STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of the Petitioner of
FIFTY-SIXTY SAGINAW REALTY, LLC

Petitioner,

v.

ASSESSOR OF THE TOWN OF HENRIETTA, NEW YORK and the BOARD OF ASSESSMENT REVIEW OF THE TOWN OF HENRIETTA, NEW YORK

Respondent.

DECISION AND ORDER

Ind # 2003/08237
2002/08585

The initial stage of a tax certiorari trial proceeds quite without consideration to the weight of the evidence. The court first must determine whether "petitioner demonstrate[s] the existence of a valid and credible dispute regarding valuation." FMC Corp. v. Unmack, 92 N.Y.2d 179, 188 (1998). "The ultimate strength, credibility or persuasiveness of petitioner's arguments are not germane during this threshold inquiry." Id. (adding that "the weight to be given to either party's evidence is not a relevant consideration at this juncture"). "[I]n answering the question whether substantial evidence exists (to rebut the presumption of validity of the assessment and thus demonstrate the existence of a valid and credible dispute regarding valuation], a court should simply determine whether the documentary and testimonial evidence proffered by petitioner is based on 'sound theory and objective data' . . . rather than on mere wishful thinking . . . 'bare surmise, conjecture,

speculation or rumor.'" Id. (emphasis supplied)(quoting Matter of Commerce Holding Corp. 88 N.Y.2d 724, 732, and 300 Gramatan Ave. Assocs. v. State Div. Human Rights, 45 N.Y.2d 176, 180 (1978)). The idea is to take petitioner's proof, such as it is, and then determine whether it has met the "minimal threshold" of a genuine and valid dispute concerning valuation. Id. 92 N.Y.2d at 188. Any rejection of evidence which "entail[s] a weighing of the evidence" is not permitted at this stage. Matter of Century Realty v. Commissioner of Finance, 15 A.D.3d 652, 653-54 (2d Dept. 2005).

For the reasons stated on the record at the trial, R. 142-45, the court has found that Petitioner survived the first stage analysis in these proceedings. Accordingly, I turn to the question whether petitioner met its burden of establishing by a preponderance of the evidence that the assessments in question were excessive.

For the reasons stated by (now Appellate Division) Justice Dickerson in a number of recent cases, some published and some not, I reject the Sales Comparison approach used by both appraisers because, for property of this kind and given the parcels' current income producing use, insufficient data concerning the income and expenses of the proposed comparable sales accompanied each appraiser's sales analysis. In this case, Mr. Falk discounted even his own sales analysis, preferring

instead to employ the income capitalization approach; hence the case stands on the proof much like the case of Earla Associates v. Board of Assessors, City of Middletown, 13 Misc.3d 1246(A) (Sup. Ct. Orange Co. 2006)(2006 WL 3525672)(Dickerson, J.). In that case, as in many others he has decided over the past few years, it was stated:

> The Court rejects the sales comparison approach used by Mr. Griffin. This is not to say that the sales comparison approach or any other approach *which is adequately supported by the record* cannot be used to value real property in tax assessment proceedings. However, without a detailed understanding of the income and expenses of the proposed comparable sales, there is no factual basis for concluding that the sales are in fact comparable to the subject property [See e.g. Reckson Operating Partnership, L.P. v. Assessor of the Town of Greenburgh, 2 Misc.3d 1005(A), 784 N.Y.S.2d 923 (West. Sup. 2004) ("a buyer of income producing property purchases an income stream"); The Appraisal of Real Estate [12th ed.], Appraisal Institute, Chicago, Ill., 2001, at 419-420 ("The sales comparison approach usually provides the primary indication of market value in appraisals of properties that are not usually purchased for their income producing characteristics. These types of properties are amenable to sales comparison because similar properties are commonly bought and sold in the same market. Typically, the sales comparison approach provides the best indication of value for owner-occupied commercial and industrial properties. Buyers of income-producing properties usually concentrate on a property's economic characteristics. Thoroughly analyzing comparable sales of large, complex, income-producing properties is difficult because information on the economic factors influencing the decisions of buyers is not readily available from public records or interviews with buyers and sellers ... [a]n appraiser may not have sufficient knowledge of the existing leases applicable to a neighborhood shopping center that is potentially comparable to the subject. Property encumbered by a lease is a sale of rights other than fee simple rights and requires knowledge of the terms of all leases and

> an understanding of the tenant(s) occupying the premises. Some transactions include sales of other physical assets or business interests. In each instance, if the sale is to be useful for comparison purposes, it must be dissected into its various components. Even when the components of value can be allocated, it must be understood that because of the complexity of the mix of factors involved, the sale may be less reliable as an indicator of the subject's real property value")].

Accordingly, the court found insufficient underlying data to support use of respondent's appraiser's sales approach:

> Without information on the most crucial aspect of comparability, the income stream, Mr. Griffin's sales comparison approach will be given no weight [See e.g. Reckson, supra; Matter of Blue Hill Plaza Associates v. Assessor of Town of Orangetown, Sup. Ct. Rockland Co., Index Nos. 5093/90 et al., Slip Op. dated December 23, 1994 (n.o.r.), modified 230 A.D.2d 846, 646 N.Y.S.2d 836 (2d Dept.1996), lv. denied. 89 N.Y.2d 804 (1996); Taxter Park Associates v. Assessor of Town of Greenburgh, Sup. Ct. West. Co., Index Nos. 16189/96 et al., Slip Op. dated October 8, 1996 (n.o.r.)].

Similarly, in this case, neither appraiser considered the income stream of any of the comparables used for analysis, in some instances indicating that such data was unavailable, and in other cases simply ignoring that factor altogether.

Given the then current use of the two parcels on the valuation dates in question, this was impermissible. Both appraisers employed the current or present use criterion for valuation. Exh. #2 p.16; Exh. B p.17; Exh. C p.18. That use was described by Falk as vacant improved industrial property in the case of 50 Saginaw Drive, and tenant occupied improved industrial property in the case of 60 Saginaw Drive. Both were held by 50-

60 Saginaw Drive, LLC as "income investment property," and the tenant at 60 Saginaw was described as related to the owner. Pogel, on the other hand, preferred to describe the present use of the property as owner-occupied industrial property, but he acknowledged that both parcels at times had tenants, at least one of which vacated due to bankruptcy, and that the owner had hired a sophisticated agent to secure tenants for the properties. Moreover, Pogel ultimately acknowledged in an otherwise withering cross-examination that, in the then current climate, the market for both parcels was as non-owner occupied income producing properties. R. 274-78. Respondent's objection that Falk was appraising an amorphous concept of "investment value" was belied by his testimony, his appraisal, and my finding at the close of petitioner's proof. R. 144-45. Because both appraisers neglected to ascertain the income stream of each of the comparables chosen for their respective sales analysis, that approach fails for lack of proof; "without a detailed understanding of the income and expenses of the proposed comparable sales, there is no factual basis for concluding that the sales are in fact comparable to the subject property." Earla Associates v. Board of Assessors, City of Middletown, 13 Misc.3d 1246(A), supra.

Accordingly, I turn to the sharply disputed question whether the income capitalization approach is appropriate for the valuation of 50-60 Saginaw Drive. I find that it is, but that

Pogel's income capitalization analysis was so flawed as to render it of no probative value. Furthermore, I find that Falk's analysis was properly supported, and carried petitioner's burden of proof.

First, where the sales or market analysis offered fails for want of proof or foundation, even respondent admits that use of the income capitalization method is proper. Respondent's Post-Trial Brief, at 4 (income approach proper "[i]n the absence of sufficiently reliable market data"). This follows the Court of Appeals decisions in Matter of Saratoga Harness Racing Inc. V. Williams, 91 N.Y.2d 639, 643-44 (1998); W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 508, 512 (1981). Indeed, Williams involved owner-occupied space. As explained in Earla Associates v. Board of Assessors, City of Middletown, 13 Misc.3d 1246(A), supra:

> The income approach is the preferred method of appraising income producing property [See e.g. Merrick Holding Corp. v. Board of Assessors of the County of Nassau, 45 N.Y.2d 538, 542, 410 N.Y.S.2d 565, 567 (1978), ("in the absence of sufficiently reliable market data, alternative methods such as income capitalization or, where necessary, reproduction cost, may be employed [citations omitted]. Not surprisingly, as to income producing property, income capitalization has been the preferred mode ..."); 41 Kew Gardens Road Associates v. Tyburski, 70 N.Y.2d 325, 331, 520 N.Y.S.2d 544, 546 (1987), ("The income capitalization approach is generally regarded as the preferred method of determining the value of income-producing property, which is the issue in this case."); Farash v. Smith, 5 N.Y.2d 952, 955-956, 466 N.Y.S.2d 308, 310 (1983) ("both appraisers relied on the preferred capitalization of income approach to finding market value ...")]. Hence, this Court finds that the income capitalization approach is the proper method to value

> the subject property.

Justice Dickerson's approach is otherwise supported in the cases. In Keane v. Keane, 25 A.D.3d 729, 736, 809 N.Y.S.2d 133 (2d Dept. 2006), it was stated:

> The Supreme Court valued the property at $291,700, based upon the capitalization of income approach with an adjustment for taxes and included that value in calculating the plaintiff's distributive award. The use of the lower value ascertained from the capitalization of income approach was appropriate since the defendant was retaining the property as income-producing property (see 41 Kew Gardens Rd. Assoc. v. Tyburski, supra at 331, 520 N.Y.S.2d 544, 514 N.E.2d 1114).

In Application of City of New York, 250 A.D.2d 304, 306-07 (1st Dept. 1998), it was stated:

> Of the three methodologies for valuation in both eminent domain and tax certiorari proceedings, courts generally prefer the comparable sales method. However, absent the availability of evidence of sales of similar property, as is the case here (and neither party advocates this method), "[a]ny fair and nondiscriminating method" that produces a "fair and realistic value" is acceptable (Allied Corp. v. Town of Camillus et al., 80 N.Y.2d 351, 356, 590 N.Y.S.2d 417, 604 N.E.2d 1348, rearg. denied 81 N.Y.2d 784, 594 N.Y.S.2d 720, 610 N.E.2d 393). Of the two remaining methods, courts prefer the income capitalization method of valuation for determining the value of income-producing property; this method entails the accumulation of such data as the actual income and operating expenses of the subject property (41 Kew Gardens Road Associates v. Tyburski, 70 N.Y.2d 325, 331, 520 N.Y.S.2d 544, 514 N.E.2d 1114).

To the same effect is Matter of Erie Blvd. Hydropower, L.P. v. Town of Ephratah Bd. Of Asssessors, 9 A.D.3d 540, 542 (3d Dept. 2004); Matter of Town of Riverhead v. Saffals Associates, Inc., 145 A.D.2d 423 (3d Dept. 1988)("if the highest and best use to

which the property can be put is the one that a property presently serves and that use is income producing, the proper valuation method is the income or capitalization approach"). In Matter of Saturn Club v. City of Buffalo, 12 A.D.3d 1084 (4th Dept. 2004), it was held that the particular analysis of income capitalization used by petitioner's appraiser was flawed because it "failed to take into account the market rents of comparable properties," id. 12 A.D.3d at 1085, but the court embraced the use of the income capitalization method if supported by appropriate data and only observed that, if data does not support use of that method, "the better approach is to look at comparable sales." Id. Accordingly, there is no impediment to the use of the income capitalization method as argued by respondent if the record otherwise supports it.

Here, Falk's appraisal takes into account the appropriate factors. Unlike Matter of Saturn Club v. City of Buffalo, petitioner's appraiser took into account the market rents of the comparable properties. See also, Matter of Saratoga Harness Racing Inc. V. Williams, 91 N.Y.2d at 644. But Falk took into account market rents of the subject property, 60 Saginaw, not exclusively that property's "accurate actual income and operating expenses of the subject propert[y]," 41 Kew Gardens Road Associates v. Tyburski, 70 N.Y.2d at 331. Exh. #2, at 83-85, 118-120, although actual rents served as his starting point. He did

not use "hypothetical" figures such as plagued the report in Matter of Arsenal Housing Associates v. City Assessor of City of Watertown, 298 A.D.2d 830, 831 (4th Dept. 2002), but respondent contends that he should not have used even in part fair market rents when actual rents exceeded market rents. Matter of Conifer Baldwinsville Associates v. Town of Van Buren, 68 N.Y.2d 783, 785 (1986); Matter of North Country Housing, L.P. v. Bd. of Assessment Review, Town of Potsdam, 298 A.D.2d 667, 668 (3d Dept. 2002).

That is not a fair characterization of Falk's testimony. What he did is start with "look[ing] at the actual income in the subject property, if there is any." R. 67. See also, R.75-76 ("actual leases"). But for 60 Saginaw, most of the space was not leased, indeed some 60% was not leased. R. 76-78. According to Falk, therefore, he appropriately used a blend of actual and market rates to arrive at a gross income figure, recognizing that, if there was full tenancy at 60 Saginaw, he would have used exclusively "actual income." R. 78. So it is not fair to say that he used market rates; in fact he used actual rent to the extent they existed and factored in market rates for the remainder of the space not leased. This is commonly accepted practice. Appraisal Institute, The Appraisal of Real Estate at 511 (12th ed. 2001).

Otherwise, Falk's analysis is credited. The dispute over

the vacancy rate is resolved in petitioner's favor. Pogel's answers on cross-examination attempting to justify his vacancy rate of 8% and 10% were just not credible. R 203-14. Pogel provided no support in his appraisal for his chosen vacancy figures, and Falk did provide ample support both in his appraisal and in his testimony. Washington Apartments, Inc. v. Board of Assessors of The County of Nassau, 43 A.D.2d 942 (2d Dept. 1974). Falk took into account the factors commonly accepted in arriving at his vacancy figures. Appraisal Institute, The Appraisal of Real Estate at 512 (12th ed. 2001). The same contrast in supporting material supports Falk's analysis of the replacement reserve as against Pogel's unsupported figure.

I cannot credit Pogel's analysis. In many aspects, he provided opinions for which there was no support in his appraisal, including his chosen vacancy factors, R. 213-18; compare R. 205-06, 213-14, the tax rate, the lease commission factor on 60 Saginaw, his .30/sq.ft. reserve for structural repairs, the 11% equity dividend rate, and failure to include relevant pages of the Marshall's Valuation Service. As alluded to above, Pogel unsuccessfully faced a withering cross-examination which "so damaged" his opinions that the court largely places "no reliance" on them. Matter of Saturn Club, 12 A.D.3d at 1085.

ACTUAL vs MARKET RENTALS

Contrary to respondent's argument, the fact of the matter is that neither appraiser used exclusively actual rentals in computing gross income. R. 119 (Pogel "didn't use the actuals"), 202 (Pogel used in part actual rentals in 2002 and some that started in 2004). Yet both found that the market rent was "pretty close" to actual rent to the property, R. 122, 202-03. Thus, both necessarily recognized that the actual rental figures, although close to market, were not reflective of market, and both recognized that Allens Associates, the primary tenant, was related in some fashion to the owner of both parcels. R. 205-06. Moreover, both appraisers recognized the volatile nature of rentals for each of these parcels in a declining market for obsolescent and otherwise aging and largely vacant improved industrial property.

Given the circumstances, respondent's contention that there is an immutable rule that a court must consider exclusively actual income if higher than market rent is without merit. True it is that an isolated sentence taken from Matter of Conifer Baldwin Associates v. Town of Van Buren, 68 N.Y.2d at 785 might be read to support respondent's argument. But the correct and historical rule is as stated in Matter of Schoeneck v. City of Syracuse, 93 A.D.2d 988 (4th Dept. 1983), which is that, although actual rental is often the best indicator of value, it is not a

reliable indicator if "rent has been determined without regard to the market rental." Id. 93 A.D.2d at 988 (citing Matter of Merrick Holding Corp. v. Bd. of Assessors of County of Nassau, 45 N.Y.2d at 543). The court in Matter of Schoeneck upheld the referee's use of market rental rates despite the existence of higher actual rents because "value trends . . . have declined since the actual rent of the subject premises were fixed under a lense negotiated in 1950." Id. See also, 98 N.Y. Jur.2d Taxation and Assessment §332 ("a court may, however, adopt a figure other than actual rents, even though actual rents offer the best indication of fair market value, where the actual rents are found to be higher or lower than market rents. A fair rental value may thus actually be less than the contract rent.")

This conclusion is supported by consideration of Matter of Federal Express Corp. v. Bd. of Assessors, Town of Greenburg, 249 A.D.2d 546 (2d Dept. 1998), in which the court rejected the Town's "contention that the court improperly disregarded evidence of actual income in reaching its determination . . . [as] without merit." Id. It appeared that actual rentals in that case were discounted by reason of the age of a 6-8 year lease in a declining market. The Town argued, as respondent argues here, that the Conifer Baldwinville Associates dictum stated an immutable rule requiring in all cases consideration of actual or contract rents if higher than market rents. See Brief for

Respondent-Appellant, 1997 WL 34605653 (characterizing the petitioner's argument drawn from Matter of Schoeneck v. City of Syracuse as "blatantly incorrect" and as violative of Conifer Baldwinsville Associates). The petitioner in Matter of Federal Express Corp. argued, on the other hand, that the indicated sentence in Conifer Baldwinsville Associates was not necessary to the decision and that the underlying case involved HUD established rates which were not shown to be a departure from market rates. Brief for Petitioner-Appellee, 1997 WL 34605652 (citing Conifer Baldwinsville Associates, 115 A.D.2d 325 ("no showing that the rents fixed by HUD do not reflect the value of the property")).

The petitioner's brief to the Appellate Division also put the matter into historical context, in a discussion worthy of repetition here because it states applicable law:

> It is stretching credulity that the Court of Appeals would, in such an off-hand manner, in a dictum unnecessary for *33 the determination of the case, reverse a long history of appellate decisions holding that 1., economic rent is always used in order to achieve equality among taxpayers, and that 2., actual rent is indicative of such economic rent unless explained away because the actual rent is based on a non-arms length or outdated lease or is fraudulent.
>
> The last Court of Appeals decision on this subject before Conifer Baldwinsville was Marine Midland Properties Corp. v. Srogi, 60 N.Y.2d 885, 887, 470 N.Y.S.2d 365, 366 (1983), involving a rejection of "actual rent because [the trial court] found the rent charged to be a computation of the cost of carrying the property with no relation to fair market rental." The Court of Appeals held that:
>
> "Actual rent may be indicative of fair market

rental, but is not necessarily so where the rent has been arbitrarily set ... " (Emphasis supplied) (Ibid.)

In another 1983 case, the Fourth Department in Schoeneck v. City of Syracuse, 93 A.D.2d 988, 461 N.Y.S.2d 641, 642 (4th Dep't 1983), dealt with the virtually identical situation as here. A long term lease was entered into in 1950 for a downtown Syracuse building whose 1977 to 1981 assessments were protested. The Fourth Department affirmed the rejection of the actual income because:

"As a general rule, actual rental income is often the best indicator of value unless rent has been determined without regard to the market rental (*34Matter of Merrick Holding Corp. v. Board of Assessors of County of Nassau, 45 N.Y.2d 538, 410 N.Y.S.2d 565, 382 N.E.2d 1341). To determine whether actual rental income of premises equaled economic income, petitioners' appraiser examined four leases on the 300 block of South Saline Street. The Referee adopted the finding that the actual rental income of the subject property was higher than the economic income. This conclusion is supported in the record. True value trends in the Syracuse downtown retail core area have declined since the actual rent of the subject premises was fixed under a lease negotiated in 1950." (Emphasis supplied)

The seminal economic rent v. contract (actual) rent case is People ex. rel. Gale v. Tax Commissioner, 17 A.D.2d 225, 233 N.Y.S.2d 501 (1st Dep't 1962), which has been cited and relied upon innumerable times. Gale which involved the 1951/52 to 1954/55 assessments for a building subject to a 1934 lease, evenhandedly held that outdated long term leases should be disregarded as reliable indicators of value in favor of economic rents when such leases are either above and below the current market:

"An outstanding lease may be a benefit or a detriment to the subject property, and thus its duration, covenants and the rental fixed are simply elements along with many other considerations used to arrive at the value of the property. The amount of rental fixed by a lease, even though negotiated at arm's length, could be very misleading, as to the

> true value of property, for it is well known that many rental contracts may be at excessive or inadequate rentals because of poor business judgment on the part of one party or another." 17 A.D.2d at 229-230; 233 N.Y.S.2d at 506. (Emphasis supplied).

*35 The Gale Court further held that long term leases, whether above or below the current market, are only indicators of value to be ignored if market conditions change:

> "Then, too, long term rental contracts may be made in boom times or in times of depression, so do not necessarily reflect true value on a change in times.
>
> "Of course, an outstanding bona fide lease and the rental income established thereby are matters to be considered in determining 'the full value' of the whole property, land and improvements. Value arrived at by capitalization of the fair rental value is, in ordinary cases, the surest guide to a sound appraisal. In that connection, the actual rent realized is significant as an important factor in determining what the fair rental value is. [citations]. But when there is evidence that factors such as long-term leases made under distress or boom conditions affect the actual rent, the weight to be given to the actual rent must be discounted accordingly. [citations]
>
> "So, the existence of an outstanding lease at an unrealistically low rental for a long term, not representing the fair rental value of the property, is not to be used as a basis for calculating actual value. Thus, the true value of the property for assessment purposes is to be ascertained as if unencumbered by such a lease." (Emphasis supplied) 17 A.D.2d at 229-230; 233 N.Y.S.2d at 506-7.

Merrick Holding Corp. v. Board of Assessors, 45 N.Y.2d 538, 410 N.Y.S.2d 565, (1978), in analyzing shopping center leases also neutrally applied the concept of using leases as indicators of value. Merrick Holding only held that *36 "leasehold bonuses" could be added to "bargain leases" for "flagship" or "anchor" tenants, but applied the same concept to above market rents for the smaller mall tenants:

> "Of course, in arriving at the value of the

> entire property, if Merrick's leases with its lesser tenants were at above market rents these should be offset against the below market rentals received from the three flagship tenants. In that connection, in remitting for review of the facts we note that, though the record contains proof that the rentals paid by Merrick's numerous lesser tenants were not below market, there is no finding as to whether these exceed market and, if so the extent to which such excess counterbalanced the below market stream of income that flowed from the three major leases to which the bonuses were applied." (Emphasis supplied) 45 N.Y.2d at 545, 410 N. Y.S.2d at 569.

The same neutral application of this principal was stated by Justice Bergen in People ex rel 379 Madison Ave., Inc. v. Boyland, 281 App.Div. 588, 121 N.Y.S.2d 238, 241 (1st Dep't 1953):

> "Assessments cannot be made to trail behind every turn in the fortunes of real property. There are times when property must bear a share of taxation proportionate to value even though it may then have no income, or an income inadequately focused to true value. There are times when the full measure of ephemeral surges of increased income should not be reflected in assessments in fairness to the owner." (Emphasis supplied)

The Court of Appeals has, at least, twice recently explained that similar properties must be assessed at similar *37 values without the distortions arising form the individual lease, sale and financing circumstances of the property. In Allied Corp. v. Town of Camillus, 80 N.Y.2d 351, 356, 356, 590 N.Y.S.2d 417, 419 (1992), the Court held:

> "The ultimate purpose of valuation, whether in eminent domain or tax certiorari proceedings, is to arrive at a fair and realistic value of the property involved so that all property owners contribute equitably to the public fisc."

The Court in Merrick Holding also held that:

> "But it must always be remembered that an underlying aim of valuation is to assure that, in providing for public needs, the share reasonably to be borne by a particular

> property owner is based on an equitable proportioning of the fair value of his property vis-a-vis the fair value of all other taxable properties in the same tax jurisdiction." 45 N.Y.2d at 545.
>
> The Town's position would doubly penalize the petitioner here, who is not only compelled by a long term lease to pay an above market net rent, but would also be required to bear a greater tax burden than its neighbors precisely because it pays an above market rent.

In other words, Merrick Holding fully embraced Gale's neutral application of the market rent/actual rent relationship depending on the particular circumstances of the case and a showing that actual contract rentals involved, as here, related parties or otherwise did not reflect the true market, as in a "roller-coaster" market (to use Falk's language) or when "ephemeral surges of increased income" should not be reflected in assessments in fairness to the owner." People ex rel 379 Madison Ave., Inc. v. Boyland, 281 App. Div. 588, supra. By its decision in Matter of Federal Express Corp., 249 A.D.2d 546, supra, the Appellate Division accepted this argument notwithstanding the dictum in Conifer Baldwinsville, as I do in this case. See In re James Madison Houses (Project No. Ny-5-33), Borough of Manhattan, City of New York, 17 A.D.2d 317, 320-21 (1st Dept. 1962)("it is always open to proof that the net income is an unreliable index, because for indicated reasons the income is too low or too high in determining market value, but the burden ordinarily is on the one who asserts the unreliability").

This view also accords with applicable standards of appraisal concerning the income capitalization approach. The leading treatise, Appraisal Institute, The Appraisal of Real Estate (12th ed. 2001) states quite categorically:

> To apply any capitalization procedure, a reliable estimate of income expectancy must be developed. Although some capitalization procedures are based on the actual level of income at the time of the appraisal, all must eventually consider a projection of future income. An appraiser must consider the future outlook both in the estimate of income and expenses and in the selection of the appropriate capitalization methodology to use. Failure to consider future income would contradict the principle of anticipation, which holds that value is the present worth of future benefits.
>
> Historical income and current income are significant, but the ultimate concern is the future. The earning history of a property is important only insofar as it is accepted by buyers as an indication of the future. Current income is a good starting point, but the direction and expected pattern of income change are critical to the capitalization process.

Id. at 497. See also, Appraisal Institute, Appraising Industrial Properties 114 (2005)("projected forecast of stabilized financial performance requires extensive research to determine the rent commanded by buildings of comparable use")(emphasis supplied). The immediately preceding quotations mirror Falk's testimony on the same point, R. 122, and esp. 137, and accordingly I find that his analysis is in accordance with accepted appraisal standards and pertinent caselaw. See generally, Anno., Income or Rental Value as a Factor in Evaluation of Real Property for Purposes of Taxation, 96 A.L.R.2d 666 (1964); Jennifer J.S. Brooks and

Ronald J. Schultz Market Theory: an Approach to Real Property Valuation for State and Local Tax Purposes, 45 Tax Law. 339, 375-380, 382-83 (1992).[1]

Finally, Falk used a capitalization rate of 14.05% for both properties, and Pogal used a 13% rate for both. I agree with petitioner that the difference is largely attributable to the equity dividend rate and the tax aspect. But Pogal supplied nothing to back up his analysis on these aspects and his testimony on these subjects was unilluminating, R. 220-23. Falk's testimony was not similarly impaired. Accordingly, I accept Falk's analysis of the appropriate capitalization rate to employ, 14.03%.

CONCLUSION

The value of 50 Saginaw was $108,500 as of January 1, 2002, and $99,000, as of January 1, 2003. The value of 60 Saginaw

[1] In any event, both appraisers would have had to factor in to the actual rent figures "market rent for vacant or owner-occupied space" and it appears that Falk did precisely that. Appraisal Institute, The Appraisal of Real Estate at 511 (12th Ed. 2001). If a court were to conclude, however, that Falk's use of a blended actual/market or stabilized rate was impermissible, respondents showed that the actual income figures would yield an increase in value of $322,281, as of January 1, 2002. R. 118-21. Respondent did not similarly examine Falk to establish what the increase would be as of January 1, 2003. Although unnecessary to do so for the valuation date January 1, 2002, for the reasons stated in the text above, it would have been open to the court to "arrive at a value based on an analysis of both [appraisers'] approaches that emphasized a pragmatic adjustment to the economic realities." In re Bass, 179 A.D.2d 387 (1st Dept. 1992). See Town of Riverhead v. Saffals Associates, Inc., 145 A.D.2d 423, 424 (2d Dept. 1988).

Drive was $423,000 as of January 1, 2002, and $459,000 as of January 1, 2003. The Petitions, with costs, RPTL § 722(1), is granted to the extent indicated, the assessment rolls are to be corrected accordingly, and any overpayments of taxes are to be refunded with interest.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: May 10, 2007
Rochester, New York