

NOT FOR PUBLICATION WITHOUT APPROVAL OF  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

TAX COURT OF NEW JERSEY

Patrick DeAlmeida  
Presiding Judge



R.J. Hughes Justice Complex  
P.O. Box 975  
Trenton, New Jersey 08625-0975  
(609) 292-8108 Fax: (609) 984-0805

March 9, 2016

Michael J. Caccavelli, Esq.  
Zipp, Tannenbaum & Caccavelli, LLC  
280 Raritan Center Parkway  
Edison, New Jersey 08837

Martin Allen, Esq.  
DiFrancesco, Bateman, Kunzman, Davis,  
Lehrer & Flaum, P.C.  
15 Mountain Boulevard  
Warren, New Jersey 07059-6327

Re: SBA Steel, LLC v. Borough of Manville  
Docket No. 010807-2015

Dear Counsel:

This is the court's opinion with respect to defendant's motion to dismiss the Complaint because of plaintiff's failure to respond to the tax assessor's requests for income and expense information pursuant to N.J.S.A. 54:4-34, commonly known as Chapter 91 (L. 1979, c. 91). For the reasons explained below, the motion is granted, subject to plaintiff's right to a reasonableness hearing. See Ocean Pines, Ltd., v. Borough of Point Pleasant, 112 N.J. 1, 11 (1988). The court's decision is without prejudice to plaintiff moving for reconsideration within 60 days upon a showing that the requests were a pretext intended only to block plaintiff's access to the courts.

## I. Findings of Fact and Procedural History

This letter opinion sets forth the court's findings of fact and conclusions of law based on the submissions of the parties on defendant's motion.

Plaintiff SBA Steel, LLC is the owner of two parcels of income-producing real property in defendant Manville Borough, Somerset County. The properties are designated in the records of the municipality as Block 37, Lot 10, commonly known as 250 North First Avenue, and Block 37, Lot 41, commonly known as 249 North Main Street.

On or about September 4, 2014, the municipal tax assessor mailed to plaintiff by certified mail, return receipt requested, two requests for income and expense information relating to the two parcels. Because the clarity of the requests are at issue, it is necessary to set forth the entirety of the requests below:

**BOROUGH OF MANVILLE**  
335 NORTH MAIN STREET, MANVILLE, NJ 08835

TELEPHONE: (908) 725-9478    FAX: (908) 725-2471    WEB:www.manvillenj.org

OFFICE OF THE TAX ASSESSOR

September 4, 2014

Block#: 37    Lot#: 10

Qualifier:

SBS STEEL, LLC

5900 BROKEN SOUND PKWY NW

BOCA RATON, FL            33487

Block#:37    Lot#:10

Qualifier:

Property Location:

250 North 1<sup>st</sup> Ave.

Dear Owner of Income Producing Property:

In accordance with N.J.S.A. 54:4-34, you are requested to submit income and expense data on the enclosed forms.

**If the tenant pays all of the expenses, please fill out the Triple Net Lease Form.**

**If the landlord pays some of the expenses, please fill out the Modified Gross Lease Form.**

**If the landlord pays all of the expenses, please fill out the Gross Lease Form.**

**If the building is owner occupied, that should be noted on page 4 of the enclosed form.**

**A full copy of each new lease executed during the period of 01/01/13 to 12/31/13 should also be enclosed with the completed forms.**

An apartment complex need only submit a new lease (not a renewal) for each type of apartment executed during the period of: 01/01/2013 – 12/31/2013.

A copy of the rent roll as of June 1, 2014 indicating tenant name, area or type of unit leased and vacant space and yearly expenses for your most recent yearly period is requested. If your accountant or management firm has this information on a computer spreadsheet, this will be acceptable if the requested information is included.

This request for the income and expense data is made pursuant to the enclosed statute.

If you have any questions with regard to this request or require any clarification relating to the information sought, kindly contact this office for further assistance.

Sincerely,  
/s/Glenn Stives  
Glenn Stives  
Borough Assessor

Enc: Chapter 91 Questionnaire  
Statute

The request for Block 37, Lot 41 was identical, except for the property identification information. Enclosed with the requests were complete copies of Chapter 91, as well as the four forms mentioned in the requests. The forms enclosed with the requests seek information regarding leases, lease dates, leased areas, rents, expenses, and other matters. The forms do not identify the periods of time intended to be addressed in the forms.

Plaintiff does not dispute that the assessor's information requests were delivered to it. Nor does plaintiff dispute that it failed to respond in any manner to the requests, or to make inquiry of the assessor to clarify the information he sought.

Having received no response from the taxpayer to his information requests, the assessor set the assessments on the two parcels for tax year 2015. Block 37, Lot 10 was assessed at a total of \$155,200 and Block 37, Lot 41 was assessed at a total of \$898,900.

Plaintiff thereafter challenged the tax year 2015 assessments before the Somerset County Board of Taxation. The board subsequently entered Judgments affirming the assessments.

On July 20, 2015, plaintiff filed a Complaint in this court challenging the Judgments of the county board of taxation.

The municipality thereafter moved on a timely basis to dismiss the Complaint pursuant to N.J.S.A. 54:4-34 based on plaintiff's failure to respond to the assessor's information requests. Plaintiff opposed the motion.

The parties waived oral argument. The municipality's motion, therefore, is decided on the moving papers.

## II. Conclusions of Law

N.J.S.A. 54:4-34 provides

Every owner of real property of the taxing district shall, on written request of the assessor, made by certified mail, render a full and true account of his name and real property and the income therefrom, in the case of income-producing property, and produce his title papers, and he may be examined on oath by the assessor, and if he shall fail or refuse to respond to the written request of the assessor within 45 days of such request, or to testify on oath when required . . . the assessor shall value his 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. No appeal shall be heard from the assessor's valuation and assessment with respect to income-producing property where the owner has failed or refused to respond to such written request for information within 45 days of such request or to testify on oath when required . . . . The county board of taxation may impose such terms and conditions for furnishing the requested information where it appears that the owner, for good cause shown, could not furnish the information within the required period of time. In making such written request for information pursuant to this section the assessor shall enclose therewith a copy of this section.

“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 correct and timely availability of this information to the tax assessor ‘avoid[s] unnecessary expense, time and effort in litigation.’” Ibid. (quoting Ocean Pines, supra, 112 N.J. at 7 (internal quotations omitted)). As provided in the statute, a property owner's failure to respond to an assessor's request for income and expense information precludes the property owner's subsequent appeal of the assessment set by the assessor.

In Ocean Pines, however, 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. Such an inquiry would be limited to "(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.

Plaintiff seeks to avoid having its appeal limited to an Ocean Pines reasonableness hearing by raising several points in opposition to the municipality's motion. Plaintiff argues that: (1) the assessor's information requests are ambiguous; (2) the assessor's requests for copies of leases and other information exceeds the scope of the inquiry permitted by Chapter 91; and (3) the court should withhold decision on the motion until plaintiff has had an opportunity to conduct discovery with respect to whether the assessor's information requests were legitimate inquiries or "pre-textual request[s] for offensive purposes mandating dismissal of the motion." Plaintiff's arguments will be addressed in turn.

A. Clarity of the Assessor's Requests.

Plaintiff argues that the assessor's requests are ambiguous, and therefore void, for several reasons: (1) the requests do not state the time period for which the income and expense data is sought; (2) the requests do not identify the assessment year for which the assessor was seeking information; (3) the requests refer to varying time frames for information requested (no time frame on the enclosed forms; 01/01/2013 to 12/31/2013 for new leases; June 1, 2014 for the rent roll; "most recent yearly period" for expenses), which could cause confusion on plaintiff's part; (4) the requests do not clearly identify the subject properties because the reader could confuse plaintiff's Boca Raton, Florida address as the location of the parcels that are the subject of the requests; (5) the requests require "the exercise of significant judgment merely to determine which [of the enclosed] forms should be completed by plaintiff"; and (6) the sequential page numbering of the

forms enclosed with the requests creates ambiguity with respect to which form plaintiff should have completed and whether the three forms were actually one form.

In support of its argument plaintiff relies on several Tax Court opinions in which the court found that the appeal-limitation provision of Chapter 91 did not apply because the assessor's information request was vague or ambiguous. See Paramus Assoc., LLP v. Borough of Paramus, 27 N.J. Tax 274, 285-286 (Tax 2013)(holding that Chapter 91 appeal-preclusion provision did not apply where taxpayer, who responded to assessor's information request, did not include information relating to income associated with a parking lot and roadway, given the assessor's failure to request such information); Town of Phillipsburg v. ME Realty, LLC, 26 N.J. Tax 57, 67-68 (Tax 2011)(holding that Chapter 91 appeal-preclusion provision did not apply because the assessor's request for information for "tax year ending December 2008/2009" did not "clearly and unequivocally indicate what information is sought."); Cassini v. City of Orange, 16 N.J. Tax 438, 453 (Tax 1997)(holding that Chapter 91 appeal-preclusion provision did not apply because the assessor's requests sought information through December 31<sup>st</sup> of a calendar year that had not yet ended, noting that the "government must speak in clear and unequivocal language where the consequence of non-compliance [with a Chapter 91 request] is the loss of the right to appeal assessments." ).<sup>1</sup>

These trial court precedents, however, we issued prior to the Appellate Division's recent holding in Waterside Villas Holdings, LLC v. Township of Monroe, 434 N.J. Super. 275 (App.

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<sup>1</sup> The court notes that plaintiff also relied on two unpublished Tax Court opinions, which do not constitute precedent. R. 1:36-3. Although counsel attached a copy of the cited unpublished opinions to plaintiff's moving papers, counsel did not affirm compliance with the requirement in R. 1:36-3 that all contrary unpublished opinions known to counsel were also served on the court and opposing counsel. Rule 1:36-3 prohibits this court from citing to unpublished opinions.

Div.), certif. denied, 217 N.J. 589 (2014). In that matter, a property owner challenged the dismissal of its Tax Court Complaint as a result of the property owner’s failure to respond to an assessor’s Chapter 91 request for income and expense information, arguing that its failure to respond should be forgiven because the request “was not clear and unequivocal” and the “taxpayer is left to guess whether the assessor is looking for the most recent [twelve] months of information (August 2009 – July 2010) or January to December 2009.” Id. at 281 (internal quotations omitted). The court unequivocally rejected the notion that a taxpayer faced with what it views as an ambiguous request from an assessor for income and expense information may simply ignore the request and avoid the appeal-preclusion provision of Chapter 91.

The court’s holding is clear:

However, where the taxpayer receives a Chapter 91 request that it deems improper in some fashion, it may not simply ignore its statutory obligation to respond. Rather,

the taxpayer 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. In any event, the taxpayer cannot just sit by and do nothing until the assessment is finalized, as this taxpayer did, and thereafter seek to appeal the assessment by plenary review. Such conduct results in “unnecessary expense, time and effort in litigation.” See Terrace View [Gardens v. Township of Dover, 5 N.J. Tax 469, 471-72 (Tax 1982), aff’d o.b., 5 N.J. Tax 475 (App. Div.), certif. denied, 94 N.J. 559 (1983).]

[Tower Center Assocs. v. Twp. of East Brunswick, 286 N.J. Super. 433, 438, 669 A.2d 829 (App. Div. 1996).]

Accord H.J. Bailey v. Neptune Twp., 399 N.J. Super. 381, 389-90, 944 A.2d 706 (App. Div. 2008); Morey v. Wildwood Crest Borough, 18 N.J. Tax 335, 340 (App. Div. 1999), certif. denied, 163 N.J. 80, 747 A.2d 287 (2000).



[Id. at 283.]

As the court noted,

Refusals on the part of taxpayers to cooperate with local property assessors cannot be tolerated by this court. Legitimate requests for information by assessors to prepare assessments are actions which should be encouraged by this court. Taxpayers frequently complain of local property tax assessors and their work. Here the taxpayer had an opportunity to supply to the assessor information pertinent to the assessor's work. It failed and refused to do so without any explanation, and its attitude in failing to even respond to the assessor's legitimate statutory request is inexcusable.

[Id. at 284 (quoting Terrace View, supra, 5 N.J. Tax at 474-475.)]

The Waterside Villas court also reaffirmed the Appellate Division's prior holding that

[w]here the request is thought not to be "legitimate," in whole or in part, the taxpayer must do something to assert that contention before the assessment is imposed to avoid the statutory bar to appeal embodied in N.J.S.A. 54:4-34. Thus, as in Ocean Pines, "plaintiff's failure to respond in any fashion to the assessor's request precluded plaintiff from asserting a 'good cause' claim." Ocean Pines, supra, 112 N.J. at 9.

[Ibid. (quoting Tower Center Assocs., supra, 286 N.J. Super. at 439).]

The only exception recognized by the court is in "cases in which, for example, 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." Id. at 284-285, n.3 (citing Middletown Twp. Policemen's Benevolent Ass'n v. Township of Middletown, 162 N.J. 361, 367 (2000)). The court cautioned, however, that "[w]e expect that such a case would be rare." Ibid.

Application of the holding in Waterside Villas to the present facts leads to the conclusion that the municipality's motion must be granted. There is a noticeable absence in the record of any evidence that the assessor's information requests were actually read by a principal or agent of

plaintiff. There is, therefore, no evidence that the text of the requests, the identification of the subject properties in the requests, or content of the enclosed forms actually caused confusion on the part of the reader, resulting in a failure to respond on plaintiff's part. Surely, if the assessor's requests had, because of their ambiguous nature, left the reader confused, one would expect that a certification from the reader detailing this fact would have accompanied plaintiff's opposition papers. This evidentiary void might reasonably be interpreted as suggesting that the assessor's information requests were discarded, misdirected, or overlooked by plaintiff, or that the legal significance of failing to respond to the requests was not fully appreciated by the reader, despite the inclusion of the text of Chapter 91 with the requests.

The court need not, however, determine whether the assessor's requests were read after their delivery to plaintiff. There is no dispute that plaintiff did not respond to the requests or reach out to the assessor to clarify any perceived ambiguities. Given the Appellate Division's unequivocal holding that a property owner must "do something" in response to an assessor's information request "before the assessment is imposed to avoid the statutory bar to appeal embodied in N.J.S.A. 54:4-34," Waterside Villas, supra, 434 N.J. Super. at 284, defendant's motion must be granted.

Nor can the court conclude that this is one of the "rare" instances in which the assessor's requests are "so egregiously ambiguous in [their] identification of the property or in the instruction to the taxpayer that due process principles are offended." Id. at 284-285, n.3. The assessor's requests quite plainly identify the subject properties by their block and lot designations, as well as street addresses. Plaintiff's argument that a reader may have considered the requests to concern the Boca Raton, Florida address at which plaintiff does business is neither supported by a certification that a person reading the letter actually drew that mistaken conclusion nor at all

plausible. The requests are on the letterhead of the Borough of Manville's Office of the Tax Assessor. The street addresses of properties that plaintiff owns in Manville are listed on the requests. No reasonable owner of income-producing property could conclude that the Manville Borough tax assessor set about to seek information on the income generated by property in Boca Raton, Florida, and, while on this unusual mission, included in his requests the block, lot and street addresses of parcels in Manville that the occupant of the Boca Raton property happened to own. There is nothing about the property identification in the assessor's requests that offend due process considerations.

In addition, although the assessor's requests arguably could have been more precise in identifying the time period about which he sought income information, there are two precisely identified time periods in his requests to which plaintiff could have responded. The assessor asked for new leases executed during the period 01/01/13 to 12/31/13 and for the rent roll as of June 1, 2014. These requests could hardly have been clearer. Plaintiff could have provided the information relating to the clearly identified time periods and contacted the assessor, as he invited plaintiff to do in the concluding sentence of his requests, to clear up any ambiguity that may have existed with respect to the other aspects of his requests. Thus, this is not a case in which a property owner responded to a Chapter 91 request, but later was faced with a motion to dismiss because the municipality argued that the property owner did not produce additional information "the average owner of an income producing property" would not have understood was also requested. ML Plainsboro, Ltd v. Township of Plainsboro, 16 N.J. Tax 250, 257 (App. Div.), certif. denied, 149 N.J. 408 (1997). Due process principles are not offended by lack of precision in some aspects of the assessor's requests.

B. The Scope of the Assessor's Requests.

Plaintiff also argues that the assessor exceeded the scope of Chapter 91 by requesting that plaintiff produce copies of leases and information relating to expenses and other matters. According to plaintiff, the assessor is entitled only to “a full and true account of . . . income” associated with the subject property. N.J.S.A. 54:4-34. The court need not decide whether a property owner's failure to produce copies of leases or other information in response to an assessor's request would justify application of the appeal-preclusion provision of Chapter 91. The court considers plaintiff's claims with respect to the breadth of the assessor's requests to be a challenge to the legitimacy of the assessor's requests that must be raised by the taxpayer within the 45-day response period provided by Chapter 91. Plaintiff could have, within the statutory response period, produced the information it believed to be within the scope of a legitimate request by the assessor, and marked its objection to producing documents and other information it believed to be outside the scope of a legitimate request, either by contacting the assessor or memorializing its objections in its written response. What plaintiff may not do is not respond at all to the assessor's requests and raise for the first time, in response to a motion to dismiss its subsequently filed tax appeal, that the assessor's requests were overly broad.

The court is well aware of the drastic penalty suffered by a taxpayer who fails to respond to an assessor's information request and thereafter feels aggrieved by the assessment placed on its income-producing property. The Appellate Division's holding in Waterside Villas, however, is clear. Judge Crabtree plainly stated the obligations of this court to follow controlling appellate precedents. “Trial courts are free to disagree with appellate opinions; they are not free to disobey.” Tuition Plan v. Director, Div. of Taxation, 4 N.J. Tax 470, 485 (Tax 1982)(citing Reinauer Realty Corp. v. Borough of Paramus, 34 N.J. 406 (1961); Dunham's & Co. v. Dzurinko, 125 N.J. Super.

296 (App. Div. 1973)). Accord Weir v. Market Transition Facility, 318 N.J. Super. 436, 448 (App. Div.) (“The trial court may disagree with our published decisions but it is obligated to comply with the procedures we mandate within them.”), certif. denied, 160 N.J. 477 (1999). It is quite plain that the Appellate Division’s holding is intended to encourage compliance by property owners with Chapter 91’s mandate that they respond to requests for information from tax assessors.

C. Plaintiff’s Request to Conduct Discovery.

Plaintiff argues that the court should refrain from deciding defendant’s motion so that plaintiff may conduct discovery with respect to whether the assessor’s requests were mere pretexts designed to preclude plaintiff’s access to the courts.

Chapter 91 places no affirmative obligation on the assessor to send information requests. Nor, where such information requests are sent, does the statute require the assessor to use the responses in the assessing function in any specified way. It is plainly within the assessor’s discretion to determine how information provided in response to a Chapter 91 inquiry is to be used. SKG Realty Corp. v. Township of Wall, 8 N.J. Tax 209 (App. Div. 1985).

The question raised by plaintiff, however, is whether an assessor may issue Chapter 91 information requests with no intention of reviewing the information provided in response to those requests. According to plaintiff, where a taxpayer’s untimely response to a Chapter 91 information request interferes with the assessing process, preclusion of the taxpayer’s appeal is warranted. However, plaintiff contends, if the taxpayer’s response could not have assisted in the assessing process – i.e. if the tax assessor’s practice is not to review any of the Chapter 91 responses – then dismissal of the taxpayer’s appeal would not be justified

In support of its argument, the taxpayer relies on the holding in John Hancock Mut. Life Ins. Co. v. Township of Wayne, 13 N.J. Tax 417, 422 (Tax 1993). In that case the court held that

a Chapter 91 information request sent to a property owner too late to be used in the assessing process could not be the basis for dismissal of the property owner's Complaint. The court explained that "[t]o advance the purpose of N.J.S.A. 54:4-34, the assessor's request must be timely, so that upon its receipt, the assessor can utilize the information by January 10" in setting an assessment for the upcoming tax year. This holding reflects the fact that the courts recognize that a Chapter 91 information request may be used as a predicate for the harsh sanction of dismissal only if the request was issued to provide financial information to the assessor for use in the assessing process.

Also implicated is the obligation of government officials to turn square corners when dealing with taxpayers. The Supreme Court examined the square corners doctrine in the local property tax context in F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-27 (1985). The Court's directive was clear:

We have in a variety of contexts insisted that governmental officials act solely in the public interest. In dealing with the public, government must "turn square corners." Gruber v. Mayor and Twp. Com. of Raritan Tp., 73 N.J. Super. 120 (App. Div.), aff'd., 39 N.J. 1 (1962). This applies, for example, in government contracts. See Keyes Martin v. Director, Div. of Purchase and Property, 99 N.J. 244 (1985). Also, in the condemnation field, government has an overriding obligation to deal forthrightly and fairly with property owners. See Rockaway v. Donofrio, 186 N.J. Super. 344 (App. Div. 1982); State v. Siris, 191 N.J. Super. 261 (1983). It may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage over the property owner. Its primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another.

[Id. at 426-427.]

The currency of the square corners doctrine in the area of taxation was highlighted by the Court. The “statutory provisions governing substantive standards and procedures for taxation, including the administrative review process, are premised on the concept that government will act scrupulously, correctly, efficiently, and honestly. It is to be assumed that the municipality will exercise its governmental responsibilities in the field of taxation conscientiously, in good faith and without ulterior motives.” Id. at 427. See also Lowe’s Home Centers v. City of Millville, 25 N.J. Tax 591 (Tax 2010); Gastime, Inc. v. Director, Div. of Taxation, 20 N.J. Tax 158 (Tax 2002).

This court is reluctant to allow a taxpayer to delve into the assessor’s practices and broad discretion with respect to the use in the assessing process of financial information provided in response to Chapter 91 inquiries. It is clear that the Legislature intended to vest in the assessor the authority to review responses to Chapter 91 inquiries and decide, based on the assessor’s opinion of the utility of the responses, whether, and to what extent, those responses will be used in the assessing process. It is likely that even a minimal review of the Chapter 91 responses by the assessor or assessor’s staff will suffice to establish that a taxpayer’s failure to respond or late response warrants preclusion of an appeal. However, were plaintiff to uncover evidence that Chapter 91 requests sent in this case were mere pretexts, never intended to be reviewed by the assessor and designed only to provide the basis for a motion to preclude a subsequent challenge to an assessment, the appeal-preclusion provision on Chapter 91 may well be inapplicable.

The court, of course, is not suggesting that the Manville Borough assessor did not use the Chapter 91 responses he received in 2014 in the assessment process for tax year 2015. Plaintiff has not even suggested an improper motive on the part of the assessor in this case. However, without having an opportunity to explore the issue through discovery plaintiff would have no way

of knowing the practices of the assessor's office for the tax year in question and would be unable to determine whether it could make a "pretext" claim.

Despite the broad discretion vested in the assessor under the statute, it is not possible for the court to conclude that plaintiff could uncover no evidence through its proposed discovery that would support a "pretext" claim. As a general rule, there shall be a substantial liberality in the granting of discovery in New Jersey courts. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 215-216 (App. Div. 1987). A party may seek production of all information "relevant to the subject matter involved in the pending action" or which "appears reasonably calculated to lead to the discovery of admissible evidence," R. 4:10-2(a); In re: Liquidation of Integrity Ins. Co., 165 N.J. 75, 82 (2000). This court has the discretion to determine the scope and manner of permissible discovery between the parties. Payton v. New Jersey Turnpike Auth., 148 N.J. 524, 559 (1997). Plaintiff is entitled to explore this issue through discovery.

Rather than refraining from deciding defendant's motion, as suggested by plaintiff, the court grants the motion without prejudice to plaintiff moving for reconsideration with evidence that the assessor's requests were pretexts designed only to preclude plaintiff's access to the courts. Plaintiff may seek discovery on this question while it seeks discovery pertinent to its Ocean Pines reasonableness hearing, which the court schedules in an Order issued today.

Very truly yours,

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