****

The "officially released" date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the "officially released" date appearing in the opinion. In no event will any such motions be accepted before the "officially released" date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

The syllabus and procedural history accompanying the opinion as it appears on the Commission on Official Legal Publications Electronic Bulletin Board Service and in the Connecticut Law Journal and bound volumes of official reports are copyrighted by the Secretary of the State, State of Connecticut, and may not be reproduced and distributed without the express written permission of the Commission on Official Legal Publications, Judicial Branch, State of Connecticut.
****

EVELEIGH, J., with whom HARPER and VERTEFEUILLE, Js., join, concurring and dissenting. I agree with part I of the majority opinion, but respectfully disagree with part II. Specifically, I respectfully disagree that the assessment made by the defendant, the town of Redding (town), was not manifestly excessive despite its inclusion of $4,800,000 in annual interest that the plaintiff, Redding Life Care, LLC, did not earn.[1] I would, therefore, reverse the judgment of the trial court. Accordingly, I dissent.

The plaintiff claims that the trial court improperly failed to conclude that the town disregarded state statutes by assessing the parcel using material assumptions known to be untrue, which, if corrected, would have reduced the valuation of the property by over $30,000,000. I agree with the plaintiff.[2]

On appeal to the trial court, the plaintiff claimed that the town's assessment was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of the real property in violation of General Statutes § 12-119.[3] Specifically, in the appraisal on which the town based its assessment, James Tellatin assumed that the plaintiff earned almost $5,000,000 in investment income from entrance fees paid by Meadow Ridge residents that were held in escrow. Prior to taking this tax appeal, the plaintiff alerted the town's assessor that this assumption was false. The plaintiff stated: "First, the [Tellatin appraisal] assumes that [the plaintiff] earns almost $5,000,000 in investment income from entrance fees that are held in escrow or otherwise. This assumption is incorrect. Connecticut law does not require that entrance fees be escrowed after the resident has occupied the facility and in fact, [the plaintiff] does not maintain entrance fees in trust or otherwise. There is therefore no 'investment income' to be earned from the entrance fees. This error causes the report to significantly overstate net operating income and hence the valuation. If the almost $5,000,000 in phantom 'investment income' is corrected in the report, then without any other changes, the valuation will be reduced to approximately $81,000,000." The town did not, however, change the assessment after receiving this information and, consequently, continued to assess the plaintiff at the value established on the October 1, 2007 grand list.

Tellatin admitted in his deposition that two key assumptions in his report were "hypothetical conditions" under the Uniform Standards of Professional Appraisal Practice. He specifically admitted that he assumed that "interest income" of approximately $4,800,000 annually was received by the plaintiff on

entrance fees in escrow. Tellatin also agreed that after a correction to remove the hypothetical income of $4,800,000, the total going concern value of the plaintiff would have been reduced to $76,500,000, plus or minus 10 percent, and that the real property valuation would have been less than $76,500,000. Thus, the plaintiff contends that this false assumption created a "manifestly excessive" assessment. I agree.

I begin by setting forth the standard of review applicable to the plaintiff's claim. The question of overvaluation is a factual one subject to the clearly erroneous standard of review. See *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 23, 807 A.2d 955 (2002). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id.

In the present case, it is undisputed that the town arrived at its assessment based on Tellatin's appraisal and that Tellatin's appraisal was based on a false assumption of $4,800,000 of annual income from an entrance fee escrow that did not exist. General Statutes § 12-63 (a)[4] requires in relevant part that "[t]he present *true and actual value* of . . . property shall be deemed by all assessors and boards of assessment appeals to be the fair market value thereof . . . ." (Emphasis added.) Further, General Statutes § 12-64 (a)[5] provides in relevant part as follows: "All the following-mentioned property, not exempted, shall be set in the list of the town where it is situated and, except as otherwise provided by law, shall be liable to taxation at a uniform percentage of its present *true and actual valuation*, not exceeding one hundred per cent of such valuation, to be determined by the assessors . . . ." (Emphasis added.) The admissions by Tellatin in his deposition established that the fair market value of the real estate should have been reduced to $76,500,000, plus or minus 10 percent, if the false assumptions were corrected and the appraisal appropriately reduced. Therefore, the town's assessment of $82,334,600 was based on admittedly false and untrue assumptions contrary to known facts about the economic characteristics of the subject property.[6] I conclude, therefore, that the plaintiff has satisfied the standard established in § 12-119 by demonstrating an assessment that "was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property . . . ." See also *Mead* v. *Greenwich*, 131 Conn. 273, 275, 38 A.2d 795 (1944). "Cases in this category must contain allegations beyond the mere claim that the assessor overvalued the property. [The] plaintiff . . . must satisfy the trier that [a] far more exacting test has been met: either there was misfeasance or nonfeasance by the taxing authorities,

or the assessment was arbitrary or so excessive or discriminatory as in itself to show a disregard of duty on their part." (Internal quotation marks omitted.) *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, 220 Conn. 335, 341, 597 A.2d 326 (1991).

Under the circumstances of this case, the knowing use of false assumptions in an appraisal for an assessment would certainly qualify on all counts under § 12-119. In the present case, the town attributed millions of dollars to the value of Meadow Ridge based on a hypothetical known to be untrue. The inclusion of this hypothetical that was known to be untrue blatantly disregards the requirements of §§ 12-63 (a) and 12-64 (a) to ascertain the true and actual value of the property and resulted in a taxation of more than 100 percent of the true and actual valuation in violation of § 12-64 (a). As this court has stated: "Municipalities have no powers of taxation other than those specifically given by statute, and strict compliance with the statutory provisions is a condition precedent to the imposition of a valid tax." *Empire Estates, Inc.* v. *Stamford*, 147 Conn. 262, 264, 159 A.2d 812 (1960). Therefore, it is clear to me that the town's assessment is not based on the true and actual value of the parcel as defined in the Connecticut statutes and case law and constituted a "manifest and flagrant disregard of statutory provisions."[7] (Internal quotation marks omitted.) *Breezy Knoll Assn., Inc.* v. *Morris*, 286 Conn. 766, 778 n.20, 946 A.2d 215 (2008).

Both the defendant and the majority cite *Ireland* v. *Wethersfield*, 242 Conn. 550, 557–58, 698 A.2d 888 (1997), for the proposition that "[i]f the trial court finds that the taxpayer has failed to meet his burden because, for example, the court finds unpersuasive the method of valuation espoused by the taxpayer's appraiser, the trial court may render judgment for the town on that basis alone." I reject this assertion because *Ireland* involved an appeal pursuant to General Statutes (Rev. to 1989) § 12-118 now General Statutes § 12-117a. Id., 551–52 n.1. It did not concern the issue raised herein pursuant to § 12-119 regarding whether the assessment was "manifestly excessive . . . ." Contrary to the decision of the trial court, the failure to consider the improper assumption of the existence of interest bearing accounts was relevant to a determination of "manifest excessive[ness]" under § 12-119. Accordingly, I would reverse the judgment of the trial court as to the plaintiff's claim under § 12-119 and remand the matter for a new trial. Therefore, I respectfully dissent.

[1] The plaintiff also claims that the trial court improperly failed to consider the deposition testimony of James Tellatin, the town's expert, and David Reis, a managing member of the plaintiff. Because I disagree with the majority on the second issue and would remand the case for a new trial, I need not reach this issue because it is not likely to arise again in the new trial.

[2] On appeal, the town claims that it was not necessary for the trial court to reach this issue because it concluded that the plaintiff's expert was not credible. As I explain herein, my analysis of the plaintiff's claim under General Statutes § 12-119 relies on James Tellatin's appraisal, not Michael G. Boehm's appraisal.

[3] General Statutes § 12-119 provides: "When it is claimed that a tax has been laid on property not taxable in the town or city in whose tax list such property was set, or that a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property, the owner thereof or any lessee thereof whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease to pay real property taxes, prior to the payment of such tax, may, in addition to the other remedies provided by law, make application for relief to the superior court for the judicial district in which such town or city is situated. Such application may be made within one year from the date as of which the property was last evaluated for purposes of taxation and shall be served and returned in the same manner as is required in the case of a summons in a civil action, and the pendency of such application shall not suspend action upon the tax against the applicant. In all such actions, the Superior Court shall have power to grant such relief upon such terms and in such manner and form as to justice and equity appertains, and costs may be taxed at the discretion of the court. If such assessment is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes in accordance with the judgment of said court."

[4] General Statutes § 12-63 (a) provides in relevant part: "The present *true and actual value* of all other property shall be deemed by all assessors and boards of assessment appeals to be the fair market value thereof and not its value at a forced or auction sale." (Emphasis added.)

[5] General Statutes § 12-64 (a) provides in relevant part: "All the following-mentioned property, not exempted, shall be set in the list of the town where it is situated and, except as otherwise provided by law, shall be liable to taxation at a uniform percentage of its present *true and actual valuation*, not exceeding one hundred per cent of such valuation, to be determined by the assessors: Dwelling houses, garages, barns, sheds, stores, shops, mills, buildings used for business, commercial, financial, manufacturing, mercantile and trading purposes, ice houses, warehouses, silos, all other buildings and structures, house lots, all other building lots and improvements thereon and thereto, agricultural lands, shellfish lands, all other lands and improvement thereon and thereto, quarries, mines, ore beds, fisheries, property in fish pounds, machinery and easements to use air space whether or not contiguous to the surface of the ground. . . ." (Emphasis added.)

[6] The majority asserts that "the use of a hypothetical condition is *not* a violation of the Uniform Standards of Professional Appraisal Practice" and that the standards contemplate the use of a hypothetical appraisal. (Emphasis in original.) Although I agree with the majority that the use of a hypothetical condition is sometimes appropriate, I disagree that the use of the hypothetical condition in the present case, namely the assumption that certain interest bearing accounts existed, was appropriately used for determining the "present true and actual value" pursuant to §§ 12-63 (a) and 12-64 (a). Indeed, as the majority acknowledges, the comment to standards rule 1-2 of the Uniform Standards of Professional Appraisal Practice indicates that "[a] hypothetical condition may be used in an assignment only if: use of the hypothetical condition is clearly required for legal purposes, for purposes of reasonable analysis, or for purposes of comparison; [and] use of the hypothetical condition results in a credible analysis . . . ." Appraisal Standards Board, Appraisal Foundation, 2012–13 Uniform Standards of Professional Appraisal Practice (2012) p. U-18, available at http://www.uspap.org (last visited February 21, 2013). Indeed, the Appraisal Institute states that "[w]hether or not it is appropriate to use such extraordinary assumptions or hypothetical conditions in an appraisal depends on the intended use and the nature of the appraisal problem." Appraisal Institute, The Appraisal of Real Estate (12th Ed. 2001) p. 56. The approved usages for hypothetical conditions often deal with improvements that are assumed to bring existing or planned structures in line with the fair market value of other structures in the area, for example, repairs to a property in disrepair, home improvements or construction in accordance with existing plans. My difference with the majority is that I believe that the hypothetical at issue in the present case is inappropriate because it has no foundation in either law or contract.

In the present case, the appraisal was prepared to comply with the requirements of §§ 12-63 (a) and 12-64 to obtain "the present true and actual value" of the property for purposes of taxation. The town was informed that the hypothetical was based on a false assumption and that it attributed approximately $4,800,000 extra value to the parcel. In fact, Tellatin testified that

he knew that the interest bearing account he attributed to Meadow Ridge did not exist. Furthermore, Tellatin testified that he was not aware of any continuing care retirement community in the country that maintained such an interest bearing account. On the basis of Tellatin's own testimony, it is clear that he did not have a reasonable basis for the hypothetical employed in the appraisal in the present case. Accordingly, I conclude that the use of the hypothetical was not required for legal purposes, was not necessary to obtain a reasonable analysis and resulted in an analysis that was not credible. Indeed, the Appraisal Institute states that "[w]hether or not it is appropriate to use such extraordinary assumptions or hypothetical conditions in an appraisal depends on the intended use and the nature of the appraisal problem." Appraisal Institute, supra, p. 56. Furthermore, the Rules of Appraisal Practice prohibit misleading appraisal reports and the competency rule prohibits mistakes of substance. See Appraisal Standards Board, supra, pp. U-7, U-11.

This court has repeatedly recognized that "[t]he terms actual valuation, market value, actual value, fair market value, market price and fair value are synonymous in the valuation of property for assessment purposes." (Internal quotation marks omitted.) *Stop & Shop Cos.* v. *East Haven*, 210 Conn. 233, 235 n.1, 554 A.2d 1055 (1989). I also agree that a hypothetical condition may be used in some circumstances. For instance, it is frequently used in an appraisal of property that already exists, but may need repairs in order to bring it to fair market value. The appraiser, although he knows the property is in disrepair, assumes it is in good condition for a determination of fair market value for comparison purposes. It may also be used in cases of proposed construction or home improvements. See Appraisal Standards Board, supra, p. U-3.

The majority cites *Somers* v. *Meriden*, 119 Conn. 5, 8–9, 174 A. 184 (1934), in support of its conclusion that the use of the hypothetical in the present case was appropriate. In *Somers* v. *Meriden*, supra, 8–9, this court concluded as follows: "As a general principle, earning or income producing capacity, as distinguished from actual earnings, is to be regarded as a factor in valuation for taxation purposes, but if the property is devoted to the use for which it is best adapted and is in a condition to produce or is producing its maximum income, the actual rental is a very important element in ascertaining its value." The present case is distinguishable from *Somers*, in which the earning capacity of the property had to be calculated and considered along with its actual earnings.

The parties in the present case agreed, and the trial court subsequently found, that the property was being used at its highest and best use and that the moneys paid for usage of the units was rated at market value. Therefore, I would conclude that it is not necessary to employ a hypothetical to determine the market value. Although a hypothetical can be used to assess a property according to its highest and best use, the inclusion of the hypothetical condition in the present case artificially increased the assessed value of the parcel beyond what the parties agreed was its highest and best use by relying on a fiction, namely that the parcel was generating an additional annual income of $4,800,000 through a nonexistent interest bearing account. An assessment of 70 percent of fair market value would have been, at most, based upon the plaintiff's appraisal, $76,500,000 multiplied by 1.1, which equals $84,150,000, multiplied by 0.7 without further deduction for intangibles and furniture, fixtures and equipment. The assessment that results from this calculation would have been at least $23,430,000 less than the assessment made by the town. In my view, this particular hypothetical condition constitutes a mistake of substance and renders the assessment of the plaintiff's property "manifestly excessive."

[7] The majority asserts that "although the plaintiff may disagree that the hypothetical condition was *necessary* to reach the valuation, it has failed to demonstrate that the town assessor's reliance on the [hypothetical] condition was *illegal*, and, accordingly, the plaintiff cannot prevail on its claim under § 12-119." (Emphasis in original.) I disagree. As I have explained previously herein, the appraisal in the present case attributed millions to the value of Meadow Ridge, which the town knew to be a false assumption. In doing so, the town ignored the requirements of §§ 12-63 (a) and 12-64 (a). Ignoring the requirements of our taxation statutes constitutes illegal action for the purposes of § 12-119. The present case is distinguishable from *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, supra, 220 Conn. 343, which was cited by the majority. In *Second Stone Ridge Cooperative Corp.*, this court concluded that "the selection of an inappropriate method of appraisal or a paucity of the underlying data in connection with an appraisal, without

more, is not manifestly illegal under our statutes . . . ." Id. In the present case, the town did not lack information or choose a different method of appraisal. Rather, it attributed millions of dollars in value to Meadow Ridge that did not exist, even after being explicitly informed of the falsity of this aspect of the appraisal. Such blatant disregard of the requirements of §§ 12-63 (a) and 12-64 (a) constitutes the "manifest and flagrant disregard of statutory provisions" contemplated by § 12-119. (Internal quotation marks omitted.) *Breezy Knoll Assn., Inc.* v. *Morris*, 286 Conn. 766, 778 n.20., 946 A.2d 215 (2008).

I would agree with the majority's position if there was a requirement, either by state statute or contract, that the entry fees be placed in an interest bearing account. No such requirement exists, however. Indeed, while the Tellatin appraisal assumes an interest bearing account in perpetuity, it fails to consider the fact that the plaintiff has six months, upon notice, to pay the resident 85 percent of the initial value. Therefore, even if there was a hypothetical account it would not be constant. It would show a rate of flux every six months after notice until the unit was again used. This transaction was treated as an interest free construction loan. Yet, what business in the state of Connecticut is taxed on imputed interest for a construction loan that it receives to improve its property? Not only does this imputed interest concept result in a manifestly excessive assessment, but it also discourages business investment. The difference between the present case and the examples of hypothetical appraisals cited by both the majority and the Appraisal Institute is that the latter addresses situations that are already in existence. For example, the majority's example of assuming the value of property without contamination concerns the value of existing property. The same is true for assumptions based on home improvement and repairs. The property exists. The improvement is assumed to bring the property to its highest and best use and comparable value. Even in the case of proposed construction, the property exists and the plans are in place for the improvements. In this case, however, the hypothetical interest bearing account does not exist, indeed, it will never exist and there is no requirement under state statute or contract that it should exist. This difference, in my view, is that the use of the hypothetical in the present case results in both a misleading appraisal report and a mistake of substance. Thus, in my view, it constitutes a manifestly excessive appraisal.

The majority places emphasis on the word "illegal," in a consideration of whether a property is assessed at a price which is manifestly excessive. The illegality reference in the test is, however, merely a reference to the violation of a statute. The test under § 12-119 speaks in terms of misfeasance of malfeasance suggesting bad practices as opposed to illegal practices. This lesser standard is more akin to a civil standard for a statutory violation than a criminal one.