

NOT FOR PUBLICATION WITHOUT APPROVAL OF  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

TAX COURT OF NEW JERSEY

Patrick DeAlmeida  
Presiding Judge



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Re: NBPE 200, LLC v. Township of Franklin  
Docket No. 004306-2014

Dear Counsel:

This letter constitutes the court's opinion with respect to whether the tax year 2014 assessment on plaintiff's real property is reasonable within the meaning of N.J.S.A. 54:4-34, commonly known as Chapter 91 (L. 1979, c. 91). As the Supreme Court held in Ocean Pines, Ltd v. Borough of Point Pleasant, 112 N.J. 1 (1988), because plaintiff failed to respond to a valid request for income and expense information from the tax assessor, plaintiff's challenge to the tax year 2014 assessment is limited. Plaintiff is entitled to relief only if it can prove that the assessment

is unreasonable in light of the data upon which the assessor relied and the valuation methodology the assessor used in setting the assessment. For the reasons explained more fully below, the court concludes that plaintiff has not met its burden of proof. As a result of this conclusion, the court will dismiss the Complaint.

### I. Procedural History and Findings of Fact

The following findings of fact and conclusions of law are based on the evidence submitted by the parties pursuant to R. 8:8-1(b), and from the court's factual findings in its August 8, 2013 letter opinion following the trial of challenges to the tax years 2009 through 2011 assessments on the subject property.

Plaintiff NBPE 220, LLC owns income-producing real property in defendant Franklin Township, Somerset County. The property is designated by the township as Block 468.01, Lot 21.02 and is commonly known as 220 Davidson Road.

The subject property is improved with a four-story, multi-tenanted office building on 9.287 acres. The building, originally constructed in 1981 and renovated in 1994 and 2007, is 162,273 square feet in size. During the trial concerning prior tax years, the parties stipulated that 154,043 square feet of the building is rentable office space. The building has front and rear entrances, both accessing a central lobby with a full-height atrium. The lobby area has marble floors. Common areas of the building include an on-site café, a small fitness center, restrooms, and common corridors. The office areas, which are considered Class B office space, consist of a combination of private and general office space and lunch rooms. Some areas of the building are vacant and have been gutted down to the frame and concrete floor.

The property has 708 feet of frontage along Davidson Avenue. A private roadway crosses the property, providing access to neighboring office buildings. The property is level, at grade with

the streets and rectangular in shape. The neighborhood is comprised primarily of office buildings, hotels, motels, and the Garden State Exhibit Center, all in close proximity to Interchange 10 of Route 287. There is over 2 million square feet of office space within approximately one mile of the subject.

On August 8, 2013, the court issued a letter opinion after trial setting forth its findings of fact and conclusions of law with respect to the tax years 2009 through 2011 assessments on the subject property. The assessments reviewed at the trial were as follows:

<u>Tax Year</u>	<u>Valuation Date</u>	<u>Assessment</u>
2009	10/1/2008	\$22,092,000
2010	10/1/2009	\$19,127,000
2011	10/1/2010	\$19,127,000

Because Franklin Township conducts annual reassessments, each of the assessments for tax years 2009 through 2011 reflects 100% of the assessor's opinion of true market value as of the relevant valuation dates. See N.J.S.A. 54:1-35a.

After trial, the court made the following conclusions with respect to the true market value of the subject property:

<u>Tax Year</u>	<u>Valuation Date</u>	<u>True Market Value</u>
2009	10/1/2008	\$9,625,000
2010	10/1/2009	\$7,075,000
2011	10/1/2010	\$5,958,000

Notably, the municipality did not offer an expert real estate appraiser at the trial for the 2009 through 2011 tax years, even though the municipality had named an expert witness and produced a report from him during discovery. The court's conclusions of value were based in large part on the testimony offered by the expert real estate appraiser called by plaintiff.

Judgments reducing the assessments on the subject property for tax years 2009 through 2011 were entered on August 8, 2013.

On the following day, August 9, 2013, the municipal tax assessor, pursuant to Chapter 91, mailed to plaintiff a request for income and expense information relating to the subject property in order to assist in setting the tax year 2014 assessment on the property. Plaintiff failed to respond to the request.

On September 23, 2013, the municipality filed a Notice of Appeal with the Superior Court, Appellate Division, contesting this court's conclusions of value with respect to tax years 2009 through 2011.

In the absence of a response from plaintiff to his Chapter 91 information request, the assessor set an assessment on the subject property for tax year 2014 using information available to him from other sources. A detailed description of the methods used by the assessor to set the assessment is provided below. Ultimately, the assessor set the tax year 2014 assessment for the subject property as follows:

Land	\$ 2,787,000
Improvement	<u>\$ 9,613,000</u>
Total	\$12,400,000

Because the municipality implemented a district-wide reassessment for tax year 2014 the ratio is presumed to be 100% and the assessment is presumed to reflect true market value. See N.J.S.A. 54:1-35a. The assessment is several million dollars higher than the court's conclusion of true market value for tax year 2011, the latest year addressed in the court's opinion. As noted above, however, the municipality's appeal of the court's value conclusion for tax year 2011 was pending at the time that the assessor finalized the tax year 2014 assessment.

On March 19, 2014, plaintiff filed a Complaint challenging the tax year 2014 assessment on the subject property.

On April 25, 2014, defendant moved to dismiss the Complaint pursuant to Chapter 91, arguing that plaintiff's failure to respond to a request from the tax assessor for income and expense information precluded plaintiff's appeal of the assessment.

On June 25, 2014, the court issued an Order granting defendant's motion, subject to plaintiff's right to a reasonableness hearing pursuant to Ocean Pines, supra. The court directed the parties to engage in discovery and set a date for a reasonableness hearing.

After discovery, the parties submitted deposition transcripts, certifications, exhibits and briefs in support of their positions. They also agreed to submit the matter for trial on the papers pursuant to R. 8:8-1(b). The evidence submitted by the parties established the following:

Franklin Township has approximately 21,000 line items of real property subject to local property tax. For tax year 2014, the municipality implemented a district-wide reassessment of each of these line items. The reassessment was conducted by, and under the supervision of, Richard J. Carabelli, Jr., the municipal tax assessor. Mr. Carabelli is a Certified Tax Assessor, State Certified General Real Estate Appraiser, serves as President of the Mercer County Board of Taxation, and is a member of the Appraisal Institute with an MAI designation.<sup>1</sup> Mr. Carabelli has been the tax assessor in Franklin Township since July 2009 and has more than thirty years of experience valuing real property. He has valued thousands of commercial properties.

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<sup>1</sup> An MAI designation is awarded by the Appraisal Institute based on an appraiser's education, experience, knowledge, character and ability to pass a comprehensive examination. Appraisers with an MAI designation agree to comply with the Appraisal Institute's code of professional ethics and standards of professional appraisal practices.

The relevant valuation date for tax year 2014 for all properties is October 1, 2013. In August 2013, Mr. Carabelli mailed to the owners of income-producing property in the township requests for income and expense information. Pursuant to N.J.S.A. 54:4-34, property owners were given 45 days in which to respond to the assessor's information requests. As noted above, plaintiff was included in the August 2013 mailing but failed to provide a response.

In the fall of 2013, Mr. Carabelli met with his staff to review each of the township's line items. With respect to each income-producing property, Mr. Carabelli and his staff reviewed income and expense information provided by the property owner in response to the assessor's Chapter 91 request and responses provided to Chapter 91 inquiries from owners of other income-producing property in the township. According to Mr. Carabelli, his review of all Chapter 91 responses enabled him to determine the reasonable economic data on which he would rely in setting assessments for tax year 2014. He also reviewed municipal building permits, data compiled by third parties regarding capitalization rates, and other relevant information.

With respect to the subject property, Mr. Carabelli considered this court's opinion regarding tax years 2009 through 2011 "for what is was," presumably a reference to the fact that the trial record included testimony from only one expert. As he explained at his deposition:

Q. Judge DeAlmeida found that value for the subject property was \$5,958,000 as of October 1[, 2010]. What led you to believe that the property more than doubled in value in three years?

MR. RAFANELLO: I object to the form of the question. You can answer.

A. Your first premise is that the Judge determined the value of the property I think that one of the biggest things was the fact that he only heard from one report, one appraisal, and I am sure that he did the best he could with the information that was presented at the trial. I don't know that I doubled the Judge's opinion. I gave it my best estimate as to what I thought was fair and reasonable based on

the information that I had for the tax year in question. I think that if the Judge heard from me maybe he would have concluded something differently. I didn't testify. . . .

[2/19/15 Carabelli Dep., p. 66, line 10 to p. 67 line 2.]

Mr. Carabelli also reviewed the expert appraisal reports commissioned by both parties for the trial regarding tax years 2009 through 2011.

Mr. Carabelli relied on this information, his knowledge of the Franklin Township office rental market, and his experience as an appraiser to determine an economic rent, a vacancy and collection loss rate, an expense ratio, and a capitalization rate to use the income capitalization approach to determine value. The income capitalization approach is the preferred method of estimating value of income-producing property, such as the subject. Parkway Village Apartments Co. v. Township of Cranford, 108 N.J. 266, 270 (1987); Hull Junction Holding Corp. v. Borough of Princeton, 16 N.J. Tax 68, 79 (Tax 1996). “In the income capitalization approach, an appraiser analyzes a property’s capacity to generate future benefits and capitalizes the income into an indication of present value.” Appraisal Institute, The Appraisal of Real Estate 445 (13<sup>th</sup> ed 2008).

Determining the value of real property pursuant to the income capitalization approach is properly summarized as follows:

$$\begin{array}{r} \text{Market Rent} \\ \times \text{ Square Footage} \\ \hline \text{Potential Gross Income} \\ \\ - \text{ Vacancy and Collection Losses} \\ \hline \text{Effective Gross Income} \\ \\ - \text{ Operating Expenses} \\ \hline \text{Net Operating Income} \\ \\ \div \text{ Capitalization Rate} \\ \hline \text{Value of Property} \end{array}$$

See Spiegel v. Town of Harrison, 19 N.J. Tax 291, 295 (App. Div. 2001), aff'g, 18 N.J. Tax 416 (Tax 1999); Appraisal Institute, The Appraisal of Real Estate 466 (13<sup>th</sup> ed 2008).

Mr. Carabelli calculated a value for the subject property by using an economic rent of \$15.00 per square foot. He multiplied that rent by 159,392 square feet of rentable space. As noted above, the parties stipulated that the subject property had 154,043 square feet of rentable space for purposes of the trial for tax years 2009 through 2011. Mr. Carabelli explained that 159,392 square feet of rental space is the figure contained in municipal tax records for the subject property and that he elected to rely on that figure instead of the amount stipulated by the parties for the purposes of the trial of the earlier years.

Mr. Carabelli then applied a 10% vacancy and collection loss rate. He explained that he determined the vacancy and collection loss rate based on vacancy rates reported on Chapter 91 responses from property owners other than plaintiff, overall market activity, and his opinion of how best to stabilize vacancy over a reasonable investment period. The vacancy and collection loss rate was at the low end of the Chapter 91 responses reviewed by Mr. Carabelli. Because plaintiff did not respond to the assessor's information request, Mr. Carabelli did not have a current vacancy and collection loss rate for the subject property.

Mr. Carabelli also used an expense ratio of approximately 40% of his estimated effective gross income. In addition to his knowledge of the office rental market in Franklin Township, Mr. Carabelli based the approximately 40% figure on responses to Chapter 91 requests from property owners other than plaintiff. Mr. Carabelli testified at his deposition that the Chapter 91 responses of property owners other than plaintiff reported vacancy and collection loss rates ranging from 35% of effective gross income to 40% of effective gross income. Plaintiff's counsel analyzed the



Chapter 91 responses to report vacancy and collection loss rates ranging from 41% to 70%.<sup>2</sup> Because plaintiff did not respond to the assessor's information request, he did not have the current expense ratio of the subject property.

Finally, Mr. Carabelli applied a capitalization rate of 10.3%. To reach this figure, the assessor reviewed the American Council on Life Insurance, or ACLI, tables on capitalization rates, as well as other publically available data compiled for the real estate industry. He also relied on his knowledge of the office rental market in the Township.

Mr. Carabelli's calculations resulted in a value of approximately \$12,535,000, which reflects \$78.45 per square foot.

Because of his knowledge of the subject property from the 2009 through 2011 tax appeals, Mr. Carabelli reduced the assessment to \$12,400,000. This reflects a market value of \$77.79 per square foot.

Plaintiff does not take issue with Mr. Carabelli's use of the income capitalization approach to determine the assessment on the subject property. Nor does plaintiff challenge the economic rent or capitalization rate used by the assessor. Plaintiff contends that Mr. Carabelli's vacancy and collection loss rate and his expense ratio are unreasonable. Plaintiff also questions the reasonableness of Mr. Carabelli relying on 159,392 square feet of rentable space in his calculation

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<sup>2</sup> The court notes that plaintiff did not produce expert testimony in support of its claims. Plaintiff's analysis of the Chapter 91 responses, as well as its assertions that various aspects of the assessor's valuation methodology were unreasonable, appear to be based on the opinions of counsel. For example, plaintiff's brief concludes that "a reasonable deduction of 20 percent for vacancy and collection loss, operating expenses of \$7.15 per square foot, and 5 percent for real estate commissions" would have resulted in a reasonable assessment of \$6,356,000. (Pb13). These opinions are unsupported by expert testimony in the motion record. They are instead bald assertions by counsel of what counsel believes would constitute a reasonable assessment for the subject property for tax year 2014.

of value, when the township stipulated to a lower figure for purposes of the tax years 2009 through 2011 trial.

In support of its argument, plaintiff points out that Mr. Carabelli used a vacancy and collection loss rate and an expense ratio that differ from those adopted by the court when it determined the true market value of the subject property for tax years 2009 through 2011. For a vacancy and collection loss rate the court concluded 17%, 22% and 27%, respectively, for tax years 2009 through 2011. For an expense ratio the court concluded \$8.23 per square foot, or 68% of effective gross income, for each tax year.

## II. Conclusions of Law

In Ocean Pines, supra, the Supreme Court held that a property owner who fails to comply with N.J.S.A. 54:4-34 may nevertheless seek a “sharply limited,” and likely summary, review of the reasonableness of the assessor’s valuation based upon the data available to the assessor when the valuation was made. Encompassed in this inquiry are “(1) the reasonableness of the underlying data used by the assessor, and (2) the reasonableness of the methodology used by the assessor in arriving at the valuation.” 112 N.J. at 11. “Both the underlying data and the methodology used by the assessor are entitled to presumptions of correctness.” 510 Ryerson Road, Inc. v. Borough of Lincoln Park, 28 N.J. Tax 184, 193 (Tax 2014)(citing Lucent Techs., Inc. v. Township of Berkeley Heights, 24 N.J. Tax 297, 308 (Tax 2008)). “The taxpayer, therefore, has the burden to produce evidence that is definite, positive and certain in quality and quantity in order to overcome” the presumptions. Ibid. (internal quotations omitted).

The record in no way suggests that the either the data upon which the tax assessor relied or his valuation methodology were unreasonable. To the contrary, credible evidence establishes that the assessor examined income and expense information provided by the owners of income-

producing properties in the municipality similar to the subject property. This information was provided in response to the statutorily authorized information requests sent by the assessor to those property owners. An assessor's use of responses to Chapter 91 requests to formulate assessments is the very purpose of the statute. "The purpose of Chapter 91 is to assist the municipal tax assessors, who are charged with the responsibility for property valuations, by affording them access to fiscal information that can aid in the valuation of property." Lucent Techs, Inc. v. Township of Berkeley Heights, 405 N.J. Super. 257, 263 (App. Div. 2009), rev'd in part, aff'd in part, 201 N.J. 237 (2010). The court surely cannot conclude that the assessor's use of Chapter 91 responses in the way intended by the Legislature was unreasonable. Accord 510 Ryerson Road, supra, 28 N.J. Tax at 195-196.

In addition, the assessor, who is a well-trained, fully-qualified, and experienced appraiser of real property, relied on publically available data compiled for the real estate industry, his experience with Franklin Township rental office buildings, and information he reviewed during his appraisal practice relating to income-producing properties similar to the subject. He also reviewed the property record card for the subject, the court's decision with respect to the subject property for tax years 2009 through 2011, and the two appraisal reports produced during discovery for the trial of those years. Review of this information is entirely reasonable and exactly what the court would expect an assessor to rely on when determining an assessment for income-producing property. Plaintiff, therefore, fails to meet its evidentiary burden with respect to the first prong of the Ocean Pines analysis.

Plaintiff does not challenge the methodology used by the assessor – the income capitalization approach to valuing real property. The court, therefore, need to tarry long on this point. The income capitalization approach is the preferred and widely recognized method for

determining the value of income-producing property such as the subject. Parkway Village, *supra*, 108 N.J. at 270; Hull Junction Holding, *supra*, 16 N.J. Tax at 79. This is the valuation approach the court used to determine the true market value of the subject property for tax years 2009 through 2011. Mr. Carabelli's use of the income capitalization approach, which comports with the prevailing view of how best to value income-producing property, was reasonable. Plaintiff, therefore, failed to meet its burden of proof with respect to the second prong of the Ocean Pines analysis.

The court's inquiry effectively ends here. The court has concluded that both the data upon which the assessor relied and the valuation methodology he employed to set the tax year 2014 assessment on the property were reasonable. Plaintiff's remaining contentions focus on the credibility of the conclusions that the assessor reached through the exercise of his judgment with respect to two of the factors he used to determine value. Plaintiff concedes the economic rent and capitalization rate used by the assessor were reasonable. Plaintiff argues, however, that the vacancy and collection loss rate and expense ratio used by the assessor were not reasonable. Plaintiff's arguments miss the point of an Ocean Pines reasonableness hearing.

The holding in Ocean Pines limits the court's inquiry to the reasonableness of the assessment in light of "data" and "methodology" used by the assessor. The court is not permitted to scrutinize the assessor's exercise of judgment when selecting the various factors used in the valuations process. As Judge Kuskin explained,

The standard applicable in the context of a Chapter 91 hearing for purposes of determining whether an assessor acted reasonably is less stringent than the standard applicable in the context of a plenary valuation hearing for purposes of determining whether a presumption of validity attaches to an assessment. In the latter context, if a taxpayer challenges the presumption, a court may require proof that the assessor obtained and considered market data

in setting the assessment. In the Chapter 91 context, however, the express language of the statute requires only that the assessor “reasonably determine” the value of a property based on “any information in [the assessor’s] possession or available to [the assessor].”

[Lucent Techs., *supra*, 24 N.J. Tax at 312.]

Thus, the fact that the assessor used reasonable data to set an assessment through a reasonable valuation methodology is sufficient to dismiss the Complaint. The court is not permitted to determine whether the assessor’s use of the reasonable data resulted in, for instance, a vacancy and collection loss rate that is below or above market rates. Nor may the court determine whether the expense ratio used by the assessor should have been a smaller or larger percentage of effective gross income. The qualitative analysis of appraisal decisions is an appropriate area of inquiry at the trial in a full tax appeal but not in an Ocean Pines reasonableness hearing.

Thus, plaintiff’s quarrel with the assessor’s vacancy and collection loss rate and expense ratio is outside of the scope of the judicial inquiry permitted by Ocean Pines. Plaintiff contends that the assessor should have consulted additional sources of data, could have selected a different vacancy and collection loss rate and expense ratio, and would have reached a more accurate value determination had he relied less on his experience and more on data plaintiff suggests is more credible than that used by the assessor. These contentions might well have proven to be fertile ground for a successful cross-examination of the assessor during a trial. However, a “reasonableness hearing, as described and defined in Ocean Pines, does not include plenary proofs as to the value of the property under appeal . . . .” Id. at 308.

Nor is the court troubled by the fact that the assessor’s vacancy and collection loss rate and expense ratio did not match those used by the court in reaching value determinations for the subject for tax years 2009 through 2011. There are several reasons for this conclusion. First, at the time

that the assessor determined the tax year 2014 assessment, an appeal of the court's opinion with respect to tax years 2009 through 2011 was pending in the Superior Court, Appellate Division. It was, therefore, an open question whether the court's opinion would be upheld.

Second, the assessor was aware that the court reached its value determinations with respect to tax years 2009 through 2011 after a trial during which only the taxpayer presented expert testimony. The municipality had, presumably for strategic reasons, elected to not present as a witness the expert it had retained for the trial. Thus, it was entirely reasonable for the assessor to take the position that the court, as he stated, "did the best [it]he could with the information that was presented at the trial," and that his opinion of the appropriate vacancy and collection rate and expense ratio was preferable to rate and ratio used by the court.

Third, the final tax year addressed by the court in its opinion was 2011 and the latest value determined by the court was as of October 1, 2010. The assessment at issue here is for tax year 2014. It is well established that all real property in the State is assessed yearly. The assessed value is determined as of October 1<sup>st</sup> of preceding the tax year. N.J.S.A. 54:4-23; Aperion Enterprises, Inc. v. Borough of Fair Lawn, 25 N.J. Tax 70, 86 (Tax 2009). Franklin Township implemented a district-wide reassessment for tax year 2014, setting a new value of the property based on its worth on October 1, 2013, three years after the last valuation date addressed in the court's opinion. It was perfectly reasonable for the assessor to have reviewed, but not felt bound by, the court's findings for earlier years when setting the assessment on the property for tax year 2014.

Having concluded that plaintiff failed to prove that the tax year 2014 assessment on the subject property was unreasonable, the court will enter Judgment dismissing the Complaint.

Very truly yours,

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