

NOT FOR PUBLICATION WITHOUT APPROVAL OF  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

TAX COURT OF NEW JERSEY



Kathi F. Fiamingo  
Judge

153 Halsey Street  
Gibraltar Building –8<sup>th</sup> Floor  
Newark, New Jersey 07101  
(973) 64-2921 Fax: (973) 645-4283

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT  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

March 16, 2016

Michael I. Schenck, Esq.  
Schenck Law Group, LLC  
301 South Livingston Avenue, Suite 105  
Livingston, NJ 07039

William T. Smith, Esq.  
Smith, Crotty, Meyer & Bruins  
851 Franklin Lake Road  
Franklin Lakes, NJ 07417-2242

RE: University Heights, LLC v. Borough of Franklin Lakes  
Docket No. 015897-2014

Counsel:

This letter constitutes the court's opinion following trial of the issue of the validity of the imposition of an omitted assessment on plaintiff's property. For the reasons expressed below, the omitted assessment is invalidated and the judgment of the Bergen County Board of Taxation is reversed.

**Findings of Fact and Procedural History**

The court makes the following findings of fact. This appeal concerns real property located at 100 Sterling Drive, designated as Lot 1 in Block 2514 on the Official Tax Map of the Borough of Franklin Lakes, in Bergen County, New Jersey.

The subject property was vacant land when it was acquired by the plaintiff on August 24, 2005. In 2007 the assessment on the subject property was \$3,500,000, allocated to land only. After acquiring the land, plaintiff constructed ten residential buildings containing ten living units each, as well as a clubhouse and a pool serving as amenities to the residential structures.<sup>1</sup>

Temporary and Permanent Certificates of Occupancy for the Structures were issued as follows:

<u>Building Number</u>	<u>Temporary Certificate Date<sup>2</sup></u>	<u>Permanent Certificate Date</u>
5	N/A	April 10, 2007
4	April 14, 2007	September 23, 2008
3	May 14, 2007	September 23, 2008
2	June 12, 2007	September 23, 2008
6	July 11, 2007	September 23, 2008
7	August 21, 2007	October 1, 2008
8	September 19, 2007	September 23, 2008
9	October 18, 2007	September 23, 2008
10	November 28, 2007	October 1, 2008
1	N/A	September 23, 2008

All of the Structures were substantially complete as of October 1, 2007, with the exception of Building 1.<sup>3</sup> All ten Structures were complete and ready for their intended use no later than October 1, 2008.

In 2008, the Borough filed an added assessment with the Bergen County Board of Taxation setting an assessment for “improvements” on the subject property at \$9,217,200 for 2007, prorated for six months. No appeal of the added assessment was filed by the plaintiff, however,

---

<sup>1</sup> All of the ten residential buildings, the clubhouse and the pool are located on the single lot identified above and are referred to collectively as the “Structures.”

<sup>2</sup> No testimony or documentation was provided to establish the dates of the issuance of Temporary Certificates of Occupancy for Buildings 1 or 5.

<sup>3</sup> A certificate of approval was issued for the pool on July 6, 2007 and a Permanent Certificate of Occupancy was issued for the clubhouse on September 23, 2008. Neither the pool nor the clubhouse are at issue in this matter. Because they are considered amenities to the residential structures, their values were included in the overall assessment of the residential apartment complex at the subject property and were not separately assessed.

plaintiff filed complaints in the Tax Court appealing both the 2008 and 2009 regular assessments against the subject property in the amount of \$12,717,200 (land—\$3,500,000; improvements—\$9,217,200). Both matters were resolved through the execution of a Stipulation of Settlement,<sup>4</sup> setting the assessment for 2008 and 2009 at \$12,500,000—\$3,500,000 for land and \$9,000,000 for improvements.

Paragraph 2 of the Stipulation of Settlement provides:

The undersigned have made such examination of the value and proper assessment of the property(ies) and have obtained such appraisals, analysis and information with respect to the valuation and assessment of the property(ies) they deem necessary and appropriate for the purpose of enabling them to enter into the Stipulation. The assessor to the taxing district has been consulted by the attorney for the taxing district with respect to this settlement and has concurred.

Paragraph 3 of the Stipulation of Settlement provides:

Based upon the foregoing, the undersigned represent to the Court that the above settlement will result in an assessment at the fair assessable value of the property(ies) consistent with assessing practices generally applicable in the taxing district as required by law.

In addition to setting the assessment of the subject property for 2008 and 2009—the years under appeal—the Stipulation of Settlement further provided at paragraph 6:

The parties agree that the property's 2010 total assessment shall be \$12,000,000 and further agree that either party shall have the right to file a tax appeal for the 2010 tax year to obtain a judgment to implement, enforce and/or confirm the \$12,000,000 assessment agreed upon herein. This agreement shall be binding upon any assignees, tenants and successors in interest with regard to the subject property.

The Borough conducted a Borough-wide reassessment for 2011, under which all assessments were revised to reflect market conditions existing on October 1, 2010. The property record card reflects that the 2011 assessment of the subject property was \$12,000,000.

---

<sup>4</sup> Although the Stipulation of Settlement is undated, a cover letter in the Borough Assessor's records attached to the fully executed stipulation of settlement was dated December 22, 2009 and the judgment of the Tax Court was entered February 19, 2010.

The Assessor employed by the Borough when the above events occurred left his position with the Borough sometime in 2012. The Borough Assessor who replaced him was replaced in late 2014 by the current Borough Assessor, Edmund Brown.

On or about September 25, 2014, the current Borough Assessor levied an omitted assessment on the subject property for 2013 in the amount of \$8,000,000, prorated for 12 months. The omitted assessment notice served on the plaintiff indicated under the "Description of Work" that the imposition was the result of an "Error in Assessment."

Plaintiff timely appealed the omitted assessment to the Bergen County Board of Taxation, which, on January 20, 2015, affirmed the Assessment. Thereafter, plaintiff filed a timely appeal in the Tax Court.

Plaintiff moved for summary judgment before this court asserting that the omitted assessment was invalid and should be vacated. At a hearing held August 7, 2015, this court found that the matter was not ripe for summary judgment because there were genuine issues of material fact in dispute and denied plaintiff's motion. The court set the matter down for trial of the issues relating to the validity of the omitted assessment only. The court delayed a hearing on the valuation issue until after the validity of the omitted assessment was decided.

A trial before this court was held on February 5, 2016, at which time plaintiff called the Borough's current assessor, Edmund Brown, as a witness. No other witnesses were presented.

Mr. Brown testified and produced various documents including the subject's property record cards, which disclose that at least as of 2007 the assessed value of the land was calculated by applying a rate of \$35,000 to 100 units for a total value of \$3,500,000. The property record cards also disclose that in 2008 an assessment on improvements was imposed in the amount of

\$9,217,200.<sup>5</sup> There is no reference on the property record cards as to the manner in which the assessment was determined, how many units were taken into account, or of what the improvements consisted.

Although the witness testified that he believed the agreed reductions in assessment for 2008 and 2009 set forth in the Stipulation of Settlement had been effectuated, those reductions are not reflected on the property record card. There is a reference on the Property Record Card “Tax Court -\$717,200,” effectuating the agreed 2010 assessment of \$12,000,000; however, it is reflected in the Assessment History as effective in 2011.

Two other documents were produced by the witness upon which the Borough relied heavily. Both were labeled “Stabilized Income and Expense Summary” and referenced the subject’s Lot and Block identification. One document contained the phrase “2007 Added Assessment” (the “2007 summary”) and the other contained the phrase “2011 Reassessment” (2011 Summary). Both documents contain the statement “Date Prepared: 3/18/2011” and purport to calculate the value of property with reference to income and expenses based on sixty units. The “potential gross income” stated on each statement is identical; however, each summary utilizes different factors for vacancy/collection loss, operating expenses and capitalization rates. The 2007 Summary concludes a value of \$12,572,700 and the 2011 Summary concludes a value of \$12,087,000.

The witness testified that both the 2007 Summary and the 2011 Summary were prepared by an independent appraisal company employed by the Borough to assist the then Assessor. He maintained that the 2007 Summary evidences the failure to include forty units (four buildings) in the 2008 Added Assessment of the Subject. He further testified that the 2011 Summary evidences

---

<sup>5</sup> Although not reflected on the property record cards, the witness testified that the added assessment on the improvements was imposed for 2007, prorated for six months.

that this error continued notwithstanding the 2011 reassessment because, unlike a revaluation, in the process of reassessment, the properties were not actually inspected. The assessments set forth in the Assessor's records were merely adjusted to reflect market conditions and as a result, since the original assessment only included sixty units, the reassessment only included sixty units, adjusted only for market conditions.

The witness testified that the error to include all 100 units likely occurred because only sixty units (six structures) had Temporary Certificates of Occupancy by the assessment date of October 1, 2007. After it was pointed out to him that seven structures had received Temporary Certificates of Occupancy by October 1, 2007, he amended his testimony to indicate that he believed that the appraisal company had prepared the 2007 Summary prior to September 19, 2007, the date the Temporary Certificate of Occupancy was issued for the seventh structure.

Mr. Brown testified that when he became assessor of the Borough in late June 2014, he had a conversation with his predecessor who indicated that only sixty of the 100 units (six of the ten Structures) were being assessed. As a result, the 2014 assessment was raised from \$12,000,000 to \$20,000,000 in January 2014 and in September 2014, an omitted assessment in the amount of \$8,000,000 was imposed for all twelve months of 2013.

### **Legal Issues and Analysis**

There are three methods for imposing assessments which are outside the normal annual assessment requirements of N.J.S.A. 54:4-23 and 54:4-35. These are added assessments, omitted assessments and omitted added assessments, each of which is permitted a different time-table as to their imposition and notice, and thus, for appeals from such assessments.

[City of S. Amboy v. Karpowicz, 28 N.J. Tax 324, 330 (2015).]

“An added assessment is where there is an increase in value due to the completion of a building/structure, or an addition or improvement thereto, after the October 1 valuation date but

either by the end of the pre-tax year or during January to October of the tax year.” Id. at 331 (citing N.J.S.A. 54:4-63.2; 63.3). “The added assessment captures tax on properties becoming ‘taxable during the year following the’ October 1 valuation date which would otherwise escape such tax ‘until the next assessment date.’” Ibid. (citing Snyder v. Borough of South Plainfield, 1 N.J. Tax 3, 7 (Tax 1980)).

“An ‘omitted added’ assessment is one where an assessor fails to make an added assessment for any reason.” Id. at 331 (citing In re New York State Realty & Terminal Co., 21 N.J. 90, 97 (1956) (assessor could use the larger time frame allowed under the omitted assessment law to include the added assessment he had failed to impose on newly constructed structures because the principle purpose of both the added and omitted assessment statutes was to prevent avoidance of taxes). See also Borough of Freehold v. Nestle USA, 21 N.J. Tax 138, 153 (Tax 2003) (“[w]here an assessor fails to discover an improvement in the year in which it is completed, he or she may, in the following year, make an omitted added assessment.”)).

Omitted assessments are authorized by N.J.S.A. 54:4-63.31, which provides:

In any tax year or in the next succeeding tax year the assessor of any taxing district, may in accordance with the provisions of this act, assess any taxable property omitted from the assessment list for the particular tax year. The taxable value of such property shall be determined as of October 1 of the preceding year.

An added assessment is intended to include the increase in value occurring as a result of the completion of the erection, addition to or improvement of any building or structure after the October 1 valuation date for a particular tax year. American Hydro Power Partners, LP v. City of Clifton, 239 N.J. Super. 130, 138 (App. Div. 1989). An assessor must file an added assessment list with the County Board of Taxation by the October 1 “first following” the completion of improvements. N.J.S.A. 54:4-63.5. Any attempt to impose an added assessment outside of the statutory time limits is invalid. American Hydro, supra, 239 N.J. Super. at 138–139. An omitted

added assessment may be imposed in the year following the tax year in which the added assessment should have been imposed. See New York State Realty, *supra*, 21 N.J. 90; Cherry Hill Industrial Properties v. Voorhees, 186 N.J. Super 307 (App. Div. 1982).

All of the Structures were completed and ready for their intended use no later than October 1, 2008 when the final permanent Certificate of Occupancy was issued. Any Added Assessment or Omitted Added Assessment must have been imposed long before 2014 to have been valid.

The Borough maintains that it is not invalidly utilizing either the added assessment or omitted added assessment process, but is instead properly employing the omitted assessment statute to assess improvements on the subject property which, through inadvertence, were never included on the tax rolls.

The omitted assessment procedure is intended “to provide means whereby new construction and property omitted from the tax rolls through design or inadvertence can be added and included and taxed from the appropriate date when added to the land or for the appropriate year in in which it was omitted from the tax rolls.” New York State Realty, *supra*, 21 N.J. at 97. The purpose of the statute is “to aid in accomplishing a proper and equitable distribution of the tax burden,” and to foster equity in the payment of property taxes. Ibid. A procedure permitting a taxpayer to avoid paying his or her share when “a substantial basis exists” would be “inequitable.” Ibid.

A parcel need not be omitted entirely to qualify for inclusion on the omitted assessment list. Where an assessor overlooks an improvement but places a value on the land as if vacant, the omitted assessment procedure may be used to remedy the omission. See, e.g., Boardwalk Properties v. City of Atlantic City, 5 N.J. Tax 192, 198 (Tax 1983).



There are, however, limitations on the use of the omitted assessment procedure. An assessor's failure to consider the full value of improvements about which he was aware when he placed assessment on those improvements is not an omission, but "is simply an erroneous determination of value on the assessing date," which cannot be corrected through the omitted assessment procedure. Glen Pointe Assocs. v. Township of Teaneck, 10 N.J. Tax 598, 601 (Tax 1989); aff'd, 12 N.J. Tax 127 (App. Div. 1991); see also Van Orden v. Township of Wyckoff, 22 N.J. Tax 31 (Tax 2005). A deliberate assessment of \$0 for an improvement cannot be corrected through the omitted assessment procedure. See 200 43<sup>rd</sup> Street, LLC v. City of Union City, 16 N.J. Tax 138, 142 (Tax 1996); see also City of South Amboy v. Karpowicz, supra, 28 N.J. Tax 324. Also, increases in value of rental property due to its conversion to cooperative units cannot be accomplished using an omitted assessment, Inwood Owners v. Little Falls, 216 N.J. Super. 485 (App. Div. 1987), nor can the omitted assessment statute be utilized to correct an alleged clerical error, SLR Associates of Millville v. Millville City, 11 N.J. Tax 1 (Tax 1989), or to increase the value of property included in an assessment as a result of the assessor's change in understanding of how it should be valued. Coastal Eagle Point Oil Co. v. West Deptford Twp., 19 N.J. Tax 123 (Tax 1999).

It is unquestionable that all of the Structures had been completed and were ready for their intended use as of the valuation date of October 1, 2008. Arguably all of the Structures were substantially complete as of October 1, 2007 and could have been the subject of a partial assessment in 2008. Snyder v. Borough of South Plainfield, 1 N.J. Tax 3 (Tax 1980). Even assuming that four of the ten Structures were not fairly assessable on October 1, 2007, and were not included in the assessment set by the Assessor on that date, they were clearly complete on the

subsequent assessment date of October 1, 2008 when the Assessor set a value on improvements in the amount of \$9,217,200.

Furthermore, after all of the Structures were completed and ready for use, the assessment on the improvements set by the Assessor on October 1, 2007 was reduced in accordance with the Settlement, with which the Assessor concurred. It is incredible that the Assessor was unaware that all of the Structures had been fully completed as of the date the Stipulation was negotiated and executed in December 2010. Clearly, the setting of assessments for the years after the Structures were completed and ready for their intended uses is evidentiary that the assessor made conscious decisions to value all of those Structures in the amounts set forth in those assessments. If there was an erroneous determination of value, as urged by the Borough, it may not be corrected through the use of the omitted assessment procedure.

**Conclusion**

The omitted assessment is vacated and the judgment of the Bergen County Board of Taxation affirming the Omitted Assesment is reverse. Judgment is entered accordingly.

Very truly yours,

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