

NO. CV 04 4000794S : SUPERIOR COURT
FRANK GULIA, JR., TRUSTEE : JUDICIAL DISTRICT OF
 : FAIRFIELD AT BRIDGEPORT
v.
CITY OF BRIDGEPORT, ET AL. : JANUARY 11, 2010

MEMORANDUM OF DECISION

This is a real estate tax appeal involving the valuation of a marina located at 86 Bostwick Avenue in the city of Bridgeport (city). The marina is located on the Black Rock Harbor end of Bostwick Avenue and fronts on Cedar Creek. This three-count amended appeal was filed on July 23, 2009.¹

Count one is a General Statutes § 12-117a appeal challenging the assessment of the subject marina on the revaluation date of October 1, 2003 “and for each successive assessment year thereafter.” Count two is a General Statutes § 12-119 appeal contending that on October 1, 2003 and each year thereafter, the assessment of the subject property was “manifestly excessive, discriminatory . . . and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of each such property in violation of C.G.S. 12-119.” Count three is a claim that the assessor made a separate assessment for the “floating docks” pursuant to § 12-117a.

¹

See entry number #142 in file.

The plaintiff, Frank Gulia, Jr., Trustee (Gulia), is the owner of the subject marina.² The marina is operated by Cedar Marina, Inc., a corporation in which Frank Gulia, Jr. and his two sons are the stockholders and officers. The subject site is triangular in shape and contains approximately 1.93 acres which includes the land, water area and riparian rights of the marina. There are four floating docks with 59 finger docks providing 136 boat slips. The floating docks are constructed of wood and vary in condition from average to poor. All of the docks have potable water for consumption by boaters. The larger slips also have electrical hook ups. There is also a large travel lift and boat well for hauling larger boats out of the water.

The subject property contains various buildings: 1) a warehouse, containing approximately 1,320 square feet, in average condition; 2) a fast food snack bar that is currently in disuse; 3) two small storage sheds containing approximately 200 square feet each, in fair condition; and 4) two restroom facilities. The subject site contains all of the public utilities such as water, sewer, electricity, natural gas and telephone service.

²

See memorandum of decision, dated October 31, 2008, denying defendant's motion to dismiss and concluding that since no trust existed, Frank Gulia, Jr. and Frank Gulia, Jr., Trustee, were one and the same.

The subject property is located within a light industrial zone where marinas are a permitted use by special permit. Parking for marina customers is located on the subject property and along Bostwick Avenue.

An asphalt plant owned by O & G Industries, Inc. (O & G) is located adjacent to the easterly side of the subject property and on Cedar Creek. O & G has a 25-foot easement along the easterly side that has no negative effect on the use of the subject. Barges bring in bulk shipments of materials and remove asphalt produced at the O & G plant. Asphalt production and the off-loading of material from the barges creates an odor and dust that has a negative impact on the use of the marina.

There is a city-owned sewage treatment plant known as the Water Pollution Control facility directly across Bostwick Avenue, from the westerly side of the subject. It occasionally produces an undesirable odor. Directly across from the Cedar Creek channel is a landfill that occasionally produces an odor. Rodents from the landfill sometimes swim across the channel to the subject property.

To the southwest of the subject and in close proximity, there is a large marina called Captain's Cove. As noted by plaintiff's appraiser, Norman Benedict (Benedict), Captain's Cove "presents substantial competition and notably better quality than the appraised. This facility is a full-service marina with slips for over 400 boats. Showers and laundries are located in the rear building, while gasoline and diesel fuel, engine oil and

ice are available through the dock master in the commercial dock area. It provides a full compliment of a restaurant, board walk, shops, charter busses and even a heliport.”
(Plaintiff’s Exhibit 5, p. 37.)

The city’s assessor determined that the fair market value of the subject property for the Grand List of October 1, 2003 was \$1,286,900. However, the plaintiff’s appraiser Benedict reported that, in his opinion, the fair market value of the subject, as of October 1, 2003, was \$540,000. Michael Fazio (Fazio), the city’s appraiser, reported that the fair market value of the subject property, as of October 1, 2003, was \$1,500,000.

As Benedict notes, Cedar Creek is a predominately industrially-oriented waterway, not oriented for marine recreational boaters with the exception of the contiguous marina. See plaintiff’s Exhibit 5, p. 38.

Both appraisers concluded that the highest and best use of the subject was for a marina and both appraisers used the sales comparison approach and the income capitalization approach in arriving at what they considered to be the fair market value of the subject, as of October 1, 2003.

In arriving at his opinion of value, Benedict used the sales comparison approach and the income capitalization approach. He weighted the sales comparison approach at 45% and the income capitalization approach at 55%.

In looking at comparable sales of marinas, Benedict considered the per acre value of the land rather than the per slip value of marinas as being more accurate in determining the fair market value of the subject. Benedict did not place any value on the floating docks since, in his opinion, floating docks were personalty, not realty. In support of this conclusion, Benedict notes that “the docks which float on the water are no more considered as part of the real estate than the owner’s boat which is connected to them, and likewise floats and could be equally moved away without damage. In summary, the description presented in the following, as well as our valuation analysis as a whole, pertains solely to the real property.” (Plaintiff’s Exhibit 5, p. 43.)

Benedict further describes the land area as follows: “The land area attributable to the property appraised, as defined by the Upland or ‘dry area’, measures 0.67 acres or 29,054.52 square feet. The total area attributable to the site, including both Upland and water areas, and any and all riparian rights which are pertinent to the property, according to the Assessor, measure 1.93 acres or 84,070.80 square feet.” (Plaintiff’s Exhibit 5, p. 44.)

Before proceeding to the analysis of the opinions of the appraisers on the issue of fair market value and the appropriate methodologies used to establish that value, it is necessary to resolve the issue raised by Benedict as to whether the docks and fingers located on the subject property are personalty or realty.

The law dealing with the issue of whether floating docks and finger piers are real property or personal property is set forth in Vallerie v. Stonington, 253 Conn. 371, 372, 751 A.2d 829 (2000) as follows: “[The court] must first look at whether the docks and [finger piers] are fixtures. If they are fixtures, the personalty becomes part of the property and they are considered realty. To constitute a fixture, we must look at the character of how the personalty was attached to real estate, the nature and adaptation of the docks and [finger piers] to the uses and purposes to which they were appropriated at the time the annexation was made, and whether the annexer intended to make a permanent accession to the realty. The character of the personal property attached to the real estate is determined at the time that the property is attached to the real estate.” (Citations omitted; internal quotation marks omitted.)

Fazio notes that “[t]here are four floating docks with 59 finger docks, providing 136 slips. It should be noted that the marina advertises the ability to accommodate either 175 or 200 boats in the water, but the owner indicated that there is only 136 slips that are useable. These are constructed of wood and vary in condition from average to poor. All the docks have water available on them, while the larger slips have electrical hook ups.” (Defendant’s Exhibit C, p. 14.)

In his appraisal report, Fazio provides photographs with various views from the marina including the concrete bulkhead, the inner, middle and outer docks (which shows

what appears to be permanently installed pilings at each slip supporting the wooden docks). These are all connected to the upland containing the concrete bulkhead.³

No evidence has been introduced in the conduct of this trial that would shed any light on the intent of the parties at the time of the installation of the finger docks and boat slips to make the docks and piers a permanent attachment to the realty. However, considering the intent of the parties at the time of the installation of the finger docks and boat slips, the easement agreement recorded in the Bridgeport land records on June 9, 1962, between Tidewater Oil Company (Tidewater) and Frank and Margaret Gulia, the previous owners of the subject, sheds some light on this issue.⁴ The easement agreement granted a twenty-five foot easement on the Gulia property running along the bulkhead of Tidewater's southerly boundary line. The following language imbedded within the easement agreement is of particular importance to the issue of intent:

“In the event that it becomes necessary or desirable, in the sole discretion of the First Party [Tidewater] and in order to accomplish any of the work above described, the First Party may remove any wharves, docks, floats, moorings, piles, spiles, piers, boats or vessels of any type, or other material, property or equipment located upon the lands of the

3

See defendant's Exhibit C, pp. 44-51; see also plaintiff's Exhibit 5, p. 18, showing a view of the bulkhead area and a general view of the dock area with the wooden docks at the pilings in the water (separating the slips as well as a utility pole attached to the dock).

4

See plaintiff's Exhibit 5, addenda.

Second Party [Frank and Margaret Gulia], or owned or maintained, or located, or permitted to be located, by the Second Party below mean high water mark, as may be necessary to properly accomplish the aforesaid work. The First Party agrees that upon the completion of said work it will promptly, and at its own expense, replace all of said wharves, docks, floats, mooring, piles, spiles, piers or other material, property or equipment which may have been removed or displaced by the First Party, its agents or employees.”

The linking of the replacement of “wharves, docks, floats, mooring, piles, spiles, piers” in 1962 shows that the Gulias had an awareness to treat such elements of a marina as part of the real property and not as personal property. In addition, there was no evidence that Frank and Margaret Gulia or their son, Frank Gulia, Jr., ever filed a declaration with the assessor claiming the finger docks and boat slips to be personal property.⁵

The court in Valerie v. Stonington, 253 Conn. 373, noted the following facts to support a finding that floating docks and finger piers were fixtures and not personal property: “The docks have fresh water and electricity available to boats using the slips. The river has a depth of ten feet at the subject premises. The docks and the slips remain in

5

See plaintiff’s Exhibit 3, the 2005 Personal Property Audit Report, excluding any reference to docks and boat fingers as personal property.

the water throughout the year. The docks are used to get to the [finger piers] which contain the boat slips. The slips are on open water. The docks and slips float up and down with the tide but are kept in place with seventy to eighty pilings in the river. The docks are attached to bulkheads which are imbedded in concrete. The docks contain utility stanchions with lights that act as street lights.”

In the present case, Benedict testified that the water depth near the docks was eight to ten feet and the mean channel depth was thirty-five feet. Benedict further noted that “[t]he land appraised does provide sufficient depth for navigation and functional utilization as a marina.” (Plaintiff’s Exhibit 5, p. 46.) From the photographs of the subject in Benedict’s appraisal report, the slips appear to be on open water; the docks are connected to the bulkheads imbedded in concrete; stanchions for utilities are located on the finger docks. Furthermore, there was no evidence that the finger docks and boat slips were ever removed during the off-season, nor was there any indication from the testimony of the plaintiff, Frank Gulia, or the appraisers, that the docks and boat slips were taken out of the water during the winter season.

The trial court in Vallerie v. Stonington, 253 Conn. 374, concluded as follows: “[T]here was no evidence presented to us that the annexer ever claimed that the docks and [finger piers] were personalty as did Norwest when it acquired title in 1995. There was also no evidence presented that the annexer meant the docks and piers to be

temporary structures. The main business conducted on the subject premises is that of a marina as a going concern. The marina business at the premises is structured on having docks and finger piers attached to the land by bulkheads and concrete walks, running out into the Pawcatuck River, containing stanchions providing amenities such as electricity and water to the slips, supported by pilings driven into the bed of the river. All of these factors cause us to conclude that the intent of the annexer was to make the docks and [finger piers] a permanent fixture to the land.” (Internal quotation marks omitted.)

Based upon this analysis, the court concludes that the subject docks and boat piers are fixtures attached to the land, and therefore, are part of the realty.

Turning to the process by which the appraisers arrived at their determination of fair market value of the subject as of October 1, 2003, it should be noted that each appraiser, in the use of the market sales approach, applied a different concept of valuation. Therefore, their selection of comparable sales involved separate issues.

Benedict based his valuation of the subject marina, using the sales approach, on a per acre price of the comparable sale. That is, Benedict selected sales of marinas and then divided the adjusted sales price by the acreage of the comparable to arrive at a per acre price. In this case, Benedict concluded that the price per acre of marinas was \$750,000, which, when multiplied by the acreage of the subject upland at 0.67 acres, resulted in a

market value, as of October 1, 2003, at \$502,500, rounded to \$500,000. See plaintiff's Exhibit 5, p. 89.

Benedict's process of analysis is reflected in the following comment:

"The Sales Comparison Approach has been completed. Both the Overall Market Comparison Technique and the Individual Market Comparison Technique have been considered. The Overall Market Comparison Technique has been developed. This is because there is adequate data for its reliable completion, and because it represents sales occurring within a broad regional real estate market. This market has a diversity of varying zoning and economic market conditions.

"The Overall Market Comparison Technique is defined as follows:

A valuation technique, within the Sales Comparison Approach, in which the appraised land or property is compared to individual sales prices of three or more similar land or property sales. Differences are adjusted for and a value indication for the appraised property is developed."

(Emphasis in original.) (Plaintiff's Exhibit 5, p. 80.)⁶

To this end, Benedict saw the market for marinas as it flowed through time.

Benedict was looking for trends and trying to understand how buyers and sellers of

6

The sales comparison approach has been defined as: "A set of procedures in which a value indication is derived by comparing the property being appraised to similar properties that have been sold recently, applying appropriate units of comparison, and making adjustments to the sale prices of the comparables based on the elements of comparison. The sales comparison approach may be used to value improved properties, vacant land, or land being considered as though vacant." The Appraisal of Real Estate (12th Ed. 2001) p. 417.

marinas reacted. However, a trend analysis is unnecessary, in this case, in view of the number of marina comparables selected by both Benedict and Fazio.⁷

Benedict considered the use of land values per acre of marinas more accurate than the value of marinas on a price per slip basis. In his land sales adjustments, Benedict adjusted groups of sales, rather than individual sales, by arriving at a median and mean. He weighted the median adjustments at 40% and the mean adjustments at 60%. See plaintiff's Exhibit 5, p. 89.

However, Benedict's use of price per acre rather than price per slip as a unit of valuation of marinas is at odds with the position he took in French v. Clinton, 215 Conn. 197, 201, 575 A.2d 686 (1990) (“[a]t trial, the plaintiffs’ appraiser, Norman Benedict, testified that the fair market value of the taken property was \$675,000, calculated on the basis of a formula of \$7,500 per potential boat slip. Benedict testified that he reached the \$7,500 per slip figure after studying the recent sales of ten area marinas, with a particular focus on three that he regarded as most similar to the marina proposed in this case. . . .”).

7

Trend analysis is defined as “[a] quantitative technique used to identify and measure adjustments to the sale prices of comparable properties; useful when sales data on highly comparable properties is lacking, but a broad database on properties with less similar characteristics is available. Market sensitivity is investigated by testing various factors that influence sale prices.” *The Appraisal of Real Estate* (12th Ed. 2001) p. 440.

Fazio, on the other hand, based his valuation on the price per slip of the comparable sale of marinas. As an example, Fazio took the sale price of the comparable sale, adjusted the sale and then divided this amount by the number of boat slips to arrive at a value per slip. As a result of this process, Fazio multiplied the number of boat slips at the subject — 136 — by the adjusted value per slip of \$11,000, to arrive at his final valuation of \$1,496,000, rounded to \$1,500,000. See defendant’s Exhibit C, p. 29.

In the process of determining the market for commercial property, such as marinas, the characteristics of the comparable sales, as compared to the subject property, must be considered. The characteristics of the comparable is relevant to “adjust the sale price of each comparable transaction as necessary to make the ‘comparable’ sale price more comparative to the subject property—or, if necessary, eliminate the less comparable sale transactions from consideration as meaningful valuation evidence.” Reilly, Robert F., and Robert P. Schweihs. *Guide to Property Tax Valuation*. New York: Willamette Management Associates, 2008, p. 69. When considering commercial real estate, the relevant units of comparison are commonly price per square foot; price per cubic foot (warehouses); price per room (hotels and motels); price per bed (hospitals and nursing homes); price per seat (theaters). See *id.*

Contrary to Benedict’s selection of the price per acre as a unit of measurement, Fazio selected the price per boat slip as the unit of measurement for the valuation of

marinas. Recognizing that marinas derive their value from the rental of boat slips, it is necessary to investigate “comparable sales and rentals of competitive income-producing properties of the same type in the same market.” *The Appraisal of Real Estate* (12th Ed. 2001) p. 501. For these reasons, it is more credible to use a valuation unit that is more related to the business of the subject as a marina, such as the rental of boat slips, rather than a broad reference to price per acre that does not consider the uniqueness of marinas. Benedict’s selection of a per acre valuation unit rather than a per slip unit ignores the fact that it is the rental of boat slips at marinas that creates the marina values, not the size of the land.

Marinas basically rent dockage spaces for pleasure boats deriving an income therefrom plus whatever additional income can be derived from boat storage, boat repairs and services. In addition, marinas are unique in that they border watercourses with riparian rights that give the upland owner the right to use the bordering watercourse. For example, in Lupo v. Bd. of Assessors, 10 Misc. 3d 473, 479, 799 N.Y.S. 2d 405 (2005), the court noted that “[i]t is well settled that an upland owner has the riparian right of free ingress to and egress from abutting navigable water, including the right to install dockage for such purpose.” (Citation omitted.) The Lupo court further noted that the town assessor valued the marina at issue in the case by using the market value per boat slip derived from statewide and regional marine sales data. See *id.*, 476.

Referring to the comparable sales selected by both Benedict and Fazio, only Fazio related the value of the subject to a unit price of the boat slips. Benedict's appraisal report, plaintiff's Exhibit 5, is devoid of any mention of a per slip value. Because the court concludes that the unit value of measurement in the valuation of the subject marina should be on a per slip basis rather than a per acre basis, it is difficult to consider any of the comparable marina sales that Benedict selected on a per acre basis.

Benedict and Fazio selected three of the same comparable marina sales. The one difference was that Fazio identified the number of boat slips comprising each sale while Benedict did not.

In his comparison of marina sales, Fazio used the location of the subject in relationship to other comparables as a key factor. All parties recognize that the subject marina is located on 0.67 acres of upland sandwiched between a city sewer facility and an asphalt-producing plant which are all located in an industrial zone. Fazio's adjustment of his comparables for location shows a downward adjustment of 40% for 160 Water Street, Norwalk; an upward adjustment of 20% for 29 Essex Road, Old Saybrook; and zero adjustments for Stony Point/Cottage Road in Clinton/Madison and 33 Indian Drive, Clinton.

In his analysis of the location adjustments, Fazio noted that 160 Water Street, Norwalk was in a better location commanding a higher slip rental rate and noted that the Old Saybrook sale was located in an inferior location because of access to Long Island Sound. Fazio made no adjustment for the subject's location between two undesirable neighbors. As a matter of fact, Fazio noted in his appraisal report, defendant's Exhibit C, p. 13, in contradiction to the facts in this case, that there were no major flaws in the site. One look at the site description photo in Fazio's appraisal report, defendant's Exhibit C, p. 11, shows that there is a small upland portion of the site crowded with boats, with no room for on-site parking and with the balance of the subject consisting of docks and finger piers located in the riparian area of Cedar Creek.

Given the deficiencies that exist at the subject site, it is significant to note Benedict's analysis of the marina sales business: the subject business increased over the years with the 2003 year producing a gross income higher than previous years.⁸ It is

8

See Benedict's appraisal report, plaintiff's Exhibit 5, p. 63: "Three analyses have been made of the income and expenses which have been generated for the time period of 1999 through 2003 On the following page is a summary of the income produced in the individual years of 1999, 2000, 2001, 2002 and 2003. The Gross Income is presented as well as other income. The totality of the income is calculated and presented annually. The viewing of the information shows a constant increase from a comparatively modest sum in 1999 of \$187,324 to a substantially greater sum in 2003. The income for this year totals \$711,472. The Mean value is \$428,736. This Mean value is presented because it shows that the first three years of income were below what was typical. It also shows that the gain in value in the last two years was sufficient to offset the incomes in the prior three years. This infers that the gain in income is an upward trending parabolic curve. This is confirmed by graphing this

difficult to rationalize the upward trend in business for the subject marina and Benedict's comment: "The reader is warranted to be aware there are influences within the immediate neighborhood of the property appraised which bear a negative influence on it. This is from a direct capacity. The most recognizable is [the O & G] plant to its east. Also worthy of note is a sewage treatment plant across the street. Finally, a problem with rodents and other small animals that swim across the creek from the opposite side of Cedar Creek also detracts from the value of the location. Each of these are important because they directly influence property value." (Plaintiff's Exhibit 5, p. 39.)

Benedict concludes that the sewage treatment plant and the O & G asphalt plant have a negative impact on the subject property, since, as Benedict notes that "[i]t is reasonable to assert that the negative influences derived from the [O & G] plant and the sewage treatment plant, much less the possibility of rodents, degrades what the typical weekend boater might define as the ideal boating experience. The end result is a decrease in the demand for the appraised's facility by contrast to others. Inasmuch as it is reasonable to assert that value is a direct influence of the greater demand versus supply of available facilities, this decrease in demand for the appraised, due to the influence of surrounding factors, can only be viewed negatively from an income generating and value perspective." (Plaintiff's Exhibit 5, p. 40.)

income data."

Outside of Benedict's comments about the negative impact of these external influences on the subject marina, there is no evidence to quantify this impact other than Benedict's comment that it is reasonable to assume a decrease in price per boat slip rentals for the subject when comparing it to other similar marina slip sales. However, a decrease in the price of boat slips, applicable to the subject marina because of external factors, is offset by Benedict's opinion that the gross earnings of the subject increased from a modest amount of \$187,324 in 1999 to \$711,472 in 2003. See plaintiff's Exhibit 5, p. 63. This change would indicate that the external factors Benedict described have little or no effect on the operation of the subject marina.

The market sales of marinas based upon a per slip value, as selected by Fazio, are as follows:

160 Water Street, Norwalk, containing 1.90 acres and 100 boat slips.
Sold on January 4, 2002 for \$2,000,000.
Three buildings totaling 14,984 square feet.
Slip rentals in 2003 were \$100-110 per foot, including utilities.

29 Essex Road, Old Saybrook, known as Brewer Ferry Point Marine, containing 4.8 acres and 140 boat slips.
Sold on June 1, 2001 for \$1,200,000.
Contains a small cottage with slip rentals in 2003 at \$60-65 per foot, including utilities.

Stony Point Road, Clinton and Cottage Road, Madison, known as Hammonasset River and Heritage Harbor Marinas, containing 6.1 acres for both parcels and 90 total boat slips.
Sold on May 13, 2003 for \$900,000.

Consists of two marinas located on opposite sides of the Hammonasset River and sold as a package.

Slip rentals in 2003 were \$55-60 per foot, including utilities.

33 Indian Drive, Clinton, known as Port Clinton Marina, containing 2.15 acres and 90 boat slips.

Sold on January 5, 2001 for \$900,000.

Contains a small cottage.

Slip rentals in 2003 were approximately \$70 per foot.

It is significant to note that, except for 160 Water Street, Norwalk (with 100 boat slips renting at \$100-\$110 per foot), Fazio selected marinas with 2003 slip rental prices between \$55 to \$70 per foot, including utilities.

Fazio determined that the average slip rental of the three marinas was between \$55 to \$70 per foot which compares fairly close to Fazio's breakdown of the price of slip rentals between \$45 to \$80 per foot for the subject. See defendant's Exhibit C, p. 36.

Turning to the income approach that both appraisers utilized, it is first necessary to consider, whether, in the face of adequate comparable sales selected by both Benedict and Fazio, it is appropriate to consider this approach to value. The reason for this inquiry is that General Statutes § 12-63b, regarding the valuation of rental income real property, prior to its amendment pursuant to Public Act (P.A.) 09-196, provided as follows:

“(a) The assessor or board of assessors in any town, when determining the present true and actual value of real property as provided in section 12-63, which property is used primarily for the purpose of producing rental income . . . and with respect to which property there is insufficient data in such town based on current bona fide sales of comparable property which may be considered in determining such value, shall determine such value on the basis

of an appraisal which shall include to the extent applicable with respect to such property, consideration of each of the following methods of appraisal: . . . (1) Replacement cost less depreciation . . . , (2) the gross income multiplier method . . . and (3) capitalization of net income based on market rent for similar property.”

In PJM & Associates, LC v. Bridgeport, 292 Conn. 125, 148-49, 971 A.2d 24

(2009), the Supreme Court interpreted General Statutes § 12-63b to mean that an assessor, when determining the fair market value of property which is used primarily for the purpose of producing rental income, may turn to the income capitalization approach only in the absence of adequate comparable sales.

Where, as in this case, there are adequate comparable sales, it would be inappropriate for the court, in light of the holding in PJM, to consider the income approach to value.

There is a dichotomy between the obligation of the trial court, once aggrievement has been found, to determine the fair market value of the assessed property (General Statutes § 12-63)⁹ and the restriction on the assessor not to use the income capitalization approach to value if there are sufficient comparable sales to make such a finding of value (General Statutes § 12-63b). This dichotomy occurs because, according to our case law,

⁹

“If a taxpayer is found to be aggrieved by the decision of the board of [assessment appeals], the court tries the matter de novo and the ultimate question is the ascertainment of the true and actual value of the applicant’s property. (Internal quotation marks omitted.) Breezy Knoll Assn., Inc. v. Morris, 286 Conn. 766, 776, 946 A.2d 215 (2008).

“[n]o one method of valuation is controlling and . . . the [court] may select the one most appropriate in the case before [it] [T]he trier arrives at his own conclusions by weighing the opinions of the appraisers, the claims of the parties, and his own general knowledge of the elements going to establish value, and then employs the most appropriate method of determining valuation” (Internal quotation marks omitted.) Sheridan v. Killingly, 278 Conn. 252, 259, 897 A.2d 90 (2006).

The issue posed by this dichotomy is whether the trial court, on a de novo hearing of a tax appeal, is bound by the same restriction contained in § 12-63b that prohibits an assessor from considering the income approach to value when there are a sufficient number of sales in the market of comparable properties to make such a determination of value on that basis alone. In other words, has the legislature, by the enactment of § 12-63b, precluded the use of the income approach under any circumstances, when there are sufficient comparable sales of the subject property to form an opinion of fair market value. The recent legislative enactment of P.A. 09-196 is key to answering this question.

Public Act 09-196 repealed § 12-63b and substituted new language which provides, effective October 1, 2009, and applicable to assessment years commencing on or after October 1, 2009, as follows: “(a) The assessor or board of assessors in any town, at any time, when determining the present true and actual value of real property as provided in section 12-63, which property is used primarily for the purpose of producing rental

income . . . shall determine such value on the basis of an appraisal which shall include to the extent applicable with respect to such property, consideration of each of the following methods of appraisal: (1) Replacement cost less depreciation, plus the market value of the land, (2) capitalization of net income based on market rent for similar property, and (3) a sales comparison approach based on current bona fide sales of comparable property.”

Because the present action was commenced prior to the enactment of P.A. 09-196, the question presented is whether the addition of the sales comparison approach to § 12-63b is retroactive.

“Whether to apply a statute retroactively or prospectively depends upon the intent of the legislature in enacting the statute. . . .” Flanagan v. Blumenthal, 100 Conn. App. 255, 259, 917 A.2d 1047 (2007). In construing the intent of the legislature, where the effect of the statute is procedural, it will be construed to apply retroactively; however, if the effect of the statute is substantive, the statute will be considered to act prospectively. Id., 259-60.

The change in § 12-63b, adding the market sales method of valuation for the assessor to consider when dealing with income producing property, is a clear indication that the intention of the legislature was to make a substantive change to § 12-63b, as

noted in PJM.¹⁰ Here the legislature made it perfectly clear that the effective date of this statutory change was to apply “to assessment years commencing on or after October 1, 2009,” not to assessment years prior to that date. Clearly, P.A. 09-196 has no retrospective application to the facts in this case.

Returning to plaintiff’s valuation issue, the adjusted sales price for the Stony Point/Cottage Road marinas and the Port Clinton marina differed from the subject only as to the market condition required to sell, whereas the unadjusted price per slip value, as determined by Fazio in his sales analysis (see defendant’s Exhibit C, p. 29), ranged between \$8,571.43 for the Brewer Ferry Marina to \$10,000 for the Stony Point/Cottage Road marinas and \$10,000 for the Port Clinton Marina.

These sales were fairly close to the valuation the assessor placed upon the subject property at \$1,286,900. The assessor’s valuation, as of October 1, 2003, when divided by 136 rental boat slips, results in a per boat slip value of \$9,463. Recognizing that the valuation of real estate is more of an approximation rather than a precise method of ascertaining value, the court cannot conclude that the assessor overvalued the subject marina, and therefore, it cannot find that the plaintiff is aggrieved by the action of the

¹⁰

It should also be noted that P.A. 09-196, while adding the “sales comparison approach” method of valuation, specifically excluded “the gross income multiplier method” from being used by the assessor in determining fair market value for assessment purposes.

assessor. See Carol Management Corp. v. Board of Tax Review, 228 Conn. 23, 39-40, 633 A.2d 1368 (1993).

The plaintiff, in support of its § 12-119 claim that the assessor acted illegally, cites to Griswold Airport, Inc. v. Madison, 289 Conn. 723, 740, 961 A.2d 338 (2008), in its post-trial brief dated October 14, 2009 (hereinafter referenced as plaintiff's 10/14/09 post-trial brief). In Griswold Airport, the court quoted from Second Stone Ridge Cooperative Corp. v. Bridgeport, 220 Conn. 335, 339, 597 A.2d 326 (1991), explaining that “[i]n short, § 12-117a is concerned with overvaluation, while ‘[t]he focus of § 12-119 is whether the assessment is illegal.’”

The plaintiff addresses the § 12-119 claim as follows:

“Plaintiff’s C.G.S. § 12-119 claim, that the assessment is manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of the property is supported by: the Defendant’s objection to the submission of the tax assessors deposition as a full exhibit; both appraisers rejecting the tax assessor’s certified assessment; and the tax assessor’s failure to take into account the numerous detrimental conditions to which the Plaintiff’s marina is subject. This evidence leads to the conclusion that either ‘there was misfeasance or nonfeasance by the taxing authorities, or the assessment was arbitrary or so excessive of discriminatory as in itself to show a disregard of duty on their part.’ Mead v. Greenwich, 131 Conn. 273, 275, 38 A.2d 795 (1944).”

(Plaintiff’s 10/14/09 post-trial brief, p. 13.)

The mere fact that the assessor did not credit the plaintiff’s claim that it is located near negative influences, such as the sewage treatment plant and O & G, and therefore the

subject's valuation was not reduced, does not implicate the assessor's authority or support a claim of misfeasance or nonfeasance on the part of the assessor. As noted in Stepney Pond Estates, Ltd. v. Monroe, 260 Conn. 406, 421, 797 A.2d 494 (2002), "[t]his court also has held that § 12-119 generally is not a substitute for a timely appeal to a board of tax review pursuant to [General Statutes (Rev. to 1993) § 12-111] . . . [but] requires an allegation that something more than mere valuation is at issue." (Internal quotation marks omitted.)

The only evidence introduced in this action addresses the valuation of the marina, not the misfeasance or nonfeasance of the assessor. With the lack of such evidence supporting the plaintiff's claim that the assessor committed an illegal act in the performance of his duties, the plaintiff has not carried his affirmative duty of proving such facts that are in dispute. This burden of proof is a "burden which rests upon every party to a cause of going forward with the evidence *if it is in dispute*." (Emphasis in original; internal quotation marks omitted.) Thalheim v. Greenwich, 256 Conn. 628, 651, 775 A.2d 947 (2001).

In summary, the plaintiff has failed to sustain his burden of showing that the assessor's valuation of the subject marina at \$1,286,900, as of October 1, 2003, was excessive and has failed to prove that the assessor's action in regard to setting the valuation was illegal.

Accordingly, judgment may enter in favor of the defendant on all counts, denying the plaintiff's appeal, without costs to either party.

Arnold W. Aronson
Judge Trial Referee