TAX COURT OF NEW JERSEY

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Judge

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NOT FOR PUBLICATION WITHOUT THE APPROVAL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

February 13, 2017

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Re: William E. Dolan
v. Borough of Woodcliff Lake and BMW of North America, LLC
BER-L-2219-14

Dear Counsel:

This letter constitutes the court's opinion with respect to the motions, *in limine,* filed by Woodcliff Lake Borough ("defendant"), BMW of North America, LLC ("intervenor"), and William E. Dolan ("plaintiff").

Defendant moves, *in limine*, to dismiss plaintiff's complaint without prejudice, under R. 4:37-2(b); and, in the alternative, to suppress plaintiff's expert witnesses' reports and testimony; to quash the notice in lieu of subpoena served upon defendant seeking production of Jeffrey

Goldsmith, Steven Muhlstock, Carlos Rendo, and Corrado Belgiovine to testify at the prerogative writ hearing, under R. 4:69-1; and, alternatively, for directed verdict at conclusion of plaintiff's prerogative writ claims and again at the conclusion of the entire hearing, for plaintiff's failure to prove that defendant's actions were arbitrary, capricious, or unreasonable, under R. 4:40-1.

Intervenor moves, *in limine*, to quash the notice in lieu of subpoena served upon Frank Wieczorek and bar his testimony at the time of the prerogative writ hearing; and to preclude the reading from or reference to the deposition of Frank Wieczorak at the time of trial.

Plaintiff moves, *in limine*, to bar defendant and intervenor from presenting any evidence in support of their counterclaims for relief against plaintiff.

I. Motions to Dismiss under R. 4:37-2(b) and R. 4:40-1

The court's analysis begins with examination of defendant's motion to dismiss plaintiff's complaint without prejudice, under R. 4:37-2(b), and motion for entry of judgment, under R. 4:40-1. Under R. 4:37-2(b), a defendant may, at trial, after plaintiff has completed presentation of its evidence, move before the court without waiving the right to offer evidence, for dismissal of "the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief." R. 4:37-2(b). Similarly, under R. 4:40-1, either party may move for entry of judgment "at the close of all the evidence or at the close of the evidence offered by an opponent." R. 4:40-1.

Thus, a motion for judgment or involuntary dismissal may be brought either at the close of plaintiff's case, under R. 4:37-2(b), or at the close of all the evidence, under R. 4:40-1. Verdicchio v. Ricca, 179 N.J. 1, 30-32 (2004). However, irrespective of when such motions are presented, the trial court's review is governed by the same evidentiary standard. That inquiry requires the trial court to:

> accept[] as true all the evidence which supports the position of the party defending against the motion and accord[] him the benefit of

> all inferences which can reasonably and legitimately be deduced therefrom….
>
> [Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000) (quoting Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 415 (1997) (quoting Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969)) (citations and quotations omitted from original)).]

Here, the prerogative writ hearing in this matter has not yet commenced, and neither plaintiff, nor defendant, nor intervenor have been afforded the opportunity to present any evidence in support of or in opposition to the claims raised herein. Thus, defendant's motions for relief under R. 4:37-2(b) and R. 4:40-1 are premature and not ripe for consideration by the court at this time. Accordingly, the court denies, without prejudice, defendant's motions under R. 4:37-2(b) and R. 4:40-1 to dismiss plaintiff's complaint and for entry of judgment, as untimely.

II. Motions to Preclude Live Testimony; Standard for Review

The court next considers defendant's motion, *in limine*, to preclude live testimony from witnesses at the prerogative writ hearing.

A. Arguments

In its motion, defendant asserts that the purpose of an action in lieu of prerogative writs is to review the decision making of the governing body to ensure that its actions were not arbitrary, capricious, or unreasonable and were supported by an adequate factual basis and record. Thus, defendant charges that the court's review, under R. 4:69-4, is limited to the record below, and because plaintiff has failed to offer any legal basis to deviate from that standard, the introduction of live testimony at the prerogative writ hearing is beyond the scope of the court's review of the governing body's decision making authority.

Conversely, plaintiff argues primarily that – because its claim involves a challenge to the defendant's revision of a local property tax assessment – plaintiff is being deprived of his constitutionally guaranteed right to equality of tax treatment under the Uniformity Clause of the

New Jersey Constitution. N.J. Const., art. VIII, § 1, para. 1(a). Here, plaintiff charges that defendant's governing body's adoption on January 23, 2014 of Resolution No. 14-19 (the "Resolution"), approving the settlement of tax appeal litigation commenced by intervenor against defendant for the tax years 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013, and which Resolution fixed the subject property's local property tax assessment for the 2014 tax year, deprived plaintiff of his constitutional right to equality of tax treatment. Thus, plaintiff asks the court to apply a more rigid standard in reviewing defendant's governing body's decision than the arbitrary, capricious, or unreasonable standard, under R. 4:69. Instead, plaintiff asks the court to impose a standard of review that measures whether "the [proposed local property tax] assessments which [form the] ground [for] the settlement approved by the Resolution. . . comport with the [constitutional] requirement for equal [tax] treatment." Plaintiff contends that, if, after evaluating all of the evidence presented, the court concludes that the Resolution and the proposed revised local property tax assessment do not afford equality of tax treatment, the proposed Resolution "must fall."

In arguing that the arbitrary, capricious, or unreasonable standard is inappropriate for review of the instant matter, plaintiff asserts that the legal precedent cited by defendant and intervenor concern only a municipal body's "police power, or other enabling statute," whereas plaintiff's claims originate under the Uniformity Clause of the New Jersey Constitution and a municipality's power to assess and collect property taxes. Thus, argues plaintiff, because of the "strict constitutional mandate" that defendant must adhere to in the treatment of taxpayers, defendant should face a more stringent duty than the standard of review ordinarily applied to governmental actions based on police powers or under statutory authority.

Plaintiff offers that application of this more stringent standard has been applied by another court in a prerogative writ matter, where judgment was entered compelling the Bergen County

Board of Taxation to equalize the assessed value of all taxable real property in the county "on the basis of its true value, so that each taxing district shall bear its full, equal and just share of the Bergen County taxes." Village of Ridgefield Park v. Bergen County Bd. of Taxation, 62 N.J. Super. 133, 147 (Law Div. 1960). Plaintiff asserts similar treatment is due in the instant case, wherein "our Constitution affords the courts and municipal governing bodies 'no discretion' to consider factors other than true value." Inmar Assocs., Inc. v. Borough of Carlstadt, 112 N.J. 593, 601 (1988). Outlining the standard it contends should apply here, plaintiff cites federal precedent which holds that, "[w]here the government infringes on a fundamental right, the government action 'can be justified only by a compelling state interest and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.'" Alexander v. Whitman, 114 F.3d 1392 (3rd Cir. 1997) (citing Roe v. Wade, 410 U.S. 113, 154 (1973)). And here, argues plaintiff, the constitutional mandate of equality of tax treatment cannot be satisfied with regard to the underlying settlement without "abundant documented sales data and other data which demonstrate that the proposed settlement figures correlate to the rate of market value to assessments as applied to all other property assessments within the Municipality." No such dependable analysis, asserts plaintiff, was relied on by defendant prior to its adoption of the Resolution.

B. Summary of Law

The tenet of "home rule" is fundamental to our system of government. "It embodies the principle that the police power of the State may be invested in local government to enable local government to discharge its role as an arm or agency of the State and to meet other needs of the community." Inganamort v. Ft. Lee, 62 N.J. 521, 528 (1973) (citing Bergen County v. Port of New York Authority, 32 N.J. 303, 312-314 (1960)). This principle is derived from our State's Constitution, which authorizes the Legislature to vest the governing body of a municipality with broad powers. Specifically, N.J. Const., art. IV, § 7, para. 11 provides:

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government . . . shall be liberally construed in their favor. The powers of . . . such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.
>
> [N.J. Const., art. IV, § 7, para. 11.]

Our "[c]ourts have consistently read this constitutional provision as a mandate to liberally construe powers granted to municipalities, either by express terms or by implication, in their favor." Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 52 (1998) (citing Township of Berkeley Heights v. Board of Adjustment, 144 N.J. Super. 291, 296 (Law Div.1976); see also Fanelli v. City of Trenton, 135 N.J. 582, 591 (1994)).

In exercising this authority, our Legislature has defined the governing body of a municipality, as "the chief legislative body of the municipality." N.J.S.A. 40:55D-4. Thus, the governing body of a municipality enjoys legislative and policing powers, to adopt and provide for the enforcement of ordinances and controls that concern issues of public health, safety, revenue, morals and general welfare. The decision of a municipal body or board is "insulated from attack by a presumption of validity, which may be overcome by a showing that. . . [the decision] is 'clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles. . ." Riggs v. Long Beach, 109 N.J. 601, 611 (1988) (quoting Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335, 343 (1973)). "Legislative bodies are presumed to act on the basis of adequate factual support and, absent a sufficient showing to the contrary, it will be assumed that their enactments rest upon some rational basis within their knowledge and experience." Witt v. Borough of Maywood, 328 N.J. Super. 432, 443 (Law Div. 1998). Thus, the burden is imposed upon the party attacking the municipal decision to overcome the presumption of validity. Grabowsky v. Township of Montclair, 221 N.J. 536, 551 (2015); Price v. Himeji, LLC, 214 N.J. 263, 284 (2013)

(citing Kramer v. Board of Adjustment, 45 N.J. 268, 296 (1965)); Toll Bros., Inc. v. Burlington Cnty. Bd. of Chosen Freeholders, 194 N.J. 223, 256 (2008).

When the decision of a municipal body is "predicated on unsupported findings [that] is the essence of arbitrary and capricious action." Witt, supra, 328 N.J. Super. at 442-443 (citing In re Boardwalk Regency Corp. for Casino License, 180 N.J. Super. 324, 334 (App. Div. 1981), modified on other grounds, 90 N.J. 361 (1982). Conversely, when there is "substantial evidence to support" the municipal decision, a court should not interfere by substituting its judgment. Kramer, supra, 45 N.J. at 296-97. Our courts should not question the wisdom of a municipal governing body decision or ordinance unless the public body has exceeded the boundaries of its statutorily prescribed authority or has engaged in "a clear abuse of discretion." Ibid. When an action is open before a municipal body and the municipal body exercises its authority "honestly and upon due consideration, even if an erroneous conclusion is reached," the courts should not intrude upon that decision. Witt, supra, 328 N.J. Super. at 442 (citing Worthington v. Fauver, 88 N.J. 183, 204-05 (1982); Bayshore Sewerage Co. v. Department of Envtl. Protection, 122 N.J. Super. 184, 199 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974)).

In recognizing that challenges may be brought to municipal action, the framers of our State's Constitution of 1947 provided a mechanism for "review, hearing and relief. . . in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right. . . ." N.J. Const., article VI, § 5, para. 4. Thus, our State's Constitution directed our Supreme Court to adopt rules for review, hearing and relief in proceedings in lieu of prerogative writs. This directive has been carried out by our Supreme Court in its adoption of R. 4:69-1 to -7 of our Court Rules, which provides for a single proceeding in lieu of all prerogative writs. Ward v. Keenan, 3 N.J. 298, 303-304 (1949). By affording parties the right to seek "review, hearing and relief" in the Superior Court of all actions of municipal agencies, our Supreme Court preserved the core

principles of common law prerogative writ review. Accordingly, a party aggrieved by the decision of a municipal body or board can pursue its right to review such decision by way of an action in lieu of prerogative writs filed in the Law Division of the Superior Court. Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 225 (2013); see also R. 4:69-1 to -7.

R. 4:69 permits a court to "set aside a municipal board decision if it is shown to be arbitrary, capricious or unreasonable, not supported in the evidence, or otherwise contrary to law." Rivkin v. Dover Township Rent Leveling Bd., 143 N.J. 352, 378 (1996); Reid v. Township of Hazlet, 198 N.J. Super. 229 (App. Div. 1985), certif. denied, 101 N.J. 262 (1985); Green Acres of Verona, Inc. v. Verona, 146 N.J. Super. 470 (App. Div. 1977).

In adopting R. 4:69, our Supreme Court observed that deference must be paid to municipal bodies and boards, which, "because of their peculiar knowledge of local conditions, must be allowed wide latitude in the exercise of the delegated discretion." Burbridge v. Mine Hill, 117 N.J. 376, 385 (1990); Medici v. BPR Co., 107 N.J. 1, 23 (1987); Kramer, supra, 45 N.J. at 296. If it can reasonably be concluded that 'a special reason' existed for the municipal action and that such grant was without any substantial detriment to the public good or resulted in substantial impairment of the overall zoning plan or ordinance, the municipal action will not be declared arbitrary or capricious. Kramer, supra, 45 N.J. at 285; Burton v. Montclair Twp., 40 N.J. 1 (1963); Andrews v. Ocean Twp. Board of Adjustment, 30 N.J. 245 (1959); Yahnel v. Bd. of Adjust. of Jamesburg, 79 N.J. Super. 509 (App. Div. 1963).

In order to ensure that the municipal body or board did not act in an unreasonable, arbitrary, or capricious manner, the municipal body's or board's resolution should contain sufficient factual findings, based on the application and proofs submitted therewith, to satisfy the reviewing court that the body or board carefully evaluated and analyzed the proposed course of action, and determined that the approval or rejection of the proposed action or application is, or is not,

consistent with valid statutory purposes (including public health, safety, morals and general welfare), or constitutional constraints on municipal authority (including due process and equal protection).

C. Application of Law

The statutory remedy available to a taxpayer feeling aggrieved by the assessed value of its property, or feeling discriminated against by the assessed value of other property in the county or taxing district, is to file a tax appeal challenging the local property tax assessment. See N.J.S.A. 54:3-21. Thus, by a taxpayer's filing a timely appeal, the fundamental tenets of the Uniformity Clause are served via the provision of a forum for relief from alleged inequalities in the standards of value and allocation of the tax burden. Moreover, our Legislature has assembled a medium to hear these challenges, vesting the Tax Court of New Jersey with jurisdiction to "review actions or regulation[s] with respect to a tax matter of. . . a county or municipal official." N.J.S.A. 2B:13-2.

Here, plaintiff charges that defendant's adoption of the Resolution deprived him of his constitutional right to equality of tax treatment. Thus, plaintiff asks the court to apply a more rigid standard in reviewing defendant's governing body's decision than the arbitrary, capricious, or unreasonable standard, under R. 4:69, ordinarily applied in prerogative writ matters.

The court observes that the tax appeal litigation which was at issue in the Resolution involved the tax years 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013, and an agreement between defendant and intervenor with respect to the 2014 local property tax assessment. Moreover, the court highlights that although plaintiff was afforded the constitutional and statutory right to challenge the local property tax assessments on the subject property for the 2006 through 2013 tax years, plaintiff did not. Plaintiff also did not timely file a motion to intervene, under R. 4:33-1, in the tax appeal litigation, as an interested taxpayer. Instead, upon the proposed conclusion of the tax appeal litigation plaintiff filed a complaint in lieu of prerogative writs

challenging the propriety and reasonableness of defendant's Resolution to settle eight years of tax appeal litigation between intervenor and defendant.

Contrary to plaintiff's argument, the court in Ridgefield Park, supra, did not adopt a more stringent standard of review of a county body's actions, instead the court recognized the fundamental obligation of each taxing district in Bergen County to equally share its burden of the tax obligation. 62 N.J. Super. 133. In compelling the Bergen County Board of Taxation to equalize the assessed value of all taxable real and personal property to its true value, the court directed the Board to perform its statutory functions, thereby ensuring that each taxing district bears its equal share of the tax burden. The court thus rejected the Board's argument that budgetary allowances and time limitations prescribed by law made it impossible to conduct such equalization.

The standard of review sought by plaintiff effectively asks the court to conduct a trial and elicit expert testimony to determine the true market value of the property. Further, after conducting such a proceeding, plaintiff would have the court conduct a comparison of the current and proposed local property tax assessment for the subject property against the court's determination of true market value. Next, the court would have to apply the Chapter 123 ratio to ascertain whether the current or proposed local property tax assessment falls within or outside the Chapter 123 corridor. See N.J.S.A. 54:1-35a(a). Finally, the court would have to apply the average Chapter 123 ratio to the court's determination of the fair market value of the subject property, to ascribe a proposed revised local property tax assessment. Only at this point would the court be able to reconcile the Resolution's proposed local property tax assessment with the court's concluded property tax assessment, and measure whether the settlement comports with the average ratio of assessed to true value of property within defendant's municipality. In sum, plaintiff asks this court to conduct a tax appeal trial and to perform the crucial functions of fact finder and reach a conclusion of law based upon the weight of the evidence to be presented by plaintiff during the trial.

However, in prerogative writ actions, even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved. Medici, supra, 107 N.J. at 15. See also Medical Realty Assocs. v. Board of Adj., 228 N.J. Super. 226, 233 (App. Div. 1988). The presumption of validity which attaches to a municipal body's or board's decision is not simply an evidentiary requirement serving as a mechanism to assign burden of proof. It is, rather, a principle expressing the view that governmental authority is presumed to have been exercised correctly and in accordance with law. See Fanelli, supra, 135 N.J. at 582. Thus, when the municipal body's or board's action contains sufficient factual findings, based on the evidence submitted, demonstrating that the body or board evaluated and analyzed the proposed course of action and made its decision "honestly and upon due consideration, even if an erroneous conclusion is reached," the decision should not be disturbed by the courts. Bryant v. Atlantic City, 309 N.J. Super. 596, 610 (App. Div. 1998).

To apply the standard of review sought by plaintiff in this matter would entail the court substituting its judgment and opinion for defendant's governing body's judgment and opinion, which decision may have been influenced by the prospects of settlement, consideration of the ongoing costs and expenses of litigation, an analysis of defendant's potential exposure in the tax appeal litigation, and the recommendation of defendant's attorney and experts. Moreover, the analysis required for the standard of review offered by plaintiff would attribute greater weight to the court's determination of market value, than to the opinions of value for the property which were agreed to by the parties, both of which were represented by legal counsel, in resolving years of tax appeal litigation.

The court, of course, recognizes New Jersey's constitutional decree, that "[p]roperty shall be assessed for taxation under general laws and by uniform rules," and that "[a]ll real property

assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein." N.J. Const., art. VIII, § 1, para. 1(a). However, a municipal body's authority to approve resolutions involving ongoing litigation and its observance of constitutional mandates are not mutually exclusive. Our State's Constitution affords the Legislature the authority to vest the governing body of a municipality with broad powers. N.J. Const., art. IV, § 7, para. 11. Therefore, the standards by which a municipal body or board decision must be reviewed require the court to set aside the decision only if it is arbitrary, capricious or unreasonable, not supported in the evidence, or otherwise contrary to law. If, based on a review of the objective facts, the underlying purpose of the ordinance or municipal action being challenged is apparent and reasonable on its face, the municipal action will prevail. If however, the ordinance or municipal action was not supported by adequate factual findings, was contrary to deliberate, cogent and rational thought, or sought to achieve an illusory purpose, the municipal action will not withstand judicial scrutiny.

Accordingly, here, plaintiff bears the burden to show that defendant's Resolution, which approved settlement of eight years of tax appeal litigation and fixed the local property tax assessment on the property for the 2014 tax year, was not supported by adequate factual findings, was contrary to deliberate, cogent and rational thought, or sought to achieve an illusory purpose. The court adheres to the principle that, where there is room for two opinions, defendant's action is valid as exercised honestly and upon due consideration, even though it may be posited that an erroneous conclusion has been reached.

II. Motion to Preclude Testimony; Extrinsic Evidence

A. Expert Testimony

In general, actions pursuant to R. 4:69-1 are limited to the record below. Roth v. Rutherford Rent Bd., 239 N.J. Super. 378 (Ch. Div. 1989); Kempner v. Edison Twp., 54 N.J. Super. 408 (App. Div. 1959); Green Acres, supra, 146 N.J. Super. at 468.

Plaintiff argues that the court may consider extrinsic evidence beyond the record below, and notes that "the court is free to receive any proper evidence relevant" to the prerogative writ matter before it. Theurer v. Borrone, 81 N.J. Super. 188, 197 (Law Div. 1963). Plaintiff further highlights that our Supreme Court has stated that in a prerogative writ matter a "party may rely on extrinsic evidence." Riggs, supra, 109 N.J. at 611 (citing Bellington v. Township of E. Windsor, 32 N.J. Super. 243, 248 (App. Div. 1954)).

Accordingly, plaintiff urges the court to consider the testimony of plaintiff's experts Robert Stack and Barbara Potash, and the possible live testimony of Jeffrey Goldsmith, Steven Muhlstock, Carlos Rendo, Corrado Belgiovine, and Frank Wieczorek, and other extrinsic evidence produced in discovery, all of which, according to plaintiff, "bear[s] upon the illegal nature of the BMW settlement, more particularly the factors other than value upon which the assessments for tax years 2014-2016 were premised." Plaintiff makes this assertion and differentiates the instant matter from other prerogative writ matters – matters wherein the record was limited to the record upon which the government acted – on the basis that, unlike that in the instant case, the record "ordinarily includes sworn testimony, expert opinions, the right to cross-examination, substantial documentary evidence, and a public hearing."

Additionally, plaintiff contends "it was wrongful for the voting members of the governing body to rely on inflammatory statements of value from the Mayor and auditor, neither of whom have any experience or background in real estate appraisals, especially in the absence of a written

appraisal report to substantiate the assertions." Plaintiff argues that "had the Borough obtained an appraisal report, Mr. Goldsmith's statement. . . to the governing body would have been proven baseless."

Plaintiff further argues that the "exposure analysis" prepared by defendant's appraiser is not an appraisal report, nor a reliable indicia of value and that defendant's reliance on such analysis requires plaintiff be permitted to offer the expert testimony of its appraiser, Robert Stack and, again, of Barbara Potash, in response thereto.

In opposition to plaintiff's position, defendant argues that plaintiff has failed to provide a legal basis to deviate from the case law standard, and that the introduction of new expert and factual "testimony at the prerogative writ hearing is beyond the scope of the court's review of the governing body's decision making authority."

The court recognizes that the factual underpinnings and record before the municipal body are the basis upon which the correctness of the action must be measured, and the receipt of testimony before the Superior Court is no substitute for this requirement. Kramer, supra, 45 N.J. at 289; Kempner, supra, 54 N.J. Super. at 416-417. Although the judicial role in an action in lieu of prerogative writs, under R. 4:69, is circumscribed, the court may, under certain circumstances, consider extrinsic evidence. Riggs, supra, 109 N.J. at 611; see also Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 19 (1976) (concluding that "the uncontradicted testimony of the municipal officials [at trial] established that, prior to adoption of these ordinances, the planning board and the governing body gave conscientious consideration both to the appropriateness of this site as a mobile home park for the elderly and the effect of this use on the general well-being of the community.")

As Justice Pollock keenly observed in Riggs,

> "in determining whether the ordinance was adopted for an unlawful purpose, we distinguish between the purpose of the ordinance and

> the motives of those who enacted it. Courts will generally not inquire into legislative motive to impugn a facially valid ordinance, but will consider evidence about the legislative purpose when the reasonableness of the enactment is not apparent on its face."
>
> [Riggs, supra, 109 N.J. at 613 (quoting Clary v. Borough of Eatontown, 41 N.J. Super. 47, 71 (App. Div. 1956))].

Thus, testimony which involves subjective considerations, motives, and evidence which was not available, or which was prepared or formulated after, or in response to the municipal governing body's or board's actions, should not serve as a guidepost for evaluating the correctness of the municipal body or board's action. The court should only consider objective factors, such as the terms and provisions of the municipal body's action, the operation and effect of the municipal body's action and the context under which the municipal body's action was adopted. If the municipal body's action can be viewed as having "both a valid and invalid purpose, courts should not guess which purpose the governing body had in mind." Riggs, supra, 109 N.J. at 613 (citing United States v. O'Brien, 391 U.S. 367, 383-84 (1968)). However, if the purpose of the municipal body's resolution is "unlawful, courts may declare. . . [it] invalid." Thus, when a challenge is levied to a municipal body's action charging that it was adopted for an "improper purpose," the court "may seek to ascertain the municipality's true purpose" by evaluating the "objective facts surrounding the adoption" of the municipal body's decision. Ibid.

Taking into consideration these standards, the court concludes that heretofore unheard expert opinions and the reports upon which those opinions may be based, are subjective and were not offered or made available for consideration by the municipal body prior to or at its public hearing, or at or prior to its deliberations. Accordingly, the court will bar the testimony and report of plaintiff's expert witness Robert Stack and the expert report and expert opinions of Barbara Potash.

Further, plaintiff's argument that it should be permitted to, during a prerogative writ hearing, offer expert testimony on the value of the property to impeach or contradict the exposure analysis which was prepared by defendant's appraiser in or about December 2013, and considered and deliberated on by defendant's governing body during a closed session meeting in January 2014, offends the very principles upon which the court's review is to be conducted. The prerogative writ hearing is not a trial on the merits which affords the aggrieved party the opportunity of a second bite at the apple, to present new or additional evidence which was not previously offered or raised and therefore, considered by, the municipal body or board below. As stated by this court, a presumption of validity attaches to the actions of legislative bodies; therefore "it will be assumed that their enactments rest upon some rational basis within their knowledge and experience." Witt, supra, 328 N.J. Super. at 443. The burden which is imposed upon the party attacking the municipal decision is not met by presenting new, or previously undisclosed evidence, or evidence that may contradict the opinions of experts retained by the municipality, but rather, to present evidence that the decision of a municipal body was arbitrary and capricious because it was "predicated on unsupported [factual] findings" or the purpose of the legislative action was unlawful. Id. at 442-443; see also Riggs, supra, 109 N.J. at 612.

Inasmuch as the court has concluded that it will bar the expert testimony and reports of Robert Stack and Barbara Potash as subjective opinion evidence and evidence which was not made available at the time of the defendant's governing body's public hearing or deliberations, the court need not address those portions of defendant's motions, *in limine,* which seek to strike the expert reports of Mr. Stack and Ms. Potash as "net opinions."

B. Fact Witness Testimony; Barbara Potash, Jeffrey Goldsmith, Steven Muhlstock, Carlos Rendo, and Corrado Belgiovine

Next, the court will turn its attention to defendant's motion to suppress Barbara Potash's testimony as a fact witness. Plaintiff contends that Barbara Potash should be permitted to testify

"as a fact witness based upon her dealings with the subject properties and other properties within the Borough in her capacity as assessor until July 2013." The court recognizes that Ms. Potash served as tax assessor for defendant during most of the tax years at issue during the pendency of the tax appeal litigation.

However, the court further observes that Ms. Potash was not serving as tax assessor for defendant on three instrumental dates involved herein: (1) on December 9, 2013, when Steven Muhlstock, Esq., special counsel for defendant in the tax appeal litigation, forwarded a letter to the governing body addressing the "strengths and weaknesses" of defendant's legal position regarding the tax appeal litigation and the prospects of settlement; (2) on December 16, 2013, when the municipal governing body conducted a closed session meeting to discuss the contents of Mr. Muhlstock's letter and Mr. Muhlstock's and defendant's expert's exposure analysis; and (3) on January 23, 2014 when defendant's governing body conducted a public hearing and enacted the Resolution.

Here, plaintiff argues that Ms. Potash's testimony is relevant to the issues facing the court, as she was defendant's former tax assessor and thus, was familiar with the property and its local property tax assessment.

Relevant evidence is defined under our rules of evidence as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. Thus, if the evidence being offered renders the desired inference more probable than it would be without the evidence, then the evidence is admissible. Hagopian v. Fuchs, 66 N.J. Super. 374 (App. Div. 1961); see also State v. Cavallo, 88 N.J. 508 (1982).

"[R]elevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence." N.J.R.E. 403. However, the

burden to demonstrate that the considerations of undue prejudice or delay under N.J.R.E. 403 should control is borne by the party seeking to exclude the evidence. Rosenblit v. Zimmerman, 160 N.J. 391 (2001). The factors for exclusion must substantially outweigh the probative value of the contested evidence. State v. Morton, 155 N.J. 383 (1998). Thus, evidence should only be excluded where its probative value is so significantly outweighed by its inherent inflammatory potential as to have a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation.

The court is uncertain whether Ms. Potash's factual testimony would offer meaningful insight whether the Resolution was adopted for an unlawful purpose, or that defendant's governing body's action was arbitrary, capricious or unreasonable, because Ms. Potash was not serving as defendant's tax assessor on the probative dates. Nevertheless, the court will afford plaintiff the opportunity to present Ms. Potash as a fact witness, and offer objective factual testimony that relates to plaintiff's allegation that the Resolution was adopted for an unlawful purpose or that defendant's governing body acted in an arbitrary, capricious or unreasonable manner.

However, plaintiff's proffer to the court that Ms. Potash will testify on: (1) the "standards for the methodologies employed" by defendant in evaluating a commercial tax appeal while Ms. Potash served as tax assessor; (2) defendant's alleged "deviation from th[ose] standards in the settlement of the underlying tax appeals"; and (3) her "dealings with the subject properties and other properties," constitutes new evidence or new information, and therefore is outside the scope of the court's review in this matter. Instead, the standard by which the court will measure the governing body's action is whether the Resolution was enacted for an unlawful purpose or whether the municipal body acted with an unsupported factual record and in an arbitrary, capricious or unreasonable manner in adopting the Resolution. If Ms. Potash cannot offer objective factual testimony which will offer insight into those specific areas, her testimony would constitute nothing

more than subjective observations, opinions and new information, which was not part of the record before defendant's governing body. Accordingly, the court will not preclude the live testimony of Barbara Potash as a fact witness.

With regard to the court's consideration of the deposition testimony of defendant's former Mayor Jeffrey Goldsmith and defendant's special tax counsel, Steven Muhlstock, Esq., the court recognizes that these individuals were at the center of the tax appeal litigation and adoption of the Resolution by defendant's governing body. However, the court observes that at this stage in the litigation neither plaintiff nor defendant have marked for identification the deposition transcripts of Mr. Goldsmith and Mr. Muhlstock. Moreover, neither plaintiff nor defendant have offered a valid exception to our hearsay rules, under N.J.R.E. 803 and 804, which would warrant the court's introduction of the deposition testimony into evidence during trial. Thus, it would be premature, at this time for the court to rule on the admissibility of the deposition transcripts of Mr. Goldsmith and Mr. Muhlstock which have not been offered into evidence.

In addition, the court observes that Mr. Goldsmith, Mr. Muhlstock, Carlos Rendo and Corrado Belgiovine may offer meaningful live testimony that supports plaintiff's allegation the Resolution was adopted to achieve an unlawful purpose. Conversely, these individuals may provide support for defendant's argument that the governing body's adoption of the Resolution was given careful and thoughtful consideration after due deliberation. As stated above, the motivations and subjective opinions of Mr. Goldsmith, Mr. Muhlstock, Mr. Rendo and Mr. Belgiovine are not at issue in this matter. However the purpose which was sought to be achieved by enacting the Resolution is at issue. Accordingly, the court will allow live testimony from Mr. Goldsmith, Mr. Muhlstock, Mr. Rendo and Mr. Belgiovine, subject however to the assertion of privileges for: attorney-client, attorney work produce, litigation work product, and deliberative

process, which were addressed more fully by the court in its May 17, 2016 letter opinion in this matter.

C. Fact Witness Testimony; Frank Wieczorak

The court next considers intervenor's motion, *in limine*, to quash the notice in lieu of subpoena served upon Frank Wieczorek and to bar his live testimony at the time of trial, and to preclude the reading from or reference to his deposition testimony at trial.

Intervenor argues that "[t]he trial court's function is usually to review the record made below without supplemental testimony, and if the record is inadequate, to remand for the purpose of establishing a proper record." Romanowski v. Brick Borough, 185 N.J. Super. 19, 203 (Law Div. 1982); Ward, supra, 3 N.J. at 306. Intervenor contends that the factual record on which the instant matter "turns is complete and has been admitted and certified to by the Borough in interrogatory answers and certifications filed in this case." Intervenor asserts primarily that Mr. Wieczorek, as a representative of BMW of North America, LLC, was not a member of defendant's governing body and therefore, had no part in the deliberation on or adoption of the Resolution, and thus, should not be required to give live testimony. Moreover, intervenor charges: that the testimony plaintiff seeks to illicit from Mr. Wieczorak is unwarranted and his presence is requested solely to inconvenience intervenor; that the testimony of Mr. Wieczorak, along with the reading of his limited scope deposition can provide no additional relevant information beyond the facts that defendant has already presented and that the admission of such testimony and deposition therefore would violate N.J.R.E. 403; and that any further inquiries are subject to the attorney-client privilege.

Additionally, intervenor argues that the deposition testimony of Mr. Wieczorek should also be prohibited. Intervenor seizes upon language in the court's May 17, 2016 Order that states, in part, that the "scope and breadth of each deposition permitted hereunder shall be expressly limited

by the court." Thus, intervenor contends that no determination as to the future admissibility of any testimony was espoused by the court.

Mr. Wieczorak, as a duly authorized representative of intervenor, was familiar with and involved in the settlement discussions with defendant, which were at the very heart of the Resolution that is at issue. The court is uncertain whether Mr. Wieczorak's testimony will provide any meaningful insight or enlightenment regarding plaintiff's allegation that there was some unlawful or illusory purpose for adoption of the Resolution, or that there was an illicit agreement between intervenor and defendant in connection with the Resolution. However, because Mr. Wieczorak is likely to possess information which is relevant to and probative of the issues facing the court, for substantially the same reasons the court declined to preclude the live testimony of Mr. Goldsmith, Mr. Muhlstock, Mr. Rendo, and Mr. Belgiovine, the court will not preclude the live testimony of Mr. Wieczorak.

III. Motion to Bar Admission of Evidence on Counterclaims

Plaintiff seeks entry of an order precluding defendant and intervenor from presenting any evidence during trial in support of their counterclaims against plaintiff for tortious interference with a contract and tortious interference with the settlement.

The alleged wrongs here committed against defendant and intervenor consisted of plaintiff's purported tortious interference with the contractual rights or prospective contractual relationship between defendant and intervenor with respect to settlement of the tax appeal litigation. The law in this area is well-settled; unjustifiable interference with either a contractual or prospective contractual right is an actionable tort. C.B. Snyder Realty Co. v. Nat. Newark, etc. Banking Co., 14 N.J. 146 (1953); Louis Schlesinger Co. v. Rice, 4 N.J. 169 (1950); Louis Kamm, Inc. v. Flink, 113 N.J.L. 582 (E. & A 1934); Kurtz v. Oremland, 33 N.J. Super. 443 (Ch. Div. 1955); Mayflower Industries v. Thor Corp., 15 N.J. Super. 337 (Ch. Div. 1951), aff'd o.b., 9 N.J.

605 (1952); C.R. Bard, Inc. v. Wordtronics Corp., 235 N.J. Super. 168, 173-74 (Law Div. 1989). A claim for "tortious interference [was] developed under common law to protect parties to an existing or prospective contractual relationship from outside interference." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 752 (1989). In a tortious interference claim, "liability rests upon whether the interfering act is intentional and improper. In making that determination, a variety of factors are to be considered, including the nature and motive behind the conduct, the interests advanced and interfered with, societal interests that bear on the rights of each party, and the relationship between the parties." Nostrame v. Santiago, 213 N.J. 109, 112 (2013) (citing Restatement (Second) of Torts §767). Thus, one of the crucial elements of a cause of action for tortious interference is malice, which "requires a showing not only that the interference was done 'intentionally' but also that it was 'without justification or excuse.'" East Penn Sanitation, Inc. v. Grinnell Haulers, Inc., 294 N.J. Super. 158, 179-180 (App. Div. 1996) (quoting Printing Mart-Morristown, supra, 116 N.J. at 751).

However, our courts have recognized that a cause of action for tortious interference does not accrue when the conduct causes "the nonperformance of an illegal agreement or an agreement having a purpose or effect in violation of an established public policy." Ibid. (quoting Restatement (Second) of Torts § 774); see also Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n, 37 N.J. 507, 518 (1962). Therefore, a "communication of truthful information which ultimately promotes the State's public policy. . . cannot be found to have been made 'without justification or excuse' and thus cannot support a finding of 'malice.'" Id. at 181.

Here, the determination of whether plaintiff's action in lieu of prerogative writs constitutes a communication of truthful information promoting public policy interests, or malicious and intentional conduct purposely devised to interfere with defendant and intervenor's proposed contractual settlement, are factual determinations to be made by the court during trial.

Accordingly, the court denies plaintiff's motion to bar presentation of evidence at trial in support of defendant's and intervenor's counterclaims against plaintiff.

IV. Conclusion

Having considered the pending motions, *in limine*, in the above matter, the court: denies defendant's motions to dismiss plaintiff's complaint without prejudice, and for a directed verdict, under R. 4:40-1 and under R. 4:37-2(b); grants defendant's motions to suppress plaintiff's expert witnesses' – Barbara Potash's and Robert Stack's – expert reports and expert testimony; denies defendant's motion to bar the testimony of Ms. Potash as a fact witness; denies intervenor's motion to quash the notice in lieu of subpoena served upon Mr. Wieczorek and bar his testimony at the time of trial; denies defendant's motion to preclude live testimony from Mr. Goldsmith, Mr. Muhlstock, Mr. Belgiovine, and Mr. Rendo; and denies plaintiff's motion to preclude defendant and intervenor from presenting evidence at trial in support of their counterclaims against plaintiff. The court will however, limit live witness testimony to objective facts concerning the purpose for which the Resolution was adopted, and whether defendant's governing body's decision was arbitrary, capricious, or unreasonable.

Very truly yours,

Hon. Joshua D. Novin, J.T.C.
temporarily assigned