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EMMETT W. AND PAMELA ACOCELLA, Plaintiffs, v. CEDAR GROVE TOWNSHIP, Defendant.	TAX COURT OF NEW JERSEY DOCKET NO. 018890-2010, 016899-2011, 010376-2013 Approved for Publication In the New Jersey Tax Court Reports

Decided: September 26, 2016

Joseph Sherman for plaintiffs
(Beattie Padovano, L.L.C., attorneys).

Joseph McGlone for defendant
(McElroy, Deutsch, Mulvaney & Carpenter, L.L.P., attorneys).

NUGENT, J.T.C.

During all years at issue Emmett and Pamela Acocella ("plaintiffs") owned two adjacent parcels of land located in the Township of Cedar Grove ("defendant"). The assessments on only one parcel are subject to the present appeals. That property, known as Block 280, Lot 560, is comprised of vacant land having no frontage or roadway access ("subject"). In 2010 the assessment on the subject property was set as part of a municipal-wide revaluation conducted in the Township. Assessed at $238,700 for land only, it remained unchanged for tax years 2011 and 2013, the other years at issue here. The second parcel, known as Block 280, Lot 624 ("residential parcel"), fronts on Bowden Road in the Township, and contains plaintiffs' residence and an accessory building. Because the subject property lies to the rear of plaintiffs' residential parcel, where the lands share a common border, use of the second parcel is relevant to this matter.

Plaintiffs appealed judgments of the Essex County Board of Taxation affirming the assessments of the subject property through timely complaints filed in the Tax Court. No counterclaims were asserted by defendant. Each party produced evidence of the subject property's value through the testimony of a general real estate appraiser at the trial of these matters, and plaintiff Emmett Acocella testified in his case-in-chief. In plaintiffs' view the subject property is rendered landlocked by all adjacent properties and is of minimal use, which warrants a reduction in the assessments. The defendant argues the subject lacks neither street frontage nor access because plaintiffs own the adjacent residential parcel fronting on Bowden Road. The court finds the subject is a landlocked parcel with minimal development potential. To assume access ignores the actual condition of the properties. Judgment reducing the assessment for all years under appeal will be entered accordingly.

I. *Findings of Fact*

The physical attributes of the subject property are comprised solely of vacant, mostly wooded land covering 45,625 square feet, or 1.0474 acres, slightly sloped in topography and irregular in shape. The subject is zoned R-10, residential, which permits single-family dwellings on lots of 10,000 square feet, and the surrounding neighborhood is residential with one- and two-story single-family residences. Located at the rear of 321 Bowden Road, the subject is surrounded on all sides by adjacent properties, including plaintiffs' residential lot to the south with which the subject shares a 90-foot boundary; land owned by Essex County known as the West Essex Trail (hiking and biking trail) to the east with which it shares a 345-foot boundary; and a PSE&G power line easement that includes towers and high tension wires to the north sharing a boundary of 179 feet with the subject. Based on its location, there is no independent means of ingress or egress to

the subject property. Bowden Road, located several hundred feet from the subject, is the nearest roadway.

Title to the two parcels was conveyed separately to plaintiffs. Acocella purchased the property fronting on Bowden Road in 1977 on which he constructed a home and later a pole barn across the front of the property. Twenty years later, in 1997, a developer sold plaintiffs the vacant land for $20,000. As Acocella testified, the developer purchased both the subject and a 50-acre parcel located on the other side of the high tension wires described by Acocella as a "sand pit." He explained that the subject was not adjacent to, nor was it ever a part of, the developer's 50-acre parcel, rather it "just went along with it" at the time of the developer's purchase. The subject has remained in the same condition since its conveyance to the plaintiffs.

Acocella elected to purchase the subject property to act as a buffer between plaintiffs' residential parcel and the county park land. He testified about an experience he had where a property adjacent to his family home in Cedar Grove was developed years earlier by the Township with tennis courts, causing lights and noise at night that bothered him. He bought the subject property so that it would not be developed. Asked whether he had ever considered developing it, he said he had not. He added that the ideal time to develop the subject would have been when he owned his neighbor's lot, since sold, and before he constructed a pole barn on his own residential parcel. "I mean a road could've been put in then and it would've been profitable," he said. "You probably could've got a half a dozen lots. But it wasn't my thing, it's not why I bought it." He never consulted counsel about seeking variances on, or in any way planned to develop the subject.

Plaintiffs' expert used the sales comparison approach to value and relied on six comparable properties to arrive at a proposed value for the subject property using the six properties for each of the three years under appeal. The comparable properties were all vacant lots in residential zones

at the time of sale, and homes were subsequently constructed on five of the lots. The expert testified he could not find any sales of landlocked properties to make a comparison. He considered parcels with limited development potential like wetlands when valuing the subject and utilized properties hampered by that kind of condition to arrive at an adjustment. In his appraisal, he adjusted each comparable sale by fifty percent to account for the lack of frontage. In considering the subject's highest and best use, he explained that because of the location of the improvements access via right-of-way over the residential parcel would have a detrimental effect on the subject. Plaintiffs' expert opined the highest and best use of the subject is as a vacant lot, citing its inaccessibility and "extremely limited" development potential, and concluded a value of $135,000 for tax year 2010 and $130,000 for tax years 2011 and 2013.

Defendant's expert utilized the sales comparison approach as well and identified four comparable sales of residential building lots for each year under appeal, twelve in total, including five of the six comparable sales also offered by plaintiffs' expert. Defendant's expert calculated a per lot value of $165,000 for 2010, $180,000 for 2011, and $185,000 for 2013. In concluding the subject's highest and best use as a subdivision of three building lots with subsequent residential development he multiplied the per-lot value by three. After he derived a value for each tax year he applied a twenty-five percent "discount" to account for the cost of a three-lot subdivision to conclude a subject property value of $495,000 for 2010, $540,000 for 2011 and $555,000 for 2013.

II. Conclusions of Law

(A) Presumption of Validity

"Original assessments and judgments of county boards of taxation are entitled to a presumption of validity." MSGW Real Estate Fund, L.L.C. v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998). 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 Co. v. City of Passaic, 100 N.J. 408, 413 (1985). See also Township of Byram v. Western World, Inc., 111 N.J. 222, 235 (1988), and City of Atlantic City v. Ace Gaming, L.L.C., 23 N.J. Tax 70, 98 (Tax 2006).

The burden is on the appealing party to overcome the presumption and prove that the assessment is erroneous. "The presumption in favor of the taxing authority can be rebutted only by cogent evidence . . . . 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.'" Pantasote Co., supra, 100 N.J. at 413 (quotation omitted.)

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. MSGW Real Estate Fund, L.L.C., supra, 18 N.J. Tax at 376 (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 535 (1995)). If the court determines that sufficient evidence to overcome the presumption has not been produced, 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); Global Terminal & Container Serv. v. City of Jersey City, 15 N.J. Tax 698, 703-704 (App. Div. 1996). In order to overcome the presumption, the evidence must be "sufficient to determine the value of the property under appeal, thereby establishing the existence of a debatable question as to the correctness of the assessment." West Colonial Enters., L.L.C. v. City of East Orange, 20 N.J. Tax 576, 579 (Tax 2003), aff'd, 21 N.J. Tax 590 (App. Div. 2004). 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).

The major issues of contention between the parties' experts are the significant adjustment made by plaintiffs' expert, said to compensate for the subject property's "lack of street frontage," and the experts' conflicting conclusions of the subject property's highest and best use. Defendant also challenges the validity of several of plaintiffs' comparable sales. The court concludes that plaintiffs produced sufficient evidence to overcome the presumption of validity attached to the assessments for tax years 2010, 2011 and 2013. If taken as true, the opinion of plaintiffs' expert and the facts upon which he relied create a debatable question regarding the correctness of the assessment in each tax year sufficient to allow the court to make an independent determination of the value of the subject. Plaintiffs' overcoming the presumption permits the court to address the question of what value the subject should be accorded.

(B) Highest and Best Use

Where a taxpayer overcomes the presumption of validity, the court's analysis of the evidence then begins with an examination of the experts' highest and best use conclusions. Highest and best use is defined as, "[t]he reasonably probable use of property that results in the highest value." Appraisal Institute, The Appraisal of Real Estate 332 (14th ed. 2013). The 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, 28 N.J. Tax 337 (App. Div. 2015) (citation omitted). "The highest and best use of a specific parcel of land is not determined through subjective analysis by the property owner, the developer, or the appraiser; rather highest and best use is shaped by the competitive forces

within the market where the property is located." Entenmann's Inc. v. Borough of Totowa, 18 N.J. Tax 540, 545 (Tax 2000), (quoting Appraisal Institute, The Appraisal of Real Estate 298 (11th ed. 1996)). Moreover, property is to be assessed in the condition in which it is held and the burden to bring forth the necessary proofs falls to the party alleging a different highest and best use. Highview Estates v. Borough of Englewood Cliffs, 6 N.J. Tax 194, 200 (Tax 1983). Highest and best use analysis is the first step in the appraisal process.

In this case, plaintiffs' expert opined the subject property in its current condition as vacant land is "the only realistic use of the property," adding "the value of the land with this limited development potential is severely impacted." By way of illustration, in his appraisal report, plaintiffs' expert described the subject's highest and best use as "vacant land for assemblage with another adjoining parcel for future development," adding "any potential buyer would be required to apply for a variance in order to develop the property . . . ." "Theoretically" the subject property could be combined with the front parcel owned by plaintiffs, although such assemblage would likely require demolition of the plaintiffs' home and pole barn, he asserted. The vacant land as it was situated for the years of valuation had no development potential, in his opinion.

Defendant's expert based his highest and best use conclusion on an assumption of access provided to the subject property from plaintiffs' adjacent residential parcel. He further testified that plaintiffs' ownership of both the subject property and adjacent parcel presents a potential merger or assemblage scenario to create a parcel with greater utility and development potential, a viable and reasonable "alternate" highest and best use.[1]

[1] Notably, the doctrine of merger has no application since these are not two substandard lots. Merger is "the combination of two or more contiguous lots of substandard size, that are held in common ownership, in order to meet the requirements of a particular zoning regulation." Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 578 (2005) (citing Robert M. Anderson, 2 American Law of Zoning § 9.67 (4th ed. 2005)).

Considering the first element of highest and best use, the uses permitted by the applicable zoning regulations determine whether a proposed use is legally permissible. Mori v. Town of Secaucus, 15 N.J. Tax 607, 619 (Tax 1996), rev'd and remanded on other grounds, 17 N.J. Tax 96 (App. Div. 1997), certif. denied, 156 N.J. 608 (1998). Here, the subject property is zoned residential allowing prima facie for the type of development defendant proposes: a three-lot residential subdivision. As reflected by the record the subject property is raw land measuring just more than an acre, located in a residential zone. From a market perspective the value of the subject lies in its potential for residential development where residential properties comprise the surrounding neighborhood located in a suburban township largely developed.[2] However, the potential for development is impacted by the peculiar characteristics affecting the subject land and would depend upon use of a separate, adjacent property to achieve its highest and best use as a buildable parcel as it lacks street frontage and access. To illustrate, the Township zoning ordinance requires street frontage of fifty feet. Cedar Grove Mun. Code § 268.A1. The Municipal Land Use Law, N.J.S.A. 40:55D1 et seq., ("MLUL"), requires that a building lot must abut a street. "No permit for the erection of any building or structure shall be issued unless the lot abuts a street giving access to such proposed building or structure." N.J.S.A. 40:55D-35. By law, development of a building on the subject property would require construction of a roadway to provide access, or a variance from the requirement would need to be secured. See N.J.S.A. 40:55D-36.

The statutory requirement of the MLUL was not raised by the parties. Instead the experts cited to the local zoning requirement for street frontage only. Defendant's expert found the zoning

[2] According to defendant's expert's report, the Township of Cedar Grove comprises an area of approximately 4.35 square miles with 4,235 line items, including 3,892 residential properties, 153 commercial properties, 43 industrial properties, 6 apartment parcels and 139 vacant parcels, as of 2008.

requirement is easily satisfied through an easement over the residential parcel. In his opinion plaintiffs would be "required to provide roadway access from [the] adjacent parcel, which would allow independent development of the site" whether plaintiffs developed it or sold it to a developer. The expert continued, "[t]he foregoing is without question as it has long been New Jersey Public Policy that no land may be made inaccessible and useless . . . ."[3] The subject property was appraised "under an assumption that ingress or egress would be provided by the property owner, since we have unity of title and unity of use," and the plaintiffs' common ownership of the adjacent residential lot would give rise to an easement over the residential lot in favor of the subject property, he opined.

Where a landlocked property is said to have limited value compared to comparable parcels with access or road frontage, the Tax Court has found value where the taxpayer had a right to an easement by necessity. Double MK Farm v. Township of Frelinghuysen, 11 N.J. Tax 6 (Tax 1990), aff'd, 12 N.J. Tax 254 (App. Div. 1991). "At common law an easement is defined as a nonpossessory incorporeal interest in another's possessory estate in land, entitling the holder of the easement to make some use the other's property." Leach, supra, 218 N.J. Super. at 24; see also Mandia v. Applegate, 310 N.J. Super. 435, 442-43 (App. Div. 1998). An easement by necessity is an implied easement created where the unity of ownership of land is severed, resulting in one parcel that is landlocked. In substance, the easement by necessity "arises by operation of law where 'an owner of land conveys to another an inner portion thereof, which is entirely surrounded by lands owned by the conveyor . . . .'" Leach, supra, 218 N.J. Super. at 25 (quoting 3 Powell, Real Property § 410 at 34-62 to 34-63) (1985 & Supp. 1987)). "Thus, unless a contrary intent is

[3] In his written report defendant's expert cited generally to Leach v. Anderl, 218 N.J. Super. 18 (App. Div. 1987).

inescapably manifested, the conveyee is found to have a right-of-way across the retained land of the conveyor for ingress to, and egress from, the landlocked parcel." Ibid. (quoting 3 Powell, Real Property § 410 at 34-66).

In the instant case evidence of the chain of title leading to severance of the subject is absent from the record. Acocella credibly testified that when he purchased the property from the developer he bought it as a landlocked parcel. There was no evidence presented by defendant to dispute the fact that severance from an adjacent parcel occurred and rendered the subject property landlocked prior to its purchase by the developer, and that it was conveyed to plaintiffs in that condition. Absent evidence to the contrary, the court accepts the fact that any future conveyance of the subject by plaintiffs would not give rise to a right-of-way over the residential lot via an easement by necessity, rather it would simply constitute a transfer of landlocked land. Nor does the subject presently benefit from an easement by necessity over the residential parcel. Quite possibly the subject had been a part of the surrounding land conveyed for county park use or the land on which the utility easement lies. In that case the benefit of an easement by necessity could arise over adjoining land creating a dominant estate in the subject. Even in that event, given the passage of time it is improbable that such an easement would arise since it would require a judicial declaration. Such easements are disfavored by the courts. Leach, supra, 281 N.J. Super. at 27 (citing A.J. & J.O. Pilar, Inc. v. Lister Corp., 38 N.J. Super. 488, 500 (App. Div.) ("The judicial power to declare an implied easement must be sensitive to changing realities and be exercised cautiously so as not to render certified title examinations unreliable or real estate titles unstable.") aff'd, 22 N.J. 75 (1956)).

Moreover, plaintiffs' expert provided cogent testimony about the limitation on use of the subject posed by the actual condition of the adjacent residential parcel. There is no indication

defendant's appraiser considered the damage or effect upon the residential parcel, from which access was assumed. Plaintiffs' expert opined that any easement over the residential property would be impractical, would have to be close to plaintiffs' existing dwelling "and have a significant adverse impact on the valuation of the property," including a need to knock down either the home or pole barn on the improved lot. Asked on cross-examination about how the subject property could be developed, plaintiffs' expert outlined two scenarios involving express easements. In the first, plaintiffs would allow access to the subject property via a right-of-way or driveway. The second possibility was the sale of the subject property with a right-of-way to a developer. Plaintiffs' expert concluded that either alternative would "have a very detrimental impact on the front lot," to the point where a roadway would be "very close if not touching" plaintiffs' existing home. It is well settled at law that "the use of the easement must not unreasonably interfere with the use and enjoyment of the servient estate." Levinson v. Costello, 74 N.J. Super. 539, 545 (App. Div.) (citation omitted), certif. denied, 38 N.J. 307 (1962).

Photographs of the residential parcel when combined with the lot dimensions depicted on the tax map credibly support the conclusion that there is limited space available for construction of a road or other corridor to provide access to the subject property. The residential parcel benefits from an 80-foot frontage on Bowden Road. From the photographs that area appears to be fully developed. Defendant's expert based his valuation on an "assumption" of an easement or access, absent recognition of the impact on the adjacent residential parcel. The proofs support a finding that an easement would be prohibitive since it would interfere with the use and enjoyment of the residential parcel. Such a scheme would also create a flag lot of the subject, a rear lot with an access corridor running alongside a front lot. See Kaufmann v. Planning Bd. for Warren, 110 N.J.

551, 554 (1988). Plaintiffs' expert testified that municipalities are averse to flag lots because of concern over issues such as emergency access and aesthetics.

On cross-examination the defendant's expert acknowledged that he was not qualified to testify about construction of a right-of-way to the subject property across the plaintiffs' residential parcel, nor did he testify whether such a right-of-way would be permitted under the Township's zoning code. He said he appraised the subject property under an assumption that ingress or egress would be provided by the property owner, conceding that he did not consider where a right-of-way would be placed "other than the fact that it could be put on his property somewhere," and based his value opinion on the physical characteristics of the site and the zoning. Absent evidence sufficient to show use in compliance with the zoning, as well as the requirements of the MLUL, the legal prong of the test for highest and best use is not met.

Many of those same considerations bring into question defendant's proposed use for the subject property as physically possible. Testing the physical possibility of highest and best use "addresses the physical characteristics [like] size, shape, terrain, and accessibility of land . . . frontage and depth" among other factors. Appraisal Institute, The Appraisal of Real Estate, 283 (13th ed. 2008). Defendant's proposed highest and best use of a residential subdivision is based on the Township's 10,000-square-foot requirement for residential lots and the 45,625-square-foot size of the subject property. However, the expert's testimony as to the feasibility of constructing such a subdivision on a rear lot is unattested and appears to be based solely on size without any evidence to support how many building lots, if any, would be permitted under the zoning based on the subject property's characteristics. Without that evidence the court cannot ascertain the physical or legal possibility of a residential subdivision. Likewise, proof of the development cost left unaddressed by the record prevents consideration whether the use would be financially feasible.

For those reasons the court finds that the subject property should be valued in its present condition as vacant land with impaired development potential. Development in the foreseeable future may be possible but appears to be remote. Substantively, proof of an alternate highest and best use is lacking. Highview Estates, supra, 6 N.J. Tax at 201.

(C) Valuation

The court next turns to the valuation of the subject property. "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). The comparable sales approach is generally accepted as an appropriate method of estimating the value of vacant land and is the proper approach in this case to value the subject.

(i) Plaintiffs' Valuation Evidence

The six comparable sales on which plaintiffs' expert relied to conclude the value of the subject property are outlined below. The expert used all six comparable sales for each tax year.

Sale	Sale One	Sale Two	Sale Three	Sale Four	Sale Five	Sale Six
Address	162 Washington Ave., West Caldwell	111 Winding Way, Cedar Grove	28 Cliff Street, Verona	11 Fellswood Drive, Verona	65 Stevens Ave., Cedar Grove	14 Crossbrook Lane, West Caldwell
Date	March 2009	May 2009	March 2010	April 2010	March 2011	Nov. 2011
Price	$257,500	$215,000	$200,000	$295,000	$250,000	$265,000
Lot size	10,000 sq. ft.	12,600 sq. ft.	7,500 sq. ft.	16,100 sq. ft.	13,500 sq. ft.	20,000 sq. ft.

Plaintiffs' expert adjusted the sales prices of two properties based on difference in location. He adjusted all of the comparable properties for lack of frontage, and applied an adjustment for time/market and for lot size, and arrived at value as follows:

Sale One and Two adjustments:

For both comparable sales, a time/market condition adjustment was first applied to the sale price for all years, then plaintiffs' expert applied the frontage and lot size adjustments to the adjusted sales price, at rates noted below. For sale one, the expert reached a final adjusted sale price of $138,084 for 2010, and $131,003 for 2011 and 2013. For sale two, the expert reached a final adjusted sale price of $115,294 for 2010, and $109,381 for 2011 and 2013.

2010		**2011 and 2013**
Time/Market Condition	(- 2.5%)	(- 7.5%)
Frontage	(-50.0%)	(-50.0%)
Lot Size	(+ 5.0%)	(+ 5.0%)

Sale Three adjustments:

The following adjustments were applied by the expert in the same sequence as above, resulting in a final adjusted sale price of $112,750 for 2010, and $107,250 for 2011 and 2013.

2010		**2011 and 2013**
Time/Market Condition	(+ 2.5%)	(- 2.5%)
Frontage	(- 50.0%)	(-50.0%)
Lot Size	(+ 5.0%)	(+ 5.0%)

Sale Four adjustments:

The expert applied the adjustments in the same manner as for Sale Three, with the addition of a location adjustment, and reached a final adjusted sale price of $151,188 for 2010, and $143,813 for 2011 and 2013.

2010		**2011 and 2013**
Time/Market Condition	(+ 2.5%)	(- 2.5%)
Frontage	(-50.0%)	(-50.0%)
Lot Size	(+ 5.0%)	(+ 5.0%)
Location	(- 5.0%)	(- 5.0%)

Sale Five adjustments:

A time/market condition adjustment was applied for 2010 only. Plaintiffs' expert then applied the remaining adjustments as with Sales Three and Four and reached a final adjusted sale price of $157,500 for 2010, and $150,000 for 2011 and 2013.

2010		**2011 and 2013**
Time/Market Condition	(+ 5.0%)	0
Frontage	(-50.0%)	(- 50.0%)
Lot Size	(+ 5.0%)	(+ 5.0%)
Location	(+ 5.0%)	(+ 5.0%)

Sale Six adjustments:

As to tax year 2010, adjustments were applied at the rates below, resulting in a final adjusted sale price of $146,081 for 2010, and $139,125 for 2011 and 2013.

2010		**2011 and 2013**
Time/Market Condition	(+ 5.0%)	0
Frontage	(-50.0%)	(-50.0%)
Lot Size	(+ 2.5%)	(+ 2.5%)

Defendant questioned both the plaintiffs' expert's methodology of employing residential lot sales to value the subject at a highest and best use of vacant land, as well as the validity of the sales relied on by plaintiffs' expert as applied to all three tax years because the sale dates did not always coincide with the valuation dates for the tax years under appeal, but instead appeared remote in time. Plaintiffs' expert said the "unique circumstances" of the subject property warranted the use of such lots for comparable sales since landlocked parcels or lots with limited or no development potential were not available for comparison. According to the expert, such residential sales were the "only methodology that I was able to come up with in order to value this property given its somewhat unique circumstances."[4]

[4] Moreover, defendant's counsel calculated the price per square foot of the comparable sales used by plaintiffs' expert as $25.75 (sale 1); $17.06 (sale 2); $26.67 (sale 3); $18.32 (sale 4); $18.52 (sale 5); and $13.25 (sale 6), and calculated the expert's valuation of the subject at $2.95 per square foot for 2010, and $2.85 for 2011 and 2013. Plaintiffs' expert countered that residential

An expert appraiser is required to recognize the difference between the highest and best use of a comparable sale and the subject property to determine if the sale is an appropriate comparable. Clemente, supra, 27 N.J. Tax at 273. If the property has a different highest and best use, the comparable property may be rejected. See e.g., American Cyanamid Co. v. Township of Wayne, 17 N.J. Tax 542, 557 (Tax 1998) (finding that because a building was sold for multi-tenant use, which was different from the highest and best use for the subject property, the price might not be reflective of the subject property's value), aff'd, 19 N.J. Tax 46 (App. Div. 2000); Newport Ctr. v. City of Jersey City, 17 N.J. Tax 405, 418-25 (Tax 1998) (excluding sales having highest and best uses so dissimilar to the highest and best use of the subject property as to render the sales of no assistance to the court in arriving at value). Moreover, sales that are too remote in time may be rejected as insufficient evidence of value. City of Atlantic City v. Boardwalk Regency Corp., 19 N.J. Tax 164, 187 (App. Div. 2000) ("[C]ourts are reluctant to rely on sales that are remote in time relative to the assessment date" but there is "no fixed rule for rejecting comparables" based on the date of sale).

Defendant's contention that the selection and use of residential land sales undermines plaintiffs' expert's opinion is unpersuasive. In the cases cited above where comparable sales were rejected as dissimilar, no allegation arose that properties with similar characteristics were unavailable. Plaintiffs' expert attempted to identify comparable properties landlocked with remote development potential but found no available sales. Where properties similar to the unusual nature of the subject property were not available, plaintiffs' expert relied on vacant land sales in the same zone as the subject property located in close proximity. This reliance is reasonable. See

property is valued based on development potential, conformance with zoning requirements, whether it has frontage, and adequate utilities, among other factors, rather than price per square foot.

Boardwalk Regency Corp., supra, 19 N.J. Tax at 186 (holding an important factor in determining value through comparable sales is whether properties are in the same zone). "Zoning is often the most basic criterion in selecting comparables" and "[s]ites zoned the same as the subject property are the most appropriate comparables." Nat'l Westminster Bank N.J. v. City of Brigantine, 11 N.J. Tax 502, 513 (Tax 1991) (citation omitted).

"Appellate courts have long recognized that the trial court must be granted 'a wide discretion' in determining the admissibility of sales to be relied on as comparable." Ford Motor Co., supra, 127 N.J. at 307 (citation omitted). The court finds that plaintiffs' expert was reasonable in his approach to value particularly where the subject property is distinct in its features. While the highest and best use of the subject differed from the comparable sales, because the sales of landlocked parcels available for comparison to the subject property did not exist, and the expert used comparable properties in the same zone as the subject, the court accepts that the comparable properties are sufficiently similar to warrant use in arriving at value.

The court next considers the plaintiffs' expert's adjustments. The expert testified that the time/market condition adjustment was based upon a declining market for vacant land from 2008 to 2010. The market for all properties, particularly vacant land, declined from 2008-2010 as a result of overall economic conditions, including reduced mortgage financing and demand for new construction in his view. He opined, however, that the real estate market "had leveled out" after 2010 and no further adjustments were necessary. While the court accepts the opinion that vacant land prices were affected by relevant economic considerations, not all geographic areas were similarly affected. Land maintained its value during the relevant period based on Cedar Grove and surrounding area comparable sales prices presented by the experts. Therefore, the court rejects the market adjustment.

The lot size adjustment was applied where the comparable sale featured a smaller lot than the subject property. Plaintiffs' expert acknowledged the subject property is larger than the comparable sales lots, but added that this has little effect on value due to the development limitations on the subject. He opined that the subject's residential development potential is limited to, at best, a single residence. The lot size adjustments applied by the expert were fairly minimal. The court accepts as reasonable both the lot size and location adjustments. Plaintiffs' expert's frontage adjustment and the theory proposed by defendant's expert resulting in the application of a discount to the comparable sales prices will be discussed, infra.

(ii) Defendant's Valuation Evidence

Defendant's expert presented four comparable sales for tax year 2010. For all years he applied a twenty-five percent discount to his resulting value, but did not make individual adjustments to the sale prices, contending the lots to be similar in terms of physical characteristics such as size, topography, highest and best use and shape.

2010 Tax Year

Sale	Sale One	Sale Two	Sale Three	Sale Four
Address	46-48 Durrell Street, Verona	111 Winding Way, Cedar Grove	8 Locust Street, Nutley	162 Washington Ave. West Caldwell
Date	October 2008	May 2009	December 2009	March 2009
Price	$225,000	$215,000	$175,000	$257,500
Lot size	22,500 sq. ft.	12,480 sq. ft.	12,500 sq. ft.	10,150 sq. ft.

Based on the sales defendant's expert established an unadjusted range and then calculated an average or mid-range of all sales. For the 2010 tax year the expert concluded a per-lot value of $218,125 which he rounded to $220,000. The expert then multiplied that value by three on the contention that the subject could be divided into three residential lots based on its 45,000-square-foot size and the defendant's residential zoning requirements for 10,000-square-foot lots. The expert then applied a twenty-five percent adjustment "to account for the absence of a paired sale

comparison or market data for rear parcels" or those "requiring subdivision." He based the twenty-five percent discount per-lot on the time and cost of subdividing the subject into a three-lot subdivision. On cross-examination, the expert said the discount included costs like legal fees, permitting costs, engineering, and fees associated with connecting a potential subdivision to utilities, but he did not detail the anticipated costs in his report or at trial.

The resulting adjusted value was $165,000 per subdivided parcel or $495,000 for the entire subject property.

2011 Tax Year

Sale	Sale One	Sale Two	Sale Three	Sale Four
Address	11 Fellswood Drive, Verona	111 Winding Way, Cedar Grove	28 Cliff Street, Verona	162 Washington Ave. West Caldwell
Date	April 2010	May 2009	March 2010	March 2009
Price	$295,000	$215,000	$200,000	$257,500
Lot size	16,262 sq. ft.	12,480 sq. ft.	7,502 sq. ft.	10,150 sq. ft.

Using the same method, defendant's expert established a mid-range value for the comparable sales at $241,875, which he rounded to $240,000, and applied the same twenty-five percent adjustment for an adjusted value of $180,000 per-lot and a total valuation of the subject property of $540,000.

Tax Year 2013

Sale	Sale One	Sale Two	Sale Three	Sale Four
Address	11 Fellswood Drive, Verona	14 Crossbrook Lane, West Caldwell	28 Cliff Street, Verona	55 Undercliff Terr., West Orange
Date	April 2010	November 2011	March 2010	November 2011
Price	$295,000	$265,000	$200,000	$230,000
Lot size	16,262 sq. ft.	20,615 sq. ft.	7,502 sq. ft.	9,148 sq. ft.

Defendant's expert established a mid-range value for the comparable sales at $247,500 and applied the same twenty-five percent adjustment, for an adjusted value of $185,625 per-lot and a total value of the subject property of $555,000.

Both experts applied a significant adjustment to the comparable sales in concluding the subject's value. The defendant's expert applied a fixed discount – twenty-five percent – to his per-lot valuation rather than an adjustment to the individual sales. Where the court found the methodology employed to conclude the defendant's expert's highest and best use to be unsupported, the twenty-five percent reduction based on the unaccounted-for costs of creating a three-lot subdivision and the subject property's status as "rear land" is likewise rejected.

The parties disagree whether an adjustment should be made to the comparable sales to account for the subject property's lack of street frontage, as applied by plaintiffs' expert. The court finds that an adjustment is proper given the landlocked nature of the subject property. Plaintiffs' expert, testifying to support a fifty percent adjustment, found in his experience that wetlands typically sell from ten to twenty percent of the value of an otherwise level and developable lot, while floodplain lots sell from twenty-five to thirty-five percent of a fully developable lot. The expert testified that these parcel types are "somewhat similar" to the subject as lots of "limited utility," but more heavily impacted by the condition of the property.

Adjustments must be adequately supported by market data. An expert's reliance on subjective measures for the calculation and application of adjustments is unacceptable. Greenblatt v. Township of Englewood, 26 N.J. Tax 41, 55 (Tax 2012) ("adjustments must have a foundation obtained from the market" with an "explanation of the methodology and assumptions used in arriving at the experts adjustments" otherwise they are entitled to little weight.). See also Congoleum Corp. v. Township of Hamilton, 7 N.J. Tax 436, 451 (Tax 1985) (adjustments must be adequately supported with objective data.). Moreover, a fifty percent deduction can suggest to a court that the element of comparability is lacking. "Adjustments that are too large suggest a lack of comparability between the concerned sales and the subject property and present a misleading

indication of the subject property's value." 125 Monitor St. L.L.C. v. City of Jersey City, 21 N.J. Tax 232, 243 (Tax 2004), aff'd, 23 N.J. Tax 9 (App. Div. 2005).

In calculating the fifty percent adjustment applied to all of the comparable sales, plaintiffs' expert reiterated that he could not find any sales of landlocked parcels to make a comparison with the subject property. Instead he looked to the sale value of lots with limited development potential and compared those properties to the sales prices of unencumbered parcels. He elected to apply a fifty percent adjustment rather than a higher figure, since he determined the subject was "not impacted as severely" as wetlands or floodplain property, but considered "the relative ability of properties to be developed" to conclude that the subject property would have a value of approximately fifty percent less than any of the comparable sales for lack of frontage. According to plaintiffs' expert, "there's no mathematically precise method of reaching the conclusion of a fifty percent adjustment."

Mindful that the adjustment is substantial at fifty percent, the court finds that the character of the subject property limits its development potential and warrants the adjustment. The realistic approach adopted by plaintiffs' expert finds adequate support through reference to properties encumbered by wetlands/floodplains with which he was familiar located in Fairfield, and outside of Essex County, in Montville and the Meadowlands. While the market data underling his opinion was not made a part of his report, the expert credibly testified about the results of his research undertaken regarding encumbered properties. Indeed, the record supports the conclusion that characteristics unique to the subject property lend measurable difficulty to the valuation process in this matter. When combined with his expertise valuing encumbered property the court finds the value ascribed to the condition of the subject property is sufficiently supported by the record. In so concluding, this court's decision is guided measurably by the Supreme Court's advice to "be

cognizant of the expense incurred by litigants" when prosecuting tax appeals. Glenn Wall Assocs. v. Township of Wall, 99 N.J. 265, 280 (1985).

Indeed, the Tax Court has a "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." New Cumberland Corp. v. Borough of Roselle, 3 N.J. Tax 345, 353 (Tax 1981). However, the tax court's "right to make an independent assessment is not boundless . . . [and] must be based on the evidence before it and the data that are properly at its disposal." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 430 (1985). The Appellate Division illustrated the practical view adopted by the court in this regard. In Township of Warren v. Suffness, 225 N.J. Super. 399, 414-15 (App. Div.), certif. denied, 113 N.J. 640 (1988), the court held a Tax Court judge "had the right to apply his own judgment in making an independent assessment of the true values," where the Tax Court deducted twenty-five percent of value from the value of the improvements to account for the adverse effect of a lot's proximity to a quarry and in the absence of an explanation to support the percentage deduction. The appellate court held the deduction sustainable, and not unreasonable or arbitrary, because "it was so clearly logical and reasonable that the value" of the assessed property was affected. Id. at 414. Moreover, the record contained expert testimony quantifying the effect the quarry had on the value of the land.

This court finds that as of each valuation date the subject property's assessment appears to represent value measured as if it existed as a buildable lot, which is against the weight of the evidence. Considering the limited use of the subject property akin to encumbered land based on its landlocked condition, the court finds a fifty percent adjustment is reasonable. The court will apply plaintiffs' expert's frontage adjustment to all comparable sales on which it relies in making a determination of value. Where the court's analysis includes plaintiffs' expert's comparable sales,

the location and lot size adjustments as calculated by plaintiffs' expert will be applied as well, to reach an adjusted sales price as to each property.[5]

There are five comparable sales illustrated below on which both experts relied ("common sale"). Common sale one: 162 Washington Avenue, West Caldwell; common sale two: 111 Winding Way, Cedar Grove; common sale three: 28 Cliff Street, Verona; common sale four: 11 Fellswood Drive, Verona; and common sale five: 14 Crossbrook Lane, West Caldwell.[6]

Additionally, defendant relied on 56 Undercliff, West Orange, and 46-48 Durell, Verona. Plaintiff also relied on the sale of 65 Stevens Avenue, Cedar Grove. The sales prices of the properties ranged from a low of $200,000 to a high of $295,000. The court finds all sales used by the experts serve as credible evidence of the true market value of the subject property and will rely on all but one of these transactions. Reliance will be placed on those sales closest in time to the relevant valuation date, as noted infra. Notably, defendant's comparable sale at 8 Locust Street, Nutley, sold for $175,000 appears to be an outlier and will not be considered by the court**.**

For the 2010 tax year, the court relies on common sales one and two, as well as defendant's sale at 46-48 Durell, Verona. Common sale one, sold in March 2009 for $257,500. A downward forty-five percent net adjustment (frontage and lot size) produces an adjusted sales price of $141,625. Common sale two, sold in May 2009 for $215,000. The same adjustment produces an adjusted sales price of $118,250. Defendant's sale at 46-48 Durrell Street, Verona, sold on October 8, 2008 for $225,000. After application of a downward fifty percent frontage adjustment, the

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[5] Defendant disagreed with the frontage adjustment applied to each comparable sale property since plaintiff's expert applied the same fifty percent adjustment without consideration of the property's actual frontage. The court finds that the amount of frontage attributable to the comparable sales is irrelevant where all comparable sales were sales of buildable lots.

[6] The square footage of the common sales varied slightly between the experts but has no effect on this court's opinion.

adjusted sales price is $112,500. In tax year 2010, the adjusted sales prices considered by the court, range from lowest to highest: $112,500; $118,250; and $141,625. After according each sale equal weight, the court concludes the true market value of the subject property for the 2010 tax year, as of the October 1, 2009 valuation date is $130,000.

For tax year 2011, the court relies on common sales one, two, three and four. As set forth above, common sale one's adjusted sales price is $141,625, and common sales two's adjusted sales price is $118,250. Common sale three, sold in March 2010 for $200,000. A net adjustment of downward forty-five percent (frontage and lot size) produces an adjusted sales price of $110,000. Common sale four, Verona, sold in April 2010 for $295,000. After a fifty percent downward net adjustment (location, frontage and lot size) the adjusted sales price is $147,500. In summary, the adjusted sales prices considered by the court, range from lowest to highest: $110,000; $118,250; $141,625; and $147,500. According each sale equal weight, the court concludes the true market value of the subject property for tax year 2011, as of the October 1, 2010 valuation date is $135,000.

For the 2013 tax year, the court relies on common sales three, four and five. Common sale three, which sold for $110,000 as adjusted, and common sale four, which sold for $147,500 as adjusted, are both set forth above. Common sale five, sold in November 2011 for $265,000. After a downward forty-seven and one half percent net adjustment (frontage and lot size) the resulting adjusted sales price is $139,125. The court relies as well on plaintiff's sale at 65 Stevens Avenue, Cedar Grove, sold in March 2011 for $250,000 and defendant's sale at 56 Undercliff Terrace, West Orange, sold in November 2011 for $230,000. After adjustments, the sales prices are $150,000 (downward forty percent net adjustment for location and frontage) and $115,000 (downward fifty percent frontage adjustment only), respectively. For tax year 2013, the range of adjusted sales

prices is $110,000; $115,000; $139,125; $147,500 and $150,000. Eliminating the high and the low then according each remaining sale equal weight, the court concludes the true market value of the subject property for tax year 2013, as of the October 1, 2012 valuation date is $135,000.

Having concluded true market value of the subject property, the court will next determine the correct assessment for the tax years 2010, 2011 and 2013. When the court is satisfied by the proofs that "the ratio of the assessed valuation of the subject property to its true value exceeds the upper limit or falls below the lower limit of the common level range, it shall enter judgment revising the taxable value of the property by applying the average ratio to the true value of the property. . . ." N.J.S.A. 54:51A-6(a). This statute, commonly known as Chapter 123, involves application of the common level range under N.J.S.A. 54:1-35a(b). Where both the average ratio and the ratio of assessed value to true value of the subject exceed the county percentage level, or 1.00, the court shall enter judgment revising the assessment by applying the county percentage level to the property's true market value. N.J.S.A. 54:51A-6(c). Finally, Chapter 123 does not apply to review of an assessment in a tax year in which the taxing district conducted and implemented a district-wide revaluation program. N.J.S.A. 54:51A-6(d).

Since 2010 was a revaluation year, Chapter 123 does not apply. The assessment for 2010 equals true market value, or $130,000.

Defendant's Chapter 123 common level range for 2011 and 2013, assessed value, the court's true market value and ratio of assessed value to true market value are as follows:

	Chapter 123 ratio			Assessed value	True market value	Ratio of assessed value to true value
	Average	Lower limit	Upper limit			
2011 tax year	94.55%	80.37%	108.73%	$238,700	$135,000	1.76
2013 tax year	100.67%	85.57%	115.77%	$238,700	$135,000	1.76

Because the ratio of assessed value to true value exceeds the township's average ratio for tax years 2011 and 2013, the court will apply the average ratio to true value to arrive at the assessment.

For tax year 2011 the assessment is $130,000 (calculated as follows: $135,000 x .9455 = $127,642, rounded to $130,000).

For tax year 2013 the assessment is $135,000 (calculated as follows: $135,000 x 100 = $135,000).

The clerk of the court is directed to enter judgment reducing the subject property's assessments for 2010, 2011 and 2013 in accordance with the findings of the court.