

NOT FOR PUBLICATION WITHOUT APPROVAL OF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

TAX COURT OF NEW JERSEY

Mala Sundar
JUDGE



153 Halsey Street
Gibraltar Building, 8th Floor
Newark, New Jersey 07101
Telephone (973) 648-2921
TeleFax: (973) 648-2149
taxcourtnewark2@judiciary.state.nj.us
taxcourttrenton2@judiciary.state.nj.us

March 7, 2013

Via Electronic Mail

David L. Menzel, Esq.
Kraemer Burns, P.A.
675 Morris Avenue
Springfield, New Jersey 07081

Christopher Stracco, Esq.
Brian W. Disler, Esq.
Day Pitney, LLP
One Jefferson Road
Parsippany, New Jersey 07054

Re: Route 21 Associates v. Township of Belleville
Block 9103, Lot 1
Docket Nos. 001224-2008; 000370-2009; 005266-2010

Dear Counsel:

This letter constitutes the court's opinion after trial in the above-referenced matters. Plaintiff ("Route 21") challenged the assessments imposed by Defendant ("Belleville") on vacant land located at 675 Main Street, designated as Block 9103, Lot 1 ("Subject") for tax years 2008, 2009, and 2010. The assessments for tax years 2008 and 2009 were as follows:

Land	\$20,080,000
Improvements	<u>\$ 0</u>
Total	\$20,080,000

*

The assessment for tax year 2010 was as follows:

Land	\$19,080,000
Improvements	\$ <u>0</u>
Total	\$19,080,000

For the tax years at issue the Chapter 123 ratio for Belleville was as follows:

Tax Year	Chapter 123 Ratio	Upper Limit	Lower Limit
2008	94.40	108.56	80.24
2009	92.38	106.24	78.52
2010	93.10	107.07	79.13

PROCEEDINGS

A. General

The court accepted each party’s two witnesses, one in real estate appraisal and one in environmental remediation, as experts, and admitted their reports into evidence. Route 21’s owner testified to the ownership and environmental conditions of the Subject.

Both valuation experts agreed that the Subject’s unimpaired value should be first determined by using the sales comparison approach. They differed on the unit of measurement (price per-square foot or “PSF” of buildable area versus price per-acre) and upon certain adjustments to the sale prices of the comparables. Each expert’s value opinion for the Subject as unimpaired was as follows:

Tax Year	Plaintiff’s Valuation Expert	Township’s Valuation Expert
2008	\$17,760,000	\$18,920,000
2009	\$17,280,000	\$19,865,000
2010	\$14,880,000	\$21,875,000

Both valuation experts agreed that unimpaired value should be reduced by the costs of remediating the Subject. Route 21’s environmental expert, First Environment, Inc. (“First

Environment”), provided an estimate of the projected cost of a 10-year remediation plan which was approved by the New Jersey Department of Environmental Protection (“DEP”). Belleville’s environmental expert, Massey & Co., agreed with Route 21’s expert’s remediation plan and the 10-year remediation period; provided an estimate based upon a third-party environmental consultant’s analysis; and maintained that certain incurred expenses should not be considered.

Based upon the cost estimates developed by the parties’ environmental experts, each party’s valuation expert agreed that a 6% discount factor should be applied to the Subject’s 10-year remediation costs. They also agreed that the Subject’s unimpaired value should be reduced by such discounted costs, plus the actual or already expended environmental costs, plus 10% for entrepreneurial risk. They differed in the method of offsetting the actual and projected costs from the unimpaired value. They opined to the Subject’s impaired value as follows:

Tax Year	Plaintiff’s Valuation Expert¹	Township’s Valuation Expert
2008	\$14,320,000	\$17,095,000
2009	\$14,400,000	\$17,230,000
2010	\$12,135,000	\$19,800,000

B. Belleville’s Motions to Dismiss

At the close of Route 21’s proofs, Belleville moved to dismiss the complaints pursuant to R. 4:37-2 on grounds the Route 21’s valuation expert was unfamiliar with his sales comparables; the magnitude of his adjustments nullified their probative value; and his reliance upon First Environment’s opinion rendered his valuation conclusion as an inadmissible net opinion. Belleville also claimed that First Environment’s expert provided an impermissible net opinion.

¹ This was based upon an amended report which was due to the amended/alternative environmental costs estimated by First Environment. The original report indicated the Subject’s impaired value as \$9,960,000; \$10,010,000 and \$7,740,000 for tax years 2008, 2009 and 2010 respectively.

Based on the evidence, the court finds that Route 21's valuation expert's opinion was not flawed. The mistakes highlighted by Belleville are not of such significance so as to render the expert's value opinion useless. For instance, his omission to evaluate each and every highest and best use of the Subject based upon the permissible uses under zoning laws is not fatal as an expert is not required to exhaust every possible use of the Subject before making a conclusion on its highest and best use. Similarly, the expert's use of the Lowe's purchase contract to develop his opinion of the Subject's buildable area and its highest/best use is credible because he adequately explained the "whys and wherefores" of his conclusions. An opinion is not inadmissible simply because it fails to account for some particular condition or fact, provided there are other substantive bases in support thereof.

Similarly, while excessive adjustments can impair the expert's credibility, "[t]he weight to be given to [each] expert's opinion depends especially upon the facts and reasoning which are offered as the foundation of his opinion." Brockway Glass Co. v. Township of Freehold, 10 N.J. Tax 356, 374 (Tax 1989) (citations and quotations omitted), aff'd, 12 N.J. Tax 263 (App. Div. 1991), remanded on other grounds, 130 N.J. 3 (1992). Based on the evidence, the court finds that the expert sufficiently explained the factual basis for his adjustments.

The court also finds that Route 21's valuation expert properly relied upon the remediation cost estimates opined to, and developed by, First Environment. "N.J.R.E. 703 requires that an expert's opinion be based on facts, data, or another expert's opinion, either perceived by or made known to the expert, at or before trial." Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002) (emphasis added). First Environment's cost analysis and opinion was made known to

Route 21's valuation expert at or before the trial. Further, First Environment provided testimony on the "whys and wherefores" of its environmental remediation efforts and cost estimates.

Finally, the court rejects Belleville's argument that because Route 21's environmental expert (a) relied upon cost information gathered from his consultations with various vendors associated with the remediation project; (b) included cost estimates reflecting chemical oxidation costs which were not certain to be incurred; (c) accepted cost invoices from a sub-contractor despite being dissatisfied with their billing practices; and (d) did not review the invoices from Route 21's environmental counsel or from the DEP, he provided an impermissible net opinion.

A "net opinion" is "an expert's bare conclusions, unsupported by factual evidence." Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). The inadmissibility or otherwise of an opinion hinges "upon the facts and reasoning which form the basis of the opinion. Without explanation as to the basis, the opinion of the expert is entitled to little weight in this regard." Dworman v. Borough of Tinton Falls, 1 N.J. Tax 445, 458 (Tax 1980), aff'd, 180 N.J. Super. 366 (App. Div.), certif. denied, 88 N.J. 495 (1981). Striking an expert's entire testimony as net opinion is appropriate when it is clear that the expert fails to show the facts he relied upon or where the information used was not of the type generally relied upon by experts in the particular field.

The court finds that Route 21's environmental expert adequately explained the facts in support of his opinion. That he consulted with vendors for a price does not make the opinion incredible. Although First Environment is a consultant and thus a vendor, it also relies upon sub-contractors or other contractors for certain items of work in a remediation project. There was no evidence in the record to refute the fact that First Environment has been in the environmental remediation business for several years, thus, familiar with the process of contracting out, and is

well-experienced in the area of remediation and estimation of related costs. Even Belleville’s environmental expert testified that it routinely uses services of third-party contractors and vendors to develop cost estimates. Thus, it is reasonable for First Environment to rely upon quotes from reliable vendors which is information of “a type reasonably relied upon by experts in” the environmental field.

The other bases for Belleville’s net opinion arguments are meritless. Route 21’s environmental expert credibly testified that it is normal and prudent practice to provide a client with cost estimates of alternate remediation methods. The company’s dissatisfaction with one of its subcontractors for untimely billing does not render their invoiced costs unreliable. Last, the expert’s failure to thoroughly review its client’s legal bills or charges imposed by the DEP, which it acknowledged are typical, is not fatal because First Environment did not rely upon items in developing its cost projections.

For the above reasons, the court denies Belleville’s motion to dismiss the complaints.

SUMMARY OF COURT’S CONCLUSIONS

After a careful review of the facts in the record and the opinion of each party’s experts, and for the reasons following, the court finds the unimpaired value of the Subject is as follows:

Tax Year	Unimpaired Value
2008	\$19,174,300
2009	\$19,174,300
2010	\$18,137,840

In this connection, and as further explicated below, the court finds that:

- (i) The unconsummated contracts and offers to purchase the Subject can be considered in determining the Subject’s fair market value. Therefore, Route 21’s motion to exclude information in this regard is denied. However, except for the 2005 Lowe’s contract in effect for tax years 2008 and 2009, the rest are of little evidentiary value due to their remoteness in time to the relevant assessment dates.

- (ii) The appropriate unit of measurement is the price PSF of buildable area because the valuation experts agreed, and the court also finds, that the Subject's highest and best use is for retail development, and a potential buyer or investor would consider buying the Subject for its income-producing developable area instead of the number of acres.
- (iii) The buildable area for the Subject for all tax years at issue is 259,112 SF because this was the area approved for the construction of Lowe's. Although the Lowe's contract was terminated as of tax year 2010, there was no evidence revoking the approval. Further, the highest and best use of the Subject continued to be for development of retail use or retail complex in accordance with the zoning regulations for tax year 2010. There is no evidence that the Subject can, as of right, be developed to the full extent allowed by the zoning laws, namely, 30% of its size.

For the reasons following, the court finds the impaired value of the Subject (after application of Chapter 123 ratio) as follows:

Tax Year	Impaired Value
2008	\$15,925,100
2009	\$15,774,000
2010	\$15,038,300

In this connection, and as further explicated below, the court finds that:

- (i) The estimated projected remediation costs provided by First Environment are credible, except that the frequency for the routine inspection/monitoring will be assumed to be on an annual basis instead of the expert's assumption of a quarterly/semi-annual basis. This reduces the projected cost for that item from \$980,000 to \$437,500.
- (ii) Route 21's valuation's expert's inclusion of the costs actually expended for the year following the assessment date as part of the remediation costs is credible. However, those costs must be discounted to their present value over a 10-year period similar to the other projected environmental costs.
- (iii) Belleville's valuation expert's application of the discount each year of the 10-year period is more credible.
- (iv) Route 21's valuation expert's addition of 3% contingency factor to the environmental costs is rejected as the court finds it a subjective net opinion.

FINDINGS

I. Property Description

The Subject is comprised of an irregularly shaped vacant land measuring 23.587 acres or 1,027,587 SF.² The site rises in elevation from east to west in three different tiers. From the photographs submitted into evidence, the Subject appears to be mostly covered with overgrown grass and vegetation, with patches of asphalt pavement in various places, and remnants of a parking lot area. There is also debris on the property, a number of oil barrels strewn about, and an array of environmental monitoring wells due to remediation activity. A portion of the Subject is within Belleville's flood zone, and the ground water flows from the Subject (in the easterly direction) into the Passaic River.

The Subject is located along New Jersey Highway Route 21. However, access to the property is from Main Street. The rear of the site is adjacent to a railroad line.

The Subject is in the B-F zone (planned retail/light industrial). The zoning regulations in existence at the respective valuation dates permit large single occupancy retail establishments, retail shopping centers, malls, financial institutions, fitness centers, full service restaurants, warehouses and manufacturing facilities. The Subject had preliminary site plan approvals in existence as of two valuations dates for tax year 2008 and 2009 due to the 2005 proposed sale of the Subject to Lowe's (see infra).

Both valuation experts agreed that the highest and best use of the Subject as vacant is for development for retail use in accordance with the zoning regulations.

² Belleville's expert's report noted the size as ± 23.65 acres, an insignificant difference for purposes of this opinion.

II. Environmental Contamination

A. Background

Route 21 purchased the Subject in September of 1983 for the purpose of using it as a tire distribution warehouse from Walter Kidde, Inc. (“Kidde”). Kidde, a defense contractor, used the property in its business of manufacturing fire extinguishers. From the date of the Subject’s purchase until 1999, Route 21 used one of the buildings for storage and distribution of tires.

In 1986, Route 21 became aware of environmental contamination problems when its agent found ammunitions, explosives, and other dangerous material in a building. In the same year a leaking oil tank was discovered. A considerable amount of oil had seeped into the ground. Subsequently, several underground storage tanks (“UST”) were discovered.

B. Remediation Efforts

Since at least 1993, Route 21 was involved in various measures and methods of remediating the Subject.³ Route 21 also demolished the buildings sometime in 2000 thus abating asbestos. By a 1996 Agreement, Route 21 and Kidde agreed to co-operatively resolve issues of soil, groundwater and/or surface water contamination in the Subject. Route 21’s was liable for 10% of the total remediation costs. Kidde’s obligations were later assumed by MHC, Inc., as successor-in-interest to Kidde.

Meanwhile, Route 21 was receiving offers from interested parties to buy the Subject. Desiring to sell, and pursuant to the DEP’s directive, Route 21 agreed to remediate the soil and

³ Exhibit E to the 2005 Lowe’s contract for the Subject titled “Environmental Reports” listed the various reports issued in connection with the remediation of the Subject by various entities including entities interested in purchasing the Subject. Route 21 removed USTs in 1993 for which the DEP issued a “No Further Action” (“NFA”) letter in January 2002. In 1994, 2000, and 2001, Kidde’s environmental consultant, Bell Environmental Consultants, Inc., prepared several reports for DEP’s approval. Numerous exchanges took place with the DEP, resulting in additional reports and NFAs. Bell was later replaced by AMEC, which continued the reporting process to the DEP from 2004 onwards.

investigate groundwater contamination. It also entered into a Brownfields Redeveloper's Agreement whereby the State agreed to reimburse Route 21 for up to 75% of eligible environmental cleanup costs if Route 21 developed the remediated Subject for business use. The reimbursement was to be against sales tax collected on Route 21's business receipts. MHC, Inc. was to reimburse Route 21 for the remaining 25% costs. The Brownfields Redeveloper's Agreement is still in effect.

Route 21 successfully completed on-site soil remediation in 2007. It then hired First Environment to remediate the on-site groundwater contamination. Since Lowe's engineering and environmental consultants desired cheaper remediation only in the area of its proposed location, namely, the south central portion of the Subject where the concentration of the groundwater contamination was the highest, without long-term monitoring or post-excavation groundwater monitoring/inspection, First Environment recommended aggressive soil excavation as the remedial action.⁴ It submitted an April 2009 Amended Remedial Investigation Report/Remedial Action Workplan ("2009 RIR/RAWP") for DEP approval, which contained a detailed breakdown of the estimated costs associated with the remediation (soil excavation and bio-augmentation) spread over a 10-year period. Neither Route 21 nor First Environment received any formal approval of the 2009 RIR/RAWP from the DEP.

After Lowe's canceled the purchase agreement (see infra), First Environment re-evaluated enhanced bioaugmentation and, its alternative, the in-situ chemical oxidation as

⁴ First Environment suggested thermal remediation which involves essentially boiling the water by introducing hot rods into the soil, and vacuuming the resultant vapors when it arises from the soil. Lowe's rejected this as too expensive. First Environment also suggested chemical oxidation/bioaugmentation remediation, which Lowe's rejected as too lengthy a process.

groundwater contamination remediation techniques.⁵ The expert opined that enhanced bioaugmentation would remediate the Subject, would limit migration of contaminants, could be performed even if retail activity is being conducted on the Subject, and if effective, would render in-situ chemical oxidation unnecessary. The expert stated that a single injection may suffice however a second injection was likely required (at lesser cost), and that post-remediation monitoring is required to ensure that residual trails of contamination, if any, stay below the DEP set concentration levels.

First Environment submitted another RIR/RAWP in March of 2010 (“2010 RIR/RAWP”) for DEP’s review and approval. The report outlined the Subject’s environmental history, levels of groundwater contamination, proposed remedial measures of bioaugmentation or chemical oxidation, and the projected costs.⁶

The DEP approved the 2010 RIR/RAWP (as amended 02/14/2011) on or about February 21, 2011 with a requirement for a progress report/pilot study. First Environment provided a Remedial Action Progress Report in November 2011 (“2011 RAPR”) outlining the steps undertaken for bioaugmentation and opining that it was an effective remedial methodology. The expert testified that First Environment was following-up with an infield study, injection of the microbes, and installation of monitoring wells. As of the trial dates, the first injection was done and the results were awaited.

⁵ Bioaugmentation involves several steps. Soil samples are first tested to determine which microbes will have the best ameliorative effect on the contaminated soil. These microbes (essentially two strains of bacteria) are then injected into the soil subsurface, which eat the organic compounds at the site, and then dissolve into the atmosphere. Chemical oxidation is a process of physically destroying the contaminants through an oxidant such as hydrochloride.

⁶ As of March 2010, the groundwater at the Subject property was contaminated with a number of chlorinated organic compounds including among others trichloroethylene (“TCE”), tetrachloroethylene, 1,1,1 trichloroethane, vinyl chloride, which are widely considered to be hazardous to health. The groundwater problem extends offsite beyond the Subject and is being handled by Golder Associates, Inc., the environmental consultant for Kidde’s successor.

Belleville's environmental expert agreed that the Subject was contaminated and that the soil remediation was completed by January 2009 (since it was part of the terms of the sale contract with Lowe's), when DEP provided its NFA letter. He testified that based upon the data provided by First Environment, the Subject showed a remarkable decrease in contamination in the last five years primarily because of the removal of the contaminated soil from the source areas, and also due to natural geochemistry, biodegradation, dilution, and dispersion process.⁷ He opined that the success of these remediation efforts not only rendered effective First Environment's remedial action proposed in the 2010 RIR/RAWP but also resulted in a much lower cost to cure.

The expert also noted that First Environment's remedial method (bioaugmentation) was acceptable because it was proven technology and very similar to a chemical oxidation method used by another company Geo-Cleanse, International, Inc. ("Geo-Cleanse"). Belleville's environmental expert provided a remediation cost estimate over a 10-year period based upon a cost estimate from Geo-Cleanse, as juxtaposed with the cost estimates in the 2010 RIR/RAWP.

III. Valuation

"[U]ncontaminated land is worth more than contaminated land." Metuchen I, LLC v. Borough of Metuchen, 21 N.J. Tax 283, 294 (Tax 2004). A "diminution in value" is the difference between the "unimpaired and impaired values" due to increased risks or costs "attributable to the property's environmental condition." Appraisal Institute, The Appraisal of

⁷ Belleville's expert examined the groundwater concentrations of TCE in 2008 as determined by the data that First Environment had generated, which at the highest concentration of the plume, was 10,000 parts per billion, much above the DEP standards of 1 part per billion. His report similarly noted that since First Environment's tabulated results of the groundwater sampling showed a decrease in chemicals in the eight monitoring wells, it meant that the "initial starting" chemical concentrations of the plume was lesser than the time when First Environment initially proposed the enhanced bioremediation (i.e., in 2008).

Real Estate, 226 (13th ed. 2008). It is undisputed that the Subject was vacant land for the assessment dates at issue undergoing DEP required/approved remediation activities. The valuation experts thus properly determined the Subject's value by an analysis of its unimpaired and impaired value for each tax year at issue.

A. Unimpaired Value

1. Valuation Methodology

The court agrees with both experts' opinion that the sales comparison approach is an appropriate method of valuation of the Subject.

2. Contracts/Offers for the Subject

Mr. Finkelstein, an owner of Route 21, testified that he received several offers to purchase the Subject and entered into some contracts. However, the offers or contracts were unsuccessful or never finalized. The following deals fell through:

- (1) A 1986 contract for sale with Manny Hirschberg which was contingent upon obtaining a variance to build condominiums. Belleville denied the variance.
- (2) An April 1999 contract with Related Retail (A&P Supermarket) for \$19.5 million. Langan Associates was the buyer's environmental consultant which prepared a Due Diligence Sampling Report reporting presence of asbestos. Related Retail canceled the contract due to lack of NFA letters from the DEP and absence of a fixed timetable for the cleanup to be completed.
- (3) A 2003 a purchase agreement with Wal-Mart for \$21.05 million which failed due to environmental contamination concerns.
- (4) A September 2005 purchase contract with Lowe's for \$22 million for the construction and development of a retail hardware store on the Subject. Lowe's had an 18-month period to obtain necessary approvals which could be extended for another 6 months.
Lowe's had to complete a traffic study and other possible conditions. From 2005 to 2009, Lowe's undertook significant site planning, and plans for groundwater remediation by extensive soil excavation, which costs were to be deducted from the purchase price.

Lowe's obtained a conditional preliminary site plan approval with variances in 2006 for development of a 259,112 SF project comprising of a home improvement store including garden center plus a retail store.

The third extension of the contract gave Lowe's until July 31, 2009 to obtain approvals with no "further right by either party to extend the Approval Period" and further to "terminate" the contract "on July 31, 2009 . . . [n]ot withstanding anything to the contrary . . . in th[e] Agreement." The contract then terminated July 2009.

- (5) A 2009 letter of intent from Wal-Mart for purchase of the Subject at \$16 million. This offer was later rescinded.

Mr. Finkelstein also testified to a number of other offers made on the Subject (one in August 2010 and others in 2011), none of which finalized⁸ although the Subject was being actively marketed through a broker at Grubb & Ellis.

Generally, offers or executory contracts are not deemed to be of reliable evidentiary value. See Linwood Properties, Inc. v. Borough of Fort Lee, 7 N.J. Tax 320 (Tax 1985). As observed by the court:

In relying on unconsummated contracts of sale in the valuation of real property two very basic and established principles must be emphasized. First, no such contract may be taken on its face without a thorough review of its provisions and the circumstances surrounding its execution. Second, when such inquiry reveals that it is replete with contingencies and is in fact nothing more than an offer or option to purchase, the contract must be disregarded and given no probative effect.

[Id. at 333]

See also N.J. Turnpike Authority v. Bowley, 27 N.J. 549, 556 (1958) (finding offers are unreliable as indicators of value in that they typically are closer to inquiries into value as compared to completed sales).

⁸ Route 21 rejected several offers because they were too burdensome (an August 12, 2010 offer by Cameron for \$17 million required Route 21 to guarantee a certain amount of rent PSF; an April 2011 offer from Washington Square Partners for \$18 million was subject to several conditions); or detrimental (an offer by Steela Machinery Company to lease or buy would adversely affect the Brownfields Agreement because the proposed buyer could not generate sufficient taxable sales); or because Route 21 lacked sufficient information to accept the offer (such as Garden State Consulting, which did not disclose the buyer's financials or name). Exhibit E to the 2005 Lowe's contract also listed Home Depot as an interested buyer which had prepared certain environmental reports in 2001 as part of its due diligence. Mr. Finkelstein testified that he was unable to recollect whether there was a signed contract in this regard.

However, “[t]he use of unconsummated contracts for valuation purposes is recognized in New Jersey.” Township of Little Egg Harbor v. Bonsangue, 316 N.J. Super. 271, 281 (App. Div. 1998). Indeed, “unlike an offer and option, contracts for the purchase of land are binding obligations, not lightly ignored. The fact that the contracts have not progressed into sales goes to the weight of the evidence rather than to its sufficiency.” Ibid. Thus, an unconsummated contract is relevant and admissible if “a litigant establishes evidence to support a finding of a ‘reasonable probability’ or ‘likelihood’ that the contingencies would be fulfilled.” Ibid. Cf. Curtis Papers, Inc. v. Borough of Milford, 2008 Bankr. LEXIS 4597 (Bankr. D.N.J. 2008) (since property valuation “is at its core a common sense determination . . . it simply does not comport with common sense to conclude that [the subject] property was devoid of value on the relevant dates when there have been offers to purchase the property for substantial amounts”) (citing Hackensack Water Co. v. Borough of Old Tappan, 77 N.J. 208 (1978)).

Barring the Lowe’s contract, the court finds that the prior offers or unconsummated contracts are not probative for purposes of establishing the Subject’s fair market value.⁹ There was credible testimony that the offers included several and burdensome contingencies. The court ascribes no weight to the purchase prices presented by these offers as probative because they are too speculative, were in any event rejected by Route 21, and further, because they occurred after the relevant assessing dates for the tax years at issue here.

As to the executed but unconsummated contracts, the 1999 contract with Related Retail for \$19.5 million, and the 2003 contract with Wal-Mart for \$21.05 million were much before the

⁹ The court overruled Route 21’s objection that unconsummated contracts are not probative of value, and therefore the purchase price is legally irrelevant. Route 21 had elicited direct testimony as to the facts of these offers or contracts and the reasons why they were executory or rejected therefore, Belleville’s elicitation of the offer prices on cross-examination was proper.

assessment dates at issue here. For this reason alone, they are not substantively probative of the Subject's fair market value for the tax years at issue.

On the other hand, the 2005 Lowe's fully executed contract, which was renewed until 2009, is proximate to the assessment dates for tax years 2008 and 2009. There was no evidence that the contract was not an arms-length agreement between a willing buyer and a willing seller, or that either party was under any duress or compulsion to enter into the transaction. The contractual provisions with respect to Route 21's environmental obligations (as impacted by the Brownfields Agreement and the 1996 Agreement with Kidde) were definitely foreseeable as of the assessment dates. Further, Route 21 had been actively pursuing environmental clean-up since at least 1994 if not earlier, and the DEP was involved prior to Lowe's contract requiring Route 21 to remediate the soil and groundwater. Therefore, compliance with the contract's conditions of performing such remediation with Lowe's input, which included providing a RIR/RAW for DEP approval, was not an improbability on the part of Route 21 such that the contract was nothing more than a wishful offer.

Thus, the Lowe's contract can be considered as an evidence of the Subject's fair market value for tax years 2008 and 2009 regardless of whether the contract terminated by its own terms because Lowe's did not obtain all the approvals by July 31, 2009, or whether, as Mr. Finkelstein testified, Lowe's decided to back out of the deal because it was not worth the wait or the cost. However, its evidentiary weight will be examined below.¹⁰

¹⁰ Belleville's valuation expert testified that he was aware of that the Subject had a number of sale contracts over the years, but placed little weight on the sales prices in reaching his valuation conclusions. He noted that the Subject's current listing price of about \$20-22 million confirmed his valuation conclusion. Listings can be admissible as evidence of value. See e.g. American Cyanamid Co. v. Township of Wayne, 17 N.J. Tax 542, 558 (Tax 1998) (rejecting a listing because it was too dissimilar to the subject property to qualify as a comparable); Schmertz v. Township of Dover, 4 N.J. Tax 145, 151 (Tax 1982) (listings are analyzed like actual sales).

3. Unit of Value Measurement

Route 21's valuation expert used the PSF of anticipated building area to be constructed on the site as the unit of measurement. He stated that potential buyers would be interested in the development and construction of a retail facility on the site. He based the potential building area upon the area approved for Lowe's store but slightly modified. Preliminary approvals were for the development of a home improvement center of 169,112 SF, which included an area of 31,179 SF for a garden center, plus an additional retail area of 90,000 SF, for a total of 259,112 SF. However, the expert opined that the garden area was not part of the building but in a fenced area outside the building thus, meriting an inclusion of only 50% (the remaining to be used for storage) for a total of 240,000 SF.¹¹ He opined that buildable area is the more accurate and better unit of comparison as the real value to the vacant property is the actual size of the area on which a retail establishment can be constructed which is what an arms-length buyer in an open market would desire, since there is no intrinsic value to large tracts of land unless proven usable.

Belleville's expert used a per-acre unit of measurement. He agreed that either a per-acre or PSF unit can be used, and here, would result in similar valuation conclusions because based upon Belleville's zoning ordinance for 30% coverage of the property, his comparable sales would be around \$70 PSF.

“The purchase price for developable land is a function of the projected use of the land.” Newport Ctr. v. City of Jersey City, 17 N.J. Tax 405, 420 (Tax 1998). Thus, “land has value because it provides potential utility as the site of a structure” or other “facility.” Ibid. Therefore, land or site value “depends on its highest and best use.” Ibid.

¹¹ Mathematically, the total buildable area under Route 21's valuation expert's calculation should be 243,552 SF (169,112SF – 31,179SF = 137,933SF + 15,589SF (50% of 31,179 SF) + 90,000SF).

In Romulus Dev. Corp. v. Township of Weehawken, 1994 N.J. Tax LEXIS 24 (Tax 1994), aff'd, 15 N.J. Tax 209 (App. Div. 1995), the taxpayer challenged the assessments upon three parcels of waterfront lands deemed vacant by both parties valuation experts. In developing his value conclusion, the plaintiff's expert "measured value in accordance with buildable density. In the case of . . . of non-residential property he estimated value in accordance with the buildable square footage" as provided by planning board approvals. 1994 N.J. Tax LEXIS at 6-7. The defendant's expert used a per-acre unit of value. Id. at 15. The court rejected the latter approach because "credible evidence" showed that "property such as the subject is marketed on the basis of its development potential." Id. at 17-18. The Appellate Division agreed. Romulus Dev. Corp. v. Township of Weehawken, 15 N.J. Tax at 209, 212. See also Watnong Assocs. Inc., v. Township of Morris, 11 N.J. Tax 108, 115 (Tax 1990) (unit of comparison "can be a common denominator if it identifies, clarifies, and tends to represent market behavior"), aff'd, 12 N.J. Tax 252 (App. Div. 1991).

The Subject is zoned B-F Planned Retail/Light Industrial, with permitted uses being planned retail centers, building supply stores, financial institutions, fitness centers, warehouses and manufacturing facilities. Both experts agreed that the Subject's highest and best use is for development of retail use or retail complex, which would be in accordance with the zoning regulations. Thus, the true value to a "potential buyer" of vacant land that is zoned for commercial or retail development is not the full acreage of the property, but rather the size of the developable area in accordance with zoning regulations. Route 21's expert's credibly testified that buyers or investors would want to make the maximal productive use of the Subject by developing it for retail purposes. Even Belleville's expert's comparable sales included lands

which are either improved with big box or other retail establishments, or are approved/proposed for development of a retail complex. Additionally, the offers for the Subject (during pre-and post assessment dates) were typically from and for large box-type or retail stores. These facts support the PSF of buildable are as the “unit of comparison [which] has the closest correlation with the comparable sales.” The Appraisal of Real Estate, *supra* at 305. The court therefore finds that a reliable measurement of value is a price PSF of buildable area.

This raises the issue of the amount of the Subject’s buildable SF. Lowe’s was preliminarily approved for 259,112 SF. Route 21’s expert reduced this to 240,000 SF. Pursuant to the zoning regulations, the 30% maximum lot coverage would be 308,276 SF (30% of 1,027,587 SF, the Subject’s total size). The court finds that as of right, the developable area can reasonably be the 259,112 SF area approved for Lowe’s. Route 21’s expert reduction of the approved square footage by 50% of the approved garden center area is purely subjective. That this area is in a fenced area outside the building does not detract from the fact that it was nonetheless approved as developable, and thus, usable. The court will therefore use 259,112 SF as the buildable SF area.

For tax year 2010, the Lowe’s contract was terminated. Per Route 21’s valuation expert, the approvals in place had expired as of the valuation date of October 1, 2009. This assertion was unsupported. Nonetheless, this does not mean that the court must use a per-acre basis as the unit for measurement. This is because (1) the experts agreed that the highest and best use of the Subject continued to be for development of retail use or retail complex in accordance with the zoning regulations for tax year 2010 for the same reasons as the prior tax years; (2) generally once approved, variances run with the land. See William M. Cox and Donald M. Ross, New

Jersey Zoning and Land Use Administration 328 (GANN 2008); (3) pursuant to the Permit Extension Act, L. 2008, c. 78, the approval period for any required permits is “suspended” from January 1, 2007 through December 31, 2014 (and can be further extended), see, N.J.S.A. 40:55D-136.3; 136.4; (4) potential buyers for the Subject have been those interested in large-scale retail development, thus, a hypothetical buyer for the Subject would be in that market of buyers; and (5) there should be a reasonable degree of stability in annual assessments. Hull Junction Holding Corp. v. Borough of Princeton, 16 N.J. Tax 68, 96 (Tax 1996).

Nor does the contract termination require the Subject’s buildable area be calculated based upon Belleville’s zoning ordinance. There simply is no evidence that the Subject can, as of right, be developed to the full extent of 30% of its size. Indeed, a lower square footage was approved for Lowe’s pursuant to variances. The court will therefore use 259,112 SF buildable area as the most credible unit measurement of value for all tax years.

4. Comparable Sales Analysis

(i) Tax Year 2008 (assessment date October 1, 2007)

(a) Experts’ Analyses

Route 21’s expert concluded a value of \$17,760,000 on a \$74 PSF basis. Belleville’s expert concluded a value of \$18,920,000 on a per-acre basis (\$800,000 per acre × 23.65 acres). Both experts used four comparable sales, three of which were common to both, none of which were located in Essex County.

Route 21’s expert made adjustments based on the general market conditions. He testified that the economy was strong and on an upward trend through 2004, 2005 and into 2006, but in 2006 and onwards the collapse of the housing bubble and over-leveraging by financial

institutions caused the real estate market to decline. His overall time adjustments were to increase sales prices by 5% for 2005 and 2006. Then through mid-year 2007, he made an additional increase of 5% and then left adjustments flat for the second half of 2007.

Belleville's expert's analysis for time adjustment was somewhat similar. He used 5% based upon market data, which was supported by the Director's ratios of assessed-to-true values. Those ratios showed that the market in Belleville increased by around 5% (for all categories of property). He opined that the market steadily increased between 2005 and 2007, and adjusted the 5% accordingly, but with reference to the assessment dates.

Both experts agreed that the Subject with its three different tiers of elevation and sloping topography made the Subject inferior to its comparables, thus, meriting a -5% adjustment.

Route 21's expert made adjustments for properties which were purchased subject to, with, or without approvals for development on grounds that properties with approvals added value which is derived from the time and cost spent on obtaining the approvals. His report noted that he did not accord much weight to the preliminary approvals granted to the Subject in connection with the Lowe's contract due to the Subject's "environmental contamination issues, the history of potential purchases terminating their contract and walking away, and the fact that Lowe's ultimately let their contract expire." Belleville's expert made no adjustments on grounds that the comparables which had approvals in place on the sales dates rendered them similar to the Subject which had conditional approvals as of the assessment dates.

Route 21's expert's first comparable was the December 1, 2005 assemblage sale of two parcels totaling 11.4 acres located at 850 Route 3 in Clifton ("Clifton Assemblage") for \$18.2 million. One parcel measured 8.029 acres, the other 3.393 acres. The larger parcel had older

industrial buildings and sold on November 23, 2004 for \$12 million with no approvals in place. The smaller lot was purchased subject to the buyer getting approvals for both parcels, which approvals were obtained. The sale closed January 25, 2007 for \$6.2 million. The expert used December 1, 2005 as the sale date, this being the mid-point of the two independent sales. The property is developed as the Promenade Shops at Clifton which includes a TGIF restaurant. The building was approved for 145,319 SF retail center reflecting \$125.24 PSF. He made the following adjustments: (a) added the costs of demolition of older buildings of \$305,000 (based upon the demolition permits) as expenditures after purchase; (b) +8% for market conditions (+5% for 2006, and up to 5% to the middle of 2007); (c) -20% for its excellent location on Route 3 due to its proximity to New York; (d) -10% for size since size is inversely proportional to unit price (the smaller the property, the higher the price per SF); (e) +5% as it was purchased “subject to” obtaining approvals; and (f) -5% because it had level topography. His final adjusted sale price was \$96.27 PSF.

His second comparable was the November 9, 2005 sale of 16.55± acres located at 265 McClean Boulevard, Paterson (also used by Belleville’s expert) for \$13,100,000 (thus, \$882,175 per-acre). This was also an assemblage sale however there was only one sale date.¹² He added back \$1.5 million for verified demolition expenditures after purchase. According to his report, the property was purchased subject to the buyer obtaining approvals which were granted in December 2004 for a Lowe’s store and garden center (170,270 SF), plus a free-standing retail building currently occupied by Pep Boys and MicroCenter Computers (50,058 SF), providing \$59.19 PSF. He made adjustments of +8% for time; -5% for topography and +5% for approvals

¹² The reports of both experts listed two blocks and three lots but each expert had different block and lot identifying numbers. Nonetheless, the street address and other details of the sale such as the grantor, grantee, date of sale, and total purchase consideration, as well as demolitions costs, were the same.

(since it was purchased “subject to” approvals, thus, inferior to the Subject) but none for location or size. With a net positive adjustment of 8%, he reached an adjusted purchase price of \$71.24 PSF.

Belleville’s expert also added back the \$1.5 million demolition costs to the stated consideration of \$13.1 million. He made a +9% adjustment for market conditions; +5% adjustment for location since it was not on a highway, thus inferior to the Subject; and -5% adjustment for topography. Since the comparable had approvals in place on the sale date, he made no adjustments in this regard.

Route 21’s expert’s third comparable was the May 31, 2005 sale of 28.62± acres located in 1900 East Linden Avenue, Linden (also used by Belleville’s expert) for \$14,406,500 (thus, \$503,372 per-acre). The property was a former research facility, and was sold subject to approvals for construction of a 277,313 SF retail center providing a PSF price of \$51.95. After sale construction included a Sam’s Club, Kohl’s, a free-standing TGIF restaurant and other retail stores of various sizes. He made the following adjustments: (a) added back demolition expenses of \$1 million, which number he obtained from the developer, and which may have also included remediation/cleanup estimates; (b) +10% for market conditions, following the same pattern as detailed above; (c) -10% because its location between two very busy highways Routes 1 and 9 made it more attractive than the Subject; (d) -5% for its superior topography; and (e) +5% for being sold subject to approvals. The adjusted price was \$55 PSF.

Belleville’s expert made the same adjustments for time (+12%) and topography (-5%). He did not include any demolition costs. Further, his report noted that the property was improved subsequent to the sale with a Wal-Mart center.

Route 21's fourth comparable sale was the May 27, 2005 sale of 1215 Harrison Avenue in Kearny (also used by Belleville's expert) for \$15,000,000 for 19.34± acres (thus, \$775,474 per-acre).¹³ His report stated that prior to the sale, the seller demolished the existing buildings (at its cost) and conducted environmental remediation (costs split with buyer)/site preparation for future development. This property is the site of a Wal-Mart, and was sold with final approvals, site improvements and utilities in place, thus, a turnkey project. The subsequently built Wal-Mart store comprised 164,925 SF thus providing a PSF price of \$90.95. The expert made the following adjustments: (a) +10% for market conditions following the same reasoning above; (b) -10% for size; (c) -5% for topography; and (d) -10% since it had final approvals as compared to the Subject. His adjusted purchase price was \$75.03 PSF.

Belleville's expert's report noted that the zoning was RA or Redevelopment Area, but the expert testified that the area was rezoned for retail. He made 5% annual adjustments for time from the sale date up to the assessing date resulting in total upward adjustment of 12%. The only other adjustment he made was -5% due to the comparable's superior topography.

Providing equal weight to all sales, Route 21's expert found \$74 PSF of planned building area as reasonable, and thus, \$17,760,000 ($\$74 \times 240,000$ buildable SF) as the Subject's value.

Belleville's expert's fourth sale was in Mount Olive, a 1.84± acre sale on October 13, 2006 for \$12,425,000 (or \$837,264 per-acre). The property was improved with a Wal-Mart store post-sale. He provided an adjustment of +5% for market conditions and -5% for topography. His four sales provided a mean of 791,800 per acre, which he rounded to \$800,000. Multiplying the Subject's size (23.65 acres), he concluded a value of \$18,920,000 (rounded).

¹³ Belleville's expert's report listed the street address as 150 Harrison Avenue. However, the both experts' reports listed the same Block and Lot number, and all other details of the sale also were identical.

(b) Court's Analysis

The court has found a per-acre approach unpersuasive. Therefore, to the extent the court does not have information about the built or buildable area of Belleville's expert's comparables it cannot determine the relative comparability of those sales as to size of the developable SF vis-à-vis the Subject. Therefore, the court will not consider those sales to determine the market value of the Subject. However, this does not indicate a finding that the sales are unusable for other purposes such as to examine the reasonableness of adjustments for the commonly used comparables since the comparables shared the same highest and best use as the Subject.

Here, Belleville's expert's fourth sale in Mount Olive is unusable to determine the Subject's PSF value. On cross-examination, the expert testified that he did not know the size of the improvement although the property had approvals for development as of the sale date. In the absence of information regarding the buildable area, its comparability to the Subject is suspect.

The court also finds that Route 21's first comparable, the Clifton Assemblage questionable. The expert admitted that the buyer operated the adjacent lot. He agreed that if someone purchased a lot to further the buyer's use of an adjacent lot, then, conceivably, the buyer would pay a premium, and as such, the value of such property is "value in use" as opposed to fair market value. However, he maintained that he did not think this happened in the assemblage sale. This speculation is insufficient. See e.g., The Appraisal of Real Estate, supra, at 362 ("frequently a higher-than-market price might have to be paid to assemble a tract of land, particularly for properties acquired near the end of the assemblage period," thus, an appraiser should "avoid summing the cost of the parts" for a value opinion of the whole"). Moreover, other than simply stating that he used December 1, 2005, the mid-point between the two sale

dates, as the sale date for purposes of valuation (and thus, for purposes of adjustments for market conditions), the expert provided no explanation of the propriety of choosing such mid-point. This is especially relevant when he admitted that he did not know when the contracts were negotiated. Finally, his report notes that the property (presumably as assembled) was located in the Special Industrial zone unlike the Subject. The court does not have information of when and whether there was any rezoning (since the property was improved for a retail shopping center). Therefore, the court will place lesser weight to this comparable.

The other sales used by both experts are usable. They all shared the Subject's highest and best use, namely, for development of a retail facility or shopping center comprising of a box store (such as Wal-Mart or Lowe's). For the most part, they had similar buildable SF area. Both experts credibly testified that sale of vacant lands similar to the Subject in terms of developable area are infrequent, and therefore the lack of proximity of the sale date to the assessment date does not require their rejection.

The court finds most adjustments as reasonable. The add-back of demolition expenses is proper. See The Appraisal of Real Estate, *supra*, at 331-32 (positive adjustments to be made for post-purchase demolition expenses). Both experts agreed in this regard to the Paterson comparable, however, only Route 21's expert added \$1,000,000 to the Linden comparable. Since no reason was provided for this omission by Belleville's expert, and further, since Route 21's expert had consulted the developer for this information, the court accepts the adjustment. For the same reason, the court accepts Route 21's expert's consultation of building permits as the basis for his upward adjustment for post-purchase demolition expenditures of \$305,000. *Id.* at

331 (adjustment should be made for expected as opposed to actual demolition expenses since the former is the basis for negotiated reduction to the sale price).

Since both experts agreed that the market was on the upswing from 2005 to 2007, the court accepts their adjustments of +5% per year. To the extent their partial pro-ration of this percentage differs, the court finds Belleville's expert's numbers persuasive since they appear to apply the adjustment using the assessment-to-assessment date (October 1 of sale year to October 1 of the assessment date) as opposed to an annual date (January to December).

The court also accepts the -5% adjustment for the Subject's topography since it is reasonable to conclude that this factor rendered the Subject inferior to the comparables.

Both experts made no adjustments for size for the two of the three comparables they both used, which the court accepts. The court finds that Route 21's expert's -10% adjustment for the third sale both experts used in Kearny, and for the Clifton Assemblage, as credible because the buildable area is smaller than the Subject.

Route 21's expert's -20% location adjustment for the Clifton Assemblage is not persuasive. He agreed that 20% was not based on empirical data, but maintained that he first reviewed the unadjusted price PSF range of his other comparable sales and rejected extremes (5% being too low, and 50% being too high). He chose 20% so that the adjusted sale price of the Clifton Assemblage would fall into the price PSF range of the other comparables. While the court finds credible the expert's testimony that Route 3 is a well-known busy thoroughfare with direct access to/from New York City, and thus, superior to the Subject for a retailer looking for a high traffic location, his 20% adjustment is not based upon market driven data. Therefore, the court will apply a -10% adjustment location as that is more consistent with the expert's other

adjustments. There was no dispute on Belleville's expert's location adjustment of 5% for the Paterson comparable, so the court accepts the same.

Finally, the court finds that no adjustment is warranted for approvals for the comparable sales. Route 21's expert credibly testified that developable property purchased with approvals in place will necessarily be worth more than one without. However, his provision of the adjustment of +5% on grounds that sales "subject to approvals" are inferior is questionable. For instance, the sale of the smaller lot in the Clifton Assemblage closed only after the grantee obtained approvals for both lots in 2007. Similarly, the second comparable in Paterson was sold subject to the buyer getting approvals, which were then obtained December 2004, and thereafter the property sold (i.e., the sale date was) November 2005. Thus, the information before the court indicates the sales were consummated with some type of approvals in place. Additionally, although his report stated that the third comparable in Linden was sold subject to approvals for construction of a retail center, the court cannot conclude without any evidence to the contrary that the sale consummated without obtaining any approvals, or that the contract terms were modified such that the approval contingency was waived.

Therefore, while these comparables may have had sale contracts which were subject to obtaining approvals, the point is that as of the sale date, there is nothing to indicate that the sales consummated without any development approvals, preliminary or otherwise, in place. The court finds persuasive Belleville's expert's reasoning that such approvals rendered the comparables similar to the Subject. Therefore, Route 21's expert's uniform +5% adjustment is unjustified.

Route 21's expert's -10% adjustment for fourth comparable in Kearny is reasonable. He noted that this property sold as a "turn-key" site with improvements such as structural slab,

utility work, on-site road and culverts in place (at buyer's cost), and remediation completed (with costs shared), with the grantor obtaining all the approvals. His adjustment was because the comparable sold "with final approvals (obtained by the Grantor) in place."

An adjustment based on the mere status of an approval, *i.e.*, final versus preliminary, is questionable. A developer is not barred from developing the property until final approvals are in place. There is no indication, statutory or otherwise, that the ability to develop land is curtailed or restricted because the property has preliminary approvals. *Cf. N.J.S.A. 40:55D-6* (defining the term "preliminary approval" as the statutory rights¹⁴ provided to a developer "prior to final approval after specific elements of a development plan have been agreed upon by the planning board and the applicant"); *N.J.S.A. 40:55D-4* (defining the term "final approval" to mean an "official action" approving the "preliminarily approved major subdivision or site plan, after all conditions, engineering plans and other requirements have been completed or fulfilled and the required improvements have been installed"); *Rockstone Group v. Township of Lakewood*, 18 *N.J. Tax* 117, 123-24 (Tax 1999) ("final approval" under the Municipal Land Use Act does not require that every regulatory approval be granted and permit be issued" before a developer can "put the spade in the ground").

However, a hypothetical buyer or investor would consider property which has certain improvements completed pursuant to approvals a more viable and attractive investment/asset than an undeveloped property with approvals, due to the savings in cost and time and certainty that the property purchased would be used for the intended purpose. Therefore, an adjustment

¹⁴ The statute bars alterations to "the general terms and conditions on which preliminary approval was granted . . . including but not limited to use requirements; layout and design standards for streets; curbs and sidewalks; lot size; yard dimensions and off-tract improvements; and, in the case of a site plan, any requirements peculiar to site plan approval . . ." *N.J.S.A. 40:55D-49(a)*. The exception is a change necessitated for "public health and safety." *Ibid.*

indicating its superiority is reasonable. Of course, if evidence shows that the partially completed improvements had to be destroyed (due to non-compliance or other reason), then such an adjustment may not be appropriate.

Here, there was no dispute that the comparable had partially completed improvements. There was nothing to show that these improvements were required to be re-built or were useless in some manner. Therefore, the comparable is superior to the Subject which had preliminary site plan approvals but remained raw land. Thus, a negative adjustment is proper.

Based on the above analysis, the court therefore finds the adjusted price PSF follows:

	Clifton	Patterson	Linden	Kearny
Buildable Area	145,319 SF	221,328 SF	277,313 SF	164,925 SF
Sale Date	12/01/2005	11/09/2005	05/31/2005	05/27/2005
Sale Price	\$18,200,000	\$13,100,000	\$14,406,000	\$15,000,000
Post-Sale Exp.	\$ 305,000	\$ 1,500,000	\$ 1,000,000	\$ 0
Adjusted Price	\$18,505,000	\$14,600,000	\$15,406,500	\$15,000,000
Adjusted PSF	\$127.34	\$65.97	\$55.56	\$90.95
Time	9%	9%	12%	12%
Adjusted PSF	\$138.80	\$71.91	\$62.23	\$101.86
Location	-10%	5%	-10%	0%
Size	-10%	0%	0%	-10%
Topography	- 5%	-5%	- 5%	- 5%
Approvals	0%	0%	0%	-10%
Net Adj PSF	\$104.09	\$71.90	\$52.90	\$76.40

With less weight given to the Clifton Assemblage, the court finds Route 21's expert's conclusion of \$74 PSF reasonable.¹⁵ The Subject's unimpaired value for tax year 2008 is thus \$19,174,288 (259,112 SF x \$74 PSF) rounded to \$19,174,300.

¹⁵ Route 21's expert inexplicably chose to use a comparable which sold in Union on February 1, 2007, for tax year 2010 (assessment date October 1, 2009) even though the sale date was closer to the assessment date of October 1, 2007 (for tax year 2008). That property with a size of 22.04 acres and 233,185 SF, sold for \$17,222,221 providing a per-acre price of \$781,407 and PSF price of \$73.86. If this sale was considered, the court would give it most weight due to its proximity to the assessment date and comparability with the Subject's size. When thus considered with the other four sales, the \$74 PSF is reasonable, even if the PSF as adjusted for market conditions (at 5% per year for 4 months or +2%) and topography (-5%), would be \$71.65.

(ii) Tax Year 2009 (assessment date October 1, 2008)

(a) Experts' Analyses

Route 21's expert concluded a value of \$17,280,000. Belleville's expert concluded a value of \$19,865,000.

Route 21's expert used the same four comparables as for tax year 2008. He used the same type and quantum of adjustments as he had for 2008 for these comparables. He changed the quantum of market conditions adjustments to account for another year of market variation from October 1, 2007 to October 1, 2008. His report noted that he made -5% adjustment per year from January 2008 through the assessment date of October 1, 2008, due to the economic downturn. He testified that in 2006 and onwards, the collapse of the housing bubble and thereafter the market kept declining due to over-leveraging by financial institutions, bailouts and the like. He stated that he tracked comparable sales and did a paired sales analysis (one in 2008 and one in 2011), which showed a 5.9% decline per year.

Thus, he used +4% for the Clifton Assemblage which sold December 2005; +4% for the Paterson comparable; +6% for the Linden comparable; and +6% for the Kearny comparable. His adjusted PSF values were \$92.70; \$68.60; \$53.00 and \$72.31 respectively.

His additional comparable sale was vacant land in Springfield Avenue, Newark, comprising of \pm 11.6 acres (also used by Belleville's expert). It sold November 21, 2008 for \$15 million (or \$1,291,990 per-acre). The report noted that the property was proposed to be developed in a business zone as a retail complex, with a "large format tenant-anchored shopping center of \pm 200,000" SF thus providing a price PSF of \$75. The property was sold without approval contingencies and approvals had not been obtained as of the report's preparation. Since

the sale was close to the valuation date, he did not make market conditions adjustment. Nor did he adjust for size or location both being similar to the Subject. He made a -5% adjustment for topography, and a +10% adjustment for approvals because it was sold without any approvals. He arrived at an adjusted sales price of \$78.75 PSF.

Placing equal weight to all sales, he concluded a value of \$72 PSF, or \$17,280,000 for 240,000 of buildable SF for the Subject.

Belleville's expert used six sales, four of which were also used by Route 21's expert (i.e., the sales in Paterson, Linden, Kearny and Newark). He used the same quantum and type of adjustments as he had for tax year 2008. For the Newark comparable, he made a -5% adjustment for size and topography, and +5% adjustment for location.

His report noted that "in light of the current economic environment, no time adjustment was made after October 1, 2007." He testified that the market for retail development did not change negatively after upswing in 2005 and 2006. Rather, it fared well and continued to develop in northern New Jersey despite the national economic downturn and financial difficulties for banks and investment entities. He agreed that his value conclusions for the Subject for each tax year kept increasing, which must have been attributable to market conditions since there was no change in the Subject. However, he maintained, the per-acre price for land in the retail market was generally non-reactive to the market downturn. He noted that his market adjustments comported with the Director's average ratios which showed a steady 5% increase each year for properties in Belleville.

Bellville's expert also used two other sales, one in Mount Olive which he had used for tax year 2008, and one in Hawthorne. The Hawthorne property (± 8.78 acres) sold on June 26,

2008, for \$6.75 million. His report noted that the site was vacant as of the date of his report, however, was approved for development of a retail complex. He concluded the Subject's value as \$19,865,000 at \$840,000 per-acre.

(b) Court's Analysis

The court finds the four sales used by both experts are usable having a comparable highest and best use and zoning as the Subject. The Newark comparable is also usable being in the same county, having similar zoning and developable area, and the sale occurring close to the valuation date for tax year 2009. The court is unable to determine the total developed or developable area in comparable sales used only by Belleville's expert (Mount Olive and Hawthorne¹⁶), and thus, cannot use these sales vis-à-vis the Subject's developable SF to determine its value. The court will also place less weight to Route 21's expert's use of the Clifton Assemblage for the reasons stated above.

As to market conditions adjustments, neither expert provided data to support their testimony. Route 21's expert did not provide his paired sales analysis in his report or in court to prove that the market fell by 5% in 2008 for retail/light industrial properties. Belleville's expert did not provide the Director's average ratio to show that the market increased by 5%, or a breakdown of the ratio specific to commercial property.

Both experts' reports, which were in evidence, contained information of the interest rates and economic indicators. The prime rate of interest dropped from October 2007 to October 2008, as did the yields on treasury bills, although there was an increase in corporate bond yields. The fixed mortgage information (from the ACLI data attached to Route 21's expert's report)

¹⁶ On cross-examination, Belleville's expert testified that the approvals for the Hawthorne property had changed since its sale, and that he was unsure of the size of the proposed retail development.

showed a slight decrease in the lending rates and a slight increase in the capitalization rates for the third quarter 2008 as compared to the third quarter 2007 for the retail and industrial loans, nation-wide and for the Mid-Atlantic region (which included New Jersey). However, the loans for New Jersey (for all types of property) showed decrease in interest and capitalization rates for the same period.

In a comparable sale analysis, appraisers can consider “other evidence of shifting market conditions,” such as, among others, terms of available institutional financing, to determine the appropriate market conditions adjustment. The Appraisal of Real Estate, *supra*, at 333-36. Such evidence should be used if “sales of comparable properties are unavailable” since the better approach is to compare actual sale prices for indications of the market shifts. *Id.* at 333-35.

The court cannot analyze the economic indicators data in the experts’ reports in determining the appropriateness of the experts’ market adjustments because, (a) neither expert testified or explained the effect of the drop in lending rates and corresponding increase in the capitalization rates for 2008, as establishing their positions on their respective market conditions adjustment; and (b) while the comparable sales close to the assessment period were not plentiful, there were still available.

The information before this court, namely, the comparable sale prices, whether it be per-acre or PSF, are useful indicators for market adjustments since the comparable sales share the same highest and best use and zoning as the Subject. The purchase price of the comparables used by both experts for tax year 2009 is as follows:

Property	Sale Date	Area (acres)	Buildable SF	Price PSF	Price per-acre
Kearny	05/27/2005	19.34	164,925	\$90.95	\$775,474
Linden (after addback)					

of demolition costs)	05/31/2005	28.62	277,313	\$55.56	\$502,985
Paterson (after addback of demolition costs)	11/09/2005	16.55	221,328	\$65.97	\$882,175
Mount Olive	10/13/2006	14.84			\$837,264
Clifton Assemblage (parcel one)	11/23/2004	8.029			\$1,494,582
Clifton Assemblage (parcel two) ¹⁷	01/27/2007	3.393			\$1,827,291
Hawthorne	06/26/2008	8.78			\$768,793
Newark	11/21/2008	11.61	200,000	\$75.00	\$1,292,435

The Director's average ratio (available on the Division of Taxation's website), shows that the average ratio for Belleville, for all types of property was 15.28% as of October 1, 2005 (tax year 2006); 13.01% as of October 1, 2006 (tax year 2007); 94.4% as of October 1, 2007 (tax year 2008); and 92.38% as of October 1, 2008 (tax year 2009).

The above information indicates that the prices for commercial property generally tended to rise. However, giving consideration to the acreage or SF size, the court finds that on an average, the prices tended to remain steady as opposed to declining, which supports Belleville's expert's opinion that the commercial market in New Jersey and Belleville did not drop.¹⁸ The court therefore finds Route 21's expert's -5% adjustment is unwarranted.

The court will accept the -5% adjustment for topography of both experts, as well as their adjustments for location (except as adjusted by the court for the Clifton Assemblage for tax year 2008). The size adjustments are accepted except for Belleville's expert -5% adjustment for the

¹⁷ Route 21's expert's report noted that the combined area of 11.42 acres would equate to \$1,593,416 per-acre actual or \$1,620,119 per-acre (adjusted for demolition costs), or \$36.58 PSF actual and \$37.19 PSF adjusted, with a buildable area of \$125.24 PSF actual or \$127.34 PSF (adjusted). Without information on whether the sale prices were negotiated together or separately, the period when the price or prices was/were finalized, and when the planned building SF was known, it is difficult to pinpoint the period for applying the market conditions adjustment.

¹⁸ If the Union sale (sold February 1, 2007) showing a per-acre price of \$781,407 and an unadjusted PSF price of \$73.86 was used, see supra n.15, it provides further support that the market was steady as of the October 1, 2008 assessment date.

Newark comparable, because it was based upon the number of acres as opposed to the buildable SF. Rather, Route 21's expert's lack of adjustment for size is more credible.

Last, the court will accept Route 21's expert's adjustment for the lack of development approvals for the Newark comparable as of the date of its sale, which property was sold without approval contingencies.

Based on the above analysis, the court therefore finds the adjusted price PSF as follows:

	Clifton	Patterson	Linden	Kearny	Newark
Buildable Area	145,319 SF	221,328 SF	277,313 SF	164,925 SF	200,000 SF
Sale Date	12/01/2005	11/09/2005	05/31/2005	05/27/2005	11/21/2008
Sale Price	\$18,200,000	\$13,100,000	\$14,406,000	\$15,000,000	\$15,000,000
Post-Sale Exp.	\$ 305,000	\$ 1,500,000	\$ 1,000,000	\$ 0	\$ 0
Adjusted Price	\$18,505,000	\$14,600,000	\$15,406,500	\$15,000,000	\$15,000,000
Adjusted PSF	\$127.34	\$65.97	\$55.56	\$90.95	\$75
Time	9%	9%	12%	12%	0%
Adjusted PSF	\$138.80	\$71.91	\$62.23	\$101.86	\$75
Location	-10%	5%	-10%	0%	5%
Size	-10%	0%	0%	-10%	0%
Topography	- 5%	- 5%	- 5%	- 5%	- 5%
Approvals	0%	0%	0%	-10%	10%
Net Adj PSF	\$ 104.10	\$71.91	\$52.90	\$76.40	\$82.50

With less weight to the Clifton Assemblage, and higher weight to the Newark comparable, its sale being closest in time to the assessment date, the court finds \$74 PSF as reasonable.¹⁹ The Subject's unimpaired value for tax year 2009 is thus \$19,174,288 (259,112 SF x \$74 PSF), rounded to \$19,174,300.

¹⁹ See supra n.15. If the adjusted price PSF for the Union comparable (\$71.65) was part of the grid, and placed next in weight to the Newark comparable, the court's finding of \$74 still remains reasonable.

(iii) Tax Year 2010 (assessment date October 1, 2009)

(a) Experts' Analyses

Route 21's expert concluded a value of \$14,880,000. Belleville's expert's value conclusion was \$21,875,000.

Route 21's expert used five comparable sales, four of which were used for tax years 2009 (Clifton, Paterson, Kearny and Newark). For these comparables, he made changes for market conditions to account for another year of negative market variation (-5%) from October 1, 2008 to October 1, 2009. He also maintained that because the preliminary approvals for the Subject were specific only to Lowe's, the termination of that contract in July 2009 rendered the approvals valueless. Thus, for purposes of valuation, he treated the Subject having no approvals in place as of the assessment date of October 1, 2009. The above adjustments, in additions to the ones he had made for location, size and topography provided an adjusted price PSF of \$69.34; \$55.51; 59.71 and \$68.40.

The expert also considered the February 1, 2007 sale of 2235 Springfield Avenue in Union for \$17,222,221 or \$73.86 per SF. The property was in the business-retail zone, and was sold to Target, with a golf driving range, miniature golf course, and storage buildings, all of which were demolished after the sale date. The deed shows a permitted building area of 233,185 SF, for Target, two smaller retail buildings and a free-standing commercial building. The expert provided -7% adjustment for market conditions; -5% for topography; and -10% adjustment because it was sold subject to approvals, resulting in an adjusted PSF price of \$58.38. He admitted that he did not know whether variances were provided, and whether the property was proximate to a state highway.

He concluded that the combined weight of all five sales provided a value of \$62.00 PSF or \$14,880,000 for the Subject for tax year 2010.

Belleville's expert used the Newark sale (used by Route 21's expert) and the two sales (in Mount Olive and Hawthorne) he had used for tax year 2009. He also considered the December 2, 2009 sale of \pm 9.8 acres in Bayonne, New Jersey, with a sale price of \$12,063,000 or \$1,230,918 per acre. The property was located in a commercial zoning district, and was improved with a shopping mall post-sale. He agreed that the property had approvals as of the date of sale for Wal-Mart store, Lowe's and satellite stores for a total area of 350,000 SF which provided a PSF price of \$34.46. He maintained that the price PSF had no bearing on the value because the site was much larger than the space the improvements would occupy. He provided a negative 10% for size; -5% for its "irregular shape;" and -5% for topography. Belleville's expert thus concluded an average price per-acre of \$925,000, and a value of \$21,875,000.

(b) Court's Analysis

As to the usability of Belleville's expert's comparables which do not include information on the buildable area, the court's analysis remains the same as for tax years 2008 and 2009, namely, that they do not assist in terms of arriving at the price PSF. Since Belleville's expert conceded that the Bayonne comparable had a developable area of 350,000 SF, the court will use the same as it is also comparable to the Subject in other aspects (highest and best use, zoning).

As to market conditions, the court's analysis as to the utility of the economic indicators attached to the experts' respective reports, of the comparable sale prices and the Director's ratio is the same. The sale prices of the comparable properties used by the experts for tax year 2010 were as follows:

Property	Sale Date	Area (acres)	Buildable SF	Price PSF	Price per-acre
Kearny	05/27/2005	19.34	164,925	\$90.95	\$775,474
Paterson (after adding back demolition costs)	11/09/2005	16.55	221,328	\$65.97	\$882,175
Mount Olive	10/13/2006	14.84			\$837,264
Clifton Assemblage (parcel one)	11/23/2004	8.029			\$1,494,582
Clifton Assemblage (parcel two) ²⁰	01/27/2007	3.393			\$1,827,291
Union	02/01/2007	22.04	233,185	\$73.86	\$781,407
Hawthorne	06/26/2008	8.78			\$768,793
Newark	11/21/2008	11.61	200,000	\$75.00	\$1,292,435
Bayonne	12/02/2009	9.8	350,000	\$34.46	\$1,230,918

The Director's average ratio was 94.4% as of October 1, 2007 (tax year 2008); 92.38% as of October 1, 2008 (tax year 2009); and 93.10% as of October 1, 2009 (tax year 2010).

The price per-acre of the similar sized acreage comparables (in Hawthorne and Bayonne), shows a price increase, and the slightly larger sized comparable (Newark) is also higher, all these sales being closest to the assessment date. However, these properties are considerably smaller in acreage than the Subject. The Bayonne property's price PSF of \$34.46 is lesser than comparables with a larger developable size, namely, \$73.86 PSF for the property in Union (sold January 2007) and \$75 PSF for the Newark property (sold November 2008). However, the Bayonne property's buildable area is larger than these two comparables and the Subject. Since larger properties command a lower price PSF, the lower price PSF for the Bayonne property does not automatically indicate a drop in the market conditions.

Balancing the comparable sale prices, their size (acre or square footage), and the slight increase in the Director's average ratio from October 1, 2008, the court finds that there is sufficient support for Route 21's expert's opinion that the market showed a decline in prices.

²⁰ See *supra* n.17.

The court will therefore accept Route 21's expert's -5% adjustment from the prior assessment date to the October 1, 2009 assessment date.

The court's conclusions as to the expert's adjustments for topography, size and location remains the same for the comparables used by Route 21's expert and by both experts (the Newark property) as in the prior tax year.

Route 21's expert's -5% adjustment for topography for the Union comparable is accepted as reasonable and consistent with his treatment of the Subject's three tiers of gradation as inferior. However, his -10% adjustment for its approvals is not credible. He concluded that the Subject was inferior because Lowe's had cancelled the contract, thus, there were no approvals in place as of October 1, 2009. However, this assertion was not supported by any evidence, for instance, any applications for, or township resolutions of, revocation of the approvals granted to Lowe's. Nor was there evidence that the approvals granted to Lowe's were not usable by Route 21. Moreover, although the expert opined that the approval was so specific to Lowe's that it was useless to any other developer or investor, he admitted that "in theory" another developer could use it exactly how Lowe's would. This concession is reasonable in that Lowe's as a box store is considered comparable to properties developed for use as a Wal-Mart store or Home Depot as evidenced by the expert's use of precisely such properties. Thus, his conclusion that the 2009 termination of Lowe's contract rendered the prior approvals useless is subjective. Therefore, his -10% adjustment is unwarranted.

Belleville's expert's -5% adjustment for shape for his Bayonne comparable is not credible since he described the Subject as also being irregularly shaped. His -10% for size being based on acreage is not accepted, however, the buildable area is more than the Subject's, thus, a

positive adjustment would be warranted (size being inversely proportional to unit price, smaller the property, the higher the price PSF). His lack of adjustments for market conditions is proper as the sale was only two months after the assessment date. His -5% adjustment for topography is also reasonable.

Based on the above analysis, the court therefore finds the adjusted price PSF as follows:

	Clifton	Patterson	Kearny	Newark	Union	Bayonne
Buildable Area	145,319 SF	221,328 SF	164,925 SF	200,000 SF	233,185 SF	350,000 SF
Sale Date	12/01/2005	11/09/2005	05/27/2005	11/21/2008	02/01/2007	12/02/2009
Sale Price	\$18,200,000	\$13,100,000	\$15,000,000	\$15,000,000	\$17,222,221	\$12,063,000
Post-Sale Exp.	\$ 305,000	\$ 1,500,000	\$ 0	\$ 0	\$ 0	\$ 0
Adjusted Price	\$18,505,000	\$14,600,000	\$15,000,000	\$15,000,000	\$17,222,221	\$12,063,000
Adjusted PSF	\$127.34	\$65.97	\$90.95	\$75	\$73.86	\$34.47
Time	4%	4%	7%	-5%	-5%	0%
Adjusted PSF	\$132.43	\$68.61	\$97.32	\$71.25	\$70.17	\$34.47
Location	-10%	5%	0%	5%	0%	0%
Size	-10%	0%	-10%	0%	0%	10%
Topography	- 5%	- 5%	- 5%	- 5%	- 5%	- 5%
Approvals	0%	0%	-10%	10%	0%	0%
Net Adj PSF	\$ 99.32	\$68.61	\$72.99	\$78.38	\$66.66	\$36.19

With less weight to the Clifton Assemblage, higher weight to the Newark and Bayonne comparables due to the proximity of their sale date to the assessment date, and lesser weight to the comparables with older sale dates and smaller size, the court finds \$70 PSF as reasonable. The Subject's unimpaired value for tax year 2010 is thus \$18,137,840 (259,112 SF x \$70 PSF).

If the court were to consider the Lowe's contract of September 2005, the price PSF would be \$84.90 (\$22 million sale price/259,112 SF). With the same adjustments for market and topography as was provided to the other comparables for tax years 2008 and 2009 (i.e., +9% and -5%), the price PSF would be about \$87. For tax year 2010 it would be about \$83 PSF with the 2010 adjustments for market and topography (+4% and -5%). If added to the grid for each tax

year, and provided a lesser weight in terms of the sale date (2005), the court's finding of the price PSF for each tax year is still reasonable.

In sum, the based upon the comparable sales and the court's analysis in this regard, the unimpaired value for the Subject for each tax year, is as follows:

Tax Year	Unimpaired Value
2008	\$19,174,300
2009	\$19,174,300
2010	\$18,137,840

B. Impaired Value

1. Remediation Costs/Cost Estimates

Both environmental experts agreed that a 10-year remediation period was reasonable. They also agreed that clean-up would include the estimated costs of the remediation methods, plus collateral/indirect costs for oversight, reporting and project closeout. However, they differed on the amount of certain cost estimates.

Both valuation experts adopted the parties' respective environmental expert's remediation costs and the 10-year remediation period. They agreed that a 6% discount factor should be applied to reduce the total projected remediation costs to their present value, however, differed slightly in that Route 21's expert applied the 6% factor from year 2 onwards, while Belleville's expert applied the same from year 1 onwards. They also agreed that a 10% entrepreneurial incentive (or risk factor) was reasonable. They further agreed that some portion of the actual costs expended can be deducted, but differed as to the controlling date with Route 21's expert deducting the expenses after the October 1 assessment date and Belleville's expert deducting the costs expended as of the October 1 assessment date. Additionally, Route 21's expert applied the discount factor to the actual expenses incurred in the year following the

assessment date at issue (e.g. to the expenses incurred in 2008 vis-à-vis the October 1, 2007 assessment date), whereas Belleville’s expert added such expenses incurred as of an assessment date to the present value of future expenses. Finally, only Route 21’s expert’s provided for a 3% contingency factor.

(i) Route 21’s Environmental Expert’s Analysis

In its 2009 RIR/RAWP, First Environment provided a detailed breakdown of cost estimates for a 10-year projected period for the following items (summarized here by title, since each item contained several line-items):

Task	Cost Estimate
Supplemental Remedial Investigation (for off-site investigation)	\$ 122,500
Soil Excavation	\$ 5,900,200
Supplemental Bioaugmentation System Design and Installation	\$ 346,790
Supplemental Bioaugmentation Injection Event	\$ 214,438
Routine Monitoring and Reporting	\$ 43,750
Project Closeout	\$ 90,000
TOTAL	\$ 6,717,678

However, the summarized “Project Subtotals” was \$7,648,303 comprising of (a) Soil Excavation costs of \$5,900,200 (exclusive of “cost to . . . third party compaction verification”); (b) Supplemental Enhanced BioAugmentation costs of \$768,103 (assuming “two additional electron donor injection events”); and (c) Groundwater Monitoring costs of \$980,000 (assuming 2 years of quarterly sampling/reporting and semi-annual sampling/reporting for 8 years).

In addition, First Environment listed the actual costs of remediation (from December 1, 2004 until the 2009 RIR/RAWP report date) as about \$7.36 million. These included operations costs (costs charged by First Environment; Enterprise Network Resolutions, the excavation contractor; Advanced Drilling, a well-drilling contractor; and Aracon); administrative costs (including normal legal fees); legal fees (for services related to environmental remediation); bank

fees (for letter of credit which DEP required if the New Jersey Economic Development Authority were to loan monies to Route 21); and DEP charges.

In its 2010 RIR/RAWP (approved by the DEP), First Environment concluded the following amounts to be the reasonable estimate of remediation costs:

Task	Cost Estimate
Supplemental Remedial Investigation	\$ 174,500
Remedial System Design and Installation	\$ 719,900
Bioaugmentation Injection	\$ 577,570
Supplemental Chemical Oxidation Injection (as needed)	\$ 364,250
Quarterly Monitoring, yearly	\$ 160,000
Project Closeout	\$ 90,000
TOTAL	\$ 2,086,220

The “Project Subtotals” totaled \$3,645,620 comprising of (a) Enhanced Bioaugmentation costs of \$1,439,470; (b) In-situ Chemical Oxidation costs of \$1,226,150 (assuming “two additional electron donor injection events”); and (c) Groundwater Monitoring costs of \$980,000 (assuming 2 years of quarterly sampling/reporting and semi-annual sampling/reporting for 8 years. Category (a) and (b) included costs for treatability studies, system and design installation, one bioaugmentation/in-situ chemical oxidation and for project closeout.

As in its 2009 RIR/RAWP, First Environment listed the actual costs of remediation (from March 2005 through March 2010) as about \$7.36 million for operations costs (charges of First Environment and other contractors); administrative costs; legal fees; bank fees and DEP charges.

In its 2011 RAPR, First Environment listed the actual costs expended as \$49,166. Of this \$7,295 was expended towards Treatability Study, and \$41,871 was expended for Sample Collection (soil and groundwater), Project Management and Reporting.

First Environment’s representative testified that its cost estimates were based on projections by its engineers, who in turn, based their estimates on several years of experience in

addition to direct costs obtained from manufacturers and vendors. He stated that although First Environment was not responsible for offsite groundwater remediation, he included such costs (about \$122,000 in the 2009 RIR/RAWP and about \$175,000 in the 2010 RIR/RAWP) because it was prudent practice and Route 21 wanted a comprehensive cost estimate. For the same reason, he included the contingent chemical oxidation costs even if such treatment could be unnecessary. He stated that monitoring is required even after the remediation is complete to check for residual trails of contamination, if any, and to ensure that they stay below the DEP set concentration levels, therefore, cost estimates in this regard should be provided. Project closeout costs (for generating a summary report, abandoning the wells, closing up the well-network, and getting final approval from the DEP) also comprised an accepted estimated expense.

The expert testified that he provided cost estimates for all aspects of remediation regardless of the party who ultimately bears the responsibility for their payment. Nonetheless, he would, and did review all invoices for accuracy, including First Environment's contractor or sub-contractor invoices which were passed on to Route 21. He admitted that he did not review the legal invoices billed to Route 21. Nor did he review invoices from DEP²¹ which, he testified, were consistent with DEP charges for other sites he had been involved with. He also stated that a 10-year cost projection period is normally accepted because a substantial reduction is generally achieved in this time-frame.

(ii) Route 21's Valuation Expert's Impaired Value Opinion for All Tax Years

Based upon the above cost estimates, Route 21's valuation expert developed his impaired value opinions. Using the 2009 RIR/RAWP, he included the six items listed on Table 51 of the environmental expert's report, except that instead of using the \$43,750 amount indicated as the

²¹ The DEP bills the owner of a contaminated property for oversight, site visits, and document review.

estimated cost for “routine monitoring and reporting,” he used the \$980,000 listed in the “Project Subtotals” as “Groundwater Monitoring” (which assumed quarterly sampling/reporting for the first 2 years, then on a semiannual sampling/reporting for the remaining 8 years). The valuation expert noted that the annual costs for monitoring/reporting was \$160,000 for each of the first two years, and then \$82,500 per year for the remaining 8 years.²² He assumed that the first and second items on Table 51 (Supplemental Remedial Investigation and soil Excavation) would occur in the first year, while items 3 and 4 (Supplemental Bioaugmentation System Design & Installation, and Supplemental Bioaugmentation Injection Event) would occur in the second year, and the last item (Project Closeout) would occur in Year 10. He conferred with Route 21’s environmental expert in concluding that only bioaugmentation would be performed, therefore did not consider any costs for the alternative remedial method of chemical oxidation. He spread the costs evenly over a 10-year period (except the monitoring costs which as noted above differed in amounts for the first two years).

For tax year 2008, he added the actual (already incurred) costs after October 1, 2007 (October 2007 to September 2008), to the first year of the projected remediation costs. Although his report noted the amount as \$736,559, his computation sheet listed the amount as \$507,431. To the second year of the projected expenses (for the same tax year), he included the actual expenses incurred after October 1, 2008 (October 2008 to July 2009) of \$229,128, but applied a discount rate to this amount. For tax year 2009, he included the actual expenses incurred after October 1, 2008 (October 2008 to July 2009) of \$229,128 (without any discount factor) to the first year of the projected remediation costs. He did not include the actual expenses for the following year at its present value (as he had done for tax year 2008). For tax year 2010, he

²² The \$160,000 per year for monitoring/reporting was actually listed in the 2010 RIR/RAW.

included \$109,552, the actual expenses spent after October 1, 2009 (October 1, 2009 to March 2010) to the first year of the projected remediation costs. Per Route 21, eliminating the actual costs “in years after the year in which they were incurred” avoided double dipping.

The expert added a contingency factor of 3% of the subtotal remediation cost (cleanup + monitoring + actual), reasoning that cost estimates are necessarily uncertain, and this would account for potential contamination the environmental consultant/contractors may discover during remediation. He also added 10% (of the subtotal remediation costs) for “risk factors” to account for the inherent possibility of additional contaminants being discovered during the clean-up process. He then discounted the total remediation costs by 6% from years 2 through 10 opining that this rate was consistent with financial data he had reviewed. He thus concluded the present value of the remediation costs as \$7,619,015 for tax year 2008; \$7,058,790 for tax year 2009; and \$6,923,275 for tax year 2010. He then subtracted these remediation cost figures from his previously calculated fair market value as unencumbered figures, summarized above, for a value conclusion (rounded) of \$10,140,000, \$10,220,000, and \$7,960,000.

Using the similar factors, but based upon the 2010 RIR/RAWP, the valuation expert concluded a subtotal for remediation costs (adding groundwater cleanup, monitoring and actual expenditures) as \$3,663,529, \$3,156,098, \$3,036,492 over a 10-year period, for each tax year 2008, 2009 and 2010. With the 3% contingency factor and 10% risk factor for each year during the 10-year period, he arrived at total remediation costs projected for 10 years of \$4,150,777, \$3,575,858, \$3,440,345 for each respective tax year. To reach the present value of the remediation costs as of the relevant valuation dates, he applied a 6% discount rate from years 2 through 10 for the present value of remediation costs of \$3,440,703, \$2,880,478, and \$2,744,965

for each tax year respectively. He then subtracted these remediation cost figures from his previously calculated fair market value as unencumbered figures, summarized above, to reach his final value opinions of \$14,320,000, \$14,400,000, and \$12,135,000 for each respective tax year.

(iii) Belleville's Environmental Expert's Analysis

Belleville's environmental expert testified that the degree of contamination in the Subject had decreased significantly over the period of time in which remediation efforts were being made. The report stated that because of this, First Environment's remediation cost estimates of \$2.4 to \$3.5 million (set forth in the 2010 RIR/RAWP), should be at the lower end.

The expert testified that he had conferred with Geo-Cleanse, a recognized expert in the area of the in-situ chemical oxidation in connection with the Subject and First Environment's 2010 RIR/RAW. He also spoke to the case manager at the DEP as to the status of the reports and the proposed remedial actions.

Geo-Cleanse generated an estimate to conduct an in-situ chemical oxidation to fully remediate the Subject. It relied on the data contained in the 2011 RAPR about the groundwater contamination concentrations at the Subject provided by First Environment. It concluded a total remediation estimate of \$2,124,363.

Based upon First Environment's 2011 RAPR, and Geo-Cleanse's estimates, Belleville's environmental expert subsequently amended its cost analysis. He started with Geo-Cleanse's estimate of \$2.12 million. To this, he added \$150,000 for First Environment's project management, oversight, injection permits, post-treatment groundwater sampling, and final report costs for a total cost estimate of \$2,274,363, which he opined was slightly less than the lower end

of the cost range projected in the 2010 RIR/RAWP, but was consistent with the successful remediation efforts.

Although the expert's report, original or amended, made no mention of any other costs, the expert testified that he had added \$175,000 which was "about 5% for First Environment . . . as a contingency." He stated that based on the 2010 RIR/RAWP, he arrived at a final cost estimate of \$2.4 million.

Finally, the expert added First Environment's reported costs of \$3,460,488 towards "pre-existing environmental costs." The \$3,460,488 was the total of actual remediation costs that had been expended from during the calendar year period 2005 to 2009 (explicated in the 2010 RIR/RAWP at Table D), towards First Environment's fees, and charges of other contractors. He excluded the legal fees, bank charges and DEP fees because they are generally not covered under the Brownfields reimbursement program, and would not have been granted by the DEP. He concluded that the total remediation costs should be in the range of \$5,860,488 (\$2.4 million for "future environmental costs" and \$3.4 million of actual costs) over a 10-year projection period.

(iv) Belleville's Valuation Expert's Impaired Value Opinion for All Tax Years

Belleville's valuation expert spread the estimated cost generated by the environmental expert (\$2,274,363) over 10 years (or \$227,436 each year). He used the same 6% discount rate starting from year 1 through year 10 (as opposed to Route 21's valuation expert who commenced application of the 6% from year 2 onwards). Thus, \$227,436 for 10 years, discounted to present value at a 6% rate provided a total projected cleanup cost of \$1,659,481 for each tax year. To this he added the out-of-pocket remediation costs (using the same amounts as Route 21's valuation expert but for different tax years, thus, \$0 for tax year 2008 claiming no remediation

costs were expended between October 1, 2006 to October 1, 2007; \$736,559 for tax year 2009 and \$229,128 for tax year 2010), and then reduced the result by a 10% entrepreneurial incentive.

His total remediation cost was \$1,825,429 for tax year 2008; \$2,635,644 for tax year 2009 and \$2,077,470 for tax year 2010. Deducting the cost from his unencumbered value conclusion, he concluded the Subject's impaired value as \$17,095,000 for tax year 2008; \$17,230,000 for tax year 2009 and \$19,800,000 for tax year 2010.

(v) Court's Analysis of the Impaired Value of the Subject

Our Supreme Court has ruled that "when . . . governmental restraints are temporary or subject to cure, the transitory absence of a market does not eliminate value." Inmar Associates, Inc. v. Borough of Carlstadt, 112 N.J. 593, 604-605 (1988). See also The Appraisal of Real Estate, *supra*, at 226 (noting that recently "contaminated properties have become more marketable and have begun to change hands with increasing frequency"). However, because market value of the property is undoubtedly affected by the contamination, the costs to remediate the contamination must be factored in the valuation analysis, though a dollar-for-dollar deduction from the unimpaired value is impermissible. Inmar, *supra*, 112 N.J. at 607-08.

Although Route 21's valuation expert provided a computation of two impaired value opinions, the court will utilize the estimated costs based upon the 2010 RIR/RAWP because this was the only plan approved by the DEP, and further since Route 21 is pursuing the implementation of the remedial action proposed in that plan. Thus, the only relevant and pertinent costs estimates are those contained in the 2010 RIR/RAWP.²³

²³ In its post-trial response brief Route 21 states that "the March 10, 2010" RIR/RAWP, "with its costs and schedules, is the only plan which the Court should utilize in considering future environmental costs" because this was the "only plan" that was "prepared by the contractor which has successfully remediated the property, approved by the NJDEP, . . . successfully tested . . . and which the owner and its environmental consultant are pursuing."

The court finds Route 21's environmental expert's cost estimates for enhanced bioaugmentation of \$1,439,470 (which did not include the cost of "off-site investigation" under the item "supplemental remedial investigation") under the 2010 RIR/RAWP reasonable. The court also finds reasonable his testimony that a less-expensive second injection would be likely required, and therefore, finds reasonable, Route 21's valuation expert's inclusion of the estimate in this regard. These amounts taken together are about \$300,000 lower than Geo-Cleanse's estimate of \$2,124,363 for projected costs allocable to the actual remediation (design, sampling, injections, well installation), which may possibly be attributable to the somewhat differing but comparably effective remediation methods (bioaugmentation versus chemical oxidation).

Although Route 21's environmental expert is not responsible for off-site investigation, its inclusion of an estimate in this regard is reasonable. There was no evidence to show that these costs were speculative. Indeed, First Environment's 2010 RIR/RAWP, approved by the DEP, contained an Off-Site Groundwater Delineation Workplan and provided proposed measures to monitor and analyze contaminated groundwater which may have migrated off-site. Moreover, the expert also credibly testified that it was prudent practice to include potential off-site investigative costs regardless of who pays for the same.

The experts are not that far apart in substance as to the estimated costs for monitoring/reporting and project closeout. Route 21's environmental expert's projected monitoring/reporting costs of \$43,750 and project closeout of \$90,000 (totaling about \$135,000) whereas Route 21's environmental expert projected a total of \$150,000 for project management, oversight, injection permits, post-treatment groundwater sampling, and final report costs. The difference is that Route 21 estimated the cost of the routine monitoring/reporting as recurring for

10 years over the remediation period (assuming quarterly monitoring/reporting for the first two years, then semi-annual reporting for the remaining 8 years). Belleville's environmental expert did not project any of the indirect costs as recurring. Consequently, they differed significantly in this aspect (\$1.07 million versus \$150,000).

The court finds credible Route 21's environmental expert's testimony that post-treatment monitoring/reporting is to be performed periodically rather than just once over the remediation period. However, although the frequency of the monitoring/reporting is consistent with that proposed in the RIR/RAWP, the court finds the assumed increased frequency in the first two years to be high. This is because each item of the remediation process listed by First Environment already factors in the reporting and monitoring for that item, and associated costs in this regard. Further, there is a proven drop in the contamination levels commencing in 2008 itself, which decrease was significant by 2011. Therefore, the assumed frequency of the routine monitoring/reporting is not credible. The court will therefore use \$43,750 as the annual estimated cost, for each of the 10-years of projected remediation.

The court finds that the estimated cost of \$90,000 for closeout is reasonable (and properly deemed as non-recurring each of the 10-year projected remediation period).

Next at issue is the reduction for and of the actually expended costs for each tax year. Route 21 notes that while "both parties agree that actual expenditure should be deducted dollar-for-dollar," its valuation expert's deduction methodology is correct because a hypothetical buyer is interested in what needs to be spent as opposed to what has already been spent. Thus, to Route 21 "it makes sense to adjust the [unimpaired] value for amounts that have not yet been incurred" as opposed to Belleville's valuation's expert's method of deducting expenses actually incurred as

of the assessment date (e.g., his deduction of expenses actually incurred between October 1, 2007 to October 1, 2008 for tax year 2009) from the Subject's unimpaired value.

Deduction of 100% of the costs from the unimpaired value of the Subject is impermissible because “[a]n owner’s expenditures of cost are never conclusive on the question of value for tax purposes.” Inmar, supra, 112 N.J. at 605. For instance, even if a property owner had “borrowed the funds to clean up before the October 1 assessment date, and did clean up, that debt would not reduce the value of the property.” Ibid. Such a deduction, especially if high in the initial years, can improperly understate the property’s fair market value. Cf. Univ. Plaza Realty Corp. v. City of Hackensack, 264 N.J. Super. 353, 358 (App. Div.) (Tax Court’s reduction of expended remediation costs from potential income under income approach was “a case specific analysis, and not a holding that dollar for dollar cost-to-cure is a proper value adjustment standard in every non-mandated remediation case”), certif. denied, 134 N.J. 481 (1993).

Further, there is no question that in “reality” a “property is worth more . . . after money is expended” in its remediation. Metuchen I, LLC, supra, 21 N.J. Tax at 295. Although that case addressed future costs, the logic and “pragmatic” approach applies equally to expenses already incurred as of the assessment date, namely, that monies spent to cleanup the property enhances the value of the property, and therefore, should not be used to reduce the unimpaired value of the contaminated property. Otherwise, it would effectively allow the recoupment of the owner’s expenses/profits, a result Inmar, supra, forbade.

A reconciliation of these principles is found in the Court’s suggestion that the amortization or capitalization of remediation costs is a preferred alternative. Inmar, supra, 112 N.J. at 608 (“investment in the cost of neglected cure might prudently be spread out by

competent management over a number of years,” the latter being a more “realistic” approach than annual deduction of the “full cost of cure from value”). See also International Association of Assessing Officers, Standard on The Valuation of Properties Affected by Environmental Contamination 15 (July 2001) (under the sales comparison approach, an assessor’s data could comprise of uncontaminated properties to establish the unencumbered value with adjustments that “should be based on the cost to cure (properly discounted or amortized)” among others).

Route 21’s expert’s deduction methodology is unsatisfactory. If his logic is that the actual expenses for the year after the October 1 assessment date is deemed to be the projected or future expenses as of that assessment date, then he should include those actual expenses in the other estimated costs and spread them over 10 years instead of discounting them for only one period (i.e. October 2008 to July 2009), and then, only in tax year 2008. His claim that his method avoids “double dipping” is not credible because by failing to apply the discount for each year of the remediation period, he is effectively providing a full dollar reduction of the actual costs expended in a particular year.

Belleville’s valuation expert’s approach fares no better. Although he claimed that he was including monies spent as of the assessment date, his provision of zero amount as of the October 1, 2007 assessment date is belied by Route 21’s evidence of the monthly amounts spent from October 2006 to September 2007 upon First Environment and other contractors or sub-contractors, as well as legal and bank fees. Further, he simply deducted the entire amounts for the subsequent tax years 2009 and 2010 (adopting the numbers of Route 21’s valuation expert) from his conclusion of the Subject’s unimpaired values for those years, contrary to Inmar, supra.

The court finds that the actual costs of environmental remediation should be considered as part of the environmental costs-to-cure, and must be evaluated by its effect upon the Subject's fair market value. Balancing the principle that an assessment must recognize that contamination may adversely affect a property's fair market value but a dollar-for-dollar deduction of the entire amount of the actual costs is improper, with the pragmatism that monies spent can appreciate the property's value, the court finds credible Route 21's valuation expert's reasoning that monies expended for the year after the assessment date is properly viewed as a part of remediation costs. Route 21 credibly posits that a hypothetical buyer would be more concerned with the future costs in terms of negotiating the purchase price, while at the same time, a property which has expended remediation efforts and costs, will better compete with uncontaminated or remediated properties in the market. Of course, the actual expenses must be reasonable and supported by the market or by credible expert opinion. Nor should there be any duplication.

As part of the environmental costs, but projected as being incurred in the future, the actual costs should be amortized with the projected expenses over the remediation period. This solution will prevent front-loading the deduction in one year, and thus, improper understatement of the property's fair market value, similar to installation of capital improvements which can increase the value of property but must be amortized over its life based upon market data and expense rates. The court will use the table/spread-sheet provided by Route 21 as the basis for the actual expenses since both parties' valuation experts also used this data.

In connection with the actual costs, the court does not find Belleville's disallowance for legal costs, bank fees and DEP charges credible. Its contention that these costs should be ignored because they would not be part of the costs reimbursable under the Brownfields

Agreement by the DEP is unpersuasive. The court is not interpreting the validity of the Brownfields Agreement²⁴ but is considering the fair market value of the property as impaired, which impairment is being evaluated and measured by, among other factors, the remediation costs. The court finds that inclusion of legal fees, DEP charges and bank fees is proper since these expenses were generated and necessitated solely in connection with the Subject's environmental remediation.

Similarly, the court does not find credible Route 21's valuation expert's failure to apply the 6% discount to the first year of the 10-year remediation period (for actual and future costs). If he deemed the first year's costs to be expended entirely in the beginning of the year thus requiring no discounting, he did not explain the basis for such assumption. In any event, his methodology would not provide a present value (as of the assessment date) of 10 years of costs, therefore, his application of a factor of 1 to the first year of the 10-year remediation period is unpersuasive. The court will use the present value of \$1 (i.e., the discount factor) presented by Belleville's valuation expert as being more credible.

Finally, the court finds that Route 21's valuation expert's 3% contingency factor is not persuasive. Although he claimed that this would account for potential unknown contamination that Route 21's environmental consultant could discover during the remediation process, this was not a factor assumed by First Environment in its projection of the remediation cost estimate. Being in the business of environmental consulting and remediation for several years, and as a contractor familiar with the other contractors/sub-contractors it hires, if First Environment itself

²⁴ Route 21 argued that the existence of the Brownfields Agreement is of no moment in deciding the valuation of the Subject, and briefed the issue anticipating Belleville to posit that because Route 21 would be reimbursed for the remediation costs by the DEP, the Subject's unimpaired value should not be reduced by such costs. Belleville did not raise this issue. Therefore, the court will not rule on this point, although this could be raised as an issue for future tax years if Route 21 receives reimbursement.

did not factor “contractor contingency” as a cost aspect, then, Route 21’s valuation expert’s subjective opinion is of little evidentiary value.

In sum, the court finds that that the reasonable remediation costs for the Subject over a 10-year period is \$2,363,720 (projected \$1,439,470 + \$122,500 + \$364,250 + \$437,500). The court also finds that the actual expenses (deemed projected) is \$507,530 for tax year 2008 (paid during October 2007 to September 2008); \$251,770 for tax year 2009 (paid during October 2008 to September 2009); and \$109,520 for tax year 2010 (paid during October 2009 to March 2010). Thus, the total remediation cost is \$2,871,250 (tax year 2008); \$2,615,490 (tax year 2009); and \$2,473,240 (tax year 2010).

Thus, the Subject’s fair market value as impaired but before application of the Chapter 123 ratio for each tax year is \$16,869,800; \$17,075,100; and \$16,152,780, computed as follows:

Tax Year 2008

Present Value of Remediation Costs

Total Estimated Remediation		\$ 2,871,250
Average Cost per year (10-year remediation period)		\$ 287,125
Average Discounted Cost per year		
Year 1	\$287,125 x .941765	\$ 270,404.28
Year 2	\$287,125 x .886920	\$ 254,656.91
Year 3	\$287,125 x .835270	\$ 239,826.90
Year 4	\$287,125 x .786628	\$ 225,860.56
Year 5	\$287,125 x .740818	\$ 212,707.37
Year 6	\$287,125 x .697676	\$ 200,320.22
Year 7	\$287,125 x .657047	\$ 188,654.62
Year 8	\$287,125 x .618783	\$ 177,668.07
Year 9	\$287,125 x .582748	\$ 167,321.52
Year 10	\$287,125 x .548812	\$ 157,577.65
Total Present Value of Costs		\$ 2,094,998.10

Rounded	\$ 2,095,000
Entrepreneurial Incentive (10%)	\$ 209,500
Unimpaired Value	\$19,174,300
Less: Present Value of Remediation Costs	\$ 2,095,000
Less: Entrepreneurial Incentive	\$ 209,500
Fair Market Value (as Impaired)	\$16,869,800

For tax year 2008, the Chapter 123 ratio was 94.40% with an upper limit of 108.56% and lower limit of 80.24%. The ratio of the assessment to the true value of the Subject is 119.02% (\$20,080,000/16,869,800).

Where the “chapter 123 ratio is less than 100% and the assessment exceeds the court determined fair market value, then the assessment will be the fair market value of the property multiplied by the chapter 123 ratio.” Passaic St. Realty Assoc., Inc. v. Garfield City, 13 N.J. Tax 482, 485 (Tax 1994) (citing to N.J.S.A. 54:51A-6(b)). Thus, the court must apply the Chapter 123 ratio to the fair market value. The assessment is thus reduced to \$15,925,091.02, rounded to \$15,925,100.

Tax Year 2009

Present Value of Remediation Costs

Total Estimated Remediation	\$ 2,615,490
Average Cost per year (10-year remediation period)	\$ 261,549
Average Discounted Cost per year	
Year 1	\$261,549 x .941765 \$ 246,317.69
Year 2	\$261,549 x .886920 \$ 231,973.04
Year 3	\$261,549 x .835270 \$ 218,464.03

Year 4	\$261,549 x .786628	\$ 205,741.77
Year 5	\$261,549 x .740818	\$ 193,760.21
Year 6	\$261,549 x .697676	\$ 182,476.46
Year 7	\$261,549 x .657047	\$ 171,849.99
Year 8	\$261,549 x .618783	\$ 161,842.07
Year 9	\$261,549 x .582748	\$ 152,417.16
Year 10	\$261,549 x .548812	\$ 143,541.23

Total Present Value of Costs \$ 1,908,383.65

Rounded \$ 1,908,400

Entrepreneurial Incentive (10%) \$ 190,840

Unimpaired Value \$19,174,300

Less: Present Value of Remediation Costs \$ 1,908,400

Less: Entrepreneurial Incentive \$ 190,840

Fair Market Value (as Impaired) \$17,075,060

Rounded \$17,075,100

For tax year 2009, the Chapter 123 ratio was 92.38% with an upper limit of 106.24% and lower limit of 78.52%. The ratio of the assessment to the true value of the Subject is 117.59% (\$20,080,000/\$17,075,100).

Since the Chapter 123 ratio is less than 100% but the assessment is greater than the value determined by the court, the ratio must be applied to the value. This provides an assessment of \$15,773,977.38, rounded to \$15,774,000.

Tax Year 2010

Present Value of Remediation Costs

Total Estimated Remediation \$ 2,473,240

Average Cost per year (10-year remediation period) \$ 247,324

Average Discounted Cost per year

Year 1	\$247,324 x .941765	\$ 232,921.09
Year 2	\$247,324 x .886920	\$ 219,356.60
Year 3	\$247,324 x .835270	\$ 206,582.32
Year 4	\$247,324 x .786628	\$ 194,551.98
Year 5	\$247,324 x .740818	\$ 183,222.07
Year 6	\$247,324 x .697676	\$ 172,552.02
Year 7	\$247,324 x .657047	\$ 162,503.49
Year 8	\$247,324 x .618783	\$ 153,039.89
Year 9	\$247,324 x .582748	\$ 144,127.57
Year 10	\$247,324 x .548812	\$ 135,734.38

Total Present Value of Costs \$ 1,804,591.41

Rounded \$ 1,804,600

Entrepreneurial Incentive (10%) \$ 180,460

Unimpaired Value \$18,137,840

Less: Present Value of Remediation Costs \$ 1,804,600

Less: Entrepreneurial Incentive \$ 180,460

Fair Market Value (as Impaired) \$16,152,780

For tax year 2010, the Chapter 123 ratio was 93.10% with an upper limit of 107.07% and lower limit of 79.13%. The assessed to true value ratio of the Subject is 118% (\$19,080,000/\$16,152,780).

Since the Chapter 123 ratio is less than 100% but the assessment is greater than the value determined by the court, the ratio must be applied to the value. The assessment is therefore reduced to \$15,038,238.18, rounded to \$15,038,300.

IV. Conclusion

The Clerk of the Tax Court shall enter judgments as follows:

Tax Year 2008

Land	\$15,925,100
Improvements	<u>\$ 0</u>
Total	\$15,925,100

Tax Year 2009

Land	\$15,774,000
Improvements	<u>\$ 0</u>
Total	\$15,774,000

Tax Year 2010

Land	\$15,038,300
Improvements	<u>\$ 0</u>
Total	\$15,038,300

Very truly yours,



Mala Sundar, J.T.C.