

NOT FOR PUBLICATION WITHOUT APPROVAL OF
THE TAX COURT COMMITTEE ON OPINIONS

VNO 1105 STATE HWY 36, L.L.C.,
%STOP & SHOP

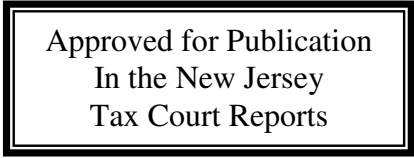
Plaintiff,

v.

TOWNSHIP OF HAZLET,

Defendant.

TAX COURT OF NEW JERSEY
DOCKET NO. 004038-2013



VNO 1105 STATE HWY 36, L.L.C.,
BY STOP & SHOP

Plaintiff,

v.

TOWNSHIP OF HAZLET,

Defendant.

TAX COURT OF NEW JERSEY
DOCKET NOS. 008116-2014
007353-2015
002076-2016
003935-2017

Decided: April 2, 2019

David B. Wolfe and Eileen Toll for plaintiff
(Skoloff & Wolfe, P.C., attorneys).

James H. Gorman for defendant
(James H. Gorman, Attorney at Law).

Michelline Capistrano Foster for New Jersey Division of Taxation and
Monmouth County Board of Taxation
(Gurbir S. Grewal, Attorney General of New Jersey, attorney) .

SUNDAR, J.T.C.

This opinion decides defendant’s motion in limine to bar the testimony and report of plaintiff’s witness, who is being proffered as a real estate appraisal expert for purposes of opining the value of certain real property (“Subject”) located in the defendant taxing district, in connection

with plaintiff's challenge to the local property tax assessment imposed on the Subject for tax years 2013 through 2017. Defendant ("Hazlet") contends that its motion should be granted because the proffered expert is currently employed as an assessor for Wall Township, another taxing district within the same Monmouth County where the Subject is located, and his employment/position, creates an undeniable and impermissible conflict of interest when he appears on behalf of a taxpayer that is challenging an assessment of another assessor. Hazlet asserts that this court should, in the interests of justice, extend the bar presently found in N.J.A.C. 18:12A-1.9(1), to the instant litigation.

Plaintiff opposes the motion claiming (1) there is no conflict because the Subject is not located in Wall Township; (2) N.J.A.C. 18:12A-1.9(1) does not apply to the Tax Court since by its express terms it only applies to appearances by assessors before county boards of taxation; (3) the correct criteria to test a conflict of interest are set forth in In re Pelvic Mesh/Gynecare Litigation, 426 N.J. Super. 167 (App. Div. 2012), a products liability case, pursuant to which Hazlet should, but failed to, prove actual conflict and prejudice; and finally, (4) preventing Wall Township's assessor from testifying on plaintiff's behalf violates his First Amendment rights.

The New Jersey Division of Taxation ("Taxation") and the Monmouth County Board of Taxation ("County Board") take no position on the conflict of interest issue, however, oppose plaintiff's contentions of First Amendment violations.

For the reasons stated below the court grants Hazlet's motion.

FACTS

The facts for purposes of the motion in limine are straightforward. Plaintiff challenged the following local property tax assessments imposed on the Subject for tax years 2013 to 2017 by filing a direct appeal with this court as follows:

Tax Year	Assessment	Complaint Date
2013	\$4,420,000	March 28, 2013
2014	\$4,420,000	March 28, 2014
2015	\$4,652,000	March 18, 2015
2016	\$4,700,000	March 05, 2016
2017	\$4,660,100	March 23, 2017

The court entered several case management orders in connection with the appeals.¹ In accordance therewith, the parties exchanged preliminary appraisal reports on October 6, 2017, and trial-ready appraisal reports on April 13, 2018. Plaintiff's expert's reports (preliminary and trial-ready) were prepared by Mr. Lamicella of Associated Appraisal Group. On May 14, 2018, and June 18, 2018, he was deposed. On June 13, 2018, plaintiff's counsel deposed Hazlet's expert, Ms. Brodowski. On July 6, 2018, Hazlet filed the instant motion in limine, returnable July 18, 2018, the first day of the scheduled trial.²

It is uncontested that Mr. Lamicella began to work for Wall Township, initially as a deputy assessor, sometime in 2016, and thereafter as the assessor sometime in September 2017. His résumé lists his position as a "tax assessor" for Wall Township from 2016 to present. Thus, as of the dates plaintiff submitted its expert's preliminary and trial-ready appraisal reports, he was the assessor for Wall Township. His résumé also lists his position as a Director in a private entity, Associated Appraisal Group, from 2008 onwards, whereby he provides "professional appraisal consulting services to government/public agencies, corporations, the legal profession, financial institutions and private individuals." For years prior to 2008, his résumé states that he "participated

¹ Duplicate appeals had been filed on behalf of the landlord (represented by another law firm), which were all subsequently withdrawn.

² On July 12, 2018, plaintiff sought an adjournment of the motion in limine. Hazlet then, on the same date, filed another motion seeking to quash plaintiff's subpoena for certain documents demanded from Hazlet's expert. The court adjourned the trial date in light of these motions, and thereafter invited the New Jersey Attorney General's office to participate in the motion in limine on behalf of Taxation and the County Board. Such office agreed to participate.

in revaluation and assessments” of several municipalities in various counties, and appeared as an expert witness in courts (state, federal and the Tax Court), various county boards of taxation, and before the Pennsylvania Board of Assessment. His professional qualifications include being a certified tax assessor; a licensed, state-certified general real estate appraiser in New Jersey and Pennsylvania; and an associate member of the Appraisal Institute.

The primary arguments of the parties can be distilled as follows. Per Hazlet: there must be a bright-line division so that an assessor cannot testify to an opinion of value on behalf of a property owner or a taxpayer. Such opinion is in substance and reality an attack on the validity of an assessment set by an assessor, thus, poses a conflict of interest just as it does under N.J.A.C. 18:12A-1.9(1) and other publications on assessor conduct. Extending the same bar to a local property tax valuation litigation before this court is warranted under the penumbra of public trust in the integrity of government officials and positions, which principles should be upheld by this court in refusing to endorse/approve an assessor testifying against another assessor’s assessment. Recognizing and validating such bar is also permissible under the court’s inherent authority to provide a resolution to this issue.

Per plaintiff: N.J.A.C. 18:12A-1.9(1) does not apply. Hazlet has not shown that Wall Township’s assessor has, or can, misuse confidential information he receives or has access to as an assessor, or that Hazlet is/will be prejudiced if the assessor is permitted to testify for plaintiff. Barring Wall Township assessor’s ability to testify on behalf of a property owner or taxpayer would limit the number of real property appraisal experts available to plaintiff, an intolerable litigation disadvantage under In re Pelvic Mesh/Gynecare Litigation. Granting Hazlet’s motion would violate Wall Township’ assessor’s First Amendment rights.

ANALYSIS

An assessor is a public/government employee who functions in a dual capacity. One is as an agent of the Legislature when performing his or her assessment duties. Arace v. Irvington, 75 N.J. Super. 258, 266-267 (Law Div. 1962) (the power to tax being an “exclusively [] legislative function . . . [,] when assessing property, the assessor performs a governmental function and acts as an agent of the Legislature.”) (citation omitted). The other is as an employee of the hiring municipality. Mitchell v. City of Somers Point, 281 N.J. Super. 492, 499-500 (App. Div. 1994). Thus, “for some purposes, assessors must be regarded as municipal officials, while, for other purposes, they are state officials.” Jeffers v. City of Jersey City, 8 N.J. Tax 313, 317 (Law Div. 1986), aff’d, 214 N.J. Super. 584 (App. Div. 1987). Although a municipal employee, an assessor is subject to supervision by Taxation and the county board of taxation. N.J.S.A. 54:1-25; 54:3-15.

However, despite “serv[ing] several masters because he or she is subject to the control of both the municipality and the State,” Mobil Oil Corp. v. Twp. of Greenwich, 20 N.J. Tax 66, 79 (Tax 2002), an assessor’s assessment responsibility is a quasi-judicial function, thus, is independent of interference or influence by anyone. Ream v. Kuhlman, 112 N.J. Super. 175, 190 (App. Div. 1970). See also Division of Taxation, Handbook for New Jersey Assessors §§105.01; 105.28-.30 and p.70 (rev’d 2017) (assessors have a “unique position,” and while responsible to Taxation, a county board of taxation, the employing municipality, and “the citizens of the taxing district for the fair assessment of all property,” they are “not subject to the control of a municipality,” because “like judges, [they] should be free to perform their duties without fear of local retaliation and should be immune from pressure and harassment.”).

In addition to appraising real property for setting assessments and granting tax exemptions or deductions, an assessor must, as part of his/her assessment responsibilities, also:

3. Represent the assessing office to the public, the governing body, and other municipal officials;
4. Represent the assessing office and the taxing district to the respective county board of taxation and personally and directly report to and receive instruction from the county board of taxation.
5. Represent the assessing office and the taxing district at formal tax appeal hearings . . .

[N.J.A.C. 18:17-4.1(a).]³

Thus, it is clear that an assessor, as a public employee delegated with a quasi-legislative duty of assessing real property in a fair manner, holds an office of significant public trust, entailing an equally significant responsibility to the public. It follows that assessors must be held to high standards in maintaining public trust in the integrity of the assessor's office/position, which means that an assessor is expected to exercise high level of ethics and professionalism, in addition to the expected representation of only the government at any "formal tax appeal hearings."

The local property taxing statute, N.J.S.A. 54:4-1 to 54:8-16, and N.J.S.A. 54:51A-1 to -22, obligates an assessor to value and assess real property, and provides for appeals from such assessments to the county boards of taxation or to this court. However, it does not articulate or address the standards/code of ethics or professionalism governing (or expected of) assessors.

Taxation's regulation, N.J.A.C. 18:12A-1.9(l), provides that "[n]o assessor shall appear before the board as an expert witness against another assessor or taxing district within the State except to defend the assessment of his or her taxing district." However, by its express terms, it applies only to appearances before a county board of taxation.

Nonetheless, the intent of the regulation appears to be clearly premised on ethical and professional concerns due to the assessor's position as a public employee with a quasi-legislative

³ Due to statutorily required certification and educational training, "assessors are [considered to be] trained, tested and certified professionals." Regent Care Center, Inc. v. City of Hackensack, 362 N.J. Super. 403, 420 (App. Div. 2003).

responsibility.⁴ See Handbook for New Jersey Assessors, at §106.01 (“Assessors should avoid work activities outside their position as assessors from which a strong presumption of conflict of interest could be drawn,” thus, for instance, an assessor cannot appear before a county board “as an expert witness against another assessor or taxing district within the State, except to defend the assessment of his/her own taxing district.”) (citing N.J.A.C. 18:12A-1.9(l); -1.18; 12-4.5(a)(1).⁵). Similarly, an assessor should avoid assessing property “in which he/she has a financial interest, creating a potential conflict of interest.” Id. at §106.02. This situation can be avoided by the municipality “employ[ing] an outside appraiser,” or for a county board of taxation “to direct particular attention to properties owned by the assessors under their jurisdiction.” Ibid. As originally emphasized:

⁴ Taxation promulgated this regulation due to a 1973 amendment to N.J.S.A. 54:3-14, which required every county board to “adopt” Taxation’s regulations. The introduction to the “Rules for the County Boards of Taxation,” N.J.A.C. 18:12A-1.1 - 12A-1.20, promulgated under N.J.S.A. 54:3-14, states that each county board had “drafted and adopted their own rules and regulations,” however, it was “preferable” to have them applied uniformly and statewide. From this it can be presumed that N.J.A.C. 18:12A-1.9(l) was likely a rule or regulation of the county boards. The court was however unable to find a county board regulation. Neither could the court find the underlying reason for N.J.A.C. 18:12A-1.9(l). When proposed, the regulation barred an assessor from appearing before any county board as an expert witness against another assessor or municipality “within the county.” See 6 N.J.R. 120 (March 7, 1974). However, when adopted the bar was extended to the “State.” See 6 N.J.R. 205 (May 5, 1974). Other than Taxation noting that it was adopting the “rules for the county boards of taxation, substantially as proposed . . . but with subsequent, substantive changes not detrimental to the public,” ibid., there is no information as to why this change was made, and whether there were public comments in this regard.

⁵ N.J.A.C. 18:12A-1.18 applies to any “commissioner or employee of a county board of taxation,” and forbids such individual to have “any interest whatsoever, directly or indirectly, as an officer, stockholder, or employee, or in any other capacity, in a revaluation firm engaged in revaluing properties in any taxing district within that county.” N.J.A.C. 18:12-4.5(a)(1) requires this bar to be stated in a revaluation contract. An appraisal firm’s parent and subsidiaries cannot “represent any property owner or taxpayer filing a tax appeal” in connection with a revaluation performed by that appraisal firm. N.J.A.C. 18:12-4.5(a)(2). A 1993 amendment to N.J.A.C. 18:12A-1.18 and N.J.A.C. 18:12-4.5 deleted assessors from the above prohibitions. See 25 N.J.R. 4591 (Oct. 4, 1993). Taxation viewed such deletion as non-detrimental since assessors are bound by the Local Government Ethics Law. 26 N.J.R. 1110 (Feb. 22, 1994).

It should be noted that, for the assessor himself, professionalization carries with it both benefits and responsibilities. Municipal governing bodies should recognize the right of an assessor to be adequately compensated for his professional responsibilities. At the same time, an assessor must recognize the need to perform competently, diligently, and in conformity with the professional ethics that reasonably accompany his professional status. In observing professional ethics, the assessor must have in mind not only the avoidance of activities which will obviously and presently involve a conflict with his ethical official duties, but also the probability or possibility that such a situation will develop . . .

[Id. at §105.02 (quoting the Foreword, N.J.A.C. 18:17 (Aug. 27, 1969)).]⁶

The above guidelines echo the constraints imposed on municipal employees under the Local Government Ethics Law (“LGEL”), N.J.S.A. 40A:9-22.1 to -22.25, which would apply to an assessor since he or she is considered as a municipal employee. See N.J.S.A. 40A:9-146; 9-146.3. Such employee is barred from, among others, “engag[ing] in any business, transaction, or professional activity which is in substantial conflict with the proper discharge of his duties in the public interest,” or from “undertak[ing] any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties.” N.J.S.A. 40A:9-22.5(c), (e). Such employee cannot “use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others.” N.J.S.A. 40A:9-22.5(c). Analogous to N.J.A.C. 18:12A-1.9(l), the LGEL provides that a municipal employee cannot directly or indirectly “represent any person or party other than the local government in connection with any cause, proceeding, application or other matter pending before any agency in the local government in which he serves” unless it is “within the context of official

⁶ The section is titled “Code of Ethics and Professional Behavior for Assessors.” The omitted language in the quotation is as follows: “Conflict of interest codes are not designed to impugn the integrity of an official but rather to insure against the occurrence of incidents which may bring his ethics into question.” N.J.A.C. 18:17 Foreword (Aug. 27, 1969).

labor union or similar representational responsibilities.” N.J.S.A. 40A:9-22.5(h).⁷ See also 26 N.J.R. 1110 (Taxation’s proposed regulations, N.J.A.C. 18:12A-1.18 or 18:12-4.5, would not encourage assessors “to have an interest in a revaluation firm doing business with the assessor’s own district,” because they are governed by the LGEL and cannot engage in an activity “which conflict with the proper discharge of their duties in the public interest”) (citing and quoting N.J.S.A. 40A:9-22.5(a), (c)-(e)).

Thus, the LGEL’s restraints, which envisaged not only any actual conflict but also an appearance of one (see, e.g., N.J.S.A. 40A:9-22.5(e) evaluating outside employment under a reasonable expectation standard), are similar to Taxation’s guidelines and to N.J.A.C. 18:12A-1.9(l), as are the concerns underlying the LGEL, viz., integrity in public office and maintenance of public trust. See N.J.S.A. 40A:9-22.2 (LGEL was enacted because “[p]ublic office and employment are a public trust,” and if “[t]he the public perceives a conflict between the private interests and the public duties of a government officer or employee, that confidence is

⁷ The LGEL also bars a municipal employee from “act[ing] in his official capacity in any matter where he . . . has a direct or indirect financial . . . involvement that might reasonably be expected to impair his objectivity or independence of judgment.” N.J.S.A. 40A:9-22.5(d). Taxation has similarly cautioned assessors that they should avoid assessing property “in which he/she has a financial interest, creating a potential conflict of interest.” Handbook for New Jersey Assessors, at §106.02. As the most recent Supreme Court decision shows, even an indirect financial interest suffices to raise public qualms about the integrity of a public actor. See Piscitelli v. City of Garfield Zoning Bd., ___ N.J. ___, 2019 N.J. LEXIS 442, *5 (2019) (zoning board members could be disqualified from voting on a site plan approval and variance application for two lots based on, inter alia, N.J.S.A. 40A:9-22.5(d) when they were employed by the owner of the two lots in question via his position on the board of education, or may have had a patient-doctor relationship, even after owner transferred his interest in the two lots to his nieces’ and nephew’s trust to avoid the appearance of conflict. Per the Court, “[t]he question will always be whether the circumstances could reasonably be interpreted to show that [conflicting interests] had the likely capacity to tempt the official to depart from his sworn public duty.”) (citation and internal quotations marks omitted).

imperiled.”).⁸ The LGEL together with Taxation’s guidelines sufficiently support the proposition that an assessor should not be casting doubt as to the validity or correctness of an assessment by appearing for a property owner or taxpayer, who or which has challenged that assessment, due to a reasonable public perception that the assessor’s actions are motivated by personal financial interest.

Notably, associations such as the International Association of Assessing Officers (“IAAO”) and the Association of Municipal Assessors of New Jersey (“AMANJ”), which are specifically geared towards educating and disseminating information to assessors, caution assessors on accepting appraisal assignments which implicitly or explicitly compromise the integrity of the assessor’s office and public trust.⁹ For instance, the Preamble to the IAAO Code of Ethics and Standards of Professional Conduct asks its members to “adhere to the highest ethical standard” because “[p]ublic trust in our performance is the foundation of our credibility.” Rule 1-1 provides that “[i]t is unethical for members to conduct their professional duties in a manner that could reasonably be expected to create the appearance of impropriety.” Rule 3-1 provides that “[i]t is unethical for members to accept an appraisal or assessment-related assignment that can

⁸ For this reason, plaintiff’s reliance on the Uniform Standards of Professional Appraisal Practice (“USPAP”) which generally governs any appraiser, is unpersuasive. Among others, the USPAP requires an appraiser to be impartial with no personal/financial stake, and keep client information confidential. However, while any appraiser, including one who is licensed as an assessor, must comply with the USPAP guidelines when appraising real property, those principles do not cede to the LGEL or the guidelines in the Handbook for New Jersey Assessors as to whether an assessor can appraise a taxpayer’s property, given the assessor’s role and status as an important public persona who should strive to avoid public mistrust and an appearance of impropriety.

⁹ The IAAO is a “nonprofit, educational, and research association [and] a professional membership organization of government assessment officials and others interested in the administration of the property tax.” IAAO, IAAO’s History, Vision & Mission, https://www.iaao.org/wcm/About/Our_Story/wcm/About_Us_Content/Our_Story.aspx?hkey=62a1e60e-1d74-4c3b-86f6-da89273e69a1 (last visited Apr. 1, 2019).

reasonably be construed as being in conflict with their responsibility to their jurisdiction, employer, or client.” Rule 3-3 provides that “[i]t is unethical to accept an assignment or participate in an activity where a conflict of interest exists and could be perceived as a bias, or impair objectivity.”

The AMANJ’s Code of Ethics adopts the IAAO’s Preamble. See Handbook for New Jersey Assessors, at §105.02. It also provides that its members’ conduct should “reflect favorably upon themselves, the assessing profession, the property tax system, and the” AMANJ, and that members must “avoid any action which may discredit themselves or these entities.” AMANJ, Code of Ethics & Standards of Professional Conduct, ¶6.¹⁰ Further, members should “[c]onduct their duties and activities in a manner that will reflect credit upon themselves and their profession . . . [and] shall avoid the appearance of impropriety.” Ibid. Additionally,

PROHIBITED ACTIVITIES:

[Members should] [a]ccept no appraisal, real estate listing or selling assignment or other assessment-related activity that could reasonably be construed as being in conflict, or giving the appearance of conflict, with their responsibilities to their jurisdiction, employer or client. Accept no appraisal, real estate listing or selling assignment in which they have an unrevealed personal interest or bias, or which they are not qualified to perform. It shall be improper for an assessing officer to represent a taxpayer in any manner, in any jurisdiction, concerning the determination of assessments.

[Id. at ¶ 9 (emphasis added).]

¹⁰ See <https://www.amanj.org/code-ethics-standards-professional-conduct> (last visited Apr. 1, 2019). The “purpose” of the Ethics Code is “to establish ethical and professional guidelines for assessing officers and other” AMANJ members, “and to provide standards by which AMANJ members whose conduct may be in question are judged.” Ibid. Assessors, deputy assessors, and assistant assessors are “regular” members (as opposed to non-assessors or non-government persons who “affiliate” members), and are entitled to vote, serve on committees and hold elected office, plus participate in the AMANJ’s legal program. See AMANJ, Membership, <https://www.amanj.org/membership> (last visited Apr. 1, 2019).

Note: N.J.A.C. 18:12A-1.1 - 12A-1.20 were promulgated with input from representatives of the Association of County Tax Board Commissioners and Secretaries; representatives of the AMANJ; and members of the New Jersey State Bar Association. See Introduction to Rules for the County Boards of Taxation.

Finally, Taxation’s counsel, the New Jersey Attorney General, has also opined that it is not advisable for an assessor to hold “a position with a real estate appraisal firm,” which only appraises real property “in the context of tax appeals,” as opposed to during revaluations or reassessments. Attorney General Opinion (Oct. 4, 1979) (citing N.J.A.C. 18:12A-1.9(l)). The Opinion explained that one of the several factors “which influenced” the promulgation of this regulation was a provision of the Code of Ethics adopted by the IAAO that information as to property and property owners “obtained in [an] official capacity,” should be treated as confidential, unless legally permissible otherwise, however, factual information could be freely exchanged “in the assessment of property legally subject to taxation.” Id. Since assessors “mutually cooperate in an attempt to seek information and advice,” and would violate the confidentiality if such information was used “against a fellow assessor in the context of an appeal,” N.J.A.C. 18:12A-1.9(l) barred assessor-against-assessor testimony. Id. The regulation was therefore “adopted . . . in part to prevent assessors from becoming involved in tax appeals on behalf of taxpayers . . . to prevent even an appearance of a breach of confidence.” Id.

Note that the requirement of treating and keeping information as to real property confidential is reiterated in another publication educating New Jersey assessors on appraising real property. See Division of Taxation, Real Property Appraisal Manual for New Jersey Assessors 1-5 (3d ed. 2002) (“[i]nformation furnished on cost or appraised value of individual properties should be treated as confidential . . . and should not be discussed or used for any other purposes”).

Thus, in addition to the LGEL, the above guidelines also support disfavoring assessors from appearing in a litigational adversary-based forum and assisting a property owner or taxpayer who or which has challenged a local property tax assessment set by another assessor, by providing an opinion of value. The foundational basis for these guidelines are no different than the reasons

for the enactment of the LGEL, viz., upholding public trust in, and perception of the integrity of an assessor's role as a public government employee entrusted with a constitutional duty of assessing real property. Consequently, simply because N.J.A.C. 18:12A-1.9(l) regulates practice and procedure in county boards of taxation is not a reason or basis to conclude that an assessor can therefore appear in the Tax Court and do what he or she could not do at a county board of taxation hearing, even though the county board, like the Tax Court decides petitions challenging the validity of an assessment in an adversarial setting, albeit as a quasi-judicial body.

Plaintiff argues that above guidelines, including the Handbook for New Jersey Assessors, do not dictate or even guide the issue before this court because they are just that: informal guidelines of no precedential import, and that the 1979 Attorney General's opinion has been withdrawn/rescinded or is moot because the IAAO has no such bar based on access to and use of confidential information. The court is not persuaded that the guidelines have no place in this court. See, e.g., Regent Care Center, Inc., 362 N.J. Super. at 420 (rejecting plaintiff's argument that there was an "absence of formal uniform guidelines" on "assessment maintenance" because such guidelines were provided by the Handbook for New Jersey Assessors). There being no proof that the 1979 Attorney General's opinion has been rescinded or deemed erroneously issued, rejection of the same is unwarranted, since while not binding, such opinion can be persuasive authority. See, e.g., Twp. of Hainesport v. Burlington Cty. Bd. of Tax'n, 25 N.J. Tax 138, 144 (Tax 2009) (opinion of what constitutes a quorum can be given weight) (citation omitted). Additionally, one of the reasons for the Opinion was a possibility that the public could view confidential information being circulated amongst assessors (hence the conclusion that N.J.A.C. 18:12A-1.9(l) was adopted "to prevent even an appearance of a breach of confidence."). The LGEL has a similar bar. Thus, a municipal employee cannot "use, or allow to be used, his public office or employment, or any

information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself . . . or any business organization with which he is associated.” N.J.S.A. 40A:9-22.5(g). Taxation’s publication, Real Property Appraisal Manual for New Jersey Assessors, has a similar bar. See supra p. 12. The court is thus disinclined to lightly dismiss the implicit and explicit disfavor of assessors appearing in a litigation forum which is adversarial in nature, in support of a property owner or taxpayer’s challenge to an assessment especially where the underpinnings of these published guidelines are the same as those of the LGEL.

During oral argument, plaintiff agreed that there is a realistic possibility for the erosion of trust/confidence amongst the property owners of a municipality if its assessor were to appear as a witness for owners of properties within that municipality since that is a closer-to-home situation. However, it argues that there are simply no such concerns here because the Wall Township assessor is not appearing for a property owner in Wall Township.

Plaintiff’s concession strengthens the ethical, or appearance of impropriety, basis for N.J.A.C. 18:12A-1.9(1)), however, does not require a conclusion that the assessor’s appearance on behalf of a property owner or taxpayer in a different municipality than where the assessor serves, is not problematic. The court does not agree that the public would not care, or would not view with any concern or disparagement, were an assessor to appear for a property owner or taxpayer in litigation simply because the Subject is not located in Wall Township. To the contrary, it is the public’s trust and confidence which render the assessor as aligned with the government (state and local). Further, because an assessor performs a quasi-legislative function with no extraneous influence, it renders him or her responsible to the public at large, not just to the public in the taxing district where he/she is employed. As Taxation persuasively points out, where an attorney

represents a property owner or a taxpayer in a challenge to an assessment, and thereafter retains the assessor who set that challenged assessment to represent/appear for the same (or even a different) property owner or taxpayer in another municipality, the public could perceive this situation as one providing a financial incentive to the assessor: enough to influence his or her independence of judgment when performing his or her assessing functions of properties wherein the property owner or taxpayer is being represented by that same counsel. This could erode public confidence in the assessor's responsibility of fair/equal assessment of all properties. Cf. State v. Clark, 324 N.J. Super. 178 (App. Div. 1999), rev'd, 162 N.J. 201 (2000) (holding that a prosecutor, a municipal employee, should not appear as defense attorney in another municipality within the same county since this created an appearance of impropriety). Although this case applied to attorneys, and as plaintiff correctly points out the appearance of impropriety is no longer a standard applicable to attorneys, that standard does and continues to apply to assessors as explicated above.¹¹ See also Randolph v. City of Brigantine Planning Bd., 405 N.J. Super. 215, 226 (App. Div. 2009) (appearance of impropriety "remains applicable" to public employees acting in a quasi-judicial capacity).

¹¹ After oral argument, the court directed parties to brief whether or how Clark applied to the instant issue. Plaintiff included as part of its brief, an unsolicited certification from Wall Township's assessor as to how he was hired in that capacity with a copy of his employment contract to show that Wall Township "approve[d]" his "employment as Director of Associated Appraisal Group." Hazlet argued that Clark was more concerned with whether this was a new or old rule, whereas here, it has always been the understanding that an assessor should not challenge another assessor's assessment. Hazlet also opposed Wall Township assessor's certification and attachment, since the court had directed briefing only on any analogy to Clark. The court will not consider the additional certification and attachment since no effort was made to seek this court's permission to add facts which were not new, but never adduced at any time until after the court asked the parties for such limited briefing. Additionally, as Hazlet correctly points out, even if this impermissible submission were to be considered, there is nothing to indicate that Wall Township permitted its assessor to testify against the assessments of other assessors, and further that it is the court which should decide the issue not an employment contract.

Additionally, this type of representation (as an expert witness for a property owner or taxpayer challenging an assessment) was not entirely a clear-cut, taint-free circumstance even to Wall Township's assessor. For instance, in his deposition he stated that since he initially primarily worked "on the assessor's side of the issue," he had had informal conversations "with a variety of people in the tax bar and on the bench . . . regarding the issue," even prior to becoming an assessor, so as to ensure that he could "make [himself] the best expert witness [he] could be." He also had informally sought advice from a "number of attorneys" he "do[es] work for," a (now retired) tax court judge, three seasoned local property tax practitioners (one of whom is from the law firm representing plaintiff herein) whether this course of conduct was acceptable. He also stated that he was unaware of any assessor testifying for a property owner at a county board hearing while still an assessor, nor could he recollect whether any assessor testified as a witness for a property owner in Tax Court. While these statements are not meant to imply that Wall Township assessor's conduct was unethical or improper, they show that taxpayer representation while employed as an assessor did raise a red flag to him.¹² This then weakens plaintiff's arguments that the possibility of public distrust in the matters herein are remote because the assessor is appearing for a taxpayer in connection with a local property tax assessment on property not located in Wall Township.¹³

¹² During his deposition, Wall Township's assessor conceded that an issue had previously arisen when he had prepared a report and appeared on behalf of a taxpayer before the County Board, but maintained it was not problematic since he was only a "deputy assessor" at such time.

¹³ Plaintiff correctly points out that Hazlet's concerns of budgetary burdens due to assessment reductions as a result of an assessor appearing as a valuation expert for a taxpayer, is not credible. A reduction in assessment due to litigation, and consequent contraction of county funds (for every reduction there is a loss of tax, therefore, a corresponding proportional increase in contribution to the county budget by the taxing district) is not an attribute of Wall Township assessor's attempted participation in this case as an expert witness for the taxpayer. The result complained of by Hazlet would occur regardless of which expert appeared before this court, or if this court were to reduce the assessment without expert testimony, or if an assessor (after setting the assessment) would voluntarily reduce the assessment, or if the matter was settled.

Plaintiff contends that that the correct test here is whether Hazlet can prove actual harm and prejudice if the Wall Township assessor were allowed to testify because this is the standard set forth in In re Pelvic Mesh/Gynecare Litigation, 426 N.J. Super. 167. However, that case is different. There, the Appellate Division reversed a trial court order that barred defendants, manufacturers of a medical device, from privately consulting with or retaining as expert witnesses, any physician who may have treated any plaintiff-patient, even where defendants had undertaken not to retain any currently treating physician of a patient-plaintiff as a defense expert witness. The higher court framed the issue as “whether some other rule or judicial or public policy categorically bars a treating physician from serving as an expert witness against the ‘litigation interests’ of his or her patient, although in a different plaintiff’s case.” Id. at 178.

Here, however, the issue is whether there is an impairment of public trust and an appearance of impropriety when an assessor, a legislative agent, responsible for setting local property assessments, subject to the LGEL and other ethical restraints, appears on behalf of a one challenging an assessment. No such issue of public trust or governmental integrity was involved in the products liability case. As such, then, the higher court’s observations that no physician owes any undying allegiance or “duty of loyalty . . . to support . . . a current or past patient’s” litigation claims, id. at 192, does not apply to the issue presented here. Indeed, although an assessor performs his or her assessment duties independent of any external influences, there is a reasonable expectation that as a quasi-legislative agent of the State, and as a local governmental employee, he or she would represent only the government, even in formal tax appeals, and thus, would not challenge or support challenges to, local property tax assessments set by another assessor under the label of an “expert witness.”

While it is correct that an expert witness is generally one who has no stake in the matter, and therefore, does not take sides, here, the court cannot turn a blind eye to Wall Township assessor's governmental position of trust and integrity when he appears in the above matters on behalf of plaintiff in challenging assessments set by Hazlet's assessor. It is reasonable to conclude that a fact finding body, such as a jury, would be likely to assign an assessor appearing for a taxpayer with more credibility simply due to the fact that he is a government employee, with expected high standards of ethics, professionalism, and public responsibility.

On the other hand, that same position and incumbent public trust and integrity can raise questions as to the propriety of an assessor supporting a taxpayer's challenge to another assessor's assessment. It is not improbable to view the assessor as having some advantage due to an access or ability to obtain taxpayer or property information not readily available to other real estate appraisers (for example: responses to an assessor's Chapter 91 requests, valuation settlements involving similar types of properties, with or without supporting appraisal reports). Despite Wall Township assessor's deposition testimony that he would contact another assessor as a last resort, and then only to verify the details of a particular sale, it is certainly likely that as an assessor, he would be seen as having easy access to such information, and more, thus, his position of public trust would be viewed with a jaundiced eye when he appears in any forum to support a taxpayer's challenge to the correctness of another assessor's assessment. It is reasonably foreseeable that the public would consider such an appearance as evidence of a lack of confidence in an assessment by an assessor, or as an elevation of personal financial interest, which would impugn the integrity of any assessment and the significance of any assessor's role as a quasi-legislative agent of the State.¹⁴

¹⁴ Also weakening claims as to openness and disclosure of information is Wall Township assessor's decision not to produce certain information during his deposition about the contacts he had used to verify sales or comparable property information that he used in his value opinion. He

Plaintiff argues that any ruling disallowing Wall Township's assessor to testify as a real property valuation expert on its behalf would "wreak havoc" because there are limited professional real estate appraisers, thus, taxpayers would be put at a gross disadvantage similar to the defendant manufacturers in the products liability case. There is simply no proof in this regard. Cf. In re Pelvic Mesh/Gynecare Litigation, 426 N.J. Super. at 174-75 (defendant certified that the number of doctors performing a particular type of surgery were "a relatively small group" nation-wide, and the estimated number of treating physicians was over 1,000, thus, a bar to use them as experts would cause them a litigation disadvantage). Nothing here was shown that the total number of assessors far out-weighted the non-assessor appraisers (whether in Monmouth County or State-wide). It may be that the number of appraisers who choose to appraise real property in the context of a local property tax assessment challenge, as opposed to some other purpose, such as for example, to obtain mortgage-based financing, may be fewer in number. However, that does not mean that they are the only ones who can appear as expert witnesses.

Additionally, a party can always "take advantage of adverse opinions of another party's professional expert because of prior contacts and consultations," thus "may call to the witness stand the other party's identified expert witness and elicit testimony adverse to the interests of the party that originally engaged the services of the expert." Id. at 182-83 (citations omitted). Thus, the alleged "havoc" in disallowing Wall Township assessor's testimony as an expert for plaintiff here is simply unpersuasive as a reason to ignore the public trust/confidence clearly implicated here due to his employment as an assessor, thus, his role as a quasi-legislative agent for the State.

reasoned this was because he did not want other appraisers "and other people in the industry" to contact those contacts, as had happened before. He maintained that disclosing his information source would ruin his "relationship," and make it difficult to obtain verification.

This is not to say that an assessor cannot undertake outside employment or business. Rather, care should be taken to choose one that does not provide a reasonable foreseeability that such employment or service can cause an appearance of impropriety such as a perception of favored treatment to counsel who retain assessors for providing testimony on behalf of property owners or taxpayers challenging local property tax assessments of other assessors. These are concerns which underlie the LGEL and the published guidelines, thus, are binding on assessors. Evidently, these are no longer controlling concerns once the individual is no longer an assessor and a government employee. Cf. id. at 179 (there is no “no significant issue of impeding treatment or eroding patient trust in a doctor who is no longer treating a patient-plaintiff.”).

Plaintiff contends that Wall Township assessor’s participation here on its behalf is not a surprising occurrence since there are other assessors who hold themselves out as providing appraisal services to anyone, based on a web-search of such individuals’ business description. However, none of these individuals certified that they act as expert witnesses for a property owner or a taxpayer in a Tax Court litigation. Even if this allegation was deemed as true, it does not sanctify or legitimize the practice for the reasons stated above.

In sum, it cannot be seriously disputed that an assessor, as an agent of the Legislature, and a governmental employee, and being responsible for the integrity of this exalted office, must strive to retain public confidence and trust in his or her actions, which include outside employment or services. Therefore, the court is of the opinion that an assessor, as a face of the government, should avoid any appearance of impropriety where the public’s perception of his or her involvement in outside employment, vis-à-vis his or her governmental role in setting and defending assessments, may be negative. This public erosion of trust and confidence is not a remote possibility if assessors represent taxpayers who challenge another assessor’s assessment. A member of the public would

easily view the assessor as placing biased or favored assessments on property/ies or property owners/taxpayers when counsel for such owners/taxpayers retain the assessor as a witness in the owners/taxpayers tax appeals in other taxing districts. Public perception would no doubt be that the assessor is being influenced by financial incentive, regardless of whether the assessor actually prepared a report and appears as a witness, and even if the assessor was absolutely honest when assessing the properties in his or her tax district. Further, the assessor's appearance in a litigation forum on behalf of a taxpayer who or which is challenging a local property tax assessment can influence a fact-finding body to assign a more favorable credibility to his or her evidence, based solely on the governmental position of trust attributed to such assessor.

The court therefore agrees with Hazlet that Wall Township's assessor, while still being in the position of an assessor, should not testify to an opinion of value of the Subject in connection with, and in support of plaintiff's challenge to the assessments set by Hazlet's assessor. This conclusion is based on an application of the underlying principles and the specific provisions of the LGEL, which are echoed in the various published guidelines for assessors, including in N.J.A.C. 18:12A-1.9(1), and 18:17-4.1(a)(3), all of which emphasize the importance of an assessor avoiding any engagement in a private capacity that will reasonably be considered as improper or would impair the integrity of his/her office and position as assessor. This court must strive to uphold the solemnity of these restrictions and cannot shirk its responsibility based on an allegation that the practice is to have assessors testify for a property owner or taxpayer, who or which is challenging another assessor's assessment, or that this court has no authority to "regulate" assessors, or that the assessor is an expert witness, thus, the public would not identify or connect him with his public office. To the contrary, this court can control the type and nature of testimony

to be proffered, and can also decide whether the individual being proffered as a witness can be accepted, since it can proceed in any manner compatible with R. 1:1-2(a).

First Amendment

Plaintiff's alternative argument that Wall Township assessor's First Amendment rights are violated if he is not allowed to provide his report and testify before this court is unpersuasive. As the Attorney General persuasively argues when an individual is a public employee, that public office casts certain responsibilities and restrictions. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006). As further persuasively pointed out, the State and its agencies have a legitimate and powerful interest in ensuring public confidence and trust in the local property tax assessing functions, and the compulsorily attendant impartiality (lack of financial incentive) from an assessor, a public service employee. Although the Attorney General's arguments conclude that these important concerns require an avoidance of an actual, potential or perceived conflicts by an assessor, such as by appearing for a property owner or taxpayer which or who is challenging another assessor's assessment in a county tax board hearing, these arguments apply equally in a Tax Court litigation context for the reasons explicated at length above.

Hazlet also correctly points out that no one is stopping Wall Township's assessor from exercising his First Amendment rights if he wants to stand on any street or any public venue to proclaim that certain assessments are deficient. Yet, proffering to do the same as a witness in a litigation, can be disallowed by this court when considered improper. Otherwise, motions in limine to bar testimony can never be granted, and hearsay testimony would always have to be permitted. The court agrees, and therefore does not find the First Amendment arguments persuasive.

CONCLUSION

For all of the above mentioned reasons, the court grants Hazlet's motion in limine.