NO. CV 07 4007788	:	SUPERIOR COURT
THE MAY DEPARTMENT STORES CO.	:	
N/K/A MACY'S RETAIL	:	JUDICIAL DISTRICT OF
HOLDINGS, INC. F/K/A FEDERATED	:	NEW HAVEN
RETAIL HOLDINGS, INC.	:	AT MERIDEN
v.	:	
CITY OF MERIDEN	:	JUNE 15, 2011

No. CV 07 4007789	:	SUPERIOR COURT
SEARS, ROEBUCK AND CO.	:	
	:	JUDICIAL DISTRICT OF
	:	NEW HAVEN
	:	AT MERIDEN
v.	:	
CITY OF MERIDEN	:	JUNE 15, 2011

MEMORANDUM OF DECISION

The plaintiffs, Macy's Retail Holdings, Inc. (Macy's) and Sears, Roebuck and Co. (Sears), brought separate real estate tax appeals challenging the valuation of their respective department store properties by the city of Meriden's assessor for the revaluation date of October 1, 2006 and subsequent years. The Macy's and Sears properties are located in the Westfield Meriden Mall, also known as the Meriden Square Mall (Meriden Mall), at 460 and 490 Lewis Avenue, respectively. These cases were consolidated for trial.

Macy's property

The Macy's property is a two-story anchor department store that was constructed in 1971 on 14.438 acres of land. It was expanded in 1993 to 178,567 square feet (SF) of gross building area (GBA).[1]

The following 100% fair market values were determined for the Macy's property, as of October 1, 2006:

City's assessor	$13,870,050	($77.67/SF)
Macy's appraiser Patrick J. Wellspeak (Wellspeak)	$10,200,000	($57.12/SF)
City's appraiser Norman R. Benedict (Benedict)	$15,250,000	($85.40/SF)

Sears property

The Sears property is a two-story anchor department store with a separate auto center at the east end of the Meriden Mall. The Sears buildings were constructed in 1993 on 7.742 acres of land. The anchor store contains 103,820 SF and the auto center covers 16,949 SF for a total of 120,769 SF of GBA.[2]

1

There is a discrepancy between what the city reports as the square footage of the Macy's property – 179,200 SF – and Wellspeak's lower figure of 178,567 SF, derived from his reliance on drawings provided to him by Macy's. See plaintiffs' Exhibit 1 and July 20, 2010 Trial Transcript (Tr.), p. 39. The court finds credible Wellspeak's calculation of 178,567 SF of GBA.

2

There is a discrepancy between what the city reports as the square footage of the Sears property – 120,033 SF – and Wellspeak's higher figure of 120,769 SF. See plaintiffs' Exhibit 2 and 7/20/10 Tr., p. 39. The court finds credible Wellspeak's calculation of

The following fair market values were determined for the Sears property, as of October 1, 2006:

City's assessor	$ 9,028,830	($74.76/SF)
Plaintiffs' appraiser Wellspeak	$ 6,800,000	($56.31/SF)
City's appraiser Benedict	$11,800,000	($97.71/SF)

Basis of Appeal

Macy's and Sears contest the city's valuation of their properties, as of the revaluation date of October 1, 2006 and subsequent years, on two grounds: (1) pursuant to General Statutes § 12-117a claiming that the assessments were excessive and (2) pursuant to General Statutes § 12-119 claiming that the assessments were "manifestly excessive" and were arrived at by "disregarding the provisions of the statutes" for determining the valuations of such properties. See plaintiffs' 1/18/11 brief, p. 4.

The Meriden Mall

Both Wellspeak and Benedict classify the Meriden Mall as a super-regional mall.[3]

120,769 SF of GBA.

3

The Appraisal of Real Estate (12th ed. 2001), p. 181, describes the classification of shopping centers as follows:

- Neighborhood or strip shopping center
    - Contains between 30,000 and 100,000 SF.
    - Typical tenants offer convenience goods and personal services with a supermarket often as an anchor.
- Community shopping center

As noted by Wellspeak, the Meriden Mall "is the most dominant land use in the subject neighborhood. This super-regional shopping center includes a GLA [gross leasing area] of 897,121 [SF] with three department store anchor tenants (Sears, Macy's and J.C. Penney's) with other larger tenants including a Borders [Books], Best Buy and Dick's Sporting Goods." (Plaintiffs' Exhibit 5, p. 12 and Exhibit 6, p. 13.) Benedict notes that the Meriden Mall "has an area of slightly more than 900,000 [SF] of two to three story retail space. It was originally constructed in 1971 and has been expanded on several occasions since then. There is no immediate shopping center competition at this super-regional mall. There is competition located further west in the City of Waterbury, further north on the border of the Towns of Farmington and West Hartford, and to the south in the Town of North Haven." (Defendant's Exhibit A, p. 4 and Exhibit B, p. 4.)

The Meriden Mall is located centrally along the U.S. Route 691 corridor and

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    - Contains between 100,000 to 300,000 SF.
    - One junior department store, a variety store or discount department store, a supermarket, and specialty shops; may also offer professional and financial services and recreational facilities.
- Regional shopping center
    - 300,000 to 900,000 SF.
    - One or more full department stores of at least 100,000 SF each.
    - Small tenant space for banks, service establishments, medical and business offices, other general merchandise stores.
- Super-Regional shopping center
    - 500,000 to 1,500,000 SF or more.
    - Includes stores described in a regional shopping center, as well as specialty shops, arcades and restaurants.

draws customers from the Hartford and New Haven markets. Lord & Taylor was an anchor department store in the Meriden Mall but it closed in 2004. The space Lord & Taylor occupied is now the location of the retailers Best Buy, Borders and Dick's Sporting Goods. The Meriden Mall also has a food court. Wellspeak classifies the Meriden Mall as a Class B property by the quality of its anchors and tenant roster. See plaintiffs' Exhibit 5, p. 13 and Exhibit 6, p. 14. Benedict classifies the Macy's and Sears stores as "Class A super-regional mall anchor store[s]." (Defendant's Exhibit A, p. 60 and Exhibit B, p. 62.) However, the city's assessor Michael Mordarski testified that the three anchor stores in the Meriden Mall were all Class B. See 7/23/10 Tr., p. 27.

<u>Issue of assessor's obligation to equalize assessments</u>

A major issue here arises from a prior unrelated tax appeal settlement between the city and the J.C. Penney anchor store located at the Meriden Mall for the Grand List of October 1, 2006. J.C. Penney contested the assessor's determination of a fair market value of $10,785,410 (GBA of $71.53/SF) for its property. In 2009, the city, through its assessor and his representative, engaged in settlement negotiations with J.C. Penney representatives and stipulated that the J.C. Penney property at the Meriden Mall had a fair market value of $7,500,000 (GBA of $49.74/SF), as of October 1, 2006. See plaintiffs' Exhibit 8.[4]

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[4] The stipulation of the parties was entered as a judgment of the court.

Macy's and Sears now contend that their anchor department store properties, at the same mall as J.C. Penney, should benefit from the city's settlement made with J.C. Penney and be valued at a GBA price of $49.74/SF. This would result in a reduction for the Macy's property to a fair market value of $8,881,923[5] and a reduction for the Sears property to a fair market value of $6,007,050.[6]

Macy's and Sears raise the issue that the city's settlement with J.C. Penney should also apply to their properties since they are all in the Meriden Mall and have similar uses and construction. The plaintiffs, relying on General Statutes § 12-55 and Matzul v. Montville, 70 Conn. App. 442, 451, 798 A.2d 1002 (2002), argue that since the assessor has an obligation to equalize the assessments of properties in a municipality, all similar properties should be valued alike. See plaintiffs' 1/18/11 brief, p. 18. Under these circumstances, the plaintiffs argue that the assessor's failure to treat the valuations of the Macy's and Sears properties the same as the J.C. Penney property, renders the assessor's action contrary to law by failing to equalize the assessments of the J.C. Penney, Macy's and Sears properties.

The plaintiffs rely on Waterbury Hotel Equity, LLC v. Waterbury, 85 Conn. App. 480, 493-94, 858 A.2d 259 (2004), for the proposition that the "adjusted revaluation

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5 Calculated by multiplying GBA of 178,567 SF by $49.74.

6 Calculated by multiplying GBA of 120,769 SF by $49.74

memorialized in the stipulated judgment is conclusive as to the value of the property for that statutorily prescribed revaluation period." The plaintiffs argue that once a municipality and a property owner agree to the fair market value in a stipulated judgment, "that value is conclusively established" and the value contained in the stipulated judgment with J.C. Penney became the value of that property. (Plaintiffs' 1/18/11 brief, p. 21.)

"[A] stipulated judgment is not a judicial determination of any litigated right . . . [and] may be defined as a contract. . . . The essence of the judgment is that the parties to the litigation have *voluntarily entered into an agreement* setting their dispute or disputes at rest . . . ." (Emphasis in original; internal quotation marks omitted.) Labulis v. Kopylec, 128 Conn. App. 571, 580, 17 A.3d 1157 (2011). A stipulated judgment is the fulfillment of a public policy favoring the pretrial resolution of disputes as embodied in General Statutes § 52-192a that "encourages fair and reasonable compromise between litigants . . . ." (Internal quotation marks omitted.) DiLieto v. County Obstetrics & Gynecology Group, P.C., 297 Conn. 105, 153, 998 A.2d 730 (2010).

Although the plaintiffs were not parties to the J.C. Penney action, nonetheless, they seek to convert the stipulated agreement (and judgment entered thereto) between the assessor and J.C. Penney to a judicial determination of value so as to bind the assessor to his disadvantage and to their advantage.[7]

Our case law shows a clear distinction between a resolution of the differences between parties that results in an agreement memorialized by a stipulated judgment and a judicial determination made after a trial on the merits. See, e.g., McCarthy v. Custom Design Services, Inc., 126 Conn. App. 274, 281, 11 A.3d 1094 (2011). This distinction supports the court's conclusion that there is no obligation on the part of the assessor to raise the level of a stipulated judgment to the level of a judicial finding. The agreement between the assessor and J.C. Penney cannot be treated as binding upon the assessor to similarly adjust the revaluation assessments of Macy's and Sears to conform to J.C. Penney's adjusted revaluation.

On the contrary, to raise the level of a stipulated judgment to that of a judicial determination would require the assessor to review all property within the municipality and make adjustments every time the assessor settles a tax appeal in order to conform to each stipulation. This would not only create bizarre and unacceptable results in tying the hands of all assessors but also it would create a reluctance to enter into settlement

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However, the plaintiffs ignore the fact that a taxpayer cannot force an assessor to make a classification for their benefit. It is the assessor that determines the classification of property for assessment purposes, not the property owners. See generally Hartford/Windsor Healthcare Properties, LLC v. Hartford, 298 Conn. 191, 3 A.3d 56 (2010), for a discussion on the assessor's authority to classify property for assessment purposes. See also General Statutes § 12-62 et seq.

agreements. See Konover v. West Hartford, 242 Conn. 727, 743, 699 A.2d 158 (1997). This is contrary to the public policy of this state which encourages parties to settle their differences when possible.

The court concludes that the city's assessor in these actions has not acted contrary to law pursuant to § 12-119. A stipulated judgment entered into by the assessor and a property owner cannot form the basis to require an assessor to equalize assessments pursuant to § 12-55 since a stipulated judgment is not an adjudication on the merits. See Labulis v. Kopylec, supra, 128 Conn. App. 580.

Valuation of the Macy's and Sears properties

The court has considered all the evidence presented on the Macy's and Sears properties and the court's analysis of the evidence applies to both the Macy's and Sears properties. For purposes of clarity in this decision, while the court may, at times, specifically address either Wellspeak's or Benedict's analysis in terms of only the Macy's property or only the Sears property, the court recognizes that the appraisers' appraisal reports for Macy's and Sears reflect the same analysis for their respective positions.

Turning to the valuation portion of this appeal, the starting point in any valuation process is the determination of the highest and best use of the property. "It is well established that [a] property's highest and best use is commonly accepted by real estate appraisers as the starting point for their analysis of its true and actual value. . . . [U]nder the general rule of property valuation, fair [market] value, of necessity, regardless of the method of valuation, takes into account the highest and best value of the land. . . . A property's highest and best use is commonly defined as the use that will most likely produce the highest market value, greatest financial return, or the most profit from the use of a particular piece of real estate. . . ." (Internal quotation marks omitted.) Bristol v. Tilcon Minerals, Inc., 284 Conn. 55, 64-65, 931 A.2d 237 (2007).

In Wellspeak's opinion, the highest and best use of the Macy's property is the "continuation of the current use as a department store . . . as improved." (Plaintiffs' Exhibit 5, p. 20.) This determination was based on the fact that "[a]s of the date of valuation, the improvements situated on the property were owner-occupied by . . . Macy's Retail Holdings, Inc. There were no leases encumbering the property so that only a fee simple analysis of the property is conducted." (Plaintiffs' Exhibit 5, 8/24/09 letter, p. 2.)

Wellspeak made a similar determination for the Sears property reporting that "continuation of the current use as a department store and auto center would be the highest and best use for the property as improved." (Plaintiffs' Exhibit 6, p. 21.) This determination was based on the fact that "[a]s of the date of valuation, the two primary improvements situated on the property were owner-occupied by Sears . . . . There were no leases encumbering the property so that only a fee simple analysis of the property is conducted." (Plaintiffs' Exhibit 6, 8/24/09 letter, p. 2.)

Based upon his determination of the highest and best use of the subject properties, Wellspeak developed the sales comparison approach and the income approach in valuing the subject properties.

In spite of Wellspeak's acknowledgment that the Macy's and Sears department stores are wholly owner-occupied and the highest and best use is as currently used, Wellspeak disregards the fact that the subject properties are not income-producing properties and goes on to develop market values of $10,400,000 for Macy's and $6,800,000 for Sears, as of October 1, 2006, using the income approach. See plaintiffs' Exhibit 5, p. 30 and Exhibit 6, p. 32.

Wellspeak, in developing his income approach for Macy's, arrived at a potential gross income of $892,835 (based on a building of 178,567 SF at $5/SF absolute net), less a 5% vacancy and collection loss of potential gross income ($44,642), producing an effective gross income (EGI) of $848,193. See plaintiffs' Exhibit 5, p. 29. From this EGI, Wellspeak deducted total operating expenses of 2% ($16,964), resulting in a pro forma net operating income (NOI) of $831,229. Id.

Using an overall capitalization rate of 8%, Wellspeak arrived at $10,390,364 for the value of the Macy's property (rounded to $10,400,000). See plaintiffs' Exhibit 5, p. 30. This approach is problematic because the Macy's property is owner-occupied. There are no leases or rent. There is no vacancy and collection loss. Real estate taxes were not considered as an expense or incorporated into the capitalization rate because Wellspeak assumed that the theoretical tenants would be paying the taxes as part of their theoretical lease.

Wellspeak, in developing the market rental for his income approach, focused on the following five mall properties, none of which were owner-occupied:

1) Enfield Square Mall, Enfield, CT, with a Macy's department store, 20-year lease, 76,247 SF of GLA, at a rent of $4.58/SF NNN (triple net[8]).

2) Brass City Mall, Waterbury, CT with a J.C. Penney department store, 20-year lease, 126,806 SF of GLA, at a rent of $5.57/SF (modified net).

3) Galleria Pittsburgh Mills, Tarentum, PA, with a J.C. Penney department store, 20-year lease, 99,935 SF of GLA, at a rent of $6.25/SF NNN.

4) Galleria Pittsburgh Mills, Tarentum, PA, with a Sears Grand department store, 20-year lease, 166,170 SF of GLA, at a rent of $5/SF NNN.

5) Colonie Center Mall, Colonie, NY, with a Boscov's store, 20-year lease, 225,000 SF of GLA, at a rent of $3.89/SF NNN.

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[8] In a triple net lease, "the tenant assumes all expenses (fixed and variable) of operating a property except that the landlord is responsible for structural maintenance, building reserves, and management." The Dictionary of Real Estate Appraisal, Appraisal Institute (5th ed. 2010), quoted in plaintiffs' 1/18/11 brief, pp. 8-9. See also The Appraisal of Real Estate (12th Ed. 2001) p. 477. Wellspeak testified that department stores are typically leased on a triple net basis. See 7/22/10 Tr., p. 184.

See plaintiffs' Exhibit 5, p. 26 and Exhibit 6, p. 27.

None of Wellspeak's five comparables had a highest and best use as an owner-occupied department store.

"The income capitalization approach to value consists of methods, techniques, and mathematical procedures that an appraiser uses to analyze a property's capacity to generate benefits (i.e., usually the monetary benefits of income and reversion) and convert these benefits into an indication of present value." (Internal quotation marks omitted.) PJM & Associates, LC v. Bridgeport, 292 Conn 125, 139, 971 A.2d 24 (2009). See also General Statutes § 12-63b (a).[9]

General Statutes § 12-63b (b) further provides that in using the income approach to determine value of income-producing property, "the term 'market rent' means the rental income that such property would most probably command on the open market as indicated by present rentals being paid for comparable space. *In determining market rent the assessor shall consider the actual rental income applicable with respect to such real*

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[9] General Statutes § 12-63b (a) provides, in relevant part, as follows: "The assessor . . . 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: . . . (2) capitalization of net income based on market rent for similar property . . . ." (Emphasis added.)

property under the terms of an existing contract of lease at the time of such determination." (Emphasis added.)

See Pilot's Point Marina, Inc. v. Westbrook, 119 Conn. App. 600, 603-04, 988 A.2d 897 (2010) ("[p]ursuant to § 12-63b (b), the court is required to consider both market rent and actual rent when determining fair market value using the income capitalization method"); First Bethel Associates v. Bethel, 231 Conn. 731, 740, 651 A.2d 1279 (1995) ("the statute requires that, in determining a property's 'market rent,' the assessor and, therefore, the court, in determining the fair market value of the property, must consider *both* (1) net rent for comparable properties, and (2) the net rent derived from any existing leases on the property" [emphasis in original]). "This legislative approach makes sense because it reflects the reality that a willing seller and a willing buyer – whose ultimate judgments are what we mean by 'fair market value' – would themselves consider in arriving at a price for the property that is subject to leases that do not closely approximate current rentals for similar properties." Id.

Wellspeak's use of the income approach to value the subject properties is misplaced. His five so-called comparables each have 20-year leases, which cannot be compared to the subject properties, and considering the mandate of § 12-63b (b) to consider the rents paid for use of the property, they do not exist since the subject properties are owner-occupied.

Wellspeak also considered the development of rent arrived at by determining gross sales of Macy's and, using national studies, arrived at a percentage of gross sales to be allocated to rent. See plaintiffs' Exhibit 5, pp. 27-28 and Exhibit 6, pp. 28-30. The theory is that department stores like Macy's and Sears will spend only a certain percentage of gross sales for rent. This amounts to nothing more than imputing constructive rent through an owner's allocation of a percentage of present gross sales as rent. The ability to value real estate based on a property owner's allocation of present gross sales to rent fails to fulfill the purpose of the income approach, which is to determine the present value of future benefits of property ownership. See The Appraisal of Real Estate (12th Ed. 2001) p. 64.

Wellspeak's use of two processes in his development of the income approach were described in Montgomery Ward v. County of Hennepin, 482 N.W.2d 785, 788-89 (Minn. 1992).

Under the "allocation-of-income" methodology, "the appraiser examines 'comparable' rents of anchor tenants in other malls and of freestanding stores [rent/SF]. In addition, it is assumed that anchor tenants in malls pay a disproportionately low amount of rent, because smaller mall tenants typically pay the landlord a surcharge in order to be near a well-known anchor." Id., 788.

The "percentage-of-income" approach "considers that the rent for a department store approximates a certain percentage of the retail sales generated by the store. The annual retail sales figure for past years is a known factor. Typically, the tenant and landlord then negotiate a rental percentage figure . . . ." This negotiation results in setting the fixed or base rent plus an additional rent if sales exceed a certain amount. Id., 788-89.

Developing constructive rent points out the problem of converting an owner-occupied retail store, where rent is non-existent, to a theoretical rent-producing property for the purpose of finding value based on the income approach.

In determining the fair market value of real estate, using the income approach, it is the income generated by the real estate, not the gross sales generated by the retail store unrelated to the property, that is of key importance.[10] See § 12-63b. The selection of credible national studies of department store sales, from which an appraiser may take a percentage as an allocation of rent, fails to conform to the statutory requirement of relating income generated by the real estate rather than income generated by a retail business.[11]

Wellspeak also used the sales comparison approach relying on a sale price per

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10 Wellspeak's definition of the income approach is in accord with this concept: "A set of procedures through which an appraiser derives a value indication for an income-producing property by converting its anticipated benefits (cash flows and reversion) into property value." (Plaintiffs' Exhibit 5, p. 21 and Exhibit 6, p. 22.)

11 "[T]he measure of economic income subject to capitalization should include only that income related to the ownership of the subject . . . commercial property." Guide to Property Tax Valuation, Reilly, Robert F., et al. (2008), p. 76.

square foot of GLA that was developed from his comparables. See plaintiffs' Exhibit 5, p. 23 and Exhibit 6, p. 24. Wellspeak further noted that "because the data is somewhat limited[,] there is less reliance placed upon this procedure as opposed to the Income Capitalization Approach." (Plaintiffs' Exhibit 5, p. 24 and Exhibit 6, p. 25.)

Wellspeak's comparable sale one was the fee simple sale of a Filene's anchor department store containing 168,879 GLA on 9.48 acres of land in the Danbury Fair Mall, a Class A mall. The sale was between Federated Retail Holdings, Inc. and Macerich Danbury Adjacent, LLC, on July 26, 2006 for $11,000,000. At the time of the sale, the property was vacant.[12]

Sale two was a fee simple sale of a one-story K-Mart discount department store building located in Windsor. It was a vacant building containing 118,442 of GLA on 21.87 acres of land. U.S. Bank National foreclosed on the property due to a nonperforming loan. The property was sold to Target Corporation on November 15, 2005 for $5,000,000. Wellspeak considered this sale to be at arms-length. Benedict, on the other hand, testified that when Target purchased this property, it was gutted, leaving only two walls, a roof and concrete floor.

Sale three was a fee simple sale of a vacant Filene's department store building in

12 Macerich is the owner of the Danbury Fair Mall. See 7/20/10 Tr., p. 107. The court notes that the city's appraiser Benedict rejected this sale as the property was vacant. See 7/21/10 Tr., pp. 77, 80.

the Stamford Town Center by the May Department Store Co. to Rich Taubman Associates on February 28, 2005 for $7,000,000. This property contained 173,060 SF of GLA on 3.08 acres of land. This sale appears to be for the land only as the new owner demolished the building and replaced it with a Barnes & Noble building at a cost in excess of $11,000,000.

With minimal analysis, Wellspeak divided the sale price of each comparable sale by each building's GLA to arrive at a fee simple market value ranging between $52.50 and $57.50/SF of GBA "with a most probable value of $9,800,000" for the Macy's store. (Plaintiffs' Exhibit 5, p. 25.)[13]

Notably, Wellspeak commented in his reconciliation and final value estimate that "[t]he Sales Comparison Approach was developed in this report because there were adequate sales within the market from which a reasonable estimate of market value could be obtained for the subject property. This method of valuation was used to estimate market value for the subject property." (Plaintiffs' Exhibit 5, p. 31 and Exhibit 6, p. 33.) However, Wellspeak made an inconsistent comment that "given the limited number of comparable sales this procedure was weighed less than the Income Capitalization Approach." Id.

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13 Similarly, for the Sears property, Wellspeak arrived at a fee simple market value ranging between $52.50 and $57.50/SF of GBA with "a most probable value of $6,650,000." (Plaintiffs' Exhibit 6, p. 26.)

Of Wellspeak's three selected sales, only sale one has an appearance of comparability. However, missing from this sale is the use for which the property was purchased given the fact that Filene's, the previous department store in possession, had vacated the building prior to the transfer of title.

Wellspeak's sale two was a bank-owned property, raising the issue of whether the bank was unloading the property. It is not credible to believe that this sale was, as Wellspeak contends, at "market" merely because the foreclosing parties put the property up for sale on the market. It is obvious that a foreclosing party does not fit into the typical mode of a seller under no compunction to sell under the definition of a willing seller and willing buyer in a market sale. See Dime Savings Bank of New York v. Grisel, 36 Conn. App. 313, 319, 650 A.2d 1246 (1994) ("a sale results from fair negotiations between a willing buyer and a willing seller, neither being under pressure to deal"). See also General Statutes § 12-63 (a).[14]

Wellspeak's sale three also does not qualify as a comparable to the subject properties since it was purchased as a "tear-down" building following the closing.

The city's appraiser Benedict selected the same two approaches as Wellspeak: the

[14] General Statutes § 12-63 (a) provides, in relevant part, as follows: "The present true and actual value *of all other property* [excludes farm land, forest land, open space land and maritime heritage land] shall be deemed by all assessors and boards of assessment appeals to be the fair market value thereof and not its value at a forced or auction sale." (Emphasis added.)

income approach and the sales comparison approach.

While Wellspeak used the income approach to develop value by applying direct capitalization, Benedict used the yield capitalization approach. According to Benedict, the income approach "translates the dollars of income into dollars of value. It begins with estimating the Potential Gross Income that the property under appraisal is capable of producing. . . . The total income is earned by the real estate and the operation of the real estate." (Defendant's Exhibit A, pp. 90-91 and Exhibit B, pp. 97-98.) Considering the income produced by the subject properties, Benedict further noted: "With no actual income and expenses made available to me, I sought nationally accepted basis upon which I could rely upon to estimate the individual line items. I also examined the records of Norman Benedict Associates, Inc. for income and expense information on shopping centers which have been appraised by this firm." (Defendant's Exhibit A, p. 91 and Exhibit B, p. 98.

In using the income approach to value, Benedict, like Wellspeak, ignored the fact that the highest and best use of the Macy's and Sears stores were their continued use as owner-occupied retail stores. Selecting the income approach to value is inconsistent here since the subject properties are not income-producing. This confusion is highlighted by Benedict's comment that "[i]n the appraised's case, the owner of the appraised property is also the tenant." (Defendant's Exhibit A, p. 92 and Exhibit B, p. 99.) This statement highlights the unreliability of this approach to determine the fair market values of the subject properties as of October 1, 2006. As noted by Benedict, the rent developed from the hypothetical tenant would be based on the "typical tenant in rental space[.]" (Defendant's Exhibit A, p. 93 and Exhibit B, p. 100.) The determination of fair market value should be made upon a more substantial basis than what is "typical."

For the subject Macy's property, Benedict, considering the cash flow (yield) capitalization approach covering a ten-year period, found the present worth of the periodic cash flows at $8,773,178, and further found the future resale estimated value of $5,949,181, for a total value of $14,722,359 (rounded to $14,700,000), as of October 1, 2006. See defendant's Exhibit A, p. 102. See also defendant's Exhibit B, p. 109 for Benedict's analysis of the Sears property.

Benedict, using the sales comparison approach, concluded that as of October 1, 2006, the fair market value of the Macy's department store was $15,700,000.[15] See defendant's Exhibit A, p. 89. See also defendant's Exhibit B, p. 96 for Benedict's analysis of the Sears property under the sales comparison approach, calculating a value of $11,500,000.

In developing his final conclusion of value, using the sales comparison approach,

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Benedict's market value is based on an indicated unit value of $87.50/SF multiplied by the city's GBA figure of 179,200 SF, resulting in $15,680,000 (rounded to $15,700,000).

Benedict considered two types of comparisons. The first was the Overall Market Comparison which Benedict defines as follows:

> "A valuation technique, with the Sales Comparison Approach, in which the appraised land, or property, is compared to a single overall real estate market unit price which summarizes the total real estate market or database studied. Differences are adjusted for and a value indication for the appraised land and/or property, is developed by comparison."

(Defendant's Exhibit A, p. 69 and Exhibit B, p. 76.)

The second type of comparison used by Benedict was the Individual Market Comparison Technique, which he defines 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."

Id.

Benedict's Overall Market Comparison is a process that he personally developed to obtain an overview of the market by surveying, as in this case, a total of 107 potential sales available for analysis. As Benedict notes: "In the overall comparison, the characteristics of the studied market are compared on a per characteristics basis to the appraised property." (Defendant's Exhibit A, p. 83 and Exhibit B, p. 90.) However, no authoritative basis has been introduced in this action to show that this overall market or universe of sales approach is a generally accepted method of valuing real estate.

Benedict's second type of comparison, the individual market approach, relies on three shopping centers, extracted from an eight-sale database which he considered to be comparable to the subject properties as a basis to determine fair market value. Benedict selected these three sales because they were classified as community shopping centers which he defined as a center containing 250,000 to 400,000 SF of GBA. Community shopping centers have smaller trading areas than regional shopping centers.

The three community shopping centers that Benedict relied upon are:

1) 1380 Berlin Turnpike, Wethersfield (Berlin Turnpike)

2) 80 Buckland-Tolland Turnpike, Manchester (Buckland-Tolland Turnpike)

3) 55 Welles Street, Glastonbury (Welles Street)

See defendant's Exhibit A, p. 84 and Exhibit B, p. 91.

The Berlin Turnpike sale is a "strip" community shopping center, not a regional mall-type shopping center. The property covers 21.25 acres of land and 185,900 SF of GBA. This property sold for $21,300,000 on November 28, 2005 or $114.58/SF. There are 21 tenants, none of which are comparable to a Macy's, Sears or J.C. Penney store. Benedict did not examine any leases pertaining to this comparable and could not testify as to the rents paid by the tenants. He relied on the information provided to him by the shopping center manager that the store rents were about market.

The Buckland-Tolland Turnpike sale is a double "strip" community shopping center covering 26.07 acres of land and 278,992 SF of GBA. There are 21 tenants, none of which were comparable to a Macy's, Sears or J.C. Penney store. Benedict had no knowledge of what rents were paid by the tenants. This property sold on May 17, 2006 for $26,236,000 or $94.04/SF of GBA.

The Welles Street sale is a community shopping center, with thirteen tenants, covering 8.14 acres of land and 110,535 SF of GBA. The property sold for $12,750,000 on June 3, 2005 or $115.35/SF of GBA.

Since the highest and best use of the subject Macy's and Sears properties are their continued use, Benedict's selection of three "strip" community shopping mall sales is far removed from being considered comparable to the subject properties which the court has previously determined to be owner/occupied retail buildings in a super-regional mall. The sales of the three "strip" community shopping malls involved multiple smaller retail tenants. As the Macy's and Sears buildings are owner-occupied, they would most likely be purchased for the owner's use, whereas the "strip" community shopping malls Benedict selected would most likely to be purchased by investors.

Under his sales comparison approach, Benedict arrived at a value of $15,700,000 for the Macy's property. (See final reconciliation of value - Step 4, Chart, defendant's Exhibit A, p. 89.) In his analysis, Benedict took 45% of his Overall Market Comparison value of $92/SF (resulting in a valuation of $41.40/SF) and added 55% of his Individual Sales Comparison value of $84/SF (resulting in a valuation of $46.20/SF) for a total value of the components at $87.60/SF (rounded to $87.50/SF). See also Benedict's Sears analysis, defendant's Exhibit B, p. 96.

Benedict's combined use of his personal Overall Market approach, which may give a view of the overall real estate market, and his use of individual sales of multi-tenant shopping malls (which are distinctly different from the subject properties), is not particularly helpful in reaching the fair market values of the subject Macy's and Sears stores, as of October 1, 2006.

Wellspeak used the same analysis for Sears as he did for Macy's. In arriving at his fair market value of the Sears property at $6,800,000, as of October 1, 2006, Wellspeak relied on the same rental market of 20-year leases, arriving at $5.50/SF for rent. See plaintiffs' Exhibit 6, p. 30. Wellspeak further noted that "[a]fter considering comparable lease transactions as well as a percentage rent analysis, we have concluded that a fair market rent for the subject department store would be $4.50/SF on an absolute net basis while the fair market rent for the auto center would be $7/SF on an absolute net basis." (Plaintiffs' Exhibit 6, p. 30.)

In developing the value of the Sears property using the income approach, Wellspeak arrived at a potential gross income of $585,833 by adding together $467,190 for the department store ($4.50/SF multiplied by 103,820 SF of GBA) and $118,643 for the auto center (7.00/SF multiplied by 16,949 SF of GBA). See plaintiffs' Exhibit 6, p. 31.

Continuing his income approach to value, Wellspeak further arrived at a pro forma vacancy and collection loss of 5% of potential gross income (or $29,292) arriving at EGI of $556,541 from which Wellspeak deducted a pro forma operating expense of 2% of EGI to arrive at a pro forma NOI of $545,410. Using a capitalization rate of 8%, Wellspeak made a final conclusion of value for the Sears store of $6,800,000.

As with the Macy's store, Wellspeak's value conclusion is speculative. First, as Wellspeak found, the highest and best use of this subject property is for it to be owner-occupied.[16] Wellspeak's development of the so-called market rent, vacancy and collection loss and operating expense, all pro forma[17], simply are not realistic.

It would seem difficult to value non-income-producing property, such as the subject Macy's and Sears stores, using the income approach and yet still come within the concept as expressed in § 12-63b that the income approach, where appropriate, should be used for income-producing property.

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As noted in Bristol v. Tilcon Minerals, Inc., supra, 284 Conn. 65, "[t]he highest and best use determination is inextricably intertwined with the marketplace because fair market value is defined as the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land . . . .The highest and best use conclusion necessarily affects the rest of the valuation process because, as the major factor in determining the scope of the market for the property, it dictates which methods of valuation are applicable." (Internal quotation marks omitted.)

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Pro forma is defined as "made or carried out in a perfunctory manner. . . ." Merriam-Webster's Collegiate Dictionary (10th Ed.) p. 931.

Similar to Wellspeak, Benedict also used the income approach to value even though Benedict concluded that the highest and best use of the subject properties was the continuation of their present use as owner-occupied. In developing the income approach, and contrary to his finding of the highest and best use of the subject properties, Benedict considered that "Purchase Capital is the value of the appraised property. . . ." (Defendant's Exhibit A, pp. 98-99 and Exhibit B, pp. 105-106.) Benedict likened Purchase Capital as a function of two elements, "Debt Capital" and "Equity Capital."[18] Id.

Recognizing that in the income approach, the value of income-producing property is the present worth of future benefits[19], it is extremely important that the development of future benefits should be based upon a reliable estimate of future income. In the present case, however, Wellspeak minimizes the value of the subject properties by selecting low rentals, whereas Benedict maximizes the value of the subject properties by selecting high rentals. The difference in fair market value determinations between Wellspeak and Benedict, for each of the subject Macy's and the Sears properties, is approximately $5,000,000. When two experienced and well-respected appraisers arrive at such a large difference in value for each of the subject properties, using the same income approach, this

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Debt Capital represents the mortgage portion of value. Equity Capital represents the owner's portion of value.

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See Appraisal of Real Estate (12th Ed. 2001) p. 64.

difference highlights the problem with using the income approach as applied to property that is owner-occupied and produces no income by itself.

For the reasons set forth above, this court can find nothing credible with either Wellspeak's or Benedict's analysis or use of the income approach to value the subject properties as of October 1, 2006 and subsequent years.

After a review of the various sales selected by Wellspeak and Benedict, the only credible sale that appears comparable to the subject properties is the fee simple sale of the Filene's department store at the Danbury Fair Mall, a super-regional mall. This sale occurred on July, 26, 2006 for $11,000,000 and consisted of a vacated anchor department store covering 168,879 SF on 9.48 acres of land.

Benedict did not consider this sale as a comparable in his analysis of the subject properties because it was his opinion that the Filene's sale was problematic. The court recognizes that the Filene's store was vacant at the time of sale, but as Wellspeak noted, its location in the Danbury Fair Mall, a super-regional mall, placed it in a high income area with limited mall competition. When comparing the Filene's sale to the subject properties at the Meriden Mall, the positive aspect of the Filene's location at the Danbury Fair Mall offsets the negative aspect of the vacant building at the time of sale. Wellspeak did not indicate that the Filene's sale was anything other than a market sale of an owner-occupied department store. The price paid for the Filene's store, as compared to the other comparable sales Wellspeak selected, lends credibility to the use of this sale as an acceptable comparable.

The court recognizes the general principle that in a tax appeal, the burden is always on the taxpayer to show that the assessor's valuation is in excess of fair market value causing the taxpayer to be an aggrieved party and once the court finds aggrievement, it must undertake a further inquiry to determine a just reassessment. See United Technologies Corp. v. East Windsor, 262 Conn 11, 22-23, 807 A.2d 955 (2002).

Also, as a general principle, valuation is considered to be a factual issue requiring the court's independent judgment and in determining valuation, "[n]o one method of valuation is controlling and . . . the [court] may select the one most appropriate in the case before [it]. . . . Moreover, a variety of factors may be considered by the trial court in assessing the value of such property. . . . [T]he trier arrives at his [or her] own conclusion by weighing the opinions of the appraisers, the claims of the parties, and his [or her] own general knowledge of the elements going to establish value, and then employs the most appropriate method of determining valuation. . . . The trial court has broad discretion in reaching such conclusion . . . ." (Internal quotation marks omitted.) Sheridan v. Killingly, 278 Conn. 252, 259, 897 A.2d 90 (2006).

As discussed above, the Meriden Mall consists of the anchor department stores Macy's, Sears (including its auto center) and J.C. Penney. Given the input from the appraisers and the plaintiffs' claims, together with the fact that the city entered into a reduction of the assessment of the J.C. Penney property, the court has a firm conviction that the assessor's valuations of the Macy's and Sears properties were in excess of fair market value.

Considering the sales approach as the only credible approach for consideration in these cases, Wellspeak's selection of the Filene's sale at the Danbury Fair Mall (on July 26, 2006 for $11,000,000 or $65.14/SF of GBA) is somewhat comparable to the subject properties.

It is difficult for the court to accept the premise that one sale can represent the market, but considering both appraisers' input, the parties' claims and the court's own general knowledge of the elements necessary to establish value, the Filene's sale in Danbury is the only sale that is credible.[20]

Accepting that evidence which the court finds most reliable and rejecting that evidence which the court determines to be unreliable, the Filene's sale, when used as a guide to resolve the issues in this case, results in a finding of $65.14/SF of GBA as applied to the Macy's department store. This amount multiplied by 178,567 SF, results in a fair market value of the subject Macy's property, as of October 1, 2006 and subsequent years, at $11,631,854.

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Applicable to the facts in this case, the court notes the following comment in <u>Post-Newsweek Cable, Inc. v. Board of Review</u>, 497 N.W.2d 810, 817 (Ia. 1993): "When the varying techniques produce divergent valuations, it does not necessarily follow that market value is accurately divined by averaging the divergent results or in applying the divergent results under arbitrarily weighted formulas. A trier of fact deciding an appeal . . . may be better served in such situations by accepting that evidence which it finds to be most reliable and rejecting that which is determined to be unreliable."

Using the same process for the subject Sears property, the value of $65.14/SF is multiplied by 120,769 SF, resulting in a fair market value of the subject Sears property, at $7,866,893, as of October 1, 2006 and subsequent years.

Furthermore, the plaintiffs seek reimbursement of $1,250[21] for the cost of Wellspeak's time testifying at trial on their behalf. The plaintiffs also seek interest as requested in their prayer for relief. However, as the defendant noted in its post-trial reply brief, this action is not one for money damages incurred prior to trial; it is a statutory appeal challenging the assessor's valuation of the plaintiffs' properties.

Although Practice Book § 18-19 provides that "[i]n proceedings before a judge no costs shall be taxed in favor of either party unless otherwise provided by statute[,]" General Statutes § 52-260 (f) authorizes a court to award costs for an appraiser's testimony in court. However, in the trial of these consolidated matters, the court considered the opinions of the appraisers for both plaintiffs and the defendant, each bearing similar costs for the prosecution of these cases. Considering the equities, the court sees no reason to award costs to the plaintiffs in these matters.

In considering the issue of awarding interest in this tax appeal, the court is guided by the discussion in Loomis Institute v. Windsor, 234 Conn. 169, 181, 661 A.2d 1001 (1995), in which the court stated that "[t]he decision to award interest is one to be made in view of

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[21] This cost would be split evenly between the plaintiffs. See plaintiffs' 1/18/11 brief, p. 25.

the demands of justice rather than through the application of any arbitrary rule." (Internal quotation marks omitted.) The court in Loomis Institute further noted that while "[t]he trial court did not explain why it had refused to award the taxpayer interest pursuant to § 37-3a[,] . . . [there was] no evidence that the town acted maliciously or in bad faith toward the taxpayer." Id. In these consolidated cases, there was no evidence that the assessor acted maliciously or in bad faith in arriving at his conclusion of value. The court, therefore, is not inclined to award any interest to the plaintiffs.

Accordingly, with the court's finding of value for each of the subject properties as discussed above, judgment may enter in favor of the plaintiffs, without costs to any party.

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Arnold W. Aronson
Judge Trial Referee