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REDDING LIFE CARE, LLC *v.* TOWN OF REDDING
(SC 18921)

Norcott, Palmer, Zarella, Eveleigh, Harper, Vertefeuille and Lavine, Js.*

Argued April 26, 2012—officially released March 12, 2013

William S. Fish, Jr., with whom were *William H. Champlin III* and, on the brief, *Heidi Hamilton*, for the appellant (plaintiff).

Elliott B. Pollack, with whom was *Tiffany K. Spinella*, for the appellee (defendant).

ZARELLA, J. The plaintiff, Redding Life Care, LLC, appeals from the judgment of the trial court denying its appeal from the decision of the board of assessment appeals of the defendant, the town of Redding (town), which upheld the assessor's valuation of the plaintiff's property. The plaintiff claims that the trial court improperly concluded that (1) it failed to establish aggrievement under General Statutes § 12-117a[1] because the going concern income capitalization approach applied by the plaintiff's expert to value the property was not a permissible valuation method under Connecticut law, and (2) the town's assessment of the property was not manifestly excessive under General Statutes § 12-119[2] despite its reliance on assumptions regarding income that it knew to be untrue and, if corrected, would have reduced the fair market value of the property by more than $30 million. The town responds that the trial court properly concluded that the plaintiff did not establish aggrievement and that the town may use hypothetical conditions in calculating the fair market value of a property. We agree with the town and, accordingly, affirm the judgment of the trial court.

The following relevant facts and procedural history are set forth in the trial court's memorandum of decision. The plaintiff is a for-profit limited liability company that purchased the subject property consisting of 133.62 acres in August, 1998, for the purpose of developing Meadow Ridge, an entry fee continuing care retirement community. Phases I and II of the development were completed in October, 2001, and August, 2007, respectively.

The development is situated on thirty to forty acres in the southerly portion of the property and contains three distinct components. These consist of (1) three separate, four-story, congregate retirement apartment and limited common area buildings containing 338 total entry fee apartments, (2) a one to two-story attached community building, and (3) a one to two-story attached health center, which includes twenty assisted living units and fifty skilled nursing beds. The community facility and the health center are located in one connected building. The three apartment buildings are connected to the community building and to the health center by enclosed walkways. The buildings are surrounded by interior driveways, open, paved parking areas, resident garages and landscaped areas, including three large courtyards. The remaining seventy acres in the northerly portion of the property contain a conservation easement accessible to the public and Meadow Ridge residents by walking trails.

All Meadow Ridge residents must execute a continuing care agreement that sets forth the financial obligations of the resident and the obligations of Meadow

Ridge to provide the resident with lifetime care. Under the terms of that agreement, residents of the independent living units must be at least sixty-two years old, must be able to function independently at the time of admission, and must have sufficient financial resources to pay the entrance fee, monthly service fees and other expenses associated with independent living. Pursuant to the residence agreement, all residents also must pay an initial entrance fee and a monthly service fee, which entitle the resident to occupy an independent living unit for life, subject to certain conditions outlined in the agreement. Residents receive a flat 85 percent refund of their entry fee, which is payable on death, voluntary withdrawal or permanent transfer to the assisted living or health center.

Services are provided to residents at no additional cost, including one meal per day, building and grounds maintenance, custodial service, laundry and housekeeping services, transportation service, all utilities except telephone and cable television, special diet and tray service when approved by a physician, planned activities, parking, use of all common and activity areas, an emergency call system, and facility security. The residence agreement also entitles residents access to assisted living or nursing care at a discount below market rate and equal to the lower of a two bedroom monthly fee or the monthly fee of the previously occupied unit, plus surcharges for extra meals and services. This benefit is unlimited. Monthly service fees are subject to increase at the discretion of the owner upon thirty days notice.

In accordance with the town's statutory obligation; see General Statutes § 12-62 (b) (1);[3] the assessor conducted a town wide revaluation of all real estate for the grand list of October 1, 2007,[4] and determined that the plaintiff's property had a fair market value of $117,621,000[5] and an assessment value of $82,334,600. The plaintiff challenged the valuation and appealed to the board of assessment appeals (board) pursuant to General Statutes (Rev. to 2007) § 12-111 (a),[6] claiming that the property had a fair market value of $89,100,000 and an assessment value of $62,370,000. The board upheld the assessor's valuation, and the plaintiff appealed to the Superior Court pursuant to §§ 12-117a and 12-119. The plaintiff alleged that it was aggrieved by the actions of the board because the assessor's valuation of the property exceeded 70 percent of its true and actual value on the assessment date,[7] and, consequently, the valuation was "grossly excessive, disproportionate and unlawful." The plaintiff thus sought a reduction in the amount of the tax and the assessment on which it had been based.

At trial, the plaintiff's appraiser, Michael G. Boehm, explained the methodology he had used to determine the fair market value of the property. On February 23, 2011, the trial court denied the appeal pursuant to § 12-117a, explaining that it was unable to find that the plaintiff was aggrieved based on the evidence presented. The court also found no evidentiary support for the plaintiff's claim that the assessment was manifestly excessive under § 12-119. It thus rendered judgment for the town.

The plaintiff appealed,[8] and the town filed a motion for articulation seeking clarification from the trial court as to whether it was the assessor's duty to value the unencumbered fee simple interest and whether the noninterest bearing refundable portion of the plaintiff's entry fees "should be considered in valuing the . . . property, and, if so, how." In response to the first question, the court stated that the issue on appeal to this court was whether the plaintiff had proven that it was aggrieved by the valuation and that the assessor's duty was not a factor in its decision. In response to the second question, the court stated that, "[s]ince the court found that the plaintiff was not aggrieved by the assessor's valuation, as the court did not find credible the plaintiff's use of the going concern approach to value its real estate, the discussion of noninterest bearing refundable entry fees is not relevant to the issue raised in the plaintiff's appeal." The court added in a footnote that the appeal had been taken by the plaintiff and centered on "the court's rejection of the use of the going concern approach to valuing its real estate."

After the briefs were filed and following oral argument, this court sought an articulation as to "whether [the trial court] rejected Boehm's testimony because [the court] found him not to be credible, or because [the court] rejected Boehm's use of the going concern approach as a method for [the valuation] of real property." The trial court responded on October 31, 2012, as follows: "[T]he trial court] rejected Boehm's testimony because the trial court found his testimony not to be credible."

I

The plaintiff first claims that the trial court improperly concluded that the going concern income capitalization approach applied by Boehm is not recognized or permitted under Connecticut law and thus may not be used to determine the fair market value of real estate and whether the plaintiff is aggrieved under § 12-117a. In response, the town argues that the trial court did not reject the going concern income capitalization approach as a matter of law but, rather, because the plaintiff had failed to provide adequate, credible evidence to meet its burden of demonstrating overvaluation. We agree with the town.

The following review of the trial court's memorandum of decision is relevant to our resolution of this claim. After setting out the facts, the trial court explained the method Boehm had used to value the plaintiff's property. The court noted that Boehm "undertook to value the subject real estate . . . by first estimating the going concern value" of Meadow Ridge. The court explained that "[t]he going concern value in this case consists of the real estate, the personal property and the intangibles" and that "[i]ntangible personal property, for tax purposes, has been defined as property which is not itself intrinsically valuable, but which derives its chief value from that which it represents." (Internal quotation marks omitted.) The court also noted that "Boehm considered only the income approach to value the subject [property] as a going concern. [He] neither considered the market sales approach nor the cost approach, although the costs of land acquisition and construction were recently incurred . . . ."[9]

Following this explanation, the trial court proceeded to analyze the plaintiff's appeal. Significantly, the trial court opened the analysis portion of its decision by noting that *both* "Boehm, as well as the [town's] appraiser . . . concluded that the valuation of the subject real estate could only be accomplished by determining the value of [the subject property] as a going concern." The court then identified several general principles for valuing real property.[10] The court referenced *Whitney Center, Inc.* v. *Hamden*, 4 Conn. App. 426, 427, 494 A.2d 624 (1985), acknowledging that continuing care facilities, such as the plaintiff's in the present case, are difficult to value for property tax assessment purposes because "the plaintiff's real estate must be distinguished from the value of its business . . . . This task is complicated . . . by the close relationship between the business and the land, as well as by the fact that the residents do not pay rent in the traditional sense." (Internal quotation marks omitted.) The trial court also addressed the principles behind the going concern income capitalization approach and noted the difficulty of relying on this approach to determine the going concern value of the plaintiff's business. The trial court specifically noted that "a purchaser of a going concern, like a [continuing care retirement community], would most likely consider allocating, for tax purposes, a greater amount of value to depreciated buildings and personal property than nondepreciable assets such as intangibles."

The trial court next turned to the actual calculations and formula used by the plaintiff's appraiser. "Boehm established the value of [furniture, fixtures and equipment] by relying on recognized cost manuals and the actual incurred costs of [such tangible property] at comparable multiple level retirement campuses. . . . This process is basically an estimate of the . . . replacement costs. . . . Boehm did not consider actual investment costs that [the plaintiff] paid for [such tangible property]." In that connection, the trial court reasoned that "[*i*]*t is difficult to accept Boehm's conclusion* that the [furniture, fixtures and equipment] depreciated 50 percent during the first year of acquisition for that portion of Meadow Ridge . . . . General Statutes § 12-63 . . . provides specific percentages of depreciated value over a period of years that are inconsistent with Boehm's application of a 50 percent broad brush stroke." (Emphasis added.)

The trial court further observed that "[t]he portion of the going concern value related to the business value of $16,350,000 comes from a method [that] Boehm claims to be widely accepted. This method compares Meadow Ridge's ongoing cash flows based on actual occupancy to an estimated value as if it were hypothetically empty as of October 1, 2007."[11] The court stated, however, that "[*c*]*ontrary to Boehm's 'widely accepted' method* of determining business value, the definition of business enterprise/going concern value includes . . . real property; personal property [furniture, fixtures and equipment]; net working capital; cash and cash equivalents . . . [and] intangible property . . . . See [Appraisal Institute], The Appraisal of Real Estate (12th Ed. 2001) p. 642.

"Considering the above definition of business enterprise/going concern value, clearly, the valuation portion of a going concern dealing with 'business value' is *more complicated than what Boehm reported*." (Emphasis added.)

In the final portion of its analysis, the trial court reasoned that "a purchaser of the subject property . . . would consider purchasing similar land and constructing similar buildings prior to commencing the operation of a [continuing care retirement community]. This appears to be the process Boehm used in developing the value of the subject's intangibles via the going concern value method. *However, this concept fails to recognize* that [the plaintiff] . . . obtained zoning approval and building permits to construct the [Meadow Ridge] complex, commenced landscaping and parking details, formed a management team and engaged a skilled workforce. All of these components would have enhanced the value of the real estate beyond being just brick and mortar. These intangibles . . . are so intertwined with the real estate so as to enhance its value." (Emphasis added.)

In concluding, the trial court stated that "the valuation of the intangible business value, as determined by Boehm, was *not credible because no other evidence—besides Boehm's own representations—was offered* in order for the court to conclude that it was reasonably probable to quantify such an intangible as business value. . . .

"[Additionally] [*t*]*he court cannot accept Boehm's simplistic formula to determine business value*. . . .

For these reasons, the court *has given little weight* to Boehm's process in computing the value of Meadow Ridge's intangible business." (Citation omitted; emphasis added.)

We begin with the applicable legal principles on aggrievement. "Section 12-117a . . . provide[s] a method by which an owner of property may directly call in question the valuation placed by assessors upon his property . . . . In a § 12-117a appeal, the trial court performs a two step function. The burden, in the first instance, is upon the plaintiff to show that he has, in fact, been aggrieved by the action of the board in that his property has been overassessed. . . . In this regard, [m]ere overvaluation is sufficient to justify redress under [§ 12-117a], and the court is not limited to a review of whether an assessment has been unreasonable or discriminatory or has resulted in substantial overvaluation. . . . Whether a property has been overvalued for tax assessment purposes is a question of fact for the trier. . . . The trier arrives at his own conclusions as to the value of land by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value, and his own general knowledge of the elements going to establish value including his own view of the property." (Citations omitted; internal quotation marks omitted.) *Konover* v. *West Hartford*, 242 Conn. 727, 734–35, 699 A.2d 158 (1997). Thus, the trial court first must determine whether the plaintiff has offered sufficient, credible evidence that the subject property has been overvalued. If the trial court concludes that the plaintiff has not met its burden, the trial proceeds no further, and the town's assessment stands. See, e.g., *Ireland* v. *Wethersfield*, 242 Conn. 550, 557–58, 698 A.2d 888 (1997) ("[i]f the trial court finds that the taxpayer has failed to meet his burden because, for example, the court finds unpersuasive the method of valuation espoused by the taxpayer's appraiser, the trial court may render judgment for the town on that basis alone"); see also id., 559 ("[a] taxpayer . . . who fails to carry [the] burden [of establishing overvaluation] has no right to complain if the trial court accords controlling weight to the assessor's valuation of his property").

In a tax appeal taken from the trial court to the Appellate Court or to this court, "the question of overvaluation usually is a factual one subject to the clearly erroneous standard of review . . . ." (Citation omitted.) *Breezy Knoll Assn., Inc.* v. *Morris*, 286 Conn. 766, 776, 946 A.2d 215 (2008). "Under this deferential standard, [w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 23, 807 A.2d 955 (2002). Additionally, "[i]t is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Citations omitted; internal quotation marks omitted.) *Torres* v. *Waterbury*, 249 Conn. 110, 123, 733 A.2d 817 (1999). Simply put, "a trial court is afforded wide discretion in making factual findings and may properly render judgment for a town based solely upon its finding that the method of valuation espoused by a taxpayer's appraiser is unpersuasive." Id.

Conversely, we review de novo a trial court's decision of law. "[W]hen a tax appeal . . . raises a claim that challenges the propriety of a particular appraisal method in light of a generally applicable rule of law, our review of the trial court's determination whether to apply the rule is plenary." *Breezy Knoll Assn., Inc.* v. *Morris*, supra, 286 Conn. 776. To be sure, if the trial court rejects a method of appraisal because it determined that the appraiser's calculations were incorrect or based on a flawed formula in that case, or because it determined that an appraisal method was inappropriate for the particular piece of property, that decision is reviewed under the abuse of discretion standard. See id., 775–76. *Only* when the trial court rejects a method of appraisal as a matter of law will we exercise plenary review.[12] See id.

Thus, the starting point in any tax appeal taken from the Superior Court, including the present appeal, is a determination as to whether the trial court reached its decision through (1) the exercise of its discretion in crediting evidence and expert witness testimony, or (2) as a matter of law. We conclude, contrary to the plaintiff's claim, that the trial court rejected the plaintiff's evidence, including Boehm's testimony, because it found it not to be credible, and, therefore, the trial court did not conclude that the going concern income capitalization approach was not recognized or permitted under Connecticut law.

This conclusion is supported by the trial court's response dated October 31, 2012, to this court's request for an articulation of the reasons for its decision, in which the trial court stated that it had rejected Boehm's testimony because it found him not to be credible, and not because his use of the going concern approach as a method for the valuation of real property was improper as a matter of law. Accordingly, the plaintiff's claim can be resolved on this basis alone. See, e.g., *Priest* v. *Edmonds*, 295 Conn. 132, 140, 989 A.2d 588 (2010) (articulation serves to clarify "the factual and legal basis upon which the trial court rendered its decision" [internal quotation marks omitted]). The trial court's memorandum of decision, however, also supports this conclusion. Portions of the decision, as previously described, and specifically the italicized portions, when read together, illustrate that the trial court rejected the formula and calculations on which Boehm relied to arrive at the valuation of the intangible business. In other words, the trial court's disagreement with the plaintiff's valuation turned on the flaws in Boehm's calculations and formula, not on the method itself. For example, the trial court concluded that Boehm's valuation omitted or distorted several essential aspects of Meadow Ridge's value as a going concern. The trial court specifically questioned the percentage by which Boehm depreciated Meadow Ridge's furniture, fixtures and equipment, the simplistic formula Boehm used to calculate business value, and Boehm's failure to recognize Meadow Ridge's state of operation when it first opened. The trial court also rejected Boehm's unsupported valuation of intangibles.[13] Any one of these flaws would have constituted sufficient grounds for the trial court to have rejected Boehm's appraisal method as unpersuasive. Simply put, the trial court rejected Boehm's appraisal as not credible because it was premised on formulas and calculations that failed to value Meadow Ridge accurately. Thus, the trial court did not summarily dismiss the method as a matter of law.

Furthermore, because the value of real estate under the going concern approach necessarily depends on an accurate valuation of the going concern, the plaintiff could not rely on Boehm's valuation as proof of overassessment. Accordingly, once the trial court rejected the plaintiff's evidence as not credible, it properly concluded that the plaintiff had failed to satisfy its burden under § 12-117a. See, e.g., *Ireland* v. *Wethersfield*, supra, 242 Conn. 557–58 ("[i]f the trial court finds that the taxpayer has failed to meet his burden because, for example, the court finds unpersuasive the method of valuation espoused by the taxpayer's appraiser, the trial court may render judgment for the town on that basis alone"). We therefore conclude that the trial court's determination that the plaintiff failed to establish aggrievement under § 12-117a was not clearly erroneous.

II

The plaintiff next claims that the trial court improperly concluded that it failed to establish a manifestly excessive valuation of the property under § 12-119, even though the undisputed evidence was that the town's assessment of the property included a material assumption related to income that was known to be untrue and that, if corrected, would have reduced the fair market value of the property by more than $30 million.[14] The town responds that the trial court properly decided this issue because hypothetical conditions may be used in real estate appraisals. We agree with the town.[15]

In a tax appeal taken pursuant to § 12-119, the plaintiff must prove that the assessment was "(a) manifestly excessive *and* (b) . . . could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of the property. . . . *E. Ingraham Co.* v. *Bristol*, 146 Conn. 403, 409, 151 A.2d 700, cert. denied, 361 U.S. 929, 80 S. Ct. 367, 4 L. Ed. 2d 352 (1959). . . . [The plaintiff] must [set forth] allegations beyond the mere claim that the assessor overvalued the property. [The] plaintiff . . . must satisfy the trier that [a] far more exacting test has been met: either there was misfeasance or nonfeasance by the taxing authorities, or the assessment was arbitrary or so excessive or 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).[16] Only if the plaintiff is able to meet this exacting test by establishing that the action of the assessors would result in illegality can the plaintiff prevail in an action under § 12-119. The focus of § 12-119 is whether the assessment is illegal. *Cohn* v. *Hartford*, 130 Conn. 699, 703, 37 A.2d 237 (1944); see *E. Ingraham Co.* v. *Bristol*, supra, 408 (municipality disregarded the statutes when it taxed real property at 50 percent of its value, personal property at 90 percent and motor vehicles at 100 percent at a time when municipalities were prohibited from assessing property as a percentage of its value); *Stratford Arms Co.* v. *Stratford*, 7 Conn. App. 496, 500, 508 A.2d 842 (1986) (property could not be taxed as condominiums when still legally an apartment building at date of assessment). The statute applies *only* to an assessment that establishes a disregard of duty by the assessors. *L.G. DeFelice & Son, Inc.* v. *Wethersfield*, 167 Conn. 509, 513, 356 A.2d 144 (1975).

* * *

"While an insufficiency of data or the selection of an inappropriate method of appraisal could serve as the basis for not crediting the appraisal report that resulted, it could not, *absent evidence of misfeasance or malfeasance*, serve as the basis for an application for relief from a wrongful assessment under § 12-119." (Citations omitted; emphasis added; internal quotation marks omitted.) *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, 220 Conn. 335, 341–43, 597 A.2d 326 (1991). In short, when reviewing a claim raised under § 12-119, a court must determine whether the plaintiff has proven that the assessment was the result of illegal conduct.

In the present appeal, the plaintiff's sole claim of misconduct is that the town's assessor relied on a "hypothetical condition," that is, a fact known to not actually exist, in arriving at the total value of Meadow Ridge as a going concern. Specifically, the plaintiff claims that the assessor included in the valuation the hypothetical "assumption of $4,800,000 of annual [interest] income at Meadow Ridge, based upon an entrance fee escrow account that did not exist . . . ."[17] The plaintiff argues that the inclusion of this hypothetical condition in valuing Meadow Ridge "imposed a manifestly excessive valuation on the property in disregard of Connecticut law" because, as the assessor conceded, the value of Meadow Ridge, and therefore the plaintiff's property, would be substantially less if the interest income were removed from the valuation.

Under the standard set forth in *Second Stone Ridge Cooperative Corp.*, the success of the plaintiff's claim turns on whether the assessor's use of a hypothetical condition was a misfeasance or malfeasance of the assessor's duty. As the following makes clear, the plaintiff's claim under § 12-119 has no merit.

A hypothetical condition is defined as "a condition, directly related to a specific assignment, which is contrary to what is known by the appraiser to exist on the effective date of the assignment results, *but is used for the purpose of analysis*." (Emphasis added.) Appraisal Standards Board, Appraisal Foundation, 2012–13 Uniform Standards of Professional Appraisal Practice (2012) p. U-3, available at http://www.uspap.org (last visited February 21, 2013).[18] Thus, contrary to the plaintiff's argument, the use of a hypothetical condition is *not* a violation of the Uniform Standards of Professional Appraisal Practice. Indeed, standards rule 1-2 of the Uniform Standards of Professional Appraisal Practice specifically contemplates the use of a hypothetical condition, and provides that "[i]n developing a real property appraisal, an appraiser *must* . . . (g) *identify any hypothetical conditions necessary in the assignment* . . . ." (Emphasis added.) Id., pp. U-16, U-18. The corresponding comment to this rule provides that "[a] hypothetical condition may be used in an assignment only if . . . use of the hypothetical condition is clearly required for legal purposes, for purposes of reasonable analysis, or for purposes of comparison; [and] use of the hypothetical condition results in a credible analysis . . . ."[19] Id., comment, p. U-18. Similarly, the Appraisal Institute has observed that "[h]ypothetical conditions are contrary to what exists, but the conditions are asserted by the appraiser for the purposes of analysis. For example, in the case of a manufacturing plant that is known to be subject to environmental contamination, it is possible for the appraisal to be based on the hypothetical condition that it is *not* contaminated." (Emphasis in original.) Appraisal Institute, supra, p. 56.

Consequently, to the extent that the plaintiff claims that the use of a hypothetical condition is a violation of the Uniform Standards of Professional Appraisal Practice, and therefore a violation of an assessor's statutory duties, that claim has no merit.

Moreover, turning to the facts of this case, we note that James Tellatin, the appraiser hired by the town to determine the value of Meadow Ridge, explained in deposition testimony that "the hypothetical condition [of interest income] has to be made, in my opinion, based on Connecticut law on the definition of the interest that is appraised for property tax purposes." Specifically, in order to value the subject property, he had to account for the value received from the entry fees paid by new residents. Tellatin explained that, "when the entry fees are paid by the residents, in a way, they're lending money to [Meadow Ridge] . . . . [Y]ou can view the residents as providing the financing and taking out the construction loan on this transaction . . . ."[20] In other words, Tellatin endeavored to "value [Meadow Ridge] on an unencumbered fee simple basis. . . . [T]he ownership [of Meadow Ridge] has given life estates to residents, and residents have made these resident loans [as] these entry fees that, on average, exceed over [one-half] million dollars. And to say to the property ownership and to the taxpayers of the . . . community that . . . those interest free loans . . . do not get factored into the valuation for fee simple purposes . . . goes against the spirit of the law of Connecticut with regard to the assessed valuation of property." Accordingly, when counsel asked, "that's why you've termed [the entry fee escrow account] a hypothetical condition, because you assume that, even if the cash isn't there [to produce the interest income], *in order to transfer the fee simple interest*, cash [or cash equivalency] in that amount must be transferred to the buyer," Tellatin answered in the affirmative.[21] (Emphasis added.)

As noted previously, the plaintiff has the burden of demonstrating that the town not only overvalued the property *but also* that the assessment constituted misfeasance or malfeasance by the assessor. In this case, the plaintiff's strongest argument is that the use of a hypothetical condition "has never been authorized under Connecticut law" and thus constitutes a misfeasance or malfeasance. The plaintiff's argument, however, is unpersuasive. The fact that this court has not specifically addressed the use of hypothetical conditions does not render their use illegal. To the contrary, the Uniform Standards of Professional Appraisal Practice, which the plaintiff explicitly references, contemplates the use of hypothetical conditions. In the present case, Tellatin explained why his use of a hypothetical condition concerning interest income was both necessary and appropriate in valuing the plaintiff's property. The plaintiff has not demonstrated why this method was illegal and thus cannot prevail under § 12-119.

Put another way, the plaintiff's argument amounts to nothing more than a claim of overvaluation. In that connection, this court has held that "[t]he process of estimating the value of property for taxation is, at best, one of approximation and judgment, and there is a margin for a difference of opinion. . . . There may be more ways than one for estimating the value of such . . . [property] for taxation." (Citation omitted; internal quotation marks omitted.) *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, supra, 220 Conn. 342. "Many factors may enter into the determination of the value of a piece of property. Its value is, in the final analysis, a matter of opinion." *Lomas & Nettleton Co.* v. *Waterbury*, 122 Conn. 228, 233, 188 A. 433 (1936). Related to this concept, in the context of valuing property under the income capitalization approach, we have rejected the notion that only *actual* rent should be considered in determining the property's income producing potential. Instead, we have explained that, "[a]s a general principle, earning or income producing capacity, as distinguished from actual earnings, is to be regarded as a factor in valuation for taxation purposes . . . ." *Somers* v. *Meriden*, 119 Conn. 5, 8–9, 174 A. 184 (1934). Thus, although a hypothetical condition is contrary to the known economic condition of the property, this factor alone is insufficient to render its use a misfeasance or malfeasance.

In sum, although the plaintiff may disagree that the hypothetical condition was *necessary* to reach the valuation, it has failed to demonstrate that the town assessor's reliance on the condition was *illegal*, and, accordingly, the plaintiff cannot prevail on its claim under § 12-119. See, e.g., *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, supra, 220 Conn. 343 ("because the selection of an inappropriate method of appraisal or a paucity of the underlying data in connection with an appraisal, without more, is not manifestly illegal under our statutes . . . the circumstances presented . . . do not rise to the level of the extraordinary situation that would warrant tax relief under the provisions of § 12-119").

Justice Eveleigh, in his concurring and dissenting opinion, maintains that "the town's assessment . . . was based on admittedly false and untrue assumptions contrary to known facts about the economic characteristics" of Meadow Ridge and that "the knowing use of false assumptions in an appraisal for an assessment would certainly qualify [as unacceptable] under § 12-119" because the assessment "could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of [real] property . . . ." (Internal quotation marks omitted.) We disagree. In referring to the hypothetical condition as a "false assumption," Justice Eveleigh appears to view the assessor's use of the condition as an arbitrary falsification of the value of the plaintiff's property. As previously discussed, however, this was not the case. The use of a hypothetical condition is an accepted means of determining the true value of real estate. It is not a number pulled out of thin air or evidence that the assessor disregarded his duty. Consequently, as the Uniform Standards of Professional Appraisal Practice and this case demonstrate, the use of a hypothetical condition, without more, is insufficient evidence to support a claim under § 12-119.

We also disagree with Justice Eveleigh's assertion that, because General Statutes §§ 12-63 (a) and 12-64 (a) require taxation to be based on the "true and actual" valuation of real estate, the use of a hypothetical condition was in violation of those statutes. General Statutes § 12-63 (a) provides in relevant part that the "true and actual value" of real property "*shall be deemed by all assessors . . . to be the fair market value thereof* . . . ." General Statutes § 12-64 (a) provides in relevant part that the unexempted real property shall be taxed at the "true and actual valuation, not exceeding one hundred per cent *of such valuation, to be determined by the assessors* . . . ." As this court explained more than fifty years ago, "[t]he expressions actual valuation, actual value, market value, market price and . . . fair value are synonymous. Usually, these expressions mean the figure fixed by sales in ordinary business transactions, and they are established when other property of the same kind in the same or a comparable location has been bought and sold in so many instances that a value may reasonably be inferred. . . . In other words, the best test is ordinarily that of market sales. . . . [*When*] *evidence of such sales is not available, other means must be employed to ascertain the present true and actual valuation*. . . . Thus, the method of reproduction cost has been used. . . . The method of capitalizing gross income was adopted in *Somers* v. *Meriden*, [supra, 119 Conn. 8], and that of capitalizing stabilized net income was approved in *Lomas & Nettleton Co*. v. *Waterbury*, [supra, 122 Conn. 230]. *No one method is controlling*; *consideration should be given to them all, if they have been utilized, in arriving at the value of the property*." (Citations omitted; emphasis added; internal quotation marks omitted.) *Sibley* v. *Middlefield*, 143 Conn. 100, 106–107, 120 A.2d 77 (1956); see also *Lerner Shops of Connecticut, Inc*. v. *Waterbury*, 151 Conn. 79, 85 n.3, 193 A.2d 472 (1963) (explaining that "the term fair value is the preferable one to use, *since it emphasizes the result to be achieved rather than the means by which that result is to be attained*" [emphasis added]). In short, the true and actual value of a property is simply the "fair value" of the property as determined by the assessor. As long as the assessor appraises the property in accordance with our laws, including the Uniform Standards of Professional Appraisal Practice, the assessed value represents the true and actual value of the real property for taxation purposes. We are therefore unpersuaded by the Justice Eveleigh's assertion that the town's use of the hypothetical condition, which is an accepted practice under the Uniform Standards of Professional Appraisal Practice, was in violation of §§ 12-63 (a) and 12-64 (a).

Justice Eveleigh further argues that, even if a hypothetical condition is sometimes appropriate, as in cases in which proposed construction, home improvements or repairs may be necessary to bring the value of existing or planned structures in line with the fair market value of other structures in the area that are valued according to their highest and best use, there was no reasonable basis for the use of the hypothetical condition in this case to determine the "present true actual value" of the property. (Internal quotation marks omitted.) Footnote 6 of the concurring and dissenting opinion. Justice Eveleigh contends that Tellatin's analysis was not credible because Tellatin testified that he knew the interest bearing account attributed to Meadow Ridge did not exist and he was not aware of any continuing care retirement community in the country that maintained an interest bearing account. Justice Eveleigh also argues that the trial court found that the plaintiff's use of the property already was its highest and best use and that the money paid by the residents was rated at market value. Id. We disagree that the town's use of a hypothetical condition, *although condoned by the Uniform Standards of Professional Appraisal Practice and therefore Connecticut law*, resulted in an appraisal that was untrue and contrary to law. As previously discussed, this court, in *Lomas & Nettleton Co.* v. *Waterbury*, supra, 122 Conn. 228, emphatically rejected the taxpayer's claim that "a valuation . . . based upon the facts should be controlling and render immaterial other methods which involve speculative factors based upon testimony of expert witnesses employed by the parties"; id., 231; and held that the trial court properly had valued the taxpayer's property "largely [on the basis of] the opinion of the real-estate experts . . . ." Id., 233. Simply put, because valuation is a matter of opinion; see id.; many factors, both real and hypothetical, properly may be included in the calculation of the "true and actual value" of real property for assessment purposes. See, e.g., *National Folding Box Co.* v. *New Haven*, 146 Conn. 578, 587–88, 153 A.2d 420 (1959) (when "the prospect of a sale . . . of the plaintiff's manufacturing plant as a whole . . . was extremely remote and . . . there were no comparable sales to use as a measuring stick . . . [t]he [valuation] method chosen, which was in effect the determination of what the market value of the property *would be if* it were occupied by several tenants . . . [was] a justifiable one" [citations omitted; emphasis added]). We also reiterate that, although "an insufficiency of data or the selection of an inappropriate method of appraisal could serve as the basis for not crediting the appraisal report that resulted, it could not, *absent evidence of misfeasance or malfeasance*, serve as the basis for an application for relief from a wrongful assessment under § 12-119." (Emphasis added.) *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, supra, 220 Conn. 343. In sum, although Justice Eveleigh offers reasons why the use of a hypothetical condition in the present case was not, in his view, appropriate, including that there was no existing or legally required account on which to base the hypothetical, none of his reasoning supports a finding of misfeasance or malfeasance under § 12-119.

For the foregoing reasons, we conclude that the trial court rejected the plaintiff's valuation of its property for lack of credibility because it was based on calculations and a formula that did not reflect a reasonable value of the real estate. The plaintiff thus failed to meet its burden of proving aggrievement under § 12-117a, and the trial court properly rejected that claim for lack of evidentiary support. We further conclude that the trial court did not abuse its discretion in rejecting the plaintiff's evidence and that it properly determined that the plaintiff failed to meet its burden of proving overvaluation under § 12-119.

The judgment is affirmed.

In this opinion NORCOTT, PALMER and LAVINE, Js., concurred.

* This appeal was originally argued before a panel of this court consisting of Justices Norcott, Palmer, Zarella, McLachlan, Eveleigh, Harper and Vertefeuille. Thereafter, Justice McLachlan resigned from the judicial branch on October 1, 2012, and did not participate in the consideration or decision of this case. Judge Lavine was added to the panel and has read the record and briefs, listened to a recording of the oral argument and participated in the resolution of this appeal.

The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] General Statutes § 12-117a provides in relevant part: "Any person . . . claiming to be aggrieved by the action of the board of tax review or the board of assessment appeals, as the case may be, in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom, with respect to the assessment list for the assessment year commencing October 1, 1989, October 1, 1990, October 1, 1991, October 1, 1992, October 1, 1993, October 1, 1994, or October 1, 1995, and with respect to the assessment list for assessment years thereafter, to the superior court for the judicial district in which such town or city is situated, which shall be accompanied by a citation to such town or city to appear before said court. . . . The court shall have power to grant such relief as to justice and equity appertains, upon such terms and in such manner and form as appear equitable . . . ."

[2] General Statutes § 12-119 provides in relevant part: "When it is claimed that . . . a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property, the owner thereof or any lessee thereof whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease to pay real property taxes, prior to the payment of such tax, may, in addition to the other remedies provided by law, make application for relief to the superior court for the judicial district in which such town or city is situated. . . . In all such actions, the Superior Court shall have power to grant such relief upon such terms and in such manner and form as to justice and equity appertains . . . ."

[3] General Statutes § 12-62 (b) (1) provides: "Commencing October 1, 2006, each town shall implement a revaluation not later than the first day of October that follows, by five years, the October first assessment date on which the town's previous revaluation became effective, provided, a town that opted to defer a revaluation, pursuant to section 12-62*l*, shall implement a revaluation not later than the first day of October that follows, by five years, the October first assessment date on which the town's deferred revaluation became effective. The town shall use assessments derived from each such revaluation for the purpose of levying property taxes for the assessment year in which such revaluation is effective and for each assessment year that follows until the ensuing revaluation becomes effective."

[4] In its amended complaint, the plaintiff also challenges the town's assessment of the property for the grand list years of 2008, 2009 and 2010.

[5] The town relied on its own expert appraiser, James Tellatin, for a determination of the property's fair market value in 2007.

[6] General Statutes (Rev. to 2007) § 12-111 (a) provides in relevant part: "Any person . . . claiming to be aggrieved by the doings of the assessors of such town may appeal therefrom to the board of assessment appeals. . . . Such board may equalize and adjust the grand list of such town and may increase or decrease the assessment of any taxable property or interest therein . . . ."

[7] The complaint initially noted that all town property is required to be valued at 70 percent of its true and actual valuation on the assessment date.

[8] The plaintiff appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[9] For purposes of clarification, we note that the income capitalization approach is a recognized method of valuing real estate that has income generating potential. "The income capitalization approach is a procedure that appraisers use to develop an indication of market value by applying a rate or factor to the anticipated net income from a property. . . . Appraisers arrive at the anticipated net income by considering the property's actual *rental* income, as well as the *rental* income for comparable properties in the vicinity, property expenses, and allowances for vacancy and collection losses." (Citation omitted; emphasis added; internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 17 n.9, 807 A.2d 955 (2002); see *First Bethel Associates* v. *Bethel*, 231 Conn. 731, 742, 651 A.2d 1279 (1995) ("the trial court properly exercised its discretion in considering both market rent and contract rent in making a valuation based on the income capitalization method"). See generally Appraisal Institute, The Appraisal of Real Estate (12th Ed. 2001) pp. 471–95. "The [income capitalization] process is based on the principle that the amount of net income a property can produce is related to its market value. . . . This approach only has utility [when] the property under appraisal is income producing in nature." (Citation omitted.) *Sun Valley Camping Cooperative, Inc.* v. *Stafford*, 94 Conn. App. 696, 702 n.9, 894 A.2d 349 (2006). In other words, the income capitalization approach values property on the basis of the *property's* income producing potential.

The going concern approach, by comparison, is not a method of valuing real estate, but a method of valuing a going concern, which may include real estate as one of its components. According to the Appraisal Institute, the value of a going concern is comprised of (1) real property, (2) tangible personal property (furniture, fixtures, equipment and inventory), and (3) intangible personal property, which includes residual intangibles. See Appraisal Institute, supra, p. 642. Simply put, the calculation "necessarily involve[s] an allocation among the component parts of real property and tangible and intangible [personal property]." Id., p. 641. Included in the residual intangible category is capitalized economic profit, or business enterprise value, which is defined as "the present worth of an entrepreneur's economic (pure) profit expectation." Id. In determining the value of a going concern, an acceptable method of calculation is to apply an income capitalization approach to the income stream *of the business*. See id., p. 643. "In the income capitalization approach [for valuing a going concern], because the capitalized income stream will most likely reflect income to [the going concern], all components of net operating income not attributable to the real estate must be removed. The difficulty of these assignments does not relieve the appraiser of the responsibility to treat the tangible and intangible [personal] property. Not to do so produces either use value or the value of [the going concern]; neither is the market value of the fee simple estate in real property." Id., pp. 643–44; cf. *West Haven Sound Development Corp.*

v. *West Haven*, 201 Conn. 305, 329, 514 A.2d 734 (1986) ("[w]hile there are several different methods by which to determine the value of a closely-held corporation, these methods, and their variants, are of two general types: [1] capitalization of earnings, or the net present value of a future income stream; and [2] net asset value, or the present sale price of the business assets less its liabilities").

Thus, although both real property and going concerns can be valued on the basis of their income producing potential, the method for doing so, and the resulting valuations, are not equivalent. Specifically, when a going concern is valued under the income approach, that value pertains to the market value of the total assets of the business, of which real property is but one component. In order to determine the value of the real estate associated with that going concern, the values of the other components of the total assets of the business must be subtracted from the overall value. See, e.g., *Avon Realty, LLC* v. *Avon*, Superior Court, judicial district of New Britain, Tax Session, Docket No. CV-04-0527376S (March 24, 2006); see also Appraisal Institute, supra, pp. 642–44. In contrast, when real estate is valued under the income approach, that value pertains to the real estate itself.

Accordingly, the foundational issue in the present case is whether it is proper to value real estate by first valuing the going concern associated with the real estate. Neither the parties nor the trial court disputes that there are three generally accepted methods to valuing *real estate*, namely, the cost approach, the market sales approach and the income approach. Rather, the issue before this court is whether, regardless of the particular method used, it is generally accepted to value real estate *as a portion of a going concern*. There may be cases in which it is proper to value real estate by first valuing the going concern associated with the property, based on an income capitalization approach, and other cases in which it is not.

[10] These principles included the following: (1) " '[T]he value of the plaintiff's real estate must be distinguished from the value of its business' "; (2) "the highest and best use of the property determines what method of valuation is used"; and (3) "the income approach is used to value real estate through the capitalization of the property's earning power, such as the collection of rental income."

[11] Boehm's calculations did not take into account the value added to Meadow Ridge through its receipt of entry fees from residents. In light of the millions of dollars that Meadow Ridge receives in the form of entry fees, and its ability to use these entry fees to cover construction and operating costs, the trial court properly questioned the fact that Boehm's appraisal valued Meadow Ridge as if it had received no entry fees.

[12] The following passage from *Sheridan* v. *Killingly*, 278 Conn. 252, 897 A.2d 90 (2006), illustrates this distinction. "The [trial] court concluded that '[the defendant town's appraiser] used an incorrect appraisal process by combining the value of the tenant's interest with that of the lessor's interest in the tracts on the subject property. The gain from the sales of various tracts on the subject land cited by the town's appraiser benefited only the tenants, not the lessor.' Thus, contrary to the [taxpayer's] claim, the trial court did not simply conclude that a comparable sales approach to valuing the leasehold interest for purposes of assessing that value against the [taxpayer] was inappropriate for this particular property. Rather, *the court stated unequivocally that, as a generally applicable rule of law*, the value of a leasehold interest cannot be attributed to the lessor when valuing the lessor's property interest for assessment purposes. Accordingly, our review of this question is plenary." (Emphasis added.) Id., 260.

[13] This failure alone would have been sufficient grounds for the trial court to reject the plaintiff's appraisal. If Boehm had failed to account for aspects of the business that the trial court, in its own knowledge and experience, considered necessary to valuing Meadow Ridge, such as the procurement of zoning approval and building permits to construct the complex, commencement of landscaping and parking details, formation of a management team, and engagement of a skilled workforce, the trial court could properly reject the plaintiff's challenge under § 12-117a because the plaintiff offered no other evidence of overvaluation. See *Konover* v. *West Hartford*, supra, 242 Conn. 735 ("[t]he trier arrives at his own conclusions as to the value of land by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value, and his own general knowledge of the elements going to establish value including his own view of the property" [internal quotation marks omitted]).

[14] The plaintiff also raises a third claim on appeal, namely, that the trial court failed to consider other substantial evidence at trial establishing

aggrievement. Review of this claim reveals that the plaintiff is repeating the same arguments that it raises in its second claim.

[15] The trial court noted that it found "no evidentiary support for the plaintiff's appeal pursuant to § 12-119 . . . ." Because the trial court did not further explain its denial of the plaintiff's claim under § 12-119, and because the plaintiff did not seek an articulation, we review the trial court's decision with the aim of upholding it. See, e.g., *Friedman* v. *Meriden Orthopaedic Group, P.C.*, 272 Conn. 57, 71–72, 861 A.2d 500 (2004) ("we ordinarily read an ambiguous trial court record to support, not to undermine, its judgment").

[16] *Mead* was decided under a nearly identical predecessor to § 12-119 and has been cited subsequently in cases involving claims under § 12-119. E.g., *Second Stone Ridge Cooperative Corp.* v. *Bridgeport*, 220 Conn. 335, 336, 341, 597 A.2d 326 (1991).

[17] James Tellatin, the appraiser hired by the town to determine the value of Meadow Ridge, initially labeled this as an "extraordinary assumption," but, during deposition testimony, which was introduced at trial by the plaintiff, Tellatin indicated that the interest income was more appropriately labeled as a "hypothetical condition." We note this distinction because these are terms of art, each with a different definition under the Uniform Standards of Professional Appraisal Practice. See generally Appraisal Standards Board, Appraisal Foundation, 2012–13 Uniform Standards of Professional Appraisal Practice (2012) p. U-3, available at http://www.uspap.org (last visited February 21, 2013).

[18] Real estate appraisers in Connecticut are required to follow the Uniform Standards of Professional Appraisal Practice. See General Statutes § 20-504.

[19] The comment further notes that a hypothetical condition may be used only when "the appraiser complies with the disclosure requirements set forth in [the Uniform Standards of Professional Appraisal Practice] for hypothetical conditions." Appraisal Standards Board, supra, comment, p. U-18. Because there is no apparent challenge to the inclusion of the hypothetical condition on this ground, we do not address it.

[20] To further illustrate how the value of the entry fees factored into the value of Meadow Ridge as a going concern, Tellatin gave the following example: "[A] [b]uyer [and] seller agree on a $100 million purchase price, and the seller owes $80 million in debt. . . . The sale happens, $100 million. . . . [The] seller has walked away with keeping a whole bunch of entry fees on top of that $100 million. They may have entry fees to keep, maybe they don't, but maybe, if they don't, they've used those entry fees. Maybe there was $175 million of entry fees collected, and they used $100 million of those entry fees to pay down the construction loan."

[21] It is also worth noting that Tellatin explained in his deposition testimony that he had "appraised about 100 [continuing care retirement communities] with entry fees that are somewhat comparable in structure to [Meadow Ridge]," including five in the last five years. Significantly, Tellatin stated that it was his recollection that an assessment for a continuing care retirement community based on similar assumptions for entry fee value had withstood a taxpayer challenge in Illinois.