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THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

Patrick DeAlmeida
Presiding Judge

R.J. Hughes Justice Complex
P.O. Box 975
25 Market Street
Trenton, New Jersey 08625-0975
(609) 815-2922 x54620

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Frank E. Ferruggia, Esq.
Daniel P. Zazzali, Esq.
McCarter & English, LLP
100 Mulberry Street
Four Gateway Center
Newark, New Jersey 07102

Richard M. Conley, Esq.
122 Main Street
P.O. Box 662
Flemington, New Jersey 08822

Re: ML Plainsboro Ltd Partnership/Gomez v.
Township of Plainsboro
Docket No. 002348-2005
Docket No. 001620-2006

Dear Counsel:

This is the court's opinion with respect to plaintiff's motion at the close of trial to strike the opinions of the subject property's true market value offered by defendant's expert. For the reasons stated more fully below, plaintiff's motion is denied, in part, and denied without prejudice, in part.

The moving papers describe in detail a number of perceived flaws in defendant's expert's analysis, including what plaintiff argues is the expert's reliance on the net opinion of another expert who determined the reproduction cost new of the improvements at the subject property. With respect to all arguments other than the expert's reliance on the net opinion of another expert, the court concludes that the trial record does not support a finding that defendant's expert's opinions must, as a matter of law, be excluded from evidence. The court will weigh the evidence supporting the opinions of value offered by defendant's expert, along with the entire trial record, to determine the true market value of the subject property. The parties will file post-trial briefs on this point.

With respect to the reliance of defendant's expert on the reproduction cost new of another expert, the court denies plaintiff's motion without prejudice to allow the parties to address in their post-trial briefs two relevant Tax Court opinions published after plaintiff's motion was filed. Plaintiff may renew its argument in its post-trial submissions that the reproduction cost new of the improvements at the subject property upon which defendant's expert relied, and the opinions of value offered by that expert based on the cost approach, are inadmissible net opinions.

I. Procedural History and Findings of Fact

The following findings of fact and conclusions of law are based on the evidence and testimony admitted at trial, and the legal arguments advanced with respect to plaintiff's motion.

Plaintiff ML Plainsboro Ltd Partnership is the owner of two parcels of real property in defendant Plainsboro Township. For tax year 2005, the parcels are designated in the records of the municipality as Block 5.01, Lot 3.07, commonly known as 800 Scudders Mill Road, and Block 5.01, Lot 3.08, which is situated on Scudders Mill Road. Effective tax year 2006, the municipal tax assessor changed the designations on the parcels to Block 1601, Lot 2 (formerly Block 5.01, Lot 3.07), and Block 1601, Lot 4 (formerly Block 5.01, Lot 3.08).

The subject property consists of 65.362 acres on which sits a corporate campus facility with a three-story office building constructed in phases between 1981 and 1993. The improvements have 698,722 square feet of rentable office space, including 33,124 square feet of cafeteria space, and excluding 32,545 square feet of below grade storage space. A cooling tower is located on Lot 3.08. Phase 1, built in 1985, contains pods A-E, which comprise about 60% of the subject property. Phase 2, built in 1990, contains pods F-H, which comprise about 31% of the subject property. Phase 3, built in 1993, contains pod I, with approximately 9% of the property.

On the relevant valuation dates, the subject property was owner occupied. The improvements at the subject property were previously part of a larger complex designed by a single corporate user, Merrill Lynch, the financial services company. The original complex included office space, and a hotel conference and training center for Merrill Lynch personnel, as well as other amenities consistent with an impressive corporate campus. Over the years, Merrill Lynch's presence at the subject property waned.

On July 30, 2004, a portion of the original complex, the hotel conference and training center, was sold to 900 Scudders Mill Road Associates, LLC for $25,325,382. The sale included a number of easements and agreements regarding the sharing of equipment for heating, ventilating, and air conditioning with the subject property. The assessment on the hotel conference and training center property is not before the court.

For tax year 2005, Block 5.01, Lot 3.07 was assessed as follows:

Land	$ 22,300,000
Improvement	$167,700,000
Total	$190,000,000

For tax year 2005, Block 5.01, Lot 3.08 was assessed as follows:

Land	$ 3,708,500
Improvement	$ 3,200,000
Total	$ 6,908,500

Because the municipality implemented a district-wide revaluation for tax year 2005, the Chapter 123 average ratio for tax year 2005 is presumed to be 100% and the assessments are presumed to reflect true market value. See N.J.S.A. 54:1-35a. The total assessed value of the subject property for tax year 2005 is $196,908,500 ($190,000,000 + $6,908,500 = $196,908,500).

The assessments on the parcels remained the same for tax year 2006. The Chapter 123 average ratio for the municipality for tax year 2006 is 98.68%. When the average ratio is applied to the assessments, the implied equalized value of Block 1601, Lot 2 (formerly Block 5.01, Lot 3.07) is $192,541,548 ($190,000,000 ÷ .9868 = $192,541,548), and for Block 1601, Lot 4 (formerly Block 5.01, Lot 3.08) is $7,000,912 ($6,908,500 ÷ .9868 = $7,000,912). This results in a total assessed value of $199,542,460 for tax year 2006 ($192,541,548 + $7,000,912 = $199,542,460).

Plaintiff filed Complaints challenging the tax year 2005 and 2006 assessments. Defendant filed a Counterclaim in the tax year 2005 appeal. The matters were consolidated for trial.

During the trial, each party presented an expert real estate appraiser who offered opinions of the true market value of the subject property on the two relevant valuation dates, October 1, 2004, and October 1, 2005. Their opinions of value are summarized as follows:

Tax Year	2005	2006
Valuation Date	10/1/2004	10/1/2005
Plaintiff's Expert	$ 99,000,000	$109,000,000
Defendant's Expert	$214,500,000	$223,000,000

Defendant's expert employed all three commonly used approaches to estimating the true market value of real property: the cost approach, the sales comparison approach, and the income capitalization approach. For the cost approach, defendant's expert relied on an opinion of the reproduction cost new of the improvements at the subject property formulated by another expert. Defendant's expert weighed the opinions of value reached under the three approaches to determine the overall opinions of value noted above.

At the close of trial, plaintiff moved to strike the opinions of value offered by defendant's expert under the cost approach. Plaintiff argues that the opinions of value offered by defendant's expert under the cost approach are inadmissible because, among other things: (1) she relied on an inadmissible net opinion of another expert as to the cost of reproducing the improvements on the subject property; and (2) the land sales on which she relied to determine a land value are, as a matter of law, not comparable to the subject. According to plaintiff, defendant's expert admitted during her testimony that her overall opinions of value are dependent on the opinions of value she reached using the cost approach. Thus, plaintiff argues, if the court finds that the expert's opinions of value under the cost approach must be stricken from the record, her overall opinions of value must also be stricken. If plaintiff's motion is granted, the only opinions of value in the record will be the opinions offered by plaintiff's expert.

II. Conclusions of Law

A proper analysis of plaintiff's motion must be made with an understanding of the elements of the cost approach to determining the value of real property. The cost approach is normally relied on to value special purpose property or unique structures for which there is no market. Borough of Little Ferry v. Vecchiotti, 7 N.J. Tax 389, 407 (Tax 1985); Dworman v. Borough of Tinton Falls, 1 N.J. Tax 445, 452 (Tax 1980), aff'd, 180 N.J. Super. 366 (App. Div.), certif. denied,

88 N.J. 495 (1981). The approach "involves a replication, through the use of widely accepted cost services . . . of the cost of the components of the building to be valued, less . . . depreciation[s]." Gale & Kitson Fredon Golf, LLC v. Township of Fredon, 26 N.J. Tax 268, 283 (Tax 2011)(quotations omitted). "A cost approach has two elements – land value and the reproduction or replacement cost of the buildings and other improvements." International Flavors & Fragrances, Inc. v. Borough of Union Beach, 21 N.J. Tax 403, 417 (Tax 2004). From the estimated reproduction cost is deducted depreciation from all causes. Depreciation is defined as a loss in value from three causes: physical depreciation, functional obsolescence and external economic factors. The cost approach is most effective when the property being valued is new, in light of the difficulties in accurately estimating the various components of depreciation. See Worden-Hoidal Funeral Homes v. Borough of Red Bank, 21 N.J. Tax 336, 338 (Tax 2004).

A. Whether Defendant's Expert's Opinions of Value Under the Cost Approach Are Net Opinions.

Defendant's expert did not independently calculate a reproduction cost new for the improvements at the subject property. She relied on the reproduction cost new determined by another expert. Plaintiff argues that the expert who determined the reproduction cost new for the improvements at the subject property offered a net opinion. The component costs used to reach the expert's reproduction cost new were generated by computer software. Plaintiff contends that the cost expert blindly relied on the software, with no knowledge of the accuracy of the data incorporated in the software, and no understanding of how the software arrived at the cost of any of the items that make up the subject's improvements.

In addition, the cost expert testified that he used "shortcuts" and "interpolation" during his determination of reproduction cost new. Plaintiff argues that the expert made a number of crucial

errors in identifying the component parts of the improvements, and substituted items that existed at the property, but which were not included in the software, with other items found in the software. Thus, plaintiff contends, the cost expert effectively used replacement costs, rather than reproduction costs, for almost have of the components of the improvements. Plaintiff also challenges the cost expert's use of costs he derived from personal experience. According to plaintiff, these flaws render the expert's reproduction cost new inadmissible.

For an expert's opinion to be meaningful to the trier of fact, it must be based on credible facts and data. As stated in Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002):

> In addition to determining whether a witness is qualified to testify as an expert, the trial court must also decide the closely related issue as to whether the expert's opinion is based on facts and data. Biunno, Current N.J. Rules of Evidence, comment 2 on N.J.R.E. 702 (2002). As construed by applicable case law, 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. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981);Nguyen v. Tama, 298 N.J. Super. 41, 48-49 (App. Div. 1997). Under the "net opinion" rule, an opinion lacking in such foundation and consisting of bare conclusions unsupported by factual evidence is inadmissible. Johnson v. Salem Corp., 97 N.J. 78, 91 (1984), Buckelew, supra, 87 N.J. at 524. The rule requires an expert to "give the why and wherefore" of his or her opinion, rather than a mere conclusion. Jimenez v. GNOC Corp., 286 N.J. Super. 533 (App. Div.).
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> The weight to be given to an expert's opinion depends especially upon the facts and reasoning which are offered as the foundation of his [or her] opinion. Ocean County v. Landolfo, 132 N.J. Super. 523, 528 (App. Div. 1975). The weight and value of expert testimony are for the trier of fact. Robbins v. Thies, 117 N.J.L. 389, 398 (E & A 1937). An expert's opinion may be adopted in whole or in part or completely rejected. Middlesex County v. Clearwater Village, Inc., 163 N.J. Super. 166 (App. Div. 1978).
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> [City of Atlantic City v. Ginnetti, 17 N.J. Tax 354, 362 (Tax 1998), aff'd, 18 N.J. Tax 672 (App. Div. 2000).]

While the facts or data upon which the expert bases an opinion need not be admissible, they must be of a type "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . . ." N.J.R.E. 703. For an expert's testimony to be of any value, it must have a proper foundation. See Peer v. City of Newark, 71 N.J. Super. 12, 21 (App. Div. 1961), certif. denied, 36 N.J. 300 (1962).

The reliability of improvement costs estimated through the use of software was addressed by this court in two opinions in 2016. In Forsgate Ventures IX, LLC v. Township of South Hackensack, 29 N.J. Tax 28 (Tax 2016), appeal pending, Judge Andresini rejected as unreliable cost estimates created through software. He explained:

> Defendant's expert utilized an automated valuation software to generate cost estimates. However, he was unable to, nor did Defendant produce independent testimony to authenticate and explain the calculations used by the automated valuation software. In order for a new technology to be deemed reliable, there must be "sufficient scientific basis to produce uniform and reasonably reliable results and [the technology] will contribute materially to the ascertainment of the truth." State v. Hurd, 86 N.J. 525, 536 (1981); see also State v. Chun, 194 N.J. 54, 62-65 (2006). The automated valuation software may be useful in terms of streamlining the valuation process, but the court is unable to ascertain the underlying data, basis, or reasoning in the generation of such estimates. In other words, without a detailed explanation of the valuation software used, the court has no way to gauge the accuracy or reasonableness of the estimates produced.
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> [Id. at 45.]

Similarly, in Palisadium Management Corp. v. Borough of Cliffside Park, 29 N.J. Tax 245 (Tax 2016), appeal pending, Judge Fiamingo found that replacement costs offered by experts at trial lacked credibility. The court concisely held:

> [T]he court takes issue with the manner in which both plaintiffs' expert and the Borough's expert arrived at their replacement costs. Both experts utilized the Marshall and Swift Valuation Service

> computer program to generate cost estimates. However, neither provided any independent testimony to corroborate the calculations produced by the software. To date there has been no demonstration in any court that the calculations produced by the software are reliable.
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> * * *
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> When questioned, the Borough's expert indicated that he "plugged in" the numbers into the program and did not independently check any of the resulting calculations to determine their accuracy vis-à-vis the Marshall & Swift hand calculations historically accepted by the court.
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> * * *
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> [T]he court was provided with no explanation of the underlying data, basis or reasoning utilized by the computer software which produced the estimates employed by the Borough's appraisal expert. Thus, the court is without any basis to determine whether the estimates produced by the software and utilized by the appraisal expert were accurate and reasonable.
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> [Id. at 263-64 (footnote and quotations omitted).]

Because these opinions were issued after the submission of plaintiff's motion, neither was addressed in the parties' moving papers. They are, however, important precedents. While not binding on this court, the published opinions of the Tax Court are persuasive. In addition, both opinions are the subject of pending appeals, the outcomes of which may prove useful in determining this aspect of plaintiff's motion.

In order to allow the parties to address these precedents in writing, and in light of the court's determination with respect to the remainder of plaintiff's motion, the court will deny this aspect of plaintiff's motion without prejudice. In the context of its post-trial submissions plaintiff may

renew its argument that the court should reject the opinions of defendant's expert, and of the cost expert on which she relied, as net opinions.[1]

B. Defendant's Expert's Land Comparable Sales.

Plaintiff raises several arguments in support of its contention that the opinions of land value offered by defendant's expert must be stricken from the record.

1. Highest and Best Use.

Defendant's expert opined that the subject property had a highest and best us as a single-user corporate facility with the adjoining conference and training center. Plaintiff argues that the expert's land value opinions are inadmissible because they are based on sales of land, all but one of which are of parcels with a different highest and best use than that opined by the expert for the subject property.

To be credible evidence of value, the comparable lands sales on which an expert relies must be of parcels with the same highest and best use as the subject property. See American Cyanamid Co. v. Township of Wayne, 17 N.J. Tax 542 (Tax 1998). In Clemente v. Township of South Hackensack, 27 N.J. Tax 255, 267-69 (Tax 2013), aff'd, 28 N.J. Tax 337 (App. Div. 2015), Judge Andresini succinctly explained the importance of the highest and best use analysis:

> For property tax assessment purposes, property must be valued at its highest and best use. Ford Motor Co. v. Township of Edison, 127 N.J. 290, 300-01, 604 A.2d 580 (1992). "Any parcel of land should be examined for all possible uses and that use which will yield the highest return should be selected." Inmar Associates, Inc. v. Township of Edison, 2 N.J. Tax 59, 64 (Tax 1980). Accordingly, the first step in the valuation process is the determination of the highest and best use for the subject property. American Cyanamid Co. v. Township of Wayne, 17 N.J. Tax 542, 550 (Tax 1998), aff'd,

[1] This includes plaintiff's arguments that defendant's expert used an incorrect trend factor when trending her reproduction cost new and included the cost of fixtures, furniture and equipment in her reproduction cost new.

19 N.J. Tax 46 (App. Div. 2000). "The concept of highest and best use is not only fundamental to valuation but is a crucial determination of market value. This is why it is the first and most important step in the valuation process." Ford Motor Co. v. Township of Edison, 10 N.J. Tax 153, 161 (Tax 1988), aff'd o.b. per curiam, 12 N.J. Tax 244 (App. Div. 1990), aff'd, 127 N.J. 290, 604 A.2d 580 (1992); see also Gen. Motors Corp. v. City of Linden, 22 N.J. Tax 95, 107 (Tax 2005).

The definition of highest and best use contained in The Appraisal of Real Estate, a text frequently used by this court as a source of basic appraisal principles, has remained relatively constant for all of the years under appeal. Highest and best use is defined as:

> The reasonably probable and legal use of vacant land or improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value.
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> [Appraisal Institute, The Appraisal of Real Estate, 22 (13th ed. 2008).]

The highest and best use analysis requires sequential consideration of the following four criteria, determining whether the use of the subject property is: 1) legally permissible; 2) physically possible; 3) financially feasible; and 4) maximally productive. Ford Motor Co., supra, 10 N.J. Tax at 161; see also The Appraisal of Real Estate at 279. Implicit in this analysis is the assumption that the proposed use is market-driven; in other words, that it is determined in a value-in-exchange context and that there is a market for such use. WCI-Westinghouse v. Township of Edison, 7 N.J. Tax 610, 616-17 (Tax 1985), aff'd o.b. per curiam, 9 N.J. Tax 86 (App. Div. 1986). A highest and best use determination is not based on value-in-use because the determination is a function of property use and not a function of a particular owner's use of subjective judgment as to how a property should be used. See Entenmann's Inc. v. Borough of Totowa, 18 N.J. Tax 540, 545 (Tax 2000). The highest and best use of an improved property is the "use that maximizes an investment property's value, consistent with the rate of return and associated risk." Ford Motor Co., supra, 127 N.J. at 301, 604 A.2d 580. Further, the "actual use is a strong consideration" in the analysis. Ford Motor Co., supra, 10 N.J. Tax at 167.

Highest and best use is not determined through subjective analysis by the property owner. The Appraisal of Real Estate at 279. The

> proper highest and best use requires a comprehensive market analysis to ascertain the supply and demand characteristics of alternative uses. See Cherry Hill, Inc. v. Township of Cherry Hill, 7 N.J. Tax 120, 131 (Tax 1984), aff'd, 8 N.J. Tax 334 (App. Div. 1986). Additionally, the proposed use must not be remote, speculative, or conjectural. Id. If a party seeks to demonstrate that a property's highest and best use is other than its current use, it is incumbent upon that party to establish that proposition by a fair preponderance of the evidence. Penn's Grove Gardens, Ltd v. Borough of Penns Grove, 18 N.J. Tax 253, 263 (Tax 1999); Ford Motor Corp., supra, 10 N.J. Tax at 167. Property should be assessed in the condition in which it is utilized and the burden is on the person claiming otherwise to establish differently. Highview Estates v. Borough of Englewood Cliffs, 6 N.J. Tax 194, 200 (Tax 1983).

2. Size of Adjustments to Comparable Sales.

Plaintiff also argues that the size of the adjustments defendant's expert made to the comparable land sales renders those sales not comparable, and, therefore, the expert's opinions of land value lacks credibility. It is well established that comparable sales with large gross adjustments are not credible evidence of value. 125 Monitor Street, LLC v. City of Jersey City, 21 N.J. Tax 232, 243 (Tax 2004)("Adjustments that are too large suggest a lack of comparability between the concerned sales and the subject property and present a misleading indication of the subject property's value")(citing U.S. Life Realty Corp. v. Township of Jackson, 9 N.J Tax 66, 72 (Tax 1987)); see also Global Terminal & Container Serv. v. City of Jersey City, 15 N.J. Tax 698 (App. Div. 1996) (affirming this court's rejection of comparable sales because of the magnitude of gross adjustments applied by the appraiser).

Plaintiff cites several Tax Court precedents in which the court rejected comparable sales based on the magnitude of the adjustments needed to account for differences between the comparable sales and the subject property. The taxpayer's argument references the percentage gross adjustments that lead to the rejection of the comparable sales in those cases. (Pb 60-62)

(citing 125 Monitor Street, supra; Pepperidge Tree Realty Corp. v. Borough of Kinnelon, 21 N.J. Tax 57 (Tax 2003); MI Holding v. City of Jersey City, 12 N.J. Tax 129 (Tax 1991)). A comparison is made to the percentage gross adjustments apply by defendant's expert to the comparable land sales she identified.

Of the expert's seven land sales, all except one had a percentage gross adjustment above 35%. The expert conceded during her testimony that the adjustments could have been higher. Plaintiff argues that "the magnitude of these adjustments clearly vitiates comparability and the land sales should be disregarded by the Court." (Pb 63).

One category of adjustments was for land size. The subject property is larger than five and smaller than one of the comparable land sales on which defendant's expert relied. The size differences range from 11% to 164%. The expert made adjustments to the sales prices to account for these differences. Plaintiff argues that, as a matter of law, these differences render the sales not comparable to the subject and, as a result, renders the expert's opinions of land value inadmissible.

Finally, plaintiff argues that defendant's expert undertook an insufficient investigation of the circumstances of the comparable land sales on which she relied. According to plaintiff, the expert did not verify the details of the sales, lacked a clear understanding of the motivations of the parties to the transactions, did not account for leases that may have been in place at one transaction, and was unaware of approvals in place at the time of the sales.

While the court acknowledges that defendant's expert made significant adjustments to her comparable land sales, the court cannot hold, as a matter of law, that the expert's opinions of land value, and, as a result, her opinions of value under the cost approach, are inadmissible. There is no legal precedent in this State setting a numerical threshold at which a percentage gross

adjustment renders a comparable sale inadmissible as evidence of value. Nor is there precedent establishing a threshold at which a size differences between a proffered comparable sale and the subject property renders the comparable sale unreliable. Instead, it is up to this court to weigh the evidence on which an expert relies, consider the expert's explanation for adjustments made to comparable sales, and make a determination of whether the expert's opinions of value is credible.

It may well be that the expert's gross adjustments and choice of comparable land sales, including the highest and best use of the comparable properties, will undermine the credibility of her opinions of value. Any such determination, however, must be made after the court considers all of the evidence in the trial record. The court is mindful of its obligation to use its knowledge and experience in conjunction with the valuation data submitted by the parties to determine the true market value of the subject property. Glen Wall Assocs. v. Township of Wall, 99 N.J. 265 (1985). This court must endeavor to reach an opinion of value provided that there is "enough substantive and competent evidence to enable the trier of fact to determine true value." Schimpf v. Township of Little Egg Harbor, 14 N.J. Tax 338, 343 (Tax 1994)(citing Samuel Hird & Sons, Inc. v. City of Garfield, 87 N.J. Super. 65, 74 (App. Div. 1965)). The court is not inclined to reject, as a matter of law, the opinions of value reached by defendant's expert under the cost approach based on the flaws in the expert's analysis identified by plaintiff in its moving papers. Nor is the court inclined to rule, as a matter of law, that the cost approach will not produce a credible determination of true market value for the subject property. The court will instead give both parties the opportunity to present arguments based on the entire trial record with respect to the true market value of the subject property on the relevant valuation dates.

Very truly yours,

/s/ Hon. Patrick DeAlmeida, P.J.T.C.