FORSGATE VENTURES IX, L.L.C., Plaintiff, v. TOWNSHIP OF SOUTH HACKENSACK, Defendant.	TAX COURT OF NEW JERSEY DOCKET NOS. 007671-2009; 006473-2011; 002984-2012 Approved for Publication In the New Jersey Tax Court Reports

Decided: January 26, 2016

Nathan P. Wolf and Chad Wolf for Plaintiff (Law Office of Nathan P. Wolf, L.L.C., attorneys).

Steven D. Muhlstock for Defendant (Gittleman, Muhlstock & Chewcaskie, L.P., attorneys).

ADRESINI, J.T.C.

Plaintiff, Forsgate Ventures IX, LLC (hereafter referred to as "Plaintiff"), challenged the assessments imposed by Defendant, Township of South Hackensack (hereafter referred to as "Defendant"), on the below-captioned property for the referenced tax years. For the reasons stated more fully below, the original assessments for the tax years in question are affirmed.

I. Procedural History and Findings of Fact

These local property tax appeals concern real property located at 45 East Wesley Street in the Township of South Hackensack, designated as Block 33.01, Lot 8 (hereafter referred to as the "subject property").

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For the tax years in question, the subject property was assessed as follows[1]:

	2009	2011	2012
Land	$3,405,000	$2,383,500	$2,383,500
Improvement	$8,595,000	$14,725,800	$14,725,800
TOTAL	$12,000,000	$17,109,300	$17,109,300

The Chapter 123 Corridor was as follows:

	2009	2011	2012
AVG. Ratio	52.11%	92.86%	95.18%
Lower Limit	44.29%	78.93%	80.90%
Upper Limit	59.93%	106.79%	109.48%

The subject property is an irregularly-shaped, 6.81 acre[2] lot situated on the southern side of East Wesley Street, between Huyler Street to the west and Florence Street to the east. The rear of the property abuts, but does not have direct access to, Interstate Route 80. It has 613 feet of frontage along East Wesley Street, and the width of that street at that location is only 24 feet. The property has regional access to several major highways including the New Jersey Turnpike (I-95), Interstate 80, which provides access to New York City, the Garden State Parkway, as well as Routes 287, 3, 46, 208, and 9W. The site is improved with all available public and private utilities including electric, water, sewer, and telephone. The subject is located in the South Hackensack C District, which permits retail and wholesale sales of restaurant supplies and equipment. See South Hackensack Municipal Code § 208-7(A)(6).

Charles Klatskin (hereafter referred to as "Landlord") is the principal of Plaintiff company. He acquired the subject property on August 23, 2005 for a purchase price of $8,425,000 and demolished the then-existing structure. He intended to lease the space for any legally permitted

[1] The appeal filed for tax year 2010 was dismissed on or about October 15, 2010 for Plaintiff's failure to respond to the Assessor's Chapter 91 request.

[2] Defendant's expert opined that the lot is 6.81 acres, while Plaintiff's expert opined that the lot is 6.72 acres. The court has determined that this difference in measurement does not affect its finding of true value.

use that would generate the most rent. After purchasing the property, but before obtaining a tenant, Landlord's construction plan included 34-foot ceilings and 140,838 square feet of building space. Post Construction, the subject property has 195 outdoor parking spaces and 46 indoor spaces, with ample room for on-site parking for trucks.

Construction was nearly complete when Restaurant Depot (hereafter referred to as "Tenant") contacted Landlord about renting the space. Prior to leasing the subject property, Tenant was leasing space for its commercial operation in a nearby location, less than a quarter-mile from the subject on East Wesley Street. Tenant presented testimony that it had decided to rent the subject even though it had approximately seven years left on its current lease in the nearby location. Such a decision was made, primarily, in order to prevent a competitor from leasing the space and taking part of its market share. Thus, for a significant period of time, Tenant leased two different locations within close proximity. Tenant is a cash-and-carry business operation which sells strictly to restaurants, food-service establishments, and non-profit organizations. Customers may only enter if they present a taxpayer identification number, resale license, or non-profit tax exempt certificate. It is a discount seller, with deliveries to the site made by tractor-trailers and box trucks.

The lease for the subject property was executed on December 13, 2006 with Tenant's adaptations of the property commencing in 2007. The property is leased to Tenant for twenty years with an average rental rate for the first ten years of the lease of $10.98[3] per square foot. Via Planning Board Resolution dated September 17, 2007, Landlord and Tenant obtained Amended Site Plan Approval in order to make the fit-ups to the subject property for purposes of Tenant's business operations. In that approval, the Planning Board indicated that use of indoor parking was

[3]$10.98 is the average annual rent per square foot over the course of the first 10 years of the subject lease, and this amount was calculated using 140,838 square feet as the subject building size. This average rental rate differs from Defendant's calculation of $15.12 because Defendant computed this amount using only 102,330 square feet.

"an implied permitted accessory use for which no variance is required." The Planning Board designated a parking standard of one space per 500 square feet based on the subject property's "quasi-wholesale use," a term which was not specifically defined in South Hackensack's Zoning Ordinance. Importantly, the terms "industrial," "warehouse," and "retail" were not used in the Resolution to describe the use.

Despite the building's construction plan for 140,838 square feet of space, Tenant testified that it only needed approximately 100,000 square feet for its business operation. As a result, approximately 38,182 square feet of space was converted to indoor parking. Additionally, there was construction of retaining walls, removal of loading doors, and installation of a sprinkler system suitable for mercantile use. The mechanical systems consist of four roof-top HVAC units. Though the mechanical units in the refrigerated space are personal property with values not considered in this court's opinion, that space was also specially configured with a poured concrete floor and PVC piping designed to keep the ground below from freezing and causing damage to the floor. The exterior of the property facing Wesley Street consists of a partial brick façade with glass doorways. Egress is made via the side of the building which has drive-in doors into the 38,182 square foot covered-parking area. The rear of the building has seven operational loading bays and three drive-in doors for indoor parking. Ultimately, the parties stipulated that Tenant expended $3,600,000 on realty in configuring the space for its use.[4]

The interior of the subject property has no drop ceilings, which would be typical of an office, except in the refrigerated area and in the 2,000 square feet reserved for offices and restrooms. The property has florescent lighting. There are separate bathrooms for the employees and for the public. The walls are typical of those one would find in a warehouse—relatively

[4] Another approximately $3,000,000 was spent on items stipulated by the parties to be personal property. The court accepts the stipulation and will not consider this additional amount in its opinion.

unfinished, with no plasterboard or sheetrock. It is entirely air-conditioned, which is a feature not typically found in warehouses. The South Hackensack Fire Subcode Official rendered a report (D-11 in evidence) regarding the subject property on behalf of the South Hackensack Building Department on February 20, 2007. This report indicated that Tenant's operations would increase the level of consumer traffic to the subject property, and as a result, the building needed to comply with new building codes. The property has signs identifying "Restaurant Depot" as the operator of the business, and it also has signs indicating that entry is only permitted for those who have a business license to shop there.

II. Conclusions of Law

At trial, the parties each presented an expert—a real estate appraiser—to offer an opinion as to the value of the subject property. The parties stipulated to the qualifications of the appraisers as experts. Plaintiff also presented testimony of Landlord, and a representative of Tenant. Plaintiff's expert came to a conclusion of value by utilizing the income capitalization approach and supported it via the sales comparison approach. Defendant's expert concluded true value based on a cost approach analysis which he supported by using the income approach.

The experts offered their opinions that the subject property had a true market value for each of the years as follows:

	As of 10/1/2008	**As of 10/1/2010**	**As of 10/1/2011**
Plaintiff's expert	$ 10,880,000	$ 11,090,000	$ 11,430,000
Defendant's expert	$ 24,670,000	$ 24,340,000	$ 24,440,000

a. Presumption of Validity

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

Judge Kuskin explained, our Supreme Court has defined the parameters of the presumption as follows:

> The presumption attaches to the quantum of the tax assessment. Based on this presumption the appealing Taxpayer has the burden of proving that the assessment is erroneous. The presumption in favor of the taxing authority can be rebutted only by cogent evidence, a proposition that has long been settled. The strength of the presumption is exemplified by the nature of the evidence that is required to overcome it. That evidence must be "definite, positive, and certain in quality and quantity to overcome the presumption."
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> [Ibid. (quoting Pantasote Co. v. City of Passaic, 100 N.J. 408, 413 (1985) (citations omitted)).]

The presumption of correctness arises from the view "that in tax matters it is to be presumed that governmental authority has been exercised correctly and in accordance with law." Pantasote, supra, 100 N.J. at 413 (citing Powder Mill, I Assocs. v. Township of Hamilton, 3 N.J. Tax 439 (Tax 1981)); see also Township of Byram v. Western World, Inc., 111 N.J. 222, 235 (1988). The presumption remains

> in place even if the municipality utilized a flawed valuation methodology, so long as the *quantum* of the assessment is not so far removed from the true value of the property or the method of assessment itself is so patently defective as to justify removal of the presumption of validity.
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> [Transcontinental Gas Pipe Line Corp. v. Township of Bernards, 111 N.J. 507, 517 (1988) (citing Pantasote, supra, 100 N.J. at 415).]

"The presumption of correctness . . . stands, until sufficient competent evidence to the contrary is adduced." Township of Little Egg Harbor v. Bonsangue, 316 N.J. Super 271, 285-86 (App. Div. 1998) (citing Byram, supra, 111 N.J. at 235); see also City of Atlantic City v. Ace Gaming, LLC, 23 N.J. Tax 70, 98 (Tax 2006). To overcome the presumption, a plaintiff must present sufficient evidence to raise a debatable question as to the validity of the assessment. MSGW Real Estate, supra, 18 N.J. Tax at 376.

"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." Id. at 377 (citations omitted). When determining whether a party has overcome the presumption, the court should weigh and analyze the evidence "as if a motion for judgment at the close of all the evidence had been made pursuant to R. 4:40-1 (whether or not the defendant or plaintiff actually so moves), employing the evidentiary standard applicable to such a motion." Ibid. The court must accept as true the proofs of the party challenging the assessment and accord that party all legitimate favorable inferences from that evidence. Id. at 376 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. Tax 520, 535 (1995)). To overcome the presumption, the evidence "must be 'sufficient to determine the value of the property under appeal, thereby establishing the existence of a debatable question as to the correctness of the assessment.'" West Colonial Enters. L.L.C. v. City of Orange, 20 N.J. Tax 576, 579 (Tax 2003) (quoting Lenal Props., Inc. v. City of Jersey City, 18 N.J. Tax 405, 408 (Tax 1999)), aff'd, 18 N.J. Tax 658 (App. Div.), certif. denied, 165 N.J. 488 (2000)).

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

At the close of Plaintiff's case-in-chief, Defendant moved to dismiss the case for Plaintiff's failure to overcome the presumption of validity. The court denied the motion and placed a statement of reasons on the record.

Of course, a finding that Plaintiff has overcome the presumption of correctness does not equate to a finding that the assessment is erroneous. To the contrary, the court's finding merely permits it to address the question of what value should be accorded to the subject property. Once the presumption is overcome, the "court must then turn to a consideration of evidence adduced on behalf of both parties and conclude the matter based on a fair preponderance of the evidence." Ford Motor Co., supra, 127 N.J. at 312 (quotations omitted). "[A]lthough there may have been enough evidence to overcome the presumption of correctness at the close of Plaintiff's case-in-chief, the burden of proof remain[s] on the Taxpayer throughout the entire case . . . to demonstrate that the judgment under review was incorrect." Id. at 314–15 (citing Pantasote, supra, 100 N.J. at 413).

b. Highest and Best Use

For property tax assessment purposes, property must be valued at its highest and best use. Ford Motor Co., supra, 127, N.J. at 300–01. A property's highest and best use is the "use that maximizes an investment property's value, consistent with the rate of return and associated risk." Ibid. "Any parcel of land should be examined for all possible uses and that use which will yield the highest return should be selected." Inmar Associates Inc. v. Township of Edison, 2 N.J. Tax 59, 64 (Tax 1980). "[T]he analysis and interpretation of highest and best use is an economic study of market forces focused on the property." Entenmann's, Inc. v. Borough of Totowa, 18 N.J. Tax 540, 545 (Tax 2000). "The concept of highest and best use is not only fundamental to valuation but is a crucial determination of market value. This is why it is the first and most important step

in the valuation process." Ford Motor Co., supra, 10 N.J. Tax at 161. As such, the court's analysis will begin with a determination of highest and best use.

"The highest and best use analysis requires sequential consideration of the following four criteria, determining whether the use of the subject property is: 1) legally permissible; 2) physically possible; 3) financially feasible; and 4) maximally productive." Clemente v. Township of South Hackensack, 27 N.J. Tax 255, 268 (Tax 2013), aff'd o.b.. per curiam 28 N.J. Tax 337 (App. Div. 2015); see also The Appraisal Institute, The Appraisal of Real Estate, 277–79 (13th ed. 2008). "Implicit in this analysis is the assumption that the proposed use is market driven; in other words, that it is determined in a value-in exchange context and that there is a market for such use." Clemente, supra, 27 N.J. Tax at 269; WCI-Westinghouse v. Township of Edison, 7 N.J. Tax 610, 616–17 (Tax 1985), aff'd o.b. per curiam, 9 N.J. Tax 86 (App. Div. 1986). A comprehensive market analysis is necessary in order to determine supply and demand for alternative uses. Clemente, supra, 27 N.J. Tax at 269. "It is not the mere opinion of appraisers as to highest and best use that is important, but rather the activities of buyers and sellers in the market place." Linwood Properties, Inc. v. Borough of Fort Lee, 7 N.J. Tax 320, 327 (Tax 1985).

Additionally, the actual use of a property may be a strong consideration when determining the highest and best use of a property, Penns Grove Gardens Ltd. v. Borough of Penns Grove, 18 N.J. Tax 253, 263 (Tax 1999); however, this factor may not be solely determinative. See Entenmann's Inc., supra, 18 N.J. Tax at 545 (Actual use may be considered, but a property's highest and best use is not based on value-in use, which is a function of a particular owner's use or subjective judgment); Ford Motor Co., supra, 10 N.J. Tax at 165 (property must be valued "in the actual condition in which the owner holds it").

Here, the parties agree that the highest and best use is the current use, as improved; however, the expert's opinions differ on how the actual use of the subject property should be characterized. Plaintiff's expert characterized the subject property as an industrial warehouse. To the contrary, Defendant's expert characterized the subject property as a large discount retail store. Each expert opined that their respective characterization of the actual use of the subject property is also its highest and best use. Additionally, both experts stated that all four elements of the highest and best use analysis are satisfied with respect to their respective characterization of the subject property's actual use. Thus, the court must first determine how the actual use of the subject property should be characterized.

In this case, Plaintiff's expert turned a blind eye to the actual use of the property. The subject property is used to facilitate a cash-and-carry operation which receives an estimated 800 customers on a daily basis. Customers drive their vehicles to the subject property, park, enter the premises, load their carts or dollies with goods, pay for them at checkout counters, and remove them from the premises with their own vehicles. These are retail characteristics that are typically found in a large discount retail facility, not industrial/warehouse properties.

Admittedly, the subject property differs from other large discount retail stores in two aspects: the building façade and number of parking spaces. However, the court finds that these differences do not significantly impact the categorization of the subject property for purposes of the highest and best use analysis.

The number of parking spaces does not solely dictate the actual use of a property. Rather, it is one of many features that can contribute to the categorization of a property. In this case, the subject property contains 241 total parking spaces, which includes 195 outdoor spaces and 46 indoor spaces. As a condition of the amended site plan, the Planning Board required that the

subject property contain one parking space for every 500 square feet. This resulted in a lower number of parking spaces as compared to the minimum required of a traditional retail or office property. See South Hackensack Municipal Code § 208-7(f)(2) (offices required to have one parking space for every 200 square feet). On the other hand, this is a significantly higher number of parking spaces as compared to the minimum required of an industrial warehouse property. See South Hackensack Municipal Code at § 208-7(f)(3) (Industrial warehouse properties are required to have one parking space per each 780 square feet). In other words, the subject property does not contain the minimum number of parking spaces that a traditional retail or office property is required to have; however, it exceeds the minimum number of spaces required of an industrial property.

If, as Plaintiff argues, Tenant was using the property purely as an industrial/warehouse, an enhanced parking requirement would not have been necessary to begin with. As previously stated, an industrial/warehouse property located in the C District of South Hackensack is only required to have one parking space per each 780 square feet. The subject property could have met these standards without requiring an amended site plan. However, Tenant's operations brought increased levels of consumer traffic, and it was this change that rendered the parking amendment necessary.

The increased consumer traffic also indicated a change in use in regards to the building occupancy levels and egress channels within the building. The increased level of consumer traffic was recognized by the South Hackensack Building Department in the February 20, 2007 report set forth by the Fire Subcode Official (D-11 in evidence). In this report, the subject property's use was reevaluated in anticipation of Tenant's business operations on the subject property. The report indicated that Tenant's business operations would change the use of the property from an S-1

group storage warehouse to an M group due to the general public's increased access to the property (as referenced in the February 20, 2007 Building Department report). The resulting change in use subjected the property to new building code requirements.

The increased levels of consumer traffic and the concerns stemming therefrom leads this court to believe the subject property's highest and best use as improved is tantamount to a large discount retail store. While the number of parking spaces is one valid consideration, it does not hold enough weight to persuade the court.

Plaintiff argues that the Planning Board did not approve the subject property for retail use. The court is not persuaded. The September 17, 2007 Resolution set forth by the Planning Board clearly states that "the subject property is located in the C District and is a permitted use." The South Hackensack Zoning Code § 208-7(a)(6) specifically authorizes the "wholesale or retail sales" of restaurant supplies and equipment in District C. In other words, the subject property is properly zoned for retail use, the Planning Board was made aware of Tenant's business operations, and the Planning Board approved the property fit-ups in light of Tenant's business operations. Thus, the evidence supports a conclusion that the subject property may be categorized as a large discount retail store.

In summary, the court finds Defendant's expert opinion categorizing the actual use of the subject property as a large discount retail store persuasive. A single feature of a property, such as substandard parking, is not enough to determinatively conclude a property is actually used for industrial/warehouse purposes. This is especially true when there is sufficient evidence showing the property was used for a cash-and-carry operation servicing approximately 800 customers on a daily basis. The court recognizes the versatility of the property; however, ultimately, the highest and best use as an improved property is a large discount retail store because the same is maximally

productive,[5] which satisfies the fourth prong of the highest and best use analysis, as compared to an industrial/warehouse use.

c. Method of Valuation

"There are three traditional appraisal methods utilized to predict what a willing buyer would pay a willing seller on a given date, applicable to different types of properties: the comparable sales method, capitalization of income and cost." Brown v. Borough of Glen Rock, 19 N.J. Tax 366, 376 (App. Div.), certif. denied, 168 N.J. 291 (2001). "There is no single determinative approach to the valuation of real property." 125 Monitor Street, LLC v. City of Jersey City, 21 N.J. Tax 232, 237–38 (Tax 2004). The choice of the approach to determine value is case specific, as it depends "upon the facts of each case and the reaction of the experts to those facts." Ibid. (citing City of New Brunswick v. Division of Tax Appeals, 39 N.J. 537 (1963) and Pennwalt Corp. v. Township of Holmdel, 4 N.J. Tax 51, 61 (Tax 1982)).

Both experts relied on the income capitalization approach to value the subject property; however, Defendant's expert used it as support for the cost approach, and Plaintiff's expert used it in conjunction with the sales comparison approach. The facts of this case dictate that the income capitalization approach is the most appropriate method in which to value the subject property.

The sales comparison approach is not an appropriate means in which to value the subject property because Plaintiff relied upon industrial/warehouse properties in his valuation. The sales comparison approach is defined as "[t]he process of deriving a value indication for the subject property by comparing similar properties that have recently sold with the property being appraised, identifying appropriate units of comparison, and making adjustments to the sales price (or unit

[5] Defendant's expert's calculation of market rent ($16.19 per year which is adjusted to reflect 140,838 square feet) is supported by the actual rent paid by Tenant over the course of 10 years, as compared to Plaintiff's expert's calculation of market rent ($7.75 for tax year 2009, and $8.40 for tax years 2011 and 2012), which is not supported by the actual rent paid by Tenant.

prices, as appropriate) of the comparable properties based on relevant, market-derived elements of comparison." The Appraisal of Real Estate, supra, at 297. Here, Plaintiff's expert only uses sales that are industrial/warehouses, which are not comparable to the highest and best use of the subject property as a large discount retail store. Therefore, the sales comparison approach is not the appropriate means in which to value the subject property because the industrial/warehouse properties provided were not comparable to the subject property.

Defendant's cost approach is also not appropriate. Defendant's expert utilized an automated valuation software to generate cost estimates. However, he was unable to, nor did Defendant produce independent testimony to authenticate and explain the calculations used by the automated valuation software. In order for a new technology to be deemed reliable, there must be "sufficient scientific basis to produce uniform and reasonably reliable results and [the technology] will contribute materially to the ascertainment of the truth." State v. Hurd, 86 N.J. 525, 536 (1981); see also State v. Chun, 194 N.J. 54, 62–5 (2006). The automated valuation software may be useful in terms of streamlining the valuation process, but the court is unable to ascertain the underlying data, basis, or reasoning in the generation of such estimates. In other words, without a detailed explanation of the valuation software used, the court has no way to gauge the accuracy or reasonableness of the estimates produced.

In addition, the court was not provided the amount expended by the Plaintiff on the building improvements. This hinders the court's ability to authenticate the reasonableness of the cost estimates. Although the court has not only "the right, but the duty to apply its own judgment to valuation data submitted by experts in order to arrive at a true value and find an assessment for the years in question," Ford Motor Co., supra, 127 N.J. at 311, the obvious premise of this principle is that the court possess such data. See Glen Wall Associates v. Township of Wall, 99 N.J. 265,

280 (absent the introduction of sufficient evidence the assessment stands). Defendant set forth that Tenant spent $3,600,000 on interior improvements to the subject building. Defendant also provided a list of physical improvements made by Landlord; however, the actual cost of the improvements expended by Landlord was not provided.[6] Such cost data would aid in applying the cost approach to valuation, and without such, the court is hindered in determining whether the estimates, calculations, and conclusions set forth are accurate. Additionally, this amount would have aided the court in recreating Defendant's expert's cost approach calculations, and determining the accuracy of the estimates produced by the automated valuation software. Therefore, the court will not consider the cost approach set forth by Defendant.

The income capitalization approach is the most appropriate method of valuation in this case. This is the preferred method for estimating the value of income producing property. See Parkway Village Apartments Co. v. Township of Cranford, 8 N.J. Tax 430, 436 (1985), aff'd, 9 N.J. Tax 199 (App. Div. 1986), rev'd on other grounds, 108 N.J. 266 (1987). "In the income capitalization approach, an appraiser analyzes a property's capacity to generate future benefits and capitalizes the income into an indication of present value." The Appraisal of Real Estate, supra, at 445.

Determining the value of real property using the income capitalization approach can be summarized in three steps. The parties must calculate the net operating income, determine the appropriate overall capitalization rate, and calculate the true value of the property. The net operating income is calculated using the following formula:

	Market Rent
x	Square Footage
	Potential Gross Income
-	Vacancy and Collection Losses

[6] In this case, the actual cost expended by Landlord would be probative because the subject building was constructed in 2007, which is in close proximity to the valuation dates in these matters.

Effective Gross Income
- Operating Expenses
Net Operating Income

The first issue is to determine the appropriate square footage of the building affixed to the subject property. This determination is imperative to the valuation because the square footage affects the relevancy of the comparable leases, the adjustments made to the comparable leases, and the true value of the subject property. Plaintiff contends that the subject property should be valued using 140,838 square feet of building space. To the contrary, Defendant asserts that the property should be valued using only 102,330 square feet because the remaining 38,182 square feet was converted into an indoor parking garage. In this case, the court finds Plaintiff's argument most persuasive for the following reasons.

The property was marketed as, and income was derived from, a 140,838 square foot building, and it should be valued as the same. After its acquisition, Landlord obtained authorization to construct a 140,838 square foot building, and the subject property was marketed as such. Tenant offered to rent only 100,000 square feet of the subject building, but Landlord declined. After Landlord declined the offer, Tenant agreed to lease the entire building. During trial, Landlord testified he intended to lease the whole building to the one tenant who would pay the most rent. Thereafter, Tenant commenced converting a section of the building into a 38,182 square foot indoor parking garage in order to accommodate Tenant's business needs.

Defendant correctly asserts that parking is an amenity to a leased space, and traditionally, it is not included in a lease. See The Appraisal of Real Estate, supra, at 195–96 (parking is one potential factor used to determine competitive status of a property). However, in this case, the entire 140,838 square foot building was leased, and then a portion of the space was converted into an indoor parking garage. The rent agreed upon in the lease was not altered due to construction of

the parking garage. In addition, the lease requires that the building be returned to its prior condition upon termination of the tenancy. As such, Landlord will be able to market the space as a 140,838 square foot building when Tenant vacates the property. Therefore, construction of the parking garage does not affect the square footage of the building for purposes of the subject property's valuation because Tenant leased the entire 140,838 square foot building.

The property should also be valued using 140,838 square feet because the parking garage is physically able to be converted back to building space. Construction of the parking garage involved, among other things, erecting an internal wall that separates the business operations from the parking area, removing some of the loading docks from the rear of the building, and creating entrance and exit ramps to and from the garage. These alterations can be reversed at the end of a tenancy because they do not permanently modify the structure of the building. An example of a permanent alteration would be if Tenant demolished an essential part of the building, such as the roof, or permanently altered the footprint of the building. However, these types of permanent modifications did not occur here. Certain types of construction are more permanent in nature and may require an alteration in square footage; however, the construction in this case does not warrant a finding that the marketed and marketable area in the building is something other than 140,838 square feet.

In summary, the proper square footage to be used for valuation purposes in this case is 140,838. The property was marketed as a 140,838 square foot building, and income was derived from the entire 140,838 square foot building. Tenant's alterations did not affect the square footage because the modifications, although substantial, are not permanent in nature. Allowing the subject property to be valued as a 102,330 square foot building would improperly affect the net operating income.

The next issue is the determination of market rent. "Central to an income analysis is the determination of the economic rent, also known as the 'market rent' or 'fair rental value.'" Parkway Village, supra, 108 N.J. at 270. Market rent is defined as "[t]he most probable rent that a property should bring in a competitive and open market reflecting all conditions and restrictions of the typical lease agreement." The Appraisal of Real Estate, supra, at 453. The parties first determine the total potential gross income attributable to the subject at full occupancy. Id. at 457. "Checking actual income to determine whether it reflects economic income is a process of sound appraisal judgment applied to rentals currently being charged for comparable facilities in the competitive area." West Colonial Enters. L.L.C., supra, 20 N.J. Tax at 583 (quotation and citation omitted). In other words, the first step is to calculate the market rent that would be realized if the property was rented at full capacity, and this is accomplished by comparing reliable market rents of comparable properties.

In this case, each expert analyzed several third party leases and the subject property's lease to determine the appropriate market rent for valuation purposes. However, there are significant issues with the leases provided by both parties. "This comparison [of properties] is not limited to the physical characteristics of the properties but also includes their economic aspects, *e.g.*, highest and best use." Ford Motor Co., supra, 10 N.J. Tax at 169. The highest and best use analysis serves two main functions: to identify the most profitable use of the property, and assist in identifying comparable properties. The Appraisal of Real Estate, supra, at 277. The highest and best use serves to "identify and analyze the competitive supply and demand factors that influence value in the market." Id. at 300. "It would be inappropriate to use, as comparable, a property that does not have the same highest and best use as the subject." Ford Motor Co., supra, 10 N.J. Tax at 170; see

also Congoleum Corp. v. Township of Hamilon, 7 N.J. Tax 436, 445 (Tax 1985) (Evidence of comparable sales is effective where there is a substantial similarity).

The leases provided by Plaintiff's expert are for industrial/warehouse properties. However, this court has determined the subject property's highest and best use is a large discount retail store. Comparing the subject property to the industrial/warehouse properties provided by Plaintiff's expert would go against established legal precedent and widely accepted valuation practices. Plaintiff's industrial/warehouse leases are not substantially similar to the subject property because they do not share the same highest and best use. This is a fatal difference that cannot be overcome by any number of adjustments. Thus, it would be inappropriate and unreasonable for the court to consider the leases provided by Plaintiff's expert. Therefore, Plaintiff's industrial/warehouse leases cannot be considered as comparable leases when determining the market rent.

Defendant's expert offered four comparable leases that are categorized as large discount retail stores for the court's consideration. His comparable lease number 1 is for 111,207 square feet of space located at 450 Hackensack Avenue in Hackensack. The lease commenced on April 22, 2002 with a 10-year average rental rate of $22.41 per square foot. The building was constructed in 1960 but was renovated in 2002 and is part of a shopping center strip mall. The expert made a positive 32% adjustment for market conditions, a negative 20% adjustment for the comparable's superior condition, and a positive 10% adjustment for the comparable's older construction. For each of the tax years in question, the expert concluded that the adjusted economic rent per square foot for this comparable is $27.34.

Defendant's comparable lease number 2 is for 40,000 square feet of space located at 317 Route 17 South in Paramus. The lease, a renewal, commenced on April 10, 2009 with a 10-year average rental rate of $24.48 per square foot per year. The building was constructed in 1960 and

has been subsequently renovated. The expert made a negative 15% adjustment for size, a negative 30% adjustment for the comparable's superior location, and a positive 10% adjustment for the comparable's older construction. For each of the tax years in question, the expert concluded that the adjusted economic rent per square foot for this comparable is $18.36.

Defendant's comparable lease number 3 is for 115,600 square feet of space located at 2100 88th Street in North Bergen. The lease commenced on July 7, 2009 with a 10-year average rental rate of $14.15 per square foot per year. The building is part of a shopping center strip mall. The expert only made a negative 20% adjustment for the comparable's superior location. For each of the tax years in question, the expert concluded that the adjusted economic rent per square foot for this comparable is $11.32.

Defendant's comparable lease number 4 is for 60,067 square feet of space located at 230 Route 17 in Paramus. The lease commenced on September 23, 2009 with a 10-year average rental rate of $21.60 per square foot per year. The building was constructed 1999 and is part of a shopping center strip mall. The expert made a negative 10% adjustment for size and a negative 30% adjustment for the comparable's superior location. For each of the tax years in question, the expert concluded that the adjusted economic rent per square foot for this comparable is $12.96.

Defendant's expert also considered the lease for the subject property in his analysis. The lease commenced on December 13, 2006, and Defendant's expert determined it has a 10-year average rental rate of $15.12[7] per square foot per year using 102,330 square feet of building space in the calculation. As previously noted, the subject lease is for 140,838 square feet, of which 102,330 square feet is used to conduct Tenant's business and 38,182 square feet serves as an indoor parking garage.

[7] See supra n.3.

The court finds Defendant's expert's conclusion of market rent, based on his comparable leases, is not able to assist the court in determining fair market rent. Defendant's expert selected and adjusted each of the leases to reflect a 102,330 square foot building. As per the court's previously stated analysis, the subject building's square footage was not altered due to the construction of the indoor parking garage, and the appropriate marketable area for valuation purposes is 140,838 square feet. As such, the leases used by Defendant's expert should have been adjusted to factor in a size of 140,383 square feet, rather than 102,330 square feet. The court thus finds Defendant's expert's leases are improperly adjusted for size.

Further, the court cannot replicate the methodology Defendant's expert used to make adjustments to the comparables because there is no explanation of how he chose the particular adjustment percentages. The court cannot use the unadjusted rental amounts since all of the comparables require some adjustment for size. The comparable leases varied from approximately 40,000 square feet to 115,000 square feet compared to the subject property's building size of 140,838 square feet. Even the property closest in size to the subject building, comparable lease 3, would require an adjustment for approximately 25,000 square feet of space.[8]

The court can determine the annual 10-year average rent per square foot for the subject property as being $10.98 per square foot.[9] However, the subject lease, on its own, does not suffice to establish its market rent determination without further evidence. In Lorenc v. Township of Bernards, 5 N.J. Tax 39, 49 (Tax 1982), the court states that there needs to be an examination of a "sufficient number of samplings . . . to establish a definite trend from which a reasonable

[8] To provide context to the difference in size between comparable 3 and the subject property, 25,000 square feet is approximately the size of half an American football field.
[9] This is the average 10-year average rent using 140,838 square feet.

conclusion can be drawn," thus, a "single sale is not a sufficient sampling to arrive at a firm conclusion."

The court is limited to considering only the four leases presented by Defendant's expert, however, these leases cannot be used due to the incorrect size adjustments. The court cannot consider Plaintiff's expert's leases because they are for industrial/warehouse properties, and as such, the properties are not comparable to the subject property. Therefore, although the court is able to calculate the average ten-year rent per square foot under the subject property's lease, the same is not sufficient on its own to constitute an accurate representation of the market rent.

The lack of comparable data renders the court unable to conduct an independent calculation of market rent; thus, the true value also cannot be determined. The Tax Court "has a duty to apply its own judgment to valuation data submitted by experts in order to arrive at true value[,]" its "right to make an independent assessment is not boundless; it must be based on evidence before it and data that are properly at its disposal." Glenpointe Assocs. v. Twp. Of Teaneck, 241 N.J. Super. 37, 46 (App. Div. 1990). The court "must not arbitrarily assign a value to the property which is not supported in the record." Ibid. "[A]n expert's conclusion rises no higher than the data which provide the foundation." Gale & Kitson Fredon Golf, L.L.C. v. Twp. of Fredon, 26 N.J. Tax 268, 281 (Tax 2011) (citations and internal quotation marks omitted).

In conclusion, the court cannot utilize the leases provided by either of the parties, and as such, the value of the subject property cannot be calculated using the income approach or any other valuation approach due to a lack of reliable, comparable data. Thus, the original assessments stand.

III. Conclusion

In Glen Wall Associates, supra, 99 N.J. at 280, the Supreme Court emphasized that the Tax Court has an obligation to use its "special qualification[s], knowledge and experience" in reaching a determination of value. However, this court can only do so with the evidence properly presented

to it. In this case, the court is forced to conclude the evidence provided is insufficient to determine a value for the property in question. Plaintiff has not overcome its burden of proving the correctness of the assessments, therefore they are affirmed. See Id. at 273 ("absent the introduction of [sufficient competent] evidence the assessment stands"); see also New Jersey Foreign Trade Zone Venture v. Township of Mount Olive, 242 N.J. Super 170, 175 (App. Div. 1990) ("where neither party carries the burden of proof of establishing the value, the original assessment should stand"). Such affirmance "is not inconsistent with a determination that the presumption of validity has been overcome" since the evidence suffices to overcome the presumptive validity of an assessment does not "necessarily" suffice to "carry" a plaintiff's "burden of proof when all the evidence is subjected to critical analysis and weighing by the court." MSGW Real Estate Fund, supra, 18 N.J. Tax at 379.

Here, although Plaintiff overcame the presumption of validity, both parties failed to provide sufficient evidence to support revising the original assessment for each tax year. Plaintiff turned a blind eye to the actual use of the subject property, and his use of only industrial/warehouse properties as comparables rendered his sales comparison approach and income capitalization approach invalid. Similarly, Defendant's expert's cost approach was unreliable as he failed to provide support for the cost estimates generated by Defendant's valuation software. Thus, there was no opportunity for the court to analyze the accuracy of the cost estimates. Finally, Defendant's expert's income capitalization approach valued the subject property's building using 102,330 square feet, rather than 140,838 square feet. Therefore, for the reasons previously stated, the original assessments for the tax years in question stand.

Judgments will be entered affirming the assessment for each tax year in question.