STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

In the Matter of the Application of
LIBERTY PRECISION INDUSTRIES, LTD,

Petitioner, DECISION AND ORDER

v. Ind #2002/8866
TOWN OF HENRIETTA, #2003/8580
#2004/8710

Respondent.

In the court's original decision and order, the parties were invited to provide additional submissions on the question of what Falk's calculation of value would be absent the ceiling height adjustments he made to two of the three comparable leases chosen for his income capitalization approach. Petitioner provided a proposed order and judgment which respondent rejected, and respondent elected to fault petitioner's approach to the ceiling height adjustment issue without proposing an approach of its own. See Letter of Mr. Considine, dated July 18, 2007. At a conference, respondent's counsel stated simply that he had nothing to say in addition to the materials already submitted to the court and that the matter was finally submitted for the court's decision without further comment. Accordingly, the court's Decision and Order of May 23, 2007 is hereby recalled, and these findings of fact and conclusions of law are substituted, and constitute the Decision and Order of the court in these consolidated Art. 7 proceedings.

FIRST STAGE ANALYSIS

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).

The court finds that Petitioner survived the first stage analysis in these proceedings, and has met the "miminal threshold." 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.

SALES COMPARISON ANALYSIS REJECTED

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. 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.

Given the then current use of the subject parcel on the valuation dates in question, this was impermissible. That use was described as non-owner occupied vacant improved industrial property. The market for both parcels was as non-owner occupied income producing properties. Respondent's objection that Falk was appraising an amorphous concept of "investment value," and that it did not concern the "fee simple absolute," was belied by his testimony, and his appraisal as modified by his testimony (there were sentences included that he conceded should not be in the report and probably got there by careless editing). 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.[1]

INCOME CAPITALIZATION APPROACH IS APPROPRIATE

Although the Town has not presented in so many words an argument that the income capitalization approach is inappropriate in the case, it has in other cases tried at about the same time as I tried this one. Accordingly, I turn to the question whether that approach is precluded in cases, such as this one, in which insufficient data supports use of the sales comparison approach.

Where the sales or market analysis offered fails for want of proof or foundation, use of the income capitalization method is proper. 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

[1] With this, it becomes unnecessary to consider respondent's main objection to the Falk sales comparison report, which is that it employs impermissible ceiling height adjustments, and an impermissible deferred maintenance adjustment.

> 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, and therefore I turn to whether either party has demonstrated flaws in the opposing party's use of the income capitalization approach.

RESPONDENT'S OBJECTIONS TO PETITIONER'S CAPITALIZATION ANALYSIS

Respondent objects to two aspects of Falk's income capitalization analysis in its post-trial brief. First,

respondent faults Falk's use of market rent, instead of actual rentals, at the subject property in its income calculations. The court dispatched a similar argument in the 50-60 Saginaw Drive case, decided recently, and a similar result applies here, but for somewhat different reasons. Here, Falk found that the actual rents at the subject premises was markedly higher than the relevant market rents, Report, pp.55, 60-61, 82, by reason of the duress that resulted in the execution of the lease agreement. In particular, Liberty "had a multi-million dollar contract to build a particular product that was scheduled for a time line requiring the immediate commencement of production and, that the subject property was the only property from the available inventory that suited their specific needs." Report, at p.159. Falk further concluded that "Liberty was under duress and was unable to negotiate with the lessor. . . . {despite the fact that] [t]he contract was vitally important to the company and, required the occupancy of space which, at that time, was best accomodated by the subject property." Report, at p.159. Falk further concluded that "[t]he conditions of this lease agreement do not coincide with important parts of the definition of market rent," and offered as support an offer to Liberty of a leasehold interest at about the same time of the only other available suitable space by Rochester Tech Park, which could not be accepted by Liberty because the lessor "could not meet the time requirement of

Liberty . . . [which was thereby forced to] op[t] for the subject property." Report, at p.159. Falk testified that, in his professional opinion, it was appropriate and "legitimate" to use the Rochester Tech Park negotiation as a partial gauge of the relevant market rent because the lessor's offer was not accepted by the prospective tenant, Liberty, for reasons unrelated to price. Respondent's argument in the post trial submissions is that Falk used this negotiation exclusively in arriving at his conclusion that the actual rentals at the subject premises were substantially above market. To some extent that argument has merit, but it is clear that Falk also determined market rents from the range of rentals of the three comparables, which were chosen from among over 20 candidates, to arrive at his conclusion that the market rent was $4.00 per square foot. For the reasons set forth below, adjustments to two of these comparables for ceiling height differences was inappropriate, and therefore the correct "range of rentals" excluding the ceiling height adjustment was $3.80 to $4.48 in each of the three years. Report, p.58 (as explicated on p.60), p.79 (as explicated on p.81), and p.100 (as explicated on p.102).[2] Accordingly, inasmuch as Falk

[2] In his letter to the court dated July 18, 2007, respondent's counsel repeated his contention that Falk "failed to supply to the Court and to counsel any fact, figures and calculations upon which he based his adjustment for ceiling height adjustments." That assertion is belied by the Falk Report. They are provided on pp. 58, 79, and 100, for each of the years in question. In each year, the adjustments were -0.32

picked a dollar figure, $4.00, just higher than the middle of the range without explaining how one or the other comparable should be weighted, a similar exercise for the comparable rentals without the ceiling height adjustment would yield a dollar figure of approximately $4.18. Factoring in the negotiated rate also relied on by Falk of $3.85, I find that the true market rate was $4.05, thus yielding a -0.70 adjustment to actual rent (instead of the -0.90 adjustment used on pp. 61, 82, and 103 of the Falk Report), or a 14.74% adjustment to actual rental income, rounded (as Falk did) to 15%. The resulting calculations are shown on

---

for Rental #1, and -0.25 for Rental #2. There was no ceiling height adjustment to Rental #3. Those three pages, together with my corrections on the grids to account for the removal of the ceiling height adjustment, are attached hereto and made a part hereof.

Respondent's counsel also made another error in his July 18th letter, although that may be attributable to misunderstood communications in the chambers conference. I asked for counsel's position on why petitioner's 10% approach was inappropriate when I was assured that respondent's position was, at its core, that the court could not "possibl[y]" take the ceiling height adjustments out. I did not ask respondent "to supply calculations to it on the assumption that the ceiling height adjustment should be ten percent," as claimed in Mr. Considine's letter. At that point, the court was simply seeking input from the parties on what the effect of removal of the ceiling height adjustment would be on the overall calculation of value. It was petitioner which proposed the 10% concept, and it did so for settlement purposes only as urged in Mr. Feldman's July 19th letter. For the reasons stated above, removal of the ceiling height adjustment required a number of additional calculations which are described in the text and on the attached pages of the Falk Report. I also reject the 10% approach as arbitrary, but note that Mr. Feldman has now made clear that that approach was offered only in aid of settlement, not as it's core position in the litigation. McDonald v. State, 42 N.Y.2d 900 (1977).

the attached Falk Report, pages 64, 85, and 106 in handwritten interdelinations on the right hand side of the pages (hereby made a part hereof). The increased net operating income resulting therefrom changes the Capitalization into Value calculations in each of the three years, using Falk's formula on pp. 66, 87, and 108, as follows:

2002 (p.66) $1,861,865 + $215,000 = **$2,076,865**

2003 (p.87) $1,968,103 + $215,000 = **$2,183,103**

2004 (p.108) $2,180,739 + $215,000 = **$2,395,739**

I note further that the circumstances of the actual subject lease as described by Falk was not in any material manner or at all impeached by respondent. I therefore credit Falk's analysis of the situation and, for the additional reasons stated below, his determination to use market rentals instead of the actual rentals. F.W. Woolworth Co. v. Srogi, 92 A.D.2d 736 (4th Dept. 1983)("actual rent under this lease is not determinative"). The values found above are within the range of expert testimony offered at trial and are supported by the evidence. Markham v. Comstock, 38 A.D.3d 1262 (4th Dept. 2007); Matter of Two Guys From Harrison, Inc. v. Assessor, Town of Henrietta, 281 A.D.2d 879 (4th Dept. 2001). See generally, In re Polo Grounds Area Project, Borough of Manhattan, City of New York, 20 N.Y.2d 618, 624-25 (1967); Alexander's Dept. Store of Valley Stream, Inc. v. Board of Assessors, 227 A.D.2d 549, 551 (2d Dept. 1996)("if the

total award, as well as its various components, is within the range of the expert testimony, it should only be upset if the trial court committed legal error")(emphasis supplied); O'Dwyer v. Robson, 103 A.D.2d 1036 (4th Dept. 1984)(referee entitled to make adjustments not made by either appraiser).

ACTUAL vs MARKET RENTALS

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.")(emphasis supplied).

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 did not reflect the true market, and 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 appraisal on the same point, Report, at 61, 82, 103, 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).

REAL ESTATE TAXES

Respondent also faults Falk's income capitalization approach in that it employed, or so respondent asserts, an unacceptable use of the assessor's formula by only estimating taxes paid at the comparable leased properties instead of "grossing up" market rent for the actual tax burden at the comparable leased properties. Matter of VGR Associates v. Assessor of the Town of

New Windsor, 13 Misc.2d 1218 (Sup. Ct. Orange Co. 2006); Appraisal Institute, The Appraisal of Real Estate 511 (12th ed. 2001). The fact of the matter, however, is that the claimed error plagued Bruckner's appraisal, Bruckner Report, ast p.41, but not Falk's appraisal which used precise tax figures and adjustments. Falk Report, at 58, 60, 66, 79, 81, 86, 100, 107. In each of the grids displaying the comparable rentals the use of precise tax adjustments would have been impossible without actual tax figures in hand, which Falk's appraisal otherwise shows he had together with other detailed information with respect the comparable rentals. Respondent cites no passage in the testimony which shows that Falk neglected to use the actual tax figures. Post trial Brief, at 8-9. By contrast, the Bruckner report makes clear, as petitioner contends, that he used only estimated figures, "~1.00," for each of the comparables. R. 236, 239 (conceding that he did not see the tax bills). For this reason I credit Falk's arrival at a capitalization rate, and discredit Bruckner's effort.

PETITIONER'S OBJECTIONS TO RESPONDENT'S APPRAISAL

Petitioner's objection that Bruckner's use of Comparable Lease #1 was inappropriate because it involved the subject property has merit. I also agree that Comparable Lease #2 was analyzed defectively because Bruckner disregarded 9500 sq. ft. of usable and used mezzanine space. Further, Comparable Lease #4

was an acknowledged sale and lease-back, which is a financing mechanism not considered arms-length. Similar infirmities did not plague Falk's report.

USE OF DEFERRED MAINTENANCE, AND CEILING HGT., ADJUSTMENTS

I find that the deferred maintenance adjustments in each year of $215,000, Report, at pp.66, 87, 108, was appropriate when using the income capitalization approach, because Falk "amortiz[ed] those costs over the useful life of the improvements." Third I.C.M. Realty Co. v. Town of Camillus, 174 A.D.2d 975 (4th Dept. 1991). See Report, at pp.63, 84, 105. Nevertheless I do not agree that Falk's use of a ceiling height adjustment was warranted, because the premises could easily be restored to a 22 ft. ceiling height. Accordingly, the values Falk arrived at for each of the respective years, Report, at pp. 66, 87, and 108 must be adjusted for the ceiling height adjustments he made on the comparable lease grids he provided in his report. Those calculations, which also encompasses only a partial consideration of the lease transaction rejected by Liberty because of time constraints unrelated to the offered rental price (Falk gave it virtually sole consideration in determining market rentals), are set forth above in detail, together with my finding of value for each of the three years in question.

I have signed the proposed Order and Judgment with the

necessary modifications.

SO ORDERED.

_____
KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: July 19, 2007
Rochester, New York