SUPREME COURT OF THE STATE OF NE COUNTY OF ORANGE In the Matter of the Application ADULT HOME AT ERIE STATION, INC.		FILED AND ENTERED ON ORANGE COUNTY CLERK
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-against- ASSESSOR AND BOARD OF ASSESSMEN' OF THE CITY OF MIDDLETOWN AND TO OF EDUCATION FOR MIDDLETOWN CEN' SCHOOL DISTRICT	E BOARD	Index No: 4842-01 7980-02
	RAL	POST TRIAL DECISION & ORDER
	Respondents.	
For Review of Certain Real Prope Assessments for the year 2001 an under Article 7 of the Real Prop Tax Law	d 2002	

NOT-FOR-PROFIT ADULT HOME: EXEMPTION & VALUATION

DICKERSON, J.

The Petitioner, Adult Home At Erie Station, Inc. [" Erie Station ", " the Petitioner "] applied to the Commissioner of Assessment and Board of Assessment Review of the City of Middletown for a real property tax exemption for the years 2001 and 2002 based on charitable ownership and use which application was denied. The Petitioner brought the instant proceedings seeking an order " directing

that respondents correct the assessment rolls to reflect exempt status for petitioner's property, further directing a refund of any taxes paid against these unlawful assessments, together with interest and costs "1. The assessed values for 2001 and 2002 were \$717,900 for each year. Petitioner has not applied for a partial tax exemption. After trial and a careful review of the record, trial exhibits and post-trial Memorandum of Law the Court renders the following Decision and Order.

PART I

INTRODUCTION & FACTUAL BACKGROUND

The Purchase Of The Adult Home

The Petitioner was incorporated on August 12, 1998 under Article 4, Section 402, of the New York State Not-For-Profit Corporations Law² to establish, administer and operate, on a not-for-profit basis, an adult home as defined in § 2(25) of the Social Services Law of the State of New York. Pursuant to New York Social Services Law § 461-a, the Petitioner was granted a not-for-profit home for adults operating certificate by the New York State Department of Health on April 27, 1999³. Accordingly, the Petitioner is under the supervision of the New York State Department of Social Services and Department of Health. Petitioner acquired the subject property, an operating Not-For-Profit Adult Home, by deed dated August 19, 1998⁴. The sale was out of

foreclosure and the purchase price was \$1,200,000 which included personal property and equipment⁵.

Licensing, Assessment & Location

Erie Station is a 31,020 square foot three story building on, approximately, 1.2 acres which was erected between 1989 and 1990. The property was assessed on the assessment rolls by the City of Middletown at \$717,000 for 2001 and 2002 which are the years at issue herein. The property is located in downtown Middletown, Orange County. Respondent's appraiser acknowledged that "the immediate neighborhood has experienced some economic decline as evidenced by closed storefronts and general lack of maintenance "6. Compared to other areas in Orange County⁷, the area where Petitioner is located is relatively poor, and Middletown's growth rate is half that of Orange County as a whole⁸. Most of the residents of Erie Station appear to be local residents of Middletown⁹.

Beds, Bathrooms & Resident Needs

Erie Station contains 96 beds and 85 rooms, of which 13 include a private bathroom and 29 contain no bathroom facilities whatsoever.

Occupants of these rooms use shared hall sanitary facilities. 10 Approximately, one-fourth of the occupants require wheelchairs or walkers and about one-half require daily help with showering and

bathing. Nearly all residents require assistance with medication and 25% require help with dressing¹¹.

<u>Definitions</u>

Erie Station is an adult home which is defined, pursuant to its not-for-profit adult home operating certificate, as " an adult care facility established and operated for the purpose of providing long-term residential care, room, board, housekeeping, personal care and supervision to five or more adults unrelated to the operator ", and who are not " in need of continual medical or nursing care ", do not " suffer from a serious and persistent mental disability ", and do not require " health or mental health services which are not available or cannot be provided safely and effectively by local service agencies or providers "12.

Elant's Health Care System

Petitioner is one branch of a comprehensive health system administered by Elant, Inc., all of whose facilities and operations are located in and around Middletown, Goshen and Newburgh in Orange County, New York¹³. Erie Station draws its occupancy from the Middletown area¹⁴.

Internal Revenue Code § 501(c)(3)

Elant and all of its branches including Erie Station are exempt from taxation under Section 501(c)(3) of the Internal Revenue Code¹⁵.

Admissions Policy

The Petitioner does not discriminate against any applicant for admission based on ability to pay, and the only requirements for admission to the facility are age and physical condition¹⁶. Petitioner does not charge an entrance fee, and no occupant has ever been discharged by Petitioner for inability to pay¹⁷.

Two Categories Of Residents Based Upon Ability To Pay

In 2000, Petitioner received 54% of its revenue from private pay occupants and 46% of its revenue from Social Security Administration's Supplemental Security Income recipients [" S.S.I. occupants "], as confirmed by the Official Statement [" the Official Statement "] for the public sale of " \$1,630,000 Civic Facility Revenue Bonds (The Adult Home at Erie Station, Inc. Project) Series 2001 B "18. The Petitioner made no distinction at that time between private pay and contract occupants in the Official Statement used in the public sale of Bonds for the Property.

In fact, the concept of a third category of occupants, the contract occupants [see below], was not even mentioned by Petitioner at the time of its initial application to the Respondents for an exemption. This is exhibited in Petitioner's response to the April 3, 2001 letter it received from Bonnie Bernaski, Assessor of the City of Middletown, wherein she requested additional information so that she could make a determination regarding the exemption filed by Petitioner¹⁹. Assessor Bernaski requested "1) Demonstration that you are serving people in need. 2) Total number of people being served...5) Is housing being subsidized...". Petitioner responded to the Assessor by letter dated April 5, 2001 wherein it was stated that "1. The number of occupied bed days for the year 2000 was 33,154 of a possible 35,040. 2. The number of bed days occupied by SSI occupants was 19,439. 3. The number of days occupied by private pay occupants was 13,715...". There is clearly no mention of contract occupants in Petitioner's letter to Assessor Bernaski²⁰.

Three Categories Of Residents Based Upon Ability To Pay

Within the context of this proceeding²¹ the Petitioner asserts that Erie Station residents are divided not into two categories but three categories based upon ability to pay.

Category 1: **S.S.I.** Occupants: There are those who are eligible recipients under the Social Security Administration's Supplemental Security Income ("S.S.I. ") program.

Category 2: **Private Pay Occupants:** There are those who have sufficient income or assets to pay the private pay occupancy rates.

Category 3: Contract Occupants: There are those who do not have sufficient income/assets to pay the full private pay rate although they do not qualify for S.S.I. [The Petitioner refers to these individuals as the "contract occupants" The S.S.I. occupants comprise, from year to year, between 50 to 55 percent of the total occupants. The private pay occupants comprise approximately 10 per cent of the residents at Erie Station²⁴.

Payment Schedules: Private Pay & Contract Occupants

Petitioner's private pay rate schedule was developed by comparing the rates charged and amenities provided by competing facilities. These competitive rates were found by both parties' appraisers to reflect the going private market rate in the area surrounding Erie Station²⁵. The contract occupants comprise 30 per cent of the residents at Erie Station. The Petitioner provides occupancy for these residents at rates which are less than the private schedule. A contract occupant may

possess sources of income such as social security and a pension, but may not retain more than \$2000 in total assets. The contract occupant's income is subjected to deductions of \$50.00 per month for personal expenses and the cost of medicines and medical care. The remainder becomes Petitioner's monthly service charge.

Financial Difficulties

Petitioner's income is limited to the monthly payments made by or on behalf of residents and any donations received from outside sources. There are no entry fees²⁶. Erie Station has experienced financial difficulties since its inception²⁷. Erie Station has received continuing financial support from other Elant entities, including the forgiveness of a \$500,000 loan that Erie Station could not repay, a one-year guarantee by another Elant entity to support Petitioner, and the payment of all insurance premiums and some utility bills on behalf of Erie Station²⁸.

Officer & Director Compensation

No officer or director of Petitioner receives any salary, expense reimbursement or other funds from Petitioner except for services rendered²⁹.

Revenues In Excess Of S.S.I. In 2000 & 2001

In 2000, Petitioner's income was, approximately, \$271,000 above the income that Erie Station would derive if it had been operated exclusively for S.S.I. occupants. And in 2001, Petitioner's income was, approximately, \$300,000 above the income that Erie Station would derive if it had been operated exclusively for S.S.I. occupants³⁰.

Percentages Of Private Pay & Contract Occupants

As evidenced by a numerical count by occupant class for the calendar years 2000, 2001, and 2002, 61 out of 124 residents

[49.19%] were private pay and contract occupants for the year 2000, 60 out of 117 residents [51.28%] were private pay and contract occupants for the year 2001, and 55 out of 118 residents [46.16%] were private pay and contract occupants for the year 2002³¹

PART II

REQUEST FOR R.P.T.L. § 420-a(1)(a) FULL TAX EXEMPTION

Real Property Tax Law ["R.P.T.L."] §420-a(1)(a) states in pertinent part that "Real Property owned by a corporation or association organized or conducted exclusively for...charitable ...purposes, and used exclusively for carrying out thereupon one or more of such purposes whether by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section."

In the <u>Matter of Miriam Osborn Memorial Home Association v.</u>
<u>Assessor of the City of Rye</u>, 275 A.D.2d 714, 715, 713 N.Y.S 2d. 186,

(2d Dept. 2000), the Court held that, "RPTL 420-a(1)(a) provides a mandatory real property tax exemption for property used exclusively for charitable purposes. In order for an entity to be entitled to this tax exemption, (1) the entity must be organized exclusively for purposes enumerated in the statute, (2) the property in question must be used primarily for the furtherance of such purposes, (3) no pecuniary profit, apart from reasonable compensation, may inure to the benefit of any officers, members, or employees, and (4) the entity may not be simply used as a guise for profit-making operations."

Petitioner Organized Exclusively For Charitable Purposes

The first requirement for an exemption from taxation pursuant to §420-a(1)(a) of the R.P.T.L. is that the owner of the subject property be organized exclusively for charitable purposes. Petitioner's goals are set forth in its Certificate of Incorporation and Amended Certificate of Incorporation³². As provided in these documents, Petitioner was organized as a not-for-profit corporation to establish and operate a not-for-profit adult home. Petitioner's stated purpose is to provide care in a residential setting to adults who, though not requiring continual medical or nursing care are, by reason of physical or other limitations associated with aging, physically or mentally disabled and are therefore substantially unable to live independently³³.

A test for a charitable use or organization is set forth in American-Russian Aid Ass'n v. City of Glen Cove, 41 Misc. 2d 622, 626, 246 N.Y.S. 2d 123 (Nassau Sup. 1964)(quoting Matter of MacDowell's Will, 217 N.Y. 454, the Court stated that "' If the purpose to be attained is personal, private or selfish, it is not a charitable trust. When the purpose accomplished is that of public usefulness unsustained by personal, private or selfish considerations, its charitable character ensures its validity '") aff'd 23 A.D.2d 988, 260 N.Y.S.2d 589 (2d Dept 1965) .

It is clear from a review of Petitioner's 501(c)(3) application for exemption from income taxes along with the evidence presented at trial, that Petitioner is exclusively organized for charitable purposes. Petitioner is organized to provide care in a residential setting to adults who, though not requiring continual medical or nursing care, are by reason of physical or other limitations associated with aging, physically or mentally disabled and therefore substantially unable to live independently. This Court finds that Petitioner has met the first R.P.T.L. §420-a(1)(a) requirement for an exemption from taxation in that it was organized exclusively for charitable purposes. [See Matter of Sayville Manor, Inc. v Assessor of the Town of Islip, N.O.R. Suffolk County Clerk, Index No. 17780/97, Werner, J.].

The Exclusive Use Requirement

The second requirement for exemption from taxation pursuant to R.P.T.L. §420-a(1)(a) is that the subject property be used exclusively in furtherance of the specified exempt purposes for which the corporation was organized [See e.g., Mohonk Trust v. Board of Assessors of Town of Gardiner, 47 N.Y.2d 476, 483, 418 N.Y.S.2d 763 (1979) (" To determine whether a particular piece of land is exempt under the statute it is necessary to determine first whether the owner of the land is 'organized or conducted 'exclusively, or primarily, for an exempt purpose ")]. The term "exclusive" has been held to connote

"principal " or "primary " [See e.g., Matter of Symphony Space, Inc. v. Tishelman, 60 N.Y.2d 33, 38, 356 N.Y.S.2d 555 (1983); Association of the Bar of the City of New York v. Lewisohn, 34 N.Y.2d 143, 356 N.Y.S.2d 555 (1974)]. The New York State Office of Real Property Services (" ORPS ") has interpreted " exclusive use " to require a finding that a large percentage of the clients must be in need of and receive a real and substantial charitable benefit [See 10 ORPS Opinions of Counsel No. 100; 6 ORPS Opinions of Counsel No. 33].

Erie Station has a license to operate an "adult home program" 34. In order for a not-for-profit adult home to be entitled to the charitable exemption under RPTL §420-a(1)(a), the property must be shown to limit its use to "persons in need" [See e.g., Belle Harbor Home of the Sages, Inc. v. Tishelman, 100 Misc. 2d 911, 913-914, 420 N.Y.S.2d 343 (Queens Co. Sup. Ct. 1981), aff'd 81 A.D. 2d 886, 441 N.Y.S 2d 413 (2d Dept. 1981); 10 ORPS Opinions of Counsel No. 100)].

The Standard To Be Followed

New York courts have interpreted the exclusive charitable use requirement [which includes limiting the property's use to " persons in need "] to require occupancy by large percentages of persons receiving only S.S.I.

Belle Harbor: 90% S.S.I.

The Court in <u>Belle Harbor</u>, supra, clearly sets out the standard which must be followed herein. In <u>Belle Harbor</u>, Petitioner was organized under the Not-For-Profit Corporation Law to operate a charitable corporation and was licensed by the Department of Social Services to operate a residential care facility. Petitioner provided numerous services in a residential facility to the aged who were unable to live on their own. Approximately 90% of residents in <u>Belle Harbor</u> received Supplemental Security Income [S.S.I.].

The Court in <u>Belle Harbor</u>, supra, at 100 Misc. 2d 913-914 held that "the property was primarily used in furtherance of charitable purposes. Ninety percent of the residents have government benefits as their only source of income. The provision of care and services to the indigent elderly on a nonprofit basis is a charitable activity, even though some of the elderly pay for the services with government benefits...because 90% of petitioner's residents receive only government support, the care given to residents capable of paying should be regarded only as 'incidental activity' not altering petitioner's essentially charitable nature. "

The Court in $\underline{\text{Belle Harbor}}$ made a clear distinction between residents that had $\underline{\text{only}}$ S.S.I. and those with $\underline{\text{some}}$ private resources

[See <u>Belle Harbor</u>, supra, at 100 Misc. 2d 913, (" At the hearing before the Tax Commission, petitioner estimated that 85% of its residents received Supplemental Security Income (SSI) and that the remainder had some private resources. As of now, approximately 90% of its residents receive SSI...")].

It is clear from an analysis of <u>Belle Harbor</u>, *supra*, that the standard for the charitable exemption requires a finding that a large percentage of Petitioner's residents receive only government [S.S.I.] support, compared with the small percentage of Petitioner's residents who are able to pay for their services with private income. The Court found that the care given to the small number of residents capable of paying for their services is to be regarded as incidental and does not alter Petitioner's charitable function.

Jeantet Residence: 97% S.S.I.

In Marino P. Jeantet Residence For Seniors, Inc. v. Comm. of Finance of the City of New York, 105 Misc. 2d 1080, 430 N.Y.S.2d 545, aff'd 86 A.D.2d 671, 449 N.Y.S. 2d 933 (2d Dept 1982), a not-for-profit home for adults had been denied a real property tax exemption by the City of New York. In that case, the Court, noting that the facility involved was indistinguishable from the one in Belle Harbor, supra, examined only two categories of tenants, those who received only governmental support and those having private resources. In Jeantet,

supra, there were 170 permanent residents residing at the premises, and "4 of whom are privately paid residents". (Jeantet at 105 Misc.2d 1082). Approximately 97 percent of the residents in <u>Jeantet</u> received S.S.I. assistance.

Sayville Manor: 95% S.S.I.

In <u>Matter of Sayville Manor</u>, Inc. v. Assessor of the Town of Islip, supra, at p.4, the same analysis was followed by the trial court when determining whether the property was being primarily used for the charitable purpose for which it was organized. The court took into consideration that " it is undisputed that the Sayville Manor operates without regard to income. Respondent does not deny that 95 percent of those in residence pay with SSI funds."

Bronxwood Home: 75% S.S.I.

In <u>Matter of Bronxwood Home for the Aged, Inc. v. Tishelman,</u> 184 N.Y.L.J. (No. 30), p.7 (Bronx Sup., August 12, 1980), the court held that "...petitioner's property appears to be used primarily in furtherance of its charitable purposes...Petitioner notes that 75 percent of its residents are so indigent as to qualify for S.S.I. benefits and that the remainder are unlikely to afford private proprietary facilities because they would soon deplete their assets and

could then become eligible for S.S.I. benefits. "The court in Bronxwood Home relied on the factual similarity it shared with Belle Harbor, supra, particularly the fact that 90 percent of Belle Harbor's residents received S.S.I. benefits.

ORPS Opinions Of Counsel No: 100

Both Petitioner and Respondent rely on 10 ORPS Opinions of Counsel No. 100 which dealt with a housing project for the elderly which accepted only "private pay "residents who were required to leave their apartment if they could not pay the " rent ". These residents also had access to an " indigent fund " but only during the relocation process. Counsel stated in 10 ORPS Opinions of Counsel No. 100 that " it appears and remains our opinion that, for a housing project to be exempted pursuant to section 420-a, a large percentage of the clients (tenants) must be in need of and receive a real and substantial charitable benefit ". This ORPS opinion cites <u>Belle Harbor</u>, supra and <u>Marino P. Jeantet</u>, supra for the proposition that " the provision of care and services to the indigent elderly on a nonprofit basis is a charitable activity, even though some of the elderly pay for the services with government benefits and a small percentage are able to pay for the services with private The opinion does not discuss the resident category of contract occupants.

No Distinction Made Between Private Pay And Contract Occupants

In 2000, Petitioner received 54% of its revenue from private pay residents and 46% of its revenue from S.S.I. residents, pursuant to the Official Statement for the public sale of "\$1,630,000 Civic Facility Revenue Bonds (The Adult Home at Erie Station, Inc. Project) Series 2001 B "35. In this Official Statement which was used to sell bonds to members of the public, Petitioner made no distinction between private pay and contract occupants, and included contract occupants in the private pay category.

In addition, the concept of "contract occupants" was not even mentioned by Petitioner in its letter dated April 5, 2001 to Town of Middletown Assessor Barnaski wherein it was stated that "1. The number of occupied bed days for the year 2000 was 33,154 of a possible 35,040.

2. The number of bed days occupied by SSI occupants was 19,439. 3. The number of days occupied by private pay occupants was 13,715...".

It appears that Petitioner never mentioned a possible contract class of occupants to anyone involved in this matter, not even the Assessor of the City of Middletown, until the approach of the instant trial. In both its Pre-Trial and Post-Trial Memorandum of Law, Petitioner failed to cite any decision of any court either in New York or out-of-state that considers the type of residents Petitioner refers to as contract occupants.

S.S.I. Is The Only Subsidy

The Petitioner, by its own admission, stated that the only subsidy to Erie Station is through S.S.I. In Petitioner's April 5, 2001 letter to Assessor Bernaski, Petitioner stated that "6. The facility is not subsidized other than SSI. [Emphasis added]" At trial, there was testimony from Petitioner's witness that no cash is paid by Petitioner to make up for any amount that a tenant pays which is less than the private pay rate, whether it be S.S.I. payments or payments made by the so-called contract occupants. It is evident from Petitioner's April 5, 2001 letter as well as from the trial testimony, that Erie Station is only subsidized by S.S.I.³⁷.

Incidental Activity

In <u>Belle Harbor</u>, supra, the Court held that the care given to residents capable of paying should be regarded only as "incidental activity" and does not alter the petitioner's essentially charitable nature. In that case, 90 percent were S.S.I. occupants and 10 percent were private pay occupants. In the instant case, Petitioner received, approximately, 45 to 50 percent of its revenue from private pay residents. The private pay residents [which includes Petitioner's contract occupants] generate in excess of \$300,000 above the amount that would be derived if the subject property were operated as a full

S.S.I. operation³⁸. This sum cannot be regarded as incidental on, approximately, \$1,000,000 of gross income³⁹. The occupancy of, approximately, one-half of the population of the subject property by persons with some private resources cannot be considered "incidental" under the standards enunciated in Belle Harbor, supra⁴⁰.

No Violation of Private Inurement Test

Respondent states that Petitioner is in violation of R.P.T.L. §420-a(1)(b) which states that real property is not exempt if "...any member...of the owning corporation shall receive pecuniary profit from the operations, except for reasonable compensation ". It is Respondent's position that Elant, Inc. f/k/a Arden Hill Senior Health System, Inc. [" Elant "], as the sole member of Petitioner "has and continues to bill the Petitioner for management services in the sum of approximately \$300,000 in excess of market management fees...Elant has violated the 'actual cost' limitation in the Administrative Services Agreement (Ex."4") by billing the petitioner a fixed percentage of Elant's administrative cost regardless of benefit...Elant has billed the petitioner for management services in excess of 25% of gross revenues, and in violation of the private inurement test under RPTL §420-a(1)(b)"⁴¹.

Pursuant to the Administrative Services Agreement, comprehensive, on-going financial and human resource services were supplied to Erie

Station. The annual administrative fee is equivalent to the cost of providing the specified services, and there is no override-profit margin⁴². The actual costs incurred and the formula which was used to apportion these costs to Erie Station were reviewed and approved by independent certified public accountants⁴³. Hence, there was no evidence whatsoever, documentary or testimonial, offered at trial by Respondent, establishing "private inurement" on the part of Petitioner.

Accordingly, upon a review of the entire record including all testimony and trial exhibits, this court finds that Petitioner has not violated the private increment test.

Private Housing Finance Law

Respondent claims that R.P.T.L. §422 and the Private Housing Finance Law [" P.H.F.L. "] Articles II and XI apply to the instant matter. Petitioner, however, is not organized to provide housing pursuant to the P.H.F.L. Rather, Petitioner is exclusively organized under the Not-For-Profit Corporation Law for the purpose of providing care in a residential setting to those in need by reason of physical or other limitations associated with aging. It is licensed by the State of New York and regulated by the Department of Social Services to perform this service pursuant to 18 N.Y.C.R.R. Part 487.

A similar argument was raised in <u>Belle Harbor</u>, *supra* wherein the Court dismissed the contention stating, "However, the Private Housing

Finance Law does not apply to the case at bar because petitioner was not organized thereunder and was not financed by government funds derived from the sources specified in that statute...Section 422 of the Real Property Tax Law which grants tax exemptions to low income accommodations for the aged organized under Article 2 of the Private Housing Finance Law is not applicable to petitioner, which never had to qualify under that article." [Belle Harbor, at 101 Misc. 2d 913; See also: Matter of Bronxwood Home for the Aged, Inc. v. Tishelman, 184 N.Y.L.J. (No. 30), p. 7 (Bronx Sup., August 12, 1980)].

This Court finds that R.P.T.L. §422 and the Private Housing Finance Law Articles II and XI do not apply to the instant matter.

Petitioner Is Not Tax Exempt

Petitioner has failed to meet the exclusive use requirement set forth in R.P.T.L. §420-a(1)(a). According, Petitioner's request for a full exemption for the subject property for the years at issue is denied in its entirety.

PART III

APPRAISAL VALUATION

The Presumption of Validity

The Respondents argue that the Petitioner's valuation evidence failed to rebut the presumption of validity of the assessments in that the Petitioner's Appraisal was not based upon standard and accepted appraisal techniques and, therefore, did not meet the substantial evidence standard. A party seeking to overturn an assessment must first overcome this presumption of validity through the submission of substantial evidence [See e.g., Matter of FMC Corp. [Peroxygen Chems. Div.] v. Unmack, 92 N.Y.2d 179, 187, 677 N.Y.S. 2d 269 (1998) ("'In the context of tax assessment cases, the 'substantial evidence' standard merely requires that petitioner demonstrate the existence of a valid and credible dispute regarding valuation. The ultimate strength, credibility and persuasiveness are not germane during this threshold inquiry...a court should simply determine whether the documentary and testimonial evidence proffered by petitioner is based on 'sound theory and objective data' "); Matter of Niagara Mohawk Power Corp. v Assessor of the Town of Geddes, 92 N.Y.2d 192, 196, 677 N.Y.S. 2d 275 (1998) (" In the context of a proceeding to challenge a tax assessment, substantial evidence proof requires a detailed, competent appraisal based on

standard, accepted appraisal techniques and prepared by a qualified appraiser "); 22 N.Y.C.R.R. 202.59(g)(2)(appraisal reports utilized in tax assessment review proceedings "shall contain a statement of the method of appraisal relied on and the conclusions as to value reached by the expert, together with the facts, figures and calculations by which the conclusions were reached ")].

A Valid Dispute Exists

This Court finds that the Petitioner has submitted substantial evidence based upon " sound theory and objective data " consisting of an Appraisal and the testimony of Appraiser Richard Marchitelli and has demonstrated the existence of a valid dispute concerning the propriety of the assessments.

Petitioner's Burden Of Proof

Having met its initial burden, the Petitioner must prove, through a preponderance of the evidence, that the assessments are excessive. The Court has considered and evaluated the weight and credibility of the evidence submitted to determine whether the Petitioner has proven that the assessments are excessive.

PETITIONER'S VALUATION APPRAISAL

Property Appraised As Not-For-Profit Home For Adults

Petitioner's Appraiser was Richard Marchitelli MAI, managing director of Cushman & Wakefield, Inc. Valuation Services, Advisory Group⁴⁴. Mr. Marchitelli appraised the subject property " in the ownership, use and condition which existed on the taxable status dates according to the mandate of RPTL §302[1]: a state-licensed not-for-profit home for adults, owned by a not-for-profit Type B Corporation "⁴⁵. Mr. Marchitelli appraised the property by placing reliance on the actual operation of the home as set forth in the Petitioner's audited financial statements⁴⁶. In so doing, he considered the existing occupancy and the income levels provided by that occupancy⁴⁷.

Income Reflective Of Market Rates For Not-For-Profits

The Petitioner's Appraisal sets forth a description of the region⁴⁸, the local area⁴⁹ and the operation of the subject property⁵⁰. Mr. Marchitelli tested the rates utilized at the subject property by comparison with four not-for-profit Homes for Adults located in Orange County⁵¹. Employing the recognized appraisal technique of relative comparison analysis, Mr. Marchitelli concluded that the rates charged at the subject property were competitive market rates based upon its

location and amenities⁵². Mr. Marchitelli also concluded that the market conditions affecting the subject property rendered the actual income⁵³ generated by the property reflective of market rates⁵⁴.

Petitioner's Income Capitalization Approach

Mr. Marchitelli's value conclusions were predicated upon the application of the income capitalization approach and he did not employ either a cost approach or a sales comparison approach⁵⁵. Mr. Marchitelli considered the subject property's three main sources of income which consists of rental income for the private pay residents, the contract residents, and the S.S.I. residents. The historical revenue per resident per month considered by Mr. Marchitelli for each category was as follows⁵⁶:

	S.S.I.	<u>Contract</u>	<u>Private Pay</u>
2000	\$802	\$1,237	\$1,670
2001	\$816	\$1,200	\$1,745
2002	\$828	\$1,359	\$2,068

Mr. Marchitelli determined that the asking rates for the subject property were consistent with the market rates⁵⁷.

In addition to rental income [room revenue], the Petitioner received additional income from miscellaneous sources such as

barber/beauty income and laundry services. This additional income was included by Mr. Marchitelli in the total revenue⁵⁸. The total revenue relied upon for 2000 through 2002 was as follows:

	<u>2000</u>	<u>2001</u>	<u>2002</u>
Revenue	\$1,145,927	\$1,083,744	\$1,032,678

Petitioner's Potential Gross Income

The procedure used by Mr. Marchitelli to determine the Potential Gross Income for the subject property was to take this total revenue which results from actual collections for 2001 which was \$1,083,744, at an 83.4% occupancy rate, and extend this actual number to 100% occupancy, resulting in a Potential Gross Income of \$1,299,453⁵⁹.

Petitioner's Vacancy & Collection Loss Rates

In determining the deduction for vacancy and collection loss, Mr. Marchitelli did not use the actual vacancy rate of 16.6% for 2001, but instead used an 8% vacancy rate. Mr. Marchitelli explained that in 2001 and 2002 there were operational changes at the subject property reflected in the reduction in the number of occupied units in an effort to reduce expenses. Since these operational changes were not successful, Mr. Marchitelli estimated higher occupancy rates [and

therefore lower vacancy rates] than those actually achieved 60 , choosing 8% rather than 16.6%.

Petitioner's Effective Gross Income

A deduction for this 8% Vacancy and Collection Loss results in an Estimated Gross Income for 2001 of approximately \$1,200,000 [rounded]⁶¹. For 2002, Mr. Marchitelli increased his 2001 Estimated Gross Income by 4%, which is the approximate increase in rates experienced at the subject property between 2001 and 2002, thereby estimating the Effective Gross Income for 2002 to be \$1,250,000 [rounded] as opposed to the actual effective collections of \$1,032,678. According to Mr. Marchitelli, this reflects a vacancy and collection loss of 8% for 2002.

Petitioner's Operating Expenses

Mr. Marchitelli estimated the subject property's annual operating expenses by reviewing the historical costs reported in the subject's financial statements and by analyzing industry-wide expenses and expense ratios published by the American Seniors Housing Association⁶²

["ASHA"]. He took into consideration that certain expenses for the property, such as insurance premiums, were being paid by other Elant entities⁶³. In determining the annual operating expenses, Mr. Marchitelli considered the following expenses: adult home, activities,

dietary, environmental, utilities, housekeeping, insurance, management fee, and replacement reserves. For 2001, he estimated the expenses at \$990,000, which is equivalent to an expense ratio of 82.5% of the Effective Gross Income. In 2002, he determined the expenses to be \$1,029,000, which is 82.3% of the Effective Gross Income⁶⁴. Mr. Marchitelli stated that he chose the expense ratios that are at the upper end of industry standards, explaining that this is "due to the age of the facility as well as the large portion of the subject census comprised of S.S.I. residents...".⁶⁵

Petitioner's Net Operating Income

Mr. Marchitelli reduced the 2001 Estimated Gross Income of \$1,200,000 [rounded] by the 2001 estimated expenses of \$990,000 to obtain a 2001 Net Operating Income of \$210,000. He also reduced the 2002 Estimated Gross Income of \$1,250,000 [rounded] by the 2002 estimated expenses of \$1,029,000 to obtain a 2002 Net Operating Income of \$221,000.

Petitioner's Overall Capitalization Rate

In determining the appropriate capitalization rate, Mr. Marchitelli utilized findings reported in *The Senior Care Acquisition Report*, 2003, published by Irving Levin Associates, Inc. 66 ["SCAR "], and findings

from the Senior Care Participants Survey⁶⁷ [" Senior Survey "], published by Cushman & Wakefield, Inc. Cushman & Wakefield, Inc. also conducted a survey of senior care participants regarding their investment parameters for senior housing properties in 2001⁶⁸ [" 2001 Senior Care Survey "]. According to Mr. Marchitelli, the Senior Survey indicated that average capitalization rates in 2001 and 2002 were 11.3% and 12.2%, respectively. In reviewing the 2001 Senior Care Survey, Mr. Marchitelli concluded that capitalization rates for adult home facilities ranged from 10.00% to 12.00% with an average of 11.10%.

In choosing the appropriate capitalization rate for the subject property, Mr. Marchitelli looked at its location, occupancy, and the overall condition and utility of the property. Mr. Marchitelli considered that the subject property is a mid-sized adult home facility located in an average demographic area in New York State and that the market area is at equilibrium with no undersupply. Mr. Marchitelli stated that a large portion of the population is comprised of S.S.I. residents as indicated by the resident census of the subject property. He stated that this is the lowest paying group with the smallest annual increase in rates, thereby influencing risk associated with investing in the subject property. Upon a review of all these factors, Mr. Marchitelli considered a capitalization rate of 12.00% to be appropriate for the property in 2001, and 12.5% to be appropriate for 2002⁶⁹.

Mr. Marchitelli added the Effective Tax Rate to the capitalization rate to derive the appropriate overall capitalization rate. For 2001, the Effective Tax Rate was 3.77%, and for 2002 it was 3.02%. When Mr. Marchitelli added those rates to his chosen capitalization rates for those years, he concluded the Overall Capitalization Rates for 2001 and 2002 to be 15.75% and 15.50% respectively.

Petitioner's Market Values

To arrive at his 2001 value conclusion, Mr. Marchitelli divided his Net Operating Income of \$210,000 by the Overall Capitalization Rate of 15.75% and determined that the retrospective market value of the property as a going concern as of January 1, 2001 was \$1,335,000. For 2002, by dividing the Net Operating Income of \$221,000 by the Overall Capitalization Rate of 15.50%, he determined that the market value of the property as of January 1, 2002 was \$1,425,806.

No Deduction For Business Value

Mr. Marchitelli made no deduction for the business value of the subject property since he concluded that there was no inherent business value in the property during the years under review.

Deduction For Personal Property

His final step, therefore, was to deduct the value of the personal property [that being the furniture, fixtures and equipment ["FF&E"]] in an amount of \$90,000 for each year in issue.

Petitioner's Final Values

This resulted in a final value opinion by Mr. Marchitelli of \$1,245,000 for 2001 and \$1,335,000 for 2002⁷⁰. When the value for each year is multiplied by the Equalization Rate for that year [29.00% for 2001 and 22.97% for 2002] the indicated assessed values are \$361,000 for 2001 and \$306,650 for 2002. According to Mr. Marchitelli, this would result in a reduction in assessed value of \$356,850 for 2001 and \$411,250 for 2002⁷¹.

RESPONDENTS' VALUATION APPRAISAL

Property Appraised As Private For-Profit Facility

Respondent's Appraiser was Barry M. Herbold, ASA, of Empire State Appraisal Consultants. Mr. Herbold, in valuing the fee simple interest for tax assessment purposes, disregarded the non-profit operation of the facility, reasoning that the below market public pay rates are synonymous with a leased fee situation. Therefore, Mr. Herbold explained that he appraised the property as a private, for-profit facility⁷².

Income Reflective Of Market Rate For Private Pay Facilities

Mr. Herbold reviewed Petitioner's 2000 through 2003 resident rent rolls, and investigated assisted living facilities in the Mid-Hudson area similar to the subject property in his effort to establish a market rent for the property. These properties are all urban located assisted living facilities, and are similar to the subject property with respect to size, type of care, services provided, and amenities. Based on this data, Mr. Herbold concluded that the private rates charged by the subject property were reflective of the market and should be utilized in his analysis⁷³.

Respondents' Potential Gross Income

By adding together the private pay rates for all 96 rooms [assuming 100% occupancy] Mr. Herbold concluded the Potential Gross Income for the subject property for 2001 to be \$1,895,652 and for 2002 to be \$2,028,444.

Respondents' Vacancy Rates

To determine the Vacancy Allowance, Mr. Herbold analyzed the occupancy history of the subject property based on monthly reports provided by the property owners. Mr. Herbold also examined the *Senior Care Acquisition Report*, 2003 ["SCAR"]. Mr. Herbold concluded that an occupancy rate of 90% for the 2001 and 2002 period was reflective of the market⁷⁴.

Respondents' Effective Gross Income

Mr. Herbold's analysis resulted in a Vacancy Loss of 10% which when subtracted from the Potential Gross Income for each year at issue resulted in an Effective Gross Income of \$1,706,400 for 2001 and \$1,825,200 for 2002.

Respondents' Operating Expenses

In determining the Operating Expenses for the subject property, Mr. Herbold examined the facility's 1999 through 2002 operating statements. He explained that since the subject property is operated by Arden Hill Holding, Corp., a related entity, which owns and operates several other health care facilities in Orange County and allocates expenses such as management, centralized administration, insurance, information systems and human resources over multiple locations, he determined that the subject property's expenses may not be reflective of expenses generated by a discrete facility. Therefore, Mr. Herbold analyzed the subject operating statements and compared them with industry data provided by SCAR. Based on his analysis, Mr. Herbold chose to use a ratio of 70% of the total Estimated Gross Income for expenses in his analysis, which is at the upper end of the range as reported by SCAR.

Respondents' Net Operating Income, Business Value & FFE

When the Estimated Gross Income is reduced by Operating Expenses at a ratio of 70%, the result is a Net Operating Income of \$512,400 for 2001 and \$547,200 for 2002⁷⁶. However, these figures were reduced because of several other considerations. In order to separate the value of the for-profit business enterprise from the value of the real estate, Mr. Herbold deducted the income attributable to the business enterprise

for each year at 4% of Potential Gross Income. This resulted in a deduction of \$75,800 for 2001 and \$81,100 for 2002. Mr. Herbold made further reductions in the amount of \$38,000 for Building Reserves, \$19,000 for Replacement Reserves, and \$8,100 for Return on Personal Property [FF&E]⁷⁷. The result was a Net Operating Income of \$371,500 for 2001 and \$401,000 for 2002.

Respondents' Overall Capitalization Rate

In order to determine an appropriate capitalization rate, Mr. Herbold reviewed The National Investment Center for the Seniors Housing and Care Industries⁷⁸ [" N.I.C. "] along with SCAR. Mr. Herbold stated that the N.I.C. reported the average range for capitalization rates to be 10.9% to 11.4%, and SCAR reported the average range to be 11.2% to 12.2%. He concluded that both sources are supportive of a going-concern capitalization rate of 11.5%. However, it was Mr. Herbold's position that a typical entrepreneurial reward of 10% to 20% for the business enterprise must be allowed, thereby requiring an overall discount of 15%. This would generate a capitalization rate of 9.78%⁷⁹. When added to the effective tax rate of 3.77% for 2001 and 3.02% for 2002, the Overall Capitalization Rate, according to Mr. Herbold, should be 13.55% for 2001 and 12.80% for 2002.

Respondents' Market Values

By dividing the Net Operating Incomes for each year by his chosen Capitalization Rates for 2001 and 2002, Mr. Herbold's values for the subject property are \$2,740,000 for 2001 and \$3,130,000 for 2002.

DISCUSSION

Elant Properly Valued As A Not-For-Profit Adult Home

Mr. Marchitelli appraised the subject property as a state-licensed not-for-profit home for adults, placing greatest reliance on the actual operation of the home as set forth in its audited financial statements contained in both appraisal reports⁸⁰. Petitioner's New York State license to operate an adult home limited the use of the property to not-for-profit operations as did its not-for-profit charter and the requirements of its Internal Revenue Code § 501(c)(3) exempt status⁸¹.

Subject Property Must Be Valued Based On Its Current Use

Real Property Tax Law ["R.P.T.L."] § 302(1) states that "[t]he taxable status of real property in cities and towns shall be determined annually according to its condition and ownership as of the first day of March and the valuation thereof determined as of the appropriate valuation date." The New York State Office of Real Property Services ["ORPS"] has set forth their opinion on this issue in Volume 10 Opinions of Counsel SBRPS No. 45. This opinion discusses when property should be valued according to its current use and when it should be valued based on its highest and best use. ORPS counsel concluded in their opinion that for purposes of real property tax assessments,

property must be valued based upon its current use, not its highest and best use.

The courts in New York State have adopted current use as the general standard for tax assessment purposes in valuing improved properties⁸² [See e.g., Addis Co. v. Srogi, 79 A.D.2d 856, 434 N.Y.S.2d 489 (4th Dept., 1980), mot. lv. to app. den., 53 N.Y.2d 603 (1980)(the standard for valuing property for assessment purposes is "its condition on the taxable status date, without regard to future potentialities or possibilities and may not be assessed on the basis of some use contemplated in the future "; Farone & Son, Inc. v. Srogi, 96 A.D.2d 711, 465 N.Y.S.2d 373 (4th Dept. 1983); BCA-White Plains Lanes, Inc. <u>v. Glaser</u>, 91 A.D.2d 633, 635, 457 N.Y.S.2d 299 (2d Dept. 1982); Adirondack Mountain Reserve v. Bd. of Assessors , 99 A.D.2d 600, 601, 471 N.Y.S.2d 703 (3d Dept. 1984), aff'd, 64 N.Y.2d 727, 485 N.Y.S.2d 744 (1984); General Motors Corp. v. Town of Massena 146 A.D.2d 851, 536 N.Y.S.2d 256 (3d Dept. 1989); General Electric Co. v. Macejka, 117 A.D.2d 896, 498 N.Y.S.2d 905 (3d Dept. 1986) (" The valuation of property is determined by its status as of the taxable date, and may not be assessed on the basis of some future contemplated use "); New Country Club of Garden City v. Bd. of Assessors, Supreme Court, Nassau County, Index No. 12696/88, June 4, 1991 (golf course valued at current use not as potential residential development; " In assessment, however, the statutory prescription of valuation according to extant conditions [i.e., RPTL §302[1]], a "cardinal principle of valuation"...

[citations omitted]...has been interpreted to require valuation of improved property according to its existing use, not a potential one contemplated in the future...[citations omitted]...This is consonant with the noted assessment goals since it appears unfair and inequitable to tax property according to value it does not have, but may have in the future..." 83)].

Mission To Provide Medical & Custodial Care For The Elderly

In Tarrytown Hall Care Center v. The Bd. Of Assessors of the Town of Greenburgh, Supreme Court, Westchester County, Index No. 14267/98, March 15, 2004, Rosado, J., the subject property consisted of a 120-bed nursing home in the Village of Tarrytown. The court rejected the Respondent's theory of valuation, wherein Business Enterprise Value (BEV) and the fixtures, furnishings and equipment (FFE) income are deducted from the Net Operating Income to arrive at the value of the real estate. The court found that the Respondent's theory of valuation "is not persuasive because it places profit 'ahead of expenses in a normal sequence of business expenses'...", and instead accepted Petitioner's valuation of the subject property wherein Medicaid capital costs reimbursements were capitalized in determining the market value of the nursing home. The court stated that the Petitioner's mission as a nursing home is to provide medical and custodial care for elderly patients who are in need [emphasis added], and "it is clear that the

great majority of the subject's patients are on Medicaid (public assistance), and there is logic in Sterling's method of capitalizing Medicaid reimbursements, with adjustments for Medicare reimbursements and private pay income."

No Evidence Of Private Pay Market

No evidence has been presented to demonstrate that a private pay market existed in the subject area which would fully occupy the property. Middletown is an old, slow-growing community with little commercial development. The subject property was originally erected by an unrelated entity as a "for profit" Home For Adults which failed, was foreclosed, and subsequently sold to Petitioner. Throughout the period under review there were empty beds at the subject property which could not be filled due to the lack of prospective occupants⁸⁴. This caused Petitioner to reduce the number of occupied units in an unsuccessful effort to reduce its deficit⁸⁵. Mr. Herbold ignored the fact that only 10 per cent of Petitioner's occupants were able to pay the full private pay rate, with the remainder being either S.S.I. residents or contract residents. He also chose not to take into consideration the depressed Middletown area and poor market conditions.

Struggling Adult Home In Poor, Run-Down Area

The condition of the subject property as of the taxable status dates at issue was as a struggling, not-for-profit adult home in a poor, run-down area, with only a small percentage of its occupants able to pay the full private pay rate. This is a far cry from the Potential Gross Income presented by Mr. Herbold where there was 100% occupancy with all residents able to pay the full private pay rate. There was no evidence presented which would indicate that Petitioner's financial situation [which would include a substantial increase in the number of residents able to pay the full private rate] would change for the better in the foreseeable future.

Not-For-Profit Home For Adults

It is this Court's opinion based on statutory mandate, prior case law, and the particular facts of this case that Petitioner is correct in its valuation of the subject property as a not-for-profit home for adults and not as a private, for-profit facility.

Potential Gross Income

This Court accepts Petitioner's Potential Gross Income for 2001 of \$1,299,453, which is the figure obtained when Mr. Marchitelli extended the Actual Collections for 2001 of \$1,083,744 at an 83.4% occupancy rate to a 100% occupancy rate. For 2002, following the same formula Mr. Marchitelli used for 2001, and extending the Actual Collections for 2002 of \$1,032,678 at a 79.2% occupancy rate to a 100% occupancy rate, the Potential Gross Income for 2002 is \$1,304,000.

Vacancy and Collection Loss

This Court accepts Mr. Marchitelli's Vacancy and Collection Loss for 2001 of 8% even though the actual rate is 16.6%. This choice of 8% reflected operational changes wherein the number of occupied units for that year were reduced in an effort to reduce expenses. Since these operational changes were not successful, Mr. Marchitelli estimated lower vacancy rates than those actually achieved. The reduction of the 2001 Potential Gross Income by an 8% vacancy rate results in an Estimated Gross Income of \$1,200,000 [rounded]. Rather than estimate the Effective Gross Income for 2002 by using the actual effective collections of \$1,032,678, Mr. Marchitelli estimated them to be \$1,250,000 [rounded] by increasing the Estimated Gross Income for 2001 by 4%, which is the approximate increase in rates experienced at the

subject property between 2001 and 2002. According to Mr. Marchitelli, this also reflects a Vacancy and Collection Loss of 8% for 2002. However, to reach an Effective Gross Income of \$1,250,000 from a Potential Gross Income of \$1,304,000, the Vacancy and Collection Loss would be approximately 4%.

Operating Expenses

Mr. Marchitelli determined that the operating expenses for the home, activities, property, including adult environmental, utilities, housekeeping, insurance, management fee, and replacement reserves, were \$990,000 for 2001 which represented an expense ratio of 82.5% of the Effective Gross Income for that year and \$1,029,000 for 2002 which represented an expense ratio of 82.3% of that year's Effective Gross Income. Mr. Marchitelli estimated these expense figures by reviewing the historical costs reported in the subject property's expense statements and by analyzing industry-wide expenses and expense ratios published by ASHA86. Mr. Marchitelli explained that his expense ratios of 82.5% for 2001 and 82.3% for 2002 are at the upper end of industry standards. Mr. Herbold determined that an expense ratio of 70% of the Estimated Gross Income was appropriate which he stated is at the upper end of the range as reported by SCAR87 This Court accepts Mr. Marchitelli's operating expense figures but is of the opinion that an adjustment downward of these expenses by 6% to a 76.3% expense ratio is a more accurate representation of the subject property's operating expenses.

No Inherent Business Value

Although adult home facilities are a combination of business and real estate, and its day-to-day operation represents a business component over and above the real estate, this Court accepts Mr. Marchitelli's conclusion that there is no inherent business value in the subject property during the years under review. Therefore, it is not appropriate in this instance to deduct a portion of the gross income stream attributable to the business enterprise as Mr. Herbold did in his appraisal.

Net Operating Income

This Court does find that it is appropriate to deduct Mr. Herbold's figure of \$8,100 for Return on Personal Property (FF&E) as well as his figure of \$38,000 for Building Reserves. This results in Operating Expenses of \$884,500 for 2001 and \$921,160 for 2002. This Court concludes the Net Operating Income to be \$315,000 for 2001 and \$328,840 for 2002.

Capitalization Rates

Mr. Marchitelli chose capitalization rates of 12% for 2001 and 12.5% for 2002 based on his review of SCAR , Cushman & Wakefield, Inc.'s Senior Care Participant's Survey [with average capitalization rates of 11.3% for 2001 and 12.3% for 2002], as well as Cushman & Wakefield's survey of senior care participants regarding their investment parameters [with an average capitalization rate of 11.10%]. He stated that he chose a capitalization rate higher than the average reported in the surveys he reviewed to reflect the risk associated with investing in the subject property. Mr. Herbold agreed with Mr. Marchitelli in that he stated that his sources supported a capitalization rate of 11.50%. Both appraisers differ in that it is Mr. Herbold's position that a typical entrepreneurial reward of 15% for the business enterprise must be allowed for, generating a capitalization rate of 9.78%88. The Court rejects Mr. Herbold's view and finds that the appropriate capitalization rate for the subject property is 11.50%.

Effective Tax Rates Added

When the capitalization rates are added to the effective tax rates of 3.77% for 2001 and 3.02% for 2002, this Court finds that the appropriate Overall Capitalization Rate for the subject property is 15.27% for 2001 and 14.52% for 2002.

Final Value, Assessment, and Refund

Dividing the 2001 and 2002 Net Operating Incomes of \$315,500 and \$328,840 by their respective Overall Capitalization Rates results in Final Values of \$2,066,143 for 2001 and \$2,264,738 for 2002. Multiplying the 2001 and 2002 Final Values by the appropriate Equalization Rates of 29.00% and 22.97%, respectively, for each year results in an Assessed Value of \$599,181 for 2001 and \$520,210 for 2002.

Subtracting these assessed values from the actual assessment for 2001 and 2002 of \$717,900 results in refunds of \$119,000 [rounded] for 2001 and \$198,000 [rounded] for 2002.

Summary of Figures

	<u>2001</u>	2002
Potential Gross Income	\$1,299,453	\$1,304,000
Vacancy & Collection Loss	8%	4%
Effective Gross Income	\$1,200,000	\$1,250,000
Total Expenses	\$884,500	\$921,160
Net Operating Income	\$315,500	\$328,840
Capitalization Rate (overall)	15.27%	14.52%
Value	\$2,066,143	\$2,264,738
Equalization Rate	29%	22.97%
Assessment	\$599,181	\$520,210
Refund	\$119,000	\$198,000

Conclusion

The Petitions, with costs [R.P.T.L. § 722[1]], are sustained to the extent indicated above, the assessment rolls are to be corrected accordingly, and any overpayments of taxes are to be refunded with interest.

The foregoing constitutes this Court's Decision and Order.

Dated: White Plains, NY July 1, 2005

HON. THOMAS A. DICKERSON SUPREME COURT JUSTICE

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ENDNOTES

- 1.Petitioner's Post-Trial Memorandum [" P. Memo. "] at p. 7.
- 2. Tr. Ex. N.
- 3. Tr. Ex. 5, Attachment entitled "Certificate of Amendment of Certificate of Incorporation of Arden Hill Holding Corp. ".
- 4. Tr. Exs. 1, 12 at p. 210, V at p. 13.
- 5. Tr. Ex. 12 at pp. 48-49.
- 6. Tr. Ex. V at p. 15.
- 7. See e.g., <u>SKM Enterprises</u>, <u>Inc. v. Town of Monroe</u>, 2 Misc. 3d 1004(A), 2004 WL 503485 (West. Sup. 2004)(SKM's 1996 appraisal refers to "dynamic nature of the real estate market in Orange County, New York area resulting in an obvious upward pressure on real estate values in the vicinity of the (Town of Monroe) ").
- 8. Trans. 1, 6/10/04 at p. 60; Trial Ex. V at pp. 14-15.
- 9. Trans. 1, 6/10/04 at pp. 61, 62, 172; Trans. 2, 10/29/04 at p. 26.
- 10. Tr. Ex. 12 at p. 31; Trans. 2, 10/29/04 at pp. 31-32; Trans. 1, 6/10/04 at pp. 158-159.
- 11. Trans. 1, 6/10/04 at pp. 87-88.
- 12. See Title 18, Department of Social Services, Chapter II, Regulations of the Department of Social Services, Subchapter D, Adult-Care Facilities, Part 487, Standards for Adult Homes, §§ 487.2 (a) and 487.4 (b)(1), (2), and (3); Social Services Law, Chapter 55 of the Consolidated Laws, Article 1, §2(25) (" An adult home shall mean an adult care facility established and operated for the purpose of providing long-term residential care, room, board, housekeeping, personal care and supervision to five or more adults unrelated to the operator. ")
- 13. Trans. 1, 6/10/04 at pp. 38-43.
- 14. Trans. 1, 6/10/04 at pp. 61-62, Trans. 2, 10/29/04 at pp. 25-26.
- 15. Trans. 1, 6/10/04 at p. 39.

- 16. Trans. 1, 6/10/04 at pp. 80-81.
- 17. Tr. Ex. 5; Trans. 1, 6/10/04 at pp. 82-83.
- 18. Tr. Ex. M at p. 41.
- 19. Tr. Ex. A.
- 20. Tr. Ex. A.
- $21.\,\mathrm{See}$ P. Memo. at pp. 2-3 and Petitioner's Reply Memorandum of Law at pp. 4-7 [" R. Reply Memo. "].
- 22. P. Memo. at p. 3; Tr. Exs. E, F & G.
- $23.\,\mathrm{Tr.}$ Ex. H (for 2000 S.S.I. 58.63% and Contract and Private Pay 41.37%; for 2001, S.S.I. 55.58% and Contract and Private Pay 44.42%); Tr. Ex. M at p. 41 (for 2000, S.S.I. 46% and Private Pay (includes Contract) 54%).
- $24.\,\mathrm{Tr.}$ Ex. H (for 2000, Private Pay 11.59% and for 2001, Private Pay 10.10%).
- 25. Tr. Exs. 12 at p. 29, V at p. 47; Trans. 1, 6/10/04 at pp. 79-80, 123-124, 158-159.
- 26. Compare: Miriam Osborn Memorial Home Association v. Te

 Assessor of City of Rye, 4 Misc. 3d 1009(A), 2004 WL 1656500
 (West. Sup. 2004)(The petitioner, The Miriam Osborn Memorial Home Association...' a not for profit organization which, for the past 90 years, has provided housing for the elderly in a facility situated on land located in the city of Rye '...'...admission to Sterling Park is restricted to relatively healthy, elderly individuals who can afford to pay entrance fees ranging from \$229,000 to \$526,000 and monthly maintenance fees ' ranging from \$1,850 to \$2,500..' ").
- 27. Trans. 1, 6/10/04 at pp. 52-53, 102-104; Trial Exs. C and D.
- 28. Trans. 1, 6/10/04 at pp. 53, 104, 106, 109-110; Trial Ex. 11.
- 29. Trans. 1, 6/10/04 at p. 91.
- 30. Tr. Ex. L; Trans. 1 at p. 139. Trial Ex. L is a comparison of the actual revenues per the audited statements versus the income received if the property were leased "exclusively "to S.S.I. tenants at the existing vacancy rates.

- 31. Tr. Exs. E, F, and G.
- 32. Tr. Ex. 5.
- 33. Tr. Ex. 5, a/b org. at p. 1.
- 34. Tr. Ex. 5.
- 35. Tr. Ex. M at p. 41.
- 36. Tr. Ex. A.
- 37. Tr. Ex. A; Trans. 1, 6/10/04 at pp. 139-140.
- 38. Tr. Ex. L; Trans. 1, 6/10/04 at pp. 137-139.
- 39. Tr. Ex. D; Trans. 1, 6/10/04 at pp. 137-139.
- 40. Tr. Exs, E, F, G, and H.
- 41. R. Memo. at p. 7.
- 42. Tr. Ex. 4 at Schedule A.
- 43. Trans. 1, 6/10/04 at pp. 173-174.
- 44. Tr. Exhibit 12).
- 45. P. Memo. at p. 27; Trans. 2, 10/29/04, p. 19.
- 46. Trans. 2, 10/29/04, p. 19; Trial Exhibit 12, p. 37.
- 47. Tr. Exhibit 12, pp. 37-39.
- 48. Tr. Ex. 12, p. 14.
- 49. Tr. Ex. 12, p. 15.
- 50. Tr. Ex. 12, pp. 17-20.
- 51. Tr. Ex. 12, pp. 24-28; Trans. 2, pp. 25-27.
- 52. Tr. Ex. 12, p. 29; Trans. 2, 10/29/04, pp. 27-29.
- 53. The Appendix to this Appraisal [Tr. Ex. 12] included schedules which itemized the subject occupancy for the years

2000-2003, along with certified, audited accounting statements for the years 1999-2002 which showed the actual revenue of the subject property.

54. Trans. 2, 10/29/04, pp. 138, 143.

55. Tr. Ex. 12, pp. 36, 48.

56. Tr. Ex. 12, p. 38.

57. Tr. Ex. 12, p. 37.

58. Tr. Ex. 12, p. 38.

59. Tr. Ex. 12, pp. 38-39; Petitioner's Post-Trial Memorandum, p. 28.

60. Tr. Ex. 12, p. 37.

61. Tr. Ex. 12, p. 39; Petitioners Post-Trial Memorandum, p. 28.

62. Tr. Ex. 12, p. 39.

63. Trans. 1, 6/10/05, p. 106.

64. Tr. Ex. 12, pp. 42-43.

65. Tr. Ex. 12, p. 42.

66. Tr. Ex._12, p. 44.

67. Tr. Ex._12, p. 44.

68. Tr. Ex._12, pp. 44-45.

69. Tr. Ex. 12, p. 43.

70. Tr. Ex. 12, pp. 49-50.

71. Tr. Ex. 12, April 23, 2004 letter to Mr. Brandt from Mr. Marchitelli.

72. Tr. Ex. V, p. 33.

73. Tr. Ex. V., p. 47.

74. Tr. Ex. V, p. 49.

75. Tr. Ex. V, p. 50.

76. Tr. Ex. V, p. 51.

77. Tr. Ex. V, pp. 54-55.

78. The National Investment Center for the Seniors Housing and Care Industries, Integra Realty Resources, 2002, New York.

79. Tr. Ex. V, p. 57.

80. Trans. 2, 10/29/04, p. 19; Tr. Ex. 12, p. 37.

81. Trans. 1, 6/10/04, p. 157.

- 82. Vacant land may be treated differently. See <u>Appraisal of Real Estate</u>, 12th Edition, Appraisal Institute, Chicago, 2001, at p. 43 ("Land is valued as if vacant and available for its highest and best use. Highest and best use for land is the use that, at the time of the appraisal, is the most profitable likely use").
- 83. In New Country Club of Garden City v. Bd. of Assessors, Supreme Court, Nassau County, Index No. 12696/88, June 4, 1991 the court contrasted the case of a parcel subject to condemnation pursuant to the Eminent Domain Procedure Law where the owner will be compensated for his loss in value only once. In such cases, the court said it is appropriate to value the property taking into consideration potential future uses. "Assessment valuation is supposed to be realistic and pragmatic [See, Matter of Merrick Holding Corp. v. Bd. of Assessors of the County of Nassau, 45 N.Y.2d 538,542, 410 N.Y.S.2d 565 (1978); Matter of Great Atlantic and Pacific Tea Company v. Kiernan, 42 N.Y.2d 236, 397 N.Y.S.2d 718 (1977)] and a seemingly important, but seldom articulated distinction is the recurring nature of assessment versus the oneshot nature of appropriation. In the latter, where just compensation is the controlling standard, it is entirely proper to consider future potentialities which are sufficiently certain, particularly where such are reflected in comparable sales in the market...In assessment cases, however, the property is evaluated every year and thus there is no comparable need to insure that future potentialities be precisely accounted for. When and if such potentialities eventuate, the property can then be reassessed on the basis of how the property actually ends up being used, without any need to prognosticate as to reasonable probabilities...citation omitted...This is consistent with the

statutory requirement that property be assessed according to actual conditions (i.e., RPTL §302(1)). Hence, potential uses considered in appropriation cased are not necessarily applicable to assessment cases." See also Matter of Village of Port Chester, 5 Misc. 3d 1031(A)(West. Sup. 2004) for a discussion of advance payments and interest rates in condemnation proceedings as compared to appropriate interest rates in tax certiorari proceedings (" It is problematical, at best, that Claimants herein would be able to borrow money at a 3% interest rate or even at the statutory 6% interest rate in order to 'replace that which (they have) lost `. The purpose of real property tax refunds, however, is to compensate tax payers for paying more taxes than they should have, typically, several years ago. While such a windfall is welcome there is none of the urgency and, perhaps, even desperation, which condemnees face when their property is taken in a condemnation proceeding. This is why advance payments have been mandated, why advance payments should be paid sooner rather than later and why statutory interest of 6% should be imposed ").

84. Trans. 1, 6/10/04, pp. 80-81, 125-127.

85. Tr. Ex. 12, p. 37; Trans. 2, 10/29/04, p. 43.

86. Tr. Ex. 12, p. 39.

87. Tr. Ex. V, p. 50.

88. Tr. Ex. V., p. 57.