure reasonable compliance with the elements of findings required by Section 1611.5." When a party is entitled to attorney fees under section 1611.6, "[t]he dollar limitation set forth in Section 800 of the Government Code [does] not apply." (§ 1611.6.)

The County contends Villa asserted three theories for downward adjustments to the value of the property (size, a portion of the cost of building a parking structure, and costs in developing the property) and prevailed on but one (costs in developing the property), so the award for attorney fees should have been limited to one-third of the fees incurred.<sup>7</sup> That seems an arbitrary determination. After all, Villa could equally argue it raised five adjustments it believed should have been made by the assessor (size, a portion of the cost of building parking structure, cost of building a bridge, cost of building an off-ramp, and the cost of other, unspecified costs), it prevailed on three of them, and additionally defeated the County's argument that the issue of development costs had been waived, an argument the County raised in connection with the adjustment for development costs. Thus, Villa could argue it prevailed on four of six issues litigated and should therefore be compensated by a minimum of 66 percent of its billed hours.<sup>8</sup>

In any event, we do not think it generally appropriate to merely divide the number of compensable theories upon which a party prevailed by the total number of theories urged to arrive at the percentage of the billed attorney fees to which the

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<sup>7</sup> The County argues it did not contest whether the board should have considered the development costs, but in connection with that issue only argued Villa had waived the issue.

<sup>8</sup> The court awarded Villa roughly 65 percent of the amount requested.

prevailing party is entitled. (See *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 157 [“fees need not be apportioned when incurred for representation of an issue common to both a cause of action for which fees are permitted and one for which they are not”].) Because the statute authorizes the award of attorney fees only “for the services necessary to obtain proper findings” (§ 1611.6), there perforce must be *some* apportionment when less than all the attorneys’ services are deemed necessary to obtain proper findings.

“The fact that a trial judge deciding attorney fees may appropriately ‘allocate’ or ‘apportion’ fees is well known.” (*Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103, 129.) However, “[a]pportionment is not required when the issues in the fee and nonfee claims are so inextricably intertwined that it would be impractical or impossible to separate the attorney’s time into compensable and noncompensable units. [Citations.]” (*Graciano v. Robinson Ford Sales, Inc., supra*, 144 CalApp.4th at p. 159.) The trial judge is in the best position to make an appropriate apportionment (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 430), and as we noted above, we will not reverse the trial court’s award of attorney fees absent a showing the trial judge’s determination was “clearly wrong.” (*Serrano v. Priest, supra*, 20 Cal.3d at p. 49.) The trial judge did not award Villa all the fees it sought. The judge awarded Villa 65 percent of the fees sought. The County has not carried its burden of proving the trial judge’s award was clearly wrong.

We also reject the County’s argument that the trial court disregarded that portion of section 1611.6 limiting the award of attorney fees to those “necessary to obtain proper findings.” The court’s minute order awarding the fees belies the County’s argument: “The court grants the motion for attorney fees in the amount of \$70,806.71. The [court] finds the attorneys’ hourly rates are reasonable given their expertise, but the hours expended are excessive considering that expertise, and the use of block billing in

up to four to seven hour blocks makes it impossible for the court to determine whether the time was well spent. *Further, Villa San Clemente was successful only on a portion of its claims, requiring a reduction to ensure attorney fees are only awarded 'for the services necessary to obtain proper findings.'*" (Italics added.) The court clearly considered the limitation imposed by section 1611.6.

Lastly, it is worth noting section 1611.6 authorizes the award of attorney fees only to successful *plaintiffs*. It does not provide the award of attorney fees to a county that successfully defeats the taxpayer's lawsuit. Thus, the section contains a unilateral fee-shifting provision. "Such nonreciprocal fee provisions 'are created by legislators as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy.' [Citations.]" (*Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 504.) Implicit in such a unilateral fee-shifting provision is a desire to encourage injured parties to broadly litigate an improper assessment. (Cf. *Ibid.* [purpose of statute is to encourage litigation of Cartwright Act violations].) The Legislature's amendment of section 1611.6 in 1995 (Stats. 1995, ch. 498, § 12) to specifically exempt attorney fees awarded under that section from the general limitation placed on similar awards by Government Code section 800 negates the County's implied argument that review of the appropriateness of an attorney fee award under section 1611.6 must be viewed with more scrutiny than that used in any other civil matter where attorney fees are awarded, because taxpayers must foot the bill when attorney fees are awarded in a matter such as this. The bottom line is: whether it is a nongovernmental party or taxpayers who must foot the bill, the trial court's decision must stand absent a showing the court clearly abused its discretion, and that showing has not been made here.

We do not find the trial judge abused his discretion in apportioning the amount of attorney fees to be awarded Villa. Accordingly, we affirm the trial court's award.

III

DISPOSITION

The judgment and order of the superior court are affirmed. Each party shall bear its own costs.

MOORE, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.