NOT FOR PUBLICATION WITHOUT APPROVAL OF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

TAX COURT OF NEW JERSEY

Patrick DeAlmeida
Presiding Judge

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Re: Surf Corporation v. City of North Wildwood
Docket No. 003489-2009
Docket No. 003688-2010

Dear Counsel:

This letter constitutes the court's opinion after trial in the above-referenced matters challenging the assessments on real property for tax years 2009 and 2010. For the reasons stated more fully below, the court dismisses the Complaint with respect to one parcel under appeal and lowers the assessment on the other parcel under appeal for both tax years.

*

I. Procedural History and Findings of Fact

The following findings of fact and conclusions of law are based on the evidence and testimony admitted at trial.

Plaintiff Surf Corporation ("Surf Corp.") is the owner of real property located in the City of North Wildwood. Surf Corp.'s property is designated in the records of the City as Block 266, Lot 11 and is commonly known as 1600 Surf Avenue. For tax year 2009, that parcel was assessed as follows:

Land	$ 2,608,300
Improvement	$ 443,400
Total	$ 3,051,700

Block 266, Lot 11 is approximately a half acre in size. The lot is bounded by Surf Avenue between East 16th Avenue and East 17th Avenue. On the property sits the Surf 16 Motel, a two-story, circa 1960's structure with 29 hotel rooms and a manager's apartment. The hotel has an in-ground pool and 29 on-site parking spaces. Typical of the genre of establishments in the Wildwoods known informally as "Doo Wop" motels, the Surf 16 Motel has limited amenities and is primarily occupied during the summer months by patrons enjoying the nearby Atlantic Ocean beaches. The motel has no restaurant, bar, shopping or entertainment facilities and is a little more than two blocks from the beach and boardwalk.

John Geers is the owner of an adjoining parcel in North Wildwood. That property is designated in the records of the City as Block 266, Lot 15 and is commonly known as 323 E. 17th Avenue. For tax year 2009, that parcel was assessed as follows:

Land	$ 585,000
Improvement	$ 10,200
Total	$ 595,200

Block 266, Lot 15 is .149 acres adjoining the motel lot. This parcel is used in conjunction with Lot 11 for the operation of the Surf 16 Motel. The two lots are considered by both experts to testify at trial to be a single economic unit. Lot 15 is largely vacant, and serves as a recreation area for the pets of patrons at the pet-friendly motel. In addition, on Lot 15 is a structure known as "the bunkhouse" with two sleeping areas and two showers. The bunkhouse is used to house employees of the motel for the summer season. The building does not generate any income.

On March 9, 2009, the Clerk of the Tax Court received a Complaint with two attached Case Information Statements. One Case Information Statement concerns Lot 11. It names as plaintiff Surf Corp., the owner of that parcel. The other Case Information Statement concerns Lot 15. It names as plaintiff John Geers, the owner of that parcel, and contains a handwritten entry of "/Surf Corporation" next to Mr. Geers' name. It is not clear from the trial record who made this entry or when it was made. Surf Corp. does not have an ownership interest in Lot 15. The Complaint itself names only Surf Corp. as a plaintiff.

On May 26, 2009, the municipality filed an Answer and Counterclaim with respect to both parcels. The Answer notes that the only plaintiff named in the Complaint, Surf Corp., is not the owner of Lot 15. The municipality did not, however, make a pretrial motion to dismiss the appeal concerning Lot 15. There are two potential grounds on which such a motion could have been made: (1) the only plaintiff named in the Complaint does not own the parcel; and (2) the assessment on Lot 15 is less than $750,000, the then-applicable statutory threshold for filing a direct appeal challenging an assessment in the Tax Court. See N.J.S.A. 54:3-21.[1]

[1] The direct-appeal threshold was increased to $1 million by legislative action effective January 16, 2010. See L. 2009, c. 251, §1.

The assessments on the parcels remained unchanged for tax year 2010. On March 19, 2010, the Clerk of the Tax Court received a Complaint with two attached Case Information Statements. One Case Information Statement concerns Lot 11. It names as plaintiff Surf Corp., the owner of that parcel. The other Case Information Statement concerns Lot 15. It names as plaintiff John Geers. The Complaint itself names only Surf Corp. as a plaintiff.

On April 26, 2010, the municipality filed an Answer and Counterclaim with respect to both parcels. The Answer notes that the only plaintiff named in the Complaint, Surf Corp., is not the owner of Lot 15. The municipality did not, however, make a pretrial motion to dismiss the appeal concerning Lot 15.

The two Complaints were tried together. At trial, the municipality withdrew its two Counterclaims. At the start of trial, the municipality moved to dismiss all claims with respect to Lot 15. The municipality argued that the only named plaintiff in the Complaint is Surf Corp., which does not own Lot 15 and is not, therefore, a taxpayer aggrieved by the assessment on that parcel. See N.J.S.A. 54:3-21 (establishing the jurisdiction of this court to hear appeals filed by "a taxpayer feeling aggrieved by the assessed valuation of the taxpayer's property, or feeling discriminated against by the assessed valuation of other property in the county . . . .") Plaintiff opposed the motion. The court reserved decision and proceeded to trial.

The parties offered widely divergent views of the true market value of the two parcels on the relevant valuation dates. Plaintiff's expert offered the opinion that the subject properties had a combined value of $897,000 as of October 1, 2008 and $870,000 as of October 1, 2009. The municipality's expert offered the opinion that the properties had a combined value of $2,625,000 as of October 1, 2008 and $2,400,000 as of October 1, 2009. The reason for the differing opinions of value rests primarily on the experts' varying views of the highest and best use of the

parcels. The taxpayer contends that the highest and best use of the parcels is their continuing use for the operation of the Surf 16 Motel. The municipality argues that the highest and best use of the parcels is for the demolition of the motel and the development of the parcels with medium-density residential units in the condominium form of ownership.[2]

The experts' highest and best use opinions resulted in stark contrasts in the evidence. Because of his highest and best use opinion, plaintiff's expert took only the income approach to determine the true market value of the subject properties. His is the only opinion of value in the record under this approach. Because of his highest and best use opinion, the municipality's expert took only the sales comparison approach to determine the true market value of the subject properties. His is the only opinion of value in the record under this approach. The opinions of the two experts rarely crossed paths, except for their descriptions of the two parcels and the neighborhood in which those parcels are located.

At the close of trial, the court gave the parties an opportunity to brief the question of whether the two parcels named in the Complaint are in common ownership. The court raised this point during discussion of the municipality's motion to dismiss with respect to Lot 15. According to R. 8:3-5(a)(3), where two contiguous parcels are "in common ownership" they may be included in the same Complaint, even if one parcel does not meet the statutory threshold for a direct appeal, provided that other parcel does meet the statutory threshold. Plaintiff's counsel thereafter submitted two Certifications with attached exhibits regarding the ownership of the two parcels. The municipality objected to these submissions. North Wildwood argued that it was inappropriate for plaintiff to submit evidence after the close of proofs where the court gave leave

[2] Notably, if the court were to find the opinion offered by the municipality's expert to be the most credible evidence of value in the record, the taxpayer would be entitled to a reduction of more than $1 million in assessed value for each year.

only for supplemental briefing on a legal issue. In addition, the municipality argues that if the court were to consider the two Certifications, the City would be deprived of the opportunity to cross-examine the witnesses who signed the Certifications.

A review of the recording of the trial reveals that the court did not give the parties leave to submit post-trial evidence. Instead, the parties were given the opportunity to submit written briefs addressing the legal question of whether the two parcels before the court are in common ownership. While the court is sympathetic to the municipality's argument on this point, the court will accept the Certifications, which establish that Mr. Geers owns 50% of Surf Corp.'s issued shares and that his wife owns the remaining 50% of Surf Corp.'s issued shares. Because the court determines that these facts, even if accepted as true, are insufficient to establish that the parcels are in common ownership within the meaning of R. 8:3-5(a)(3), the municipality is not harmed by not having the opportunity to cross-examine the parties who signed the Certifications.

II. Conclusions of Law

A. Jurisdiction Over Block 266, Lot 15

The court must first decide whether it has jurisdiction to review the assessments on Block 266, Lot 15. As our Supreme Court has made clear, the "Tax Court is vested with limited jurisdiction" defined by statute. McMahon v. City of Newark, 195 N.J. 526, 546 (2008)(citing N.J.S.A. 2B:13-2 and Union City Assocs. v. City of Union City, 115 N.J. 12, 23 (1989)). "'The right to appeal a real property assessment is statutory, and the appellant is required to comply with all applicable statutory requirements.'" Macleod v. City of Hoboken, 330 N.J. Super. 502, 505 (App. Div. 2000)(quoting F.M.C. Stores Co. v. Borough of Morris Plains, 195 N.J. Super. 373, 381 (App. Div. 1984), aff'd, 100 N.J. 418 (1985)). The statutory scheme establishing this

court's jurisdiction is "one with which continuing strict and unerring compliance must be observed . . . ." McMahon, supra, 195 N.J. at 543.

At the time that the 2009 Complaint was filed, N.J.S.A. 54:3-21 established this court's jurisdiction to entertain a direct review of an assessment on real property, that is without first having review of that assessment by the relevant county board of taxation, as follows:

> [A] taxpayer feeling aggrieved by the assessed valuation of the taxpayer's property . . . may on or before April 1, or 45 days from the date the bulk mailing of notification of assessment is completed in the taxing district, whichever is later, appeal to the county board of taxation by filing with it a petition of appeal; provided, however, that any such taxpayer . . . may on or before April 1, or 45 days from the date the bulk mailing of notification is completed in the taxing district, whichever is later, file a complaint directly with the Tax Court, if the assessed valuation of the property subject to the appeal exceeds $750,000.

As noted above, the direct appeal threshold was raised to $1 million effective 2010. See L. 2009, c. 251, §1. The statute is incorporated by reference in R. 8:4-1(a)(4).

The 2009 assessment on Block 266, Lot 15 does not exceed $750,000. A direct appeal to this court from the assessment on that parcel, standing alone, is not, therefore, authorized by statute. Rule 8:3-5(a)(3) purports to allow for the direct appeal of an assessment below the statutory threshold in limited circumstances. At the time that the 2009 Complaint was filed, the rule provided:

> In cases of direct review by the Tax Court pursuant to N.J.S.A. 54:3-21, the complaint shall contain an allegation that the assessed valuation of the property for which direct review is sought exceeds $750,000. A complaint for direct review may include in separate counts separately assessed, contiguous properties in common ownership, in the same or different taxing districts, provided the assessed valuation of one of such separately assessed, contiguous properties exceeds $750,000.
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> [R. 8:3-5(a)(3)(2009).]

The rule was amended to reflect the $1 million direct-appeal threshold applicable to 2010.

The municipality contends that the two parcels at issue here, one with an assessment in excess of the statutory direct-appeal threshold and one with an assessment below the statutory direct-appeal threshold, are not in common ownership. As a result, defendant argues, the two parcels cannot be combined in a single Complaint on a direct appeal pursuant to R. 8:3-5(a)(3). The city contends, therefore, that this court lacks jurisdiction to review a direct appeal of the assessment on Block 266, Lot 15. The taxpayers take the position that the court has jurisdiction over the direct appeal of the assessment on Lot 15 because Mr. Geers' partial ownership interest in Surf Corp. is sufficient to satisfy the "common ownership" element of R. 8:3-5(a)(3).

Regulations are subject to the same rules of construction as are applicable to statutes. Krupp v. Board of Educ., 278 N.J. Super. 31, 38 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995); Department of Health v. Tegnazian, 205 N.J. Super. 160, 175 (App. Div. 1985); Beljakovic v. Director, Div. of Taxation, 26 N.J. Tax 455 (Tax 2012). Statutory construction begins with the statute's plain language. Merin v. Maglaki, 126 N.J. 430, 434 (1992). "A statute should be interpreted in accordance with its plain meaning if it is clear and unambiguous on its face and admits of only one interpretation." Board of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 25 (1996)(quotations omitted). "[T]he best approach to the meaning of a tax statute is to give to the words used by the Legislature their generally accepted meaning, unless another or different meaning is expressly indicated." Public Serv. Elec. & Gas Co. v. Township of Woodbridge, 73 N.J. 474, 478 (1977)(quotations omitted).

"In common ownership" as that term is used in R. 8:3-5(a)(3) is not defined in the court rules or any legal precedent. The meaning of the phrase, however, is plain. For two parcels to

be in common ownership it is necessary that they be owned by the same person or entity. It is not sufficient that the owner of one parcel have a partial ownership interest in the owner of the other parcel. The Supreme Court's holding in Jock v. Zoning Bd. of Adjustment, 184 N.J. 562 (2004), supports this conclusion.

In that case, the Court examined the concept of "in common ownership" in the context of a zoning board decision to grant a variance. The question before the court was whether two parcels had merged for zoning purposes. The Court explained that the "term 'merger' is used in zoning law to describe the combination of two or more contiguous lots of substandard size that are held in common ownership . . . ." Id. at 578. One of the parcels under consideration was owned by a Mr. Amato. The other was owned by Shire Realty, a corporation in which Mr. Amato and his wife were the sole shareholders. Id. at 589. The Court rejected the notion that the two parcels were in common ownership. The two owners are "entirely distinct legal entities entitled to recognition by the court." Ibid. (citing Lyon v. Barrett, 89 N.J. 294 (1982)(stating that professional corporation and its sole owner are separate entities which will be respected); and L.B.D. Constr. v. Director, Div. of Taxation, 8 N.J. Tax 338 (1986)(noting that individual and corporation of which he is sole shareholder are separate legal entities entitled to recognition by courts). As the Court explained,

> Even if Amato and his wife, as the sole owners of Shire Realty, were viewed as the actual owners of Lot 27 (as opposed to the corporate owners) that would not advance plaintiffs' position because Amato alone owned lot 26. See, e.g., Carciofi v. Bd. of Appeal of Billerica, 22 Mass.App.Ct. 926, 492 N.E.2d 747 (1986) (stating lots owned individually and adjoining lot owned as tenant in common with another were not in common ownership).
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> [Ibid.]

These are precisely the facts presented here. Mr. Geers owns one parcel in his individual capacity. A corporation in which he holds a 50% interest and in which his wife holds a 50% interest owns the other parcel. Despite Mr. Geers interest in Surf Corp. the two property owners are distinct legal entities entitled to recognition by the courts. Mr. Geers is, of course, free to organize his affairs in any manner he chooses. He elected to own one parcel in his individual capacity and he elected to purchase another parcel through a corporation he controls with his wife. Presumably, this arrangement is beneficial to Mr. Geers in some fashion. Having elected to structure ownership of the two parcels in two different entities, Mr. Geers must accept the tax consequences of his decision, whether anticipated or not. General Trading Co. v. Director, Div. of Taxation, 83 N.J. 122 (1980).

The parcels named in the Complaint are not, therefore, in common ownership within the meaning of R. 8:3-5(a)(3). This court lacks jurisdiction over the appeal of the assessments on Block 266, Lot 15.[3]

The determination that the court lacks jurisdiction to review the assessments on Lot 15, does not preclude its review of the assessments on Lot 11. As explained by Judge Kahn in Universal Folding Box Co. v. City of Hoboken, 19 N.J. Tax 141 (Tax 2000), aff'd, 351 N.J. Super. 227 (App. Div.), certif. denied, 174 N.J. 545 (2002), where two separately assessed

[3] The court's decision with respect to Lot 15 is based on jurisdictional considerations and not on the fact that Mr. Geers is not named as a plaintiff in the Complaint. If the court had jurisdiction over the challenge to the assessments on Lot 15 leave would have been granted to amend the Complaint to add Mr. Geers as a plaintiff. See Prime Accounting Dept v. Township of Carney's Point, 212 N.J. 493 (2013)(allowing amendment of Complaint to name proper taxpayer where Complaint was timely filed in correct forum and identified property by block, lot and address). In light of the court's determination that the two parcels named in the Complaint are not in common ownership, it is not necessary to address the underlying question of whether the Supreme Court has the authority to expand this court's jurisdiction to hear direct appeals of assessments below the statutory threshold through the "contiguous and in common ownership" provision of R. 8:3-5(a)(3).

parcels are considered a single economic unit, the failure to establish jurisdiction in this court to review the assessment on one of the parcels will not preclude review of the assessment on the other. Instead, the court will determine the combined value of the two parcels as an economic unit and then extract from that figure the value allocable to the parcel not under review. Id. at 150. The remaining value will be attributed to the parcel before the court.

B. The True Market Value of Block 266, Lot 11.

The court's value analysis begins with the well-established principle that "[o]riginal assessments . . . are entitled to a presumption of validity." MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998). As Judge Kuskin explained, our Supreme Court has defined the parameters of the presumption as follows:

> The presumption attaches to the quantum of the tax assessment. Based on this presumption the appealing taxpayer has the burden of proving that the assessment is erroneous. The presumption in favor of the taxing authority can be rebutted only by cogent evidence, a proposition that has long been settled. The strength of the presumption is exemplified by the nature of the evidence that is required to overcome it. That evidence must be "definite, positive and certain in quality and quantity to overcome the presumption."

Ibid. (quoting Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985)(citations omitted)).

The presumption of correctness arises from the view "that in tax matters it is to be presumed that governmental authority has been exercised correctly and in accordance with law." Pantasote, supra, 100 N.J. at 413 (citing Powder Mill, I Assocs. v. Township of Hamilton, 3 N.J. Tax 439 (Tax 1981)); see also Byram Twp. v. Western World, Inc., 111 N.J. 222 (1988). The presumption remains "in place even if the municipality utilized a flawed valuation methodology, so long as the quantum of the assessment is not so far removed from the true value of the property or the method of assessment itself is so patently defective as to justify removal of the

presumption of validity." Transcontinental Gas Pipe Line Corp. v. Township of Bernards, 111 N.J. 507, 517 (1988).

"The presumption of correctness . . . stands, until sufficient competent evidence to the contrary is adduced." Little Egg Harbor Twp. v. Bonsangue, 316 N.J. Super. 271, 285-86 (App. Div. 1998)(citation omitted); Atlantic City v. Ace Gaming, LLC, 23 N.J. Tax 70, 98 (Tax 2006). "In the absence of a R. 4:37-2(b) motion . . . the presumption of validity remains in the case through the close of all proofs." MSGW Real Estate Fund, LLC, supra, 18 N.J. Tax at 377. In making the determination of whether the presumption has been overcome, the court should weigh and analyze the evidence "as if a motion for judgment at the close of all the evidence had been made pursuant to R. 4:40-1 (whether or not the defendant or plaintiff actually so moves), employing the evidentiary standard applicable to such a motion." Ibid. The court must accept as true the proofs of the party challenging the assessment and accord that party all legitimate favorable inferences from that evidence. Id. at 376 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 535 (1995)). In order to overcome the presumption, the evidence "must be 'sufficient to determine the value of the property under appeal, thereby establishing the existence of a debatable question as to the correctness of the assessment.'" West Colonial Enters, LLC v. City of East Orange, 20 N.J. Tax 576, 579 (Tax 2003)(quoting Lenal Props., Inc. v. City of Jersey City, 18 N.J. Tax 405, 408 (Tax 1999), certif. denied, 165 N.J. 488 (2000)), aff'd, 18 N.J. Tax 658 (App. Div. 2004).

Only after the presumption is overcome with sufficient evidence at the close of trial must the court "appraise the testimony, make a determination of true value and fix the assessment." Rodwood Gardens, Inc. v. City of Summit, 188 N.J. Super. 34, 38-39 (App. Div. 1982). If the court determines that sufficient evidence to overcome the presumption that the assessment is

correct has not been produced, the assessment shall be affirmed and the court need not proceed to making an independent determination of value. Ford Motor Co. v. Township of Edison, 127 N.J. 290, 312 (1992); Global Terminal & Container Serv. v. City of Jersey City, 15 N.J. Tax 698, 703-04 (App. Div. 1996).

The court finds that Surf Corp. produced sufficient evidence to overcome the presumption of validity attached to the assessment on Block 11. If taken as true, the opinion of the taxpayer's expert and the facts upon which he relied, create a debatable question regarding the correctness of the assessment on Block 11 for each tax year that is sufficient to allow the court to make an independent determination of the value of that parcel. The expert opined that the two parcels named in the Complaint together had a true market value of $897,000 for tax year 2009 and $870,000 for tax year 2010. It is true that the expert did not reach an independent determination of value of each of the parcels. The combined value that he offered for the two lots, however, is approximately $2 million less than the assessment on Block 11 alone. Thus, if taken as true, the opinion of the taxpayer's expert supports a conclusion that Block 11 is assessed well in excess of its true market value for both tax years.

The court's inquiry, however, does not end here. Once the presumption is overcome, the "court must then turn to a consideration of the evidence adduced on behalf of both parties and conclude the matter based on a fair preponderance of the evidence." Ford Motor Co., supra, 127 N.J. at 312 (quotations omitted). "[A]lthough there may have been enough evidence to overcome the presumption of correctness at the close of plaintiff's case-in-chief, the burden of proof remain[s] on the taxpayer throughout the entire case . . . to demonstrate that the judgment under review was incorrect." Id. at 314-15 (citing Pantasote, supra, 100 N.J. at 413).

C. Highest and Best Use.

As noted above, an essential inquiry in this matter is the determination of the highest and best use of Lot 11. In his recent opinion in Clemente v. Township of South Hackensack, 27 N.J. Tax 255, 267-269 (Tax 2013), appeal pending, Judge Andresini succinctly explained the legal precedents that guide this court in making a highest and best use determination:

> For property tax assessment purposes, property must be valued at its highest and best use. Ford Motor Co. v. Township of Edison, 127 N.J. 290, 300-01, 604 A.2d 580 (1992). "Any parcel of land should be examined for all possible uses and that use which will yield the highest return should be selected." Inmar Associates, Inc. v. Township of Edison, 2 N.J. Tax 59, 64 (Tax 1980). Accordingly, the first step in the valuation process is the determination of the highest and best use for the subject property. American Cyanamid Co. v. Township of Wayne, 17 N.J. Tax 542, 550 (Tax 1998), aff'd, 19 N.J. Tax 46 (App. Div. 2000). "The concept of highest and best use is not only fundamental to valuation but is a crucial determination of market value. This is why it is the first and most important step in the valuation process." Ford Motor Co. v. Township of Edison, 10 N.J. Tax 153, 161 (Tax 1988), aff'd o.b. per curiam, 12 N.J. Tax 244 (App. Div. 1990), aff'd, 127 N.J. 290, 604 A.2d 580 (1992); see also Gen. Motors Corp. v. City of Linden, 22 N.J. Tax 95, 107 (Tax 2005).
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> The definition of highest and best use contained in The Appraisal of Real Estate, a text frequently used by this court as a source of basic appraisal principles, has remained relatively constant for all of the years under appeal. Highest and best use is defined as:
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> > The reasonably probable and legal use of vacant land or improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value.
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> > [Appraisal Institute, The Appraisal of Real Estate, 22 (13th ed. 2008).]
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> The highest and best use analysis requires sequential consideration of the following four criteria, determining whether the use of the subject property is: 1) legally permissible; 2) physically possible;

> 3) financially feasible; and 4) maximally productive. Ford Motor Co., supra, 10 N.J. Tax at 161; see also The Appraisal of Real Estate at 279. Implicit in this analysis is the assumption that the proposed use is market-driven; in other words, that it is determined in a value-in-exchange context and that there is a market for such use. WCI-Westinghouse v. Township of Edison, 7 N.J. Tax 610, 616-17 (Tax 1985), aff'd o.b. per curiam, 9 N.J. Tax 86 (App. Div. 1986). A highest and best use determination is not based on value-in-use because the determination is a function of property use and not a function of a particular owner's use of subjective judgment as to how a property should be used. See Entenmann's Inc. v. Borough of Totowa, 18 N.J. Tax 540, 545 (Tax 2000). The highest and best use of an improved property is the "use that maximizes an investment property's value, consistent with the rate of return and associated risk." Ford Motor Co., supra, 127 N.J. at 301, 604 A.2d 580. Further, the "actual use is a strong consideration" in the analysis. Ford Motor Co., supra, 10 N.J. Tax at 167.
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> Highest and best use is not determined through subjective analysis by the property owner. The Appraisal of Real Estate at 279. The proper highest and best use requires a comprehensive market analysis to ascertain the supply and demand characteristics of alternative uses. See Cherry Hill, Inc. v. Township of Cherry Hill, 7 N.J. Tax 120, 131 (Tax 1984), aff'd, 8 N.J. Tax 334 (App. Div. 1986). Additionally, the proposed use must not be remote, speculative, or conjectural. Id. If a party seeks to demonstrate that a property's highest and best use is other than its current use, it is incumbent upon that party to establish that proposition by a fair preponderance of the evidence. Penn's Grove Gardens, Ltd v. Borough of Penns Grove, 18 N.J. Tax 253, 263 (Tax 1999); Ford Motor Corp., supra, 10 N.J. Tax at 167. Property should be assessed in the condition in which it is utilized and the burden is on the person claiming otherwise to establish differently. Highview Estates v. Borough of Englewood Cliffs, 6 N.J. Tax 194, 200 (Tax 1983).

The highest and best use opinion offered by the taxpayer's expert is the use to which the property was put on the relevant valuation dates. It is, therefore, the burden of the municipality, whose expert offers a different highest and best use, to establish that the highest and best use of Lot 11 is for development as residential condominiums.

North Wildwood's expert undertook an extensive analysis to reach an opinion on the highest and best use of the subject property. The expert noted that the zoning at the subject property permits both residential and small commercial uses. In the expert's opinion, the physical attributes of the subject (which he considered to be both parcels) are sufficient to permit both residential and small commercial uses, given the primary frontage on Surf Avenue, as well as 17th Avenue and 16th Avenue. He opined that economic demand for the subject is created by its proximity to the beach and boardwalk. Commercial uses, however, are not likely to prosper at the subject property, given the fact that it is not located on a heavily travelled road and is not within a convenient distance to a significant year-round population. In addition, competition from boardwalk commercial establishments would likely render commercial development of the subject not viable.

The expert also examined the neighborhood surrounding that subject, which is dominated by existing residential and new residential construction in the second, vacation home market. The expert noted that economic conditions for residential use in the area of the subject were favorable during the period 2002 through 2007. During that time, parcels in close proximity to Lot 11 were developed with single-family residences in the condominium form of ownership. These residences were used largely as vacation homes and shore rentals. According to the expert, after the housing and financial markets began deteriorating in late 2007, lower demand for housing use occurred and a housing correction began. He opined that residential price trends declined following 2007, but that transactions continued, indicating the demand for these types of homes remained at a corrected price point.

The municipality's expert also examined the highest and best use of Lot 11 as improved. The expert identified two potential market participants for the subject: investors interested in an

equity return from the operation of the motel and a developer interested in demolishing the motel to make way for construction of residential units. He opined that the Surf 16 Motel competes with numerous other more desirable motel properties closer to the beach and in better condition than the subject. While the motel use conforms to general neighborhood uses, its physical condition and functional obsolescence do not create added value for investors. In addition, residential growth in the immediate area of the subject has been ongoing since 2002. New construction in the neighborhood is the result of transition from older residential and commercial properties into new residential, medium-density, structures in the condominium form of ownership. According to the expert, new residential supply occurs in the neighborhood only when developers assemble sites from older obsolete land uses for residential development.

The expert opined that the subject motel is in below average condition. Most competitors are closer to the beach. In addition, according to the expert, the rooms have low quality décor and a lack of appliances and other amenities. He opined that the property was at the end of its economic life as a motel. The expert's opinion on this point is supported by the income and expense information provided by the taxpayer with respect to the operation of the Surf 16 Motel. From 2007 to 2008 the motel experienced a drop in revenue. A more significant decline in revenue was experienced from 2008 to 2009. After expenses, net operating income dropped each year from 2006 to 2009, with the motel losing money in 2009 (without consideration of a deduction for a reserve for replacement, which would result in a further reduction in net income). The expert reasonably concluded that given the existing financial information, the property was not performing in a manner that would justify its continued existence as a motel.[4]

[4] Notably, the taxpayer's expert, when reaching an opinion of value under the income approach made a significant adjustment to the actual expenses incurred in the operation of the

In order to determine if development of the subject as residential property is economically feasible, the expert conducted a market analysis of the four municipalities which constitute the Wildwoods: Wildwood City, North Wildwood City, Wildwood Crest Borough and West Wildwood Borough. From this study, the expert concluded that: (1) typical residential unit size in the neighborhood is between 1,500 and 2,000 square feet; (2) market density for previous North Wildwood residential projects of the type that would be constructed on the subject is between 1,250 and 2,000 square feet; and (3) residential development costs are in the $125 to $150 per square foot range, including soft costs and entrepreneurial profit. The expert also concluded that the municipality would allow between 14 to 18 units on the subject. He selected 15 units as a reasonably likely to be permitted.

Using a direct sales comparison approach of land sales to determine a land value for the subject, the expert reached an opinion that the subject had a true market land value of $2 million. If an investor could purchase the subject for $2 million and could construct 15 units at a cost of $150 per square foot, including soft costs and entrepreneurial profit, the total project cost would be $6.5 million. In order to achieve the profit objectives of residential development, the residential units would require a purchase price of $434,000 per unit. According to the expert's market study, this is an achievable purchase price. He concluded that the market would produce a purchaser interested in holding the subject property for a period of time until oversupply in the

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Surf 16 Motel. He reduced expenses, which ranged from 62% to 86% of income from 2007 to 2009, to 50% of income. This adjustment is puzzling in light of the fact that the expert considered the Surf 16 Motel to have been properly managed. See Glen Pointe Assocs. v. Township of Teaneck, 10 N.J. Tax 380 (1989)(applying presumption of good management to hotel properties), aff'd, 12 N.J. Tax 118 (App. Div.), certif. denied, 122 N.J. 391 (1990). In the absence of evidence of bad management, the only plausible explanation for adjusting expenses to such an extent is to make an otherwise financially threatened property appear economically viable.

residential second vacation home market was corrected to allow for residential development of the property.

The taxpayer's expert did not undertake an extensive market study to formulate an opinion on the highest and best use for the subject property. The expert testified that he consulted with a developer and broker regarding the residential development market. In addition he noted the well-recognized economic downturn beginning in late 2007 and the tightening of credit markets, as well as the number of residential units listed for sale in North Wildwood, a drop in the number of building permits issued by the municipality after 2007, and the fact that recent motel sales in North Wildwood were made with the intent to continue motel operations. Based on these considerations, the expert concluded that the residential market in North Wildwood was flooded and that no purchaser would buy the subject property to develop residential units. The expert produced little or no market data to support this conclusion, however. While it is true that the proponent of a highest and best use other than the current use has the burden of persuasion, the taxpayer was on notice after the pretrial exchange of expert reports, that the municipality's expert was offering the opinion that the highest and best use of the subject was for residential development. The taxpayer proffered no rebuttal expert report to bolster the opinion that the continued operation of a motel was the highest and best use for the subject. This is true even though the taxpayer's expert made a considerable adjustment to actual expenses to reach a conclusion that the motel operation was economically viable.

The court finds the opinion of the municipality's expert with respect to highest and best use to be the most credible of the opinions offered at trial. The court recognizes that the booming residential development market in North Wildwood between 2003 and 2006 began to slow in late 2007. The dampened market continued from that time through 2009. However, by

2010 the market was showing signs of improvement. The court is not convinced, as suggested by the taxpayer's expert, that the residential development market in North Wildwood was moribund as of the valuation dates. Instead, the court concludes that a viable market for the development of residential units, at a corrected purchase prices after a reasonable holding period, existed for the subject property. In light of the poor condition and economic prospects for the continued operation of a motel at the subject property, the court adopts the highest and best use analysis of the municipality's expert.

D. Approach to Valuation

"There are three traditional appraisal methods utilized to predict what a willing buyer would pay a willing seller on a given date, applicable to different types of properties: the comparable sales method, capitalization of income and cost." Brown v. Borough of Glen Rock, 19 N.J. Tax 366, 376 (App. Div.)(citing Appraisal Institute, The Appraisal of Real Estate 81 (11th ed 2006)), certif. denied, 168 N.J. 291 (2001). "There is no single determinative approach to the valuation of real property." 125 Monitor Street, LLC v. City of Jersey City, 21 N.J. Tax 232, 237 (Tax 2004)(citing Samuel Hird & Sons, Inc. v. City of Garfield, 87 N.J. Super. 65, 72 (App. Div. 1965); ITT Continental Baking Co. v. Township of East Brunswick, 1 N.J. Tax 244 (Tax 1980)), aff'd, 23 N.J. Tax 9 (App. Div. 2005). "The choice of the predominant approach will depend upon the facts of each case and the reaction of the experts to those facts." Id. at 238 (citing City of New Brunswick v. Division of Tax Appeals, 39 N.J. 537 (1963); Pennwalt Corp. v. Township of Holmdel, 4 N.J. Tax 51, 61 (Tax 1982)).

The comparable sales approach "usually provides the primary indication of market value in appraisals of properties that are not usually purchased for their income-producing characteristics." Appraisal Institute, The Appraisal of Real Estate, 419 (12th ed 2001). This

method of valuation has been defined as "[a] set of procedures in which a value indication is derived by comparing the property being appraised to similar properties that have been sold recently, applying appropriate units of comparison, and making adjustments to the sales prices of the comparables based on the elements of comparison." Id. at 417.

The income capitalization approach is the preferred method of estimating the value of income producing property. Parkway Village Apartments Co. v. Township of Cranford, 108 N.J. 266, 270 (1987); Hull Junction Holding Corp. v. Borough of Princeton, 16 N.J. Tax 68, 79 (Tax 1996). "In the income capitalization approach, an appraiser analyzes a property's capacity to generate future benefits and capitalizes the income into an indication of present value." Appraisal Institute, The Appraisal of Real Estate 445 (13th ed 2008). This approach generally applies to real property that generates income from the rental of the property, not from the business activities that take place at the property.

The cost approach is normally relied on to value special purpose property or unique structures for which there is no market. Borough of Little Ferry v. Vecchiotti, 7 N.J. Tax 389, 407 (Tax 1985); Dworman v. Borough of Tinton Falls, 1 N.J. Tax 445, 452 (Tax 1980), aff'd, 180 N.J. Super. 366 (App. Div.), certif. denied, 88 N.J. 495 (1981). The cost approach "involves a replication, through the use of widely accepted cost services . . . of the cost of the components of the building to be valued, less . . . depreciation[s]." Gale & Kitson Fredon Golf, LLC v. Township of Fredon, 26 N.J. Tax 268, 283 (Tax 2011)(quotations omitted). "A cost approach has two elements – land value and the reproduction or replacement cost of the buildings and other improvements." International Flavors & Fragrances, Inc. v. Borough of Union Beach, 21 N.J. Tax 403, 417 (Tax 2004). From the estimated reproduction cost is deducted depreciation from all causes. Depreciation is defined as a loss in value from three causes: physical

depreciation, functional obsolescence and external economic factors. The cost approach is most effective when the property being valued is new, in light of the difficulties in accurately estimating the various components of depreciation. See Worden-Hoidal Funeral Homes v. Borough of Red Bank, 21 N.J. Tax 336, 338 (Tax 2004).

Given the court's finding with respect to highest and best use, the court concludes that the sales comparison approach is the best approach to take to determine the true market value of the subject property. The income approach is inapplicable because the highest and best use of the property is not for rental purposes. The cost approach also is not applicable because the highest and best use of the subject is for demolition of existing structures and development of new residential units. The sales comparison approach will determine the price that a willing seller and a willing purchaser interested in developing the subject as residential units would reach after arms' length negotiations.

E. Calculation of Value Using Sales Comparison Approach.

The municipality's expert is the only witness at trial to offer an opinion of value based on the sales comparison approach. The expert examined six sales of land in North Wildwood during 2005. The expert verified the terms of the sales with the grantor, grantee, brokerage representative or other sources. He determined that each was an arms' length transaction. Each sale was for the purpose of developing new medium-density residential housing in the condominium form of ownership. Although the taxpayer challenged the validity of the comparable sales by arguing that they were assemblages, the court was not convinced by the line of questioning. An assemblage may raise questions about whether true market value has been paid for a parcel – there is a common assumption that a purchaser may pay more than true market value for the final parcel of an assemblage. Here, however, the expert was satisfied after

inquiry into the facts that the transactions were the result of arms' length negotiations. In addition, the expert testified that the two parcels listed in the Complaint would themselves be assembled for the purpose of residential development. The taxpayer offered no evidence that the negotiations leading to the comparable sales were unduly influenced because they represented the assemblage of more than one parcel. The expert determined a sales price per bulk residential unit constructed. The sales prices per bulk residential unit ranged from $182,143 to $286,000.

To these purchase prices per unit the expert made various adjustments. He made adjustments to account for the subject property's proximity to the beach and boardwalk. The expert credibly testified that market value of residential property in North Wildwood increases as proximity to the beach and boardwalk improves. He also made adjustments to account for the existence of development approvals at the time of sale, as a purchaser of the subject property, which did not have development approvals in place on the valuation dates, would take the risk of securing such approvals. The expert opined that a purchaser of the subject property would hold it for a three-year period to permit absorption of the existing supply of residential properties. These adjustments – characterized by the expert as a form of economic obsolescence – ranged from negative 6% to negative 12%. The expert also made an adjustment to account for the expense of demolishing existing structures on the subject property. Because all adjustments applied were negative, the expert's net adjustments and gross adjustments were the same. These adjustments ranged from 15% to 25% for tax year 2009.

After adjustment, the price per bulk unit of the six comparable sales ranged from $152,885 to $225,940 for tax year 2009. The expert, giving the three comparable sales he considered most similar to the subject the greatest weight, reached the opinion that the market rate for the subject property as of October 1, 2008 was $175,000 per residential unit. Having

determined that the subject property would be developed with 15 residential units, the expert concluded a true market value of $2,625,000 as of the first valuation date (15 x $175,000 = $2,625,000).

The expert relied on the same six comparable sales for tax year 2010. He made adjustments for the same categories as were made for tax year 2009. Again, all adjustments were negative. As a result, the expert's net adjustments and gross adjustments were the same. These adjustments ranged from 12% to 24%. The adjusted prices per bulk unit ranged from $144,078 to $215,444. The expert, giving the three comparable sales he considered most similar to the subject the greatest weight, reached the opinion that the market rate for the subject property as of October 1, 2009 was $160,000 per residential unit. Having determined that the subject property would be developed with 15 residential units, the expert concluded a true market value of $2,400,000 as of the second valuation date (15 x $160,000 = $2,400,000).

The court adopts these opinions of true market value.

F. Extracting Value of Block 266, Lot 15

Because the court lacks jurisdiction to review the assessment of Block 266, Lot 15, the value of Lot 15 must be subtracted from the total value of the two lots as a single economic unit. The assessment on Lot 15 for both tax years is $595,200. This amount will be subtracted from the true market value determined by the court for the two tax years as follows:

Year	Total Value		Lot 15 Assessed Value		Remainder
2009	$2,625,000	-	$595,200	=	$2,029,800
2010	$2,400,000	-	$595,200	=	$1,804,800

The remainder values will be allocated to Block 266, Lot 11.

G. Applying Chapter 123

Pursuant to N.J.S.A. 54:51A-6a, commonly known as Chapter 123, in a non-revaluation year an assessment must be reduced when the ratio of the assessed value of the property to its true value exceeds the upper limit of the common level range. The common level range is defined by N.J.S.A. 54:1-35a(b) as "that range which is plus or minus 15% of the average ratio" for the municipality in which the subject property is located.

The true values determined above must, therefore, be compared to the common level range for North Wildwood for the relevant tax years. The formula for determining the subject property's ratio is:

Assessment ÷ True Value = Ratio

1. Tax Year 2009

$3,051,700 ÷ $2,029,800 = 1.50

The chapter 123 average ratio for North Wildwood for tax year 2009 is 1.0832.

Where both the average ratio and the ratio of the assessed value of the subject to its true value exceed the county percentage level (100%), the court shall enter judgment revising the taxable value of the property by apply the 100% county percentage level to true value. N.J.S.A. 54:51A-6(c). Consequently, a Judgment establishing the assessment for the subject property for tax year 2009 will be entered as follows:

Land	$1,734,900
Improvement	$ 294,900
Total	$2,029,800

2. Tax Year 2010

$3,051,700 ÷ $1,804,800 = 1.69

The chapter 123 average ratio for North Wildwood for tax year 2010 is 1.1375.

Where both the average ratio and the ratio of the assessed value of the subject to its true value exceed the county percentage level (100%), the court shall enter judgment revising the taxable value of the property by apply the 100% county percentage level to true value. N.J.S.A. 54:51A-6(c). Consequently, a Judgment establishing the assessment for the subject property for tax year 2010 will be entered as follows:

Land	$1,542,600
Improvement	$ 262,200
Total	$1,804,800

Very truly yours,

Patrick DeAlmeida, P.J.T.C.