NOT FOR PUBLICATION WITHOUT APPROVAL OF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

TAX COURT OF NEW JERSEY

Mala Sundar
JUDGE

R.J. Hughes Justice Complex
P.O. Box 975
25 Market Street
Trenton, New Jersey 08625
Telephone (609) 943-4761
TeleFax: (609) 984-0805
taxcourttrenton2@judiciary.state.nj.us

November 4, 2016

C. Justin McCarthy, Esq.
Giodano, Halleran & Ciesla, P.C.
125 Half Mile Road, Suite 300
Red Bank, New Jersey 07701-6777

Martin Allen, Esq.
DiFrancesco Bateman et al.
15 Mountain Boulevard
Warren, New Jersey 07059

Re: 1485 Ocean Avenue Realty, L.L.C. v. Borough of Sea Bright
Block 4, Lot 5
Docket No. 002445-2016

Dear Counsel:

This matter comes before the court on defendant's motion to dismiss plaintiff's 2016 local property tax appeal for failure to respond to the tax assessor's request for financial information pursuant to N.J.SA. 54:4-34 (L. 1979, c. 91), commonly known as "Chapter 91," in connection with the above captioned property ("Subject"). Plaintiff does not dispute receipt of, and non-response to, the Chapter 91 request. However, it opposes the motion on grounds the property is a beach club, with its receipts solely from membership fees, and since members cannot stay overnight at the cabanas or lockers, i.e., there is no lodging at the facilities, the Subject is not income-producing and does not require a response to the Chapter 91 request. Plaintiff further

*

argued that the Chapter 91 request was ambiguous, and that it be permitted to conduct discovery to determine if the request was "illegitimate pre-text."

For the reasons stated below, the court finds the Subject as income-producing. It therefore grants defendant's motion subject to plaintiff's right to a reasonableness hearing pursuant to Ocean Pines Ltd. v. Borough of Point Pleasant, 112 N.J. 1 (1988).

FACTS

On June 1, 2015, defendant's ("Borough") assessor sent, by certified mail return receipt requested, a Chapter 91 request to plaintiff. Included in the request was his cover letter, a copy of the statute, and the income and expense ("I&E") form. On the cover letter, the property owner was advised as follows:

> If your property is 100% owner-occupied, (no rental income from any source, including a related entity), please state that on the first page of the enclosed form. You need not fill out the remainder of the form. However, if there is rental income from any source (including cell tower, billboard or parking), please provide that information.

The cover letter also advised the owner that it could "contact" the assessor's office with "any questions concerning" the Chapter 91 request.

It is undisputed that the Chapter 91 request was properly made, mailed, and received, and that plaintiff did not respond to the same. Plaintiff's manager, William Stavola, certified that "after reviewing" the Chapter 91 request, he could not "clearly discern" the type of information being sought because "the income and expenses generated at the [Subject] are tied to the use and operation of the beach club business as opposed to the use of the land."

For tax year 2016, the Subject was assessed at $16,437,700. Plaintiff filed a timely direct appeal. The Borough filed a counterclaim, then the instant timely motion.

Plaintiff is a real estate holding company. It purchased the Subject in 2010. The Subject is operated as Driftwood Beach Club ("Beach Club"). The Beach Club is open daily and only during the summer (Memorial Day to Labor Day). Members are provided facilities such as a locker and/or a cabana; access to the ocean; use of the swimming pool; plus "arts, restaurant, crafts and holiday based activities." The Beach Club also provides furniture, chairs, tables, towels, and umbrellas for member use. A beach cabana features a shower, picnic table, benches, and outside deck. A large cabana, which can be shared by up to four families, is advertised as being "spacious," with a full bath, sink and shower, wall-to-wall carpeting, sliding glass doors which leads to a deck, a wet bar, and sufficient room for furniture or a fridge.

A person becomes a Beach Club member by paying the requisite fee depending on the type of facility selected. Facilities include a locker and/or a cabana. "The member payments vary based on the size and location of the [facility] being used and the amount of people using the [facility]." Guests are also charged at rates which vary for weekday versus weekend.

A related entity Seahorse L.L.C. apparently operates the Beach Club. It makes quarterly payments to plaintiff so that plaintiff can pay the real estate taxes on the Subject. Per plaintiff, these payments are not "market rent[s]" but a pass-through "mechanism for the payment of property taxes" on the Subject. The operating statements provided to the Borough, which appears to include both plaintiff and the related entity since it is titled "Stavola Entities," includes a line item expense for "Rent." The amounts shown are $1,620,983 (for calendar year 2012); $904,205 (for calendar year 2013); and $1,256,865 (for calendar year 2014).

In response to plaintiff's request for discovery on whether the assessor truly intended to use the Chapter 91 information, the assessor provided a supplemental certification explicating that he did use the Chapter 91 information to set assessments, and although the 2016 assessment was

a result of revaluation conducted by an outside firm, that firm also used Chapter 91 responses to set assessments for an income-producing, similar beach club.

ANALYSIS

N.J.S.A. 54:4-34 requires a property owner to "render a full and true account of" the property owner's "name and real property and income therefrom," if the property is "income-producing." Failure or refusal to respond within 45 days of the Chapter 91 request (i) allows the assessor to reasonably determine the property's "full and fair value" based upon any information he or she has; and (ii) bars the property owner from appealing that assessment. Ibid.

(A) Response Requirement for Non-Income-Producing Properties

It is well-established that a complaint should not be summarily dismissed where a property owner failed to respond to a Chapter 91 request because the property is not income-producing, even if the request had sought an affirmative response that the property is owner-occupied. H.J. Bailey Co. v. Neptune Township, 399 N.J. Super. 381, 384 (App. Div. 2008). The court noted that while the statute "clearly requires that property owners respond to Chapter 91 requests, irrespective of whether their property is income-producing or not," its language on "the sanction for not responding to the request for information . . . refers only to owners of income-producing properties." Id. at 386.

The court was cognizant that owners of non-income-producing properties could have their day in court despite ignoring Chapter 91 requests. It noted that the statute's "clear language confers upon owners of non-income-producing properties the unilateral right to ignore Chapter 91 requests with impunity." Id. at 389. While this appeared improper, "it is not the judiciary's role

to formulate public policy," but to effectuate the statute's clear intent, which was that the Chapter 91's penalty "does not apply to non-income-producing properties." Ibid.[1]

In sum (1) owner-occupied or non-income-producing properties are not automatically barred from maintaining an appeal despite the property owner's failure to respond to a Chapter 91 request; (2) the non-response does not prevent a taxing district from nonetheless moving for a complaint dismissal; and, (3) in the context of such motion the court must decide whether the property was indeed income-producing. Here, plaintiff's basis for opposing the Chapter 91 motion is that the Subject is "an owner-occupied beach club," thus, not income-producing. Pursuant to precedent above, its undisputed non-response is not a per se reason to grant the Borough's motion.

(B) Is the Subject Income-Producing?

Property is deemed income-producing if the income is related to, or connected with the real estate. ML Plainsboro Ltd. P'p v. Township of Plainsboro, 16 N.J. Tax 250 (App. Div.), certif. denied, 149 N.J. 408 (1997). In that case, the court ruled that the term "income producing property" as used in the statute is "a term of art" that should be "construed . . . in accordance with the understanding commonly ascribed to it by the business, investment, and real estate community." Id. at 259 (citations and quotations omitted). Since that term "is generally limited to property producing rental income" in the "real estate appraisal field," it has a "restrictive meaning." Ibid. Thus, the term is "commonly understood to refer solely to property which generates rental income." Ibid. It is the anticipated stream of revenue generated from the rental, lease, custody, or occupancy of the property which renders a property income-producing. Great Adventure, Inc. v. Township of Jackson, 10 N.J. Tax 230, 232-33 (App. Div. 1988).

[1] The court recommended legislative change so that there is a "clear consequence" for non-responsive owners of non-income producing properties. 399 N.J. Super. at 389. The statute remains unaltered.

In Great Adventure, supra, the court rejected as "specious" the argument that a portion of an amusement park's admission fee was "rental payment for the use of the premises." Id. at 233-34. The court concluded that fee is "not paid by the patron for the use of the property in any tenancy sense but rather for the entertainment package offered." Ibid.

In Rolling Hills of Hunterdon L.P. v. Township of Clinton, 15 N.J. Tax 364, 369 (Tax 1995), the court concluded that a portion of payments by patients to a nursing home is for "use of real estate." Therefore, the payment is akin to rent, making the nursing home an "income-producing" property for purposes of Chapter 91. Ibid.

In Southland, supra, the court noted that when the issue is whether property is income-producing is an issue, the inquiry is "whether the fee paid to the owner of land by tenants or patrons is for the continuous and exclusive use of a specific portion of the land and buildings, in the traditional sense of a tenancy, or for the brief right to enter the land and buildings with others on a non-exclusive basis, more akin to a license." 21 N.J. Tax at 589 (citing Great Adventure, supra, and Rolling Hills, supra). It concluded that a portion of the royalty paid by the franchisee to plaintiff was "for the continuous and exclusive use of its real estate," as further evidenced by the franchise agreement, therefore, the property was "income producing for purposes of Chapter 91." Ibid. The "fact that [the rent] . . . is aggregated with other obligations of the tenant to the landlord" was of no moment. Id. at 590.

Plaintiff claims that the Subject is not income-producing because "all income earned at the [Subject] is generated from members and guest use of the [B]each [C]lub operation amenities including but not limited to cabanas, lockers, restaurant, pool activities, parties and membership fees." It also notes that the Beach Club members must vacate the premises every night, thus, there

is no lodging. Plaintiff concedes that the Beach Club "takes in income for "renting" the lockers and cabanas," but contends that such "rentals are more akin to temporary licenses."

The Borough maintains that (1) the members have an exclusive possessory right to use of real property (the cabanas and/or lockers plus parking), which they specifically reserve in advance, at fixed rates, for a fixed, albeit, short term (summer months); (2) the occupation and use is no different than at a hotel or motel, which are undisputedly income-producing properties; and, (3) commercial buildings such as offices also do not permit lodging for its tenants, yet are unquestionably considered income-producing for valuation, thus, for Chapter 91 purposes.

The court finds the Borough's arguments more persuasive. While both the license and lease of real property include use, the former does not include exclusive use or possession. See Van Horn v. Harmony Sand & Gravel, Inc., 442 N.J. Super. 333, 341-42 (App. Div. 2015) (in a lease, the property owner provides "exclusive possession of a property" to the lease "for some period of time," during which the "the lessee's rights of possession and use are greater than the landowner's," whereas in a license, the property owner only grants a "permission to use the land at the owner's discretion," so that the user is "not provide[d] protection . . . against interference by the" property owner) (citations omitted)); see also Sandyston v. Angerman, 134 N.J. Super. 448, 451 (App. Div. 1975) ("[a] license is simply a personal privilege to use the land of another in some specific way or for some particular purpose or act," whereas "a lease is a grant of exclusive possession to use the land for any lawful purpose, subject to reservation of a right of possession in the landlord for any purpose or purposes 'not inconsistent with the privileges granted the tenant.'") (citations and quotations omitted); Thiokol Chem. Corp. v. Morris Cty. Bd. of Taxation, 41 N.J. 405, 417 (1964) (although difficult to distinguish at times, . . . a lease gives exclusive possession of the premises against all the world, including the owner, while a license confers a privilege to

occupy under the owner"). If there is no "rent . . . or other consideration . . . for the transfer of possession," nor a fixed term, but there are "limitations on exclusive possession and control of the premises," plus the owner's ability to "revoke the permit to use at any time," then there is likely no lease-type agreement. Ibid.

Here, there were no documents between members and plaintiff styled as a typical lease or rental agreement. Rather, and presumably as other beach clubs, one becomes a member based on a written application, which contains the rental rates, terms and conditions.[2] Even if the application did not use the term "rent" or "rental" (although plaintiff concedes that the cabanas and lockers were rented), this lack of use or reference, would not control the issue. Cf. Sandyston, supra, 134 N.J. Super. at 451 ("determination of whether a given agreement is a lease or a license depends not upon what the parties to it choose to call it nor the language, but [upon] the legal effect of its provisions") (citations and quotations omitted).

It is clear that the members are afforded rights to the Subject which are more in quantity and quality than a mere license, and no doubt have exclusive possession and use of the reserved cabana for the entire summer. General public have no access, use and occupancy to the member's cabana, and a guest is permitted use and occupancy only if a guest of a member. Further, the cabanas have amenities such as kitchens, bathrooms and utilities, rendering them more than just temporary shelters. None of the members have any stake in plaintiff's ownership or management (thus, cannot claim to be owner-occupiers). It is clear that members are renting a facility for which they must pay rental fees. Based on the above factors, the court finds that some portion of the fee is for the exclusive possession, use, and occupancy of real property. Cf. Van Ness v. Borough of

[2] The court was not provided with a copy of the application.

Deal, 139 N.J. Super. 83, 89 (Ch. Div. 1975) (describing the Deal Casino beach club owned by the taxing district and operated by the board of commissioners, which beach club included cabanas, beach houses, and bath houses, as well as restrooms, a restaurant, and swimming pool, and operated very similar to the Beach Club herein in that all facilities were available only to members and their guests, and members had to be prior members, and had to apply in advance. The board was given the power to "lease bathhouses and cabanas" to such members and their guests "at such rates and upon such terms" to be decided by the board, and "rental" of cabana or bathhouse was limited to one per member family), aff'd, 78 N.J. 174 (1978).[3]

Should the fact that overnight stays are barred render the Beach Club a non-income-producing property? In Rolling Hills, supra, the court decided that the nursing home was income-producing because an aspect of the patients' stay was lodging, which averaged thirteen months, although for some it was much shorter. 15 N.J. Tax at 367-68. "For this period of time the home constitutes a patient's residence." Id. at 368. The court noted that although the portion paid for services would be larger, it did not detract from the conclusion that "a portion of a nursing home patient's fee is paid for lodging," and thus is "at least partially attributable to a tenancy in real estate." Ibid. The court noted that the fact that there were differing rates charged for a single versus a double room also showed that a portion of the fee charged a patient was "for the use of real estate." Ibid.

This court concludes that the inability to sleep at night at the cabanas is not dispositive of whether the Beach Club is income-producing. For the summer months, members have the full ability to treat the lockers and cabanas as their alternate residence. While the Beach Club may

[3] The issue in that case was whether the taxing district could limit the Casino beach club access, and beach access to residents.

have rules and regulations which impose certain restrictions on use of personal property in the rented cabanas, those would be no different than similar such restrictions at an apartment or other leased premises. Cf. State v. Stavola, 103 N.J. 425, 429 (1986) (ruling that luxury cabanas could be considered as structures "equivalent" to dwellings for purposes of the permit laws of the Department of Environment Protection ("DEP") requiring permits for construction of certain structures, although "[t]he rules of each [beach] club, as well as municipal ordinances, prohibit overnight occupancy"), rev'g in part, on other grounds, 206 N.J. Super. 213 (App. Div. 1985).[4] Although the Stavola case involved interpretation of a DEP statute, which is not complementary to N.J.S.A. 54:4-34, given that the description, operation, use, and occupancy of the cabanas in that case is almost identical in the instant matter, this court finds that the higher courts' reasoning persuasive, and supports this court's conclusion that the Beach Club members' rights to the exclusive use, possession, and occupancy of the cabanas exceed those granted by a license. See also Southland, supra, 21 N.J. Tax at 589 (when the property owner "just as the property owner in

[4] The Appellate Division had ruled that that the luxury cabanas were "reasonably susceptible of being considered in the same category as motel or hotel units or their equivalent," and that the lack of "overnight use" was not "determinative" for purposes of applying the DEP laws. 206 N.J. Super. at 223. Rather, "[t]o the extent desired by the occupant, and perhaps limited by the regulations of the respective defendants, they can be essentially lived in during all the daylight hours and the time periods the facilities are open." Ibid. Therefore, the "deluxe cabana facilities are sufficiently equivalent to dwellings, whether or not the cabanas are intended to be used for sleeping, to be considered the type of shelter which can be included within the provisions of the regulation which includes motel and hotel rooms." Ibid

The dissent noted that "a cabana club" could not be considered a dwelling because "[p]eople do not live there, either permanently or for short periods," and in the summer only, spend "daylight hours" at the club just as people do in "offices, stores, stadiums, assembly plants or restaurants," which are also equipped with utilities, "[b]ut, no one calls them housing developments." Stavola, supra, 206 N.J. Super. at 226 (Cohen, J.A.D., dissenting). Since the cabanas had "no heat, air conditioning or insulation;" were not built to construction code; "and overnight occupancy is prohibited;" the dissent opined that the structures could not be considered as dwelling units simply on the notion that the members were provided the exclusive use of an enclosed space. Id. at 226-27.

The Supreme Court reversed that portion of the Appellate Division's holding that the DEP could bar completion of the cabanas' construction without the need for regulations. The Court noted that "[l]uxury cabanas, even conceding that they differ greatly from traditional cabanas, are more akin to recreational structures such as bath houses than to residential structures such as housing developments or dwelling units," however, this did not mean "that recreational uses and residential uses are mutually exclusive." 103 N.J. at 434. It concluded that while the DEP could include beach club cabanas as a dwelling, it must do so by properly promulgated regulations. Id. at 439.

Rolling Hills receives money from its franchisees for the continuous and exclusive use of its real estate . . . [then a] tenancy was created and the money received is, at least in part, rental income and therefore, the subject property is income producing for purposes of Chapter 91").[5]

(C) Is Ambiguity in the Request Sufficient Good Cause for a Non-Response?

Plaintiff next contends that it could not respond because it was confused by the information requested since none of the income or expense line items matched with the income and expense of the Beach Club.[6] Plaintiff notes that since the assessor was "well-aware" the Subject was operated as a beach club, thus, income from the same was business income, his use of a "standard" Chapter 91 form was improper. Additionally, since the attached I&E form sought information as to "leasehold operations" (e.g., number of units rented; vacancy percentage; gross possible rental; escalation income; percentage rent; other income; total of possible gross income; total of actual income), plaintiff would be confused since it was only generating business income. Thus, the request was defective since it was not tailored to the beach club operations, and even if so tailored, would be defective since business income cannot be the basis for assessing the Subject.

In Southland, supra, the court after finding that the property was income-producing, held that the owner's "failure to [timely] respond or object to the" Chapter 91 requests "now bars its

[5] The Borough also argues that the Subject is not owner-occupied because a related entity is making payments to plaintiff for use of the property, although not styled as rent (relying upon SKG Realty Corp. v. Township of Wall, 8 N.J. Tax 209 (App. Div.1985), where the court ruled that "[w]here real property is owned by one entity and occupied by a related entity," a non-response to a Chapter 91 request can be fatal since "[t]here is nothing about . . . the language or purpose of N.J.S.A. 54:4-34 that exempts a real estate taxpayer who owns property rented and occupied by a sister corporation." 8 N.J. Tax at 211). The I&E statements provided to the Borough do not help address this issue since (1) they are the I&E statements of a group of entities; (2) the only income source is "sales" and if Seahorse L.L.C. was the operator, it should have been receiving management fees; (3) an item of expense is "taxes" and if the related entity was making payments twice a year towards taxes, that line item would be shown as something else (example, a loan or gift); and (4) there is a line item for "Rent" for each calendar years 2012-2014 which is unexplained. Since the court has ruled that the Subject is income-producing, the Borough's argument need not be addressed, but of note is the fact that unlike in SKG, here, the related entity is not using or renting the Subject but is supposedly operating plaintiff's business.

[6] Plaintiff also argues that the Borough must turn square corners in this regard by providing actual copies of the Chapter 91 request sent to the plaintiff. This argument is specious since plaintiff does not dispute receipt.

defenses that the properties are not income producing for purposes of Chapter 91." 21 N.J. Tax at 590. The court further noted that since the owner could not "prove that the properties are owner-occupied and are not 'income producing,' [it would] . . . therefore . . . not be able to show 'good cause' for its failure to respond adequately." Ibid. For this reason, namely, failure to prove that the property was not income-producing, the court noted that the owner's complaint would have been dismissed even if the owner had timely objected to "its obligation to respond" to the Chapter 91 request. Ibid.

In Waterside Villas Holdings, L.L.C. v. Township of Monroe, 434 N.J. Super. 275 (App. Div.), certif. denied, 217 N.J. 589 (2014), the higher court rejected the owner's contention that ambiguity in the Chapter 91 request justified a non-response. The court ruled that an owner cannot "simply ignore its statutory obligation to respond" to a Chapter 91 request which it feels is "improper." 434 N.J. Super. at 284. Rather, the owner "must take action to challenge the request within the forty-five day statutory time limit, and to put the municipality on notice of its contention," and not "just sit by and do nothing until the assessment is finalized . . . and thereafter seek to appeal the assessment by plenary review." Ibid. (citations omitted). The higher court further held that since the owner "ignored a clear and proper Chapter 91 request for information," it was unnecessary to decide whether there was "good cause" for the owner's non-response. Ibid.

Nonetheless, the court did not foreclose non-response as a defense in any situation. Thus, for instance, a non-response would not be sanctioned if the request was made untimely such that receipt of the same would not "assist the assessor in making the assessment and to diminish the likelihood of litigation" or the Chapter 91 motion is untimely. Id. at 285 n.3 (citations omitted). Further, "where the property in question is not "'income-producing,' . . . the statutory sanction is unavailable." Ibid. (citing H.J. Bailey, supra).

However, the higher court's caveat as to income-producing properties was simply reiterating the ruling in H.J. Bailey, supra, that the Chapter 91 sanctions do not apply to non-income-producing properties. It was not carving out an exception to its rejection of the ambiguity defense for properties found to be income-producing. This conclusion is also evidenced by the ruling in H.J. Bailey, supra, where the court cautioned that a property owner could still be denied its appeal rights if the "property will ultimately be found to be income-producing." 399 N.J. Super. at 389. Thus, if (a) the property used to be income-producing;[7] (b) the property owner had a "mistaken belief that his property was non-income-producing;"[8] or, (c) the property "was, in fact, income-producing;[9] then the appeal preclusion could apply. Id. at 389-90.

Pursuant to H.J. Bailey, Southland, and Waterside Village, plaintiff's complaint should then be dismissed subject to its right to a reasonableness hearing, since this court has found the Subject to be income-producing.

It is true that in Waterside Village, supra, the higher court noted that although a "rare" eventuality, a property owner should not be penalized if the "request is so egregiously ambiguous in its identification of the property or in the instruction to the taxpayer that due process principles are offended." 434 N.J. Super. at 285 n.3. The court is unpersuaded that the Chapter 91 request at issue here implicates one of those rare circumstances. The information sought on the I&E forms is not ambiguous. The same I&E statement asks very simple questions such as year of construction; story height of building; gross floor area; use of building; and, whether the building

[7] Citing Alfred Conhagen, Inc. v. Borough of South Plainfield, 16 N.J. Tax 470 (App. Div.), certif. denied, 151 N.J. 74 (1997).
[8] Citing SKG, supra, 8 N.J. Tax at 211.
[9] Citing Southland Corp. v. Township of Dover, 21 N.J. Tax 573, 585 (Tax 2004).

had elevators. These answers do not require legal interpretation. Further, the terms highlighted by plaintiff as being vague or "typically" lease-related, are actually defined in the request itself.

That plaintiff believes the information sought is inapplicable to it does not convert the request to one that is utterly incomprehensible. Indeed, if it did so believe, it could have responded to the question "is rental of space subject to lease," in the manner it is now vociferously contending to this court, namely that no space is leased, or that rental of the cabanas and lockers are not subject to a lease. It could also say "not applicable" if the term did not apply to what it believed it was earning. The assessor's cover letter gave it additional options; (1) to state that the property is 100% owner-occupied on the first page of the form and fill out nothing else; and/or (2) to "contact" the assessor's office with "any questions concerning" the Chapter 91 request. Plaintiff did neither.

To argue that the government did not turn square corners because the assessor's request was not tailored to a property operating as a beach club, and would not be used to set the Subject's assessment since the income is purely business income, is to ignore the purpose and intent of Chapter 91 requests. See H.J. Bailey, supra, 399 N.J. Super. at 390 n.3 (The risk of not responding to a Chapter 91 request would "be particularly great where . . . the nature of the . . . property is such that" an assessor cannot "readily determine whether the property is income-producing or not"); SKG , supra, 8 N.J. Tax at 211 ("purpose of" the Chapter 91 statute "is to afford the assessor access to fiscal information that can aid in valuing the property"); Senate Revenue, Finance and Appropriations Committee, Statement to Senate Bill 309 (1978) (explaining that the proposed Chapter 91 law would "grant[] the assessor access to information on which the appellant is basing his appeal," so that the assessor is "properly prepared to argue the appeal"). For all of these reasons, the court does not find persuasive plaintiff's arguments that it was unable to respond because it was unable to understand the information sought.

(D) Discovery on the Assessor's Motives in Making Chapter 91 Requests.

Plaintiff asks it be allowed establish through discovery that the assessor's request for information is mechanical and not with any intent to assist him in setting the Subject's 2016 assessment. The request is denied.[10]

It is true that the implied purpose of a Chapter 91 request is that the income/expense information is to assist an assessor in determining the assessment of the property. See N.J.S.A. 54:4-34 (in the absence of a response, or if a false one is provided, then the assessor must "value [the] property at such amount as he may, from any information in his possession or available to him, reasonably determine to be the full and fair value thereof"). See also John Hancock Mut. Life Ins. Co. v. Township of Wayne, 13 N.J. Tax 417, 422 (Tax 1993) ("purpose of N.J.S.A. 54:4-34 is to assist the assessor in making the assessment and to diminish the likelihood of litigation," therefore, "the assessor's request must be timely, so that [when received], the assessor can utilize the information by January 10," consequently, a "taxpayer must show that the information could not have been used by the assessor in completing the assessment by January 10 to defeat a [Chapter 91] motion").

However, this court does not extend the holding in John Hancock, supra, such that property owners are excused from their statutory obligation to respond to a Chapter 91 request on grounds that they are entitled to know whether or not the information that could have been provided, would have been used by the assessor in setting the assessment. Such a reading turns the statute on its head. N.J.S.A. 54:4-34 places two express burdens: one upon the property owner to respond in a timely manner; and one upon the assessor to send a written request by certified mail with a copy

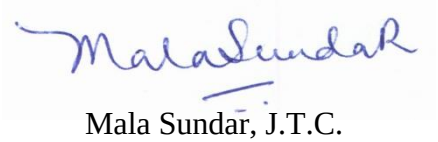
[10] As noted above, the assessor provided a reply certification explaining the use of Chapter 91 information in the setting on the assessments. Plaintiff provided absolutely nothing to refute the certification.

of the statute. There is nothing limiting, prescribing, or determining the method or means by which the assessor can or must use such information. See SKG, supra, 8 N.J. Tax at 211 ("it is up to the assessor and not the taxpayer to decide whether to consider the information furnished"). Indeed, requesting the information itself is discretionary. This court therefore rejects plaintiff's argument that it must conduct discovery on whether the assessor would have used the Chapter 91 information in the assessing process, had the same been provided by plaintiff. Plaintiff is not prejudiced because it would be entitled to a reasonableness hearing should its complaint be dismissed, and in that context, is permitted discovery on the methods employed by the assessor in setting the Subject's assessment.

CONCLUSION

The court finds the Subject is income-producing. The Borough's motion to dismiss the complaint is granted in part since plaintiff is entitled to a reasonableness hearing.

Very Truly Yours,



Mala Sundar, J.T.C.