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EAST NEWARK TOWN CENTER, LLC, Plaintiff, v. EAST NEWARK BOROUGH, Defendant.	TAX COURT OF NEW JERSEY DOCKET NO. 005820-2008, 000503-2009, 008463-2010, 000727-2011 Approved for Publication In the New Jersey Tax Court Reports

Decided**:** April 5, 2016

Jeffrey M. Gradone and Michael F. Floyd for plaintiff
East Newark Town Center, LLC (Archer & Greiner, P.C.).

Paul Tannenbaum for defendant East Newark Borough
(Zipp & Tannenbaum, L.L.C.).

NUGENT, J.T.C.

This is the court's opinion after joint trial of these matters where plaintiff seeks to lower assessments set for all tax years under appeal at $7,337,800 (allocated $2,000,000 to land and $5,337,800 to improvement) through direct appeals filed with this court.

Central to the court's decision is the determination of the property's highest and best use. The facts of the case are unusual. They involve plaintiff's purchase of a property previously part of a three-lot economic unit historically operated as an industrial site. Simultaneous with the purchase, the property under contract was rezoned for redevelopment. Title was transferred to plaintiff one month after the new zone took effect. Plaintiff submitted a proposal to act as redeveloper of the property, and the few remaining pre-acquisition industrial leases were permitted to expire. For all years under appeal the property remained undeveloped. In the opinion of plaintiff's expert appraiser, the market value of the property derives from its status as a

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nonconforming industrial use. For all years under appeal, the expert concluded the highest and best use was continued industrial and opined a value through the income approach based on area industrial leases from which he concluded a market rent capitalized to value. Defendant did not provide proof of value.

Because the credible proofs do not support a finding that industrial use is the highest and best use of the property the comparable leases relied on by plaintiff's expert to arrive at economic rent do not provide competent evidence of value. The court finds that the highest and best use for all years under appeal is holding the property for redevelopment, with the remaining industrial tenancies serving as the interim use of the property. The assessments are affirmed.

The Clark Thread Mill

The property under appeal is identified as Block 12, Lot 1, on the tax map of the Borough of East Newark ("Borough"), located at 900 Passaic Avenue ("subject property"). The Borough is located in Hudson County on a peninsula between Newark and New York City and is served by several major highways. The Harrison PATH station is located two miles away. The Borough is predominately residential with some commercial uses, and is the smallest municipality in Hudson County, containing just 0.10 square miles.

East Newark Town Center, LLC, ("plaintiff"), purchased the subject property from the seller, First Republic Corporation of America, ("seller"). The seller had operated an industrial site known as the Clark Thread Mill comprised of three different lots in the Borough; the subject property and two vacant lots across the street used for parking. The Mill was operated for over fifty years before the seller decided to market the properties for sale. All of the Mill's industrial buildings, or improvements, are located on the subject property which is the largest of the three lots. It measures 12.53 acres in land size. The improvements consist of a series of mostly

interconnected brick buildings constructed, circa 1880, numbering around 40. In the aggregate, they contain 1,008,993 square feet of space. The remaining two parcels that comprised the Mill property, used for parking, are located across the street from the subject. They measure 3.45 and 1.63 acres in size.[1] The subject property measures a full city block and is the largest property in the Borough.

The seller retained real estate broker CB Richard Ellis, sometime in 2005, to market the three parcels comprising the Clark Thread Mill. The broker testified in plaintiff's case. In describing the marketing process the broker explained that the seller first sought a partner for full or partial joint venture development of the properties. To that end, an information package was prepared and circulated to a targeted list of potential investors that buy industrial sites for development and engage in redevelopment activity. The list, dated April 1, 2005, and containing at least one hundred names, with diverse development interests, among them, Accor Economy Lodging, Choice Hotels International, Extended Stay America, BJ's Wholesale Club, Target, Erickson Retirement Communities, and Developers Diversified Realty, was produced in evidence. On cross-examination the broker was asked whether he was aware of an incentive program offered by the seller early in 2005 to locate industrial tenants for the site, before the properties were marketed for sale. The broker testified he was unfamiliar with the program.

With that the broker testified that after the seller's intent to locate a joint venture partner was unsuccessful, the seller sought bids for outright purchase. The seller sought out buyers able to complete the sale "quickly," preferably by the end of 2005. While he was unaware of the seller's

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[1] The historic use of the property is set forth in First Republic v. Borough of East Newark, 16 N.J. Tax 568 (Tax 1997), aff'd, 17 N.J. Tax 531 (App. Div. 1998). In First Republic, the Tax Court referred to the three parcels as a single economic unit. Id. at 570. This court accepts the description since no evidence was provided to contradict that fact.

motivation, he knew that the seller "wanted the property out of its portfolio." Plaintiff submitted a bid to purchase the subject property, only, without the two adjacent parcels. According to the broker, the subject property suffered some environmental contamination. Riparian rights presented an issue, as well, given the subject property's proximity to the water. Plaintiff's bid was among twenty-five responses and five credible offers received by the seller for purchase of the subject property. The bids ranged from approximately $10,900,000 to $14,000,000. Among the higher bids some had longer due diligence periods. The seller accepted plaintiff's bid, the lowest of the bids received. The negotiations culminated in a contract of sale executed in or around January 2006. Plaintiff agreed to purchase the property "as is," and they agreed on a sales price in the amount of $10,652,000, which included an estimated $2 million allocation to remediate environmental contamination at the subject property. Plaintiff assumed responsibility for the cost of the clean-up. The property was not sold subject to a change in the zone. Plaintiff purchased the property subject to that risk. Corroborated by testimony from the broker, plaintiff's expert ("expert") testified that the conveyance constituted a bona-fide, arms-length transaction, between unrelated parties, neither under any constraint, with the property having been exposed to the market for a reasonable period of time, and without creative/atypical financing or unusual circumstances surrounding the purchase price.

The contract contained a provision that prohibited the seller from entering into any new tenant leases without the consent of the plaintiff/purchaser. The subject property was conveyed to plaintiff by bargain and sale Deed dated April 20, 2007. The Deed conveying the property to plaintiff listed consideration in the amount of $8,652,243.50. Plaintiff formed Alma Corporation as a special purpose entity to buy the subject property. The subject property was zoned I-industrial at the time.

East Newark enacts redevelopment zone

In the early months of 2006 the Borough commissioned a blight analysis to focus on land considered to be in need of redevelopment or rehabilitation. The study resulted in the preparation of a Redevelopment Plan (the "Plan"). The Plan created four sub-districts labeled Riverside District, Thread Mill District (the "Mill sub-district"), School House District and Public Facilities District. The only district pertinent to this case is the Mill sub-district, and the Plan identifies the properties that comprise it. The Mill sub-district contains the subject twelve-plus-acre lot and buildings, and one of the vacant parking lots that serviced the prior Clark Thread Mill. At the time of the blight study, plaintiff was under contract to purchase the twelve-plus-acre acre subject lot, but title had not yet been conveyed.

The redevelopment vision for the four sub-districts was outlined in the Plan as follows:

> REDEVELOPMENT OBJECTIVES AND REQUIREMENTS OF ANY DEVELOPMENT AND CONSTRUCTION WITHIN THE REDEVELOPMENT PLAN AREA [are] A. [t]he planning and development of the Redevelopment Plan Area with appropriate residential and commercial uses[,] B. [t]he adaptive re-use of the former industrial and institutional buildings recognizing the size and scale of these buildings, and the modification or alteration of the facades and interiors of these buildings, where appropriate, to better reflect the new uses to be housed within the buildings and the character of their surroundings[,] C. [e]ncourage infill development on vacant portions of the Redevelopment Plan Area to create a more continuous streetscape[,] D. [t]he improvement of the pedestrian environment and traffic circulation . . . with the provision of new sidewalks, street trees and other pedestrian amenities within the existing street rights-of-way[,] E. [t]o promote the principles of Smart Growth and sustainable economic and social development, including a variety of housing choices, providing pedestrian friendly streets . . . minimize automobile use by maximizing the appeal of mass transit, encourage reduced parking and shared use parking solutions, and creating a livable community with convenient access to commercial facilities[,] F. [t]o promote additional green space . . . the development of a new elementary school, community facilities and related open space.

The Plan was adopted by ordinance enacted on March 7, 2007. By its terms the ordinance supersedes the prior zoning in place. Specifically, industrial use in the subject property zone has been replaced by residential lofts, office and commercial uses and ground floor retail and services uses as the principally permitted uses. Development of the subject brick industrial buildings would consist "primarily of rehabilitation of all (or most) of the existing buildings" with "limited new construction for ancillary facilities, such as parking structures, which shall be responsive and sensitive to the existing historic fabric of the mill complex." Demolition of the subject improvements is discouraged and it is permitted only upon approval of the Planning Board and "only after a comprehensive site plan clearly demonstrates the necessity of any such demolition for the sake of the remaining complex." The Plan calls for the Borough to assume the role of redevelopment entity, and a Request for Proposals ("RFP") was issued in an effort to secure a redeveloper for the subject property. Plaintiff submitted a development proposal to the Borough, dated May 2007, in response to the RFP.[2]

At trial, plaintiff relied on the testimony of a general real estate appraiser to testify to his opinion and written report, admitted into evidence without objection. The court will refer hereinafter to plaintiff's expert as "the expert." According to the expert, within the development proposal plaintiff anticipated reusing 950,000 square feet of the subject mill buildings' existing floor space through two different options. Under option one, 613 residential units, 89,444 square feet of retail space, 10,548 square feet of commercial office space, and 33,750 square feet of publicly accessible recreational greenspace in a central courtyard with parking for 1,334 vehicles would be built. The expert described option two as being identical in all respects, "except perhaps for the amount of parking," and option two provided for 767 residential units. According to the

[2] Neither document was provided to the court, the RFP nor plaintiff's response.

expert, plan one was described as "fully compliant" with the Plan, and option two would require "modifications to the Plan." Within the terms of plaintiff's proposal, the financing component contemplates $190 million in development costs and an estimated land value of $15 million. After submission of plaintiff's proposal, the parties engaged in negotiations over a redeveloper agreement and a financial agreement where plaintiff sought to arrive at payments in lieu of taxes ("PILOT").

Evidence of highest and best use

A significant portion of the evidence produced focused on the legal status of the subject property and the effect that had on the correct highest and best use conclusion. The expert concluded that the subject property was located in an industrial zone for all years under appeal, with other uses "also permitted" pursuant to the redevelopment ordinance enacted by the Borough. With that, the legal status of the subject property became an issue at trial. On cross-examination questions were directed at the language of the new zoning ordinance, in particular as it supersedes the previous industrial zone. The expert reconsidered his direct testimony, acknowledged that the subject property is located in the new redevelopment zone, and re-characterized its use to be a "pre-existing, nonconforming" industrial use. With that, defendant pursued the theory that plaintiff abandoned the nonconforming use from a zoning perspective. Both parties introduced testimony addressed to the issue. Defendant called the Borough attorney and the fire official on the issue of abandonment, after which John Mavroudis ("Mavroudis"), a principal of the owner, provided rebuttal testimony on plaintiff's behalf.

In substance, the Borough fire official had issued citations to plaintiff, during some unspecified period of plaintiff's ownership, for conditions at the subject property alleged to be in violation of the Borough fire code. In an effort to deal with violations it had accumulated for

failure to maintain the property, including the fire protection systems, plaintiff met with the fire official and other Borough representatives in November 2009 and reached an agreement to resolve the ongoing violations. Among other measures, plaintiff agreed to address physical defects at the property, terminate utilities, and provide security at the vacant buildings as they were rehabilitated. According to the witness, plaintiff agreed to take the necessary measures to resolve the violations by electing to "abandon" the premises, as that term is defined under Section 311 of the Borough Fire Code. A draft Letter of Agreement, dated November 5, 2009, was prepared. It outlined the measures that plaintiff intended to take at the site, and it identified plaintiff as the designated redeveloper of the property. The Agreement was made final by Letter Agreement ("final Agreement") dated December 29, 2009.

All of the buildings on the subject property are addressed in the final Agreement which places them essentially into three separate groups. The first group contains those buildings slated for demolition. The second group includes the buildings to be designated as "abandoned" under the Borough Fire Code and provided with heat as they are rehabilitated. In the remaining group are two small buildings, Buildings 19 and 20, respectively, used as a guard house measuring approximately 200 square feet, and the other a small office of 600 square feet, used to oversee the subject property. Defendant proffered the final Agreement as proof of plaintiff's intent, and as evidence of its overt act, to abandon the nonconforming industrial use. In particular, the final Agreement reads that the parties "are in the process of finalizing a Redevelopment Agreement pursuant to which [plaintiff] will be agreeing to demolish certain buildings and to rehabilitate or construct certain other buildings, all part of the Thread Mill Sub-district as designated in the [defendant's] Redevelopment Plan."

Mavroudis was called as a witness for plaintiff to rebut defendant's evidence of abandonment. Initially, he confirmed that since the time of the property purchase, plaintiff sought to be named redeveloper of the site and engaged with defendant in ongoing negotiations over the terms of a Redevelopment Agreement. Despite that resolve, the witness testified that plaintiff had no intention to abandon the industrial use of the property, which Mavroudis maintained could continue at any time. He concluded his testimony by stating that plaintiff eventually signed a Redevelopment Agreement, thereby committing to redevelop the property. Neither the date of the document nor the document itself was provided to the court.

Conditions at the subject property were described in full by plaintiff's expert in the context of his highest and best use analysis. In describing the physical qualities of the land and improvements, the expert described improvements in poor physical condition, with the land no longer able to accommodate tenant parking needs. Despite his description of the property, he steadfastly maintained that the highest and best use of the property was for continued industrial use. Defendant's challenge to the expert's highest and best use conclusion was directed at the expert's opinion, particularly as to the following: the property's ability to continue in industrial use given its legal status as a pre-existing, nonconforming industrial use; the reliability of his opinion that continued industrial use was financially feasible given the physical condition of the property and the lack of parking at the site; and, the omission of a market study of the property for redevelopment use. The significance of existing tenancies at the property was also an issue.

Witness testimony revealed that when the subject property was conveyed to plaintiff there were some older existing leases which were either terminated or "being allowed to expire." Testimony about remaining tenancies was important to both parties. Plaintiff relied on the tenancies in an effort to establish industrial use as the subject property's existing use, in support

of the expert's highest and best use conclusion. Defendant relied on the evidence to support its position that the sale of the property represented the sale of a leased fee, rather than a fee simple interest, where it was encumbered by existing leases at the time of conveyance.

While the evidence is important to the parties, the court finds the testimony about remaining tenancies to be confusing. There were contradictions in the documentary evidence and testimony presented. For instance, a list containing eighteen tenant names and some general leasing information was attached as an addendum to the expert's report admitted in evidence. However, in cross-examining the expert, defendant did not rely on the addendum. Instead, testimony about the remaining tenancies was elicited through the use of several lease abstracts and a different list of names, purportedly attached to the contract of sale. The list and abstracts referenced on cross-examination identified fifteen tenant names and differed from the addendum as to the names of all but six tenants. Those six tenant names appeared on both lists. Neither party offered those documents in evidence. The evidence was ineffective in establishing which tenants occupied the premises at the time of conveyance, what floor they occupied, the amount of space rented or when they vacated. Testimony about lease terms revealed that nearly all commenced in the 1980s and 1990s, except for two short term leases dated 2004.

Testimony about the level of occupancy at the time of the conveyance also varied from witness to witness. Mavroudis said there were "a few tenants" at the property at the time of the sale. Based on information reported to plaintiff's expert, the expert "assumed" an occupancy between 20% and 40%. However the expert later testified that the property was 60% occupied at that time. No leases or rent rolls were produced at trial.

There was evidence of income and expense through statements prepared by Alma Group and included in the expert's report. The statements show income from industrial tenants received

in 2007 in the amount of $280,000, which decreased to $236,000 in 2008 based on rental income from two tenants. The last year of reported industrial rental income was 2008. After computation of actual expenses, the net operating income was negative $357,103 for 2007 and negative $618,984 for 2008. No tenant rental income was reported for 2009, but the property's record of operating history reflected total expenses of $896,784 for the year, including such costs as insurance and maintenance. According to the expert, he "would have anticipated about $3.5 million in annual income" for those years.

Based on the credible evidence, the court finds there was some level of tenant occupancy when the subject property was conveyed, and the property was sold subject to outdated leases. As of 2009, there were no remaining tenants at the site. Unlike the evidence of tenancies, testimony regarding plaintiff's efforts to re-lease the subject property as the leases expired was consistent. According to the expert, plaintiff "honored the leases but never sought out tenants when the property became vacated." Mavroudis testified that any efforts to locate long term tenants for the subject property would be unrealistic given plaintiff's plan for redevelopment of the site.

The expert testified candidly about the property's physical characteristics. In his opinion, the lack of adequate parking for tenants would adversely affect occupancy of the subject property. Adequate parking could no longer be achieved without the adjacent parcels once owned by seller, due to the limited parking available on the subject property. As constructed, the subject improvements nearly reach the property's perimeter. In the subject property's interior, a small paved courtyard area would allow little if any available parking, and area on-street parking was limited to two hours, all of which prevents full utilization of the buildings, in the opinion of the expert. He testified that "there's really no parking at the site. This is also a problem of an industrial

building or any building that – in New Jersey we drive to work, we drive home, we need a place to park." The lack of parking presented a "functional problem" according to the expert.

He testified, "[d]ue to the lack of on-site parking, it is possible that a portion of the building cannot be utilized due to the potential legal requirements, as well as the requirements from a market perspective." He found "a lack of available on-site parking compared to the necessary parking required at stabilized occupancy." After comparing the subject to the buildings he located as comparable properties for use in his income approach, he concluded that the subject property was lacking 500 parking spaces. Because there was minimal parking available for the subject property, it would be necessary to contract for parking "for the entire building." He found no leased parking in the area, except in Newark, across the river.

Physical problems at the buildings accompanied its low occupancy rate. The expert described leaking roofs, and inoperable freight and passenger elevators. The defects limit the use of the subject property's upper floors, and affect the ability to lease the property, since tenants would have to climb stairs to access the upper floors. While he did not quantify the effect the elevators would have on occupancy, because of the multi-story design of the buildings, the condition needed to be cured "in order to have substantial occupancy take place." He described the conditions as items of deferred maintenance. The costs to cure the various items of deferred maintenance was not obtained. The expert described the property as "inferior to that of competing properties due to age, vacancy and deterioration" and found construction of a one-story building would serve as the typical warehouse or manufacturing/industrial facility in the present market. The outdated building design affected the functional utility of the complex, and inadequate column spacing hampered the movement of people and materials. Access from the interior space of one building to another was restricted due to the multi-level, multi-building layout. At his March 2010

property inspection, the expert was advised that the buildings' basement floors had collapsed and he was denied entry to the area. He had no personal knowledge whether the basement space could be leased, but opined that if it was leasable it had a market value.

While the expert found that the subject property suffered from a lack of necessary parking, physical obsolescence and deferred maintenance, in his opinion, continued industrial use was more financially feasible than redevelopment use, which use he said he had considered. In the expert's opinion, industrial use of the property constituted its most profitable use. In support of his finding, he testified:

> Obviously the industrial use is feasible. You don't really need much in the way of investment to continue that use, so a low investment and a fixed return, as far as tenants go, makes a use relatively feasible because you have minimal investment and you have a known quantity in your amount of income, therefore, that tends to be feasible.

Defendant challenged the expert's conclusion that it would be financially feasible to continue a multi-tenant industrial use, focusing on the effect that the parking deficit would have on the ability to generate future income. When asked whether the limited on-site parking affected his highest and best use conclusion, the expert explained that he had applied an adjustment to the comparable leases to compensate for the lack of parking, steadfast in his opinion of highest and best use. In the expert's view, if the various deferred maintenance items in the existing building are cured, as well as the various curable functional items addressed, he assumes that the building can be leased to a stabilized occupancy.

The expert valued the industrial use using an income approach to value for all years under appeal, and relied on leased industrial properties located in northern New Jersey. He arrived at an estimate of a market-oriented rent, occupancy and operating expenses "in order to estimate a fee simple market value on a stabilized basis." As noted, in arriving at the highest and best use

conclusion for the subject property, the expert considered redevelopment use of the site, in addition to industrial use. The expert was unable to state with certainty that redevelopment use was legally permissible. Instead, he wavered in his testimony, saying that along with continued industrial use, redevelopment use "is also legally possible although it's not approved on the property," and thereby concluded that the use was speculative.

He said, "I don't know whether − we don't know what could be built, how many units would be permitted. So we don't know how much parking would be required for that type of use." Along with the fact that no approvals had been obtained, the expert concluded that features related to the legal use and physical property restricted redevelopment of the property, underscoring the speculative nature of the use, in his opinion. The expert explained:

> There's ─ redevelopment could be [physically] possible. The redevelopment ordinance has legal restrictions so that kind of moves us to the legal permissibility test. It requires certain amounts of parking which we don't have so that's kind of a physically possible limitation on the redevelopment use. It requires residential use which needs to be approved by the council. It needs to be approved by the planning board. There needs to be water plan allocation approvals. There needs to be landscape − street scape I should say approvals. So those uses are potentially there, but they're somewhat speculative because they're not approved. There's − as far as I understand there's been no application submitted officially and no vote taken on any redevelopment use for the property. Therefore, I looked at the redevelopment use as somewhat speculative compared to the existing industrial use which obviously could take place in the property and was permitted by zoning.

The expert's report included one page entitled "highest and best use analysis" where the expert concluded, "[r]edevelopment does not appear to be feasible as of the valuation dates nor is it approved." On direct examination the expert explained the steps he took to analyze financial feasibility of the redevelopment use. "I didn't prepare a 100-page document studying (sic), but there are documents in the file which look at the types of construction that could be put on the

property and the market for those types of construction." The expert defended his actions on cross-examination when confronted with the fact that he had not prepared a feasibility study of the redevelopment use. He and some appraisers in his office "batted around some ideas" regarding the feasibility of such projects, concluding the redevelopment use does not get past the first two tests "so its feasibility is speculative." No further testimony nor file documents were produced in support of his feasibility analysis for redevelopment use.

On cross-examination the expert explained his understanding that the property had been "purchased in 2007 for redevelopment purposes" with "anticipated conversion to residential use with an office and commercial component in keeping with the redevelopment plan." It was his understanding that property had not been purchased for industrial use. The expert also testified that he had been provided with a copy of the demolition plan, dated November 4, 2009, by plaintiff.

Testimony addressed to the assessment and proof of value

Both parties called the assessor to testify about the assessment. He had been hired by the Borough in 2004. The assessor confirmed that he carried the same assessment on the property from the prior year for each year under appeal, and he was unaware of how his predecessor had set the figure. He was asked whether "significant demolition" had occurred at the premises but testified that he knew of none, and that a search for the subject property record card was unavailing. In 2009, a tax appeal filed by the prior owner for the 2005 tax year was settled, resulting in a reduction of the assessment based on a fair market value to $7,040,025. The assessor said he had no role in the matter, but acknowledged that the stipulation of settlement contains language that the "assessor has concurred" with the settlement, and that he did "aver." The assessment was raised to $7,337,800 for the following tax year, 2006. In defense of his methodology, the assessor explained on cross-examination that it is not unusual for an assessor to carry an assessment

forward, and that, to a certain extent, the equalization ratio accounts for market fluctuations. The implied fair market of the property increases and decreases as the ratio fluctuates. According to the assessor, "that's the faith of the system[.]" As for the subject sale, it was marked non-usable by the assessor.[3]

In reaching his conclusion of value, the expert explained that he relied only indirectly on the subject sale since it represented the sale of a leased fee. Instead, the expert valued the property as a continuing industrial use in reliance on the income approach. As noted in his report:

> [t]he number of properties sold in recent years that are similar to the subject in terms of age and quality and located within the competitive market area is limited. These types of facilities were typically either purchased as a leased fee estate (vs. fee simple valuation herein) or purchased for redevelopment potential (which has not been permitted on the subject property thus far). As a result, the sales comparison approach is used only to evaluate the subject sale as support for the income capitalization approach.

The expert identified leases in six industrial properties he found comparable to the subject, located in Passaic, Bergen and Union counties. He concluded adjusted market rents for first-floor space in the amount of $5.00 per square foot on a gross rental basis for 2008, $4.75 for 2009 and 2010, and $4.50 for 2011. A market rent of $3.00 per square foot on a gross rental basis of the upper floor space, for all years under appeal, was derived. The expert allocated rent to 239,622 square feet of space on the first floor, and to 769,371 square feet of space for the upper floors. The concluded potential gross income ("PGI") based on an industrial highest and best use was $3,506,223 as of October 1, 2007; $3,446,318 as of October 1, 2008; and $3,386,412 as of October

[3] The explanation for the marking was not helpful since it consisted mainly of testimony elicited by the Borough on cross-examination through leading questions that rendered the credible nature of the testimony as suspect, and did little to clarify the issue.

1, 2009 and 2010.[4] The concluded market rents reflect a negative 10% adjustment for parking based on the expert's opinion that "due to the subject's inadequate on-site parking, there will be a limitation on the type of tenants and the amount of tenants that the property owner can lease space to."

To quantify the parking adjustment the expert researched the cost to rent a parking space. After a study of the area the expert was unable to locate available parking lots in East Newark. Instead, he relied on parking lots in Newark, located across the river, to serve as the basis for his parking adjustment, having found there was no parking in closer proximity to the subject property. The expert also adjusted some leases for market conditions, depending on the lease date, and for some categories of expenses, depending on whether they were paid by the landlord or the tenant.

For all years at issue the expert selected a 20% vacancy and collection loss factor, which he applied to the PGI. He indicated that in selecting that factor, he considered the occupancy at the subject property as well as data from northern New Jersey-area industrial properties. The survey data revealed vacancy rates between 5% and 12% for all relevant years with much greater vacancy reported at the subject property.

Next, the expert arrived at a figure representing the estimated operating expenses for the subject property and deducted the same to arrive at net operating income, which he capitalized to an opinion of value. The expert relied on national capitalization rate surveys data and the band of investment technique to derive the capitalization rates of 10.52%, 11.58%, 11.69% and 10.95%, for 2008-2011, respectively.[5] Applying the capitalization rate to the effective gross income

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[4] The expert acknowledged that approximately 28,000 square feet of basement space existed at the subject property. He did not calculate the value of the basement space for inclusion in potential gross income.

[5] He relied on capitalization rate surveys published by IRR-Viewpoint, Korpacz (PWC), ACLI, and Realtyrates.com in selecting the equity rate. In the opinion of the expert, the building

resulted in the following opinions of value: $11,850,000 as of October 1, 2007; $10,300,000 as of October 1, 2008; $9,500,000 as of October 1, 2009; and $9,400,000 as of October 1, 2010. East Newark's Chapter 123 ratios during that time ranged between 21% in 2008, 22.52% in 2009, 24.24% in 2010 and 27.52% in 2011.

In support of his income approach, the expert relied on the subject sale as an indication of value. He concluded that the subject property had been sufficiently exposed to the market, through an experienced broker, and that the subject sale resulted from an arms-length transaction, between two unrelated parties, with financing and other conditions of sale that satisfy the requirements of a market-oriented conveyance.

Conclusions of Law

Presumption of Validity

In tax appeal proceedings, real property tax assessments are entitled to a presumption of correctness. Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985). "It is clear that the presumption is not simply an evidentiary presumption serving only as a mechanism to allocate the burden of proof. It is, rather, a construct that expresses the view that in tax matters it is to be presumed that governmental authority has been exercised correctly and in accordance with law." (internal citation omitted.)

"The presumption attaches to the *quantum* of the assessment . . . [and] based on this presumption, the appealing taxpayer has the burden of proving that the assessment is erroneous." Id. "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

is old "with an elevated risk profile" based on the following features: multi story warehouse, inadequate parking, and items of deferred maintenance.

overcome the presumption.'" Id. (quoting Aetna Life Ins. Co. v. City of Newark, 10 N.J. 99, 105 (1952)). As explained by the courts, 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)). The presumption attaches even where the assessor's methodology is incorrect. "Absent any strong indication arising from the evidence properly before the Tax Court that the quantum of the assessment was far wide of the mark of true value, inadequacies in the municipality's evidence or deficiencies in the assessment methodology will not impugn the presumption of validity that attaches to the original assessment." Pantasote Co. v. City of Passaic, supra, 100 N.J. at 414. Moreover, the assessment reached by the assessor must not be "arbitrary or unjust." Id. at 416.

"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," and before proceeding to weigh the evidence the court "must first determine whether the presumption of validity has been overcome." MSGW Real Estate Fund, LLC, v. Borough of Mountain Lakes, 18 N.J. Tax 364, 377 (Tax 1998). "In making this determination, the court should view 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." Id. Such a determination requires that the court 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 resolving the issue courts have found that "the judicial function is quite a mechanical one. The trial court is not

concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Id. at 378 (citing Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969)). The evidence is viewed by the court through "rose-colored glasses." MSGW Real Estate Fund, LLC, supra, 18 N.J. Tax at 379. In the within matter, defendant did not move to dismiss plaintiff's case under R. 4:37-2(b).

The facts of this case present challenging valuation issues largely because the subject property zone and use transitioned during the years under appeal. There is no dispute that historically the subject property operated together with two other parcels, as an income producing property and industrial site, once the highest and best use of the property. The single parcel subject property was sold around the first valuation date, having been exposed to the market, where it was viewed as a future development site and multiple bids were received. At the time of the sales contract the subject property, encumbered by old industrial leases and zoned for industrial use, was purchased by plaintiff for its development potential. When the sale was consummated fifteen months later the property was zoned for redevelopment. Post-acquisition, some minimal industrial tenancies continued temporarily in the new redevelopment zone. When defendant, acting as the redevelopment entity, sought to approve a redeveloper for the site, plaintiff immediately applied for redeveloper status of a proposed mixed use project. As of each valuation date it was zoned redevelopment but the original improvement remained undeveloped.

Plaintiff argues that the presumption is overcome in light of the expert's well-supported conclusions of value and evidence of the purchase price. In the alternative, it claims that the presumption should be removed because the assessor carried the assessment year to year without change. This court finds that the presumption has been overcome. Plaintiff provided witness testimony about the bona fides of the property sale and its use as an industrial site. A qualified

real estate appraisal expert appraised the property as a continuing industrial use as of each valuation date and a principle of the owner testified in support of the property's continued use. The expert arrived at an economic rent based on leased space at industrial buildings he found comparable to the subject property and capitalized the income to reach value. Reliance was placed on the subject sale as support for the income approach to corroborate the estimate of value. The expert's opinion of value, if accepted by the court, would require a reduction in the assessment. Therefore, the court will proceed to consider the evidence presented in an effort to find value. Ford Motor Co. v. Township of Edison, 127 N.J. 290 (1992).

Highest and Best Use

In New Jersey, the value of real property is based on a sale of the property between a hypothetical buyer and seller. The objective is to "determine the full and fair value . . . at such price as . . . it would sell for at a fair and bona fide sale by private contract on October 1 . . . [of the pre-tax year]." N.J.S.A. 54:4-23. For the purpose of assessing tax, property must be valued at its highest and best use. Ford Motor Co. v. Edison, supra, 127 N.J. at 300-01. "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). See also 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). In order to constitute the property's highest and best use, four factors are considered. The use must be 1) legally permissible, 2) physically possible, 3) financially feasible, and 4) maximally productive. Appraisal Institute, The Appraisal of Real Estate, 333 (14th ed. 2013). See also Ford Motor Co., supra, 10 N.J. Tax at 161; Clemente v. Township of South Hackensack, 27 N.J Tax 255 (Tax 2013), aff'd o.b. 28 N.J. Tax 337 (App. Div. 2015). The four criteria are considered

sequentially, though "physical possibility and legal permissibility can be applied in either order . . . they both must be applied before the test of financial feasibility and maximum productivity. A use may be financially feasible, but this is irrelevant if it is legally prohibited or physically impossible." The Appraisal of Real Estate, supra, at 335.

Highest and best use depends on the most profitable use to which a property may be put. The "essential components of the analysis" are defined as "[t]he reasonably probable use of property that results in the highest value." Id. See also, General Motors Corp. v. Linden City, 22 N.J. Tax 95, 107 (Tax 2005) (citation omitted) ("[h]ighest and best use . . . is the most profitable likely use or [use that] produces the highest property value."). Ultimately, the determination is market driven. Ford Motor Co. v. Edison, supra, 127 N.J. at 290 (highest and best use "implements a market value standard."). See also Entenmann's Inc. v. Borough of Totowa, 18 N.J. Tax 540, 545 (Tax 2000). The value of property is based on value-in-exchange, rather than value-in-use. Clemente, supra, 27 N.J. Tax at 255.

When analyzing the highest and best use the property's actual condition is an important factor. Id. The concept has been explained thusly:

> The general rule in real property taxation is that property must be valued "in the actual condition in which the owner holds it." Newark v. West Milford, 9 N.J. 295, 304; Colwell v. Abbott, 42 N.J. L. 111, 115 (Sup. Ct. 1880). However, this general concept is modified to avoid a disproportionate share of the burden of taxation falling upon the other taxpayers when "its value in that condition is affected by what can be done with the property." Delaware, L & W R. Co. v. Hoboken, 16 N.J. Super. 543, 570 (App. Div. 1951), rev'd on other grounds, 10 N.J. 418 (1952). The property should be examined for all possible uses and that use which will yield the highest return should be selected. Inmar Associates, Inc. v. Edison Tp., supra, 2 N.J. Tax at 64.
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> [Owens-Illinois Glass Company v. Bridgeton, 8 N.J. Tax 495, 501-2 (Tax 1986).]

Resolution of highest and best use in this case depends on analysis of the proofs and legal theories developed by the parties with particular emphasis on market demand for the subject property, the property's legal status, physical condition, and actual use. To reiterate, only plaintiff provided expert testimony and an opinion of the property's highest and best use, which met with cross-examination and lay testimony presented by defendant.

The expert considered the property both "as vacant" and "as improved," and concluded that the improvements add value to the subject property. On that basis he appraised the subject property "as improved," as an industrial property.[6]

i. *Legally permissible*

In this case there was confusion over the proper identification of the subject property zone. Consistent with the expert's direct trial testimony, in the written report the subject property zone is identified by the expert as I-Industrial, rather than redevelopment. It may have resulted from a misunderstanding over the process the Borough followed when it enacted the redevelopment zone. When rezoning for redevelopment, a public entity has the option to enact legislation that supersedes the prior zoning, or it may enact a redevelopment zone that serves as an overlay zone, where prior uses retain legal vitality as permitted uses. N.J.S.A. 40A:12A-7(c). As to the subject property, the Borough elected to enact a new zone for the Mill sub-district thereby replacing the prior industrial use. The expert's ultimate conclusion that the subject property was maximally productive as an income producing property was based on his understanding that industrial use was still a permitted use for the subject property, perhaps under the belief that the Borough had

[6] The expert also opined that the highest and best use of the property "as vacant" would be to hold it for development. However, he found that the subject property's highest and best use "as improved" was more valuable than "as vacant," and valued it accordingly.

enacted an overlay zone.[7] Factually, with enactment of the new redevelopment zone, the subject property was converted to a nonconforming use.

The Municipal Land Use Law, N.J.S.A. 40:55D-1 et. seq., ("MLUL"), defines a nonconforming use as, "a use or activity which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption, revision or amendment." N.J.S.A. 40:55D-5.

On cross-examination the expert testified, for the first time, that industrial use was not permitted in the zone, but instead identified the subject property as a pre-existing, nonconforming use. Based on that testimony, a dispute at trial over the legal status of the property ensued. In post-trial submissions, defendant summarized the evidence and set forth three legal theories arguing that the subject property could not continue to operate as a legal nonconforming industrial use. First, defendant cites the language of the redevelopment ordinance. By its terms, the ordinance permits continuation of a nonconforming use in two of the three sub-districts created under the Plan. It expressly provides that "current uses may continue as nonconforming uses." However, while the nonconforming use may continue in the other three sub-districts, no such use is permitted in the Mill sub-district. The court finds the provision in the redevelopment ordinance disallowing a nonconforming use would be unlikely to survive a challenge. Do-Wop Corp., t/a Razzle Dazzle Fantasy Runway v. City of Rahway, 168 N.J. 191 (2001) (operation of adult sexually-oriented business was rendered non-compliant in its present location based on state

[7] In the report the property zone is identified in as "I-Industrial." The report section labeled "Permitted Uses" lists all uses permitted under the Industrial zone. In that section the report also reads, "Additional Uses are permitted pursuant to the East Newark redevelopment plan subject to all applicable approvals." Direct testimony was consistent with the report.

statute, but N.J.S.A. 40:55D-68 protects preexisting nonconforming uses from changes made in municipal zoning ordinances).

Second, at the time the Borough adopted the new zone, the subject property was part of "a 17.58, three-tax parcel economic unit owned by First Republic [seller]" that had "adequate on-site parking." However, as of each valuation date, the subject property "was a 12.53+ acre stand-alone tax parcel with no on-site parking." Defendant argues in post-trial submissions, "this change in the size of the economic unit, and loss of on-site parking, constituted an intensification [or expansion] of use that would have required [the plaintiff purchaser] to have obtained a use variance" for the preexisting nonconforming industrial use to be legal.

In accordance with the MLUL, "any nonconforming use or structure existing at the time of the passage of an ordinance may be continued *upon the lot* or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof." N.J.S.A. 40:55D-68 (emphasis added).

The law permits the owner to continue any use existing on the lot at the time of the zone change. There is nothing in the record to suggest that activity on the *subject lot* changed between plaintiff's purchase and the passage of the redevelopment ordinance. The facts do not provide sufficient proof that the *size of the economic unit* affects the legal status of the subject lot.

In addition, courts are required to apply a qualitative analysis to the facts when considering a claim of this type. In order to determine whether an activity constitutes the expansion/intensification of a nonconforming use, the test requires that the court review the record for the following:

> "whether an activity is within the scope of a permitted nonconforming use, regard must be had to the particular facts of the case, the terms of the particular ordinance, *and the effect which the increased use will have on other property*."

> [Conselice v. Borough of Seaside Park, 358 N.J. Super. 327, 333-334 (App. Div. 2003) (citing Hantman v. Randolph, 58 N.J. Super. 127 (App. Div. 1959), certif. denied, 31 N.J. 550 (1960)). (Emphasis added).]

Additional facts beyond those provided at trial would be needed to make such a determination. See also Town of Belleville v. Parillo's, Inc., 83 N.J. 309 (1980); Avalon Home and Land Owners Ass'n v. Borough of Avalon, 111 N.J. 205, 211 (1988); Tamburelli Properties Ass'n v. Borough of Cresskill, 15 N.J. Tax 629, 636 (Tax 1996). Therefore, the court does not deem plaintiff's purchase of the subject lot as an enlargement/intensification of the use.

In its third argument, defendant highlights evidence that plaintiff had abandoned the nonconforming use. An owner's "abandonment" of a nonconforming use "terminates the right to its further use." S& S Auto Sales, Inc. v. Zoning Bd. of Adjustment, 373 N.J. Super. 603, 613-614 (App. Div. 2004) (The test for abandonment is a subjective one requiring both the intent to abandon, and an overt act or failure to act "which carries a sufficient implication that the owner neither claims nor retains any interest in the subject matter of the abandonment.")

On the issue of abandonment, both sides presented evidence at trial. While the owner testified he never intended to abandon the industrial use, there was also strong evidence of a contrary intent as plaintiff moved forward with plans to redevelop the site. No industrial tenants occupied the site as of the last two valuation dates consistent with the owner's explanation that it would be unrealistic to seek tenants for space slated for redevelopment. However, the structures did remain place. The courts have found that property may remain idle for an extensive period of time before it is declared to be abandoned. See Saddle River ex rel. Perrin v. Bobinski, 108 N.J. Super. 6 (Ch. Div. 1969).

Fundamentally, "nonconforming uses are inconsistent with the objectives of uniform zoning." Berkeley Square v. Zoning Bd. of Adjustment, 410 N.J. Super. 255, 263 (App. Div. 2009), certif. denied, 202 N.J. 347 (2010). While the record contains substantial evidence related to the issue, this court finds that application of the abandonment theory in the context of the present tax appeal is misplaced. The concept commonly arises where the continued use of property, no longer in conformance to the present zoning, is challenged before the local zoning board. Id. The board is recognized as having "peculiar knowledge of local conditions." Under the facts presented, no one challenged plaintiff's continued industrial use of the property during any year under appeal. Moreover, case law reveals that the concept of abandonment has been limited to zoning disputes, which this court is reluctant to disturb. As such, this court will not apply the theory to the facts of this case.

Defendant also argues that the loss of on-site parking affects the legal status of the property. The court agrees that the lack of parking is critical to the question of whether industrial use is physically possible at the subject property and whether the use is financially feasible, to be discussed, infra. However, as it pertains to the legal status of the property the facts were not sufficiently developed. The record contains only a vague, conclusory reference by the expert to the legal requirements related to parking at the property. The expert testified, "[d]ue to the lack of on-site parking, it is possible that a portion of the building cannot be utilized due to the *potential legal requirements*," which the court finds is insufficient proof that the lack of adequate parking renders nonconforming industrial use illegal. Considering the facts in toto, the court finds that evidence is insufficient to render the nonconforming use legally impermissible on the valuation dates under the theories raised by defendant.

ii. *Physically possible and financially feasible*

The physical condition of the improvements, and lack of available land needed to accommodate parking on-site, weigh heavily in this court's consideration whether industrial use is physically possible and financially feasible. As noted, plaintiff's expert placed particular emphasis on a lack of parking at the subject property, and its effect on the ability to lease the industrial site. Plaintiff purchased only one of the three lots that comprised the industrial economic unit. The subject property was physically unable to provide the parking required by tenants because the improvements occupied most of the land, and relied on the adjacent parcels to operate. Once the subject parcel was separated from the two parking lots, it suffered from a lack of adequate parking. The expert's parking study formed the basis for his opinion that the subject property lacked 500 parking spaces. Indeed, on cross-examination the expert confirmed that multi-tenant use at the site was dependent upon the availability of parking either "off-site or elsewhere." There was no testimony about the present use of the two vacant lots but apparently they were no longer available to the new owner. The only evidence of available parking in the record consists of pay-to-park lots located in Newark across the river from the subject property.

A credible opinion of highest and best use depends upon the property's ability to physically accommodate the proposed use. See Six Cherry Hill, Inc. v. Township of Cherry Hill, 7 N.J. Tax 120, 132 (Tax 1984), aff'd, 8 N.J. Tax 334 (App. Div. 1986) ("'[s]ize, shape, area and terrain affect the uses to which land may be developed . . . .' A proper determination of highest and best use cannot be made without consideration of these physical factors.") (citation omitted). The inability of the property to accommodate sufficient parking undermines the expert's ultimate conclusion of industrial highest and best use given the physical limitation of the subject property.

The parking deficit is critical as it relates to the property's potential to generate income. In the expert's opinion due to inadequate parking the property could not be leased to a stabilized

level. Stabilization is defined as "[t]he point in a property's life when it has reached a level of utility commensurate with supply and demand." The Appraisal Institute, The Appraisal of Real Estate, 184 (13th ed. 2008). Insufficient parking at the property served to limit both the type and amount of tenants to whom the property could be leased. In the post-trial submission, counsel for plaintiff suggested that the owner could provide tenants with a shuttle, or public transportation could be used. The suggestion directly contradicts the expert's opinion that parking at the subject property affects the ability to occupy the property since people in the New Jersey area drive to work, thereby requiring 500 nearby parking spaces. Likely due to the limitations on demolition and new construction at the subject property, the addition of a parking deck was not suggested as a reasonable option, and the question whether the expansion of the nonconforming use in that regard is restricted by law is palpable. While the expert found that full use of the property would be impossible, the effect the parking deficit would have on the capacity to generate income was not measured.

Other complications caused by the physical conditions at the property also effect the property's potential to generate income. In his report, the expert identified inoperable elevators and leaking roofs, poor building design and layout, inadequate column spacing and uneven floors, opining, "[i]f the various deferred maintenance items . . . are cured [and] the various curable functional items addressed, we *assume* that the building can be leased to a stabilized occupancy." (emphasis added.)

The record lacks the evidence needed by the court to consider whether the identified items of functional obsolescence are curable, and if so, the associated cost to cure. Functional obsolescence "is caused by a flaw in the structure, materials, or design of the improvement . . . which may be curable or incurable, which means some aspect of the subject property is below

standard in respect to market norms." The Appraisal of Real Estate, supra, at 434. Certain items, such as the antiquated building style, could only be cured by demolition and replacement of the improvements, which the current zone prohibits. The cost to correct items of deferred maintenance, critical to the analysis, was also lacking.

The value of the property from a market perspective depends, in part, upon the physical condition of the improvements and the use that can be made of them. See The Appraisal of Real Estate, supra, at 347-48 (14th ed.) ("The costs of curing physical deterioration or functional obsolescence . . . should be analyzed in light of the value created in the market. The effect on value of implementing any changes is more important than simply how much the changes will cost. If the changes will not be economically feasible, the expenditures would not be made – a point that an appraiser should incorporate into the highest and best use analysis.")

Without an estimate of the expenditures needed to repair curable items there is no foundation for the expert's conclusion that a "low" or "minimal investment" is required to cure the defects. The expert also appeared to rely on the rate at which the subject property had previously been leased to support his finding that it would achieve its most productive use by continuing industrial operation since the property yielded income of a "known quantity" being "leased at known rates." Notably, details of prior rental income at the property were not provided.

The opinion that continued operation of the improvements in industrial use would be economically feasible is unsupported by the credible proofs. The expert's conclusion appears to be contradicted by the facts, particularly where inoperable elevators limit access to use of the upper floors and parking limits use of the property in an amount left unmeasured. While there was no measure of the effect the physical condition and lack of parking has on the property's ability to generate income, the expert maintained his opinion that industrial use at the subject property could

continue, “leased at known rates,” in defense of his highest and best use conclusion. The expert’s explanation that adjusting the comparable properties’ base rent per square foot downward ten percent for superior parking ameliorates any negative effect the lack of adequate parking at the subject property will have on future income, is unpersuasive. An adjustment for an inferior condition like inadequate parking is proper. The issue left unresolved, however, is the ability of the property to attract tenants when parking on site or within a reasonable proximity to the property is lacking. In his various descriptions of the parking problem, the expert concluded that a lack of adequate parking would prevent a “stabilized occupancy” and “substantial occupancy” at the subject property, but the actual usable square footage was never quantified for any year under appeal.

Notably, the expert calculated a vacancy factor of 20% for use in his income approach. After a careful review of the evidence, the court finds that the expert’s opinion does not provide a reliable measure of the subject property’s potential occupancy since it was not supported by the evidence. In his appraisal report, the expert notes that the vacancy and collection loss estimate considers the following: the submarket vacancy rate based on national surveys of warehouse space on the market during the relevant time frame; vacancy rates at the subject property; the lack of on-site parking; vacancy rates at competing properties; and, the credit risk of the subject’s tenants. There was no testimony on direct examination to support the fact that the expert considered those elements in reaching his concluded rate.

Initially, there was no breakdown offered of the 20% vacancy and collection loss adjustment as between the vacancy factor and collection loss factor. Instead, the expert calculate a rate that “blended” the two. It is equally unclear how the actual occupancy at the subject factored in to the rate, given that the information about actual occupancy was left uncertain. Likewise, no

testimony was offered about the effect the lack of parking had on the concluded rate, nor about the likely credit risk of the tenants. Of critical importance, no information was offered to determine whether the submarket vacancy rates he relied upon included properties comparable to the subject in the market study- property without adequate parking and other physical defects that prevented a stabilized occupancy. Use of the area industrial properties to arrive at a credible vacancy rate is undermined by the expert's prior testimony that those buildings had adequate parking, thereby vitiating comparability with the subject. Coupled with that, on cross-examination, the expert conceded that he did not know the actual vacancy and collection loss figures for any of the comparable properties. Without credible support for his conclusion, the vacancy and collection rate represents conjecture on the expert's part, and does not assist the court to determine the potential occupancy of the subject property for any year under appeal and adds no support for his opinion that industrial use was financially feasible.

Those facts, in addition to the reasons set forth above, lead the court to conclude there is inadequate proof in the record to support the expert's opinion that as of each valuation date industrial use of the property was physically possible or financially feasible.

iii. *The expert's conclusion regarding actual use of the property and the speculative nature of redevelopment use*

Plaintiff contends there is ample support for the expert's industrial highest and best use conclusion since it was the existing use of the property for all years under appeal. Defendant argues that plaintiff never operated the property in that manner. Rather, plaintiff held the property for redevelopment as of each valuation date. In defendant's view, industrial use was merely incidental to plaintiff's actual use of the property. According to defendant, since the property was being held for redevelopment use and not being devoted to industrial use as of each valuation date, plaintiff has the burden of establishing that industrial use was the property's highest and best use

by a preponderance of the evidence. Further, because the expert relied on the incorrect highest and best use of the property, and failed to perform a complete highest and best use analysis for redevelopment use, it failed to meet its burden of proof. To the contrary, the expert contends that due to the speculative nature of redevelopment use it must be eliminated in considering the property's highest and best use.

The highest and best use determination depends on a market analysis to come to a conclusion about the maximally productive use of the property. Six Cherry Hill, Inc, supra, 7 N.J. Tax at 120. The value of a property depends upon the use or uses for which it is suitable. And ultimately, the market dictates the most profitable use. Little Ferry Borough v. Vecchiotti, 7 N.J. Tax 389 (Tax 1985).

> It is not the mere opinion of appraisers as to the highest and best use that is important but rather the activities of buyers and sellers in the market place. Without purporting to set forth all of such factors, some of the more significant to be considered in determining highest and best use may be . . . growth patterns, change of use patterns and character of neighborhood, demand within the area for certain types of land use . . . physical characteristics of the subject and nearby properties.
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> [Linwood Properties, Inc. v. Borough of Fort Lee, 7 N.J. Tax 320, 327-28. (Tax 1985).]

Moreover, highest and best use of a property is not a "fact to be found" but rather an opinion resulting from "the appraiser's judgement and analytical skill." Id. at 327.

Market demand for development/redevelopment as a probable use for the property for all years under appeal finds particular support in the record through the following evidence: the marketing and sale of the subject property; the Borough's efforts to change the character of East Newark through redevelopment uses; plaintiff's proposal to build uses permitted under the redevelopment plan; and, evidence of other development and market trends in the area.

As early as May 2005, nearly a year and a half before the zone change, the search for a buyer to develop the property began. Initially the seller was interested in developing the property itself and sought to attract a joint venture partner to develop the property, before selling the property to plaintiff to develop. Broker CBRE sent the brochure to 100 developers, including plaintiff, who undertake large scale projects, as for instance hotels, senior housing, and big box retailers. In the language of the marketing materials seller acknowledges the advent of change in the character of the uses at the subject property, noting that the Mill serves as "an integral part of the history of the East Newark community" whose "industrial use [is] long since vanished . . . ." In response to the marketing brochure, the broker received twenty-five responses and several credible bids.

Plaintiff purchaser's proposal to build a mixed-use project at the site in the new zone is also telling. Immediately after the zone took effect, plaintiff formally proposed two options. The expert was made aware of plaintiff's intentions for the site. He knew that plaintiff bought the property with the intention to redevelop it in accordance with the Borough redevelopment plan. It was his understanding that plaintiff never intended to continue the industrial use. He was also aware of the redevelopment proposal submitted by plaintiff to the Borough and on cross-examination agreed that option one was "compliant" with the Plan, which he described as 623 residential units, retail and commercial uses. Moreover, he had a copy of plaintiff's plan to demolish pursuant to the December 2009 final Agreement. In the Agreement, plaintiff described a plan to demolish certain buildings at the site and rehabilitate others. In his report, the expert acknowledged "the availability of utilities result in overall functional utility suitable for a variety of uses including those permitted by relevant zoning." No evidence was produced to suggest any limitation on the ability to redevelop the property for any of the uses permitted under the new zone.

Nonetheless, the expert steadfastly maintained that, in his opinion, redevelopment use was speculative, because nothing had been "approved" for the property. Through effective cross-examination the expert testified that plaintiff could have elected to develop the property without a PILOT agreement in a manner that would be "compliant" with the Plan.[8]

Market demand for residential use in the area, on the later valuation dates, was apparent from the photographs of residential construction adjacent to the subject property, introduced through plaintiff's expert. The court accepts the expert's testimony that the market was not strong during the years under appeal due to a global financial crisis, however the effects of the crisis on the real estate market varied among property type and location. Plaintiff's expert's photographs of the subject property taken during the 2010 inspection depict residential development during the relevant time frame with units under construction two blocks from the subject property. On cross-examination the expert testified that of all property types, residential apartment use was the strongest during the relevant time period, which belies his opinion that market demand for the residential use, a permitted redevelopment use, did not exist.

The assessor testified in a similar manner. As the assessor in Lyndhurst, a municipality located on the Passaic River six or seven miles from the subject property, he found that the market in Hudson and Bergen county apartment use was very strong during the relevant timeframe. Despite those facts, plaintiff's expert concluded that since nothing had been built, a feasible development option could not have been available to the owner. The expert did not undertake a

[8] There was no evidence produced at trial about the redevelopment process other than the fact that plaintiff submitted a response to the RFP. While Mavroudis testified that plaintiff and the Borough entered into a Redevelopment Agreement, neither the date of the Agreement or its details were provided to the court. The witness testified, but only on rebuttal, with respect to the issue of abandonment. Certainly the witness had personal knowledge about plaintiff's attempts at redevelopment and issues raised by the evidence. Those issues were left unaddressed by both parties.

market study for residential use, retail or commercial use. Rather than conduct the necessary market study, the expert in this matter "just batted some ideas around" about redevelopment use with another appraiser in his firm. The expert concluded that the property remained undeveloped because plaintiff "can't find an alternative [it was] willing to accept in order to invest more money in the property." Moreover, he suggested that the cost of construction could include a parking deck given the lack of parking at the site, with off-site parking in the Borough limited to two hours, and suggested that a deck could be an expensive item. On that basis he found no feasible development alternative and brought an end to his analysis.

The search for highest and best use of an improved property no longer in conformance with the zoning, like the subject property, requires an analysis of the uses permitted by the present zone. When considering whether or not a nonconforming use constitutes a property's highest and best use, The Appraisal of Real Estate is instructive. "[C]areful analysis of the income or selling price produced by the nonconforming use and the incomes or selling prices that would be produced by alternative uses if the property were brought into conformity with existing regulations [is required]." Id. at 291. In this case, that comparison was available to the expert. Such an analysis could have been performed where the appraisal report notes that there were "properties of this type sold for redevelopment purposes."

The court finds merit to the position that the occurrence of a zone change in and of itself provides little certainty to the timing for actual change in property uses in the affected area. That determination is a function of the market. See BASF Corp. Coating & Ink Division v. Town of Belvidere, 23 N.J. Tax 551, 564 (Tax 2007) (citing The Appraisal of Real Estate, supra, at 325 (12th ed.) ("[t]he exact future use of the property may not be predictable with certainty, ... 'but the general type of future use . . . is often known or anticipated by the zoning, surrounding land-

use patterns, or comprehensive city plan.'")) See also Clemente, supra, 27 N.J. Tax at 255. Given the subject property's potential for development as a permitted use under the new zone, particularly based on the size, characteristics, and overall potential for and probable change in use, the potential impact of the zone change on the property's value warranted more weight than it was accorded.

What emerges from the evidence is a property being prepared for redevelopment in the midst of lingering industrial tenancies. While pre-acquisition leases existed at the property plaintiff permitted them to expire. As a result, the tenants remained at the site in 2007 and for part of 2008, only, at a minimal level. Fire code violations were found to exist at the premises that stemmed from concern over conditions at the vacant improvements as plaintiff furthered plans to rehabilitate some buildings and demolish others in accordance with the redevelopment plan. In the owner's testimony elicited to counter the evidence of abandoned use, the advent of the new zone made it impossible to locate tenants and to ready the property for redevelopment at the same time. No effort was made to lease the space for industrial use. Plaintiff purchaser elected to pursue redevelopment of the property over continued industrial use.

Indeed, the fact that industrial use could legally continue to exist after the zone change is insufficient proof that it did. The concept of "actual use" as being a property's highest and best use arises most often where a use has been a comparatively long standing and productive use of the land. Under these particular facts, the property did enjoy a history of productive industrial use. However, the shift away from industrial use to redevelopment as the most probable, and likely most productive use, is supported by the evidence and cannot be ignored by the court. See Hackensack Water Co. v. Borough of Old Tappan, 77 N.J. 208, 214 (1978)("property valuation should have some relationship to reality . . . .").

In weighing the credible evidence, the court rejects the conclusion that the remaining tenancies support industrial use as the property's highest and best use. Rather, the tenancies represent an interim use of the property until such time as the land and improvements reach their maximally productive use, most probably as a permitted redevelopment use.

> Highest and best uses are subject to change over time. The use that a site or improved property is put to until it is ready for its highest and best use has traditionally been known as its *interim use*. An interim use is not the highest and best use of the property at the present time, and it should not be represented as the subject property's current highest and best use. Rather, the current highest and best use of a property with an interim use would be to leave the property as it is until land value rises to a level that modification of the interim use (or demolition of the improvements and redevelopment for some other use) is financially feasible.
>
> [The Appraisal of Real Estate, supra, at 354 (14th ed.).]

The search for evidence in the record to value the property in its interim use is equally unavailing. Arriving at the value of an interim use "begins with the land value for the new highest and best use and adds the contributory value of the current improvements until the new highest and best use can be achieved." The Appraisal of Real Estate, supra, at 278 (13th ed.). While the expert identified the existence of some properties sold within the competitive market purchased for redevelopment potential, albeit in a limited amount, he did not consider those properties in arriving at his highest and best use conclusion. The data was omitted from the analysis since the expert considered redevelopment use to be speculative. As well, any value attributable to the improvements would depend upon an analysis of the amount space that could be occupied given the physical conditions at the property which was never quantified.

Under the facts presented it is unlikely that the property could be modified to a level where industrial use would be financially feasible, given its status as a nonconforming use. While the structures remained in place, the property's physical limitations previously discussed make the use

improbable, particularly given the strict construction afforded by the courts to nonconforming uses. "[B]ecause nonconforming uses are inconsistent with the objective of uniform zoning, the courts have required that consistent with the property rights of those affected and with substantial justice, they should be reduced to conformity as quickly as is compatible with justice." Town of Belleville v. Parrillo's, Inc., supra, 83 N.J. at 315.

In summary, the record lacks competent proof that an investor would consider purchase of the subject property for its interim use, or for its ability to generate future income from industrial use for any years under appeal. Indeed, the expert's opinion that the nonconforming use, beset by physical problems that interfere with the property's ability to generate income and located in an area slated for redevelopment, is its most profitable use, lacks credibility.

The court finds the highest and best use for all years under appeal is to hold the property until it reaches its redevelopment potential as the maximally productive use of the land and improvements. The question posed by the evidence is not whether the property will be redeveloped, but when. The expert failed to perform a full analysis of highest and best use of the property for the redevelopment uses permitted in the new zone. Certainly, without a market study the court is unable to conclude what will be developed on the site or the timing of the project. An expert's opinion as to highest and best use that fails to fully consider the activity and complexion of the subject market does not guide the court to value.

iv. *Defendant's failure to produce evidence*

Plaintiff raised several arguments in post-trial briefs directed to the fact that defendant commissioned an appraisal report, served it on plaintiff, and filed the document with the court but elected not to call the expert at trial. In the weeks preceding trial, defendant advised plaintiff of

the Borough's reluctance to rely on the expert, who had also opined an industrial highest and best use, an opinion that defendant concluded was incorrect.

Plaintiff included defendant's expert witness on the list of potential trial witnesses. Both in the opening statement and at trial, plaintiff apprised the court that both experts had arrived at the same conclusion of highest and best use and had valued the property in its industrial use, at a value below the equalized assessment. Neither party called defendant' expert witness to testify at trial.

According to plaintiff, defendant violated its obligation to "turn square corners," by taking a position wholly inconsistent with the trial-ready appraisal report and should be barred from asserting that redevelopment use is the highest and best use of the subject property. As the Supreme Court instructs in FMC Stores, Inc. v. Borough of Morris Plains, 100 N.J. 418 (1985), public entities must comport themselves with compunction at all times, and government is prohibited from gaining a litigation advantage in dealing with taxpayers. Plaintiff relied on FMC, and on a second case decided by the Superior Court, Appellate Division in an unpublished opinion. According to plaintiff, the facts of this matter and those in the appellate case are analogous and should persuade this court of plaintiff's position.

In the appellate matter plaintiff had also challenged the tax assessment on property it owned. However in that case, the City obtained the opinion of an appraisal expert and relied on the expert's reported opinion of value to lower the property tax assessment in subsequent years. Despite relying on the lower value, at trial the City moved pursuant to R. 4:37-2(b) to dismiss plaintiff's case for failure to overcome the presumption of validity that attaches to the higher assessment remaining in place for prior years. The trial court granted the motion dismissing the case at the conclusion of plaintiff's proofs.

According to the appellate court, the fact that the City had obtained a report where the expert opined a value considerably below the assessment, then relied on the report to reduce the assessment going forward, was enough to obliterate any presumption that the assessment's *quantum* in the prior years was valid. The appellate court found that in bringing the motion, the City failed to turn square corners. Unlike in that matter, in this case defendant Borough did not bring a R. 4:37-2(b) motion to dismiss plaintiff's case or reduce the assessment in future years based on its expert's report. Defendant instead elected not to rely on the expert witness or on the report based on its belief that its expert reached an incorrect highest and best use conclusion that did not provide a credible basis for value. Rather than call the expert, defendant challenged the opinion of the adverse expert at trial through cross-examination and the introduction of lay witness testimony. This court does not find that defendant's actions, and its election not to call the expert at trial, constitutes a failure to turn square corners.

Plaintiff also asks that the court draw an adverse inference regarding the expert's failure to testify. See State v. Clawans, 38 N.J. 162 (1962); Maul v. Kirman, 270 N.J. Super. 596 (App. Div. 1994). Historically, courts have recognized that a fact finder may be asked to draw an adverse inference when a party fails to call a witness of the type expected to testify at trial, and who is within its power to produce. State v. Clawans, supra, 38 N.J. at 162. Plaintiff asks this court to infer that defendant's expert would have presented testimony favorable to plaintiff. Such an inference is not warranted where the testimony would be cumulative, or where the witness was available to the party who seeks the charge. Id. Moreover, "a Clawans charge will rarely be warranted when the missing witness is not a fact witness, but an expert." Washington v. Perez, 219 N.J. 338, 364 (2014).

In applying the factors enunciated by the Court in Perez, this court does not find that defendant's failure to rely on the expert witness at trial warrants an adverse inference. The expert retained by the Borough ("defendant's expert") is an independent appraiser who regularly appears in Tax Court on behalf of litigants, was not within the control of the defendant Borough, and whose opinion was subject to the rules of discovery. Defendant's expert developed factual information that served as the basis for his opinion about the subject property value and disclosed the information in his report, which was provided by the defendant to plaintiff. Those facts would be available to both experts, and were not the sole province of the defendant's expert.

In its post-trial brief, plaintiff explains the reason it seeks the adverse inference is because defendant's expert "made a determination that a preexisting, non-conforming use is legally permissible for the subject property." Because plaintiff's expert testified in the same manner, the opinion would constitute cumulative testimony, with both experts reaching the same conclusion. This court rejected plaintiff's expert's highest and best use conclusion as unreliable, based on evidence of the subject property zone, proof of market trends, and physical characteristics of the land and improvements, which compelled the court to find that industrial use was not the property's highest and best use. The opinion of defendant's expert would have been subject to the court's determination of whether it was reliable. In addition, there was also nothing to indicate that the witness was unavailable to the parties. The court reminded plaintiff during the pendency of the trial that it had the opportunity to call the expert as a witness in the event that the expert was willing to testify, but plaintiff did not call the expert to testify.

To draw an adverse inference in this case would be tantamount to compelling defendant to produce and pay an expert witness to provide testimony, with which it disagrees. Moreover, to do so would be against the weight of legal precedent. Perez, supra, 219 N.J. at 362

("notwithstanding the detailed requirements that govern the development of expert witness testimony and mandate expert discovery, the New Jersey court rules do not compel a litigant who has disclosed the name and opinion of a particular expert to call that expert to testify at trial."); see also Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 297 (2006) (access to expert named as witness is allowed and adversary may produce *willing* witness at trial) (emphasis added).

v. *Analysis of the subject sale*

"[I]t is well settled that a bona fide sale of property may be indicative of the true value of the property. Such a sale, however, is not dispositive on the issue of value." Glen Wall Assocs. v. Township of Wall, 99 N.J. 265, 282 (1985). In this matter, the subject sales price did not reflect true value in the expert's view, where he did not rely on the price to establish the property's value. Rather, the expert derived the property's value based on the income producing potential of the property in its industrial use. In reliance on industrial leases, the expert arrived at an opinion of market rent that he capitalized to a conclusion of value. The expert considered the subject sales price only as support for, or corroboration of, his derived value. Because this court found that the property did not reach its maximum potential from industrial use for any year under appeal, the court rejected the expert's value conclusion. However, this court is charged with the obligation to find the value of the property under appeal. Ford Motor Co., supra, 127 N.J. at 310. To that end, the court will examine all aspects of the subject sale.

In post-trial briefs, plaintiff contends that the subject sale satisfies the requirements of a market oriented sale, and as such, provides proof of the property's market value. In Hull Junction Holding Corp. v. Borough of Princeton, 16 N.J. Tax 68, 94 (Tax 1996), the court accepted the general proposition that a subject sale is not dispositive of value, but then went on to state that the sale of the subject property could be a "reliable indicator of fair market value" when certain criteria

are satisfied. Ibid. The court listed five criteria, including: 1) the buyer and seller are typically motivated and neither is under duress; 2) buyer and seller are well informed or well advised and are acting prudently, knowledgeably, in their respective interests; 3) the property has been reasonably exposed to an open, relevant and competitive market for a reasonable period of time; 4) the purchase price is paid in cash or its equivalent, and 5) the purchase price is unaffected by special or creative financing or by other special factors, agreements or considerations. Ibid. Plaintiff also argues that since the property was purchased for redevelopment, the sales price must represent the subject property value.

The court finds that plaintiff's reliance on the sale as evidence of value is contrary to the weight of the credible evidence and disregards certain facts critical to resolution of the issue. Specifically, effective cross-examination revealed that the seller sought to locate a partner for a joint venture to develop the property. When the joint venture sale was unsuccessful, the seller intended that the asset be sold "quickly" in a "short time frame," and "subject to as little as possible," with a short term due diligence. The evidence is clear that the seller accepted the lowest reported offering price. The facts render suspect the nature of the seller's motive. It appears the seller was highly motivated to sell.

In addition, the property was sold for $10.2 million and consideration in the amount of $8,652,243.50 was paid, but there was no testimony to account for the difference between the agreed upon sales price and the consideration listed on the Deed. The only explanation was that the sale included a $2 million allocation for environmental cleanup, and the property was sold "as is." Town of Bloomfield v. Parkway Industrial Center, 3 N.J. Tax 220, 227 (Tax 1981) (for sale of subject to provide reliable indication of value the sale "must be scrutinized for circumstances tending to increase or depress the sales price in derogation of the property's true value.")

Unfortunately the court was not provided with the necessary facts to evaluate the actual terms of the sale, or to evaluate the other offers to purchase. No details about the bids were provided nor was the contract offered in evidence. Further, there was scant testimony regarding the terms of the contract which limited the court's understanding of the transaction. The court was frustrated in its search for value, where the facts were not fully developed. Curiously, although the principal was produced at trial, no testimony about the terms of the purchase was offered.[9]

In undertaking the appraisal assignment, the expert rejected use of the sales comparison approach as unreliable, having found the sale of properties similar to the subject were limited in number, and those properties had been purchased as a leased fee. While he did not rely on the subject sale as independent proof of value, he "evaluate[d] the subject sale as support for the income approach." The expert expressly recognized the limitation inherent in using the sales price because income-producing industrial properties are typically sold encumbered by leases, as with the subject property. It is unclear whether the subject sale price may have been influenced by the existence of pre-existing leases, or the effect they had on the property's value. Any effort to rely on the sale would require that the appraiser review and analyze the subject leases to determine their effect on the sales price, yet there was no reliable testimony in this regard. As the courts have recognized, "[w]hen analyzing a leased fee interest, it is essential that the appraiser analyze all of the economic benefits or disadvantages created by the lease." International Flavors & Fragrances,

[9] Notably, despite the fact that both parties agree the circumstances of the case pose challenging valuation issues, further development of important facts may have assisted the court in the determination of the property's highest and best use, and ultimately in its duty to find value. Areas of further inquiry include: the activity at the property immediately prior to the seller's decision to dispose of it; the seller's motivation; the substance of the negotiations between plaintiff and the seller; the terms of the sales contract and the offers to purchase; details about the pre-existing leases in place at the property; as well as testimony about the negotiations between the parties regarding plaintiff's efforts to redevelop the property.

Inc. v. Borough of Union Beach, 21 N.J. Tax 403, 423 (Tax 2004)219 (citing Appraisal Institute, The Appraisal of Real Estate 82 (12th ed. 2001)).[10] See also WCI-Westinghouse, Inc. v. Township of Edison, 7 N.J. Tax 610, 620 (Tax 1985) (a comparable sale was not considered by the court as a "valid indication of value" where "the sale price could have reflected the burden of a noneconomic lease."); University Plaza Realty Corp. v. City of Hackensack, 12 N.J. Tax 354, 366 (Tax 1992).

The timing of the sale as it relates to the valuation dates is also problematic. A sale that is too remote in time in relation to the property valuation date may not serve as credible evidence of value. While the sale was not remote as to the first valuation date, the court finds that it was remote as to the later dates. Adjustments to the sale price to account for value difference based on the zone, market changes, and the presence of noneconomic lease encumbrances were lacking. Appropriate adjustments are necessary to account for the effect those factors have on value. WCI-Westinghouse, Inc. v. Township of Edison, supra, 7 N.J. Tax at 620. Based on the concerns raised herein, the court is unable to conclude that the sales price reflects the property's true value for any year under appeal.[11]

Conclusion

The burden of proving that the assessment is erroneous remains with the taxpayer throughout the case, and the taxpayer must "persuade the factfinder to accept its proofs." Ford

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[10] As set forth in the 14th edition, "[t]he sale price of a property encumbered by a lease involves rights other than the complete fee simple estate, and valuation of those rights requires knowledge of the terms of all leases and an understanding of the tenant or tenants occupying the premises." The Appraisal of Real Estate, supra, 381 (14th ed.).

[11] The court also questions the credibility of plaintiff's position where in its redevelopment proposal of May 2007 submitted in response to the Borough RFP, plaintiff included a land value of $15 million, excluding a value attribution for the improvements, which the expert concluded had value.

Motor Co., supra, 127 N.J. at 314. The court finds there is inadequate support in the record for the expert's conclusion that the subject property achieves maximum productivity from industrial use on any valuation date, particularly where the proofs were insufficient to establish that the industrial use was physically possible or financially feasible. The weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which it is formed. Because the proofs do not support a finding that industrial use is the highest and best use of the property, the comparable leases relied on by the expert to arrive at economic rent do not provide competent evidence of value. See, Clemente, supra, 27 N.J. Tax at 273-74 (court found the "rental value component" of plaintiff's income approach was faulty where comparable leases had been "selected in the absence of a proper highest and best use analysis" so plaintiff's income approach was "inapplicable as a matter of law" where evidence did not permit '[ ] rational probative valuation inferences,' nor len[t] 'logical, coherent support' to an opinion of value.") And for the reasons set forth, the subject property sale does not provide a reliable indicator of the subject property's value.

The Clerk of the Tax Court is directed to enter judgment affirming the assessments.