NO. CV 09 4029370S	:	SUPERIOR COURT
WHEELABRATOR BRIDGEPORT, L.P.	:	JUDICIAL DISTRICT OF FAIRFIELD
v.	:	AT BRIDGEPORT
CITY OF BRIDGEPORT	:	JUNE 28, 2013

NO. CV 11 6012150 WHEELABRATOR BRIDGEPORT, L.P., ET AL.	:	SUPERIOR COURT
 v.	: :	JUDICIAL DISTRICT OF NEW BRITAIN
CITY OF BRIDGEPORT	:	JUNE 28, 2013

MEMORANDUM OF DECISION

This case involves two tax appeals of a waste-to-energy (WTE) facility located at 95 Howard Avenue in the city of Bridgeport (city).

In the first tax appeal with Docket Number FBT CV 094029370 (hereinafter referenced as the 2009 appeal), the plaintiff (Wheelabrator Bridgeport, LP) challenges the city assessor's valuation as to its real and personal property on the Grand Lists of October 1, 2007 and 2008.

In the second appeal, Docket Number HHB CV 116012150 (hereinafter referenced as the 2011 appeal), the plaintiffs (Wheelabrator Bridgeport, LP, U.S. Bank National Association (as corporate owner trustee), James E. Mogavero (as individual owner trustee), and Waste to Energy I, LLC challenge the assessor's valuation as to their real and personal property on the Grand Lists of October 1, 2010 and subsequent Grand Lists based upon the valuation of the subject property as of the revaluation date of October 1, 2008.

For purposes of clarity in this decision on the two appeals, the plaintiffs will be often referenced as Wheelabrator or the plaintiff.

The discussion in this memorandum of decision is set out as follows:

1) The 2009 appeal and the defendant's motion to dismiss.

2) The issue of whether, for the purpose of a tax appeal, a taxpayer may combine real estate and personal property as a single asset.

3) The 2011 appeal.

4) The valuation of personal property.

5) The claims that the assessor acted illegally pursuant to General Statutes § 12-119.

<u>Description of the Facility</u>

The WTE facility, located in an industrial zone (I-LI), is a 138,494-square-foot building that houses a mass-burn plant operated by Wheelabrator Bridgeport, LP[1] to

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"Wheelabrator Bridgeport, LP (the 'Company'), is organized as a Delaware limited partnership between Wheelabrator Ridge Energy Inc. ('WREI,' a general partner who has a 21% interest) and SES Bridgeport, LLC ('SBL,' a general partner and a limited partner who has a 79% interest) (collectively, the 'Partners'), both of which are wholly-owned receive municipal solid waste (MSW) and burn the MSW in three boilers producing steam. The steam runs an electric generator to produce electricity. Wheelabrator sells the electricity to United Illuminating, a local corporation that distributes the electricity to the public. In addition to the income received from the sale of electricity, Wheelabrator also receives income from "tipping fees" paid by municipalities to collect and haul away MSW. Tipping fees are derived from the process whereby trucks collect MSW from the city and surrounding municipalities and dump it at the WTE facility.[2]

As Wheelabrator notes: "[WTE] plants are largely creatures of federal and state policy objectives. Federal and state law encouraged the development of such plants from the late 1970s through the mid-1990s, but changes in the law in the mid-1990s have discouraged the creation of new plants. Thus . . . no [WTE] plant has been built in the U.S. in nearly twenty years. There are only 89 [WTE] plants in the U.S., six of which are

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subsidiaries of Wheelabrator Technologies, Inc. ('WTI'), which is a wholly-owned subsidiary of Waste Management, Inc. ('Waste Management' or 'Parent'). Pursuant to the terms of the partnership agreement, net income or losses, items related to capital expenditures and the amount and timing of capital contributions and distributions of the Company are allocated to the Partners, subject to certain restrictions, based on the Partners' capital balances." (Ex. K4, p. 6.) "In May 1988, prior to commencement of operations, ownership of the Facility was transferred to Ford Motor Credit Company ('Ford') through a sale and leaseback financing transaction. In 1996, Ford assigned its interest in the Facility to DFO Partnership, which subsequently sold its interest to Waste to Energy I, LLC [(WEI)], a variable-interest entity . . . ." Id.

[2] The dumping of MSW is called "tipping" since the truck body is tipped to empty MSW into the plant for burning.

in Connecticut." (Citations omitted.) (Plaintiff's 8/24/12 brief, p. 7.)

The subject property was built in the mid-1980s and became operational in 1988. It was owned by the Connecticut Resources Recovery Authority (CRRA) and leased to Wheelabrator.[3] See Ex. N5, showing ownership of the machinery, equipment and buildings (collectively, the facility) by owner trustees. For the purposes of valuation, the parties disregard the split in ownership and treat land, machinery, equipment, buildings and personal property as part of a going concern business. See the parties' respective responses dated 1/30/13.

The 2009 Appeal

On the October 1, 2007 Grand List, the city's assessor listed the fair market value (FMV) of the subject real property at $365,624,993 and of the subject personal property at $17,253,570. See plaintiff's 6/26/09 complaint, p. 3, ¶ 7.

The plaintiff alleges that "[o]n February 19 and February 26, 2009, Wheelabrator paid the [city] . . . a combined total of $5,806,233.25, equal to 90% of the combined real estate and personal property tax bills and interest charges." (Plaintiff's 6/26/09 complaint, p. 5, ¶ 17.)

On the revaluation date of October 1, 2008, the city's assessor listed the FMV of

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Wheelabrator was formerly known as Bridgeport Resco Company, LP, pursuant to a site lease dated December 1, 1985 and recorded in the city's land records.

the subject real property at $401,624,570 and of the subject personal property at $10,559,534. See plaintiff's 6/26/09 complaint, p. 3, ¶ 10.

In the 2009 appeal, Wheelabrator appealed the action of the city's assessor and the board of assessment appeals (BAA) pursuant to General Statutes § 12-117a[4], § 12-119[5] and § 12-81a. Wheelabrator recited in its complaint that "[p]rior to December 31, 2008, the [CRRA], a tax exempt public agency, owned, and leased to Wheelabrator, the Subject Real Property, along with certain personal property. . . . As such, the Subject Real Property and Subject Personal Property (collectively, the 'Subject Property') were exempt

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General Statutes § 12-117a provides, in relevant part, as follows: "Any person, *including any lessee of real property whose lease has been recorded as provided in [§] 47-19* and who is bound under the terms of his lease to pay real property taxes, claiming to be aggrieved by the action of the . . . [BAA] . . . 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 . . . to the superior court . . . . The amount to which the assessment is so reduced shall be the assessed value of such property on the grand lists for succeeding years until the tax assessor finds that the value of the applicant's property has increased or decreased." (Emphasis added.)

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General Statutes § 12-119 provides, in relevant part, as follows: "When it is claimed that a tax has been laid on property not taxable . . . or 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 [§] 47-19 and . . . is bound under the terms of his lease to pay real property taxes . . . may, in addition to the other remedies provided by law, make application for relief to the superior court . . . . Such applications may be made within one year from the date as of which the property was last evaluated for purposes of taxation . . . ."

from taxation. Wheelabrator, moreover, was not required to declare the Subject Personal Property, for purposes of municipal assessment and taxation." (Plaintiff's 6/26/09 complaint, p. 2, ¶ 4.) Wheelabrator further alleged that "[o]n December 31, 2008, upon the expiration of the lease term in effect as of January 1, 2007, [WEI], a limited liability company in which Wheelabrator's parent company owns an interest, became the owner of the Subject Property, and Wheelabrator became the lessee with responsibility under its lease to pay all taxes." (Plaintiff's 6/26/09 complaint, p. 2, ¶ 5.)

Furthermore, Wheelabrator alleged as follows: "Because the Subject Real Property was exempt from taxation prior to January 1, 2009, Wheelabrator is entitled to appeal the tax assessments on the subject property on both the October 1, 2007 and October 1, 2008 Grand Lists. Said appeals are timely pursuant to . . . § 22a-270 (b) and § 12-81a (d)[6]." (Plaintiff's 6/26/09 complaint, p. 2, ¶ 6.)

<u>The Motion to Dismiss the 2009 appeal</u>

On December 13, 2010, the city filed a motion to dismiss all six counts in the 2009 complaint for lack of subject matter jurisdiction. As to the assessment years of October 1, 2007 and October 1, 2008, the city claims that Wheelabrator has alleged that it

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General Statutes § 12-81a (d) provides: "The purchaser may appeal the doings of the assessor to the [BAA] and the Superior Court as otherwise provided in this chapter; provided such appeal shall be extended in time to the next succeeding [BAA], if the statutory period for the meeting of such [BAA] has passed."

was the lessee from the owner, WEI, when in fact, WEI was never the record title holder of the real and/or personal property located at 95 Howard Avenue. No motion pursuant to Practice Book (P.B.) § 10-1 has been filed to conform the pleadings to the evidence in order to allege that CRRA, and not WEI, was the record title holder of the subject real property. Prior to trial, on June 30, 2011, the court denied the city's motion to dismiss without prejudice to raise the motion at the time of trial.

On pp. 3-4 of the city's memorandum of law in support of its motion to dismiss in the 2009 appeal (hereinafter referenced as defendant's MOL #109), the city recites the following factual background information, to which the plaintiff has not disputed:

"On December 31, 2008, CRRA and the Owner Trustees, as assignees of Bridgeport Resco's interest, terminated the December 1, 1985 Lease Agreement between CRRA and Bridgeport Resco, thereby also terminating the Operating Lease.

"On December 31, 2008, the a) land, b) building, improvements and appurtenances (the 'Improvements'), and c) the personal property located at 95 Howard Avenue (collectively the 'Subject Property') saw further transfers:

"I. As to the <u>land</u> of the Subject Property, while CRRA maintained ownership, Wheelabrator exercised its first option to extend the Site Lease's term as successor-in-interest to Bridgeport Resco as lessee. Ex. A, ¶ 7 (d).

"II. By quit claim deed dated December 31, 2008, CRRA transferred title to the

Improvements to the Owner Trustees. Ex. A, ¶ 8 (e)-(f). (A copy of the recorded deed is attached to Ex. A.)

"III. On January 2, 2009, the personal property was also transferred by quit claim bill of sale from CRRA to U.S. Bank National Association and Mogavero [as Owner Trustees]. See personal property transfer documents, attached hereto as Ex. B.

"On information and belief, the Bridgeport Land Records contain no other documentation subsequent to and pertinent to the foregoing."

(Emphasis in original.)

The defendant further sets out the following summary based on its analysis of Exhibits A, B and D:

"1. The land is owned by CRRA.

"2. The land is leased by CRRA to Wheelabrator Bridgeport, L.P.

"3. The Improvements are owned by U.S. Bank National Association and James E. Mogavero, as Owner Trustees.

"4. The personal property is owned by U.S. Bank National Association and James E. Mogavero, as Owner Trustees."[7]

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"The ownership and leasehold structure was established to allow the Facility to be financed by tax exempt bonds to be paid-off in 20 years (i.e., by 2008); until the bonds were fully redeemed, the CRRA would nominally own the fixtures and personal property, subject to leases to Wheelabrator, which would build and run the Facility and be responsible for certain taxes (though the Facility was exempt from property taxes at the time); during the twenty-year period before the bonds were redeemed, the lease payments

(Emphasis in original.) (Defendant's MOL #109, p. 6.)

The focus of the defendant's motion to dismiss is that §§ 12-117a and 12-119 provide that only an aggrieved person may challenge the valuation placed on a taxpayer's property by the assessor. These statutes further define an aggrieved person to include "any lessee of real property whose lease has been recorded as provided in [§] 47-19 and who is bound under the terms of his lease to pay real property taxes[.]" See also J.C. Penney

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from Wheelabrator would pay-off the bonds; and after the twenty-year period, Wheelabrator or its assignee had the option to purchase the Facility for a nominal amount, at which time the Facility would become taxable and Wheelabrator would pay the property taxes. During the term of the bonds and thereafter CRRA would lease the land to Wheelabrator. See [3/16/12 Tr.] at 136:12-21; 85:14-18." (Plaintiff's 8/24/12 brief, p. 8, n.8.)

"In 1988, Wheelabrator entered into a sale-leaseback transaction, pursuant to which Wheelabrator sold to owner trustees . . . acting on behalf of a financial investor, its right in the Facility (minus the land) through a sublease of the lease with the CRRA and then subleased the Facility back from the owner trustees. Wheelabrator also subleased the land to the owner trustees and then sub-subleased the land back from them. The net result was that Wheelabrator was the ultimate lessee of both the Facility and the land. . . . [T]his transaction benefitted the parties in various ways, including that it permitted Wheelabrator to continue operating the Facility while receiving back its equity investment in the Facility through the sale of its interest in the Facility (thereby enabling Wheelabrator to invest that money in other projects), and it enabled the financial investor to take advantage of the Facility's depreciation and tax credits for federal tax purposes.

"On December 31, 2008, the owner trustees purchased the Facility's fixtures and personal property for the nominal fee agreed-to in the 1980s. The history of the ownership and leaseholds of the Facility (including the machinery, equipment, and buildings) and land is illustrated in Exhibit N5, p. 1 and the exhibits cited therein."

(Citations omitted.) (Plaintiff's 8/24/12 brief, p. 8, n.9.)

Corp. v. Manchester, 291 Conn. 838, 844, 970 A.2d 704 (2009).

The parties agree that WEI was never the owner of the subject property, even though Wheelabrator has alleged on p. 2, ¶ 5 of its 6/26/09 complaint that "[o]n December 31, 2008, upon expiration of the lease term in effect as of January 1, 2007, [WEI], a limited liability company . . . became the owner of the Subject Property, and Wheelabrator became the lessee with responsibility under its lease to pay all taxes."

Wheelabrator's response to the defendant's motion to dismiss is that the city has repeatedly billed Wheelabrator for the taxes and has accepted payment of the taxes from Wheelabrator. The plaintiff notes on p. 59 of its 8/24/12 brief that the court need not reach estoppel because Wheelabrator has standing for a variety of reasons.

Wheelabrator relies on General Statutes § 22a-270 to establish standing.[8] Subsection (a) therein provides that the CRRA, as the authority organized pursuant to the Solid Waste Management Services Act, Ch. 446e, "shall at all times be free from taxation of every kind by the state except for estate or succession taxes and by the municipalities and all other political subdivisions or special districts having taxing powers of the state;

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Wheelabrator maintains that it has been the operator and the "ultimate" lessee of the facility and that "[p]ursuant to . . . § 22a-270 and its predecessor statutes, the Facility was exempt from property taxes until January 1, 2009 (although it made 'Payments in Lieu of Taxes'), by which time the bonds for the Facility had been paid off, and Wheelabrator has the express right pursuant to § 22a-270 to challenge the City's tax assessments." (Plaintiff's 8/24/12 brief, p. 8.)

provided nothing herein shall prevent the authority from entering into agreements to make payments in lieu of taxes with respect to property acquired by it or by any person leasing a project from the authority or operating or managing a project on behalf of the authority." Therefore, in the statutory scheme, CRRA, as the authority, is exempt from municipal property taxes.[9]

However, the exemption provided in § 22a-270 (b) would not prohibit a lessee of the CRRA in the operation of a WTE facility to pay property taxes: "Notwithstanding the provisions of subsection (a) of this section, *real and personal property owned by the authority may be assessed and taxed against a lessee pursuant to chapter 203 by the municipality* in which such property is located if such property is leased as of July 1, 2007, to a lessee or operator by the authority pursuant to an initial site lease entered into between the authority and a lessee on or before December 31, 1985. . . . *The lessee shall be liable for taxes assessed pursuant to this subsection and shall have the right to appeal the amount it is assessed* in the tax year such property first becomes taxable hereunder in the same manner as a purchaser of formerly tax-exempt property under [§] 12-81a, with the same effect as if a conveyance to a nonexempt purchaser had been placed on the land records on the date the property first ceases to be exempt pursuant to this section. The

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Section 22a-270 (a) further provides that "[t]he exercise of the powers granted by this chapter constitute the performance of an essential governmental function . . . ."

assessor and collector of the municipality shall proceed with respect to such property in the same manner as is provided in said [§] 12-81a with respect to adding the property to the grand list, giving notice of the assessment to the lessee and billing the taxes due thereon to the lessee."

(Emphasis added.)

As illustrated by Ex. N5, CRRA leased the land and facility (which included the buildings, machinery and equipment) to Wheelabrator; Wheelabrator subleased the land to owner trustees, dated May 1, 1988, recorded in Volume 2493, p. 39; the owner trustees subleased, as an operating lease, to Wheelabrator dated May 1, 1988, recorded in Volume 2494, p. 301, which lease was extended on September 5, 2007.

Section 22a-270 is not an alternative path for taking a tax appeal in order to avoid the restrictions contained in §§ 12-117a and 12-119. Specifically, subsection (b) of § 22a-270 requires the lessee to comply with chapter 203 of the General Statutes (property tax assessment) which incorporates §§ 12-117a and 12-119, whose terms specifically require a lessee from the owner of real property to record its lease "as provided in [§] 47-19."[10]

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"The phrase 'including any lessee of real property whose lease has been recorded as provided in [§] 47-19 and who is bound under the terms of his lease to pay real property taxes' was added to chapter 12 of the General Statutes in 1965. That amendment was enacted in apparent response to the Supreme Court's decision in Lerner Shops of Connecticut, Inc. v. Waterbury, 151 Conn. 79, [193 A.2d 472] (1963). In that case, the Supreme Court held that a lessee of property was not an 'aggrieved person' within the meaning of General Statutes § 12-118 (now § 12-117a). . . .

Contrary to the allegations in the 2009 complaint, CRRA was the owner that leased the land to Wheelabrator. Although WEI is alleged to be the owner in the plaintiff's 2009 appeal, it was never a record title holder to the facility. See Ex. 3.

Wheelabrator responds that it was not necessary to correctly identify the owner in the 2009 complaint. See Wheelabrator's 8/24/12 brief, p. 64. This argument is problematic because Wheelabrator did plead that WEI was the owner of the facility in its 2009 complaint. See plaintiff's 6/26/09 complaint, p. 2, ¶ 5. Pursuant to §§ 12-117a and 12-119, only a party that has an interest in the subject property, such as an owner, may challenge an assessor's valuation of the property by way of appealing the assessor's valuation to the BAA and to the superior court. See Megin v. New Milford, 125 Conn. App. 35, 40, 6 A.3d 1176 (2010). To make light of a pleading, showing that WEI was the

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"Following Lerner, the legislature passed Public Acts, Spec. Sess, February 1965, No. 65-65. The legislative history clearly demonstrates that this Public Act was passed in response to Lerner. Speaking in support of the bill, Representative Coleman noted that under Lerner, lessees of property had no right to appeal the assessment of property even though they were obligated to pay the taxes under the terms of a net-net lease. He stated: . . . 'In short, this bill empowers the person having the actual burden of the tax payment to claim such relief as may be allowed by law to the lessee of the property.' This passage shows that the intent of the legislation was to overrule legislatively the holding of Lerner Shops, but only as to lessees whose lease had been recorded on the local land records. In the absence of broader language, it is clear that the legislature intended to leave the holding of Lerner Shops intact with respect to unrecorded leases."

(Citations omitted.) Stamford Windustrial Co. v. Stamford, Superior Court, judicial district of Stamford, Docket No. CV 116009771 (*Tobin, D., JTR*, July 5, 2012).

owner when in fact it was not, flies in the face of the importance of pleadings.

"Pleadings have an essential purpose in the judicial process. . . . The purpose of pleading is to apprise the court and opposing counsel of the issues to be tried . . . . For that reason, [i]t is imperative that the court and opposing counsel be able to rely on the statement of issues as set forth in the pleadings. *[A]ny judgment should conform to the pleadings, the issues and the prayers for relief.* The [trial] court is not permitted to decide issues outside of those raised in the pleadings. Facts found but not averred cannot be made the basis for a recovery." (Citations omitted; emphasis in original; internal quotation marks omitted.) Warner v. Brochendorff, 136 Conn. App. 24, 34, 43 A.3d 785 (2012).

It is obvious that the problem raised by the defendant's motion to dismiss arises from the drafting of the plaintiff's pleading in the 2009 appeal. All parties recognize that this allegation is incorrect and instead of moving to correct the error, the plaintiff seeks to overlook the error through an exercise of statutory interpretation that relies on § 22a-270 (b) as a vehicle to challenge the city's assessment as of October 1, 2007 and October 1, 2008.

As to the issue of the facility's ownership by WEI, without any further evidence being offered as to when WEI became the owner of the subject property, the court relies on Wheelabrator's allegation on p. 2, ¶ 5 of its 6/26/09 complaint that "[o]n December

31, 2008, upon expiration of the lease term in effect as of January 1, 2007, [WEI] . . . became the owner of the Subject Property." Accepting this allegation as true, on the valuation dates of October 1, 2007 and October 1, 2008, it conflicts with the actual fact that CRRA was the owner of the subject land.

Simply put, the plaintiff's complaint in the 2009 appeal, covering the October 1, 2007 and October 1, 2008 assessment years[11], alleging that WEI was the owner and lessor

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The plaintiff raises the issue of whether the October 1, 2009 assessment year was included in the first appeal (Docket No. 094029370), also referenced as the 2009 appeal in this decision. The following facts and discussion are relevant to this issue: On June 26, 2009, the plaintiff commenced its appeal contesting the valuation placed upon the subject property on the Grand Lists of October 1, 2007 and October 1, 2008. At the time that the plaintiff commenced the first appeal, the assessment of the plaintiff's property on the Grand List of October 1, 2009 had not occurred.

In the second appeal, HHB CV 116012150, the plaintiff makes the following allegation in the 6/24/11 complaint, p. 4, ¶ 10:

"Wheelabrator is currently litigating an appeal of the 2007 and 2008 assessments on the Subject Property in this Court, in an action captioned Wheelabrator Bridgeport, L.P. v. City of Bridgeport, FBT CV 094029370. In that related pending litigation . . . the city . . . has challenged Wheelabrator's standing to appeal and has moved to dismiss the appeal. . . . Wheelabrator believes that the City's challenge to its standing is frivolous, completely without merit, and designed principally to cause further delay. Nonetheless, Wheelabrator and all of the plaintiffs herein, having ownership and/or leasehold interests in the Subject Property, bring this separate appeal in an excess of caution, in order to fully protect Wheelabrator's rights as a taxpayer. By bringing this appeal of the 2010 Grand List Assessment on the Subject Property, Wheelabrator does not concede any merit to the City's standing challenge, nor does it waive any rights or defenses in the Related Litigation."

In its 8/24/12 brief, p. 3, n.1, the city raises the question that the pleadings in the

2009 appeal concerning the Grand Lists of October 1, 2007 and 2008 were never amended to include the 2009 Grand List:

"Plaintiffs attempted to amend the 2009 appeal to include the October 1, 2009 Grand List in a Request to Amend and Consolidate Appeals on March 9, 2012. The City objected; the Court sustained the City's objection on March 23, 2012. Plaintiffs never filed an amendment for the 2009 Grand List thereafter. Therefore, the Plaintiffs cannot be granted relief for the October 1, 2009 Grand List.

"Notwithstanding, if the 2009 Grand List is considered, it must be considered with the 2009 appeal and not the 2011 appeal. Plaintiffs even concede this point. See Plaintiffs' Response to Defendant's Objection to Plaintiffs' Request for Leave to File an Amended and Consolidated Complaint dated March 27, 2012, at 3. ('Plaintiffs do not seek through their Request for Leave to add U.S. Bank National Association (as Corporate Owner Trustee), James E. Mogavero (as Individual Owner Trustee), and [WEI] as parties to claims arising out of the 2007, 2008, and <u>2009</u> Grand Lists.') (emphasis added). Thus, if the court dismisses the 2009 appeal for lack of standing, the appeals of the 2007, 2008 and 2009 Grand Lists should all be dismissed."

The plaintiff responds as follows in its 10/15/12 reply, p. 1:

"This argument blatantly disregards the Court's clear and unambiguous ruling that all Grand List years from 2008 to the next revaluation are subject to Wheelabrator's appeal, and therefore, Wheelabrator did not need to file an amended complaint listing 2009, 2010, 2011 and 2012. See 3/30/12 Tr. At 733:18-734:2 ("ATTY DAUKAS: . . . What I'm uncertain about is whether under the current complaints we've covered 2009 and 2011 so what I - I'd like to go back and look at this. What I might seek to do is file a short request that the years up through the time of trial are covered. THE COURT: I don't know if you need to do that, Mr. Daukas, because I'm going to state for the record that the Court will consider the - all those years that are covered in this appeal. ATTY DAUKAS: Okay. Thank you, Your Honor, then I don't think I need to.")

At the time that the court made this ruling, the matters then being presented to the court for decision were the 2009 appeal covering the Grand Lists of October 1, 2007 and October 1, 2008 and the 2011 appeal covering the October 1, 2010 Grand List.

Considering the 2009 appeal, the court's ruling was made in the context that § 12-117a of the subject property, failed to comply with §§ 12-117a and 12-119 that allows only an owner of property or a lessee of the owner who has agreed to pay the property tax and whose lease or notice of lease has been recorded on the city's land records to appeal from an assessor's valuation. Accordingly, as to the 2009 appeal, the defendant's motion to dismiss is granted as to all counts regarding the subject real and personal property.

Issue of Treating Real Estate and Personal Property as One Asset

Before turning to the issue of valuation in the 2011 appeal, it is necessary to come to grips with the plaintiff's argument that for purposes of appeal, the plaintiff may combine the real estate, the improvements to the land and the personal property at the subject site into one single asset. The plaintiff contends that since the personal property and the real estate are subject to the same tax rate, it makes no difference whether the assets are combined or treated separately.

The plaintiff contends that there is no distinction between real estate and personal property. See Ex. A, p. 72: "The final value conclusion represents the value of land and improvements, including the contributory value of the machinery and equipment and other assets considered to be business personal property."

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specifically provided that if the court were to reduce the assessed value of the subject property, as of the revaluation year of October 1, 2008, this revised valuation would apply to succeeding years until the property was subsequently revalued. See Samnard Associates, LLC v. New Britain, 140 Conn. App. 290, 295-96, 58 A.3d 377 (2013). As noted above, since the assessment year of October 1, 2009 was included in the 2009 appeal, the dismissal of the 2009 appeal includes the October 1, 2009 assessment year.

One of the problems with this appeal is the confusion that exists with regard to the inclusion of the valuation of personal property with the valuation of real estate. As a matter of fact, the parties' appraisers Kettell and Pomykacz[12], using the Discounted Cash Flow (DCF) Income Approach, made no such distinction.[13]

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The defendant's appraisal report, Ex. 2, is signed by Mark Pomykacz. The plaintiff's appraisal report, Ex. A, is signed by Alexander L . Hazen, Joseph Kettell and Joseph E. Baldoni. For purposes of clarity in this decision, the court will reference Pomykacz and Kettell when discussing the parties' appraisers.

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Kettell testified as follows:

"Q Now Mr. Kettell, what was the [FMV] that you determined from your analysis that's shown on Ex. J? You can look at it now.

THE COURT: [FMV] of what?

ATTY. DAUKAS: Of the Wheelabrator Bridgeport facility.

THE COURT: Of the real estate, not the personal property.

ATTY. DAUKAS: Of the entire facility. Well, let me ask the witness.

Q Mr. Kettell, what were you valuing in Ex. J?

A The entire Bridgeport facility.

Q All the taxable property -

A Yes.

Q - and the pollution control equipment as well?

A Yes, and all the personal property which comprises of the vast majority of the value.

Concurring with Kettell, Pomykacz also combined the valuation of the real estate and personal property of the subject facility to arrive at a final value conclusion. See Ex. 2, p. 43.

Wheelabrator contends that, if the court disagrees with its position that real estate and personal property may be treated as one asset, the value of the subject facility's real property "may be determined simply by subtracting the facility's personal property value from the facility's aggregate [FMV] of $201,700,000 (including tax-exempt pollution control equipment). Which leaves a value for real estate of $147,153,417. (The math is simply: $201,700,000 [total value] (Ex. A at 2, 73) minus $54,546,583 [personal property value] (Ex. F3 (A) at Codes 10, 16, and 20) equals $147,153,417 [real estate value].)" (Citation omitted.) (Plaintiff's 2/11/13 reply brief, p. 2.)

Because the parties do not make a distinction between the valuation of real estate and personal property for tax purposes, the issues in these appeals are at variance with how

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Q Right. And using this pretax method, what's the [FMV] that you determined?

A $201,600,000.

(3/14/12 Tr., p. 132.)

In a few instances in the plaintiff's appraisal report (Ex. A, pp. 46, 84) and during the course of witness testimony (3/14/12 Tr., p. 88, 132, 134-135), the value of $201,600,000 is discussed as the FMV of the Wheelabrator facility. The court will focus its analysis of the plaintiff's argument on the figure of $201,700,000 as set out in Ex. A, p. 73.

each asset is viewed and valued by our statutes.

The valuation of real estate begins with the assessor making a determination of FMV through the process of using one or all of the three approaches to value (market sales, income or cost).

On the other hand, personal property begins its valuation process for tax purposes with the owner submitting to the assessor a declaration containing a list of taxable personal property. See General Statutes § 12-40[14]; see also General Statutes § 12-63 (b) (setting out depreciation schedules for personal property).

Although real estate and personal property are taxed under the same rate, the valuation of each is distinctly different. For these reasons the process for the valuation of real estate and personal property require separate and distinct appeals.

The city also argues that there is no statutory provision for a lessee of personal property to take an appeal pursuant to §§ 12-117a and 12-119. These statutory provisions refer only to a lessee of real property, not a lessee of personal property. See defendant's 8/24/12 brief, p. 17.

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General Statutes § 12-40 provides, in relevant part, as follows: "The assessors in each town . . . shall, on or before the fifteenth day of October annually, post on the signposts therein . . . or publish in a newspaper . . . a notice requiring all persons therein liable to pay taxes to bring in a declaration of the taxable personal property belonging to them on the first day of October in that year in accordance with [§] 12-42 and the taxable personal property for which a declaration is required in accordance with [§] 12-43."

Section 12-40 places the burden of taxation upon the owner of the personal property, not the lessee. Section 12-57a (a) requires a lessee of personal property to identify the owner to the assessor.

For purposes of the 2011 appeal, the issue of a lessee of personal property taking an appeal, which in this case would be Wheelabrator, is a non-issue since the owners of the personal property are parties to the appeal.

<u>2011 appeal</u>

Turning to the main issue of the valuation of the subject property for the assessment years 2010 and subsequent years, it is helpful to set down, at the beginning of the analysis, the various computations of the assessor and the parties' appraisers, which reflect their valuation of the subject property as of the revaluation date of October 1, 2008.

City's appraiser's FMV of Real and Personal Property (Ex. 2, p. 6)		$357,500,000
Plaintiff's appraiser's FMV of Real and Personal Property (including pollution control equipment) (Ex. A, ltr.)		$201,700,000
City assessor's FMV (Ex. A, p. 10)	(Real Estate Only)	$401,624,570
	(Personal Property Only)	$ 10,559,534

Although all parties recognize that CRRA leased the land to Wheelabrator, the parties' appraisers, using the income capitalization approach, ignore this fact and treat the property as if ownership was in the hands of Wheelabrator. This is illustrated by a statement by the city's appraiser in Ex. 2, p. 13: "Our appraisal assumes that the property is held in a fee simple estate, as is required for property tax valuation purposes. As such, our appraisal does not consider either the operating lease or the land lease agreement with the [CRRA]. Expenses related to these leases have been excluded from our analyses."

In the same vein, Wheelabrator agreed that the valuation of the subject property should be arrived at by use of the DCF Income Approach through the use of the income generated by tipping fees and electricity revenue, not income generated by rentals derived from a lease of the subject property. See Wheelabrator's 8/24/12 brief, p. 26: "Here, in sharp contrast . . . Wheelabrator is not asking the Court to apply a rental capitalization approach[.]"

For tax purposes, the valuation of income-producing real property pursuant to General Statutes § 12-63b (a) requires the use of "market rent" as the indicator of income. Subsection (b) of § 12-63b defines "the term 'market rent'" as "the rental income that such [rental] 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 property under the terms of an existing contract of lease at the time of such determination." (Emphasis added.) "'Market rent' under § 12-63b (b) thus is calculated by examining the '(1) net rent for comparable properties, and (2) the net rent derived from existing leases on the property.'" PJM & Associates, LC v. Bridgeport, 292 Conn. 125, 140, 971 A.2d 24 (2009).

The reason Kettell and Pomykacz relied primarily on the DCF Income Approach is that the subject facility is a special-purpose type property in which there is no market from which to develop comparables. As Kettell notes, "[w]hen estimating the value of a specialized process plant for assessment purposes, the use of an Income Approach presents the appraiser with a myriad of difficult but not insurmountable problems. At the outset, it must be realized that most process plants are owner-operated. Since facilities such as the subject are not usually leased in the marketplace, with the exception of sale-leaseback financing arrangements, there are no real comparable rentals upon which an estimate of economic rent can be based." (Ex. A, p. 30.)

On a similar note, Pomykacz stated that "[t]he marketplace, not the appraiser, determines how things are sold or rented. If real property is typically sold in conjunction with personal property and business intangibles, the appraiser must accept the fact, and develop theory and practice that reflects the condition. If real property is typically sold in conjunction with personal property and business intangibles, then the overall value should include the personal property and business intangibles, and should not be used to designate the sum of merely the real property elements." (Ex. 2, p. 43.)

Because the subject is a special-purpose type property with no true comparables, neither appraiser considered the sales comparison approach as a viable method to determine the value of the subject property.

Although it is appropriate to use market rent when dealing with the issue of valuation of income-producing property[15], both Kettell and Pomykacz recognized that the subject property was so specialized that it was difficult to adapt the classic concept of market value. Kettell bypassed the classic concept of market value (where the economic unit is rental income derived from the property), and considered an alternative approach by relying on the "income-producing capabilities of the subject plant as an economic unit of production by using a Discounted Cash Flow (DCF) Technique." (Ex. A, p. 30.)

Kettell further described his methodology as follows:

"This technique is based on a forecast of the business income and expenses that the property will generate over a given period of time. The approach assumes that the value of the enterprise is dependent on the ability of all the assets to earn a reasonable return. Since all business enterprises can include net working capital and non-assessable assets in addition to assessable tangible assets, any value exercise based on the capitalization of income generated by the business would include the contributory value of all asset groups. Therefore, it is necessary to remove the contribution of the non-assessable assets from the income stream prior to capitalization or to deduct the value of these assets from the final

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See PJM & Associates, LC v. Bridgeport, 292 Conn. 140.

value conclusion after capitalization. It must be remembered that the value sought in this appraisal pertains to the assessable real estate, equipment and personalty (excluding working capital, intangible and exempt assets)." (Ex. A, pp. 30-31.)[16]

The essence of the problem here is succinctly stated by Pomykacz when he noted that "[s]ince our appraisal purpose is to find the value of the taxable real and personal property, we began our search for income approach data for the Facility by looking for income that was attributable to strictly the taxable real and personal property. Traditionally at commercial properties, such as offices, apartments, malls, such income is prescribed by leases or the market potential to be leased. There is no such rental market for power generation plants and [WTE] facilities. Thus, we were not able to find income that was strictly attributable to the taxable real and personal property, or just the taxable real property. Similar market conditions exist at many properties where the business activities are intertwined with the personal and real property. Such conditions exist at hotels, movie theaters, hospitals, telephone companies, water companies, landfills, race tracks, factory mills, restaurants and many other properties. Appraisers in all of these cases will find it difficult or impossible to find adequate data on the income to the business that is strictly

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See also Ex. 2, p. 43, where Pomykacz noted: "The overall value concluded considering the three general appraisal approaches includes real property, personal property, intangibles, and taxable and non-taxable property. We shall segregate this overall value among the relevant components in this section, and we shall derive the value of the taxable real and personal property."

attributable to the real property or the real and personal property.” (Ex. 2, p. 63.)

As Kettell further notes, in considering the valuation of the subject property, the question is “‘[w]hat would a typical potential purchaser/user be justified in paying for the subject assets as a unit of production?’” (Ex. A, p. 7.) In other words, Kettell’s focus in this case appears not to be the valuation of the Facility as of October 1, 2008, but what amount a potential purchaser would be justified in paying for the subject business.

An additional problem that arises in using the DCF Income Approach is that from the standpoint of the assessor, the assessor must by statute determine the FMV of the assessable property on a certain date, which in this case is October 1, 2008.[17] The assessor’s concern is somewhat different from that of a purchaser/investor who looks for the generation of profits in the future over a long period of time rather than the value of property at a certain period of time. In using the DCF Income Approach in this case, Kettell has assumed a projection period of 30 years in which to develop a long period of cash flows which can be discounted to produce a current value of the business. See Ex. A, p. 37. Although future profits are a consideration for an appraiser using the DCF Income Approach, the future profits must be based on reliable projections of income. See The Appraisal of Real Estate (12th Ed. 2001) p. 497.

Of key importance in the conduct of an appraisal is that the appraiser has to

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See General Statutes § 12-62 (5).

identify the assets to be appraised. In this case, the appraisal "includes the land, taxable real estate improvements (buildings/structures and land improvements) and taxable personal property (machinery and equipment, furniture and fixtures, electronic data processing equipment, and mobile equipment) assessed at the subject site." (Ex. A, 1/11/12 introductory letter.) The appraisal specifically excludes "[p]roperty owned by [Wheelabrator] that is assessed on parcels not considered to be part of the plant site, working capital, exempt pollution control equipment and intangible assets[.]" Id.

In pointing out the problem of using comparable sales of WTE businesses, Kettell notes that these companies consider their sales transactions confidential making this information unavailable to appraisers. See Ex. A, p. 70. However, Kettell further notes that the purchase price would include "not only the WTE facilities and/or the right to operate the facility, but also other assets such as long-term operating agreements with the respective municipal client, power purchase agreements, leasehold interests and other intangible assets associated with the business enterprise. Unless all of the details of the transaction were known, it would be impossible to allocate the value to individual plants or asset groups (land, buildings, land improvements, machinery & equipment, working capital and intangibles)." (Ex. A, p. 70.)

The city contends that there was no evidence introduced in this case which would disclose how much income CRRA has collected for the land lease or the operating lease as referred to in Ex. N5. However, Wheelabrator notes that pursuant to its lease with CRRA, it was obligated to make annual rental payments of $21.3 million. See Ex. K4, p. 14. See also plaintiff's 2/11/13 reply brief, pp. 4-5. In addition, there is no evidence that would explain whether the site lease entered into by CRRA and Wheelabrator was improved with the subject WTE plant or whether only unimproved land was leased to Wheelabrator with the subject facility constructed later and at what cost. One indication as to cost is reflected in Pomykacz's appraisal report, Ex. 2, p. 51, reflecting a historical cost of $241,949,000 to which Pomykacz added a developer's profit of 15% (calculated at $36,292,350), for a total historical cost of $278,241,350.[18]

Pomykacz, in his development of the cost approach, relied on the value of the land as completed by Vimini Associates (Vimini) in its 1/17/12 appraisal report. The Vimini report sets the value of the land at $2,650,000 (rounded to $2,500,000). See Ex. 2, pp. 58-59.

Wheelabrator's appraiser, using the cost approach, valued the land at $1,570,000. See Ex. A, p. 54. With the difference in valuation between the appraisers of approximately $1,000,000, the defendant, in its 8/24/12 brief, p. 31, n.7, states that, "[w]ithout waiving any rights, the parties have stipulated to the value of the land at $2,000,000. See Ex. D6."

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Pomykacz's inclusion of a developer's profit of 15% of the historical cost lacks credibility. It is logical to assume that when the original facility was constructed, all costs, including a developer's profit, would have been included in the historical costs.

As previously noted, the plaintiff's appraiser Kettell and the defendant's appraiser Pomykacz relied primarily on the DCF Income Approach to arrive at the value of the subject property as of the revaluation date of October 1, 2008.

In addition to the use of the DCF Income Approach, Wheelabrator's appraiser Kettell and the city's appraiser Pomykacz employed the cost approach method as a check on the validity of their findings using the Income Approach.

Using the cost approach, Kettell concluded that "[o]ur cost analysis considered both the cost of replacing the existing facility with a modern substitute and the cost of reproducing it as it currently exists. We are of the opinion that the replacement cost information provides the most accurate method of determining cost-new . . . ." (Ex. A, p. 59.)

The defendant's appraiser Pomykacz also used the cost approach as a check on his findings under the DCF Income Approach, and like Kettell, Pomykacz relied on the replacement cost rather than the reproduction cost. See Ex. 2, p. 52: "We utilized the following Cost per Unit Capacity Method in our analysis to compute the overall Replacement Cost of the Facility. We relied primarily upon this approach when concluding on our cost approach value."

A review of the appraisal reports and the testimony of Wheelabrator's appraiser Kettell and the city's appraiser Pomykacz, convinces the court that, for the reasons stated below, the reproduction cost approach is the only credible approach to use in this case in order to arrive at a FMV of the subject property as of October 1, 2008. The excluded approaches, namely, the DCF and the DC Income Approaches as well as the Replacement Cost Approach, are discussed below.

Although Kettell and Pomykacz contend that the going concern using the DCF approach can determine the value of Wheelabrator's real estate and personal property, as of October 1, 2008, the process used in the DCF Income Approach lacks credibility for the following reasons:

1. As previously noted, if the DCF/Going Concern Income Approach process were credible, then two experienced and knowledgeable appraisers who are given the same basic facts and who use the same Income Approach would not be over $200,000,000 apart in their valuation of the subject property.

2. Both appraisers used an extended holding period in developing the cash flow of the plaintiff's business as of October 1, 2008. Kettell used a holding period of 30 years based on his estimate of a life expectancy of 50 years, 20 years of which have been used as of the 2008 revaluation date. Kettell further notes that "[a]t the end of the Projection Period, we assume that the plant will be permanently shut down and dismantled, and that the demolition cost will be offset by the scrap and salvage value of the equipment and components, plus any remaining working capital." (Ex. A, p. 38.) However, after examining Kettell's DCF analysis for the 30-year period covering 2008 through 2038, a significant amount of Wheelabrator's annual expenses are attributed to plant maintenance and capital expenditures. See Ex. A, Appendix III. As an example, an expenditure for plant

maintenance for 2037 was scheduled for $28,705,086, which would be one year before the facility becomes worthless. Capital expenditures for 2037 are scheduled for $848,364. One would have to inquire why the plaintiff, if in existence in 2037, would spend so much money for plant maintenance and for capital expenditures knowing that the following year, its investment would be worthless. The life of the facility would be extended with these expenditures for plant maintenance and capital expenditures. Therefore, Kettell's opinion that the facility would be worthless at the end of the 30-year holding period is simply not credible.[19]

3. The appraisers employed the going concern approach rather than directly valuing the real and personal property which are the subject of these appeals.

4. Kettell assumes that a likely buyer of the business would be a "C-corporation" which would incur income taxes at an effective tax rate of 40%. This rate was calculated by "blending the marginal federal tax rate of 35% and the Connecticut state income tax rate of 7.5%." (Ex. A, p. 42.) Kettell factored these income taxes into his income approach. On the contrary, Wheelabrator is not a corporation; it is a limited partnership with corporate partners.[20] Since the appraisers are giving an opinion of value for the subject property, as of October 1, 2008, and their opinion is based on Wheelabrator's historical financials, there is no basis for Kettell to change the facts as they presently exist. As noted in the city's 8/24/12 brief, p.

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See, e.g., Orange & Rockland v. Haverstraw, 4133-95 (8-11-2006) 2006 NY Slip Op 51564 and Mirant NY, Inc. Stony Point, 4357 (8-28-2006) 2006 NY Slip Op 51679 (in tax appeals of electricity generating plants, 31 years of forecasting revenues and expenses to develop a DCF model was too long a period of time because of the risks and uncertainties).

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See footnote 1.

42, limited partnerships such as Wheelabrator do not pay income taxes. See also Ex. K4, p. 10.[21]

5. Using the DCF Income Approach based on a projection of net cash flow, Kettell concluded that "the [FMV] of the Bridgeport Facility is $201.6 million, as of the Valuation Date. After deducting working capital in the amount of $2.3 million, the indicated value amounts to $199.3 million." (Ex. A, p. 46.) It would appear that the only intangible Kettell deducted from the overall business value of Wheelabrator to arrive at the taxable tangible property was Wheelabrator's working capital. This goes hand in hand with the acknowledgment in the plaintiff's 8/24/12 brief, p. 2, that "virtually all of the Facility's business value is attributable to revenues the Facility receives from the use of its real and personal property (only a de minimis portion of its business value is attributable to intangibles) . . . ." Working capital, as recognized by both appraisers, represents only a portion of the intangibles of a going concern.

6. In contrast to Kettell's analysis using the DCF Income Approach, the defendant's appraiser, Pomykacz, arrived at a total value of the intangible (non-taxable) property of Wheelabrator's going concern at $15,498,000 for 2008. This amount is based on four of plaintiff's identifiable intangible assets: its computer software, its operational and procedural manuals, its workforce in place, and its working capital accounts. See Ex. 2, p. 83.

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Operating statements prepared for the purpose of appraising real estate using the income approach excludes depreciation and income taxes. This is so because "[t]he amount of income tax varies with the type of property ownership – i.e., the property may be held by a corporation, a partnership, a public utility or an individual. The income tax obligation of the owner is not an operating expense of the property; it is an expense of ownership." The Appraisal of Real Estate (12th Ed. 2001) p. 521.

While the plaintiff contends that the intangible portion of the plaintiff's business is de minimis, it nevertheless acknowledges substantive intangible assets such as the right to operate the facility; long-term operating agreements with the respective municipal client; power purchase agreements; leasehold interests; and other intangibles.

Giving credibility to Pomykacz's opinion that the value of Wheelabrator's intangibles were more than de minimis, it is difficult to accept Kettell's opinion that the value of the intangibles was only $2.3 million in working capital. See Ex. A, p. 46.

Although Kettell and Pomykacz used the DCF Income Approach as their primary method to arrive at the value of Wheelabrator's real and personal property, their contrasting conclusions leave a lot to the imagination.[22]

Each appraiser acknowledged that they also considered the use of the Direct Capitalization (DC) Approach. However, only Pomykacz went through, in a limited way, the process of using the DC Income Approach by taking one year of income consisting mostly of tipping fees and the generation of income from the production of electricity. For October 1, 2008, Pomykacz arrived at net operating income (NOI) of $43,431,749 which

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For example, in Tamburelli Properties Ass'n v. Cresskill Borough, 15 N.J. Tax 629, 643 (1996), the court noted as follows: "It is true that the courts have not always discussed the . . . [DCF] as a method for arriving at true market value for real estate in the most positive terms. . . . [DCF] as applied to tax valuation proceedings, is an amalgam of interdependent, attenuated assumptions of limited probative value. Whatever may be its utility in other contexts, its use in this case can only be described as an exercise in financial haruspication." (Citations omitted.)

was capitalized at a tax-loaded capitalization rate of 10.90%, producing a value conclusion of $398,456,411.[23] See Ex. 2, p. 80.

Both appraisers also considered the cost approach, but again, were miles apart (by more than $150 million) in their findings of value.

Using the cost approach, Pomykacz concluded that, for the revaluation year of October 1, 2008, Wheelabrator's WTE facility was valued at $362,027,000 for the cost of reproduction and valued at $402,753,000 for the replacement cost. See Ex. 2, p. 59.

Kettell, using the cost approach, as of October 1, 2008, concluded that the Wheelabrator's WTE facility was valued at $211,300,000, considering only the replacement cost method, to the exclusion of the reproduction method. See Ex. A, p. 69.

As mentioned above, Wheelabrator and the city have agreed that the value of the underlying land as applied in the use of the cost approach, as of October 1, 2008, was $2,000,000. See Ex. D6.

The cost approach is "[a] set of procedures through which a value indication is derived for the fee simple interest in a property by estimating the current cost to construct a reproduction of, or replacement for, the existing structure plus any profit or incentive; deducting depreciation from the total cost; and adding the estimated land value." The

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23 It is apparent that both appraisers considered the DC Income Approach to have little merit. For this reason, there is no justification for the court to give any consideration to Pomykacz's value conclusion based on the DC Income Approach.

Appraisal of Real Estate (12^{th} Ed. 2001) p. 349.

In the use of the cost approach, Kettell considered both the cost of reproducing the facility as it currently exists and the cost of replacing the existing facility with a modern substitute.

For the following reasons, Kettell chose the replacement of the facility:

"1. If the Bridgeport plant were reconstructed as of the appraisal date, it would not be built exactly as it currently exists; but would be replaced with a modern facility incorporating the latest production technology. A prudent investor would consider this factor when contemplating the alternatives available to him.

"2. The replacement cost data gathered in our investigation includes an analysis of a benchmark modern plant and reference to the costs of other proposed facilities. The information assembled is considered reliable and supported though our consultations with reputable sources in the industry."

(Ex. A, p. 59.)

The FMV of the real estate must be based on the facility as it existed on October 1, 2008. See The Appraisal of Real Estate (12^{th} Ed. 2001) p. 22, defining market value as "[t]he most probable price, as of a specified date . . . ." According to Kettell, he would value the subject on October 1, 2008 as "a modern facility incorporating the latest production technology." (Ex. A, p. 59.) Using the concept of constructing a new modern facility, Kettell arrived at a replacement cost new of $620,000,000. See Ex. A, p. 57.

Pomykacz arrived at a replacement cost new, as of October 1, 2008, of $643,263,000, (see Ex. 2, p. 54), which is relatively close to Kettell's replacement cost new value.

Using the replacement cost method, Kettell calculated the final value for the facility by the cost approach, as of October 1, 2008, as follows:

Replacement Cost New	$620,000,000
Less normal depreciation (40%)	248,000,000
Depreciated Value	$372,000,000
Less: Obsolescence	
Functional/Technological	$ 45,800,000
Economic	116,500,000
Indicated Market Value - Improvements	$209,700,000
Add: Land Value	1,570,000
Market Value Conclusion	$211,270,000
Market Value Conclusion (Rounded)	**$211,300,000**

See Ex. A, p. 69 [Table 19.1].

Pomykacz, on the other hand, set out his conclusion of cost approach values, as of October 1, 2008, as follows (Ex. 2, p. 59 [Table 10]):

Valuation Date	Reproduction	Replacement
October 1, 2008	$362,027,000	$402,753,000

While Kettell has shown a preference for the replacement cost approach, Pomykacz, in explaining the difference, noted that "[t]here is more than one method to estimate the cost to develop electric generating assets; however, these methods tend to fall into either the general category of the Reproduction Cost approach or the Replacement Cost approach. Using the Reproduction Cost, the appraiser is concerned with issues surrounding an exact duplicate of the subject property, whereas, using the Replacement Cost, the appraiser is concerned with issues surrounding the replacement of functionality or utility." (Ex. 2, p. 47.)

As noted by Kettell, "[i]n determining value, it is important to distinguish between *replacement* cost new and *reproduction* cost new. *Replacement* cost considers constructing a new facility with the same utility as the subject's, but using state-of-the-art technology, standards, materials, and the most cost effective design and layout. . . . By contrast, *Reproduction* cost is the cost of constructing a mirror image of the subject property. To estimate reproduction cost, current prices of the improvements, having the same design and quality, using the same or closely similar materials, and embodying the deficiencies and superadequacies of the appraised subject property, are estimated." (Ex. A, p. 55.)

Considering the reproduction cost method, Pomykacz simply took the historical cost of the facility at $241,949,000 and added a developer's profit of 15% (or $36,292,350). He then applied a 2.08% "trend factor via Handy-Whitman (1998 to 2008)" to arrive at a reproduction cost new of $577,811,000. See Ex. 2, p. 51.

Furthermore, Pomykacz made no distinction in the amount of depreciation he factored (38%) in his replacement cost new method and his reproduction method when considering physical, functional and economic depreciation.[24] See Ex. 2, p. 57.

As to economic obsolescence, Pomykacz did not observe any such form of obsolescence at the facility. See Ex. 2, p. 58.[25] With Kettell's determination that economic

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The following definitions are set out in the Appraisal of Real Estate (12th Ed. 2001) p. 363:

Physical deterioration – wear and tear from regular use and the impact of the elements.

Functional obsolescence – a flaw in the structure, materials, or design that diminishes the function, utility and value of the improvement.

External obsolescence – a temporary or permanent impairment of the utility or salability of an improvement or property due to negative influences outside the property. (External obsolescence may result from adverse market conditions. Because of its fixed location, real estate is subject to external influences that usually cannot be controlled by the property owner, landlord, or tenant.)

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Kettell notes that economic obsolescence "is defined as a reduction of property value because of effects, events, or conditions external to, and not controlled by, the physical condition of the asset; it is generally beyond the control of the property owner. Poor economic and industry conditions can be a major cause of economic obsolescence. . . . One element frequently associated with industry-wide economic obsolescence is declining product selling prices. Typically, if average selling prices decline precipitously over a prolonged period, then economic obsolescence is present in that industry." (Ex. A, obsolescence amounted to $116,500,000 (or better than half of Kettell's final value figure under the cost approach as compared to Pomykacz's analysis that there was no economic obsolescence), it would be useful to analyze why two experienced appraisers would have such divergent conclusions.

To summarize the finding of economic obsolescence, the plaintiff's appraiser Kettell stated as follows:

"Based on an economic obsolescence of $69.5 million from tipping fees and $47.0 million from electricity, we estimate that the total economic obsolescence of the Bridgeport Facility is $116.5 million as of the Valuation Date." (Ex. A, p. 68.) According to Kettell, construction of WTE plants, such as the subject facility, "can only be economically justified when government assistance is provided, or when tipping fees increase to a level that can support the cost of constructing new plants." (Ex. A, p. 66.)

Kettell inserted the Income Approach as a factor in determining economic obsolescence. However, since economic obsolescence deals, in some respects, with negative external obsolescence that may be tied to the market for tipping fees and electricity fees, an appraiser must look at other factors that may influence economic obsolescence. An important factor, which Kettell did not recognize, is that the facility is located in a zone that permits it to function as a WTE plant in an operation that is not

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p. 62.)

generally acceptable to residential areas.

According to Kettell, the market plays a role in determining the loss in value due to economic factors resulting in an economic obsolescence of $116,500,000. However, certain factors would outweigh market conditions such as the zone in which the subject is located, the lack of residential property affected by the WTE operation, the permits in place to operate a WTE plant, and the neighborhood tolerance of the substantial daily truck traffic carrying waste to the plant. All of these factors would enhance the value of the subject facility substantially more than temporary market conditions. On this basis, it is more credible to accept Pomykacz's opinion that there was no economic loss to the subject using the reproduction cost approach.

The reproduction cost approach has credibility for purposes of valuing the subject. It takes the facility as it existed on October1, 2008. Kettell discussed the reproduction cost approach but relied only on completing the replacement cost approach because of his determination that this was an acceptable route to take in arriving at a final value conclusion of the facility, as of October 1, 2008 at $211,300,000. See Ex. A, p. 69.

In the present case, the reproduction cost method is preferable to the replacement cost method because the valuation of the subject facility should not be that of a newly constructed modern facility which did not exist as of October 1, 2008. The valuation of the facility should be as it existed on October 1, 2008. Contrary to the court's reasoning for preferring the reproduction cost method over the replacement cost method, Kettell remarks that "[i]t must be noted that we are concerned with the use value to a potential purchaser, which is a value in exchange concept and not the value in use to the current owner/operator." (Ex. A, p. 8.) In other words, Kettell was not looking at the current use of the subject property, as would the assessor. Instead, he looked at the subject property from the standpoint of a purchaser's potential future use.

Taking the historical costs presented by Pomykacz at $241,949,000, excluding developer's profit of 15%, and trending this amount by a trend factor of 2.08% as found by Pomykacz using Handy-Whitman (see Ex. 2, p. 51), results in a reproduction cost new valuation of $503,253,920. Applying the 38% depreciation figure ($191,236,490) found by Pomykacz (see Ex. 2, p. 57), the present value of the subject facility, as of October 1, 2008, would be $312,017,430. However, since the cost approach considers the valuation of the land separately from the improvements at the facility, the agreed upon land value of $2,000,000 should be added to $312,017,430, for a total value of $314,017,430.[26]

Valuation of the Personal Property for October 1, 2010

Our Supreme Court has noted that "[i]t is the duty of each taxpayer, as a personal obligation, to file with the assessors a list of his taxable property and *furnish the facts upon*

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It should be noted that the value of the facility under the cost approach does not include personal property since the cost valuation is not based upon the valuation of a going concern.

which valuations may be based. . . ." (Emphasis in original; internal quotation marks omitted.) J.C. Penney Corp. v. Manchester, 291 Conn. 845.

The court finds that there was no evidence introduced in the trial of the subject personal property that credibly affects the plaintiff's allegation that, on the assessment date of October 1, 2010, the assessor's value of the personal property, was $56,873,060. See plaintiff's 6/24/11 complaint, p. 5, ¶ 12. In their amended answer, the city admitted the allegation in ¶ 12 of the plaintiff's 6/24/11 complaint.

Section 12-119 claims that the assessor acted illegally

Independent of the issue of valuation of the subject facility as of October 1, 2008, Wheelabrator makes the following claims as set forth in its 8/24/12 brief, pp. 50-58:

- The city illegally failed to conduct a valid appraisal and treated Wheelabrator differently than similarly situated parties.
- The city illegally charged Wheelabrator interest and penalties for nonpayment of taxes.
- The city illegally raised Wheelabrator's taxes in retaliation for Wheelabrator's proper refusal to turn over protected work product.
- The city illegally refused to grant Wheelabrator exemptions for its pollution control equipment.
- The city illegally double-taxed Wheelabrator.

In each of these claims, Wheelabrator asserts that the assessor acted illegally. In this regard, the court in Redding Life Care, LLC v. Redding, 308 Conn. 87, 105-106, 61 A.3d 461 (2013), has set forth a clear understanding of § 12-119:

"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. . . . [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. 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. . . . The statute applies *only* to an assessment that establishes a disregard of duty by the assessors.

"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. 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."

(Citations omitted; emphasis in original; internal quotation marks omitted.)

Wheelabrator contends that in 2009 it "filed a personal property declaration showing that the personal property included in the city's $401 million value had a value of approximately $55 million. Instead of separating out the personal property value from the $401,624,585 real property value, the city double taxed Wheelabrator by keeping the $401,624,585 value for the real property and adding the value of the personal property declaration, resulting in a total valuation of $456,958,242. . . . There is no explanation other than double counting for this spike in value from 2008 to 2009." (Plaintiff's 10/15/12 reply brief, pp. 20-21.)

If a problem existed, as the plaintiff claims, the problem was one that the plaintiff created.

The plaintiff contends that it could combine the value of the real estate and the personal property into one single amount rather than treat each separately. The appeals were taken on that basis. However, the plaintiff is in no position to claim that the assessor acted illegally, especially when the appraisers of both parties added to the confusion by combining the valuation of the real estate and the personal property.

There are significant differences between the assessment of real property and personal property. The valuation of real property is determined every five years pursuant to

§ 12-62. Personal property is valued, for assessment purposes, pursuant to § 12-40 by the annual filing of a declaration of ownership of the taxable personal property. The value of real estate, for assessment purposes, is determined by its FMV as of the date of revaluation. Personal property is valued by its cost of acquisition as depreciated by reference to the depreciation schedules in § 12-63 (b) (3) - (6).

Given the amount of confusion caused by Wheelabrator itself, the claim of double taxation, if indeed any occurred, was not caused deliberately by the assessor.

Wheelabrator also contends that "the factor driving the city's assessment was the amount of tax revenues that the city wanted to take in, and not what the facility was actually worth." (Plaintiff's 8/24/12 brief, p. 51.) The implication here is that the assessor valued the facility on the monetary needs of the city to meet its budget, not on the subject's FMV.

It is well recognized that a municipality, like any governmental entity, needs to know what its tax base is in order to plan its budget for the year. This need for fiscal certainty, as a matter of public policy, does not support Wheelabrator's claim that the assessor skewed the city's assessments in order to support its budgetary needs. See Redding v. Elfire, LLC, 98 Conn. App. 808, 821, 911 A.2d 1141 (2006). There is no evidence to support the plaintiff's claim that the assessor illegally valued the subject property to satisfy the city's economic needs.

Wheelabrator further contends that the assessor, in setting the assessment of the facility for October 1, 2008, committed civil larceny by intentionally defrauding the plaintiff. This is a serious charge, which if true, would be grounds for removal of the assessor from office.[27] However, the allegations here of misfeasance, nonfeasance or malfeasance are not supported by the evidence. Although Wheelabrator claims that it was treated differently from similarly situated parties, the appraisers for Wheelabrator and the city recognized that the facility was a unique property with no similar comparables and difficult to quantify.

Wheelabrator also contends that the city retaliated against it by arbitrarily raising the valuation of the subject property because Wheelabrator refused to produce evidence which it claimed was protected work product. This issue arose in the context of the plaintiff's attorney and comptroller appearing before the BAA. The BAA's chairperson requested that the plaintiff produce at the hearing a copy of its appraisal report. The plaintiff refused to comply claiming that the appraisal report would be produced subsequently in a court-ordered exchange of reports. The plaintiff claims that as a result of its refusal to comply with this request, the BAA increased the plaintiff's assessment by approximately $3 million. Following a complaint by the plaintiff, the city reverted to the assessment of October 1, 2008.

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[27] See, e.g., Post v. Dillane, 119 Conn. 655, 178 A. 595 (1935).

Wheelabrator also claims that the city improperly failed to use a mass appraisal technique and selected a value higher than that produced by such a technique in violation of § 12-62 (b) (2) which provides as follows: "When conducting a revaluation, an assessor shall use generally accepted mass appraisal methods *which may include, but need not be limited to*, the market sales comparison approach to value, the cost approach to value and the income approach to value." (Emphasis added.)

It would appear that the plaintiff attaches a meaning to "mass appraisal methods" as a separate approach to valuation different from the three traditional approaches to value. "Mass appraisal methods" are more of a process in the collection of data that may be used in any one of the three approaches to value; the term does not connote a fourth approach to value.[28]

The plaintiff's claims that the city's assessor committed illegal acts in the performance of the subject property's valuation, for tax purposes, are not supported by the evidence presented to the court.

Summary

As to the 2009 appeal, the defendant's motion to dismiss is granted as to all counts regarding the subject real and personal property, and judgment of dismissal may enter in

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See Trust v. Deschutes County Assessor, TC-MD 120096C (Or. Tax 12-19-2012) (mass appraisal methods not fourth method of valuation).

favor of the defendant city on all counts.

As to those counts of the plaintiff's complaint in the 2011 appeal that challenge the assessor's valuation of the subject real property on the Grand Lists of October 1, 2010 and subsequent years, judgment may enter in favor of the plaintiff, setting the FMV of the subject real property, as of the revaluation year of October 1, 2008, at $314,017,430 (consisting of the facility valued at $312,017,430 and the stipulated land value at $2,000,000).

As to those counts of the plaintiff's complaint in the 2011 appeal that challenge the assessor's valuation of the subject personal property on the Grand List of October 1, 2010, the value of the subject personal property, shall remain unchanged with judgment entered accordingly.

No costs are awarded to any party.

Arnold W. Aronson
Judge Trial Referee