

TAX COURT OF NEW JERSEY

Kathi F. Fiamingo
Judge



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NOT FOR PUBLICATION WITHOUT APPROVAL OF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

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RE: 757 Page Ave. Inc. v. Township of Lyndhurst
Docket Nos. 005810-2011, 004444-2012, 001002-2013 & 008183-2014

Counsel:

This letter constitutes the court's opinion after trial in the above-referenced matter challenging the 2011 through 2014 tax year assessments on plaintiff's property.

For the reasons set forth below, the court reduces the assessments for tax years 2011, 2012 and 2013. As the court finds that the assessment for 2014 does not exceed the upper limit of the Chapter 123 ratio, it is affirmed.

I. Procedural History and Factual Findings

The court makes the following findings of fact based on the evidence and testimony offered at trial in this matter.

The subject property is located at the intersection of Page Avenue and Orient Way in Lyndhurst, New Jersey and contains 3.59 acres of property. The improvement is a one and partial

two-story building totaling 86,890 square feet: 81,352 square feet of warehouse/office (68,640 square feet of warehouse 12,712 square feet of offices), 1,014 square feet of retail sales space for a discount tire store and 4,524 square feet of service garage space associated with the sale and installation of tires.

The building was originally constructed in 1942 and was partially renovated in 1994 to incorporate the tire store. It is in average condition. The subject property is located in a mixed-use neighborhood, surrounded by residential, some retail and a few older industrial buildings. It is located in an M-1 zone (Light Industrial District) which permits research laboratories; business offices and offices accessory to an industrial use; animal hospital and veterinary offices; warehousing (with certain limitations); manufacturing; caretaker/watchman living quarters; and wholesale and/or storage conducted in an enclosed building.

The subject property is designated as Lot 20.01 in Block 235 on the official tax map of the Township of Lyndhurst. The assessment for each of the years under appeal are as follows:

Tax Year 2011:

Land:	\$ 3,590,000
Improvements:	<u>\$ 2,773,700</u>
Total:	\$ 6,363,700

Tax Years 2012–2014

Land:	\$ 3,590,000
Improvements:	<u>\$ 1,910,000</u>
Total:	\$ 5,500,000

The average ratio of assessed to true value, commonly referred to as the Chapter 123 ratio, for the Township of Lyndhurst for the 2011 tax year was 103.73%, making the implied equalized value of the subject property \$6,134,869 for that year. For 2012 the Chapter 123 ratio was 100%, making the implied equalized value \$5,500,000.¹ For the 2013 tax year the Chapter 123 ratio was

¹ The Township of Lyndhurst conducted a revaluation for the 2012 tax year.

94.59%, making the implied equalized value \$5,814,568. For 2014 the Chapter 123 ratio was 97.14%, making the implied equalized value \$5,661,931.

Plaintiff filed timely direct appeals with the Tax Court challenging the assessment on the subject property for each of the tax years 2011–2014. No counterclaims were filed by the defendant.

Both plaintiff and defendant offered the testimony of a State of New Jersey certified general real estate appraiser each of whom was accepted without objection as an expert in the field of real estate valuation. Both experts prepared appraisal reports which were admitted into evidence without objection.

The experts' conclusions as to value are as follows:

<u>Valuation Date</u>	<u>Plaintiff's Conclusion</u>	<u>Defendant's Conclusion</u>
October 1, 2010	\$4,300,000	\$6,600,000
October 1, 2011	\$4,350,000	\$6,700,000
October 1, 2012	\$4,450,000	\$7,000,000
October 1, 2013	\$4,750,000	\$7,000,000

II. Conclusions of Law

A. Presumption of Validity

The court's analysis begins with the well-established principle that "[o]riginal assessments and judgments of county boards of taxation are entitled to a presumption of validity." MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998). As Judge Kuskin explained, our Supreme Court has defined the parameters of the presumption as follows:

The presumption attaches to the quantum of the tax assessment. Based on this presumption the appealing taxpayer has the burden of proving that the assessment is erroneous. The presumption in favor of the taxing authority can be rebutted only by cogent evidence, a proposition that has long been settled. The strength of the presumption is exemplified by the nature of the evidence that is required to

overcome it. That evidence must be “definite, positive and certain in quality and quantity to overcome the presumption.”

[Ibid. (quoting Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985) (citations omitted)).]

The presumption of correctness arises from the view “that in tax matters it is to be presumed that governmental authority has been exercised correctly and in accordance with law.” Pantasote, supra, 100 N.J. at 413 (citing Powder Mill, I Assocs. v. Township of Hamilton, 3 N.J. Tax 439 (Tax 1981)); see also Byram Twp. v. Western World, Inc., 111 N.J. 222 (1988). The presumption remains “in place even if the municipality utilized a flawed valuation methodology, so long as the quantum of the assessment is not so far removed from the true value of the property or the method of assessment itself is so patently defective as to justify removal of the presumption of validity.” Transcontinental Gas Pipe Line Corp. v. Township of Bernards, 111 N.J. 507, 517 (1988) (citation omitted).

“In the absence of a R. 4:37-2(b) motion . . . the presumption of validity remains in the case through the close of all proofs.” MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, supra, 18 N.J. Tax at 377. In making the determination of whether the presumption has been overcome, the court should weigh and analyze the evidence “as if a motion for judgment at the close of all the evidence had been made pursuant to R. 4:40-1 (whether or not the defendant or plaintiff actually so moves), employing the evidentiary standard applicable to such a motion.” Ibid. The court must accept as true the proofs of the party challenging the assessment and accord that party all legitimate favorable inferences from that evidence. Id. at 376 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 535 (1995)). In order to overcome the presumption, the evidence “must be ‘sufficient to determine the value of the property under appeal, thereby establishing the existence of a debatable question as to the correctness of the assessment.’” West Colonial Enters, LLC v. City of East Orange, 20 N.J. Tax 576, 579 (Tax 2003) (quoting Lenal

Props., Inc. v. City of Jersey City, 18 N.J. Tax 405, 408 (Tax 1999), aff'd, 18 N.J. Tax 658 (App. Div.), certif. denied, 165 N.J. 488 (2000)).

Only after the presumption is overcome with sufficient evidence at the close of trial must the court “appraise the testimony, make a determination of true value and fix the assessment.” Rodwood Gardens, Inc. v. City of Summit, 188 N.J. Super. 34, 38–39 (App. Div. 1982) (citing Samuel Hird & Sons, Inc. v. City of Garfield, 87 N.J. Super. 75 (App. Div. 1965)). If the court determines that evidence produced is insufficient to overcome the presumption that the assessment is correct, the assessment shall be affirmed and the court need not proceed to making an independent determination of value. Ford Motor Co. v. Township of Edison, 127 N.J. 290, 312 (1992), aff'g, 12 N.J. Tax 244 (App. Div. 1990), aff'g o.b. per curiam, 10 N.J. Tax 153 (Tax 1988); Global Terminal & Container Serv. v. City of Jersey City, 15 N.J. Tax 698, 703–04 (App. Div. 1996).

The defendant made a motion to dismiss for failure to overcome the presumption of correctness at the end of the plaintiff’s case. The court found that plaintiff produced sufficient credible evidence to overcome the presumption of validity. If taken as true, the opinion of plaintiff’s expert created a debatable question regarding the correctness of the assessments in each tax year which supports a conclusion that the subject property was assessed in excess of its true market value for all tax years. The court denied defendant’s motion to dismiss for failure to overcome the presumption of correctness.

The court’s inquiry, however, does not end there. Concluding the presumption of validity has been overcome does not equate to a finding by the court that the assessment is erroneous. Once the presumption has been overcome, “the court must then turn to a consideration of the evidence adduced on behalf of both parties and conclude the matter based on a fair preponderance of the evidence.” Ford Motor Co. v. Township of Edison, 127 N.J. 290, 312 (1992). The court must be

mindful that “although there may have been enough evidence [presented] to overcome the presumption of correctness at the close of plaintiff’s case-in-chief, the burden of proof remain[s] on the taxpayer throughout the entire case...to demonstrate that the judgment under review was incorrect.” Id. at 314–15 (citing Pantasote Co.v. City of Passaic, supra, 100 N.J. at 413). Only after the presumption is overcome with sufficient evidence at the close of trial must the court “appraise the testimony, make a determination of true value and fix the assessment.” Rodwood Gardens, Inc. v. City of Summit, 188 N.J. Super. 34, 38–39 (App. Div. 1982)(citations omitted).

Accordingly, the court must evaluate and weigh the evidence presented to determine if plaintiff has met the requisite burden of proof.

B. Highest and Best Use

In determining the market value of a property, the court must first find the highest and best use of that property. As explained in Clemente v. Township of South Hackensack, 27 N.J. Tax 255, 267–269 (Tax 2013), aff’d o.b. 28 N.J. Tax 337 (App. Div. 2015):

For property tax assessment purposes, property must be valued at its highest and best use. Ford Motor Co. v. Township of Edison, 127 N.J. 290, 300–01, 604 A.2d 580 (1992). “Any parcel of land should be examined for all possible uses and that use which will yield the highest return should be selected.” Inmar Associates, Inc. v. Township of Edison, 2 N.J. Tax 59, 64 (Tax 1980). Accordingly, the first step in the valuation process is the determination of the highest and best use for the subject property. American Cyanamid Co. v. Township of Wayne, 17 N.J. Tax 542, 550 (Tax 1998), aff’d 19 N.J. Tax 46 (App. Div. 2000). “The concept of highest and best use is not only fundamental to valuation but is a crucial determination of market value. This is why it is the first and most important step in the valuation process.” Ford Motor Co. v. Township of Edison, 10 N.J. Tax 153, 161 (Tax 1988) aff’d o.b. per curiam, 12 N.J. 290, 604 A.2d 580 (1992); see also Gen. Motors Corp. v. City of Linden, 22 N.J. Tax 95, 107 (Tax 2005).

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

The reasonably probable and legal use of vacant land or improved property that is physically possible, appropriately supported, and financially feasible and that results in the highest value.

[Appraisal Institute, The Appraisal of Real Estate, 22 (13th ed. 2008).]

The highest and best use analysis requires sequential consideration of the following four criteria, determining whether the use of the subject property is: 1) legally permissible; 2) physically possible; 3) financially feasible; and 4) maximally productive. Ford Motor Co. v. Township of Edison, supra, 10 N.J. Tax at 161; see also, The Appraisal of Real Estate, supra, at 279 (13th ed. 2008). Implicit in this analysis is the assumption that the proposed use is market-driven; in other words, that it is determined in a value-in-exchange context and that there is a market for such use. WCI-Westinghouse v. Township of Edison, 7 N.J. Tax 610, 616–617 (Tax 1985), aff'd o.b. per curiam, 9 N.J. Tax 86 (App. Div. 1986). A highest and best use determination is not based on value-in-use because the determination is a function of property use and not a function of a particular owner's use or subjective judgment as to how a property should be used. See Entenmann's Inc. v. Borough of Totowa, 18 N.J. Tax 540, 545 (Tax 2000). The highest and best use of an improved property is the "use that maximizes an investment property's value, consistent with the rate of return and associated risk." Ford Motor Co. v. Township of Edison, supra, 127 N.J. at 301, 604 A.2d 580. Further, the "actual use is a strong consideration in the analysis. Ford Motor Co. v. Township of Edison, supra, 10 N.J. Tax at 167.

Plaintiff's expert determined that the highest and best use of the subject property was its "current use of an office warehouse building." Similarly, defendant's expert concluded that the highest and best use of the subject property was its current use, which he characterized as a warehouse/office with a discount tire center.

While both experts concluded that the current use, as characterized by each, satisfied all four elements of the highest and best use analysis, neither supplied support for the legally permissible use of the subject property for its retail function as a discount tire store.

Defendant's expert suggested that the service garage part of his highest and best use analysis could be considered as "wholesale and/or storage conducted in enclosed building" because the tires that are sold are "part of the warehousing." He also testified that the discount tire store/retail use might be a conditional use allowed in the M-1 light industrial zone in which the subject property was located, but was unable to provide any documentation as to the conditional uses allowed in the M-1 zone. Neither of the experts provided any testimony or documentation

that a variance or other municipal approval permitted a retail use at the subject or that the use was a pre-existing non-conforming use.

The first element of the highest and best use analysis is whether a proposed use is legally permissible. In this context, the uses permitted by the applicable zoning regulation determine whether a proposed use is legally permissible. Romulus Development v. West New York, 7 N.J. Tax 305 (Tax 1985), aff'd o.b. per curiam, 9 N.J. Tax 90 (App.Div.1987); Schimpf v. Little Egg Harbor Tp., 14 N.J. Tax 338 (Tax 1994).

While the court acknowledges that the subject property is in actual use as a “warehouse/office with a discount tire center,” nothing put before this court demonstrates that such use was legally permissible in the M-1 zone. This court cannot assume that such use was legally permissible when the only evidence before it makes it clear that the use was not permitted. In this regard, the court rejects defendant’s expert’s suggestion that either the store front selling the discount tires or the garage area of the subject property was “wholesale or storage conducted in enclosed building” as permitted in the M-1 zone. As nothing before this court would lead the court to conclude that retail sales or service garages constitute uses permitted in the M-1 zone, the court concludes that the highest and best use of the subject property is as a warehouse/office.

C. Valuation Methodology

“There are three traditional appraisal methods utilized to predict what a willing buyer would pay a willing seller on a given date, applicable to different types of properties: the comparable sales method, capitalization of income and cost.” Brown v. Borough of Glen Rock, 19 N.J. Tax 366, 376 (App. Div. 2001) (citing The Appraisal of Real Estate, supra, at 81 (11th ed. 1996)), certif. denied, 168 N.J. 291 (2001). “[T]he answer as to which approach should predominate depends upon the facts in the particular case.” WCI-Westinghouse, Inc. v. Township of Edison, 7 N.J. Tax, 610, 619 (Tax 1985), aff'd, 9 N.J. Tax 86 (App. Div. 1986).

1. Cost Approach

“The cost approach is normally relied on to value special purpose property or unique structures for which there is no market.” Marina Dist. Dev. Co., LLC v. City of Atl. City, 27 N.J. Tax 469, 519 (Tax 2013) (citing Borough of Little Ferry v. Vecchiotti, 7 N.J. Tax 389, 407 (Tax 1985); Dworman v. Borough of Tinton Falls, 1 N.J. Tax 445, 452 (Tax 1980), aff'd, 180 N.J. Super. 366, (App.Div. 1981), certif. denied, 88 N.J. 495 (1981)). The cost approach values a property “based on a comparison with the cost to build a new or substitute property. The cost estimate is adjusted for the depreciation evident in the existing property.” The Appraisal of Real Estate, supra, at 561 (14th ed. 2013).

Plaintiff’s expert testified that he determined the value of the subject property based on the cost approach, the sales approach and the income approach in reaching his conclusions of value for each year, but that he gave more weight to the income approach. Incongruently, plaintiff’s expert indicated that the cost approach was appropriate when the property to be valued involved a relatively new improvement, where it was a special use property, or where there were no comparable properties on the market. Plaintiff’s expert did not, however, provide any testimony upon which this court could conclude that the subject property was any of the types of property for which the cost approach was appropriate. In fact, on cross-examination plaintiff’s expert acknowledged that he gave the least weight to the cost approach in reaching his conclusion of value and that it had been included “for the court.”

In reaching his conclusions under the cost approach the expert testified that he utilized software produced by Marshall and Swift. He did not verify the results by any other method, nor did the expert produce independent testimony to authenticate and explain the calculations used by the software. See Forsgate Ventures IX, L.L.C. v. Township of South Hackensack, No. 007671-2009, 2016 N.J. Tax LEXIS 1 (Tax Jan. 26, 2016). Neither did the expert produce scientific data

with respect to the Marshall and Swift cost calculation software such that the court could determine its reliability. See State v. Hurd, 86 N.J. 525 (1981); see also State v. Shun, 19 N.J. 54 (2006). Thus the court is without any basis to determine whether the software and the expert’s utilization of it to support his cost approach conclusion of value is reliable. For all of these reasons, the court rejects plaintiff’s expert use of the cost approach to valuation for the subject property.

2. Sales Comparison Approach

The sales comparison approach derives an opinion of market value “by comparing properties similar to the subject property that have recently sold, are listed for sale, or are under contract.” The Appraisal of Real Estate, *supra*, at 377 (14th ed. 2013). The sales comparison approach involves a “comparative analysis of properties” and requires the expert to focus on the “similarities and differences that affect value . . . which may include variations in property rights, financing, terms, market conditions and physical characteristics.” *Id.* at 378. “When data is available, this [approach] is the most straight forward and simple way to explain and support an opinion of market value.” Greenblatt v. Englewood City, 26 N.J. Tax 41 (Tax 2011) (citing The Appraisal of Real Estate, *supra*, at 300 (13th ed. 2008)).

While both experts utilized the sales approach, they testified that they gave this approach the least weight.

3. Income Capitalization Approach

The income capitalization approach is the preferred method of estimating the value of income producing property. 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 (1996). “The income capitalization approach to value consists of . . . procedures that an appraiser uses to analyze a property’s capacity to generate benefits (i.e., usually the monetary benefits of income and reversion) and convert these benefits into an indication of present value.” The Appraisal of

Real Estate, supra, 439 (14th ed. 2013). Each expert employed the income capitalization and provided this approach the most weight in arriving at their conclusions of value.

The subject property is owner occupied. This court has found that the income approach is inappropriate in valuing owner-occupied industrial property. See Shulton, Inc. v. Clifton, 7 N.J. Tax 208 (Tax 1983). However, where owner-occupied property consists of warehouse buildings which are commonly rented by their owners as investment property, the income approach is a viable valuation methodology. M.I. Holdings, Inc. v. Jersey City, 12 N.J. Tax 129, 139 (Tax 1991); see also New Cumberland Corp. v. Roselle, 3 N.J. Tax 345 (Tax 1981). As in M.I. Holdings, supra, the identification of the numerous leases for warehouse properties relied upon by the experts in this matter suggests that the income approach is a viable method of valuation. Ibid.

The court finds that the income approach is the most appropriate methodology of valuing the subject property. As both of the experts also utilized the sales approach, the court will first examine each expert's approach under that methodology.

D. Calculation of Value Under the Sales Approach

Plaintiff's Expert's Sales Approach

For each valuation date, plaintiff's expert identified four sales as comparable to the subject property. All of the comparable sales identified by the plaintiff's expert were office/warehouse properties of varying sizes which, for the most part, were not comparable to the subject property.

For the valuation date of October 1, 2010, Comparable Sale One was a building containing 31,800 square feet, Comparable Sale Two was a building containing 38,000 square feet and Comparable Sale Four contained 16,505 square feet. The subject property was more than twice the size of each of the comparables and in the case of Comparable Sale Four – more than five times larger. Only Comparable Sale Three at 99,021 square feet was comparable in size.

“Evidence of comparable sales is effective in determining [the] value of property for property tax purposes only where there is substantial similarity between the properties” and the subject. 90 Riverdale, L.L.C. v. Borough of Riverdale, 27 N.J. Tax 328, 338 (Tax 2013) (citing Kearny Leasing Corp. v. Town of Kearny, 6 N.J. Tax 363, 376 (citation omitted)). However, “[c]omparability is [] vitiated when there is a vast difference in size between the comparables and the subject.” *Id.* at 338–39 (citing 43 David E. Crabtree, New Jersey Practice, State and Local Taxation, § 7.3 at 103 (2nd ed. 2007); see also Thomas J. Lipton, Inc. v. Township of Raritan, 10 N.J. Tax 202, 208 (Tax 1988), aff’d, 11 N.J. Tax 100 (App.Div. 1989) (finding sales comparison inappropriate when “comparables” were two and three times larger than the subject)).

For these reasons, the court rejects plaintiff’s Comparable Sales One, Two and Four for his 2010 valuation conclusion as not credible in determining the true market value of the subject.

In doing so, the court recognizes that plaintiff’s expert made size adjustments to Comparable Sales One, Two and Four. The adjustments were for “smaller” and “much smaller,” in the amounts of 5% and 15%, respectively. However, plaintiff’s expert did not provide the methodology by which the determination of smaller and much smaller was made and the court was unable to discern the methodology employed. Additionally, plaintiff’s expert was unable to explain how he arrived at the adjustments of 5% and 15%.

Comparable Sale Three was a 99,921 square foot warehouse/office building located at 170 Schuyler Avenue, North Arlington, NJ, which sold on May 13, 2011 for \$3,100,000, or \$31.02 per square foot. Plaintiff’s expert made an adjustment of 6% to account for the difference in office space (5% versus 16% in the subject) and 25% for Comparable Sale Three’s “Below Avg” condition. Plaintiff’s expert did not inspect comparable Sale Three but he testified that he spoke with someone involved with the sale to determine its condition. He was unable to identify the person to whom he spoke or provide any further information to support the condition adjustment.

Plaintiff's expert could not explain the basis for applying the 25% adjustment versus some other percentage.

It is well settled in the realm of tax appeals that an expert's reliance on subjective measures for calculation and application of adjustments is unacceptable. Greenblatt v. Township of Englewood, 26 N.J. Tax 41, 55 (Tax 2012) ("adjustments must have a foundation obtained from the market" with an "explanation of the methodology and assumptions used in arriving at the [] adjustments []" otherwise they are entitled to little weight). In Dworman v. Borough of Tinton Falls, 1 N.J. Tax 445, 458, this court established that "[t]he opinion of an expert depends upon the facts and reasoning which form the basis of the opinion. Without explanation as to the basis, the opinion of the expert is entitled to little weight in this regard." Thus an expert's opinion is only as good as the data upon which the expert relied. See Congoleum Corp. v. Township of Hamilton, 7 N.J. Tax 436, 451 (Tax 1985) (Adjustments must be adequately supported by objective data); Kearny Leasing Corp. v. Township of Kearny, 6 N.J. Tax 363, 376 (Tax 1984), aff'd o.b., 7 N.J. Tax 665 (App. Div. 1985), certif. denied, 102 N.J. 340, 508 A.2d 215 (1985). "An expert's conclusion rises no higher than the data which provide the foundation." City of West Orange v. Goldman, 2 N.J. Tax 582, 588 (Tax 1981) (citations omitted). "Expert opinion unsupported by adequate facts has consistently been rejected by the Tax Court." Hull Junction Holding Corp. v. Princeton Borough, supra, 16 N.J. Tax at 98 (citing Willow/Leonia Assocs. v. Borough of Leonia, 12 N.J. Tax 338, 344 (1992)).

[TD Bank v. City of Hackensack, 28 N.J. Tax 363, 382–83 (2015).]

The court is unable to determine the credibility of the adjustments noted. Comparable Sale Four is therefore rejected.

For the valuation date of October 1, 2011, Plaintiff's expert also identified four sales he deemed comparable to the subject, one of which was Comparable Sale Three discussed above. The other comparables identified by plaintiff's expert for October 1, 2011 were warehouse/office buildings containing 23,288 square feet, 30,000 square feet and 23,138 square feet. These comparables are rejected for the reasons expressed above.²

² Again plaintiff's expert made adjustment for smaller and much smaller buildings, but failed to provide a basis for the adjustments.

For the valuation date of October 1, 2012, plaintiff's expert identified four sales, two of which were of warehouse buildings containing 37,864 and 18,940 square feet, both of which are rejected for the reasons expressed above.

Comparable Sale Three was the sale of a warehouse/office building, identified as being located at "370 Overpeck/465 Alfred, Englewood/Teaneck." The building contained 102,045 square feet and sold on July 20, 2012 for \$4,200,000, or \$41.16 per square foot. Plaintiff's expert made a 6% adjustment to Comparable Sale Three to account for the difference in office space (5% in the comparable versus 16% in the subject) and arrived at an adjusted sales price of \$43.63 per square foot.

Comparable Sale Four was the sale of an 85,441 square foot warehouse/office building located at 10 Fairway Court, Northvale, NJ. The sale occurred on April 2, 2012 at \$5,466,000, or \$63.97 per square foot. Plaintiff's expert made an adjustment of 3% to account for the 6% difference in office space. The adjusted sales price was \$65.89 per square foot.

For the valuation date of October 1, 2013, plaintiff's expert identified four sales, the largest of which was 37,864 square feet. The court finds that each of comparable sales lack credibility as evidence of the true market value of the subject property for the same reasons expressed above.

Thus of all the comparable sales identified by plaintiff's expert, the court accepts Comparable Sale Three at \$41.16 per square foot and Comparable Sale Four at \$63.97 per square foot as of October 1, 2012 as credible evidence of the value of the subject property. Of these sales, the court relies more heavily on Comparable Sale Four as being the most similar to the subject property.

Defendant's Expert's Sales Approach

The defendant's expert reviewed eleven sales and made adjustments for size, age/condition/quality, office space, and ceiling height to various of the comparable sales. As to

each comparable sale, a 5% adjustment was made for “service garage.” As the court has rejected this use of the subject property, this adjustment is rejected.

Of the eleven comparable sales identified by plaintiff’s expert, four required a size adjustment (Comparable Sale One at 48,384 square feet, Comparable Sale Seven at 47,424 square feet and Comparable Sale Nine at 58,830 square feet were adjusted at -5% each and Comparable Sale Three at 38,000 square feet was adjusted at -10%). In justifying the adjustment, defendant’s expert testified that the adjustments constituted his opinion based on his review of the data, but he did not specify the data upon which he relied or the manner in which he arrived at the amount of the adjustment. There was nothing in his report to support any specific adjustment per square foot or otherwise. Furthermore, it is unclear whether defendant’s expert adjusted for the 81,352 square feet of warehouse building as concluded in his highest and best use analysis or 86,890 which is the court’s conclusion. For these reasons, the comparable sales identified by defendant’s expert requiring an adjustment for size are rejected.

There remains the following seven comparable sales for consideration:

Comparable Sale Two which was the sale of a 70,482 square foot industrial building located at 200 Green Street, Teterboro, NJ on December 23, 2009 for \$5,900,000, or \$83.71 per square foot. The building was built in 1978 and is situated on a lot of 2.37 acres. Defendant’s expert made an adjustment of +5% for the difference in office space (6% versus 16% in the subject) and +5% for ceiling height (18 feet ± in the comparable versus 23 feet in the subject), to arrive at an adjusted sales price of \$92.08.³

Comparable Sale Four was the sale of an 83,500 square foot industrial building located at 98 Main Avenue, Elmwood Park, NJ on December 14, 2010 for \$5,500,000, or \$66.47 per square foot. The building was built in 1975 and is located on a lot of 3.41 acres. Defendant’s expert made an adjustment of 5% for the 10% difference in office space, resulting in an adjusted price per square foot of \$69.79.

Comparable Sale Five was the sale of an 89,160 square foot industrial building located at 17-10 Willow Street, Fair Lawn, NJ on November 1, 2010 for \$4,990,000, or \$55.97 per square foot. The building was built in 1952 and the lot size is 5.34 acres. Defendant’s expert made no adjustments to this sale.

³ As noted above, defendant’s expert also adjusted by 5% for a “Service Garage” for this and all of his comparable sales, which is being eliminated by the court in its calculation of adjusted price per square foot.

Comparable Sale Six was the sale of a 114,762 square foot industrial building located at 1270 Valley Brook Avenue, Lyndhurst, NJ on December 20, 2011 for \$9,750,000, or \$84.96 per square foot. The building was built in 1950 on a lot of 7.53 acres. No adjustments were made to this sale.

Comparable Sale Eight was the sale of the 98,087 square foot industrial building located at 9 Empire Boulevard, South Hackensack, NJ for \$7,006,134, or \$71.43 per square foot, on June 27, 2012. The building was built in 1971 and the lot size is 3.13 acres. An adjustment of 5% was made for office space (5% versus 16% in the subject) and 5% for ceiling height (18 feet ± versus 23 feet in the subject), resulting in an adjusted price per square foot of \$78.57.

Comparable Sale Ten was the sale of a 97,440 square foot industrial building built in 1969 located at 433 Murray Hill Parkway, East Rutherford, NJ on May 1, 2013 for \$6,850,000, or \$70.30 per square foot. The building was built in 1969 and the lot's size is 4.62 acres. A 5% adjustment was made for the office space (5%), resulting in an adjusted price per square foot of \$73.82.

Comparable Sale Eleven was the sale of a 67,443 square foot industrial building built in 1976 located at 275 Veterans Boulevard, Rutherford, NJ on November 6, 2013 for \$4,800,000, or \$71.17 per square foot. The building was built in 1976 and the lot size is 5.02 acres. No adjustments were made to this sale.

Based on all of the foregoing, and placing more weight on those comparables most similar to the subject property, the court concludes that the fair market value of the subject property based on the sales comparison approach is as follows:

October 1, 2010:	86,890 SF x \$60.00 = \$5,213,400
October 1, 2011:	86,890 SF x \$60.00 = \$5,213,400
October 1, 2012:	86,890 SF x \$65.00 = \$5,647,850
October 1, 2013:	86.890 SF x \$70.00 = \$6,082,300

E. Calculation of Value under the Income Approach

As indicated above, both experts employed the income approach and placed most weight on this approach.

Determining the value of real property pursuant to the income approach is achieved by the following formula:

	Market Rent
<u>Times</u>	<u>x Square footage</u>
Equals	= Potential Gross Income
<u>Less</u>	<u>- Vacancy Rate and Collection Losses</u>
Equals	= Effective Gross Income
<u>Less</u>	<u>- Operating Expenses</u>
Equals	= Net Operating Income
<u>Divided by</u>	<u>÷ Capitalization Rate</u>
Equals	= Property Value

Spiegel v. Town of Harrison, 19 N.J. Tax 291, 295 (App. Div. 2001), aff'g, 18 N.J. Tax 416 (Tax 1999).

The first step in the process is to determine market rents. The subject property was owner occupied and the experts went to the market to determine economic rents for similar property. In both cases, however, the experts reviewed leases for both warehouse/office properties and retail spaces.

Despite determining that the highest and best use of the subject property was warehouse/office, plaintiff's expert distinguished the 1,014 square feet of retail store at the subject property from the 85,876 square feet of warehouse space⁴ in order to determine value under the income approach. Accordingly, he identified leases he deemed comparable for determining market rents for the warehouse/office portion of the subject property and leases he deemed comparable for the retail space.

Defendant's expert identified leases for what he determined was 81,352 square feet of warehouse/office space and 5,538 square feet of service garages which he then combined to arrive at a market rent.

⁴ Plaintiff's expert included the 4,524 square feet of service garage space within his calculation of the warehouse, finding the garages were a function of the warehouse.

As the court has determined that the highest and best use of the subject property does not include a retail component, the court will review only those warehouse/office leases identified by the experts.

Plaintiff's Comparable Rents

For each tax year under review, plaintiff's expert identified four leases of warehouse/office buildings he deemed comparable to the subject. No adjustments were made by plaintiff's expert to any of the leases identified for the warehouse space. Those leases are summarized below:

Leases Identified for the October 1, 2010 Valuation Date

Comparable Lease One is a 50,160 square foot industrial warehouse/office building on a 1.953 acre lot with 14% offices located at 40 Triangle Boulevard, Carlstadt, NJ. The lease began on February 15, 2011 and ran through February 14, 2016. The rent was \$5.00 per square foot, triple net.

Comparable Lease Two is a five-year lease commencing December 5, 2010 and terminating December 5, 2015 for property located at 462 Barell Avenue, Carlstadt, NJ. The 62,268 square foot warehouse/office building is located on a 2.6 acre lot and rent was \$4.95 per square foot, triple net.

Comparable Lease Three is a two-year lease commencing November 8, 2010 and terminating November 7, 2012 for a 202,847 square foot building on ± 5 acres at 738 Schuyler Avenue, Lyndhurst, NJ. The rent per square foot was \$5.00 triple net.

Comparable Lease Four is a five-year lease commencing May 5, 2010 and ending May 4, 2015 for a 67,300 square foot building on a 4.52 acre lot. The rent per square foot was \$4.93 triple net.

Plaintiff's expert concluded an estimated rent of \$5.00 per square foot triple net.

Leases Identified for the October 1, 2011 Valuation Date

Comparable Lease One is a 50,160 square foot industrial warehouse/office building on a 1.953 acre lot with 14% offices located at 40 Triangle Boulevard, Carlstadt, NJ. The lease began on 2/15/11 and ran through 2/14/16. The rent was \$5.00 per square foot triple net.⁵

Comparable lease two is a five-year lease commencing December 5, 2010 and terminating December 5, 2015 for property located at 462 Barell Avenue, Carlstadt, NJ. The 62,268 square

⁵ This lease is the same Comparable Lease One identified for the October 1, 2010 valuation.

foot warehouse/office building is located on a 2.6 acre lot and rent was \$4.95 per square foot, triple net.⁶

Comparable lease three is for property located at 245 West Commercial Avenue, Moonachie, NJ which commenced on February 3, 2011 and terminated February 2, 2013. The building is a 62,200 square foot industrial warehouse with 9% office space on a 2.6 acre lot. The rent was \$3.74 per square foot, triple net.

Comparable Lease Four is a five-year lease commencing March 1, 2011 and terminating February 28, 2016, for property located at 111 Commerce Road, Carlstadt, NJ. The building was a 94,000 square foot industrial warehouse with 37% office space on a 4.42 acre lot. Rent was \$5.75 per square foot, triple net.

The expert concluded that based on the comparable leases, the “estimated rent” for the office warehouse of the subject was \$5.00 per square foot, triple net.

Leases Identified for the October 1, 2012 Valuation Date

Comparable Lease One is a five-year lease for a 24,057 square foot building beginning January 12, 2012 and ending January 11, 2017, located at 99 Murray Hill Parkway, East Rutherford, NJ. Rent was \$5.00 per square foot, triple net.

Comparable Lease Two is a five-year lease beginning April 2, 2012 and ending April 1, 2017 for a 28,115 square foot building at 1 Terminal Road, Lyndhurst, NJ. Rent was \$5.75 per square foot, triple net.

Comparable Lease Three was shown as being a five-year lease. Incongruently, it is indicated as beginning November 5, 2011 and ending May 4, 2012 (6 months) and is dated August 15, 2012 several months after the lease end date. The building was listed as 450 Murray Hill Parkway, East Rutherford, NJ and the rent was listed at \$4.85 per square foot for a building with 340,113 square feet. The discrepancies in the lease length, start and end date and signed date were not explained.

Comparable Lease Four was a five-year lease for a 65,000 square foot building, located at 3 Ethel Boulevard, Wood Ridge, NJ, commencing on February 15, 2011 and ending February 14, 2016. Rent was \$4.00 per square foot, triple net.

The expert concluded that based on the leases reviewed, the estimated rent for the office warehouse was \$5.00 per square foot, triple net.

Leases Identified for the October 1, 2013 Valuation Date

Comparable Lease One is for a 78,800 square foot warehouse located at 120 Woodbine Street, Bergenfield, NJ, with a six-year term beginning November 4, 2012 and ending November 3, 2018. Rent is \$4.75 per square foot, triple net.

⁶ This lease is the same Comparable Lease Two identified for the October 1, 2010 valuation.

Comparable Lease Two is for a 28,115 square foot building at 1 Terminal Road, Lyndhurst, NJ for a five-year lease beginning April 2, 2012 and ending April 1, 2017 at \$5.75 per square foot triple net.

Comparable Lease Three is the lease for 450 Murray Hill Parkway, East Rutherford, NJ. Again the property is shown as 340,113 square feet with a five-year lease shown as starting November 5, 2011 and ending May 4, 2012 with a signing date of August 15, 2012 at \$4.85 per square foot, triple net.

Comparable Lease Four is a five-year lease beginning June 22, 2013 and ending June 21, 2018 for a 40,557 square foot building at 599 Gotham Parkway, Carlstadt, NJ at \$5.75 per square foot, triple net.

The expert concluded that based on the leases reviewed, the estimated rent for the office warehouse was \$5.25 per square foot, triple net.

With respect to all of the leases, plaintiff's expert conceded that he did not inspect any of the properties nor did he review any of the lease documents. All of the information provided was obtained through the New Jersey Multiple Listing Service. He maintained that he confirmed all of the lease information with brokers or other participants, but was unable to provide any information as to with whom he spoke on any individual lease.

Defendant's Comparable Rents

Defendant's expert identified eleven leases for industrial properties. Comparable Leases 2, 3, 5, 6, 7, 8, 9, 10 and 11 were identified as being leases "within an industrial building" and comparable leases 9 and 11 specifically indicated that the industrial building was "multi-tenant." Comparable leases 3, 5, 6, 8 and 10 were for warehouse space ranging from 16,500 square feet to 30,080 square feet. Defendant's expert testified that he made no adjustment for size because although the subject property was single-tenanted the subject property "could have been" divided into smaller areas to accommodate multiple tenants by the construction of demising walls, although on the valuation dates it was not so divided.

The court finds that all of the leases which were for multi-tenanted property, or for leaseholds "within an industrial building" are not comparable to the subject which was a single-tenanted building. Thus comparable leases 2, 3, 5, 6, 7, 8, 9, 10 and 11 are rejected, leaving comparable leases 1 and 4 for consideration.

Comparable Lease One was dated May 1, 2009 with a five-year term for 83,000 square feet of industrial building constructed in 1962, located at 109 Kero Road, Carlstadt, NJ. The effective rent was \$5.84 per square foot, triple net. Defendant's expert made a +5% adjustment for office space and a +5% adjustment for ceiling height, arriving at an adjusted price per square foot of \$6.42.

Comparable Lease Four was dated November 17, 2010 for a seven-year term for 100,000 square feet of industrial building constructed in 1965, located at 565 Windsor Drive, Secaucus, NJ. The effective rent was stated to be \$5.74 per square foot. Defendant's expert made no adjustment to this lease.

Market Rent and Potential Gross Income Conclusions

Based on the leases set forth above, the court finds the market rent and the potential gross income for each of the years under review as follows:

<u>Valuation Date</u>	<u>Market Rent</u>	<u>Potential Gross Income</u>
October 1, 2010	\$5.00 per square foot	\$434,450.00
October 1, 2011	\$5.00 per square foot	\$434,450.00
October 1, 2012	\$5.00 per square foot	\$434,450.00
October 1, 2014	\$5.25 per square foot	\$456,172.50

Vacancy and Collection Losses

In establishing his conclusion as to vacancy and collection losses, plaintiff's expert referred to a graph which he testified was produced by Co-Star and represented the vacancy rates for office/warehouse space in Bergen County. Based on his review of that graph, plaintiff's expert concluded the following vacancy rates: 2010–15%; 2011–13%; 2012–15% and 2013–16%. Plaintiff's expert was unable to provide any information as to how many buildings were included in the survey for any particular valuation date.

Defendant's expert testified that based on his review of the historical vacancy at the subject, a survey of the local market, conversations with market participants and reviews of market studies, he concluded a stabilized vacancy and non-collection loss rate of 5%.

Documentation that was provided by defendant's expert indicated that nationally, overall vacancy for the U.S. Industrial Sector was at 10.6% for midyear 2010, and 9.8% for 2011.

Defendant's expert testified that the Bergen County market was in better condition than the national market.

Neither expert produced conclusive proof of the vacancy nor non-collection rates for the years in question; however, based on the evidence that was provided and taking into account the fact that the subject is owner-occupied warehouse, the court concludes a vacancy and non-collection loss rate of 8%.

Operating Expenses

In arriving at Net Operating Income, plaintiff's expert utilized a 3% factor for leasing commissions, 4% for Reserves, 4% for management fees and a \$3,000 deduction for "Legal and Accounting" for each of the years under review.

Defendant's expert utilized a leasing expense of 2.5%, management fee of 2.5% and a replacement reserve of 2%. Defendant's expert did not allow for any other deductions.

In support of his expenses, plaintiff's expert testified that he believed that leasing commissions were typically 3–5% and that the other expenses were based on his experience in having performed other appraisals.

Similarly, defendant's expert testified that the deductions he allowed were based on his experience and were supported by market publications. With respect to management fees, defendant's expert noted that the subject property was a single-tenanted building, for which management would be minimal.

The court finds that the following expenses to be applicable:

Leasing Commissions:	3.0%
Management Fee:	2.5%
Replacement Reserve:	2.0%
Legal and Accounting:	\$3,000

Thus, Net Operating Income is:

For October 1, 2010 through October 1, 2012:

Potential Gross Income	86,890 x \$5.25	\$434,450
Less: Vacancy & Non-Collection Losses @ 8%		<u>(34,756)</u>
Effective Gross Income		\$399,694
Less: Leasing commissions @ 3%		(11,991)
Reserves @ 2%		(7,994)
Management Fee @ 2.5%		(9,992)
Professional & Accounting		<u>(3,000)</u>
<u>Net Operating Income</u>		<u>\$366,717</u>

For October 1, 2013:

Potential Gross Income	86,890 x \$5.00	\$456,173
Less: Vacancy & Non-Collection Losses @ 8%		<u>(36,494)</u>
Effective Gross Income		\$419,679
Less: Leasing commissions @ 3%		(12,590)
Reserves @ 2%		(8,394)
Management Fee @ 2.5%		(10,492)
Professional & Accounting		<u>(3,000)</u>
<u>Net Operating Income</u>		<u>\$385,203</u>

Capitalization Rate

Each expert developed a capitalization rate to convert net operating income into overall value. Plaintiff's expert used three methods in arriving at his final conclusions: band of investment, ACLI surveys and a survey of industrial sales in Bergen County. Of the three methodologies, he placed the least weight on the industrial sales survey and the most weight on the band of investment.

Plaintiff's expert was unable to support the results obtained in any of the surveys of industrial sales in Bergen County. He testified that the information to support the conclusions of capitalization rates for each of the sales noted were in his files but not in his report and he was unable to provide any details during his testimony. Plaintiff's expert further indicated in his reports, that the least weight was placed on this methodology because the numbers were

“unadjusted.” The court will not consider any of the surveys of industrial sales in Bergen County because plaintiff’s expert was unable to provide any information as to the reliability of the data included in the survey as well as his own lack of trust placed on the results.

Plaintiff’s expert testified that the market was explored for each valuation year, and he determined that for each year a mortgage of 75% could be obtained. He determined the mortgage interest rates to be 6.25% for 2010; 6% for 2011; 5.375% for 2012; and 5.5% for 2013. He concluded that an equity rate of 8% for 2010 through 2012 and a 7% equity rate for 2013. The resulting capitalization rates for each year under the band of investment approach was:

2010: 7.94%
2011: 7.80%
2012: 7.46%
2013: 7.28%

Plaintiff’s expert also reviewed the ACLI tables for Industrial properties in the National Market and determined a range for each year in question as follow:

2010: 8.80%–9.10%
2011: 8.00%–8.40%
2012: 7.48%–8.28%
2013: 7.62%–8.25%

Giving the most weight to the results obtained under the band of investment approach, plaintiff’s expert concluded a capitalization rate for each of the valuation years as follows:

2010: 8.00%
2011: 7.88%
2012: 7.63%
2013: 7.50%

Defendant’s expert also concluded a mortgage loan ratio of 75% and an equity dividend rate of 8% for each of the years under review. He determined interest rates at 5.5% for 2010; 5.0% for 2011; 4.5% for 2012 and 4.5% for 2013. These conclusions were based on his review of national publications and discussions with local lenders and market participants.

Based on these assumptions, defendant's expert concluded the following capitalization rates under the band of investment approach:

2010: 7.53%
2011: 7.27%
2012: 7.00%
2013: 7.00%

Defendant's expert also reviewed the ACLI tables, both for the National Market and the Middle Atlantic Market as well as the PriceWaterhouseCoopers Real Estate Investor Survey.

Based on the evidence presented, the court finds that defendant's expert's conclusion as to the appropriate capitalization rate are more persuasive. As a result, the court finds the following as to value for the years in question based on the income approach:

October 1, 2010: $\$366,717 \div .0753 = \$4,900,000$ (R)
October 1, 2011: $\$366,717 \div .0727 = \$5,044,000$ (R)
October 1, 2012: $\$366,717 \div .0700 = \$5,240,000$ (R)
October 1, 2013: $\$385,203 \div .0700 = \$5,500,000$ (R)

Final Conclusion as to Value

After review and consideration of the foregoing conclusions and placing more weight on the court's conclusions as to value determined under the income approach, the court finds that the fair market value of the property for the years under review is as follows:

October 1, 2010: \$5,000,000
October 1, 2011: \$5,100,000
October 1, 2012: \$5,300,000
October 1, 2013: \$5,600,000

III. Conclusion

Having found true market value, the court must determine the correct assessment through the application of the Chapter 123 ratio to fair market value. See N.J.S.A. 54:1-35a. The formula for determining the subject property's ratio is $\text{Assessment} \div \text{True Value} = \text{Ratio}$

Here, that equation is represented as follows:

Tax Year 2011:	$\$6,363,700 \div \$5,000,000 = 1.27$
Tax Year 2012:	$\$5,500,000 \div \$5,100,000 = 1.08$
Tax Year 2013:	$\$5,500,000 \div \$5,300,000 = 1.04$
Tax Year 2014:	$\$5,500,000 \div \$5,600,000 = 0.98$

The Chapter 123 average ratio for the Township of Lyndhurst for tax year 2011 was 103.27%, with a lower limit of 87.78% and an upper limit of 118.76%.

Pursuant to N.J.S.A. 54:51A-6c, if both the average ratio and the assessed value of the subject property to its true value exceed the county percentage level, the tax court is to enter judgment revising the taxable value of the property by applying the county percentage level to the true value of the property. In tax year 2011, the average ratio and the assessed to true value ratio of the subject property exceeded 100%. The county percentage level in those years was 100%. Therefore for tax year 2011 the assessed value of the property is \$5,000,000.

Pursuant to N.J.S.A. 54:51A-6c in a revaluation year, the assessed value of the subject property is its true value. Since 2012 was a revaluation year, the assessed value of the overall property is its true value—\$5,100,000.

For tax year 2013 the Chapter 123 average ratio for the Township of Lyndhurst was 94.59%, with a lower limit of 80.40% and an upper limit of 108.78%

Pursuant to N.J.S.A. 54:51A-6b, if the average ratio is below the county percentage level (100%) and the ratio of the assessed value of the subject property to its true value exceeds the county percentage level, judgment is to be entered by applying the average ratio to the true value of the property. Therefore the assessment of the subject property is $\$5,300,000 \times .9459 = \$5,013,270$.

For tax year 2014, the Chapter 123 average ratio for the Township of Lyndhurst was 97.14%, with a lower limit of 82.57% and an upper limit of 111.71%.

Since the ratio of the assessed value of the subject property to its true value as established for 2014 does not exceed the common percentage level or fall below the lower limit, the assessed value of \$5,500,000 is affirmed for this year.

Judgement establishing the assessed value of the subject property for the years in question is entered as follows:

Tax Year 2011

Land	\$3,590,000
<u>Improvements</u>	<u>1,410,000</u>
Total	\$5,000,000

Tax Year 2012

Land	\$3,590,000
<u>Improvements</u>	<u>1,510,000</u>
Total	\$5,100,000

Tax Year 2013

Land	\$3,590,000
<u>Improvements</u>	<u>1,423,270</u>
Total	\$5,013,270

The assessment of \$5,500,000 for Tax Year 2014 is affirmed.

Very truly yours,

/s/ Kathi.F. Fiamingo, J.T.C.