FILED, Clerk of the Appellate Division, January 16, 2025, **A-003476-23**, AMENDED

Superior Court of New Jersey
Appellate Division

Docket No. A-003476-23

City of Newark,

Plaintiff -Appellant,

v.

Township of West Milford,

Defendant- Respondent.

Civil Action

On Appeal from the
Final Judgments of the
Tax Court of New Jersey

Docket No: 015734-2014, 006894-2015, 005070-2016, 007402-2018, 005841-2018, 006935-2019, 008282-2019, 008756-2020, 011966-2020, 003283-2021, 003338-2021

Sat Below:
Hon. Joshua D. Novin, J.T.C.

Brief of Plaintiff – Appellant

Submitted December 4, 2024.

Blau & Blau
Attorneys for Plaintiff-Appellant
223 Mountain Avenue
Springfield, New Jersey 07081
973-564-9003
rblau@blauandblau.com

On the Brief:
Robert D. Blau
Attorney ID # 036031983

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF PROCEDURAL HISTORY 3

STATEMENT OF FACTS 4

STATEMENT OF STANDARD OF REVIEW 21

LEGAL ARGUMENT

Point I (A399) 22

THE COURT ERRED BY FINDING THAT THE HIGHEST AND BEST USE OF THE SUBJECT PROPERTY WAS TO HOLD AND MAINTAIN IT AS OPEN SPACE WITHOUT DETERMINING THAT IT IS FINANCIALLY FEASIBLE TO DO SO.

Point II (A409) 29

BECAUSE THE PROPERTY HAS ALREADY BEEN PRESERVED AS OPEN SPACE, AND MUST BE MADE AVAILABLE TO THE PUBLIC FOR PASSIVE RECREATION, NO ONE HAS ANY INCENTIVE TO PURCHASE IT.

Point III (A342, A425) 35

BECAUSE THE COURT RELIED ON A SALE TO A CONSERVATION ORGANIZATION THE VALUE THAT IT FOUND WAS THE PUBLIC VALUE AND NOT THE MARKET VALUE OF THE SUBJECT PROPERTY.

FILED, Clerk of the Appellate Division, January 16, 2025, **A-003476-23**, **AMENDED**

Point IV (A381) 37

BECAUSE THERE IS NO MARKET FOR THE SUBJECT PROPERTY IT HAS, AT MOST, A NOMINAL VALUE.

CONCLUSION 42

FILED, Clerk of the Appellate Division, January 16, 2025, **A-003476-23**, **AMENDED**

TABLE OF AUTHORITIES.

Cases

Advance Hous. Inc. v. Twp. of Teaneck, 215 N.J. 549, 566 (2013) 21

Borough of Englewood Cliffs v. Estate of Allison, 69 N.J. Super 514 (App. Div. 1961) 39

City of Newark v. Township of Jefferson, 31 N.J. Tax 303, 319 (Tax 2019) 9, 10

City of Newark v. West Milford Tp., 9 N.J. 295, 302. (1952) 15

Clemente v. South Hackensack, 27 N.J. Tax 255, 268 (Tax 2013), aff'd o.b. per curiam. 28 N.J. Tax 337 (App. Div. 2015) 22

Crane-Berkley Corporation v. Lanvis, 238 App. Div. 124, 263 NYS 556 (1933) ..37

East Orange City v. Livingston Twp., 15 N.J. Tax 36 (Tax 1995).................... 17, 18

Fairlawn Shopper Inc. v. Drirector Division of Taxation, 98 N.J. 64, 72-73 (1984) 19

Ford Motor Co. v. Edison Twp., 10 N.J. Tax 153, 161 (Tax 1988), aff'd o.b. per curiam, 12 N.J. Tax 244 (App.Div. 1990), aff'd 127 N.J. 290 (1992)..................22

Ford Motor Company v. Edison, 127 N.J. 290, 302 (1992) 23

Forsgate Ventures, IX, L.L.C. v. Tp. of South Hackensack, 29 N.J. Tax 28, 39 (Tax 2016) 22

General Motors v. Linden, 22 N.J. Tax 95, 108 (Tax 2005) 22

Glen Wall Associates v. Township of Wall, 99 N.J. 265, 280 (1985).....................24

Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 183 (1979)
....19

Jersey City, Div. of Water v. Parsippany-Troy Hills Twp., 16 N.J. Tax 804 (Tax
1997).. 17, 18

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1119 (1992)..................28

Manalapan Realty v. Tp. Committee, 140 N.J. 366, 378 (1995) 21

Methode Electronics v. Township of Willingboro, 28 N.J. 289 (Tax 2015)............40

Morris County Land and Improvement Co. v. Township of Parsippany Troy Hills,
40 N.J. 539, 551 (1963) 27, 28

People ex rel. Poor v. O'Donnell, 139 App. Div. 83, 124 N.Y.S.36 (App. Div.
1910), affirmed 200 NY. 518, 93 N.E. 1129 (Ct. App. 1910) 37

Pepperidge Tree v. Kinnelon Borough, 21 N.J. Tax 57, 66 (Tax 2003)...................36

Ridgewood v. Bolger Foundation, 104 N.J. 337 (1986) 20

State v Pohatcong Tp., 9 N.J. Tax 528, 543 (Tax 1988) 19

Tualatin Development Co. v. Department of Revenue, 473 P2d 660 (Or. 1970)....38

Twin Lakes Golf Club v. King County, 548 P.2d 538 (Wash. 1976).......................38

Village of Ridgewood v. Bolger Foundation, 104 N.J. 337, 339 (1986).................39

West Milford Tp. v. Garfield Recreation Comm., 194 N.J. Super. 148, 158 (Law Div. 1983) 19

Statutes

N.J.S.A. 54:4-3.3 15

Other Authorities

David C. Stockford, Property Tax Assessments of Conservation Easements, 17 B.C. Envtl. Aff. L. Rev. 823, 838 (1990) 26, 27

Keating, The Valuation of Wetlands, 2nd Ed., The Appraisal Institute, p. 34 35

N.J.A.C. 18:12.1.1 36

The Appraisal of Real Estate, 15th edition 29, 42, 44

Uniform Standards for Federal Land Acquisitions, The Appraisal Institute, 2016, § 4.3.2.3, p. 105 36

TABLE OF JUDGMENTS AND RULINGS

Tax Court of New Jersey Opinion
filed July 7, 2023 .... A34

Tax Court of New Jersey Judgments
filed July 7, 2023 .... A98

PRELIMINARY STATEMENT

It is black letter law and fundamental appraisal theory that the first and most important step in finding market value is to determine the highest and best use of the real estate. It is black letter law and fundamental appraisal theory that unless a use is financially feasible, it cannot be the highest and best use.

In this real estate tax appeal, the Tax Court found that the highest and best use of the subject property was conservation and passive recreation. It did so, without determining that conservation or passive recreation was a financially feasible use. It did so despite overwhelming evidence to the contrary. Without explicitly saying so, the Tax Court found financial feasibility irrelevant.

The subject property is land held by the City of Newark for the protection of its water supply. The State of New Jersey Department of Environmental Protection owns conservation easements that preclude any development but require Newark to make the property available to the general public for passive recreation purposes. West Milford's appraiser thought that it was unnecessary for conservation or passive recreation to be financially feasible because such use satisfied human needs wants and desires. The Tax Court apparently agreed. The court erred, as a matter of law.

The conservation easements run in perpetuity. There is no market for the property because there is no incentive to buy land for conservation or passive

recreation that is already preserved. Buying the land does nothing to conserve the land or add to the supply of land for passive recreation. In its opening statement, Newark asserted that the Tax Court would have to determine whether there was a market for the property, burdened as it is with the conservation easements. The Tax Court found it unnecessary do so. The court erred, as a matter of law.

STATEMENT OF PROCEDURAL HISTORY

The City of Newark filed timely complaints to the Tax Court challenging the 2014, 2015, 2016, 2018, 2019, 2020 and 2021assessments of the subject property. (A1-14). West Milford Township filed timely counterclaims for each of those years. (A15-33). Trial was held before the Honorable Joshua D. Novin, J.T.C. on July 17, 2023, July 21, 2023, July 24, 2023, July 27, 2023, August 30, 2024, August 31, 2023, September 13, 2024, September 14, 2023, and October 3, 2024.[1] Newark filed a post-trial submission and closing argument on January 18, 2024. (A378).

West Milford filed its post-trial submission and closing argument on March 16, 2024. Newark responded on March 27, 2024. (A 418). Judge Novin rendered an opinion on July 7, 2024 (A34-97) and entered judgments affirming the assessments on the same day. (A98-200).

---

[1] "1T" = July 17, 2024
"2T" = July 21, 2024
"3T" = July 24, 2024
"4T" = July 27, 2024
"5T" = August 30, 2024
"6T" = August 31, 2024
"7T" = September 13, 2024
"8T" = September 14, 2024
" 9T" = October 3, 2024

STATEMENT OF FACTS

The subject property consists of 117 parcels containing 16,485 acres of unimproved property acquired by the City of Newark in the early 1900's for the protection of its water supply. The subject property is a portion of the 35,000 acres Newark owns in Morris, Passaic, and Sussex County for that purpose. The property is remote, heavily forested land with numerous parcels having limited road access. The property borders New Jersey's Wawayanda State Park and the Apshawa Preserve. (A35, A366).

As of the valuation dates the equalized values of the subject property ranged from $37,598,497 to $49,877,104. (A36).

The Conservation Easements

The New Jersey Department of Environmental Protection ("NJDEP") acquired conservation easements from the City between the years 2002 and 2006. The conservation easements complete "the critical connection between State Holdings at Waywayanda State Park, Hamburg Mountain and Jersey City Waterworks/Split Rock Reservoir." (A251). Under the conservation easements, Newark agreed that the subject property will be retained forever and predominantly in its natural forested condition." Subdivision and development, structures, mining, new roads, and timber harvesting were prohibited forever.

FILED, Clerk of the Appellate Division, January 16, 2025, **A-003476-23**, AMENDED

(A38, A242). Newark agreed to "allow pedestrian access along existing interior trails and assumed an affirmative obligation to allow public access for public hunting and fishing subject to reasonable fees and rules for access by means of a public access system. (A40, A244; §V.B.2). The easements granted the NJDEP the right to establish a trail system establish trail connections. (A40, A244; §V.B.3). The easements grant NJDEP the right to enforce and assure compliance with Newark's obligations under the conservation easements. (A41, A244; §V.B.4). The conservation easements impose strict constraints on the subject property's permitted uses, beyond the development and sale restrictions traditionally associated with watershed property under the Watershed Protection Act, the Highlands Preservation Act, and local zoning laws. (A41).

The Subject Property's Use

Newark sells annual permits to allow the public to use its watershed holdings for passive recreation purposes. Newark charges $30.00 to fish in its lakes, $35.00 for use of a boat. The fee for trapping is $50.00 and $27.50 for seniors. Since 2014, Newark's annual income from the sale of permits for passive recreation averaged approximately $93,000, for the entire 35,000 acre watershed. (A1T36). The largest portion comes from fishing. (1T47:2).

Competing Passive Recreation Opportunities.

Neither the Passaic County Parks and Recreation Department or the Morris County Parks and Recreation Department charge for its parks for passive recreation. (1T38). West Milford allows the public to use its parks for passive recreation for free. (1T40). Pedestrian entrance to New Jersey state parks is free. (1T42:13). An annual parking pass to all the New Jersey state parks cost $50. (1T41). There are many places where one can fish without paying an entrance fee. (1T48-49).

Facts Related to Open Space, Conservation and Land Preservation

Frank Pinto, West Milford's expert in open space, land conservation, and land preservation, defined open space as lands that are open to the public and restricted from development." (5T22:25; 5T30:15). Pinto acknowledged that the subject property is already open space. (5T117:25). Pinto acknowledged that the conservation easement preserves the property in its natural state in perpetuity. (5T90:6).

Pinto produced a report entitled "Evaluating the Market: The Utility of Open Space." (5T25:3; A347). The purposes of the report were "to illustrate that open space lands are important to New Jersey" and to "illustrate that there is a market for lands that are restricted from development or with no development potential." (5T25:40:10). A section of his report entitled "The Natural Capital

of Open Space" showed that there is an intrinsic value to open space for society. (A260-261; 5T28:21 to 5T29:10).

He testified that there were a multitude of conservation groups that acquire land for open space purposes. (5T29:24). Pinto testified that New Jersey's Green Acres Program funds municipalities and non-profits to acquire property for open space. For instance, Peqannock Township acquired land along the river to take houses out of the flood plain. The Morris County Parks Commission looks to expand their parks. (5T44:12-25). The New Jersey Conservation Foundation, looks to conserve environmentally sensitive land and tries to develop a large contiguous land base for that purpose. (5T45).

Asked, why would those entities be interested in purchasing this already protected land, Pinto replied: "It comes down to one word, 'control' . . . .They need control in order to carry out their mission." (5T49:21to 5T50:7). Pinto was asked about the utility of encumbered open space and how that related to why an entity would be interested in purchasing it. Pinto noted that the property could be used for a variety of passive recreational purposes as well as scientific research. He noted that it was rare to have 16,000 contiguous acres and that to have control of the property would be attractive. He testified that it really depended on who the purchaser was as to what their motivation would be. "But without control of the property, they can't really pursue what their missions are.

They need to own the property to be able to carry that out." (5T50:15 to 5T51:7). Asked what these organizations would do differently with the subject property, Pinto testified that it "depends on who the owner is and how they might approach their stewardship of it." (T51:25; 5T52:13).

Asked whether there was a market for the subject property as open space, Pinto concluded his direct testimony, "I feel there is a market for the property *if* Newark were to try to sell the property." (T75:22). When asked on cross how he determined that there is a market for deed restricted property, he admitted that he "took a very subjective approach." (5T125:11).

Neither his report or his testimony identified any potential purchasers who would be in the market for deed restricted land. (5T121:4). In his opinion, neither a municipal government, a county government nor Green Acres would be in the market for property with deed restrictions like the subject. (5T124:17 to 25). He admitted, that as an open space expert he would be aware if a conservation organization had expressed an interest in purchasing land with a deed restriction such as the one on the subject property. (5T122:14). He had no examples of anyone purchasing land with deed restrictions similar to the subject property. (5T123).

Facts Related to Use of the Subject Property for Timber Harvesting

The conservation easements severely restricts timber harvesting. Clear cutting of timber stands is expressly prohibited. The sale of firewood for off-site purposes is expressly prohibited. With the prior approval of the New Jersey Department of Environmental Protection select trees may be cut, for specific reasons, under the supervision of a New Jersey State Forester. Any commercial timber harvesting must be conducted on a sustainable yield basis and in accordance with an approved Forest Stewardship Plan. (A335; §2F).

Newark's appraiser opined that commercial timber harvesting was not financially feasible and that there was no market for such land for commercial timber operations. His reasoning is summarized on page 19 of the court's opinion. (A52).

In *City of Newark v. Township of Jefferson,* 31 *N.J. Tax* 303, 319 (Tax 2019), the City's appraiser opinioned that that the highest and best use of watershed property, with the same conservation easement restrictions, was "harvesting the property for wood and selling it to loggers, sawmills, timber buyers and the like." He searched the State's records for any sales of land in the State of New Jersey that sold for timbering purposes and found none. He was unaware of any other appraisals of New Jersey land that determined that the highest and best use was timbering. Newark's fact witness admitted that

"forestry in the State of New Jersey was pretty much a dead industry." Jefferson's appraiser testified that in twenty four years as an appraiser, he had never seen a sale where property was purchased solely for timber value. He rejected commercial timbering as a highest and best use because, if there are no sales in the market, there is demand for that use. Id. at 320.

The Tax Court agreed with Jefferson's appraiser. It would not accept timbering "without any persuasive explanation and supporting data that establish a clear demand for timberland in New Jersey." In the court's view, once Newark's appraiser determined that there were no sales of land in New Jersey for timbering , he should have eliminated timbering as a potential highest and best use for the subject property." Id. at 321.

Jefferson's appraiser was Matt Krauser, West Milford's appraiser here. (A62, fn. 36). His testimony on behalf of West Milford was the same. In his 28 years as an appraiser with a specialty in open space, he had never come across a sale that was purchased primarily for timbering. Without such sales he could not conclude that there was any demand for timbering. (7T8-14). He acknowledged that most timbering operations use clear cutting because that is the most economical way to cut timber. (7T15:3). Clear cutting is prohibited by the conservation easements.

Financial Feasibility - Generally

Both appraisers agreed that for a property's use to be financially feasible, the use must derive enough income to pay all expenses, including property taxes, associated with producing the income. (1T58:3; 7T126:11).

The actual use of a property does not mean that the use is financially feasible. For instance, it is not financially feasible to use a property that loses money year after year with no prospect of increasing the revenue [or reducing the expenses] to the break-even point. (1T59:14). Newark must make the property available to the public whether it is financially feasible or not.

Brody testified that the private sector provides goods and services only when it is financially feasible to do so. (1T60:10). Krauser agreed, governments provide opportunities for passive recreation because the private sector does not. (7T138L).

Financial Feasibility - Passive Recreation

Brody determined that passive recreation was not a financially feasible use based on the approximately $93,000 annual revenue that Newark receives from the sale of passive recreation permits for the entire 35,000 acre watershed. He did not think that it was possible for Newark to increase the revenues sufficiently to pay the real estate taxes and the other expenses associated with passive recreation use. (1T74). Although Krauser's report states that passive

recreation was the maximally productive use of the site, it does not conclude that passive recreation is a financially feasible use. (7T123). Nor did Krauser testify that passive recreational is financially feasible.

Market Demand For Passive Recreation

Brody found no market for passive recreation use. (1T174). He found that West Milford wouldn't buy the property because it would lose a significant ratable and because its priority under its open space plan was active recreation. (1T75:25; A359). Purchasing the subject property would not add land available to West Milford's residents for passive recreation use. (1T76:12).

Passaic County already has 56,837 acres of dedicated open space. (1T78:13). The Passaic County Parks Recreation and Open Space Plan has a goal to expand its park system in strategic locations, such as along rivers within historic and scenic byways, in areas that are adjacent to existing areas of the Passaic County park system and in historically underserved communities. The plan identifies acquisition targets for expansion of the park system, giving particular attention to areas in southern part of the county that are underserved by outdoor recreation opportunities. (1T82:24 to 1T83:11). Although, the plan calls for acquisition of 1,199.2 acres in West Milford, none of that land is owned by the City of Newark. (1T85:15 to 1T86:6; A373-A374).

In Brody's opinion, a conservation agency would not be interested in purchasing the subject property for passive recreation because passive recreation is not the purpose for which conservation organizations exist. Conservation organizations have been established to preserve or conserve land in its natural state. Although land that has been acquired by a conservation organization may be used for passive recreation that is not the motivation for acquisition by a conservation organization. (1T94).

Krauser started the assignment with an understanding that there is a market demand for open space and conservation in northern New Jersey. He spoke to Pinto and other non-identified market participants to confirm his understanding. (6T10:10; 6T9:5). Krauser's report states that based on discussions with market participants, including with Mr. Pinto and "a review of his expert report, the most probable buyer is a land preservation group or a governmental agency." (A313; 7T22:18). Pinto testified that he did not see a municipal or county government, or Green Acres in the market for Newark's deed restricted property. (7T24:16 to 25).

Market Demand for Conservation

Brody testified that no one would have any incentive to preserve the subject property it in its natural state because the conservation easement already preserves the property in its natural state forever. (1T94).

Krauser's direct testimony supported Brody's opinion that there is no market for the subject property. Krauser conceded that "nobody local has any intention of buying the subject property because they are okay with how it is being used." (6T87:16). He speculated that "maybe there's somebody else who would buy this property." (6T88:2).

Krauser testified that there are only two reasons why entities buy property to conserve open space; connectivity and control. (7T54:18 to 55:4). But because the subject property is already connected to Wawayanda State Park, Hamburg Mountain and Jersey City's Split Rock Reservoir, Krauser admitted that if someone acquired the subject, it would be for control. (7T60-61; A343).

On direct examination, Mr. Krauser was asked who or why someone would be interested in purchasing the subject property that was already subject to the restrictions in the conservation easement. He replied, "the motivation of all these purchasers is to preserve our land." (6T69:24). Counsel repeated the question. "Why would a conservation group buy the property if is already, quote, conserved?" (6T71:10). Mr. Krauser's response was lengthy but vague. He

testified that different groups would have different motivations. For instance, an organization interested in preserving the Indiana bat might want to purchase the property. (6T71-75). But there was no evidence that Indiana Bats are present on the property. There was no evidence that any organization is interested in preserving Indiana Bats. Nor was there evidence that acquisition would help preserve Indiana Bats. Krauser testified: "There's a variety of these organizations that would be interested in controlling this property for their own mission." (6T76:21). Krauser did not identify the organizations or their missions. But Krauser did not know of anything that the State could do with the property if it purchased it that it can't do now. (7T66:14 to 7T69:3).

Highest and Best Use

Newark's appraiser, Jon Brody, found there was no highest and best use for the property because no use was both legally permissible and financially feasible. (1T50:25). Brody rejected integrated water utility based on legal instructions. The New Jersey statute which allows the property to be taxed, as interpreted by the New Jersey Supreme Court, precludes valuation as an integrated water utility. *N.J.S.A.* 54:4-3.3; *City of Newark v. West Milford Tp.*, 9 *N.J.* 295, 302. (1952).

He rejected development in accordance with West Milford's zoning because the conservation easements preclude any development. He rejected

passive recreation as the highest and best use because he found that the use was not financially feasible. (1T54:8). He rejected commercial timbering because he found it would not be financially feasible and because there is no market for the use. He rejected the growth and sale of firewood as the highest and best use because the conservation easement allows cutting firewood only for use on the property. (1T53:13).

West Milford's appraiser found that the highest and best use of the property is "open space and passive recreation." (6T22:9). Krauser opined that open space did not have to be financially feasible to be the highest and best use. In his opinion, it was sufficient that there was market demand for passive recreation uses. (7T126:21).

Krauser's report stated that the highest and best use is passive recreation. (A347). His testimony was that the highest and best use of the property is "open space and passive recreation" (6T24:9). Krauser admitted that passive recreation is not the highest and best use from a financial standpoint. (6T23:6). Krauser does not believe that open space must be financially feasible to be the highest and best use because, he believes, there is market demand for passive recreation uses. (7T126:21).

The Court's Analysis

The court emphasized that its analysis of highest and best use was guided by state statutes and the jurisprudence that has evolved in interpreting those laws. (A64). The court stressed "that attempting to apply conventional valuation principles to land with ecological significance or natural resources that are environmentally critical to the continued survival is often fought with pitfalls." The court underscored that the one constant under the state's jurisprudence is that consideration must be given not only to market market forces but to the bundle of rights and encumbrances that accompany or burden the land. (A65).

The court found that the highest and best use of the property was for it to be held or maintained for as open space with public access for passive recreational uses. (A67). The court found it unnecessary to determine whether the highest and best use was financially feasible or whether there was a market for the subject property.

The court examined the state's jurisprudence and found two opinions concluding that land can have a highest and best use for conservation as open space. *East Orange City v. Livingston Twp.*, 15 *N.J. Tax* 36 (Tax 1995); *Jersey City, Div. of Water v. Parsippany-Troy Hills Twp.*, 16 *N.J. Tax* 804 (Tax 1997). To say that conservation as open space can be the highest and best use is not to

say that the highest and best use of the subject property is conservation as open space.

Both cases are factually different than the facts here. East Orange's property was in Livingston, a densely populated affluent suburban community. Both sides agreed that some of the property was developable. Millburn's Township Committee had adopted a resolution opposing a proposed development as a serious threat to the environment of the residents of west Essex County. *East Orange City v. Livingston Township*, at 46. It was only because of an indefinite ban on sewer hookups that the property could not be developed as zoned that the court concluded that the highest and best use was open space or conservation. *Id.* at 47-48.

In *Jersey City v. Parsippany Troy Hills*, Jersey City advocated that the highest and best use of the non-developable portion of the property was conservation and open space. Parsippany's assessment records demonstrated that lands under all other privately owned lakes in the township had generally been assessed at a relatively nominal amounts. 16 *N.J. Tax* at 521.

In both cases, both parties concluded that portions of the sites were developable. In neither case had the land already been conserved as open space forever. No one argued, in either case, that there was no market for the property because the land had already been conserved as open space. No one argued, in

either case, that financial feasibility was required of a highest and best use. Neither case is precedent on legal points that were not argued or mentioned in the opinion. *Fairlawn Shopper Inc. v. Drirector Division of Taxation*, 98 *N.J.* 64, 72-73 (1984); *West Milford Tp. v. Garfield Recreation Comm*., 194 *N.J. Super*. 148, 158 (Law Div. 1983); *State v Pohatcong Tp*., 9 *N.J. Tax* 528, 543 (Tax 1988); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979).

Here, the court found it unnecessary to determine whether there was a market for property already dedicated as open space in perpetuity. The court recognized the distinction between there being a market for unencumbered land to be dedicated, upon acquisition for open space, and there being a market for land already burdened by conservation easements restrict use to passive recreation. The court found that Pinto's testimony demonstrated the former but not the later. (A83). Apparently, the court found this distinction irrelevant.

The court's criticism of Newark's appraiser for failing to account for the $27 million dollars that NJDEP paid to Newark for voluntarily imposing the deed restrictions is troubling. (A70, fn. 43). The consideration means only that the property was worth $27 million dollars less than it was worth before the deed restrictions were imposed. What Newark did or might have done with the money

is irrelevant. That the transaction was voluntary is also irrelevant. *Ridgewood v. Bolger Foundation*, 104 N.J. 337 (1986).

Ultimately, based on one sale to the Land Conservancy of New Jersey, the court determined that the value of the subject property was between $41,700,000 for the first year under appeal and $47,642,000 for the last year under appeal. Accordingly, the court affirmed the assessments. (A61-62).

STATEMENT OF THE STANDARD OF REVIEW

Although the Tax Court's factual findings are entitled to deference, appellate courts do not defer to its interpretation of legal principles. *Advance Hous. Inc. v. Twp. of Teaneck*, 215 *N.J.* 549, 566 (2013).

A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to deference. *Manalapan Realty v. Tp. Committee*, 140 *N.J*. 366, 378 (1995). Because the Tax Court ignored basic legal principles, and determined highest and best use based on its review of New Jersey jurisprudence, its opinion should be reviewed de novo.

LEGAL ARGUMENT

POINT 1

(A399)

THE COURT ERRED BY FINDING THAT THE HIGHEST AND BEST USE OF THE SUBJECT PROPERTY WAS TO HOLD AND MAINTAIN IT AS OPEN SPACE WITHOUT DETERMINING THAT IT IS FINANCIALLY FEASIBLE TO DO SO.

Determining the highest and best use of a property is "the first and most important step in the valuation process." *Ford Motor Co. v. Edison Twp.*, 10 *N.J. Tax* 153, 161 (Tax 1988), aff'd o.b. per curiam, 12 *N.J. Tax* 244 (App.Div. 1990), aff'd 127 *N.J.* 290 (1992).

Highest and best use analysis involves the "consideration of the following four criteria, determining whether the use of the subject property is: 1) legally permissible; 2) physically possible; 3) financially feasible; and 4) maximally productive. *Ibid*., *General Motors v. Linden*, 22 N.J. Tax 95, 108 (Tax 2005); *Clemente v. South Hackensack*, 27 N.J. Tax 255, 268 (Tax 2013), aff'd o.b. per curiam. 28 N.J. Tax 337 (App. Div. 2015); *Forsgate Ventures, IX, L.L.C. v. Tp. of South Hackensack*, 29 N.J. Tax 28, 39 (Tax 2016).

No New Jersey opinion has ever held otherwise. The Tax Court acknowledges this test in its opinion. (A50). Highest and best use is a market driven concept. Only the market driven value in exchange, not the value of the

use to the property owner, should identify the highest and best use of a property. *Ford Motor Company v. Edison*, 127 N.J. 290, 302 (1992).

The evidence in the record establishes that holding the property as open space with public access for passive recreational uses is not financially feasible. Newark's annual income from the sale of permits for passive recreation averaged approximately $93,000, for the entire 35,000-acre watershed. (1T36). The income attributable to the 16,500-acre subject property is approximately $43,500 per year. ($93,000 / 35,000 acres ='s $2.67 per acre. $2.67 x 16,458 ='s $43,731). The property taxes were $1,282,358 in 2014 and $1,639,683 in 2021. (AV $35,820,050 x 0.0358 ='s $1,282,358), (AV $43,263,400 x 0.0379='s $1,639,683). In the first valuation year, Newark would have to increase revenue by almost 30 times just to pay the property tax as assessed by West Milford. In the last valuation year, Newark would have to increase revenue by more than 37 times, to pay the property tax as assessed.

But, property tax is not the only expense. A potential buyer would also be responsible for insurance, security, the cost of sales and financing.

The Tax Court did not find Newark's appraiser's opinion, that passive recreation is not financially feasible, to be credible, because he finished his appraisal without evaluating public permit fees from other passive recreation sites to ascertain whether the fees charged by Newark were representative of the

market. The court also criticized Newark's appraiser for not presenting evidence or analysis of the number of daily visitors the subject property could accommodate. (A70, fn43).

The court's criticism is unwarranted. As the court acknowledged, Brody conducted such a survey after his appraisal was completed and found that the fees Newark charges are representative of the market. Pinto's testimony confirmed that the state and county typically do not charge for passive recreation opportunities. (5T52-53). Considering the actual revenue generated by the subject property, it is inconceivable that the city could do anything to increase the revenue sufficiently to cover operating costs.

In evaluating an expert's evidence, the court should have considered the expense incurred by litigants in engaging an expert. The volume of information that required to support an expert's opinion must be kept within practical and realistic limits. *Glen Wall Associates v. Township of Wall*, 99 *N.J.* 265, 280 (1985).

If the Tax Court had viewed the evidence practically and within realistic limits, it would have found sufficient competent evidence to conclude that passive recreation is not financially feasible.

There is no reason to believe that Newark's revenue would go up if it raised its prices. Elasticity of demand suggests that revenue will not necessarily

increase, and may go down, if prices are raised. The more easily a consumer can substitute one product for another the more elastic the demand. Consumers of passive recreation in northwest New Jersey have many options where they need not pay a fee. Neither the Passaic County Parks and Recreation Department nor the Morris County Parks and Recreation Department charge for passive recreation. (1T39. 5T52:5). West Milford does not charge for the uses of its parks for passive recreation. (1T41:9). There is no charge to use the State Parks for passive recreation. As West Milford stipulated, there are many places where one can fish for free. (1T48-49).

As Krauser admitted, the financial feasibility of a use depends on the price one pays for the property. (7T135:22). The equalized assessed values of the subject property ranged from $37,600,000 in the first year to $49,877,000 in the last year. Judge Novin found values ranging from $41,700,000 in the first year to $47,642,000 in the last. No matter what rate of return is assumed, even if the property was tax exempt, it cannot generate enough money to make its acquisition financially feasible.

If passive recreation was a financially feasible use, the private sector would provide it. The private sector provides goods and services only when it is financially feasible to do so. Governments support passive recreation opportunities that are not financially feasible because people will pay taxes to

support them. (1T60). Governments provide opportunities for passive recreation because private entities generally do not. (7T138). Private entities do not provide opportunities for passive recreation because it is not financially feasible for them to do so.

The Tax Court cited an published in the *Boston College Environmental Affairs Law Review* for the proposition that traditional property appraisal methods are often unsuitable for determining the fair market value of property burdened with conservation easements. David C. Stockford, *Property Tax Assessments of Conservation Easements*, 17 *B.C. Envtl. Aff. L. Rev*. 823, 838 (1990). The article does not support the proposition that a court may ignore financial feasibility in its analysis of highest and best use. To the contrary, the article is premised on the idea that assessments are based on highest and best use and that conservation easements likely alter the highest and best use of a property. Id. at 825-826.

The article notes that assessors may be reluctant to give full recognition to the impact of easements on fair market value because of concerns about a diminishing tax base. Id. at 839. The article notes that local officials may be hostile to downwardly reassessing burdened land because they fear losing revenue. Id. at 840. The article also notes that the procedures for appealing a property tax assessment often are complicated and require the devotion of

significant resources and effort, which owners may be unwilling or unable to expend. Id. at 841. The article concludes:

> Property tax abatements from the granting of conservation easements could be a significant incentive to landowners to keep their property undeveloped. Unfortunately, many landowners cannot count on receiving a favorable property tax assessment when the grant a conservation easement on their land. Even where statutes mandate that restrictions on property shall be reflected in the assessment of property, such assessments are neither always fair or guaranteed.

Id. at 852-853. Thirty years later, it is almost as if the author is describing this appeal.

Financial feasibility of permitted uses is the benchmark for the validity of a zoning ordinance. In *Morris County Land and Improvement Co. v. Township of Parsippany Troy Hills*, 40 *N.J.* 539, 551 (1963), New Jersey Supreme Court found that "the prime object of the zoning regulation was to retain the land substantially in its natural state." The Court found that many of the permitted uses were "public or quasi-public in nature, rather than of the type available to the ordinary private landowner as a reasonable means of obtaining a return on his property." The Court found that "about the only practical use which can be made of the property in the zone is hunting or fishing or a wildlife sanctuary, none of which can be considered productive." Id. at 552. The court found that the practical effect of the regulation was "to appropriate private property for a flood water detention basin or open space." While the Court found those uses to

be "laudable public purposes" the Court found that both public uses were "necessarily so all-encompassing as practically to prevent exercise by a private owner of any worthwhile rights or benefits in the land." Id. at 556. Therefore, the court found that public acquisition rather than regulation was required.

The United States Supreme Court followed the New Jersey Supreme Court's holding in *Morris County Land and Improvement Co*. "When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is to leave his property economically idle, he has suffered a taking." *Lucas v. South Carolina Coastal Council*, 505 *U.S.* 1003, 1119 (1992), citing *Morris County Land and Improvement Co*. at 1018.

POINT II

(A409)

BECAUSE THE PROPERTY HAS ALREADY BEEN PRESERVED AS OPEN SPACE, AND MUST BE MADE AVAILABLE TO THE PUBLIC FOR PASSIVE RECREATION, NO ONE HAS ANY INCENTIVE TO PURCHASE IT.

In its opening statement, Newark posited that ultimately the court would have to determine whether there was a market for the subject property. (1T15:14). The court found it unnecessary to do so. A real estate market is a group of individuals or firms that are in contact with one another for the purpose of conducting real estate transactions. *The Appraisal of Real Estate*, 15th edition, p. 137. A market segment identifies the market participants likely to be interested in the subject real estate. Id. at 138. Both appraisers defined market value as "the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently, knowledgably and assuming the price is not affected by undue stimulus." (A216; A281). Unless there are buyers there is no market value.

Brody concluded that no one would be interested in purchasing the subject property for either conservation or recreation purposes. (1T74). West Milford wouldn't purchase the property because it would lose a ratable and because they

already had enough land for passive recreation within their park system. (1T75). Purchasing the land would not add one acre of land to their inventory of open space. (1T77).

Based on his examination of the Passaic County Parks and Recreation Open Space Plan, Brody concluded that Passaic County would not be interested in purchasing the subject property. (1T77:7). The plan revealed that 56,837 acres of recreation / open space was already located in Passaic County. (1T78:11). One of the goals was to expand the Passaic County Park System by acquiring new properties in strategic locations such as along rivers, within historic and scenic byways, in areas that are adjacent to existing areas of the Passaic County Park System and in historically underserved communities. (1T79:18). The plan recommended and identified 1,199 acres for acquisition in West Milford. Passaic County's plan does not envision acquiring any of Newark's land. (1T85-86; A375).

Brody also examined the New Jersey State Comprehensive Outdoor Recreation Plan, also known as SCORP. (1T87). The plan suggested that there was not sufficient funding for NJDEP to acquire the land they would like to acquire. (1T90:22; A377). One of SCORP's goals was to encourage open space and recreation planning by local governments and conservation organizations. Another was to implement open space and recreation planning policies that are

consistent with DEP's goals. (1T23; A376). The Department of Environmental Protection would not have to acquire the property to build trails. They are specifically permitted to do so under the conservation easements. (1T93).

Brody concluded that a conservation organization would not be interested in purchasing the property for recreation purposes because that is not their mission or motivation. (1T94). He concluded that no one would purchase the property for conservation purposes because neither the State of New Jersey nor a conservation organization would have any incentive to conserve the property in its natural state because the property has already been preserved in its natural state. (1T96).

Krauser never testified that the market for open space and conservation properties, included property, like the subject, that had already been preserved in a natural state forever. Krauser's conclusion that there was a market for open space and conservation properties, was based on his conversations Pinto and other unidentified "market participants." (6T8:23). He wanted Pinto to affirm the demand that he saw for preserving land and for passive recreation. (6T13:13). He also found evidence of a market based on ten allegedly comparable sales.

According to Krauser, there are only two reasons entities buy property for open space: connectivity and control. (7T54:18 to 55:4). But the subject property

is already connected to Wayayanda State Park, Hamburg Mountain and Jersey City's Split Rock Reservoir. (A251). Krauser admitted that no one would acquire the property for connectivity. If someone were to acquire the subject, it would be for control. (7T60-61).

Krauser is brought in by the preservation groups to assist them with transactions for preservation purposes. (6T14:2). Asked whether in his opinion a conservation group would be interested in purchasing the property, Krauser replied that it was "very possible." (6T75:7). He testified that there were a variety of organizations that would be interested in controlling this property for their own mission. (6T76:20). He did not identify the organizations or what their missions were.

The conservation easements conveyed to the State assure the open space character, wildlife habitat scenic qualities, will be conserved and maintained forever. (A242 – "Now therefore clause"). The easements' purpose is to prevent any use of the property that will impair or interfere with the conservation values of the property. (Id. §I). The easements prohibit any use which will interfere with the conservation values of the property. (Id. §II). The State has the right to prevent and correct violations of the easement's terms. (Id. §VII). The easement is interpreted under the laws of the State of New Jersey, resolving any ambiguity as to give maximum effect to its conservation purposes. (Id. §XI).

Krauser knew of nothing that the Department of Environmental Protection could do with the property, if it purchased it, that it can't do now. (7T66:14 to 7T69:3). There is nothing. There is no need to purchase the property for any conservation purpose. The State of New Jersey has the right to protect the conservation values of the property.

Krauser's comparable sales do not establish a market for the subject property. Six of the sales were purchased by the Morris County Park Commission. (6T51, 6T53, 6T54-55, 6T59, 6T60, 6T65). Two of the sales were purchased by Jefferson Township for their park parks. (A649, 6T63). The other two sales were to the Land Conservancy. (7T69:15). None of the sales were deed restricted before the sale. In each of the sales, the property became tax exempt after purchase. (7T:69:23). In each of the ten sales, the buyer's motivation was "connectivity and control, neither of which are implicated here." (7T70:17). In each of the ten sales the buyer approached the landowner. (7T70:13). This is significant because, in Pinto's opinion, the market for the subject property is contingent upon Newark putting the property up for sale. (T75:22).

Two of Krauser's sales, five and eight, were to the Land Conservancy. The Land Conservancy's motivation to purchase sale eight was to preserve West Brook, a trout producing stream, and to connect it to Norvin Green State Park. (7T106-107). Sale five, was totally surrounded by the subject property. The

Land Conservancy and West Milford Township wanted to acquire the property to deed restrict it in perpetuity. (6T58:12). Sale five is what the subject property would be worth, if it were not subject to a conservation easement, and if a tax exempt organization wanted to impose a conservation easement on it. It does not suggest that there is a market for the subject property. It suggests the opposite.

POINT III

(A342; A425)

BECAUSE THE COURT RELIED ON A SALE TO A CONSERVATION ORGANIZATION THE VALUE THAT IT FOUND WAS THE PUBLIC VALUE AND NOT THE MARKET VALUE OF THE SUBJECT PROPERTY.

The Appraisal Institute's publication "The Valuation of Wetlands" cautions that the presence of public benefits can confuse or distort a dispassionate evaluation of private interests and that care must be taken to disregard social benefits. Keating, *The Valuation of Wetlands*, 2nd Ed., *The Appraisal Institute*, p. 34.

The publication makes a distinction between market value and total economic value. Total economic value encompasses all rights and values that may be present in property, including both private and public rights and values. As a result, the market value of private property interest in real estate is a subset of the real estate's total economic value. Id. at 33.

Total economic value of environmentally sensitive land is greater than the market value of a private property, due to the presence of public benefits. Id. at 37. A wide "discrepancy in value opinions is caused by blurring the line between private and public interests. Some appraisers allocate public interest value to a private property interest being appraised. Then, to justify their

positions, they claim transactions involving governmental and environmental agencies." Ibid. That is what both Krauser and the court did here.

Because noneconomic uses reflect something other than market value, appraisals for federal acquisition cannot consider public interest value or related concepts such as habitat value or preservation value. *Uniform Standards for Federal Land Acquisitions, The Appraisal Institute*, 2016, §4.3.2.3, p. 105. Accordingly, uses based on preservation, conservation, or open space cannot be considered in determining market value for federal acquisitions. Id. at 106.

Sales to or from the State of New Jersey or any of its political subdivisions are generally excluded by the Director of the Division of Taxation in determining assessment sales ratios. *N.J.A.C.* 18:12.1.1. Such sales are particularly suspect when government is acquiring property under the Green Acres Program as such sales are based on appraisals rather than competitive bidding. *Pepperidge Tree v. Kinnelon Borough*, 21 *N.J. Tax* 57, 66 (Tax 2003). Most of the sales in Krauser's appraisal were based on sales that he had previously appraised. (7T70:17). And those sales were based on sales that he had also previously appraised. (7T105:20).

POINT IV

(A381)

BECAUSE THERE IS NO MARKET FOR THE SUBJECT PROPERTY IT HAS, AT MOST, A NOMINAL VALUE.

Not all real estate has value. Courts in other states have recognized that if real estate has no value, it should not be assessed as if value exists. In *People ex rel. Poor v. O'Donnell*, 139 *App. Div.* 83, 124 *N.Y.S.*36 (App. Div. 1910), affirmed 200 *NY.* 518, 93 *N.E.* 1129 (Ct. App. 1910), the Appellate Division of the Supreme Court of New York held that Gramercy Park had no value because a deed of easement appurtenant to the sixty-six lots surrounding the property preserved it as an private park to benefit the owners and tenants of the lots surrounding the park.

The assessment of a park was contested in *Crane-Berkley Corporation v. Lanvis,* 238 *App. Div*. 124, 263 *NYS* 556 (1933). The park was owned by a developer, who had to set aside the land for recreational purposes to obtain approval of his development. The developer retained fee title to the park area. Deeds to the lots in the subdivision stated that the grantor would restrict the subject property to park and outdoor recreational uses to benefit of the lot owners. New York's Appellate Division held that although the deeds did not grant easements to the lot owners, the taxpayer had been estopped for all time

from denying the use and enjoyment of the property as a park. The court held that the estoppel had the effect of an easement and that its result was to destroy the taxable value of the park.

Tualatin Development Co. v. Department of Revenue, 473 *P2d* 660 (Or. 1970) involved a golf course. The county planning commission required the plaintiff to set aside open areas to be retained as recreational areas. The golf course had been losing money. There was no prospect that it could be operated profitably. Oregon's Supreme Court agreed with its Tax Court that "the golf course property was without taxable value."

Twin Lakes Golf Club v. King County, 548 *P.2d* 538 (Wash. 1976) is a Washington case with facts almost identical to those in *Tualatin Development Co.* The property was encumbered with restrictions regarding use and nonalienation of the realty, and had a history of operating at a substantial, apparently unavoidable, financial loss every year. The trial court had held that the golf course had no taxable value. The issue, as posed by the Washington Supreme Court was "whether the golf course had a fair market value for tax assessment purposes." The Washington Supreme Court affirmed the trial court's judgment, holding that "When the use of land is so restricted that its ownership is of no benefit or value, the assessment for tax purposes should be nothing." Id. at 540.

New Jersey's courts have not yet gone quite that far. *Borough of Englewood Cliffs v. Estate of Allison*, 69 *N.J. Super* 514 (App. Div. 1961) involved 7.8 acres of land held in trust to benefit the public on terms which precluded profitable development. Englewood Cliffs assessed the property for $52,065. The Bergen County Board of Taxation declared the property tax exempt. The Division of Tax Appeals restored the assessment. The Appellate Division exercised original jurisdiction and held that a nominal value of one tenth the value of the same land had it been unencumbered by the trust would fairly reflect the remote possibility of the sale of the bare legal title. Id. at 524.

In *Village of Ridgewood v. Bolger Foundation*, 104 *N.J.* 337, 339 (1986), the property owner (Bolger Foundation) granted a perpetual conservation easement to the New Jersey Conservation Foundation (NJCF). The easement was granted to benefit the general public. Like the conservation easement on Newark's land, it precluded the owner (Bolger Foundation) from removing vegetation, excavating soil, erecting structures, dumping trash, or engaging in any activity that might be detrimental to drainage, flood control, potable water, erosion control, or soil conservation. Like the easement on Newark's land, it prohibited "any act or use detrimental to the preservation of the Property in its natural state." But unlike the easement on Newark's land, access was reserved to the defendant (Bolger Foundation) with the NJCF being permitted limited entry

solely to inspect to ensure compliance with the terms and conditions of the easement.

The Bergen County Board of Taxation reduced the assessment from $21,200 to a nominal value of $1,000. Id. at 340 (1986). The Tax Court and the Appellate Division held that the reduction was not allowable. The New Jersey Supreme Court reversed and reinstated the board of taxation's judgment. Id. at 344.

Township of Middletown v. Simon, 193 *N.J.* 228, 245 (2008) was a tax foreclosure, not a tax appeal. The New Jersey Supreme Court agreed with the Appellate Division's observation that "the assessment of the land must reflect its dedication to a public park, which may result in an assessment of only a nominal amount." The Court found "Implicit in that statement is the notion that the Township should have assessed the land at a nominal amount rather than the amount assessed."

Methode Electronics v. Township of Willingboro, 28 *N.J.* 289 (Tax 2015) was an appeal of a $404,600 assessment on a small parcel vacant of land that had been contaminated with toxic compounds as the result of abandoned industrial activities that had been conducted on the property. The plaintiff's appraiser opined that the property could not be developed in any meaningful fashion, had no realistic probability of being fully remediated at any identifiable

future date, and posed the threat of liability to any potential purchaser from the property's continued capacity to produce toxic vapors. He opined that the property had no market value and suggested that it should be assessed for a nominal amount. The Tax Court agreed and reduced the assessment to $2,000. Id. at 297.

CONCLUSION

Value is the present worth of future benefits. *The Appraisal of Real Estate*, 15th edition. p. 437. Those benefits are encapsulated in the bundle of rights associated with ownership. The right of possession. The right of exclusion. The right of enjoyment. The right of disposition. The right to mortgage. The right of control; the authority to decide how the property is to be used within the bounds of the law. According to West Milford's experts, that is where the value lays.

Here, the right to control means right to manage the property, as open space available to the public for passive recreation purposes, as one sees fit. As West Milford's experts put it. The right to steward the property, subject to the requirements of the conservation easement, as they see fit. The question remains. What would one pay for the right to control the subject property?

West Milford says that a conservation organization would pay more than $73,000,000 for the right to steward the property this way or that. But why would they? Couldn't they just ask Newark for a license to manage the property according to the conservation values imposed by the easement? Unless there was a bidding war, Newark could not drive a hard bargain for such a license. No one is beating down Newark's door to control the property.

The property has no market value. The conservation easements don't just limit the property's use, they proscribe the use to which it must be put.

Conservation is not a use. Open space is not use. They are merely motivations to purchase property. *The Appraisal of Real Estate*, 15th edition. p. 311. The question remains. Who would purchase the property? If the answer is no one, the property has no value in the market. No one has expressed interest in the property in the two decades since Newark sold it development rights. Inferentially, no one has any interest.

West Milford's says that a market would appear, *if* Newark were to put the property up for sale. The hypothetical terms: "For sale to highest bidder, 16,500 acres of land subject to a conservation easement to the NJ-DEP, precluding development, but requiring that the land made available to the public subject a use permit fee system. The prospective owner is subject to damages to the NJ-DEP for violation of the easement or to any conservation values protected by the easement. (A245; §VII. D). The owner is responsible for all real estate taxes and assessments levied against the property." (A244; §VI. A).

What does the hypothetical buyer get? The right to steward the property for its own conservation values. The obligation to keep the property clean from illegal dumping. The obligation to pay damages if the conservation values of the property are injured or lost. The obligation to pay any taxes based on the assessed value of the property.

What does Newark give up? The obligation to maintain the subject property's conservation values. The liability associated with property ownership. The obligation to pay real estate taxes.

While we generally think in terms of market value, There are other types; use value, investment value, insurable value, liquidation value, disposition value. *The Appraisal of Real Estate* 15th ed. p.60. And the inherent or public value of open space. That value is real. That is the value that West Milford and the Tax Court put on the property. But that is not the value upon which Newark's property should be assessed.

The inherent or public value of the property belongs to the people of New Jersey, not to the City of Newark. That value is not subject to taxation. The assessment should not include elements of value transferred to the community in the form of public rights. *Estate of Allison* at 530. Newark has no rights left to sell but for the right to manage the property.

Because of the conservation easements, the subject property must be maintained as open space that must be made available to the public for passive recreation purposes. No one has any motivation to purchase the underlying fee. The subject property is a park. The subject property is a public good. Pursuant to New Jersey jurisprudence, the property has, at most, a nominal value.

It is respectfully submitted that this court should assume original jurisdiction and use its discretion to find the nominal value at which it should be assessed.

Respectfully submitted,

BLAU & BLAU
Attorneys for Plaintiff-Appellant

BY: *// Robert D. Blau ///*
ROBERT D. BLAU, ESQ.
For the Firm.

Dated: January 14, 2025

FILED, Clerk of the Appellate Division, June 26, 2025, **A-003476-23**, **AMENDED**

CITY OF NEWARK, PLAINTIFF-APPELLANT, v. TOWNSHIP OF WEST MILFORD, DEFENDANT-RESPONDENT.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003476-23 CIVIL ACTION On Appeal from the Final Judgments of the Tax Court of New Jersey Docket No: 015734-2014, 006894-2015, 005070-2016, 007402-2018, 005841-2018, 006935-2019, 008282-2019, 008756-2020, 011966-2020, 003283-2021, 003338-2021 Sat Below: Hon. Joshua D. Novin, J.T.C.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT/CROSS-APPELLANT TOWNSHIP OF WEST MILFORD

Submitted April 29th, 2025

Fred C. Semrau, Esq.; Of Counsel
Attorney ID #017871993
fsemrau@dorseysemrau.com

Robert J. Rossmeissl, Esq.; On the Brief
Attorney ID #207142017
rrossmeissl@dorseysemrau.com

DORSEY & SEMRAU
Attorneys for Defendant-Respondent/Cross-Appellant,
714 Main Street
Boonton, New Jersey 07005
Phone: (973) 334-1900

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

TABLE OF JUDGMENTS, ORDERS, AND RULINGS……………...………vi

PROCEDURAL HISTORY………………………………………………….vii

PRELIMINARY STATEMENT...1

STATEMENT OF FACTS...4

STANDARD OF REVIEW 23

LEGAL ARGUMENT...24

Point I (A70-71)
THE TAX COURT CORRECTLY FOUND THAT THE HIGHEST AND BEST USE OF THE SUBJECT PROPERTY WAS TO HOLD OR MAINTAIN IT AS OPEN SPACE WITH PUBLIC ACCESS FOR PASSIVE RECREATIONAL USES………………………………………………………………………..**24**

Point II (A94-95)
THE SUBJECT PROPERTY, AS ENCUMBERED BY A CONSERVATION EASEMENT, HAS A MARKET AND A MARKET VALUE.............................**28**

Point III (A90-95)
THE COMPARABLE SALES BASIS ON WHICH THE COURT RELIED IN REACHING ITS CONCLUSION OF VALUE IS A VALID BASIS FOR DETERMINING THE MARKET VALUE OF THE SUBJECT PROPERTY…..**31**

Point IV (A81-82)
APPELLANT FAILED TO DEMONSTRATE AT TAX COURT THAT THE ASSESSMENT OF THE SUBJECT PROPERTY SHOULD BE REDUCED AND HAS NO OPTION ON APPEAL BUT TO MAKE A NOVEL ARGUMENT ON AN INAPPLICABLE LEGAL BASIS...**33**

Point V (A94)
THE TOWNSHIP'S APPRAISAL EXPERT PROPERLY ACCOUNTED FOR THE CONSERVATION EASEMENT IN MAKING ADJUSTMENTS TO HIS 'LAND SALE 5'...**43**

CONCLUSION...**46**

TABLE OF AUTHORITIES

NEW JERSEY STATUTES CITED **PAGE**

N.J.S.A. 54:4-3.3 .... **12**

N.J.S.A. 54:4-23 .... **33**

NEW JERSEY CASES CITED

Jersey City, Div. of Water v. Parsippany-Troy Hills Twp., 16 N.J. Tax 504 (1997), aff'd sub nom. Jersey City v. Parsippany-Troy Hills Twp., 17 N.J. Tax 538 (Super. Ct. App. Div. 1998) **2, 8, 11, 25, 26, 27, 28, 35, 40**

E. Orange City v. Livingston Twp.,
15 N.J. Tax 36 (1995) **11, 25, 26**

City of Newark v. Twp. of Jefferson,
31 N.J. Tax 303 (Tax 2019) **13**

MSGW Real Estate Fund, LLC v. Mountain Lakes Borough,
18 N.J. Tax 364 (Tax 1998) **19**

Pantasote Co. v. Passaic City,
100 N.J. 408 (1985) **19**

Little Egg Harbor Twp. v. Bonsangue,
316 N.J. Super. 271 (App. Div. 1998) **19**

Aetna Life Ins. Co. v. Newark City,
10 N.J. 99 (1952) **19**

Ford Motor Co. v. Edison,
127 N.J. 290 (1991) **19, 33**

Entenmann's Inc. v. Totowa Borough,
18 N.J. Tax 540 (Tax 2000) **19**

Currie v. Waverly & New York Bay Railroad Co.,
52 N.J.L. 381 (E. & A. 1890) **19**

FILED, Clerk of the Appellate Division, June 26, 2025, **A-003476-23**, **AMENDED**

Glenpointe Assocs. v. Twp. of Teaneck,
241 N.J. Super. 37, (App. Div. 1990). **23, 24, 30, 43**

Yilmaz, Inc. v. Dir., Div. of Tax'n,
390 N.J. Super. 435(App. Div. 2007)...**23**

N.J. Tpk. Auth. v. Twp. of Monroe,
30 N.J. Tax 313 (App. Div. 2017)...**24**

Clemente v. Twp. of South Hackensack,
27 N.J. Tax 255 (Tax 2013)...**24**

Inmar Associates, Inc. v. Edison Twp.,
2 N.J. Tax 59 (Tax 1980)...**25, 34, 45**

Ridgewood v. Bolger Foundation,
104 N.J. 337 (1986)..**28, 29, 41, 42, 43, 44, 45**

Borough Englewood Cliffs v. Estate of Allison,
69 N.J. Super. 514 (App. Div. 1961)..**28, 40**

Matter of Romnes' Estate,
79 N.J. 139 (1979)...**32**

East Newark Town Center, LLC v. East Newark Borough,
29 N.J. Tax 164 (Tax 2016)...**33, 34**

Linwood Properties, Inc. v. Borough of Fort Lee,
7 N.J. Tax 320 (Tax 1985)...**34**

Township of Middletown v. Simon,
193 N.J. 228 (2008)...**41**

Methode Electronics v. Township of Willingboro,
28 N.J. 289..**42**

OUT-OF-STATE CASES CITED

People ex rel. Poor v. O'Donnell,
139 App. Div. 83, 124 N.Y.S.36 (App. Div. 1910)..**39**

Crane-Berkley Corporation v. Lanvis,
238 App. Div. 124, 263 NYS 556 (1933)..**39**

Tualatin Development Co. v. Department of Revenue,
473 P2d 660 (Or. 1970)..**39**

Twin Lakes Golf Club v. King County
548 P.2d 538 (Wash. 1976)..**39**

OTHER AUTHORITIES CITED

The Appraisal of Real Estate, 14th Edition..**33**

- **ALL CITATIONS TO APPENDICES (e.g. 'A123') ARE CITATIONS TO APPENDICES VOLUME 1 & VOLUME 2 AS UPLOADED TO THE RECORD BY PLAINTIFF-APPELLANT**

FILED, Clerk of the Appellate Division, June 26, 2025, **A-003476-23**, **AMENDED**

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

Tax Court of New Jersey Opinion
filed July 7, 2023……………………………………………………..…. A34

Tax Court of New Jersey Judgments
filed July 7, 2023……………………………………………………. ..A98

FILED, Clerk of the Appellate Division, June 26, 2025, **A-003476-23**, **AMENDED**

STATEMENT OF PROCEDURAL HISTORY

The City of Newark filed timely complaints to the Tax Court challenging the 2014, 2015, 2016, 2018, 2019, 2020 and 2021 assessments of the subject property. (A1-14). West Milford Township filed timely counterclaims for each of those years. (A15-33). Trial was held before the Honorable Joshua D. Novin, J.T.C. on July 17, 2023, July 21, 2023, July 24, 2023, July 27, 2023, August 30, 2024, August 31, 2023, September 13, 2024, September 14, 2023, and October 3, 2024. Judge Novin rendered an opinion on July 7, 2024 (A34-97) and entered judgments affirming the assessments on the same day. (A98-200). On July 10, 2024, the City of Newark filed its Notice of Appeal to the Appellate Division, initiating the instant case.

PRELIMINARY STATEMENT

At issue in this matter is whether the assessment of the subject property should stand. At trial in the Tax Court, Plaintiff-Appellant City of Newark (hereinafter, the "City," "Newark," "Appellant," or "Plaintiff-Appellant") sought to prove the assessment should be reduced. Judge Novin determined that the City's evidence in support of this argument was not credible. Defendant-Respondent/Cross-Appellant Township of West Milford (hereinafter, the "Township," "West Milford," "Respondent," "Defendant-Respondent," or "Cross-Appellant") sought to prove the assessment should be increased. Judge Novin determined that the Township's evidence for this argument *is* credible. Nevertheless, because the Court found that the increase warranted by the Township's evidence is not large enough to rise above the Chapter 123 common level range, the original assessments were affirmed.

In the instant matter, the City has appealed the Tax Court judgment, asking the Appellate Division to effectively deem the subject property to be totally without value, on an unorthodox legal basis that can only be described as a moonshot approach. Considering the novelty of Appellant's argument that the subject property has zero value, and considering that the value of the subject property will remain unchanged even if Appellant is successful in discrediting Respondent's Tax Court evidence, it appears that Appellant has an ulterior motive:

it appears that Appellant is trying to upend longstanding caselaw – particularly the matter of

Jersey City, Div. of Water v. Parsippany-Troy Hills Twp., 16 N.J. Tax 504 (1997), aff'd sub nom. Jersey City v. Parsippany-Troy Hills Twp., 17 N.J. Tax 538 (Super. Ct. App. Div. 1998) – in order to facilitate its future appeals of watershed properties.

The subject property, owned by the City of Newark, consists of 16,485 acres of land situated within the borders of the Township of West Milford. This property is part of the broader Newark watershed land, which spans 35,000 acres across six municipalities. Counsel for Appellant represents the City in multiple tax appeals against these municipalities.

In West Milford, the City puts the subject property to use for hunting, fishing, horseback riding, cycling, hiking, and myriad other recreational activities. The land serves as a connector to other preserved public lands. Its awesome bounty of resources, from wildlife to water to scenery to woodlands & other vegetation, make it a unique expanse in a state as densely developed as this one. The land's potential for sustainable timbering is robust and untapped. And its utility as a water resource is unmatched in the region, providing a critical commodity and a virtually limitless income supply to whichever entity controls it. In short, this land is a treasure.

In the Tax Court trial of these matters, Appellant failed to meet its burden to prove the assessment of the subject property should be lowered. As Appellant notes in its legal brief, it is black letter law and a fundamental principle of property appraisal that the first and most important step in finding market value is to determine the highest and best use of real estate. Appellant failed to even conclude a highest and best use of the subject property. Appellant has simply not put sufficient evidence on the record to overcome its burden in challenging the assessment of the subject property, and the City's appeal must be denied.

Conversely, while the Tax Court found that Judge Novin determined that the Township's evidence for this argument is credible, the Tax Court supplemented the Township's expert's conclusions of value with the Court's own, additional adjustments. Respondent respectfully requests that the Court review the basis for the Court's adjustments, and let stand the conclusions of the Township's expert without these additional adjustments.

STATEMENT OF FACTS

The Property

The subject property consists of 117 parcels of watershed land ranging in size from 0.0400 acres to 2,553.3799 acres and totaling approximately 16,485 acres. The parcels are all zoned R-4 "Very Low Density Residential." The subject property is a massive tract of land owned by the City, part of the Newark-Pequannock Watershed, which is utilized to provide the water supply for the City as well as to be sold to the City's suburbs. (A286). There is a deed of conservation easement, dated May 31, 2006, governing the subject property, which property is also subject to the Watershed Moratorium Act and the Highlands Preservation Act (together, the 'Restrictions'). (A241-247; A218). Notwithstanding the Restrictions, the subject property has a number of legal uses, including for passive recreation on a fee-charge basis, for commercial timbering on a sustainable yield basis, and as a watershed, to name a few. (1T27:11-19; 1T195:11-13). The Restrictions permit the City relatively wide latitude with regard to the conveyance of the subject property. A 2006 New Jersey Department of Environmental Protection Conservation Easement concerning the subject property is the most limiting of the Restrictions with regard to conveyance, yet provides that:

> "[N]othing in this Deed of Conservation easement shall in any way be construed to prevent or restrict a sale, lease, transfer, conveyance, or other encumbrance by the City of the property ..."

(A309).

Some of the permitted uses for the subject property have been employed by the City, including certain fee-based public recreation uses, such as hiking, fishing, horseback riding, boating, hunting, as a day camp, and of course as a watershed. (4T113:1-25; 4T136:6-8). Many of the potential uses of the subject property, however, have not been taken advantage of by the City, including use for a number of additional recreational activities, such as swimming, camping, or ATV riding. Other potential, legal uses for the subject property include but are not limited to carbon sequestration and commercial timbering, subject to certain conditions. (4T142:21-25; 4T:131:1-5; 7T76:2-6; A241). For the existing recreational uses, the City sells permits ranging from $18 to $50 per season, depending on the use. Not long ago, these fees were raised marginally, for the first time in decades (4T76:7-8; 4T126:16-21).

It was stipulated by and between the parties that the appropriate determination of value for the subject property is on a per-acre basis. The parcels making up the subject property range in size from less than a quarter-acre to over 2,500 acres. (A301). As the Court is aware, regarding the years under appeal, the subject property is presently assessed as follows:

Year	Assessment (TOTAL)	Assessment (PER ACRE)	Ratio	Equalized AV (TOTAL)	Equalized AV (PER ACRE)

2014	$35,820,050	$2,172.89	0.9527	$37,598,457	$2,280.77
2015	$35,820,050	$2,172.89	0.9034	$39,650,266	$2,405.23
2016	$35,820,050	$2,172.89	0.9176	$39,036,672	$2,368.01
2018	$39,138,250	$2,374.17	0.9068	$43,160,840	$2,618.19
2019	$39,138,250	$2,374.17	0.8738	$44,790,856	$2,717.07
2020	$ 43,263,400	$2,624,41	0.8674	$49,877,104	$3,025.61
2021	$ 43,263,400	$2,624,41	0.7958	$54,364,664	$3,297.83

(A269).

Township of West Milford's Valuation of the Property

The Township relied on two expert reports in this case, in order to 1) evaluate market options concerning lands sold/purchased for open space purposes, and 2) to determine the market value of the subject property. (A264; A269).

<u>The Court Recognized Frank Pinto as an Expert in Open Space, Land Conservation, and Land Preservation</u>

The Township in its trial preparations enlisted the expert opinion of Frank Pinto, principal of Pinto Consulting, LLC, which provides consulting work in the areas of land conservation, land preservation, open-space planning, and the agricultural industry, (5T11:20-25; 5T12:18-22). Mr. Pinto, stipulated by the parties and recognized by the Court as an expert in open space, land conservation,

and land preservation, completed a report entitled, 'Evaluating the Market: the Utility of Open Space.' (5T22:25; A255). In a previous role, Mr. Pinto served as the Farmland Preservation Director for Morris County, overseeing the Morris County Preservation Trust, including the Trust's Open Space Preservation Program. (5T15:12-25). In that role, Mr. Pinto oversaw well over 150 transactions of open space land for the purpose of determining whether an open space grant award was warranted. (5T33:12-25). In his current work, Mr. Pinto advises both private and public entities regarding the acquisition and development of open space lands. (5T36:18-25). Mr. Pinto identified potential purchasers of land for the use of preservation as open space, which entities include public corporations, environmental nonprofit organizations, institutions of higher learning, the federal government, municipalities, and counties. (5T48:1-25; 5T49:1-11; 5T25:22-25; 5T26:1-5). Although it was ultimately the testimony of the Township's valuation expert, Matthew S. Krauser, on which the Court primarily relied to determine the specific marketability of the subject property, the Court found that Mr. Pinto's testimony supports the premise that in New Jersey, a market exists for land to be acquired for use as open space. (A83).

Krauser Report

West Milford's expert appraisal report for these matters was prepared by Matthew S. Krauser, CRE, FRICS. Mr. Krauser confirmed upon direct

examination that the valuation of open space land is a specialty of his, noting that he formerly chaired an organization, the Great Swamp Watershed Association, which deals in the preservation of open space land. (6T158:6-15; 5T189:9-20). The foundation of Mr. Krauser's report was his conclusion of highest and best use for the subject property. Pursuant to an analysis of uses that are 1) legally permissible, 2) physically possible, 3) financially feasible, and 4) maximally productive, Mr. Krauser concluded that the highest and best use of the subject property is for passive recreational purposes. Regarding the satisfaction of the 'financially feasible' prong for his determination of highest and best use, Mr. Krauser concluded that "[t]here does not appear to be any reasonably probable use of the site that would generate a higher residual land value than passive recreational use." (A300). Mr. Krauser noted accordingly that:

> [I]t is our opinion that utilizing the land for passive recreational purposes is the maximally productive use of the property. The highest and best use conclusion is a result of both physical constraints and legal restrictions. As noted previously, we conclude that the highest and best use is for passive recreation both with and without the existing encumbrances of the conservation easement.
>
> (A341).

On redirect examination at trial, Mr. Krauser testified that, in determining his highest and best use, he had accounted for the holding of <u>Jersey City, Div. of Water v. Parsippany-Troy Hills Twp.</u>, 16 N.J. Tax 504 (1997) that, in valuing a

property such as the subject property, where the property cannot be put to an economic use, a finding of "highest and best use for conservation and open space is both reasonable and *necessary*." (8T161:9-12)(*emphasis added*). For this highest and best use, Mr. Krauser observed that the most probable buyer of the subject property is a land preservation group or a governmental agency, and proceeded to analyze the appropriate appraisal methodology for valuing the subject property pursuant to same. (A313). Mr. Krauser determined that the appropriate method for the valuation of the subject property is the Sales Comparison Approach, as "there is an active market for similar properties, and sufficient sales data is available for analysis." Noted Mr. Krauser with regard to the other two valuation approaches:

> The cost approach is not applicable because there are no improvements that contribute value to the property. The income approach is not applicable as market participants do not utilize this approach to determine value. The exclusion of these approaches does not impact the reliability of this analysis.

(A314).

In utilizing the Sales Comparison Approach, Mr. Krauser examined sales of land with constrained development potential throughout New Jersey over an approximately 10-year period beginning in 2011, Mr. Krauser focused his research to sales of large tracts of land located in West Milford and the surrounding Passaic County and Morris County areas, specifically rural areas with minimal population density, comparable to the subject property. Mr. Krauser testified on direct examination that, in selecting his comparable sales, he attempted to find sales that

had physical and legal constraints similar to those of the subject property. (7T34:14-15). Mr. Krauser concluded that, based upon his analysis of all the sales listed, the purchasers in the sales he ultimately chose, including Land Sale 5, shared the same motivation, which is to utilize the land for passive recreational purposes and to preserve the property in perpetuity, regardless of whether the property had some limited development potential or not. (A315). Mr. Krauser on direct examination at trial explained that his verification of his chosen sales entailed such actions as discussing the sales with the appraisers involved and with the entities buying and selling the properties. Mr. Krauser testified that, accounting for the impact of the Restrictions on the development potential of the subject property, potential purchasers included, among others, conservation groups, educational institutions, private companies, and governmental entities. Mr. Krauser indicated that potential purchasers could be local or could be large enough to have a national or even international presence. (7T71:9-13; 7T24:20-22).

Regarding the adjustments he made to his comparable sales, Mr. Krauser utilized three types of adjustments: adjustments for size, for access/exposure, and for market conditions. Mr. Krauser completed his sales comparison analysis based upon appraisal practices recognized by the State Tax Court. Notably, the value of each of Mr. Krauser's comparable sales exceeds the value of the subject property. (A318).

On redirect examination at trial, Mr. Krauser testified that he had reviewed State Tax Court decisions concerning the valuation of Watershed Properties. He was aware of both Jersey City, supra and E. Orange City v. Livingston Twp., 15 N.J. Tax 36 (1995). He testified that, in both of those cases, the properties at issue had been valued for conservation purposes (including for passive recreation), which the Court found to be the highest and best use. Mr. Krauser made mention of the holding of the Jersey City case that, in valuing a property such as the subject property, where the property cannot be put to an economic use, a finding of "highest and best use for conservation and open space is both reasonable and *necessary*." (8T161:9-12)(*emphasis added*). On direct examination, Mr. Krauser testified that these Tax Court decisions informed his conclusion that passive recreation and open space is the highest and best use of the subject property. In addition to legal precedent, Mr. Krauser took into consideration countless other factors in reaching his conclusion of value, including connectivity and control of the land. (A300). Mr. Krauser's accounted for the conservation easement, applying a downward adjustment of 10% of the fee simple valuation analysis, to reflect the 90% of rights retained by the fee holder. (A341-343).

City of Newark's Valuation of the Property

Highest and Best Use

Newark's expert appraisal report for these matters was prepared by Jon P.

Brody, MAI, CRE. In his appraisal report, Mr. Brody identified five potential highest and best uses, as follows:

1) Integrated Water Utility
2) Passive Recreation
3) Commercial Timber Harvesting.
4) Growth and Sale of Firewood
5) Development in Accordance with West Milford's zoning ordinance.

Out of these five potential uses, Mr. Brody eliminated 'Integrated Water Utility' on the basis that "N.J.S.A. 54:4-3.3, the statute under which the subject property is assessed, precludes the consideration of any improvements such as dams, water treatment facilities, or pipelines." Mr. Brody conducted no further inquiry into or analysis of the potential use of the subject property for use as an integrated water utility. Mr. Brody cursorily eliminated 'Passive Recreation' (i.e. 'open space') as a potential use, with no substantive explanation, on the basis that "[i]t is doubtful that anyone would assume the risk" of such a low-value use. Mr. Brody eliminated 'Commercial Timber Harvesting' as a potential use, with no substantive explanation, on the basis that "there is no market for commercial timber operations in New Jersey" and that such a use is "neither legally permissible nor financially feasible." And he eliminated 'Development in Accordance with West Milford's zoning ordinance' as a potential use on the basis that "[t]he conservation easements preclude any development of the subject property." (A232-234). On cross examination at trial, Mr. Brody acknowledged his recognition of

Robert Williams as a qualified New Jersey forester and noted that he was aware Mr. Williams had professionally opined, in the matter of City of Newark v. Twp. of Jefferson, 31 N.J. Tax 303 (Tax 2019), that commercial timbering could in fact be a profitable operation for property in the Newark Watershed. (2T191:12-19; 2T188:5-9). And Mr. Brody acknowledged on direct examination that timbering at the subject property is permissible, explaining that such a use is legal when conducted "on a sustainable yield basis and in accordance with an approved Forest Stewardship Plan," and that the Township's ordinances do not prohibit this use. (1T32:18-20). Mr. Brody acknowledged on cross examination that, in preparation of his report, he had never spoken to the forester who was on staff and retained by the City of Newark. (2T183:7-10). In his report, Mr. Brody concluded that the "subject property does not have a highest and best use," and, accordingly, that "the subject property does not have a market value." Subsequently, at the direction of the City's legal counsel, Mr. Brody devised a 'Hypothetical Condition,' that "the sale of firewood is legally permissible" as a use for the subject property, and proceeded to provide a hypothetical valuation on this basis, while acknowledging that this is not actually a legal use. (2T125:4-13; A235-A239).

Passive Recreation as a Potential Highest and Best Use

On cross examination at trial, Mr. Brody testified that he did not rely on passive recreation as a use because the revenue derived by the City, compared to

what he believed the costs to be, did not result in a positive financial return. (2T97:13-25; 2T98:1-14). Mr. Brody's report does not include a market study; instead, it contains a 'basic income analysis' for the use of passive recreation, based upon the income the property produces annually, approximately $100,000, which analysis does demonstrate a positive return based upon his utilization of a 5% expense rate. The analysis relies upon estimates regarding income and regarding the market but does not include an explanation of the underlying reasoning for arriving at said estimates with regard to the specific property at issue. Per his report's discussion of passive recreation, Mr. Brody relied upon a capitalization rate of 5% plus a 3.3% tax component, by which he determined the value of the subject property to be $1,144,578 or 69.55 per acre. (A233). On cross examination, Mr. Brody acknowledged that the figures in his calculations were purely hypothetical. (2T106:12-25). Ultimately, Mr. Brody's report does not conclude a highest and best use for the subject property of passive recreation. At trial, Mr Brody told the Court that he gave up on the possibility of utilizing passive recreation as a highest and best use because he could not get the necessary expense information from his client, explaining that "the only expense that I could derive from the City of Newark, my client, were real estate taxes. All the others, the City could not provide them to me." (1T62:7-9). Mr. Brody on cross examination at trial asserted that a highest and best use of passive recreation "would not be

financially feasible." He did not claim to have obtained any additional expense information from the City at this point. (1T54:6-9).

Regarding the actual expenses required to use the subject property for passive recreation, Mr. Brody acknowledged on cross examination that the subject property would require the employment of a forester and guards regardless of whether it is used for passive recreation. (2T113:6-25; 2T114:1-8). Regarding income, Mr. Brody stated on cross examination that he did not analyze the market or economic fees related to use of the subject property for passive recreation, and that he had done no investigation into the fees charged by the City for use of the subject property. (2T98:23-25; 2T99). The City's employee tasked with managing the subject property, Kenya Travitt, noted on direct examination at trial that, aside from a recent, marginal increase, the City's Recreational Fees for the Subject Property hadn't been raised in "twenty, thirty years." (4T126:16-21). With respect to the City's advertisement of its use of the subject property for passive recreation, Mr. Brody noted on cross examination that he had not looked into what the City does to promote this use. (2T103:2-19). Mr. Brody did note that the conservation easement which governs permissible uses for the subject property requires the use of the subject property for passive recreation and allows for the charging of permit fees therewith. (2T105:15-20). Mr. Brody's report concluded that the risk of purchasing the subject property for use as passive recreation would be too high.

(A232-234).

On cross examination at trial, Mr. Brody acknowledged that he had not conducted his income analysis for passive recreation in the manner that he should have, and that, "[a]t the time of the writing of my appraisal report, I had done almost no in-depth research" in connection with the fees charged by the City. (2T100:21-25; 2T101:1-13; 2T98:8-13). Asked on cross examination about his market research concerning use of the property for passive recreation, Mr. Brody noted, without elaborating, that "I guess there's -- I guess there's -- I guess there's possibly -- the only buyers, there might be three buyers out there, conceivable buyers, that would buy the property," elaborating that these three would be the County, "[p]ossibly the New Jersey Department of Environmental Protection, NJDEP or lastly, the Town of West Milford, itself." (1T:75:19-21; 1T75:6-8). Asked whether he had "conducted an investigation of the recreation activities on West Milford Township properties, along with the type of fees they charge for such activities," Mr. Brody responded simply, "no, I have not." (3T106:6-14). Asked whether he had found "any property that had somewhat similar passive recreation opportunities," Mr. Brody responded "no." (3T106:15-22). Asked whether he was aware of the 1,360,977-person attendance for Wawayanda State Park during a one-year period spanning 2016 & 2017, Mr. Brody affirmed that he was not aware of the level of attendance. (3T126:14-20). Asked whether the

subject property is contiguous with Wawayanda State Park, Mr. Brody stated, "I can't give you the geographics." (3T122:15-18). And asked whether, if told that "Wawayanda State Park is 35,000 acres in size," this would suggest to Mr. Brody that Wawayanda State Park is similar in size to the Newark Watershed property, Mr. Brody responded, "[i]f what you're saying is correct, and I don't know what part is in New Jersey or what part is in New York State, but if it's 35,000 acres and it's a state park, then it's very similar to the Newark Watershed." (3T123:14-21).

Alternate Highest and Best Use and Valuation

Mr. Brody's report ascribes an 'alternate' highest and best use – the use of "Growing and cutting wood for sale" – to the subject property. (A204). Mr. Brody's report analyzes this 'alternate' highest and best use based upon a hypothetical condition that the sale of firewood is legally permissible (the report includes an acknowledgement of the legal *impermissibility* of this use).(A211). On cross examination, Mr. Brody admitted that he conducted his 'alternate' highest and best use analysis because the City's attorney asked him to do it. (2T125:4-13). In his analysis of this 'alternate' use, Mr. Brody determined that there are 3,500 acres of property within West Milford devoted to this use; the sale of firewood. Mr. Brody did not provide a basis for his conclusion that these 3,500 acres are devoted to the growth and sale of 'firewood,' as opposed to, say, the growth and commercial sale of timber. (A234). On cross examination, Mr. Brody testified that

his 'alternate' use was based upon an assumption that the sale of firewood was a financially feasible use for the subject property. (2T132:4-10). In conducting his 'alternate' use analysis, Mr. Brody relied upon the State Farmland Evaluation Committee's 'Report of Productivity Values' to deduce the market price of firewood for purposes of reaching a valuation on the basis of his 'alternate' use and, in his report, he included a table titled 'Passaic County Non-Appurtenant Woodland Values Per Acre by Soil Group,' taken from the State 'Report of Productivity Values.' From this table, Mr Brody chose to utilize the values for 'Soil Group B' (an explanation for this choice cannot be found in Mr. Brody's report) in order to establish the valuation for his 'alternate' highest and best use. (A238-A239). When asked on cross examination about his reasoning for choosing 'Soil Group B' for his valuation purposes, Mr. Brody admitted that it was hypothetical. (3T89:2-11).

When asked on cross examination at trial about the applicability of the State Farmland Evaluation Committee's Report of Productivity Values to the subject property, Mr. Brody admitted he understood that an assessor is not bound by these values in setting the assessment. (3T89:12-15). Pursuant to his 'alternate' highest and best use analysis, Mr. Brody concluded a valuation for the subject property ranging from $150 to $158 per acre. (A239). At trial, Mr. Brody noted that his investigation into the price of firewood entailed only asking a personal associate

what she pays for a cord of firewood. (2T134:21-25).

The Court's Analysis

The Court in its June 7, 2024 Opinion reiterated the standard for challenging an assessment of real property, noting, critically, that:

> "Original assessments and judgments of county boards of taxation are entitled to a presumption of validity." MSGW Real Estate Fund, LLC v. Mountain Lakes Borough, 18 N.J. Tax 364, 373 (Tax 1998). This presumption of validity denotes that the appealing taxpayer shoulders "the burden of proving that the assessment is erroneous." Pantasote Co. v. Passaic City, 100 N.J. 408, 413 (1985). "The presumption of correctness . . . stands, until sufficient competent evidence to the contrary is adduced." Little Egg Harbor Twp. v. Bonsangue, 316 N.J. Super. 271, 285-86 (App. Div. 1998). A taxpayer can only rebut the presumption by introducing "cogent evidence" of true value. Pantasote Co., 100 N.J. at 413. That is, evidence "definite, positive and certain in quality and quantity to overcome the presumption." Aetna Life Ins. Co. v. Newark City, 10 N.J. 99, 105 (1952).
>
> (A47).

Pursuant to the above, the Court reiterated the principle that 'true value' is evidenced by:

> . . . analyz[ing] the marketplace to discern the property's highest and best use. Ford Motor Co., 10 N.J. Tax 153, 161 (Tax 1988), aff'd, 127 N.J. 290 (1992). "For local property tax assessment purposes property *must be valued at its highest and best use*." Entenmann's Inc. v. Totowa Borough, 18 N.J. Tax 540, 545 (Tax 2000). This principle has been a construct of New Jersey jurisprudence since 1890. See Currie v. Waverly & New York Bay Railroad Co., 52 N.J.L. 381, 391 (E. & A. 1890) (stating that "best and highest use in view of its adaptability for those purposes which give the land its highest market value").(1952). (*emphasis added.*)
>
> (A49).

Referencing the valuation conclusion of the City's appraisal expert, who not only

failed to find a highest and best use for the subject property, but who admittedly neglected to complete an evaluation for the potential highest and best use of the property as open space/passive recreation, the Court made clear that:

> . . . in valuing land encumbered by restrictions dedicating it as open space for use by the public, consideration must be given to how those restrictions impact true or market value. Correspondingly, the analysis of the land's highest and best use must appropriately account for those limitations. Therefore, central to the court's evaluation of highest and best use is not only the traditional reasonably probable legal use of land that is physically possible, financially feasible, and maximally productive, but the more specific role or impact that the constrained property rights have on defining the legal uses of the land.
>
> (A66-A67).

Accordingly, the Court found the City's valuation expert's opinion to be "not credible," for its baseless dismissal of open space conservation as a highest and best use, clarifying that:

> [c]ontrary to the opinion expressed by Newark's valuation expert . . . the court's examination and analysis of our state's jurisprudence has disclosed two published decisions concluding that undevelopable land can have a highest and best use for conservation as open space.
>
> (A67).

In rebuking this failure by Newark's appraisal expert to establish a highest and best use, the Court found further fault in the expert's deficient analysis concerning the potential highest and best of the subject property as open space, noting that the expert neglected to "account for the more than $27 million dollars consideration paid to Newark by the NJDEP to voluntarily impose these restrictions on the subject

property," whilst Newark simultaneously took the position of aggrieved taxpayer for West Milford's modest assessment of the subject property as open space – exactly the use that Newark had "voluntarily agreed to undertake in granting the Conservation Easements on the subject property." (A70).

The Court, determining that the City's appraisal expert had failed to establish a legitimate conclusion of value for the subject property on the basis of a proper highest and best use analysis, proceeded to opine on the expert's proffer of a 'hypothetical' highest and best use for the subject property of "cutting [fire]wood for sale" pursuant to a woodlands management plan, stating that "the court does not find Newark's valuation expert's approach to be a credible method for deriving the subject property's true or market value." (A76-77). And the Court, upon full analysis of Newark's expert's appraisal report, testimony, and opinion, indicated that it "rejects Newark's valuation expert's concluded value for the subject property."(A82).

In analyzing West Milford's expert's valuation of the subject property, the Court validated the highest and best use analysis of West Milford's expert, finding that, "[a]fter reviewing the Conservation Easements, the actual use of the subject property, and consulting with market participants, West Milford's valuation expert concluded that the subject property's highest and best use was for it to be held or maintained as open space with public access for passive recreational uses," and

establishing that "the court accepts West Milford's valuation expert's conclusion of the subject property's highest and best use." (A70-71).

Having established the validity of West Milford's expert's conclusion of highest and best use for the subject property, the Court proceeded to evaluate the sales comparison approach undertaken by the expert. Parsing the sales relied upon by the expert, the Court determined one sale – Land Sale 5, comprising "a 58.51-acre tract of land in West Milford sold on May 21, 2014, for consideration of $199,500, or $3,410 per acre" – to be particularly comparable to the subject property, on the basis of location, access, topography, and potential for development, among other criteria. (A90-91). Proceeding to analyze the adjustments made by West Milford's expert in his comparative sales approach, the Court accepted "all but one of West Milford's valuation expert's time/market condition adjustments," accepted "West Milford's valuation expert's 10% downward adjustment to account for [the impact of a conservation easement on surrounding property]," applied its own "15% downward adjustment for Newark's assumption of the obligation to afford public access to the subject property," and concluded on the basis of West Milford's expert's analysis a market value for the subject property of:

> (i) $41,740,000, as of October 1, 2013 ($2,532 x 16,485 acres); (ii) $42,169,000, as of October 1, 2014 ($2,558 x 16,485 acres); (iii) $43,421,000, as of October 1, 2015 ($2,634 x. 16,485 acres); (iv) $45,119,000, as of October 1, 2017 ($2,737 x 16,485 acres); (v) $45,960,000, as of October 1,

2018 ($2,788 x 16,485 acres); (vi) $46,801,000, as of October 1, 2019 ($2,839 x 16,485 acres); and (vii) $47,642,000, as of October 1, 2020 ($2,890 x 16,485 acres).

(A91-A95).

Because, for each tax year under appeal, the ratios of assessed value to the Court's market values, above, fall within West Milford's upper limit and lower limit of the Chapter 123 common level range, the Court necessarily found that – in spite of its conclusions of true market value – the assessments for each year under appeal must remain unchanged, and the Court, accordingly, affirmed these assessments. (A96-A97).

STANDARD OF REVIEW

Appellate courts apply "a highly deferential standard of review" to the decisions of a Tax Court judge because "judges presiding in the Tax Court have special expertise." Glenpointe Assocs. v. Twp. of Teaneck, 241 N.J. Super. 37, 46, 574 A.2d 459 (App. Div. 1990). When reviewing a Tax Court's factual findings, an appellate court examines "whether the findings of fact are supported by substantial credible evidence with due regard to the Tax Court's expertise and ability to judge credibility." Yilmaz, Inc. v. Dir., Div. of Tax'n, 390 N.J. Super. 435, 443(App. Div. 2007). Consequently, we do not disturb a Tax Court's factual findings "unless they are plainly arbitrary or there is a lack of substantial evidence to support them."

Glenpointe, 241 N.J. Super. at 46, 574 A.2d 459. Appellate review of a Tax Court's legal decisions, however, is de novo. N.J. Tpk. Auth. v. Twp. of Monroe, 30 N.J. Tax 313, 318 (App. Div. 2017)

LEGAL ARGUMENT

POINT I

(A70-71)

THE TAX COURT CORRECTLY FOUND THAT THE HIGHEST AND BEST USE OF THE SUBJECT PROPERTY WAS TO HOLD OR MAINTAIN IT AS OPEN SPACE WITH PUBLIC ACCESS FOR PASSIVE RECREATIONAL USES

To discern a property's highest and best use, an appraiser must sequentially consider "the following four criteria, determining whether the use of the subject property is: 1) legally permissible; 2) physically possible; 3) financially feasible; and 4) maximally productive." Clemente v. Twp. of South Hackensack, 27 N.J. Tax 255, 268 (Tax 2013), aff'd, 28 N.J. Tax 337 (App. Div. 2015). The appraiser must evaluate all reasonably possible legal and physical uses of the property, gauge the demand in the marketplace, identify the most probable users of the property, and discern the property's most probable market value based on the concluded highest and best use. When conducting a highest and best use analysis, the valuation expert must scrutinize the physical surroundings, zoning ordinances, and legal restrictions applicable to the parcel being appraised, and consider "all possible [permitted] uses

and [select] *that use which will yield the highest return*. . . ." Inmar Associates, Inc. v. Edison Twp., 2 N.J. Tax 59, 64 (Tax 1980). (*Emphasis Added*).

It is well established with regard to publicly-owned water supply land that, where the property is precluded from development, the highest and best use of the subject property "is for open space or conservation." E. Orange, supra, at 44. More explicitly, as concerns publicly-owned water supply land, the Tax Court has held, where valuation based on an 'economic' highest and best use would be unrealistic, that "*valuing the property based on a highest and best use for conservation and open space is both reasonable and necessary*." Jersey City, supra, at 526–27. (1997), (*Emphasis Added*).

In the matter on appeal, Newark's expert and West Milford's expert each reached the same conclusion, that the subject property, publicly-owned water supply land for the City of Newark, severely lacked development potential. (A42). On the basis of this conclusion, the experts diverged in their subsequent opinions. West Milford's expert accounted for the conservation easement's restriction on the use of the subject property, testifying at trial that he was aware of both Jersey City, supra and E. Orange City, supra, observing that in both of those cases, the properties at issue were valued for conservation purposes (including for passive recreation), which the Court found to be the highest and best use. West Milford's expert even made mention of the holding of the Jersey City, supra matter that, in valuing a

property such as the subject property, where the property cannot be put to an economic use, a finding of "highest and best use for conservation and open space is both reasonable and necessary." (8T161:9-12). On direct examination, West Milford's expert testified at trial that these Tax Court decisions informed his conclusion that passive recreation and open space is the highest and best use of the subject property.(7T27-33).

In Its brief, Appellant grasps at straws to find discrepancies between the subject property at issue here, and those at issue in Jersey City, supra and E. Orange City v. Livingston Twp. With regard to E. Orange City, supra, Appellant arbitrarily observes that some of the property at issue therein was developable, without expanding on why this distinction has any import on the instant matter. And what Appellant selectively *refrains* from mentioning is that, with regard to the *non-developable* lands in E. Orange City, supra, the Court analyzed the value of these lands -- whose highest and best use was found to be for open space or conservation -- and assigned these non-developable lands a true value of $5,000 per acre (in *1995* dollars!). E. Orange City v. Livingston Twp., 15 N.J. Tax 36, 50 (1995).

With regard to Jersey City, supra, Appellant notes, again without expanding on the importance of the distinction, that portions of the property at issue therein were developable. But again, what Appellant omits is that the Court in that matter valued the *non-developable* portion at $6,790 per acre as of October 1, 1990 and

$7,000 per acre as of October 1, 1991. Jersey City, supra, at 537. Respondent reminds the Court that Appellant, without any expert support for Its request, is asking the Court here to effectively assign a de minimis value to the subject property. The basis for Appellant's argument in support of this de minimis value is Appellant's expert's assertion that the subject property has a value ranging from $150 to $158 per acre. (A239). But Appellant's expert, having considered five potential highest and best uses, did virtually zero due diligence in analyzing these potential uses; apparently pursuant to the direction of Appellant's legal counsel. Appellant's expert, Jon P. Brody, explicitly noted that he was dissuaded from completing his normal due diligence on the basis of "legal instruction." (A232). Cursorily dismissing the five potential highest and best uses he had 'considered,' with scant explanation, Mr. Brody's report concluded a hypothetical 'alternate' highest and best use for the subject property based upon the harvesting and sale of firewood, which the expert himself recognized is not legally permissible at the subject property. (A211, A235, A239). This hypothetical highest and best use was the apparent result of heavy-handed intervention by counsel, or "legal instruction," as Mr. Brody described it. Regardless of its invalidity as an appraisal approach, it did result in a theoretical valuation of the subject property of $150 to $158 per acre, to suit the purposes of Appellant's legal counsel.

There is only one valid expert conclusion of highest and best use in the matter on appeal, rightly recognized as such by the Tax Court, and that is West Milford's expert's determination that the highest and best use of the subject property is for open space with public access for passive recreational uses. As settled in the case law, the valuation of publicly-owned water supply land "*based on a highest and best use for conservation and open space is both reasonable and necessary*." Jersey City, supra, at 526-27.

POINT II

(A94-95)

THE SUBJECT PROPERTY, AS ENCUMBERED BY A CONSERVATION EASEMENT, HAS A MARKET AND A MARKET VALUE

In order to determine market value of land encumbered by a conservation easement, there is a two-step analysis. As indicated in the opinion of Judge Novin, First, the land at issue must first be valued free of any public rights, constraints, or restrictions, as a "marketable commodity." Ridgewood v. Bolger Foundation, 104 N.J. 337, 342 (1986); Englewood Cliffs v. Estate of Allison, 69 N.J. Super. 514, 530-31 (App. Div. 1961). Second, after determining the unimpeded land value, an adjustment must be formulated and applied to the unimpeded land value to account for the property rights that were conveyed or surrendered under the conservation

easement. In order to determine the appropriate size of the adjustment, real property subject to a conservation easement should be assessed and valued as a "marketable commodity," with a deduction then applied for the "elements of value [that] are surrendered by the taxpayer." Bolger, supra. As noted in Judge Novin's opinion, to determine market value of an encumbered property, "the value of the easement should be deducted from the fair value of the land." Id. at 341.

In the instant matter, West Milford's expert concluded that a market exists for land dedicated for use as open space and/or passive recreation, and proceeded to undertake a comparable sales valuation approach, utilizing for the basis of his conclusion a sale that was not only comparable, but that was "inherently impacted and influenced by the Conservation Easements at issue," as the land sold was actually surrounded by the subject property. (A90). The Tax Court accepted the adjustments made by West Milford's expert to this comparable sale, supplementing these adjustments with an additional "15% downward adjustment for Newark's assumption of the obligation to afford public access to the subject property," and reaching a market value therefrom. (A94).

i. Appellant asks the Court to go beyond its Purview

In Its brief, Appellant appropriately recognizes the standard of Appellate review applicable to the matter below, rightly noting that the Tax Court's factual

findings are entitled to deference. However, Appellant's assertions under POINT II of Its brief, totally absent of citation to law, seem to call for the Appellate Division to undertake a new, subjective review of the validity of facts, and the candor & thought processes of witnesses such as the parties' experts. Respondent wishes to remind Appellant that the Appellate Division applies "a highly deferential standard of review" to the decisions of a Tax Court judge because "judges presiding in the Tax Court have special expertise." Glenpointe Assocs., supra, at 46. If Appellant wants the Appellate Court to newly review facts and witness credibility, It should identify the applicable legal standard for this.

ii. Respondent's Appraisal Expert did his Due Diligence

Because Appellant shares his subjective opinion that "Krauser's comparable sales do not establish a market for the subject property," Respondent will take the opportunity simply to remind the Appellate Division of the comprehensive and thorough process in which West Milford's expert engaged. (Appellant brief, p.33).

Undertaking his sales comparison approach, Mr. Krauser researched, verified, and analyzed sales of similar properties. Mr. Krauser specifically selected comparable sales for which the purchaser had been motivated not by the development potential of the property, but simply by the utilization of the property for passive recreational purposes and to preserve the property in perpetuity. (A315). Having examined sales of constrained land (i.e. land with development potential

precluded by a range of constraints, including legal and physical) throughout New Jersey over an approximately 10-year period beginning in 2011, Mr. Krauser focused his research to sales of large tracts of land located in West Milford and the surrounding Passaic County and Morris County areas, specifically rural areas with minimal population density, comparable to the subject property. Mr. Krauser specifically relied upon sales data concerning properties with physical and legal constraints similar to those of the subject property, and made appropriate adjustments. (7T34:14-15). The Tax Court recognized Mr. Krauser's diligence, opining that "West Milford's valuation expert offered credible testimony supporting his review and analysis of a ratio study from 'the first year through the last year' of the tax years at issue to support his time/market condition adjustments. (A91). In stark contrast, Judge Novin wrote that "the court does not find Newark's valuation expert's approach to be a credible method for deriving the subject property's true or market value." (A77).

POINT III

(A90-95)

THE COMPARABLE SALES BASIS ON WHICH THE COURT RELIED IN REACHING ITS CONCLUSION OF VALUE IS A VALID BASIS FOR DETERMINING THE MARKET VALUE OF THE SUBJECT PROPERTY

The definition of "market value" for purposes of the New Jersey Tax Court is the price at which property would change hands between a willing buyer and a willing seller, with neither party being under any compulsion to buy or sell, and both parties having reasonable knowledge of relevant facts. Matter of Romnes' Estate, 79 N.J. 139 (1979). In reaching its conclusion of market value for the subject property, the Tax Court relied in part on 'Land Sale 5' from the appraisal report of West Milford's expert. This sale was an arm's length transaction, usable for tax assessment purposes, with a buyer motivated to own the property for passive recreational use. (A323).

Without defining the term, Appellant, in Its brief, characterizes the value found by the Tax Court on this basis as a 'public value.' Appellant notes that "Sales to or from the State of New Jersey or any of its political subdivisions are generally excluded by the Director of the Division of Taxation in determining assessment sales ratios," while failing to recognize that the purchaser in Land Sale 5 was not a political subdivision of the State, but was an independent organization, the Land Conservancy of New Jersey. (Appellant brief, p.36).

POINT IV

(A81-82)

APPELLANT FAILED TO DEMONSTRATE AT TAX COURT THAT THE ASSESSMENT OF THE SUBJECT PROPERTY SHOULD BE REDUCED AND HAS NO OPTION ON APPEAL BUT TO MAKE A NOVEL ARGUMENT ON AN INAPPLICABLE LEGAL BASIS

i. Property must be valued at its Highest and Best Use

"In New Jersey, the value of real property is based on a sale of the property between a hypothetical buyer and seller. The objective is to "determine the full and fair value . . . at such price as . . . it would sell for at a fair and bona fide sale by private contract on October 1 . . . [of the pre-tax year]." East Newark Town Center, LLC v. East Newark Borough, 29 N.J. Tax 164, 188 (Tax 2016) (citing N.J.S.A. 54:4-23). For the purpose of assessing tax, property *must* be valued at its highest and best use. Ford Motor Co. v. Edison, 127 N.J. 290, 300-301 (1991)(*Emphasis Added*). "The concept of highest and best use is not only fundamental to valuation but is a crucial determination of market value. This is why it is the first and most important step in the valuation process." East Newark Town Center, supra, at 188 (internal citations omitted). "In order to constitute the property's highest and best use, four factors are considered. The use must be 1) legally permissible, 2) physically possible, 3) financially feasible, and 4) maximally productive." Id. (citing Appraisal Institute, *The Appraisal of Real Estate*, 333 (14th ed. 2013)). "The four criteria are considered sequentially" and, though "physical possibility and legal permissibility

can be applied in either order . . . they both must be applied before the test of financial feasibility and maximum productivity. A use may be financially feasible, but this is irrelevant if it is legally prohibited or physically impossible." Id. Property should be examined for all possible uses and that use which will yield the highest return should be selected. Inmar, supra, at 64.

Resolution of highest and best use depends on analysis of the proofs and legal theories developed by the parties with particular emphasis on market demand for the subject property, the property's legal status, physical condition, and actual use. East Newark Town Center, supra, at 189. Moreover, highest and best use of a property is not a "fact to be found" but rather an opinion resulting from "the appraiser's judgment and analytical skill." Linwood Properties, Inc. v. Borough of Fort Lee, 7 N.J. Tax 320, 327 (Tax 1985).

ii. Appellant Failed to Establish a Highest and Best Use

Newark’s appraisal report, prepared by Mr. Brody, blatantly declined to determine the highest and best use of the subject property, listing as the highest and best use “None.” and noting simply that “the subject property does not have a highest and best use.” (A235). The report failed, accordingly, to provide any support or justification for a valid highest and best use. Instead, it merely set forth the net opinion of the appraiser, based upon an ‘alternate’ highest and best use, which

'alternate use' was acknowledged by the report itself to be legally impermissible. (A211).

Engaging in merely a cursory evaluation of one of the possible highest and best uses that it considered – use of the property for open space – the Brody Report seemed predestined to dismiss 'passive recreation/open space' as a possible highest and best use. On cross examination at trial, Mr. Brody testified that he did not rely on passive recreation as a use because the revenue derived by the City, compared to what he believed the costs to be, did not result in a positive financial return. (2T97:13-25; 2T98:1-14). However, it has been affirmed by the Appellate Division that, where restrictions of the type affecting the subject property exist, "valuation based on an "economic" highest and best use would be totally unrealistic." Jersey City, supra, at 526. In any case, Mr. Brody's report contains a basic income analysis for the use of passive recreation that demonstrates a positive return based upon the utilization of a 5% expense, a capitalization rate of 5%, and a 3.3% tax component (A233). However, Mr. Brody acknowledged that the figures in his calculations were *purely hypothetical*. (2T106:12-25). At trial, Mr. Brody stated that he gave up on the possibility of utilizing passive recreation as a highest and best use because he could not get the necessary expense information from his client, explaining that "the only expense that I could derive from the City of Newark, my client, were real estate taxes. All the others, the City could not provide them to me." (1T62:7-9). In

connection with the potential use of the subject property for passive recreation, Mr. Brody cited the potential expenses of employing a forester and guards as cost-prohibitive, yet acknowledged on cross examination that the subject property would require the employment of a forester and guards regardless of whether it is used for passive recreation. (2T113:6-25; 2T114:1-8). What remains totally unexplained is how, without this expense information, Mr. Brody could assert on cross examination at trial that a highest and best use of passive recreation "would not be financially feasible." (1T54:6-9).

Beyond his candor regarding his lack of investigation into expenses for use of the subject property as passive recreation, Mr. Brody admitted that he did not determine the market or economic fees related to this use. Mr. Brody acknowledged that the conservation easement which governs permissible uses for the subject property requires the use of the subject property for passive recreation and allows for the charging of permit fees therewith. (2T105:15-20). Yet, asked on cross examination whether he had "conducted an investigation of the recreation activities on West Milford Township properties, along with the type of fees they charge for such activities," Mr. Brody responded simply, "no, I have not." (3T106:6-14). Mr. Brody simply assumed that the City Recreational Fees are in fact market fees, without even testing them; without going out and examining the market to see what fees other facilities are charging for recreational uses, hunting rights, or any other

uses, in spite of the fact that the City's permit fees for recreational activities at the subject property hadn't been raised in "twenty, thirty years." (4T126:16-21). Asked whether he had found "any property that had somewhat similar passive recreation opportunities," Mr. Brody simply responded "no." (3T106:15-22). Mr. Brody eventually admitted to his investigative lapse, testifying on cross examination at trial that, "[a]t the time of the writing of my appraisal report, I had done almost no in-depth research" in connection with the fees charged by the City. (2T98:8-13). Mr. Brody admitted also that he was aware of whether the City promotes the recreational use of the property. (2T103:2-19).

Asked on cross examination about whether the City's current use of the subject property for passive recreation is optimal, Mr. Brody further demonstrated his dearth of market research, confirming that he had not found any property that had somewhat similar passive recreation opportunities, and then demonstrated total ignorance about one such property that is literally contiguous with the subject property, Wawayanda State Park. (3T106:15-22). Asked whether the subject property is contiguous with Wawayanda State Park, Mr. Brody stated, "I can't give you the geographics." (3T122:15-18). Asked whether, if told that "Wawayanda State Park is 35,000 acres in size," this would suggest to Mr. Brody that Wawayanda State Park is similar in size to the Newark Watershed property, Mr. Brody responded, "[i]f what you're saying is correct, and I don't know what part is in New Jersey or what part is in New

York State, but if it's 35,000 acres and it's a state park, then it's very similar to the Newark Watershed." (3T123:14-21). Finally, asked whether he was aware of the 1,360,977-person attendance for Wawayanda state park during a one-year period spanning 2016 & 2017, Mr. Brody affirmed that he was not aware of the level of attendance. (3T126:14-20). If the same 1,360,977 visitors were to visit the subject property in a calendar year, each paying, say, a $50 permit fee, the total, single-year revenue earned by the subject property would equal $68,048,850! This of course is purely hypothetical, yet it helps to illustrate just how determined Mr. Brody must have been to conclude that the risk of purchasing the subject property for use as passive recreation is too high, without having considered any of the above information (A232-234).

So, of the five potential highest and best uses for the subject property outlined in his report, Mr. Brody dismissed the use, passive recreation, that the Court has deemed the 'necessary' highest and best use for a property without economic value, and it appears that Mr. Brody dismissed this use without even having done the most basic due diligence to actually ascertain the expenditures and the revenue that would result from such a use. The abject failure of Mr. Brody's report to conclude a highest and best use for the subject property led Judge Novin to find Newark's valuation expert's opinion to be "*not credible*." (*Emphasis Added.*) Full stop. Now, with no leg of its own to stand on, Newark has filed the instant appeal, desperately trying to

assassinate the conclusions of West Milford's expert, Mr. Krauser, and grasping at straws to make an unprecedented legal argument as to why the subject property effectively has zero value.

iii. There is no Legal Basis for Appellant's Argument that the Subject Property should be assigned a De Minimis Value

One after another, Appellant trots out cases that are not remotely applicable to the instant matter. Appellant cites to *People ex rel. Poor v. O'Donnell*, 139 App. Div. 83, 124 N.Y.S.36 (App. Div. 1910); a 1910 case from New York State concerning a private park. Appellant cites to *Crane-Berkley Corporation v. Lanvis*, 238 App. Div. 124, 263 NYS 556 (1933), another case from New York State concerning another private park. Appellant cites to *Tualatin Development Co. v. Department of Revenue*, 473 P2d 660 (Or. 1970), an Oregon case concerning an unprofitable golf course. And he cites to *Twin Lakes Golf Club v. King County*, 548 P.2d 538 (Wash. 1976), a case from Washington State concerning a different golf course operating at a financial loss. None of these cases concerns publicly-owned watershed land preserved as open space for public use similar to the subject property, and none of these cases is from New Jersey. If Appellant was attempting to convince the Court that, over the past 100+ years, there have been four instances in which courts *outside* of New Jersey have found that four properties – distinctly different from the subject property – are without taxable value, then perhaps

Appellant has succeeded in that cause. But these cases have no legal relevance to the instant matter.

To Its credit, Appellant's brief does admit the total lack of precedent in New Jersey for land to be assigned zero taxable value. However, Appellant subsequently attempts to constructively piece together an argument that there is New Jersey case law precedent for assigning de minimis value to land in certain instances. Appellant's arguments fall flat. Appellant references Borough of Englewood Cliffs v. Estate of Allison, 69 N.J. Super 514 (App. Div. 1961), wherein the Court accounted for the value of 'public rights' in determining the assessment of a deed-restricted property. However, in Allison, supra, the Appellate Division determined that land burdened by 'public rights' should be assigned a market value of approximately $2,308 per acre. Inflated to current dollar value (per the U.S. Labor Department's Bureau of Labor Statistics), that $2,308 per acre becomes $24,686 per acre. Be assured that the Township of West Milford would be *happy* to obtain an Appellate Court judgment assigning the equivalent of a $24,686-per-acre 'nominal' market value for the subject property. Once again, however, if Newark had approached its valuation of the subject property pursuant to established case law, namely Jersey City, Supra, Its valuation of the subject property as Open Space would have properly accounted for the restraints on the property's use.

Appellant cites also to Village of Ridgewood v. Bolger Foundation, 104 N.J. 337, 339 (1986), wherein the New Jersey Supreme Court indeed reinstated a Board of Taxation's 'nominal assessment.' The Supreme Court in Bolger, supra, did not conduct its own valuation analysis of the property at issue, but rather answered the question on appeal, which it characterized literally as "whether a taxpayer may reduce, for real estate tax assessment purposes, the value of property because of a conservation easement thereon that it granted in perpetuity to a conservation foundation." Id. at 338. Finding that the value of a property may indeed be reduced to account for a conservation easement, the Supreme Court did not conduct its own valuation analysis for the property at issue, but rather simply reinstated the judgment reached by the County Tax Board that had been overturned by the Tax Court, because the County Tax Board had rightfully accounted for the conservation easement. It is critical to point out, accordingly, that in the instant matter, the value of the conservation easement *was* explicitly accounted for in the conclusion of value reached by Respondent's expert. Respondent's expert's approach was validated in Judge Novin's Opinion, with explicit reference to this particular case, Bolger, supra.

Interestingly, Appellant's citation to another case, Township of Middletown v. Simon, 193 N.J. 228, 245 (2008), reaffirms Respondent Township's interpretation of Bolger, supra. The Court in Simon, supra, noted in its opinion

simply that "the assessment of the land must reflect its dedication to a public use, which *may* result in an assessment for only a nominal amount." Simon, supra, at 245. This is essentially the conclusion reached by the Supreme Court, in its default deference to the County Board adjudgment of value in Bolger, supra. What was at issue was whether a taxpayer *may* reduce, for real estate tax assessment purposes, the value of property because of a conservation easement. And again, in the instant matter, the conservation easement was accounted for in West Milford's expert's appraisal of the property.

Finally, Mr. Blau cites to Methode Electronics v. Township of Willingboro, 28 N.J. 289 for an example of a case wherein a property was assigned a 'nominal value.' In Methode, supra – markedly different from the instant matter in that the restriction on the property in Methode, supra resulted from severe chemical contamination, leading to annual remediation costs of $120,000 to $150,000 at the property – the Court explained that a nominal value was appropriate in that specific instance because "*recognized approaches for valuing contaminated property* for local property tax purposes are of limited utility for determining the true market value of the subject property." Methode, supra, at 289. Once again, respondent does not disagree that 'nominal' valuations of certain properties have been affirmed by certain Tax Court cases. However, once again, respondent points out

that Appellant has offered no legal basis to support his argument that, somehow, the subject property in the instant matter *must* be assigned a de minimis value.

POINT V

(A94)

THE TOWNSHIP'S APPRAISAL EXPERT PROPERLY ACCOUNTED FOR THE CONSERVATION EASEMENT IN MAKING ADJUSTMENTS TO HIS 'LAND SALE 5'

As cited by Judge Novin in his Opinion concerning the matters below, the New Jersey Supreme Court has instructed trial courts to "deduct[] from the fair value of the land," the value of a conservation easement. Bolger, supra, at 341. The easement value should be "based on the difference between the value of the whole property before (or without) the easement and the value of the property with the easement in place." As discussed above, Respondent recognizes the precedent of Appellate Division deference to decisions of Tax Court Judges. Glenpointe Assocs., supra. And as discussed above, Appellant is totally out of line in requesting that the Appellate Division go far beyond reviewing the legal decisions of the Tax Court Judge, to instead wholly revisit the Tax Court's weighing of the facts, and weighing of the credibility of the parties' respective experts. Respondent, alternatively, humbly requests that the Appellate Division engage in a very simple and narrow review, concerning the limited issue of whether the Tax Court's interpretation of

Bolger should stand, as concerns the Tax Court's adjustment to Respondent's expert's Land Sale 5.

Pursuant to Bolger, real property subject to a conservation easement should be assessed and valued as a "marketable commodity," with a deduction then applied for the "elements of value [that] are surrendered by the taxpayer." Bolger, supra. This process is essentially, step-by-step, that which was undertaken by Respondent's expert in his analysis concerning Land Sale 5. At trial, Respondent's expert, Mr. Krauser, explained that "before the encumbrance of the conservation easement, we have essentially a hundred percent of our rights," and that, after the conservation easement, the rights are limited to "passive recreation" and potential timber value. Accordingly, Mr. Krauser made sure in his analysis of Land Sale 5 to account for the fact that the "the City of Newark's required to maintain public access and to use the property for passive recreational purposes." In fact, as Mr. Krauser explained at trial, considering the natural restrictions already encumbering the property from Land Sale 5, a downward adjustment of merely 5% to account for the conservation easement might have been appropriate. Yet Mr. Krauser wanted to account for the "higher end" of the adjustment spectrum as concerns the impact of the conservation easement "on the use and utility" of the property in Land Sale 5, and thusly made his downward adjustment of 10%. (7T21:20-22; 7T99:7-21).

FILED, Clerk of the Appellate Division, June 26, 2025, **A-003476-23**, **AMENDED**

As cited by Judge Novin, "[i]t is the court's obligation to apply its judgment to the valuation data . . . and to ascertain and determine the true value of the subject provided there is enough substantial and competent evidence to enable the trier of the facts to determine true value." Inmar, supra, at 66. In the instant matter, however, Respondent respectfully submits that it simply does not seem as if there is a substantial basis for the additional downward adjustment of 15% applied by the Tax Court to Respondent's expert's Land Sale 5. The Court indicates that this adjustment accounts for Newark's assumption of the obligation to afford public access to the subject property. However, Respondent would point out that Its expert already accounted for the fact that the City of Newark is "required to maintain public access," and that, having already made a downward adjustment of 10% of the value from Land Sale 5, Mr. Krauser fulfilled his obligation to account for the impact of the conservation easement pursuant to Bolger, supra.

Accordingly, Respondent respectfully submits that the Court should accept the value conclusions for the subject property, reached by Respondent's expert on the basis of Land Sale 5, which equate to a price per acre, of: $3,376, for the 2014 tax year; $3,410, for the 2015 tax year; $3,512, for the 2016 tax year; $3,649, for the 2018 tax year; $3,717, for the 2019 tax year; $3,785, for the 2020 tax year; and $3,853, for the 2021 tax year.

CONCLUSION

For all of the above reasons, Respondent respectfully requests that the Court reject Appellant's appeal that a de minimis value be assigned to the subject property, and accept the value conclusions for the subject property, reached by Respondent's expert on the basis of the expert's Land Sale 5.

Respectfully submitted,
Dorsey & Semrau
Attorneys for Respondent
Township of West Milford

By: /s/Fred Semrau
Fred Semrau

DATED: April 29th, 2025

Superior Court of New Jersey
Appellate Division

Docket No. A-003476-23

City of Newark,

Plaintiff -Appellant,

v.

Township of West Milford,

Defendant- Respondent.

Civil Action

On Appeal from the
Final Judgments of the
Tax Court of New Jersey

Docket No: 015734-2014, 006894-2015, 005070-2016, 007402-2018, 005841-2018, 006935-2019, 008282-2019, 008756-2020, 011966-2020, 003283-2021, 003338-2021

Sat Below:
Hon. Joshua D. Novin, J.T.C.

Reply Brief of Plaintiff – Appellant

Submitted May 12, 2024

Blau & Blau
Attorneys for Plaintiff-
Appellant 223 Mountain
Avenue Springfield, New
Jersey 07081 973-564-9003
rblau@blauandblau.com

On the
Brief:
Robert D.
Blau
Attorney ID # 036031983

FILED, Clerk of the Appellate Division, June 05, 2025, **A-003476-23**, **AMENDED**

TABLE OF CONTENTS

POINT 1

NO ONE WOULD PAY ANYTHING FOR THE SUBJECT PROPERTY BECAUSE NO ONE WOULD HAVE ANY MOTIVATION TO DO SO.

……………………………………………………………………………………page 1

REPLY TO CROSS APPEAL

POINT 2

NONE OF THE SALES PROFFERED BY WEST MILFORD ARE COMPARABLE TO THE SUBJECT PROPERTY BECAUSE NONE ARE ENCUMBERED BY A CONSERVATION EASEMENT AND BECAUSE ALL OF THE PROPERTIES BECAME TAX EXEMPT AFTER ACQUISITION.

……………………………………………………………………………………..page 12.

CONCLUSION………………………………………………………………………page 13

FILED, Clerk of the Appellate Division, June 05, 2025, **A-003476-23**, **AMENDED**

Table of Authorities

Statutes

N.J.S.A. 54:4.3.3

Cases

Borough of Englewood Cliffs v. Estate of Allison,
69 N.J. Super 514 (App. Div. 1961)……………………………………………10, 14

City of Newark v. Jefferson Twp.,
31 N.J.303, 321 (Tax 2019)…………………………………………………….2

Crane-Berkley Corporation v. Lanvis,
238 App. Div 124, 263 NYS 556 (1933)………………………………………9

E. Orange City v. Livingston Twp.,
15 N.J. Tax 36 (Tax 1995)………………………………………………………5

Jersey City Div. of Water v. Parsippany-Troy Hills Twp.,
16 N.J. Tax 504 (Tax 1997)……………………………………………………..5

Lorenc v. Bernards Tp.,
5 N.J. Tax 39, 49 (1982)……….……………………………………………12

Methode Electronics v. Township of Willingboro,
28 N.J. 289 (Tax 2015)……………………………………………….…...….7,11

Morris County Land and Improvement Co. v. Township of Parsippany Troy Hills,
40 N.J. 539, 551-552 (1963)……………………………………………………..8

Orient Way Corp. v. Township of Lyndhurst,
27 N.J. 361 (Tax 2013)…………………………………………………………12

Phillips v. Hamilton,
15 N.J. Tax 222, 227 (App. Div. 1995)………….…………………………….…12

Poor v. O'Donnell,
139 App. Div. 83, 124 N.Y.S. 36 (App. Div. 1910)………………………………..9

Township of Middletown v. Simon,
193 N.J. 228 (2008)……………………………………………… …………..11

Tualatin Development Co. v. Department of Revenue,
473 P2d 660 (Or.1970)……………………………………………………………9

T*win Lakes Golf Club v. King County*,
548 P2d 328 (Wash. 1976)…………………………………………………………..9

Village of Ridgewood v. Bolger Foundation,
104 N.J. 337 (1986)………………………………………...……………10,11

FILED, Clerk of the Appellate Division, June 05, 2025, **A-003476-23**, **AMENDED**

Blau & Blau

Attorneys at Law
223 Mountain Avenue
Springfield, New Jersey 07081
973 564-9003
973 564-9071(fax)
rblau@blauandblau.com

Robert D. Blau
Charles E. Blau

Daniel R. Kanoff
Eileen W. Toll
Thomas D. Blau

May 12, 2025

Marie C. Hanley
Clerk of Appellate Division
Hughes Justice Complex
PO Box 37
Trenton, NJ 08625-0984

Re: City of Newark, Appellant – Cross Respondent v. Township of West Milford, Respondent – Cross Appellant.
Docket No. A-003476-23. T2

Dear Ms. Hanley:

Pursuant to R. 2:6-2 (b), please accept this letter brief is in response West Milford's response brief of April 30, 2025.

POINT 1

NO ONE WOULD PAY ANYTHING FOR THE SUBJECT PROPERTY BECAUSE NO ONE WOULD HAVE ANY MOTIVATION TO DO SO.

The issue in this case is whether anyone would pay anything for the subject property. Logic says no. There is no evidence to the contrary.

Historically, the property has been used for hiking, fishing and other forms of "passive recreation." The conservation easements require that Newark make the property available to the public for those purposes. As a practical matter, the conservation easements have turned the property into a public park. The easements allow Newark to charge reasonable fees for public access. Since 2014 those fees have averaged approximately $93,000 per year, for Newark's entire 35,000-acre Pequannock watershed holdings, of which the 16,458-acre subject property is only a part. But under West Milford's assessment the resulting taxes range for the property ranged from $1,282,358 in the first year under review to $1,369,683 in the last.

The historic use, passive recreation, is the only legal use to which the property can be put. Commercial timbering is not viable. There is no commercial timbering industry in New Jersey. The conservation easement precludes construction of logging roads. The Tax Court found in a previous case that it could not accept timbering "without a persuasive explanation and supporting data that establish a clear demand for timberland in New Jersey. *City of Newark v. Jefferson Twp.*, 31 N.J.303, 321 (Tax 2019). Both appraisers testified, in this case, that they searched for, and failed to find, land sales for commercial timbering. (7T8-14)

West Milford's suggestion that someone might purchase the property for "carbon sequestration" is speculative, at best. (Db7). Although Frank Pinto testified that there is a market for the purchase of large properties to obtain carbon sequestration credits which, he said, you get by keeping a forest in its natural state, he did not explain what a carbon credit was. He did not explain who issued carbon credits. He did not explain the process for obtaining a carbon credit or what one would do with a carbon credit. He had no examples of anyone purchasing a forest to obtain a carbon credit. He was not familiar with the specifics of the carbon credit market. (5T133). Whatever the facts may be, one cannot obtain credit for purchasing a forest and agreeing to keep it in its natural state, if the forest has already been preserved in its natural state forever.

The suggestion that there is a market for large forest properties for carbon credits, has no factual support. But even if a market existed, no one could obtain a carbon credit by purchasing Newark's underlying fee in the subject property. The conservation easement granted any development credits inherent in the property to the State Department of Environmental Protection. P-2 §VIII. Any sequestration rights or credits inherent in the property are owned by the State and exempt from taxation. *N.J.S.A.* 54:4.3.3.

Both West Milford's expert, and the Tax Court, concluded that holding the property for conservation purposes and passive recreation use is the highest and best use of the subject property, and that the property has value for those purposes and use. This conclusion begs two important and interrelated questions. First, whether passive recreation is financially feasible. Second, whether anyone would purchase property for conservation purposes or passive recreation use, when the property has been preserved in its natural state and dedicated to passive recreation use forever.

West Milford's brief acknowledges that property must be valued at its highest and best use and that the highest and best use must be financially feasible. (DB-34). West Milford's expert acknowledged that for a property's use to be financially feasible the use must derive enough income to pay for all expenses including property taxes associated with producing the income. (7T126:11). West Milford, and the court, criticize Newark's expert's conclusion that passive recreation is not a financially feasible use because Newark's expert did not consider *all* the expenses associated with the use and because Newark had not raised its prices only nominally since 2014. Regardless, the record shows that the fees Newark charges for passive recreation are in line with the competition. (1T38 to 1T49). The record shows that the revenue Newark derives from the property is insufficient to pay even

five percent of the taxes attributable to the assessed value that the Tax Court affirmed.

West Milford's brief acknowledges that to be the highest and best use, the use must be financially feasible. (Db47). That is, the use must derive enough income to pay all the costs associated with holding the property. However, West Milford, its appraiser and the court make an exception for property used for passive recreation or held for conservation purposes. Each relies principally on two opinions, *E. Orange City v. Livingston Twp*., 15 N.J. Tax 36 (Tax 1995) and *Jersey City Div. of Water v. Parsippany-Troy Hills Twp*., 16 N.J. Tax 504 (Tax 1997), aff'd sub nom. 17 N.J. Tax 538 (App. Div. 1998).

West Milford asserts that "it is well established" that the highest and best use of publicly owned water supply land that is precluded from development is open space and conservation. (Db35). That is not well established at all. That the highest and best use one property that is precluded from development does not make it so for all such property. Neither party in *E. Orange v. Livingston* or in *Jersey City Div. of Water v. Parsippany-Troy Hills Twp*., asserted, that financial feasibility is required to be a highest and best use. In neither case did the Tax Court or the Appellate Division consider the argument made by Newark here.

No matter what the highest and best use of Newark's watershed property, if no one would buy the property to conserve it or for passive recreation, it has no value. That was true also of East Orange's property in Livingston and of Jersey City's property in Parsippany. But no one made that argument. East Orange argued that someone might buy its property in Livingston for conservation or passive recreation. Jersey City argued that someone might buy its property Parsippany for those purposes. Whether it was Essex County in Millburn or Morris County in Parsippany, purchase by the county park commission would add to the supply of land available for conservation or passive recreation purposes. Not so here.

The conclusion that no one would purchase the subject property for conservation or for passive recreation is inescapable. The explanation is quite simple. No one has a motivation to do so. Passaic County doesn't. Buying the subject property won't add even one acre to its inventory of land available for passive recreation. Buying the property will not conserve or preserve this land which will stay in its natural state forever, without Passaic County spending a dime.

West Milford won't buy the property. West Milford can't afford it. Buying additional land for passive recreation is not consistent with its master plan. West Milford needs land for active recreation. (1T75:25). Most

importantly, buying the property would remove it from West Milford's tax base.

The State won't buy the underlying fee. The conservation easements protect the natural resource and conservation values of the property and assure that the property will be accessible to the public forever. There is nothing that the State could do with the property if it bought it that it cannot do now. (7T66 to 7T69).

The Tax Court found that, in New Jersey, a market exists for land to be acquired for open space. No doubt. That there is a market for open space does not establish that there is a market for the subject property any more than that there is a market for environmentally contaminated property means there is a market for all environmentally contaminated property. Compare, *Orient Way Corp. v. Township of Lyndhurst*, 27 N.J. 361 (Tax 2013), *aff'd*, 28 N.J. 272 (App. Div. 214) (contaminated property with estimated value of approximately 5.3 million clean sold for 2.5 million) with *Methode Electronics v. Township of Willingboro*, 28 N.J. 289 (Tax 2015) (expert opined and Tax Court found that property had no market value.)

West Milford takes issue, as did the court, that Newark's appraiser did not value the underlying fee "based on the value of the whole property before (or without) the easement and the value of the property with the easement in

place" as recommended by Sherwood in his article for the *Right of Way Magazine*. A before and after approach makes sense in the context of an easement taken by eminent domain, where the bottom line is just compensation, or in the context of a deduction, for a charitable contribution or gift, under the Internal Revenue Code, 26 *U.S.C.* §170(h). In eminent domain, the measure of just compensation is what the value the condemnee lost, not the value the condemnor gained. The deduction for the contribution of a conservation easement depends not on the value recipient of the easement but on the value lost by the easement's grantor. But here, we are not valuing the easement. The issue *is* the value of the underlying fee. In other words, what could the City sell the property for during the years in question? No matter what method is used, the answer is the same; almost nothing.

If the State, had attempted to use the police power "to retain the land substantially in its natural state" leaving the only permitted uses of a "public or quasi-public nature" it would have been required to purchase the entire property. *Morris County Land and Improvement Co. v. Township of Parsippany Troy Hills*, 40 N.J. 539, 551-552 (1963). Just like Parsippany, the public uses permitted on Newark's property in West Milford "practically prevent exercise by a private owner of any worthwhile rights or benefits to the land." *Id*. at 556. But for the context, the zoning regulations that the Court

struck down in Parsippany are identical to the conservation easement that Newark sold to the State. The zoning ordinance was illegal because it deprived the property owner of all beneficial use to the land. The conservation easement is legal because the State paid for it. But the result is the same. Newark's land is practically worthless.

Long ago, New York court's recognized that a public park held in private ownership has no taxable value. *Poor v. O'Donnell*, 139 App. Div. 83, 124 N.Y.S. 36 (App. Div. 1910), *Crane-Berkley Corporation v. Lanvis*, 238 App. Div 124, 263 NYS 556 (1933). More recently, the supreme courts of Oregon and Washington recognized that land set aside for open space and recreational use that have no prospect of being operated profitably have no taxable value. *Tualatin Development Co. v. Department of Revenue*, 473 P2d 660 (Or.1970), T*win Lakes Golf Club v. King County*, 548 P2d 328 (Wash. 1976).

West Milford's attempt to distinguish these cases rests on thin reeds. Although they do not involve watersheds and are from other states, the principles are the same. That there are only four and that they are fifty to a hundred years old means only that these situations are relatively rare, and that taxing authorities recognize the immutable truth of their holdings. Telling is that West Milford cites not cases to the contrary.

Equally thin are West Milford's attempts to distinguish *Borough of Englewood Cliffs v. Estate of Allison*, 69 N.J. Super 514 (App. Div. 1961) and *Village of Ridgewood v. Bolger Foundation*, 104 N.J. 337 (1986).

Estate of Allison involved 7.8 acres of land held in trust to benefit the public on terms which precluded profitable development. The Appellate Division exercised original jurisdiction to assess the property at a nominal value. West Milford's suggestion that the court's nominal value of 7.8 acres of land in suburban Englewood Cliffs in 1960 should be compared and trended up to value 16,458 acres in rural West Milford 75 years is ludicrous. There the Appellate Division found that a value of 10% of the assessed valuation was appropriate. It was within the Appellate Division's discretion to do so in Englewood Cliffs. It is within the Appellate Division's discretion to do so here.

It is true that the Supreme Court in *Bolger Foundation* did not conduct its own valuation analysis. But the facts were virtually indistinguishable from those here. The property owner granted a perpetual conservation easement for the benefit of the public. The easement prohibited any act or use detrimental to the preservation of the property in its natural state. The only distinction was that access to the land was reserved to the property owner. The holder of the conservation easement was allowed access solely to ensure compliance with

the terms and conditions of the easement, whereas Newark must make the subject property available to the public. Nevertheless, the Supreme Court affirmed that Bergen County Board of Taxation's to a nominal value of $1,000.

West Milford's interpretation of *Bolger Foundation* is that the assessment *may*, but need not, be for a nominal value. West Milford's interpretation of Bolger Foundation is wrong. In *Township of Middletown v. Simon*, 193 N.J. 228, (2008) the Supreme Court agreed with the Appellate Division's observation that the "assessment of the land must reflect its dedication to a public park, which may result in an assessment of only a nominal value." *Id*. at 245 The Supreme Court went further, "the Township should have assessed the land at a nominal value." *Ibid*.

West Milford admits that nominal values have been affirmed in New Jersey Tax Court cases. It tries to distinguish *Methode Electronics v. Township of Willingboro*, 28 N.J. 289 (Tax 2015), because the court found that recognized approaches for valuing contaminated property are of limited utility for determining the market value of the subject property. That is exactly the point. It is as true for subject property as it was for the property in Willingboro. Neither the sales comparison approach, nor the income capitalization approach have any utility for determining the value of property

for which there is no legally permitted financially feasible use or for property with no market value.

REPLY TO CROSS APPEAL

POINT 2

NONE OF THE SALES PROFFERED BY WEST MILFORD ARE COMPARABLE TO THE SUBJECT PROPERTY BECAUSE NONE ARE ENCUMBERED BY A CONSERVATION EASEMENT AND BECAUSE ALL OF THE PROPERTIES BECAME TAX EXEMPT AFTER ACQUISITION.

There is not sufficient credible evidence in the record for the court to have found a market value for the subject property. West Milford's appraiser proffered ten sales that he alleged as comparable. The Tax Court rejected nine of those sales relying exclusively on sale number five a sale to the Land Conservancy.

Generally, one sale is insufficient to conclude a credible value determination because one sale cannot reasonably be considered representative of the general market. *Lorenc v. Bernards Tp*. 5 N.J. Tax 39, 49 (1982), *Phillips v. Hamilton,* 15 N.J. Tax 222, 227 (App. Div. 1995) (acknowledging and affirming the refusal of the Tax Court to rely on one sale), *Orient Way v. Township of Lyndhurst*, 27 N.J. Tax 361, 390 (Tax 2013) (acknowledging that the Tax Court is generally reluctant to accept a single sale as an indicator of market value but noting an exception for sales of special purpose subject

properties in close proximity to the valuation date.), aff'd 28 N.J. Super 272 (App. Div. 2014),

Sale five is not a sale of the subject property. Sale five is not remotely comparable to the subject property. Sale five was not encumbered by a conservation easement. According to West Milford's appraiser, the motivation for the purchase was West Milford Township's desire for the Land Conservancy to acquire the property to deed restrict it in perpetuity. (6T58:12). Because it has already been deed restricted in perpetuity, no one has that motivation to purchase the subject property.

CONCLUSION

This case is not difficult. Despite West Milford's apt description of Newark's land as a treasure, because of its "awesome bounty of resources" (Db3) the property has no monetary value to the City of Newark. The State of New Jersey acquired that value nearly 20 years ago. No one would pay Newark anything for what it has left; the right to let others hike, hunt and fish and the obligation to protect the conservation values it sold to the State.

Financial feasibility depends on the price one pays for the property. A given use may be finically feasible at a low price but not at a high price. The revenue derived from the use must be sufficient to meet all expenses including property tax. Even if it could acquire the property by gift, it would not be

financially feasible for a private entity to acquire the property for passive recreation uses.

Conservation is not a use. Conservation can be a motivation for purchasing property that needs to be conserved. No one has the motivation to purchase Newark's property for conservation purposes because it will remain in its natural state forever.

The Appellate Division should exercise it original jurisdiction, as it did in *Englewood Cliffs v. Estate of Allison,* and assess the property for a nominal value.

Respectfully submitted,

Robert D. Blau

CITY OF NEWARK, PLAINTIFF-APPELLANT, v. TOWNSHIP OF WEST MILFORD, DEFENDANT-RESPONDENT.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003476-23 CIVIL ACTION On Appeal from the Final Judgments of the Tax Court of New Jersey Docket No: 015734-2014, 006894-2015, 005070-2016, 007402-2018, 005841-2018, 006935-2019, 008282-2019, 008756-2020, 011966-2020, 003283-2021, 003338-2021 Sat Below: Hon. Joshua D. Novin, J.T.C.

REPLY BRIEF ON BEHALF OF DEFENDANT-RESPONDENT/CROSS-APPELLANT TOWNSHIP OF WEST MILFORD

Submitted July 21st, 2025

Fred C. Semrau, Esq.; Of Counsel
Attorney ID #017871993
fsemrau@dorseysemrau.com

Robert J. Rossmeissl, Esq.; On the Brief
Attorney ID #207142017
rrossmeissl@dorseysemrau.com

DORSEY & SEMRAU
Attorneys for Defendant-Respondent/Cross-Appellant,
714 Main Street
Boonton, New Jersey 07005
Phone: (973) 334-1900

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

Preliminary Statement……………………………………………………...5

LEGAL ARGUMENT..5

Point I
HAVING FAILED TO DEMONSTRATE AT TAX COURT THAT THE ASSESSMENT OF THE SUBJECT PROPERTY SHOULD BE REDUCED, NEWARK IS NOW REQUESTING THAT THIS COURT TAKE THE UNJUSTIFIED STEP OF SETTING A 'NOMINAL' ASSESSMENT FOR THE SUBJECT PROPERTY ON THE BASIS OF ZERO EVIDENCE……………..………6

Point II
THE TAX COURT WAS CORRECT IN ITS FINDING THAT A MARKET VALUE EXISTS FOR THE SUBJECT PROPERTY……………………………..9

Point III
THE TAX COURT WAS JUSTIFIED IN ITS FINDING OF VALUE FOR THE SUBJECT PROPERTY ON THE BASIS OF THE TOWNSHIP APPRAISAL EXPERT'S COMPARABLE SALE NUMBER FIVE…………………...…….15

CONCLUSION...17

TABLE OF AUTHORITIES

NEW JERSEY CASES CITED **PAGE**

Ford Motor Co. v. Edison, 127 N.J. 290, 300-301 (1991)…………………….………**6**

East Newark Town Center, LLC v. East Newark Borough, 29 N.J. Tax 164, 188 (Tax 2016) **6, 7**

Linwood Properties, Inc. v. Borough of Fort Lee, 7 N.J. Tax 320, 327 (Tax 1985). **7**

MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998) **8**

Pan Chemical Corp. v. Hawthorne Borough, 404 N.J.Super. 401 (2009)…………**8**

Village of Ridgewood v. Bolger Foundation,
104 N.J. 337 (1986)..**9, 11, 12, 14, 15, 18**

Jersey City, Div. of Water v. Parsippany-Troy Hills Twp., 16 N.J. Tax 504 (1997), aff'd sub nom. Jersey City v. Parsippany-Troy Hills Twp., 17 N.J. Tax 538 (Super. Ct. App. Div. 1998)...**10, 11, 14, 17**

E. Orange City v. Livingston Twp.,
15 N.J. Tax 36 (1995) **11, 14**

Borough Englewood Cliffs v. Estate of Allison,
69 N.J. Super. 514 (App. Div. 1961)... **14**

Methode Electronics v. Township of Willingboro,
28 N.J. 289..**12, 13, 14**

Little Egg Harbor Twp. v. Bonsangue, 316 N.J. Super. 271, 282 (App. Div. 1998)..**16**

OUT-OF-STATE CASES CITED

People ex rel. Poor v. O'Donnell,
139 App. Div. 83, 124 N.Y.S.36 (App. Div. 1910)..14

Crane-Berkley Corporation v. Lanvis,
238 App. Div. 124, 263 NYS 556 (1933)..14

Tualatin Development Co. v. Department of Revenue,
473 P2d 660 (Or. 1970)...14

Twin Lakes Golf Club v. King County
548 P.2d 538 (Wash. 1976)..14

- **ALL CITATIONS TO APPENDICES (e.g. 'A123') ARE CITATIONS TO APPENDICES VOLUME 1 & VOLUME 2 AS UPLOADED TO THE RECORD BY PLAINTIFF-APPELLANT**

FILED, Clerk of the Appellate Division, July 21, 2025, **A-003476-23**

DORSEY & SEMRAU

FRED SEMRAU*
JONATHAN TESTA*
DAWN M. SULLIVAN **
SUSAN C. SHARPE **
EDWARD PASTERNAK**
ROBERT ROSSMEISSL **
KYLE FISHER
NICHOLAS WALL
JEFF FRANKENBURGER
*PARTNER
** ASSOCIATE PARTNER

ATTORNEYS AT LAW
714 MAIN STREET
BOONTON, NJ 07005
973-334-1900
FACSIMILE 973-334-3408
RROSSMEISSL@DORSEYSEMRAU.COM

IN MEMORIAM:
JOHN H. DORSEY
(1937-2018)

July 21, 2025

Marie C. Hanley
Clerk of Appellate Division
Hugehs Justice Complex
P.O. Box 37
Trenton, NJ, 08625-0984

Re: City of Newark, Appellant/Cross-Respondent v. Township of West Milford, Respondent/Cross-Appellant
Docket No. A-003476-23. T2

Dear Ms. Hanley:

Pursuant to R. 2:6-2(b), please accept this letter brief in response to Appellant/Cross-Respondent's Reply Brief, submitted May 12, 2025.

PRELIMINARY STATEMENT

In the instant matter, Appellant/Cross-Respondent, the City of Newark, appears to be requesting that this Court overturn the decision of the New Jersey Tax Court on a novel legal argument, and impose an unheard-of 'nominal' valuation to the assessment of the subject property; a watershed property. Respondent/Cross-Appellant, the Township of West Milford, reminds the City of

Newark that its multimillion-dollar water supply system provides water for at least 500,000 *customers* in Northern New Jersey, while the City's thousands of acres of watershed land in West Milford are assessed modestly as open space. Now, the City seeks to pay effectively zero property tax to West Milford on what might be the City's most valuable asset. The objective of the City's appeal is as misguided as the unsubstantiated legal theory on which it is based, and West Milford humbly implores this Court to see the City's appeal for what it is: an attempt to circumvent the Tax Court's conclusion as to valuation.

POINT I

HAVING FAILED TO DEMONSTRATE AT TAX COURT THAT THE ASSESSMENT OF THE SUBJECT PROPERTY SHOULD BE REDUCED, NEWARK IS NOW REQUESTING THAT THIS COURT TAKE THE UNJUSTIFIED STEP OF SETTING A 'NOMINAL' ASSESSMENT FOR THE SUBJECT PROPERTY ON THE BASIS OF ZERO EVIDENCE

For the purpose of assessing tax, property *must* be valued at its highest and best use. Ford Motor Co. v. Edison, 127 N.J. 290, 300-301 (1991)(*emphasis added*). "The concept of highest and best use is not only fundamental to valuation but is a crucial determination of market value. This is why it is the first and most important step in the valuation process." East Newark Town Center, LLC v. East Newark Borough, 29 N.J. Tax 164, 188 (Tax 2016) (internal citations omitted). Resolution of highest and best use depends on analysis of the proofs and legal theories developed by the parties with particular emphasis on market demand for

the subject property, the property's legal status, physical condition, and actual use. East Newark Town Center, supra, at 189. Moreover, highest and best use of a property is not a "fact to be found" but rather an opinion resulting from "the appraiser's judgment and analytical skill." Linwood Properties, Inc. v. Borough of Fort Lee, 7 N.J. Tax 320, 327 (Tax 1985).

A common thread through New Jersey Tax Court cases is their recognition of the importance of a determination of highest and best use to an assessment valuation case. Proving that an assessment should be reduced is dependent upon establishing the value to which that assessment should be reduced. Establishing value cannot be achieved without first determining a property’s highest and best use. In the instant matter, the appraisal report prepared by Appellant/Cross-Respondent (hereinafter, “Newark” or the “City”) failed to determine the highest and best use of the subject property, listing as the highest and best use “None” and noting simply that “the subject property does not have a highest and best use.” (A235). As a result of this failure, Newark’s appraisal report failed also to determine a legitimate value for the subject property, opining simply that the subject property does not have a highest and best use and therefore has no value in the marketplace. (A41). The Tax Court found, accordingly, that Newark’s appraisal expert’s opinion was “not credible.” (A70).

It is well settled in the law of taxation that there is a presumption that the assessor's determination of true value is correct and the taxpayer has the burden to overcome that presumption. MSGW Real Estate Fund, LLC v. Borough of Mountain Lakes, 18 N.J. Tax 364, 373 (Tax 1998). A taxpayer must present sufficient competent evidence to overcome the presumption ***and*** establish a true valuation of the property that differs from the assessment. Pan Chemical Corp. v. Hawthorne Borough, 404 N.J.Super. 401 (2009)(***emphasis added***). In the instant matter, Newark completely failed in both overcoming the presumption ***and*** in establishing the true valuation of the subject property. Newark provided the Tax Court with no credible conclusion of value for the subject property, effectively precluding itself from a judgment reducing the assessment even if it somehow had been able to overcome the presumption of the assessment's validity.

At trial before the Tax Court, even if Newark were to discredit the Tax Court's acceptance of Respondent/Cross-Appellant's (hereinafter, "West Milford" or the "Township") expert's conclusion of value, the assessments would simply be affirmed (i.e. the outcome would remain the same), because nothing in the record below or in Judge Novin's opinion provides a credible lower alternative value for the subject property. Accordingly, Newark has put before this Court its tortured argument that a 'nominal' assessment should be imposed upon the subject property. Having been dealt the Tax Court's judgment affirming the assessment,

Newark is out of options and has essentially resorted to the wildest of long shots: asking this Court to invalidate the current assessment of the subject property and – on zero evidentiary basis – impose a 'nominal' assessment.

POINT II

THE TAX COURT WAS CORRECT IN ITS FINDING THAT A MARKET VALUE EXISTS FOR THE SUBJECT PROPERTY

It is the Supreme Court of New Jersey that has definitively established that real property subject to a conservation easement has market value, and it is the Supreme Court that has established the exact process by which this value must be determined. In order to determine market value of land encumbered by a conservation easement, there is a two-step analysis, outlined in Judge Novin's opinion (hereinafter, the "Bolger Process"): first, the land at issue must be valued free of any public rights, constraints, or restrictions, as a "marketable commodity." Village of Ridgewood v. Bolger Foundation, 104 N.J. 337, 342 (1986). Second, after determining the unimpeded land value, an adjustment must be formulated and applied to the unimpeded land value to account for the property rights that were conveyed or surrendered under the conservation easement. Accordingly, in order to determine the appropriate size of the adjustment, real property subject to a conservation easement should be assessed and valued as a "marketable commodity," with a deduction then applied for the "elements of value [that] are surrendered by the taxpayer." Bolger, supra.

As noted in West Milford's April 29th, 2025 Brief (hereinafter, West Milford's "Initial Brief"), West Milford's appraisal expert, Matthew Krauser, explained at trial his adherence to the Bolger Process in connection with how he had adjusted the value of his comparable Land Sale 5, explaining that he applied his 10% downward adjustment because, "before the encumbrance of the conservation easement, we have essentially a hundred percent of our rights" and, after the conservation easement, the rights are limited to "passive recreation," acknowledging that "the City of Newark's required to maintain public access and to use the property for passive recreational purposes." (7T21:20-22; 7T99:7-21). Likewise, although he came to a slightly different conclusion of value, Judge Novin adhered to the Bolger Process in undertaking his own valuation of the subject property, albeit with a larger downward adjustment. (A91-A95).

The Township cannot sufficiently emphasize the holding of the Appellate Division that, in valuing a watershed property that cannot be put to an economic use, a finding of "highest and best use for conservation and open space is both ***reasonable and necessary***." (***emphasis added***). Jersey City, Div. of Water v. Parsippany-Troy Hills Twp., 16 N.J. Tax 504 (1997), aff'd sub nom. Jersey City v. Parsippany-Troy Hills Twp., 17 N.J. Tax 538 (Super. Ct. App. Div. 1998). This principle had been affirmed via the Appellate Division's earlier holding in E. Orange City v. Livingston Twp., 15 N.J. Tax 36, 50 (1995), where the court held

that, with regard to publicly-owned water supply land that is precluded from development, the highest and best use of the subject property "is for open space or conservation." E. Orange, supra, at 44. And the holdings of Jersey City and East Orange are directly in line with the holding in Bolger, wherein the Supreme Court established that there must be a method for "arriving at an assessed valuation" of a property for which a conservation easement has "seriously compromised its value as a marketable commodity." What is clear in this matter is that 1) there is case law directly on point, establishing that the highest and best use of the subject property is for conservation/open space, and that 2) there is case law directly on point, establishing the valuation method for such open space property subject to a conservation easement. Bolger, supra, at 342.

What is *unclear* is what, exactly, Newark is seeking here. Is Newark seeking that a 'nominal' assessment be assigned to the subject property? If this is what Newark is seeking, then Newark should have provided cogent evidence establishing a basis for this 'nominal' assessment at Tax Court. In its reply brief (hereinafter the "Reply Brief), Newark asks what the City could "sell the property for during the years in question," answering the question with: "almost nothing." (Newark Reply Brief at 8). It is unclear to West Milford whether Newark is actually arguing that the assessment of the subject property should be "almost nothing," but it is worth reminding Newark that the subject property's utility as a

water resource provides a virtually limitless income supply to the City. It is worth reminding Newark, also, that somehow the State of New Jersey was willing to pay more than $27,000,000 to the City in order for the City to *voluntarily* accept the conservation easement on the subject property. (A70). That the subject property is worth "almost nothing" seems a particularly convenient argument for the City to now make, having secured itself a $27,000,000 down payment and unlimited income in perpetuity. Newark is essentially asking this Court to make brand new case law, setting the assessment of the subject property at a 'nominal' value or at zero, solely on an abstract argument and without even offering a credible basis on which to establish whatever value it is apparently requesting. West Milford respectfully recommends that this Court decline Newark's invitation.

In Its Reply Brief, Newark summarily dismisses the Supreme Court holding in Bolger, and implies that this Court should do the same, on the totally-unsupported premise that "the terms and conditions of the easement" are marginally different in the instant matter than in Bolger. As far as the Township can tell, the key difference is that, unlike the conservation easement in Bolger, Newark charges permit fees to the public in accordance with *Its* conservation easement. (1T388 to 1T49). In any case, Newark's baseless dismissal of Bolger is representative of Its broader dismissal of case law precedent in this matter. Newark continues to reference Methode Electronics v. Township of Willingboro,

28 N.J. 289 in making its argument, suggesting that this Court should value the subject property via the same approach that was deemed appropriate for a property whose use was restricted by severe chemical contamination, in a case where the Court made clear that its approach was uniquely tailored for the valuation of a property impacted by severe chemical contamination and the resulting steep annual remediation costs. Methode, supra, at 289.

Newark's argument is built not only on New Jersey case law concerning the valuation of completely-distinguishable property types, such as the subject property in Methode; it is built also on ancient cases from far off places (though without much elaboration as to how the subject properties of those cases are similar to that in the instant matter). In its Reply Brief, Newark tiredly cites the same four out-of-state cases on which it relied in its Initial Brief; from Oregon, Washington State, and New York State (each, of course, with its own distinct laws concerning property valuation), between them a collective 311 years old, and respectively concerning two unprofitable golf courses and two private parks. And Newark defends its use of these cases, implying they are the only relevant valuation cases for situations that, like the instant case, are "relatively rare." But situations like the instant case are apparently common enough that there are at least two *New Jersey* cases from within the past 30 years establishing that the highest and best use of restricted watershed property is for open space or conservation, and

finding values for same of $5,000 and $6,790 per acre, respectively (not adjusted for 2025 inflation). E. Orange City v. Livingston Twp., 15 N.J. Tax 36, 50 (1995). Jersey City, supra, at 537. Newark must continuously grasp at the straws of cases that either 1) concern totally inapplicable issues (e.g. Methode), or that 2) are completely remote from the instant matter in time, place, governing law, and property type (e.g. *People ex rel. Poor v. O'Donnell*, 139 App. Div. 83, 124 N.Y.S.36 (App. Div. 1910); *Crane-Berkley Corporation v. Lanvis*, 238 App. Div. 124, 263 NYS 556 (1933); *Tualatin Development Co. v. Department of Revenue*, 473 P2d 660 (Or. 1970); and *Twin Lakes Golf Club v. King County*, 548 P.2d 538 (Wash. 1976)). Unfortunately for Newark, It has no choice but to reach for these remote cases, because the case law that is *explicitly on point* simply does not comport with the story that Newark wants to tell.

As concerns publicly-owned water supply land that is precluded from development, **"*valuing the property based on a highest and best use for conservation and open space is both reasonable and necessary*."** Jersey City, supra, at 526–27. (1997), **(*emphasis added*)**. And as concerns such land encumbered by a conservation easement, there is a two-step analysis for determining value: first the land at issue must first be valued free of any public rights, constraints, or restrictions, as a "marketable commodity." Bolger, supra, at 342; Englewood Cliffs v. Estate of Allison, 69 N.J. Super. 514, 530-31 (App. Div. 1961); and second, after determining

the unimpeded land value, an adjustment must be formulated and applied to the unimpeded land value to account for the property rights that were conveyed or surrendered under the conservation easement, with "the value of the easement . . . deducted from the fair value of the land." Bolger, supra, at 341. In the instant matter, only one party's appraisal expert, West Milford's expert, properly determined the highest and best use of the subject property and properly accounted for the conservation easement in his valuation.

Newark's appraisal expert not only failed to provide any valuation method supporting Newark's claim that the subject property should be assigned a 'nominal' or zero-value assessment; he failed to even determine a highest and best use for the subject property, merely listing as the highest and best use "None" and noting simply that "the subject property does not have a highest and best use." (A235). West Milford respectfully requests that the Appellate Division see this appeal for what it is: a desperate attempt by Newark to create new legal precedent for the valuation of watershed land in New Jersey, all because It failed to properly put on a case before the Tax Court.

POINT III

THE TAX COURT WAS JUSTIFIED IN ITS FINDING OF VALUE FOR THE SUBJECT PROPERTY ON THE BASIS OF THE TOWNSHIP APPRAISAL EXPERT'S COMPARABLE SALE NUMBER FIVE

Contrary to Newark's contention, the Appellate Division has *explicitly*

held that, even in an instance where the Court "recognize[s] only one of the comparable sales," one sale alone can suffice as a sufficient basis on which to make a determination of value, so long as "the evidence presented before the Tax Court on that one comparable sale withstands scrutiny." Little Egg Harbor Twp. v. Bonsangue, 316 N.J. Super. 271, 282 (App. Div. 1998). The key criteria in determining whether a sale supports a conclusion of value include:

> The number of adjustments made, the failure of an appraiser to support and justify adjustments, the nature of the differences between the subject property and each comparable sale, and the distances of comparable sales from the subject property are all factors of an adjustment that makes the comparable sales data meaningful for purposes of establishing the value of the subject property.
>
> Bonsangue, supra, at 284.

In the instant matter, Judge Novin thoroughly analyzed land sale 5, determining, among other things, that it is "a 'donut hole' in the middle of the subject property," that "its sale price was inherently impacted and influenced by the Conservation Easements at issue," that it "possesses similar physical characteristics and topography to the subject property, with steep slopes and dense woodlands," that, like the subject property, it "is subject to the Highlands Preservation Act," and that, generally, "land sale 5 comprises the 'representative component parts' required by our Supreme Court for proper value comparison." (A90-A91).

In short, land sale 5 is the textbook definition of an excellent comparable sale. Newark dwells on the fact that land sale 5 is not encumbered by a conservation

easement; however, not only is this discrepancy accounted for in the analyses of both the Tax Court and West Milford's appraisal expert, but we remind Newark that a comparable property is just that: a property which is not perfectly identical to the subject property because it *is* not the subject property.

CONCLUSION

Newark at least appears to acknowledge that It is asking the Appellate Division to do something completely novel. However, this Court should not take the bait.

Newark continues to argue its case solely on the basis of financial feasibility. This seems a rich argument for Newark to be making, considering the subject property is located in arguably the passive recreation capital region of New Jersey, where nearby Wawayanda State Park can draw 1,360,977 visitors in a single year, yet the subject property fails to capitalize on this revenue potential because of the City's own under-management. More critically though, as the Township has emphasized time & again: for watershed property that cannot be put to an economic use, a finding of "highest and best use for conservation and open space is both reasonable and *necessary*." (*emphasis added*). Jersey City, supra, at 504. As concerns land encumbered by a conservation easement, such as the subject property, the land must be assessed and valued as a "marketable commodity," with

a deduction then applied for the "elements of value [that] are surrendered by the taxpayer." Bolger, supra, at 342.

For all of the above reasons, Respondent respectfully requests that the Court reject Appellant's appeal, once and for all, as the baseless and desperate money grab that it is.

Respectfully submitted,
Dorsey & Semrau
Attorneys for Respondent
Township of West Milford

By: /s/Fred Semrau
Fred Semrau

DATED: July 21st, 2025