NOT FOR PUBLICATION WITHOUT APPROVAL OF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

TAX COURT OF NEW JERSEY

Mala Sundar
JUDGE

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BY ELECTRONIC MAIL

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Re: Hertrich v. Township of Middletown
Block 619, Lot 1 (1255 Highway 35)
Dkt Nos. 11371-2009; 8163-2010; 5896-2011; 5805-12; 5265-13

Dear Counsel:

This letter constitutes the court's decision following trial of the above captioned matters. Plaintiff contests the local property tax assessments for tax years 2009-2013 on the above captioned property ("Subject") located in defendant Middletown Township ("Township"). The Township filed counterclaims for tax years 2012 and 2013. The contested assessments are as follows:

*

Tax Years 2009-2011:

Land:	$3,960,000
Improvements:	$ 672,200
Total:	$4,632,200

Tax Years 2012-2013

Land:	$3,960,000
Improvements:	$ 764,400
Total:	$4,724,400

The Chapter 123 ratio and the upper/lower limits for each tax year were as follows:

Tax Year	**Average Ratio**	**Upper Limit**	**Lower Limit**
2009	39.83%	45.80%	33.86%
2010	95.56%	109.89%	81.23%
2011	100.02%	115.02%	85.02%
2012	91.38%	105.09%	77.67%
2013	94.81%	109.03%	80.59%

Each expert's value opinion for each tax year was as follows:

Tax Year	**Plaintiff's Expert**[1]	**Township's Expert**[2]
2009	$2,181,000	$6,500,000
2010	$2,260,000	$6,250,000
2011	$2,260,000	$6,700,000
2012	$2,260,000	$6,600,000
2013	$2,400,000	$6,600,000

PROCEEDINGS

Plaintiff presented a witness who was qualified to testify as an expert in real estate appraisal in these matters, and his report was admitted into evidence without objection.

After plaintiff's proofs, the Township moved to dismiss the complaints under R. 4:37-2. The court found that plaintiff's expert's opinion was of sufficient quality and quantity being

[1] Plaintiff's expert also concluded a value under the cost approach for each tax year as $2,662,000; $2,710,000; $2,885,000; $2,885,000; and $2,992,000, respectively. He however chose his value conclusions under the sales comparison approach as the most reliable indicator of the Subject's fair market value.

[2] The Township's expert's report did not include tax year 2013. The Township stipulated that its expert's value conclusion for 2012 was the same for 2013. Plaintiff did not object to this stipulation.

based on reasonable appraisal theory and underlying data, which when viewed through "rose-colored glasses," and giving plaintiff "all legitimate inferences which can be deduced from the evidence," required denial of the motion. See MSGW Real Estate Fund, L.L.C. v. Borough of Mountain Lakes, 18 N.J. Tax 364, 376, 378-79 (Tax 1998).

The Township then presented its expert witness, qualified and accepted as such by the court. His report was admitted into evidence, subject to the court's ruling on plaintiff's motion to strike certain portions on grounds defendant's expert was incompetent to testify about the valuation of excess lands because he did not know the difference between excess and surplus lands, and thus, the applicable or accepted valuation methodology in this regard. Plaintiff also moved to dismiss the Township's counterclaims under R. 4:37-2.

For the reasons stated below, the court finds that neither expert's approach provides a reliable indicator of the Subject's true value. Therefore, it affirms the assessments.

FACTS

(A) Physical Description

The Subject is a Chevrolet car dealership commonly known as "All-American Chevrolet." It is located on Route 35 which is fully developed as a highway development zone with commercial buildings such as motels, restaurants, retail strip malls and shopping centers.

The Subject is comprised of an irregular shaped lot measuring about 9.9± acres (or 431,244 SF) with about 810± feet of frontage on Route 35; about 880± feet on Oakdale Drive, the rear street; and about 508± feet on Greenoak Boulevard, the side street. Access to the site is through a driveway from Route 35, and another driveway from Greenoak Boulevard. There is a 25-foot wide sewer easement along the frontage on Route 35. All public utilities are available.

The Subject is generally level along the street frontage on Route 35. It then markedly slopes downward toward the rear (about 100 feet from Route 35). There are a flight of stairs on the slope to the right of the showroom for access to the rear improvements. There is a retaining wall at the bottom of the slope on either side of the showroom. Beyond the sloping area, the Subject is fairly level to the extent improved.

The site map indicates that there are natural areas/boundaries towards and in the southern and westerly areas of the Subject such as stream encroachments, stream buffers, woods and natural vegetation. These areas lie behind what is marked as "edge of pavement" on the site map, the southerly area in this regard being beyond where the Subject is improved (i.e., behind the main showroom and service buildings) and the westerly areas being the unimproved areas to the side of these buildings. Also in the southerly and westerly direction are two areas marked as 50' wetlands buffers. The portion of the land within these buffers is identified as wetland area. A small portion of the 50' wetlands buffer located in the southern area lies inside the "edge of the pavement" line (i.e., behind the main showroom and service buildings). Portions of the buffer are also on the westerly area where plaintiff built an additional parking lot for display/storage of its vehicles (see infra for further description of the parking lot). The photographs included in plaintiff's expert's report show streams with abutting trees and land covered with natural (un-landscaped) vegetation. The extreme southern portion of the Subject is marked with residential buffers.

In June 2005, the New Jersey Department of Environmental Protection ("NJDEP") issued a Letter of Interpretation confirming the existence of wetlands. Both experts were uncertain as to the exact acreage of the area covered by natural features, excluding the two 50' buffers. Plaintiff's expert testified that he estimated the same as being about 4.9 acres in the westerly area

of the site map towards the rear of the Subject, and that his brother's friend had assisted him with a software program to make this calculation. The Township's expert also deemed about 4.9 acres as being the area which was not developed. He did not agree that all of this area was to the rear of the Subject.

The Subject is improved with a 15,840 square foot ("SF") building constructed sometime in 1989. The first floor, which is at street level, houses the showroom, customer service waiting area and sales offices. Downstairs from the showroom is the service and parts department, as well as the service area. The service area, containing several fully functional garage bays, continues to the rear of the main building and is made of masonry and metal. The experts agreed that the main building's condition was average.

In 2007, the NJDEP approved plaintiff's application and granted permits for disturbing 653 SF of State Open Waters for the planned construction (additional parking lot) and for disturbing 378 SF of freshwater wetlands for building an "outfall structure with associated rip-rap aprons and hardwalls." This was in connection with plaintiff's 2005 plan to expand the site to build another parking area for vehicle parking/storage and expand the building structure by about 3,200 SF, which plan and variance approval[3] was provided in May of 2006.

By deed of September 29, 2009, plaintiff granted a conservation easement over the Subject to the Township so as to preserve the undisturbed wetlands and transition areas, pursuant to which plaintiff undertook not to remove any trees and ground cover unless necessary for conservation. Despite the parties assertion that the easements covered 2.17 acres, the metes and

[3] The court was not provided with any information regarding the reasons for, and the nature of, the variance sought by plaintiff and approved by the Township. Plaintiff's expert's report noted that variances were required because the expansion was into "a residential buffer area," however, there was no evidence in this regard. Further, the residential buffer areas lay to the southern portion of the site whereas the expanded parking lot was in the south-westerly portion which did not contain areas identified as residential buffers.

bound description in the deed shows two easements covering 0.89 acres and 0.28 acres, both areas being towards the south-easterly and westerly portions of the site. The easements were required as a part of the NJDEP's permit grants.

Plaintiff then constructed the additional paved parking lot and bridged a small stream in the process. This lot is about an acre and is located in the westerly portion of the Subject. This construction was completed sometime in 2011. The paved lot is not visible from Route 35 due to the sloping topography.

In 2012, plaintiff started renovations and expansion of the building from 15,840 SF to 18,836 SF. A certificate of occupancy for the expansion was issued May 2013. The experts agreed that the plaintiff was a functionally profitable car dealership which led to the construction of the additional parking lot and building expansion.

(B) Zoning

The Subject lies in the B-3 or the Highway Business zoning district. Permitted uses include automotive sales and services. Section 16-921 of the Planning and Development Regulations provide that the minimum gross lot area is three acres; the minimum buildable lot area is 2.5 acres; the minimum lot frontage is 200', and the minimum gross floor area and first floor area is 5,000 SF. §16-921. The maximum building height is three stories or forty feet; the maximum lot coverage is 70% for one-story buildings and 60% for two-plus stories; and the maximum floor area ratio is 25%. Ibid. The experts agreed that the Subject's use is legally conforming. They also agreed that the 60% lot coverage applied to the Subject.

(C) Highest and Best Use

Plaintiff's expert opined that the highest and best use of the Subject as vacant was for future commercial development. He noted that the streams and wetlands on the Subject could

affect the development potential of the site if vacant, but construction was possible where legally permitted; future commercial construction is financially feasible due to recent occupancy levels and because the Subject's immediate and zoned areas were for commercial uses; and that the maximally productive use of the Subject as vacant was for future commercial development.

As improved, he opined that the Subject's highest and best use was its current use because it was permitted by zoning; the site was large enough to accommodate its present use and it was also physically possible to build any of the permitted uses allowed under the zoning on the site; the current use was profitable since it provided a financial return in excess of operating expenses; therefore, was also the maximally productive use.

He testified that while hypothetically it was physically possible to develop the Subject for any commercial use, it may not be financially feasible to develop a retail shopping center. He stated that this was due to the sloping topography which would limit visibility, a significant factor for shopping centers, and require substantial costs to cure.

The Township's expert concluded that Subject's highest and best use as vacant was for development of a retail shopping center in accordance with the zoning requirements because the site was large enough to physically support "any appropriately scaled improvement." As improved, he concluded the Subject's highest and best use was its current use "on an interim basis until market demand justifies" demolition of the car dealership and redevelopment into a retail shopping center. He testified that this was because the Subject was under-utilized given its large acreage, and the land was too valuable for such a small dealership.

The Township's expert's opinion of the potential highest and best use of the Subject as a retail shopping center was primarily based upon the large size of the lot. He however provided no factual basis such as sub-division applications, approvals or permits. He agreed, as did

plaintiff's expert, that the plaintiff's business was a good location for a car dealership due to the nearby commercial cluster. Both experts agreed that the Subject was functionally a profitable automobile dealership despite the wetland buffers and streams. They agreed that the highest and best use was for commercial purposes. The court finds that the Subject's use as vacant was for commercial development and as improved, was its current commercial use.

(D) Subject's Valuation by Experts

Both experts agreed that the optimal lot size for a car dealership is about five acres. They also agreed that prior to expansion the Subject had a lot coverage of 3.94 acres (or 39.75%) and after expansion in 2011, the coverage increased to 5.76 acres (or 58.23%). However, they disagreed on the meaning/calculation of lot coverage under the zoning regulations, and on the valuation of the undeveloped portion of the Subject.

(1) Plaintiff's Expert's Value Conclusion

Plaintiff's expert theorized that although the zoning regulations allowed for 60% lot coverage, that percentage should be computed on the usable portion only, i.e., excluding the wetlands/forest area of about 4.9 acres. He testified that no one typically builds out to the maximum allowed percentage since there is always an "ideal size," which, for car dealerships is five acres. Since car dealerships are valued on a per square foot ("PSF") basis of buildable area, land in excess of the ideal size is irrelevant, according to him, especially if such land is not buildable due to wetlands or other natural impediments.

He testified that the zoning was confusing, but opined that only buildable area has value. For example, he stated, if the site had 6 acres with no wetlands, then the buildable or usable area, and thus, the subject of valuation is 60% or 3.6 acres. He explained that if, however, three of the 6-acre site has wetlands in the rear, then only three acres has value, thus, the buildable area is

60% of 3 acres. On the other hand, he said, if the site was 10 acres, all of it was wetlands, then the entire site is inutile, thus, of little value, regardless of the 60% allowance to build. According to him, if that same site had a frontage of 7 acres of wetlands, 3 acres of upland in the back but no access, then, the same result would entail, namely, 100% inutile, thus, of little value, regardless of the 60% allowance. He thus developed a value under the sales comparison approach for 4.75 acres in 2009 and 5.75 acres thereafter.

His comparable sales were four car dealerships all located in Monmouth County. He made adjustments for market condition; location; land-to-building ratio (deeming the Subject's undeveloped area as "having no frontage, low lying and not capable of being subdivided" thus meriting only +5%); and physical condition. He arrived at an adjusted PSF sale price of $140 for the Subject. He adjusted this for market conditions for tax years 2010 and 2013, respectively, and by +10% for "the additional acre of land" for tax year 2010. He concluded a value (rounded) of $2,181,000 for tax year 2009 (15,578 SF x $140 PSF); $2,260,000 for tax years 2010-2012 (15,578 SF x $145 PSF); and $2,400,000 for tax year 2013 (15,578 SF x $154 PSF).

The expert also used a cost approach which resulted in higher value conclusions. He first developed the value of the "usable" portion of the Subject (4.75 acres for tax year 2009 and 5.75 acres for succeeding tax years) by using six vacant commercial land sales in Monmouth County. He made adjustments for market conditions; location; lot size; and approvals. He concluded an opinion of $310,000 per-acre for the Subject's 4.75 acres. He attributed 50% of this amount to the additional acre of the developable expanded parking lot for tax year 2009. For tax year 2010 onwards the value of the "useable" portion was at $310,000 per-acre for 5.75 acres. He adjusted the $310,000 for market conditions for tax years 2010 to 2013. His final conclusion of value for

the "useable" portion of the Subject was $1,627,500 (2009); $1,675,550 (2010-2012); and $1,782,500 (2013).

For the "unusable" portion of the site of 4.15 acres (9.9 acres less 5.75 acres), he used four land sales of parcels in Fairfield Township (in Essex County) and one in Chatham Borough. The Fairfield lands, all zoned Agricultural Conservatory, were conveyed by private parties to the NJDEP and the conveyance to Chatham Borough, zoned manufacturing, was from the NJ Water Company. He deemed $10,000 as the per-acre value, thus added $41,500 for each tax year to the above land value conclusions for a total land value for each tax year as $1,669,000 (2009); $1,717,000 (2010-2012); and $1,824,000 (2013).

To this he added the depreciated value of the Subject's improvements based upon 11,200 SF average Class S car dealership (which was the rear of the building built of metal with minimal finishes) and 4,378 SF of good Class C car dealership (which was the front showroom of superior masonry structure). He concluded the depreciated cost of improvements (after entrepreneurial profit and 50% depreciation) plus site improvements as $993,000. For later tax years he added $175,000 as the undepreciated cost of the expanded parking lot for a total cost of $1,168,000.

The depreciated cost of the improvements plus land values provided a value conclusion of $2,662,000 (2009); $2,710,000 (2010); $2,885,000 (2011-2012); and $2,992,000 (2013)

(2) Township's Expert's Value Conclusion

The Township's expert used the sales comparison approach and the cost approach. Although he testified that since most of the assessment for each tax year was upon the land and he thus deemed the cost approach to be of significant consideration, his report noted that the sales comparison approach was "given greatest weight in [the] final value conclusion."

The expert stated that a major portion of the improved land was being used as parking lots, an important factor for car dealerships since ample space allows for more display and storage of inventory. He agreed that about 4.9 acres of the undeveloped area on the Subject had no frontage on Route 35 (the highway), which frontage would be an important factor when valuing land for commercial use. He also agreed that generally buffer zones are not allowed to be improved and that if the wetlands portion was a separate parcel, significant adjustment would have to be made in its value conclusion.

He maintained that he valued the entire parcel because zoning approvals and floor area analyses are done on the full acreage and by considering the entire lot as one (although he did not know for a fact whether the Township would use the entire tract of 9.9 acres or only the "useable" acreage in any lot coverage approval process). He also stated that the buildings on the site could be expanded further since they currently occupied 4% of the lot which was much below the 25% allowed floor area ratio, thus, there is value to the entire land; and, although wetlands as entire or block parcels are not buildable, the Subject has wetlands and stream encroachments only in portions of the site, thus, the site could be developed around these impediments. He therefore attributed additional value to 4.9 acres based upon a comparable sales analysis of vacant commercial land sales but without any adjustments for the Subject's natural conditions and the environmental encumbrances. He maintained that "we valued the 5 acres as a car dealership and valued the 4.9 acres as excess land that can be subdivided and sold off" under his sales comparison approach, but for his cost approach he valued the Subject "as one 9.9. acre lot."

The expert first developed a land value under the cost approach. He used vacant land sales with zoning similar to the Subject. None of the comparables had any environmental issues

or restrictions. He made adjustments for market conditions; location; tract size; approvals; and utility (compared to the Subject's level frontage and downward sloping in the rear). He did not provide any adjustments for topography, conservation easements, wetlands, wetland buffers, streams or forested areas of the Subject.

For tax year 2009, he concluded the Subject's per-acre price as $475,000 for a land value conclusion of $4,702,500. He added the depreciated cost of the Subject's improvements (computed separately for building, paving, and other improvements such as landscaping, walkways, curbs, lighting) opining the building to be Class C average/good quality, as $1,496,989, which when added to the land value gave a total value of $6,200,000 (rounded).

For 2010, he concluded an adjusted per-acre price of $450,000, which provided a land value conclusion of $4,455,000. His depreciated cost of improvements was $1,720,274, which when added to the land cost of $4,455,000 provided a total value of $6,175,000 (rounded).

For tax year 2011, he concluded a per-acre price of $550,000, thus a total land value of $5,445,000. The depreciated cost of improvements was $1,700,869, which when added to the land value provided a total of $7,145,000 (rounded).

For 2012 and 2013, the expert concluded the Subject's per-acre price as $525,000, thus, total value of $5,197,500. His depreciated cost of improvements was $1,614,433, which when added to the land value provided a total value as $6,810,000 (rounded).

Under his sales comparison approach, the Township's expert developed a value for 5 acres of the Subject "to reflect a typical automobile dealership land to building ratio." He used comparable sales of automobile dealerships in commercial/business zones, with acreage of about six acres of less, and made adjustments for market conditions; location; building size; physical

condition;[4]and land-to-building ratio (proportion of land to gross building area using 5 acres as the Subject's land size[5]); and utility. He then attributed a value for the remaining 4.9 acres based upon his land value conclusion under the cost approach for each tax year.

For 2009, he concluded the Subject's PSF price as $275 which provided a value of $4,356,000. To this he added $2,327,000 (land value for 4.9 acres), for a total value of $6,685,000. He reconciled this with his $6,200,000 value conclusion under the cost approach for a final value of $6,500,000.

For 2010, the expert concluded a value of $4,197,600 at $265 PSF for the Subject. To this he added $2,205,000 (land value for 4.9 acres), for a total value of $6,402,600. He reconciled this with his $6,175,000 value conclusion under the cost approach for a final value of $6,250,000.

For tax years 2011-2013 he concluded the Subject's value as $3,960,000 at $250 PSF. To this he added $2,695,000 (land value for 4.9 acres), for a total value of $6,655,000 for 2011. He reconciled this with his $7,145,000 value conclusion under the cost approach for a final value of $6,700,000. For tax years 2012 and 2013, he added $2,572,500 (land value for 4.9 acres), for a total value of $6,535,000 (rounded), and reconciled this with his $6,810,000 value conclusion under the cost approach for a final value of $6,600,000.

ANALYSIS AND FINDINGS

(*A) Standard of Review*

[4] On cross-examination he noted that all the comparables were in better condition than the Subject since the Subject's condition in 2013 (when he had inspected it) was average, therefore, on the respective assessment dates must have been below average or less-than average.

[5] He stated that dealerships generally had larger lot space as compared to the improvements, and that the Subject had a 13.75:1 ratio using the 5 acres.

"Original assessments and judgments of county boards of taxation are entitled to a presumption of validity." MSGW, supra, 18 N.J. Tax at 373. Due to the "strength of the presumption," a taxpayer has the burden of proving "that the assessment is erroneous" with evidence that must be "definite, positive and certain in quality and quantity to overcome the presumption." Ibid. (citations and quotations omitted).

Once the presumption of correctness is overcome, the court must determine the value "based on a fair preponderance of the evidence." Ford Motor Co. v. Township of Edison, 127 N.J. 290, 312-13 (1992). The court's "independent assessment" depends "on the evidence before it and the data that are properly at its disposal." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 430 (1985). The complainant continues to bears the burden of persuading the court that the "judgment under review" is erroneous. Ford Motor Co., supra, 127 N.J. at 314-15.

(B) Credibility of Experts' Value Conclusions

Both experts' positions are problematic. Plaintiff's expert's theory that the Subject should be valued as if it had only 5 acres is questionable because the undisputed fact is that the Subject's improvement coverage at 3.94 acres pre-expansion and 5.75 acres post-expansion, was possible only because of the large site size which allowed for greater area of improvement. As the expert agreed, plaintiff was definitely motivated to construct the additional parking area of about an acre for additional vehicle display and storage. If, as he posited, 5 acres is the ceiling for a car dealership (being the optimal lot size), then the Subject's improvements at 3.94 and 5.75 acres would exceed the 60% lot coverage allowed by the zoning regulations. But there is no evidence of such a violation or any information in support thereof. Nor is there any indication that variances were obtained to exceed the 60% maximum coverage limit. See supra, n.3.

Further, plaintiff's expert opined that the Subject's highest and best use was its current use because it was permitted by zoning; the site was large enough to accommodate its present use; it was physically possible to build any of the permitted uses allowed under the zoning on the site; and the current use was profitable since it provided a financial return in excess of operating expenses. This, combined with the improvements' actual lot coverage, shows that plaintiff obtained the benefit of the large size of the lot for its business purposes.

The court is not convinced that because the allegedly optimal size for a car dealership is 5 acres, land in excess of this area is automatically surplusage of minimal value. Larger lot sizes are desirable as they allow for bigger displays and storage of automobiles. See generally Carole Hale, The Peculiarities of Appraising Auto Dealership Facilities, The Appraisal Journal 355 (Oct. 1998). The court is persuaded by the Township's arguments that plaintiff was able to obtain a maximal utilization of 9.9 acres and took full advantage of the portion of allowable use of the site, therefore, plaintiff's expert should not assign a value to only 4.75 to 5.75 acres of the Subject.

Contrary to the Township's argument, however, the zoning regulations do exclude certain environmentally sensitive areas from the computation of lot coverage.[6] The term "lot coverage" is defined as follows:

> **Lot Coverage** means the area of the lot covered by buildings and structures and accessory buildings or structures and expressed as a percentage of the total lot area. For the purpose of this Ordinance, lot coverage shall include all parking areas and automobile access driveways and internal roadways, whether covered by an impervious or pervious material, . . . , and all other impervious surfaces except for the following:

[6] Both experts testified to, and their reports contained references to the Township's zoning ordinance in terms of the minimum requirements, including, the lot coverage. The court therefore takes judicial notice of the definition of the term contained in the ordinance since this is public law. See Evid. R. 201(a).

> 1. Exterior walkways and plazas designed exclusively for pedestrian use as part of a commercial . . . or office development and which are part of an overall landscaping plan . . . .
>
> [§16-203]

"Lot area" is defined as "the acreage and/or square footage of a lot contained within the lot lines of the property" excluding portions "in a street right-of-way" but including "[p]ortions of lots encumbered by easements." Ibid.

"Lot" means "a designated parcel, tract or area of land established by a plat or otherwise as permitted by law and to be used, developed or built upon as a unit." Ibid. It also includes "land occupied or to be occupied by a building, structure and permitted accessory uses, . . . together with such open spaces as are specified and required under the provisions of this Chapter, having not less than the minimum area required . . . for a lot in the zone district in which such a lot is situated, and having the required frontage on a street." Ibid.

The regulations address areas of a lot encumbered by environmentally designated lands in the section titled "Description of Districts." Section 16-902(I) states:

> The method of calculating lot coverage for all parcels created, subdivided, merged or established after the effective date of this Ordinance shall be based upon the contiguous buildable lot area and not the gross tract area. The method of calculating lot coverage for existing isolated lot, lawfully existing prior to the effective date of this Ordinance shall be based upon the gross tract area and not the buildable lot area.[7] (emphasis added).

The term "contiguous buildable lot area" is not defined as such. However, the regulations define the terms "contiguous developable area;" and "buildable lot area" as follows:

> **Contiguous Developable Area** means lot area less all Class I Critical Areas and no more than twenty-five (25%) percent Class II Critical Areas within a lot.
>
> **Buildable Lot Area** means the contiguous area of any lot exclusive of Class I Critical Areas and with not more than twenty-five (25%) percent of its area classified as Class II Critical Areas.

[7] The "Planning and Development Regulations" were adopted June 13, 1994 by Ordinance No. 94-2378. Thus, the quoted section applies to plaintiff's matters.

[§16-203]

In turn, "Critical Area" is defined as "an area containing sensitive natural resources or features, including steep slopes, tidal and non-tidal wetlands, transition areas, stream corridors and transition areas." Ibid. "Class I" and "Class II" critical areas are defined in regulations governing "Lot Design and Critical Area Requirements" as follows:

> A. All site plans, subdivision and planned development layouts shall comply with the following requirements:
>
> 1. Each development shall identify and map on-site critical areas such mapping shall depict the location of each of two (2) classes of critical area in relation to the proposed development. Each class of area shall be distinguished graphically and the total area of each class within each lot shall be noted.
>
> a. Class I Critical Areas shall include all lands which are within one (1) or more of the following:
>
> (1) Tidal Wetlands.
>
> (2) Nontidal Wetlands.
>
> (3) The area of steep slopes which are twenty-five (25%) percent or greater.
>
> (4) Surface waters and watercourses.
>
> b. Class II Critical Areas shall include all lands which are within one (1) or more of the following:
>
> (1) Steep slope areas where the slopes are fifteen (15%) percent or greater, but less than twenty-five (25%) percent.
>
> (2) Transition areas, insofar as they apply to freshwater wetlands, required pursuant to the New Jersey Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.)
>
> 2. Each lot shall contain a contiguous developable area in accordance with the buildable lot area as specified in the Schedule in Section 16-902. Up to twenty-five (25%) percent of the contiguous developable area of any lot can be Class II critical areas. (Ord. No. 2000-2604 §I)
>
> 3. Any portion of any site or lot which is both a Class I and Class II Critical Area shall be considered as Class I only.
>
> [§16-624]

In sum, the zoning regulations exclude 100% of a "Critical I" area and up to 25% of a "Critical II" area from the computation of lot coverage. To the extent a site contains both categories, the entire portion is excluded as a Critical I Area.

The Subject's site map does not contain the labels "Critical 1" or "Critical II" areas. Nor is there an identification of areas labeled "tidal" or "nontidal" wetlands or steep slopes of 15%-25% or greater. The area covered by a conservation easement in the Subject does not appear to be excludable under the above definitions. But see §16-203 (defining a "conservation easement" as a "deed restriction" limiting development, and noting that it is "generally utilized to protect environmentally sensitive areas including, but not limited to wetlands, transition areas, streams, ponds, steep slopes, screening buffers and specimen trees").

However, several areas on the map are identified as being "freshwater wetlands." It also identifies streams or surface waters/watercourses. Further, it notes that "flags B24-B32, A20-A28, B6-B10, A8-A11, B-15-B20 are State Open Waters and do not have an associated transition area," however, "all other flags are intermediate resource value wetlands with a standard transition area of 50 feet." The site map indicates several flags in addition to flags B24-B32, A20-A28, B6-B10, A8-A11, B-15-B20. It is also undisputed that the NJDEP provided a letter of interpretation that the Subject has wetlands.

Consequently, there may be areas on the Subject which may qualify as either Critical I and/or Critical II Areas. However, the court has no way of knowing whether this is so, and if so, the size of the area which falls in either category. Neither expert nor their reports provided this information. Neither expert posited that the highest and best use of the 4.9 acres was for conservation. Thus, plaintiff's expert's position that all of the 4± acres which is not developed and not being used by plaintiff is entirely excludable from lot coverage as undevelopable,

environmentally protected and encumbered lands, is questionable. So is the Township's expert's contrary belief.

Thus, while the court disagrees with plaintiff's expert that an area above 5 acres merits little to no value as surplusage, under the facts above, the court also disagrees with the Township that the zoning regulations do not permit exclusion of environmentally sensitive areas from the computation of lot coverage. Nonetheless, it is undisputed that the Subject's current improvements cover about 6 acres, thus regardless of the actual area covered in the 60% calculation, plaintiff was able to obtain a maximal utilization of the 9.9 acres. Consequently, notwithstanding the Township's erroneous interpretation of lot coverage under the zoning regulations, the court finds that valuation of the Subject is not limited to 4.75 to 5.75 acres.

This then raises the issue of the application of the sales comparison approach used by and solely relied upon by plaintiff's expert, and principally by the Township's expert, and whether the experts' methodology provides a credible value for the entire lot.

Plaintiff's expert methodology is not persuasive. First, his determination was based upon the Subject having only 4.75 acres (in 2009) and 5.75 acres (for 2010 onwards). The court has determined that this is not reasonable.

Second, while he correctly observes that in a sales comparison approach, land value is not separately computed or provided, his allocation of +5% land-to-building ratio adjustment as the value of the Subject's 4.9 acres is not credible. He did not know the exact area impacted by environmental protections, and thus, the total non-buildable areas. The conservation easements are about one acre, not 2.17 acres as he posited. The site map and zoning regulations do not lend to a conclusion that the 4.9 acres is a Critical I area, thus fully excludable from lot coverage. Other than the two areas marked as 50' wetlands buffers, within which buffers lay the wetland

areas, the court has no measurements on the exact amount of environmentally impacted acreage. Further, the adjustment percentage contradicts the expert's opinion that the Subject's highest and best use is for future commercial development if vacant and its current use as improved. To thus deem that 4.9 acres merits only +5% adjustment to the comparables' sale prices is not credible.

Last, the expert's opinion that the value of the extra acre of additional parking lot is 10% more than the Subject's PSF value for 2009 is not supported by objective data. It is also flawed because that 2009 PSF value was determined by giving only a 5% adjustment for lot size which adjustment, as explained above, is not persuasive.

The Township's expert's position is also not persuasive. There was no factual information to support his supposition that the 4.9 acres could be subdivided or that a subdivision was a known and positive eventuality. See e.g. Russo v. Borough of Carlstadt, 17 N.J. Tax 519, 524-525 (App. Div. 1998) (affirming the Tax Court's decision to reject the Borough's valuation as being based on supposition that the property could be developed simply because it was located in a light industrial zone despite its official classification as wetlands and navigable waters and receipt of a post-assessment permit to develop).

More importantly, treating the 4.9 acres as excess land contradicts his position that the six acres of improvement was possible only because of the Subject's tract size of 9.9 acres. It also contradicts the basis for his theory that the entire land was to be valued as one segment as opposed to limiting valuation to the five-acre "ideal" car dealership or "usable" land only. Indeed, he did not make adjustments for the undisputed natural conditions on the land such as wetlands, conservation easements, and buffers nor treated the same as impediments to, or as adversely impacting, the land value because he treated that land as one 9.9 acre lot. Thus, his deeming the entire lot as fully utilized for purposes of benefitting from the allowed lot coverage

contradicts his factually unsupported opinion that the undeveloped 4.9 acre portion merits a separate value as excess land.

In sum, the court is not persuaded by either expert's treatment of the undeveloped portion of the Subject under their respective sales comparison approach. The court's removal of either expert's +5% land-to-building ratio adjustment in not a satisfactory answer since ignoring the same would not provide a reliable fair market value conclusion of the Subject. The court cannot hypothesize this adjustment. The experts' unsatisfactory treatment of the undeveloped portion of the Subject renders unnecessary the court's detailed analysis of the credibility of their respective comparable sales.

The court also finds neither expert's cost approach reliable. Plaintiff's expert's allocation of wetlands classification to the entire 4.9 acres is likely erroneous in light of the site map and the lot coverage definition in the zoning regulations. It also contradicts his opinion of the Subject's highest and best use. Moreover, none of the comparables were zoned as the Subject. Rejection of his value for the 4± acres necessarily precludes evaluation of his land value analysis and conclusion for the 5± acres, and thus, of the improvement cost, which is the second element in the cost approach.

The Township's expert land value conclusion is problematic due to absence of any adjustment for the Subject's undisputed environmental encumbrances (regardless of whether they extended to the entire or some portion of the 4.9 acres). Normally such environmental conditions must be accounted for. See e.g. Bergen County Assoc. v. Borough of East Rutherford, 12 N.J. Tax 399, 413-14 (Tax 1992) ("governmental restrictions may affect the value of real property for property tax purposes"), aff'd, 265 N.J. Super. 1 (App. Div.), certif. denied,

134 N.J. 482 (1993); Russo, supra, 17 N.J. Tax at 525 (since expert "did not offer comparables of the wetlands restriction, his analysis cannot be utilized in any fashion.").

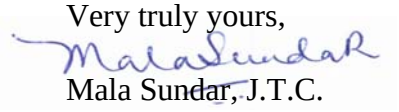
His development of the depreciated cost of improvements was also not persuasive. He agreed that Class C in Marshall & Swift was for masonry structure, but the Subject's service area was steel/metal and even the property record card, which was prepared by the Township's same expert during revaluation, had delineated the same as corrugated steel. He also agreed that he could have separated out the cost for Class C versus Class S; that Class S had lower costs; that life expectancy of steel/metal was not as long as masonry (30 years as opposed to 45 years); thus, two-thirds of the buildings had a lower life expectancy than his uniform 45-year lifespan. He conceded that he may have used an incorrect area for paving for tax years 2009 and 2010 because added to the building area, it would result in an impervious coverage of 2.96 acres (30%), and thus contradict his conclusion that the Subject met the 60% lot coverage requirements. The incorrect numbers renders questionable his cost conclusion in that regard.

In sum, the court finds that the assessments have to be affirmed. Neither party proved by a preponderance of evidence that the same were incorrect. In this connection, the Township's expert's proffer of the sales comparison and cost approach with underlying data in support, suffices to overcome plaintiff's R. 4:23-7 motion requesting dismissal of the Township's counterclaims under the standards set forth in MSGW, supra. Additionally, plaintiff's motion to deem the Township's expert as incompetent to testify as an expert on the issue of surplus/excess lands is denied. While the expert's characterization of the 4.9 acres as excess lands was not credible under the facts of this case, his opinion that this portion merits full value based on plaintiff's maximal utilization of the Subject which was possible because of the 9.9 acre size is not unreasonable.

CONCLUSION

A final Order and Judgment affirming the assessments will accompany this memorandum opinion.

Very truly yours,



Mala Sundar, J.T.C.