NO. CV 09 4017023S	:	SUPERIOR COURT
BRCP CT PROPERTIES, LLC	:	JUDICIAL DISTRICT OF
v.	:	STAMFORD/NORWALK
	:	AT STAMFORD
CITY OF NORWALK	:	OCTOBER 9, 2013

MEMORANDUM OF DECISION

This action is a real estate tax appeal brought by the plaintiff, BRCP CT Properties, LLC (BRCP) contesting the valuation of its real estate at 32 Weed Avenue by the assessor for the city of Norwalk (city) on the revaluation date of October 1, 2008 and subsequent years.

The subject property is described by the plaintiff's appraiser, Barry J. Cunningham, Ph.D. (Cunningham), as "a corporate conference center and celebratory events facility with a supporting 120-room hotel wing *exclusively* accommodating conference and event attendees. No transient business is permitted by . . . Norwalk. It sits on a lightly wooded and gently rolling 66.459 acres in a residential section of West Norwalk. It is encumbered by [cemeteries][1], ponds, flood zone areas[2], and easements and

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There are two small cemeteries located on the site with deeded allowance for interested parties to visit. See plaintiff's Exhibit 7, p. 15.

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"The subject is partly located in FEMA Special Flood Hazard Area 'A'. . . ." (Plaintiff's restrictions that physically and legally limit further development." (Emphasis in original.) (Plaintiff's Exhibit 7, p. 3.)

On the revaluation date of October 1, 2008, the city's assessor valued the subject real estate at $21,761,500. The plaintiff's appraiser, Cunningham, valued the subject real estate, as of the same date, at $11,400,000. See plaintiff's Exhibit 7, p. 2. The city's appraiser, Robert F. Mulready (Mulready), valued the subject property, as of the same revaluation date, at $24,500,000. See defendant's Exhibit K, p. 92.

The plaintiff had previously appealed the assessor's determination of fair market value of the subject, as of October 1, 2008, to the city's board of assessment appeals (BAA) which denied the plaintiff's application for relief. In appealing the BAA's denial, the plaintiff also added a claim of illegality on the part of the assessor pursuant to General Statutes § 12-119. No evidence was introduced to support this claim.

Cunningham describes the sales history of the subject as follows:

"The subject property sold - *as a going concern* - in July 2007 for $30,417,327. It was part of [a] broader transaction between Dolce (seller) and Broad Reach Capital Partners (buyer) to acquire Dolce's management company and then two of their facilities (the subject being one of them). The subject was not openly marketed. Dolce Hotels & Resorts, now as a subsidiary of Broad Reach, retained the management contract and

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Exhibit 7, p. 17.)

continued to manage the property since the sale. At the time of the sale, the buyers were basing their decision on a 2006 net income (after reserves) of $1,946,248. The implied cap rate on the *going concern* in early 2007 was ($1,946,248 [divided by] $30,417,327) 6.40%. The allocated price of the real estate at the time of sale was $24,898,934." (Emphasis in original.) (Plaintiff's Exhibit 7, p. 3.)

Cunningham further noted that the seller in this transaction was the management company. See plaintiff's Exhibit 7, p. 62.

There are three ponds and substantial wetlands on the site covering about two-thirds of the area. Approximately fifteen acres of the subject land are encumbered by a conservation easement. The subject property, lying within and surrounded by a one-acre AAA residential zone, was zoned Research and Development (RD) allowing for research and development firms, executive offices, and executive and management educational facilities for their corporate business use. Any use in this RD zone requires a special permit to be granted by the zoning commission. See plaintiff's Exhibit 7, p. 20.[3]

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See Certificate of Special Permit #1-80SP, setting forth the resolution of the Norwalk Planning & Zoning Commission, effective 4/25/80, authorizing the construction of an executive and management educational facility. See attachment to plaintiff's Exhibit 7.

See also Certificate of Special Permit #1-94SP, executed on 12/26/97, reciting that the application "for the addition of up to twenty-five (25) unaffiliated companies during any one calendar year, with no more than twelve (12) unaffiliated companies during any one calendar week, for use of an existing management training center . . . ." (See attachment to plaintiff's Exhibit 7.)

In February 2009, Dolce was successfully granted reduced restrictions on its use to allow for celebratory events such as weddings, bar/bat mitzvahs, birthday parties, reunions, graduations and the like. However, the maximum number of celebratory events was limited to 48/year as well as restrictions on late evening events. In order to obtain these zoning concessions from the city with the approval of adjoining residential property owners, Dolce dedicated an additional 5 acres of its land adjoining the conservation easement for open space in perpetuity. See plaintiff's Exhibit 7, p. 21.

Of particular significance to the issue of valuation, is the fact that the plaintiff, in the operation of the conference center, cannot serve transient business per the city's zoning regulations. See plaintiff's Exhibit 7, p. 22. This preclusion is a major distinction between the subject as a conference center and the hotel industry in general.

The improvements to the subject property consists of three connected brick

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See also Certificate of Special Permit #8-03SP, executed 8/20/03, reciting approval for "use of an existing 120-room executive and management training facility to permit the addition of meetings and the training of unaffiliated company employees . . . no more than twelve (12) unaffiliated companies during any one calendar week and no more than 399 persons during any one calendar day[.]" There was a grant of a conservation restriction executed on 9/23/03, allowing "[a]ccess to the Property for members of the West Norwalk Property Owner's Association and property owners eligible to belong to the West Norwalk Property Owner's Association, and their immediate families, for walking and hiking, at such times and places as [the owner] may permit from time to time." (See attachment to plaintiff's Exhibit 7.)

buildings[4], the center of which is a 21,200-square-foot (SF) conference center containing 31 meeting rooms, an amphitheater, a full-service restaurant and bar, fitness center, indoor pool, basketball court, sauna, and outdoor tennis courts. A 6,491-SF basement beneath the conference center is partially used for offices. See plaintiff's Exhibit 7, p. 18. There is a 151-space parking lot and a 45-space parking garage. The conference center is supported by a 120-room hotel wing with wide hallways and larger than typical hotel rooms. The hotel rooms have large windows and the hotel contains a variety of small and large meeting rooms, and a rustic pub. See plaintiff's Exhibit 7, p. 19. The areas of the easements, ponds and wetlands contain nature trails which are not only available to guests but also to residents living in the neighborhood.

Cunningham noted that "[t]he substantial decline in value between early 2007 and October 1, 2008 is the result of a convergence of economic events, both nationally and to the hospitality sector in particular. Corporate training is paid for with discretionary income and since early 2008[,] corporate America has been holding it." See plaintiff's Exhibit 7, p. 4.

Cunningham's rationale for arriving at such a low valuation of $11,400,000 for

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As the plaintiff notes in its 4/26/13 brief, p. 5, n.2, "[b]oth Mr. Cunningham and Mr. Mulready agree that the subject improvements have a gross building area of 191,360 [SF]. This is in contrast to the gross building area of 222,197 [SF] reflected on the city's field cards." (Citations omitted.)

the real estate is based on his view that the plaintiff had contracted to purchase the subject in early 2007 premised on a 2006 net operating income (NOI) of $1,946,248 which dropped at the end of 2008 to $1,012,605 and further dropped by the end of 2009 to a minus $29,969. See plaintiff's Exhibit 7, p. 4. Cunningham concluded that by "October 1, 2008, the market for corporate conference centers was declining rapidly and it was known that 2009 was to be even worse." (Plaintiff's Exhibit 7, p. 36.)

From a historical perspective, the plaintiff was a private real estate fund. It was looking for a real estate management company to manage its acquisitions. Dolce Norwalk Management Company managed the Dolce Conference Center in Norwalk. The plaintiff saw an opportunity to acquire a management company as well as a conference center for it to manage. Dolce Management had a 20-year management contract with the owners of Dolce Norwalk. In June 2007, the plaintiff signed a contract to purchase Dolce Management as well as two conference centers, including the subject.

UBS Real Estate Securities, Inc. (UBS), as the plaintiff's lender, provided $23.5 million to purchase the subject and required the plaintiff to set aside 4% of gross revenue to provide for the property's maintenance. See plaintiff's Exhibit 7, p. 60. UBS had Cushman & Wakefield complete an appraisal of the property but the plaintiff itself did not engage an appraiser. The previous owners of the subject property did not list the subject with a broker, and therefore, the subject was not put on the market. The plaintiff and the owners concluded the deal as a private sale.

As noted by the plaintiff in its 4/26/13 brief, p. 7, "at the time the acquisition of the subject property was being negotiated, the buyer and seller were already related by virtue of the prior acquisition of the Dolce management business. . . . [T]his transaction did not exhibit all of the hallmarks of a 'market value' transaction as that term is generally understood by appraisers."

At the time of the revaluation on October 1, 2008, the plaintiff's core business was conferences for corporate training. In February 2009, there was a change in the zoning requirements to permit the plaintiff to book up to 48 celebratory events per year, including evening events, as noted above, on condition that the plaintiff would set aside five acres as a conservation easement to placate the adjoining residential property owners.

When the plaintiff purchased the management company and the conference center in July 2007, the going concern purchase price of $30,417,327 included assets such as the management company; the real estate; the personal property; future contracts and the work force in place.[5]

Cunningham concluded that the highest and best use of the subject property, as of

[5] "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." Redding Life Care, LLC v. Redding, 308 Conn. 87, 95-96 n.9, 61 A.3d 461 (2013).

October 1, 2008, was “for its continued use as a corporate training center and celebratory events facility.” (Plaintiff’s Exhibit 7, p. 37.) As noted above, it was only after October 1, 2008 that the plaintiff sought the city’s permission to book celebratory events. Contrary to Cunningham’s conclusion of the highest and best use of the subject, as of the date of October 1, 2008, celebratory events were not permitted.

Starting with the sales approach to value, Cunningham stated: “In the sales comparison approach, the value of a property is estimated by comparing it with similar, recently sold properties in the surrounding or competing area. Inherent in this approach is the principle of substitution, which holds that when a property is replaceable in the market, its value tends to be set by the cost of acquiring an equally desirable substitute property, assuming that no costly delay is encountered in making the substitution.” (Plaintiff’s Exhibit 7, p. 38.)

Cunningham went on to describe something different:

“Four sales were found to be most comparable to the subject. The most comparable were those requiring the least adjustments and where those adjustments were quantifiable or qualitatively defensible. Bear in mind that this analysis compares the subject to the going-concern of the sales, inclusive of business enterprise value (BEV) including personal property in-place. When summarizing this approach to value, the contributory value of the personal property for the subject was deducted to render a value for the real estate-only." (Emphasis omitted.) (Plaintiff's Exhibit 7, p. 38.)

It would appear that Cunningham, in deducting only the value of the personal property from the going concern to arrive at a value for the real estate, ignored other elements, such as intangibles like the work force, management, cash and cash equivalents, etc. "[W]hen 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." Redding Life Care, LLC v. Redding, 308 Conn. 96 n.9.

Cunningham noted that he could not find any corporate conference sales to consider so he considered hotels similar to the subject because these hotels were large enough to accommodate corporate conferences. However, there is a major distinction between the subject and the four sales Cunningham considered to be comparable.

The subject was restricted from lodging transient guests while the full-service hotels lodged transient guests. Additionally, the subject had a conference center with 31 meeting rooms and a large amphitheater while the full service hotels did not. These sales are hardly comparables.[6]

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6 Cunningham commented: "While the subject's meeting space approximates the space

Cunningham's sale #1 was the Doubletree Inn located in Norwalk. It sold as a going concern on May 30, 2008 for $19,385,800. The Doubletree Inn is a 140,000-SF hotel containing 266 rooms and 7,000 SF of meeting space. After factoring the cost of renovations completed prior to the sale, Cunningham arrived at an adjusted sales price of $22,385,800. See plaintiff's Exhibit 7, pp. 39-41.

Cunningham's sale #2 was the Westport Inn located in the center of Westport. It sold as a going concern for $13,149,500 on October 26, 2007. This property has a 65,000-SF hotel containing 115 rooms and 6,000 SF of meeting space. Cunningham noted that substantial renovations were made before the sale. See plaintiff's Exhibit 7, pp. 42-44.

Cunningham's sale #3 was the Sheraton located in downtown Stamford. It sold as a going concern for $22,000,000 on March 2, 2007. There is a 187,513-SF hotel containing 383 rooms and 20,000 SF of meeting space. Cunningham noted that $14,350,000 in renovations were completed after the sale. Therefore, the adjusted sales price was calculated at $36,350,000. See plaintiff's Exhibit 7, pp. 45-47.

Cunningham's sale four was the Marriott in Trumbull that sold as a going concern for $28,250,000 on February 8, 2007. This was a 241,074-SF hotel containing 324 rooms

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from the competitive properties, its hotel room-count is comparatively less. This is consistent with the fact that the subject's hotel rooms only serve conference and celebratory events and not transient business. All other properties profiled allow transient business and most are better located to capture it." (Emphasis omitted.) (Plaintiff's Exhibit 7, p. 32.)

and 18,000 SF of meeting space. Cunningham reported that $3,000,000 was spent for renovations immediately after the sale, for the adjusted sales price of $31,250,000. See plaintiff's Exhibit 7, pp. 48-50.

The reason Cunningham focused on the sale price and number of rooms of the so-called comparables was to form an opinion of value based on a price per room as a basis to compare to the subject.

Cunningham concluded as follows: "The data demonstrate a mean of $100,692 [per room] with a range of $92,000 to $107,000, rounded. Based on this analysis, it is my opinion that the market value of the subject property's going concern via the sales comparison approach as of October 1, 2008, is between $106,000 and $107,000 per unit." (Plaintiff's Exhibit 7, p. 54.)

Using the 120 rooms in the subject property, Cunningham found that the going concern value of the subject was between $12,720,000 and $12,840,000, from which he deducted the value of the personal property at $1,750,000, to arrive at a market value for the real estate using the sales approach at $10,450,000 to $10,570,000, rounded to $10,500,000, as of October 1, 2008. See plaintiff's Exhibit 7, p. 54.

Cunningham struggled to compare his selection of sales to the subject. This was evident in his comment that "[s]etting aside the offsetting factors of aesthetics and subject features versus its lack of taking in transient business, the subject is poorly located relative to the sales." (Plaintiff's Exhibit 7, p. 54.)

This analysis is problematic because Cunningham was comparing the proverbial apples and oranges. As Cunningham was quick to point out, the subject is not a hotel as it did not cater to transient business.

In comparison to the hotels that Cunningham selected, which have substantially less meeting rooms, the subject has a conference training center with 31 meeting rooms and an amphitheater. See plaintiff's Exhibit 7, p. 18. There is little credibility in using hotels that cater to transient guests when the subject specializes in employee training conferences as of the revaluation year of October 1, 2008.

As discussed above, Cunningham noted that the subject sold as a going concern for $30,417,327 in early 2007 and reported an adjusted price for the real estate at the time of sale at $24,898,934. Yet, over just one year later, he valued the subject real estate, as of October 1, 2008, at $11,400,000, a reduction of over 50% of the original allocation of the real estate's value. See plaintiff's Exhibit 7, p. 54.

Cunningham's final conclusion of value of $11,400,00 was for the value of the real estate only. However, this value was derived from Cunningham's finding that, as of October 1, 2008, the going concern value of the subject was $13,686,175. See plaintiff's Exhibit 7, p. 61. Cunningham deducted the value of the personal property at $1,750,000 and the cost of future roof repairs at $520,000 from the subject's going concern value to arrive at his real estate value of $11,400,000.[7]

As the plaintiff notes in its 4/26/13 brief, p. 15, "[n]o deduction for business value was deemed necessary by Mr. Cunningham." It is difficult for the court to accept the opinion that no business value was included in Cunningham's finding of value of the subject, as of October 1, 2008, at $13,686,175. By definition, a going concern, such as the conference center, was presently in business having all the attributes of an ongoing business.

Cunningham attributed this reduction in value of the subject to "the subject's inability to pivot to transient business as other conference centers did when corporate business dried up in 2008." (Plaintiff's Exhibit 7, p. 54.) Cunningham knew that, under present circumstances, there was no way that the city would permit the plaintiff to pivot to transient business. This dramatic fall in value in such a short period of time raises additional questions related to the credibility of a valuation that values the subject at less than 50% of the purchase price occurring 18 months earlier. Of particular interest is the fact that the plaintiff obtained a loan secured by a mortgage in the amount of $23,500,000 from UBS at the time of the 2007 purchase. See defendant's Exhibit K, p. 68. In other

7 Cunningham's $520,000 deduction for the future repair of the roof appears problematic in view of the requirement of the lender UBS that requires the plaintiff to set up a lender-mandated escrow of 4% of gross income yearly to be used for such repairs.

words, as of October 1, 2008, a seller would have to pay off a mortgage of $23,500,000 with the proceeds of the sale at $11,400,000 (as opined by Cunningham). This is hardly credible since such a loss would imply a forced sale.

A hallmark of the valuation of real estate for assessment purposes is that valuation is based on fair market value. See General Statutes § 12-63 (a): "The present true and actual value of all other property 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.)

As noted by the court in United Technologies Corp. v. East Windsor, 262 Conn. 11, 25, 807 A.2d 955 (2002): "The 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 assuming, of course, that a market exists for such optimum use.'"

It is difficult to imagine that the plaintiff would purchase the subject conference center in 2007 and, as a willing seller, dispose of the subject real estate with a loss of approximately $13,500,000 ($24,898,934 minus $11,400,000). This type of sale would indicate a forced sale not indicative of fair market value. It simply is not credible for a seller as sophisticated as the plaintiff to sell within such a short period of time in a climate that results from a downturn in the economy.

Mulready, the city's appraiser, reported that the hotel market had experienced periodic recessions, and following these recessions, had made relatively quick recoveries. This information supports the conclusion of the court that "[w]ith recoveries so quick, it further backs up the logic of not selling unless the market is stabilized." (Defendant's Exhibit K, p. 54.)[8]

As a matter of fact, subsequent events would mitigate against the plaintiff being a willing seller on October 1, 2008, because the plaintiff, as a corporate training center, attempted to overcome the recession by applying to the city in 2009 for permission to conduct celebratory events on the premises.

Turning to Cunningham's use of the income capitalization approach, Cunningham focused on the direct capitalization method which, as noted below, capitalizes one year's

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Mulready noted that "[i]t is very important to note that during this recession, as with previous recessions, smart money is often on the side lines. This means many companies in good fiscal health do not buy or sell in poor markets." (Emphasis omitted.) (Defendant's Exhibit K, p. 45.)

Mulready further noted: "There have been 11 recessions since 1946 in total, of which there were four since 1973 (not including the recession that began in December 2007). They ranged from 1 year to start recovery to 4 years. There was one recession with two years to start recovery and one with three years to start recovery." (Defendant's Exhibit K, p. 54.)

Contrary to Cunningham using the market sales approach to value the subject property, Mulready declined to use the market sales approach because in his opinion, "sales of individual comparable hotels are not readily available. . . . [M]ost sales are portfolio sales and definitive information is often not available." (Defendant's Exhibit K, p. 66.)

income.

As Cunningham reported: “The income approach is predicated on the notion that the buyer will receive *future* benefits in the form of an income stream; known as the principle of anticipation. The income capitalization approach attempts to quantify the present value of those *future* benefits. The conversion of future benefits may be accomplished either through direct capitalization or through yield capitalization. Yield capitalization converts future benefits (income) into value by discounting those (yearly) benefits into a present value via a Discounted Cash Flow (DCF) Analysis. The direct capitalization method considered the subject’s net income 2006 through 2009, as well as the prospect of *future* performance. In this appraisal, Direct Capitalization is used in deriving a market value opinion for the going-concern. From this, personal property existing in the facility (PP-in Place) is deducted to arrive at an opinion of the contributory value of the real estate.” (Emphasis in original.) (Plaintiff’s Exhibit 7, p. 55.)

Cunningham’s selection of the direct capitalization approach to value the subject is problematic because he considered the plaintiff’s net income from 2006 through 2009 “as well as the prospect of *future* performance.” (Emphasis in original.) This analysis appears to transform a direct capitalization method into a DCF analysis.

“Direct capitalization is distinct from yield capitalization . . . in that the former does not directly consider the individual cash flows beyond the first year. Although yield capitalization explicitly calculates year-by-year effects of potentially changing income patterns, changes in the original investment's value, and other considerations, direct capitalization processes a single year's income into an indication of value." The Appraisal of Real Estate (12th Ed. 2001) p. 529.

Mulready also recognized that the direct capitalization income approach required the capitalization of one year's NOI to arrive at fair market value. See defendant's Exhibit K, p. 58: "The direct capitalization method is defined as: 'A method used to convert an estimate of a single year's income expectancy into an indication of value in one direct step . . . ." In using the direct capitalization approach, Mulready, like Cunningham, considered the plaintiff's NOI covering four years from 2006 through 2009. See defendant's Exhibit K, p. 61.

The only credible way to arrive at the fair market value of the subject property, as of October 1, 2008, is to consider the DCF analysis which would take into consideration the cash flow over a period of years, not just for the year of October 1, 2008 which was in recession. Cunningham, in his development of the DCF analysis, considered only the recession period from 2006 through 2009, whereas Mulready considered the period from 2008 through 2013.[9] Pursuant to General Statutes § 12-62 (b), municipalities must

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9 For clarity purposes, it should be noted that Mulready covered BRCP's NOI period under his direct capitalization analysis from 2006 through 2009. Mulready covered BRCP's NOI period under his DCF analysis from 2008 through 2013.

conduct a revaluation of all real estate every 5 years. Therefore, it is more appropriate to consider the DCF analysis, by considering the five-year period from October 1, 2008 through October 1, 2013, not the shorter period of time encompassing the recession years.[10]

Although Mulready reported the pro forma total income of the plaintiff for the period of October 2008 - September 2009 at $8,341,096 (see defendant's Exhibit K, p. 65), he reported the actual total revenue of $10,426,370 (see defendant's Exhibit K, p. 61) in his calculation via direct capitalization, a difference of approximately $2 million.

In his income capitalization approach via direct capitalization, Mulready averages NOI from 2006 through 2008 to arrive at $1,857,370, which he capitalized at a tax-loaded capitalization rate of 9.0%, to arrive at a fair market value of the subject hotel property at $20,635,000. See defendant's Exhibit K, p. 61. Mulready calculated a deduction for personal property in the amount of $2,280,000. See defendant's Exhibit K, p. 61. Considering this amount, Mulready's resulting indicated market value of the subject real estate was, therefore, $18,355,000.

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As the court in DeSena v. Waterbury, 249 Conn. 63, 83, 731 A.2d 733 (1999) noted: "Tax assessors are required to recognize and act on the principle that the true value of a fixed asset such as real estate is fairly constant and must be gauged, not by conditions temporary and extraordinary, but by those prevailing over a period of time, and the assessors, in listing values of property for taxation, may, to a certain extent, disregard excesses of a boom as well as the despair of a depression." (Internal quotation marks omitted.)

However, Mulready concluded that there was additional value of $4,000,000 for what he considered to be 10 acres of excess land located to the south of the hotel wing. Mulready should have known that the plaintiff did not have plans to develop the excess land, but he speculated that it could be subdivided into 10 single-family house lots and sold for $400,000/lot.[11]

"The potential value of land if subdivided could well be considered by a willing buyer and a willing seller where subdivision is a reasonable possibility and the costs of subdivision are not speculative or uncertain." (Internal quotation marks omitted.) Robinson v. Westport, 222 Conn. 402, 408, 610 A.2d 611 (1992).

In the present case, however, it is not reasonably probable that 10 acres of the subject land could or would be developed into 10 building lots. As noted by the plaintiff in its 4/26/13 brief, p. 23 n.3: "Mr. Mulready testified that the existence of the wetlands would require any homes constructed on the surplus land to be as close as 40 feet to the guestroom wing. Realizing that the location of homes so close to the guestrooms would be problematic, Mr. Mulready speculated that the residences could be shielded by the creation of a berm. Mr. Lowery testified on rebuttal that BRCP would never allow homes in such close proximity to the guest rooms as they would constitute an eyesore that would

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The court also notes that Mulready calculated the value of special events at $780,000. See defendant's Exhibit K, p. 61.

significantly diminish the experience of their guests."[12]

Following a review of all of the facts presented in this case, it would be pure speculation to presume that the so-called excess land of the subject would presently, or in the near future, be developed into a 10-lot residential subdivision.

In the resolution of the value of the subject property as of October 1, 2008, Cunningham undertook a development of his projection of income for use in the direct capitalization approach covering a period of 2006 to 2009, a bleak period for conference center business. Commenting on this period of time, Cunningham noted that "[i]t is reasonable to believe then that the most probable stabilized projection a typical buyer would make is a stabilized total revenue projection capturing the three highest years on record (2006-2008) and the known expectation for a very low year in 2009. No buyer would ignore the revenue slide in making a purchasing decision." (Emphasis omitted.) (Plaintiff's Exhibit 7, p. 58.)

It is more credible, given the circumstances that existed, in a period of recession

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See Robinson v. Westport, 222 Conn. 409: "The uses to be considered must be so reasonably probable as to have an effect on *present market value of land.* Purely imaginative or speculative value should not be considered." (Emphasis in original; internal quotation marks omitted.)

See also plaintiff's 4/26/13 brief, p. 24 – reference to Michael Wrinn's testimony that governmental approval to subdivide and build 10 houses on the existing land could not occur under present zoning regulations.

with temporary and extraordinary economic conditions on the revaluation date of October 1, 2008, to level the playing field between boom and bust by considering a period used by Mulready covering a period from October 2008 through September 2013.

Mulready's use of the DCF analysis[13], covering a five-year period from October 1, 2008 through September 30, 2013, indicates a going concern value as follows:

Rounded value of reversion	$18,500,000
Rounded value of cash flow	4,700,000
	$23,200,000

See defendant's Exhibit K, p. 65.

Cunningham's opinion that there was no business value of intangibles included in the subject's 2007 sale conflicts with the actual figures. For example, taking the original sale price of $30,417,327 and deducting the real estate value of $24,898,934 and then deducting the personal property value of $1,750,000[14], results in a balance of $3,768,393, which is approximately 12% of the original sale price. This 12% amount could only be accounted for as the intangible portion of the subject's business value.

Mulready's finding of the reversion value at $18,500,000 and the cash flow value at $4,700,000 was based on his use of pro forma figures rather than actual numbers.

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For an example of discounting of income streams and reversions for commercial property, see The Appraisal of Real Estate (12th Ed. 2001), p. 591. See also R. Reilly & R. Schweihs, Guide to Property Tax Valuation (2008), p. 105.

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See Exhibit 7, p. 13, plaintiff's 2009 personal property declaration filed with the city.

However, the plaintiff, relying on Exhibits 11 and 12, points out that the actual NOI figure for 2010 was $476,000. See plaintiff's 4/26/13 brief, p. 18. In 2011, the actual NOI figure was $1,118,000. In 2012, the actual NOI figure was $1,080,000.

It is difficult for the court to accept pro forma valuations when the actual numbers exist upon which to base a determination of the subject property's fair market value. Although projections are an element in the DCF analysis, there is no reason to speculate if actual figures are available. Since the actual NOI for 2010, 2011 and 2012 are available, these actual numbers can be substituted for the pro forma numbers used by Mulready. Using actual NOI figures, the court will have more accurate information upon which to base its finding of the subject's fair market value. With regard to NOI for 2008-2009, Mulready reported in his DCF model, see Exhibit K, p. 65, a pro forma amount of $979,928. Yet Mulready reported in his direct capitalization model, see Exhibit K, p. 61, actual NOI for 2008-2009 of $1,577,034.

Substituting the actual NOI for 2008, 2009, 2010, 2011 and 2012, the value of the cash flow would be approximately $5,000,000. Adding the value of the cash flow at $5,000,000 to the reversion value, as found by Mulready, at $18,500,000, results in a total value of the going concern at $23,500,000.

In determining the fair market value of the subject real estate, as of October 1, 2008, certain principles should be considered in order to address the divergent opinions of the appraisers and gauge the credibility of the parties' experts.

First, "the 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 of estimating the value of such . . . [property] for taxation." (Citation omitted; internal quotation marks omitted.) Carol Management Corp. v. Board of Tax Review, 228 Conn. 23, 39-40, 633 A.2d 1368 (1993).

Next, the trier, in arriving at his or her own conclusions, does so by weighing the opinion of the appraisers, the claims of the parties and his or her own general knowledge of the elements going to establish value. See Xerox Corp. v. Board of Tax Review, 240 Conn. 192, 204, 690 A.2d 389 (1997).

Finally, "[t]he 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. . . ." (Internal quotation marks omitted.) Redding Life Care, LLC v. Redding, 308 Conn. 101.

In the present case, the court heard the testimony of the parties' appraisers. However, each appraiser's analysis raises credibility issues.

As an example, Cunningham used the going concern approach to value in which he found no value to the intangibles connected to the plaintiff's overall business. Yet, a highlight of the original sale was the acquisition of the contract of the management company whose expertise was certainly a valuable intangible asset. Cunningham also used hotels as being comparable to the subject when the subject conference center could not accept transient guests similar to hotels.

As to Mulready, he also used the going concern approach considering hotel criteria. In his DCF process, Mulready used a pro forma model when, as the plaintiff points out, actual NOI figures were available at the time he prepared his report. Mulready also included the value of a theoretical subdivision that, as the court pointed out, could never, in the present circumstances, become viable.

The fact that two experienced and knowledgeable appraisers using the same principles of valuation and having the same factual information, end up with valuations $13 million apart is difficult to fathom.

In its analysis, the court has accepted Mulready's process as more credible than Cunningham's, even though the court recognizes the flaws in Mulready's approach that relied on pro forma figures instead of actual figures. In an attempt to rationalize Mulready's use of pro forma figures, the court in its mathematical analysis used actual figures which did not materially change the outcome as found by Mulready.

Taking the total value of the going concern at $23,500,000, it is necessary to deduct the value of the intangibles which the court had previously established at 12% of the going concern value, or $2,820,000, and then to deduct the value of the personal property at $1,750,000. Therefore, the total value for the real estate is calculated at 18,930,000, rounded to $19,000,000.

Having arrived at a fair market value of the real estate, as of October 1, 2008, at $19,000,000, which is less than the city assessor's valuation, judgment may enter in favor of the plaintiff. Although the plaintiff seeks costs for appraisal fees and pre-judgment interest, the court is not inclined to award costs or interest to either party given the nature of this case in which both parties expended substantial time and costs.

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Arnold W. Aronson
Judge Trial Referee