SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MIRIAM OSBORN MEMORIAL HOME ASSOCIATION,

Petitioner,

Index No: 17175/97
18077/98
16567/99
16113/00
16626/01
18115/02
16987/03

-against-

THE ASSESSOR OF THE CITY OF RYE, THE BOARD OF ASSESSMENT REVIEW OF THE CITY OF RYE, AND THE CITY OF RYE,

Respondents,

DECISION & ORDER

-and-

THE RYE CITY SCHOOL DISTRICT,

Intervenor-Respondent.

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DICKERSON, J.

POST TRIAL DECISION : THE MIRIAM OSBORN MEMORIAL HOME ASSOCIATION

PART II : VALUATION

In this Court’s Post Trial Decision Part I : Tax Exemption rendered on December 30, 2006 [Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, 14 Misc. 3d 1209 (West. Sup. 2006)] the issue of whether and to what extent the Petitioner, The Miriam Osborn Memorial Home Association [“ The Osborn “], may claim a “ charitable use “ and/or “ hospital use “ real property tax exemption pursuant to R.P.T.L. § 420(a)(1)(a) [“ RPTL § 420-a “] for the tax years 1997 to 2003 was resolved with the denial of any RPTL § 420-a charitable use exemption and the granting of a partial RPTL § 420-a hospital use exemption.

The Valuation Issue

On the premise that the Osborn’s 100% exemption from real property taxation would not be restored, in whole and or in part, the Osborn pursued its challenge to the assessments imposed upon its property for the tax years 1997 through 2003, seeking a reduction in assessed value and appropriate refunds of taxes paid [Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, No: 17175/97, Slip Op. February 3, 2005 at pp. 4-5 (“ Were...the Osborn’s 100% tax exempt status restored then there would be no further need for evidence on the issue of market value for assessment purposes. However, if such (is not found) then the trial will continue with the Petitioner presenting its case on the tax exemption issue after which the Petitioner shall present its case on the valuation issue followed by the Respondents' case ")].

Tax Exemption Revocation & Partial Restoration

In 1996 the Assessor revoked the Osborn's 100% tax exemption and raised the assessed value of the subject property from $2,045,100 to $2,584,000. However, the Osborn protested and after a Public Hearing the BAR confirmed the increase in assessed value but exempted $538,050 from taxation amounting to an exemption of 20.8%. In 1998 the Assessor revoked the Osborn's partial tax exemption and raised the assessed value from $2,584,000 to $2,794,000. Again, the Osborn protested and after a Public Hearing the BAR confirmed the increase in assessed value but exempted $581,700 from taxation amounting again to an exemption of 20.8%. In 2002 the Assessor increased the assessed value of the subject property from $2,794,000 to $3,224,000 while continuing the BAR restored exempt portion of $581,700, thereby reducing the percentage of the partial exemption from 20.8% to 18.04.

R.P.T.L. Article 7 Petitions Filed

The Osborn filed R.P.T.L. Article 7 Petitions for each of the tax years 1997 through 2003 challenging the revocation of its 100%

tax exemption and the amount of the assessed value of the subject property.

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 Bob Sterling and has demonstrated the existence of a valid dispute concerning the propriety of the assessments.

Ceiling & Floor Analysis

We have found it useful in determining the true value of real property in tax certiorari[1] and eminent domain proceedings[2] to establish a valuation floor and/or ceiling below which and/or above which this Court may not go, based upon certain well accepted principals.

The Ceiling

This Court finds that the Ceiling, based on the actual assessments set by the Respondent Assessor, and the corresponding market values, based on the conceded equalization rates, is as follows:

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[1] See e.g., VGR Associates LLC v. Assessor of the Town of New Windsor, 2006 WL 2851618 (Orange Sup. 2006); Orange And Rockland Utilities, Inc. v. Assessor of the Town of Haverstraw, 12 Misc. 3d 1194 (Rockland Sup. 2006); Mirant New York, Inc. v. Town of Stony Point Assessor, 13 Misc. 3d 1204 (Rockland Sup. 2006)(" We found it useful in determining the true value of Bowline to begin our analysis by constructing a valuation floor and ceiling based upon several well accepted principals. First, the Petitioners and Respondents are bound by their admissions of reconciled values in their respective appraisals for each year under review. Second, the Petitioners are bound by their full value figures set forth in their Petitions but only to the extent [as in Bowline but not herein] that they are greater than the admissions of value which appear in their appraisal. "); Orange and Rockland, Inc. v. Assessor of the Town of Haverstraw, 7 Misc. 3d 1017, 801 N.Y.S. 2d 238 (Rockland Sup. 2005).

[2] See e.g., Matter of Application of Village of Irvington v. Sokolik, 13 Misc. 3d 1220 (West. Sup. 2006).

Assessment Year	Market Value	Equalization Rate	Assessment
1997	$ 47,675,277	5.42 %	$ 2,584,000
1998	$ 52,716,981	5.30 %	$ 2,794,000
1999	$ 59,700,855	4.68 %	$ 2,794,000
2000	$ 66,523,810	4.20 %	$ 2,794,000
2001	$ 73,720,317	3.79 %	$ 2,794,000
2002	$ 113,122,807	2.85 %	$ 3,224,000
2003	$ 122,121,212	2.64 %	$ 3,224,000

The Floor

This Court also finds that the Floor, based on the Petitioner’s Appraisal and the Appraiser’s trial testimony, and the corresponding market values, based on the conceded equalization rates, is as follows:

1997	$ 38,000,000	5.42 %	$ 2,059,600
1998	$ 44,000,000	5.30 %	$ 2,332,000
1999	$ 46,000,000	4.68 %	$ 2,152,800
2000	$ 52,000,000	4.20 %	$ 2,184,000
2001	$ 54,000,000	3.79 %	$ 2,046,600
2002	$ 69,000,000	2.85 %	$ 1,196,000
2003	$ 76,000,000	2.64 %	$ 2,006,400

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 Bob Sterling MAI, of Stirling Appraisals, Inc. Mr. Sterling 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 and related residential facilities, owned by a not-for-profit Type B Corporation.“ In addition, Mr. Sterling appraised the property by determining that the property, with its 381 dwelling units, was a multi-family housing complex for tax certiorari purposes, which, although it operates in a manner similar to for-profit institutions, nevertheless was non-profit and generally charged below-market fees for the services that it provides. He further placed reliance on the actual operation of the home as set forth in the Petitioner’s audited financial statements. In so doing, he considered the existing occupancy and the income levels provided by that occupancy.

Arriving At Income Reflective Of Market Rates

The Petitioner’s Appraisal sets forth a description of the region, the local area and the operation of the subject property. Mr. Sterling recognized that, while The Osborn does receive monthly resident fees for meals, personal care, and various other goods and services, it does not receive rent for the residential areas of the property. In addition, while The Osborn does receive rental for three small commercial areas, Mr. Sterling concluded that these rentals were unusual and not reflective of market conditions. Therefore, Mr. Sterling utilized rental conditions at similar rental properties located in Westchester County to compute proper market rates and expenses for The Osborn’s residential and commercial rental space.

Petitioner’s Income Capitalization Approach

Mr. Sterling’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 approach, except (regarding the latter) in the case of the surplus land on the property. Mr. Sterling, by using comparable rental properties in the area, computed a potential gross income for each of the tax years, from which he deducted a vacancy rate. He then computed an Effective Gross Income for these years.

Petitioner’s Potential Gross Income

The procedure used by Mr. Sterling to determine the Potential Gross Income for the subject property was to take the total revenue which results from actual collections by the examined comparable properties for the years 1997 through and including 2003, which was as follows:

1997	1998	1999	2000
$ 6,443,836	$ 7,149,875	$ 7,461,836	$ 8,019,553
2001	2002	2003	
$ 8,207,959	$ 11,492,303	$ 11,774,544	

Petitioner’s Vacancy & Collection Loss Rates

In determining the deduction for vacancy and collection loss, Mr. Sterling initially used the actual vacancy rate of 2% provided by the Osborn, excluding the entrance fee units from consideration since he believed that they were not representative of typical rental apartment vacancies. Mr. Sterling then modified that figure to account for the presence of office space at The Osborn, which space generally experiences much higher vacancy rates, to arrive at a rate of 3.5 %. He then compared this rate with three recent comparables in Westchester County, two of which experienced rates more than double that which he utilized.

Petitioner's Effective Gross Income

A deduction for this 3.5% Vacancy and Collection Loss results in an Estimated Gross Income for the attendant tax years as follows:

1997	1998	1999	2000
$ 6,218,301	$ 6,899,629	$ 7,200,672	$ 7,738,869
2001	2002	2003	
$ 7,920,680	$ 11,090,072	$ 11,362,435	

Petitioner’s Operating Expenses

Mr. Sterling estimated The Osborn’s annual operating expenses by reviewing the historical costs reported in the comparable properties’, rather than utilizing The Osborn’s actual expenses, due to the fact that the latter were largely intermingled with the daily operations of the CCRC, which expenses are not typically related to the mere operation of real estate.

In determining the estimated annual operating expenses, Mr. Sterling considered the following expenses: common area maintenance, interior repairs and maintenance, insurance, management fees and superintendent housing, leasing commissions, and structural repairs and replacement reserves. The estimated expenses for The Osborn for the tax years at issue are as follows:

1997	1998	1999	2000
$ 1,633,092	$ 1,775,311	$ 1,828,889	$ 1,896,803
2001	2002	2003	
$ 1,945,968	$ 2,932,827	$ 3,051,071	

Petitioner’s Net Operating Income

Mr. Sterling reduced the yearly Estimated Gross Income for each tax year by the estimated expenses for each year, to obtain a Net Operating Income for each year, as follows:

1997	1998	1999	2000
$ 4,585,209	$ 5,124,318	$ 5,371,783	$ 5,842,066
2001	2002	2003	
$ 5,974,712	$ 8,157,246	$ 8,311,364	

Petitioner’s Overall Capitalization Rate

In determining the appropriate capitalization rate, Mr. Sterling utilized findings reported in the Korpacz Real Estate Investor Survey, a published survey commonly used by appraisers. Mr. Sterling also referenced a survey published by the American Council of Life Insurance. Mr. Sterling then considered the comparability of The Osborn to the property described in the surveys, including the fact that The Osborn contained a mix of commercial office space, garden homes, a nursing home, and small, apartment-like units. He concluded that some, but not all, of the property met “prevalent institutional investment criteria.” Combined with the fact that the property is only usable as a home for the aged, and thus has somewhat limited marketability compared to not-similarly-restricted properties in the area, and that the real estate market in Westchester County during the years at issue was, at best, flat, depressing rental rates somewhat and therefore increasing investment risk, Mr. Sterling concluded that the appropriate capitalization rates in the tax years at issue should be:

1997	1998	1999	2000
10.50 %	10.25 %	10.25 %	10.00 %
2001	2002	2003	
10.00 %	9.75 %	9.25 %	

Mr. Sterling the added the Effective Tax Rate[3] to the capitalization rate to derive the appropriate overall capitalization rate. For the years here, the Effective Tax Rate was as follows:

1997	1998	1999	2000
2.71 %	2.31 %	2.36 %	2.18 %
2001	2002	2003	
2.08 %	2.06 %	1.75 %	

[3]See discussion, *infra*.

When Mr. Sterling added those rates to his chosen capitalization rates, he concluded the Overall Capitalization Rates for the tax years at issue to be:

1997	1998	1999	2000
13.21 %	12.56 %	12.61 %	12.18 %

2001	2002	2003
12.08 %	11.81 %	11.00 %

<u>Petitioner’s Market Values</u>

To arrive at his value conclusion, Mr. Sterling divided his Net Operating Income in each of the tax years by the Overall Capitalization Rate in those years and determined that the retrospective market value of the property as a going concern as of the relevant tax dates was:

1997	1998	1999	2000
$ 34,703, 683	$ 40,797,691	$ 42,613,447	$ 47,961,009
2001	**2002**	**2003**	
$ 49,443,948	$ 69,054,353	$ 75,544,838	

No Deduction For Business Value

Mr. Sterling 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.

Surplus Land

Mr. Sterling's final step was to add to the above market values, the value of surplus land present on the property. Mr. Sterling calculated values for the surplus land utilizing a comparable sales approach by examining comparable sales of similar properties in Westchester County. He then determined that the value of the surplus land in the relevant tax years was:

1997	1998	1999	2000
$ 3,500,000	$ 3,400,000	$ 3,800,000	$ 4,100,000

2001	2002	2003
$ 4,500,000	$ - 0 -	$ - 0 -

Petitioner's Final Values

This resulted in (rounded) final value opinions by Mr. Sterling of:

1997	1998	1999	2000
$ 38,000,000	$ 44,000,000	$ 46,000,000	$ 52,000,000

2001	2002	2003
$ 54,000,000	$ 69,000,000	$ 76,000,000

When the value for each year is multiplied by the Equalization Rate for that year, as follows:

1997	1998	1999	2000
5.42 %	5.30 %	4.68 %	4.20 %
2001	2002	2003	
3.79 %	2.85 %	2.64 %	

the indicated assessed values are:

1997	1998	1999	2000
$ 2,059,600	$ 3,332,000	$ 2,152,800	$ 2,184,000
2001	2002	2003	
$ 2,046,600	$ 1,966,500	$ 2,066,400	

According to Mr. Sterling, this would result in a reduction in assessed value, for each of the tax years in dispute, of

1997	1998	1999	2000
$ 524,000	$ 462,000	$ 641,200	$ 610,000

2001	2002	2003
$ 747,400	$ 1,257,500	$ 1,157,600

RESPONDENTS' VALUATION APPRAISAL

Property Appraised As Private For-Profit Facility

Respondent's Appraiser was Gerald V. Rasmussen, MAI, of Cushman & Wakefield. Mr. Rasmussen, in valuing the fee simple interest for tax assessment purposes, did not take income directly attributable to the property [namely, rental income, even imputed rental income, as generated by Mr. Sterling in petitioner's appraisal] in order to compute income for the purpose of the income capitalization theory. Instead, he took the actual revenues from resident fees to The Osborn, added its business revenue, and then calculated business expenses for the enterprise. Mr. Rasmussen then capitalized this sum.

Respondents' Potential Gross Income

By adding together the private pay rates [Resident Fees] for all of The Osborn's constituent parts [the Osborn Pavillion, Sterling Park, new apartments, and Sterling Park II] and the rental and other income, Mr. Rasmussen concluded what he termed the Total Operating Revenues for the subject property for the tax years in question:

1997	1998	1999	2000
$ 10,016,317	$ 11,967,417	$ 15,364,466	$ 16,627,749
2001	2002	2003	
$ 18,758,696	$ 22,327,366	$ 23,076,954	

Then, although the Osborn either does not generate, or at least does not report, interest on entrance fees or on endowment, Mr. Rasmussen imputed interest on those amounts, concluding that the income should amount to:

1997	1998	1999	2000
$ 3,909,728	$ 4,193,175	$ 4,496,865	$ 4,821,337
2001	2002	2003	
$ 5,183,986	$ 9,097,780	$ 9,842,440	

Mr. Rasmussen then calculated Total Revenues for The Osborn:

1997	1998	1999	2000
$ 13,926,045	$ 16,160,592	$ 19,861,034	$ 21,449,086
2001	2002	2003	
$ 23,942,683	$ 31,425,146	$ 32,916,393	

<u>Respondents' Operating Expenses</u>

In determining the Operating Expenses for the subject property, Mr. Rasmussen examined The Osborn's 1997 through 2003 operating statements, i.e., all of the expenses derived from the operation of the enterprise in those years. The total expenses reflected in those statements are as follows:

1997	1998	1999	2000
$ 12,264,614	$ 14,084,003	$ 15,493,779	$ 16,491,031

2001	2002	2003
$ 20,162,111	$ 23,029,048	$ 24,108,321

Operating Expense Ratios

Mr. Rasmussen then compared these total expenses with the operating revenues to arrive at an operating expense ratio (i.e., the ratio of operating revenues to operating expenses), as follows:

1997	1998	1999	2000
122.5 %	117.69 %	100.84 %	99.18 %
2001	2002	2003	
107.48 %	103.14 %	104.47 %	

Respondents' Estimated Operating Expenses

Mr. Rasmussen then explained that in nearly all of the years at issue, the operating expenses exceeded the operating income, leading to the reporting of negative operating income. Mr. Rasmussen then considered operating expense ratios at comparable properties, and from data in his files, to determine whether such ratios as reported by The Osborn were reasonable. He determined from this analysis that The Osborn’s expenses may not be reflective of expenses generated by similar facilities, since such ratios varied between 65.56 % and 82.64 %. Based on his analysis, Mr. Rasmussen chose to use a ratio of 77 % of the total operating revenues for expenses in his analysis, which is at the upper end of the range as he reported. Application of this ratio to operating revenues yields the following estimated operating expenses:

1997	1998	1999	2000
$ 7,712,564	$ 9,214,911	$ 11,830,639	$ 12,803,367
2001	2002	2003	
$ 14,444,196	$ 17,192,072	$ 17,769,255	

Respondents' Net Operating Income

When the Estimated Total Revenues are reduced by Operating Expenses at a ratio of 77%, the result is a Net Operating Income for the tax years of:

1997	1998	1999	2000
$ 6,213,481	$ 6,945,681	$ 8,030,395	$ 8,645,720

2001	2002	2003
$ 9,498,487	$ 14,233,074	$ 15,150,139

Respondents' Overall Capitalization Rate

In order to determine an appropriate capitalization rate, Mr. Rasmussen reviewed the Senior Care Acquisition report (SCAR) findings reported in Cushman & Wakefield Inc.'s Senior Care Participation Study (SCPS), and also capitalization rates from other sales. Mr. Rasmussen stated that SCAR reported the average range for capitalization rates to be from 9.2 % to 12.8 % in 1997, and 9.9 % to 13.4 % in 2003, with a mean as follows:

1997	1998	1999	2000
10.5 %	11.3 %	11.8 %	11.7 %
2001	2002	2003	
11.2 %	11.8 %	10.8 %,	

Mr. Rasmussen also analyzed 5 sales of CCRCs, four in Florida and one in Arizona, and found rates between 7.8 % and 12.85 %. He concluded that the three sources are supportive of a going-concern capitalization rate of 7.8 % to 10.8 %. Since The Osborn is one of the premier retirement properties in the country, and would therefore attract significant investor interest, the proper capitalization rate should, in his opinion, be at the bottom of that range; while the rate might vary somewhat from year to year, he determined it to be 8.0 % in each of the tax years in question. When added to the Effective Tax Rates[4] for those years, as follows:

[4]See discussion, *infra*.

1997	1998	1999	2000
2.25 %	2.26 %	2.08 %	1.96 %
2001	2002	2003	
1.88 %	1.55 %	1.62 %	

the Overall (Tax Loaded) Capitalization Rate, according to Mr. Rasmussen, should be:

1997	1998	1999	2000
10.25 %	10.26 %	10.08 %	9.96 %
2001	2002	2003	
9.88 %	9.55 %	9.62 %	

Respondents’ Market Values

By dividing the Net Operating Incomes for each year, as set forth above, by his chosen Capitalization Rates for those years, Mr. Rasmussen’s values for the subject property are:

1997	1998	1999	2000
$ 60,611,163	$ 67,702,219	$ 79,664,629	$ 86,828,936
2001	2002	2003	
$ 96,134,741	$ 149,019,092	$ 157,522,674,	

which values Mr. Rasmussen rounded to:

1997	1998	1999	2000
$ 60,600,000	$ 67,700,000	$ 79,700,000	$ 86,800,000

2001	2002	2003
$ 96,100,000	$ 149,000,000	$ 157,500,000

DISCUSSION

The Osborn Properly Is Valued As A Multi-Family Housing Complex

Mr. Sterling appraised the subject property as a multi-family housing complex, placing greatest reliance on the actual operation of the home as set forth in its audited financial statements contained in both Appraisal reports. Petitioner's New York State license to operate an adult home limited the use of the property to not-for-profit, nursing and old-age home operations, as did its not-for-profit charter and the requirements of its Internal Revenue Code § 501©)(3) exempt status. In so doing, he estimated market rents by comparison of The Osborn to similar properties. Mr. Rasmussen, to the contrary, used revenues from resident fees paid to The Osborn, which fees include payments for all of the services, many of which are unrelated to the property, provided to residents by The Osborn.

Actual Expenses Vs. Estimated Expenses

Further, while Mr. Sterling employed the actual expenses related solely to the real property, Mr. Rasmussen estimated expenses based on his reference to a national survey of senior housing facilities. In addition, after deducting these estimated expenses, Mr. Rasmussen imputed interest to The Osborn’s endowment portfolio, and to his estimate of the refundable entrance fees, and added these sums to the net revenues before capitalizing the figures.

The Osborn 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 properties [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. v. Glaser, 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 Hill 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.”

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 the tax years at issue:

1997	1998	1999	2000
$ 6,443,836	$ 7,149,875	$ 7,461,836	$ 8,019,553
2001	2002	2003	
$ 8,207,959	$ 11,492,303	$ 11,774,544,	

The figures were obtained by Mr. Sterling when he compared The Osborn to comparable properties in Westchester County.

Vacancy & Collection Loss

This Court accepts Mr. Sterling's Vacancy and Collection Loss of 3.5% for the tax years at issue, as a blended rate consisting of an upward modification of the 2% rate for the rental portion of the premises to account for the higher vacancy rates of the commercial portions of the premises.

Effective Gross Income

The reduction of the yearly Potential Gross Income by a 3.5% vacancy rate results in an Estimated Gross Income for the affected tax years of:

1997	1998	1999	2000
$ 6,218,301	$ 6,899,629	$ 7,200,672	$ 7,738,869
2001	2002	2003	
$ 7,920,680	$ 11,090,072	$ 11,362,435,	

The Court accepts these figures.

Operating Expenses

As noted above, Mr. Sterling estimated the subject property's annual operating expenses, including adult home, activities, dietary, environmental, utilities, housekeeping, insurance, management fee, and replacement reserves, by reviewing the historical costs reported in the comparable properties, rather than utilizing The Osborn’s actual expenses. This was based on his opinion that these latter expenses were largely intermingled with the daily operations of The Osborn, and that these expenses are not typically related to the basic operation of the real estate. As also indicated above, Mr. Rasmussen used the Osborn’s operating statements to compile all of the expenses derived from its operation in the affected tax years, and then compared these figures to the effective gross income to arrive at an expense/income ratio, which in all but one year exceeded 100 %. He analyzed the yearly ratios in comparison to comparable national properties, concluded that an industry average ratio of expense to income of 77 % was more appropriate, and applied that ratio to the effective gross income to arrive at net operating expenses.

The Court rejects Mr. Rasmussen’s expense figures, and accepts Mr. Sterling’s figures, as a more accurate representation of the subject property’s operating expenses, as follows:

1997	1998	1999	2000

$ 1,633,092	$ 1,775,311	$ 1,828,889	$ 1,896,803
2001	2002	2003	
$ 1,945,968	$ 2,932,827	$ 3,051,071	

No Inherent Business Value

As noted above, although adult home facilities are a combination of business and real estate, and the day-to-day operation represents a business component over and above the real estate, this Court accepts Mr. Sterling'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. Rasmussen did in his Appraisal.

Net Operating Income

Accepting Mr. Sterling's income and expense calculations, the Court likewise accepts his estimate of the Net Operating Income, as follows:

1997	1998	1999	2000
$ 4,585,209	$ 5,124,318	$ 5,371,783	$ 5,842,066
2001	2002	2003	
$ 5,974,712	$ 8,157,246	$ 8,311,364	

Base Capitalization Rate

In setting forth his determination of the proper capitalization rate, Mr. Sterling relied, as indicated previously, on the Korpacz Real Estate Investor Survey, as well as a survey published by the American Council of Life Insurance. When taking into consideration that The Osborn constituted a mix of commercial and varied residential space, he concluded that some, but not all, of the property met "prevalent institutional investment criteria", and that the appropriate capitalization rates in the tax years at issue should be at the high end of [but still within] the Korpacz range of rates, namely:

1997	1998	1999	2000
10.50 %	10.25 %	10.25 %	10.00 %
2001	2002	2003	
10.00 %	9.75 %	9.25 %	

Mr. Rasmussen, as also indicated above, relied on the SCAR, Cushman & Wakefield Inc.'s own SCPS, and capitalization rates from other sales. SCAR rates ran from 9.2 % to 12.8 % in 1997, and 9.9 % to 13.4 % in 2003, while SCPS reported a range from 7.0 % to 18.0 %, declining towards the end of the tax period. While Mr. Rasmussen also used 5 CCRC sales, none were in the Northeast, much less in Westchester County. He concluded that, while his surveys showed capitalization rates from 7.8 % to 10.8 %, because The Osborn is a premier retirement community in the entire nation, he believed an 8.0 % capitalization rate properly reflected potential investor interest in the property.

Proposed Capitalization Rates Rejected

The Court rejects both Mr. Sterling's and Mr. Rasmussen's proposed capitalization rates. Regarding the former, while the premises is indeed a mix of commercial and residential properties, as a premier retirement facility it would undoubtedly attract significant investor attention. Thus, the rates chosen by petitioner are too high. Regarding the latter, a fixed capitalization rate of 8 % over a period of widely differing market conditions is simply not supportable, nor is a rate within 10 % of the bottom of the Korpacz range, since respondent presented insufficient evidence to justify such a departure from the mean Korpacz rate during the period. The Court thus rejects the respondent's rate as too low, and finds that the appropriate capitalization rates, balancing investor interest with market conditions as they varied over several years, and the presence on the site of both residential and commercial properties, are as follows:

1997	1998	1999	2000
9.75 %	9.50 %	9.50 %	9.25 %

2001	2002	2003
9.00 %	9.00 %	8.50 %

Effective Tax Rates Added

When the capitalization rates are added to the Effective Tax Rates, an Overall Capitalization Rate for the subject property is derived. Respondents recognize that the Effective Tax Rate is derived by application of the Appraiser's Formula by multiplication of the Total Tax Rate by the Equalization Rate. Mr. Rasmussen sets forth his computation for the Effective Tax Rate by listing the Tax Rate for the years at issue:

1997	1998	1999	2000
415.384	426.257	444.498	465.997
2001	2002	2003	
496.145	544.272	612.784	

which numbers the parties agree on, and the Equalization Rate for those years:

1997	1998	1999	2000
5.42 %	5.30 %	4.68 %	4.20 %
2001	2002	2003	
3.79 %	2.85 %	2.64 %	

which numbers are in contrast to those presented by petitioner as the Equalization Rates to be used for those years. Petitioner asserts that the proper Equalization Rate to employ for each tax year is the rate set by ORPS for the previous year,

1997	1998	1999	2000
6.53 %	5.42 %	5.30 %	4.68 %
2001	2002	2003	
4.20 %	3.79 %	2.85 %.	

The Fiscalization Analysis

As this Court set forth in Earla Associates v. City of Middletown, 13 Misc.3d. 1246, 2006 WL 3525672 ****7 (Supreme Court, Westchester County, Dickerson, J, 2006), a "fiscalization" analysis which "applies the applicable State rate for the assessment upon which the tax rate was levied" was proper. However, neither of the parties herein performed such an analysis in this case. Since the taxable status dates in each of the years at issue (1997 to 2003) is May 1 of that year, on which dates the Equalization Rate in effect was that set by ORPS for the previous year, then the "applicable tax rate for the assessment upon which the tax rate was levied" in each of the tax years at issue herein was, as petitioner persuasively argues, the rate established by ORPS the previous year, i.e., the 1996 rate for the 1997 assessment, and so on. Therefore, in the absence of a fiscalization analysis by the parties, the Court holds that the proper Equalization Rate to be employed for each tax year herein is the rate set by ORPS for the previous year, as employed by petitioner's appraiser, Mr. Sterling.

As such, the correct Effective Tax Rates for the tax years at issue are as follows:

1997	1998	1999	2000
2.71 %	2.31 %	2.36 %	2.18 %
2001	2002	2003	
2.08 %	2.06 %	1.75 %	

Overall Capitalization Rates

When added to the capitalization rates for those years, as set forth above, the Overall Capitalization Rates for the tax years at issue are:

1997	1998	1999	2000
12.46 %	11.81 %	11.86 %	11.43 %
2001	2002	2003	
11.08 %	11.06 %	10.28 %	

Market Values

To arrive at a value conclusion, Operating Income in each of the tax years is divided by the Overall Capitalization Rate in those years. The retrospective market value of the property as a going concern as of the relevant tax dates was:

1997	1998	1999	2000
$ 36,799,430	$ 43,389,652	$ 45,293,279	$ 51,111,688
2001	2002	2003	
$ 53,923,393	$ 73,754,484	$ 80,849,844	

No Deduction For Business Value

As set forth above, the Court accepts Mr. Sterling's decision not to deduct for the business value of the subject property since he is correct that there was no inherent business value in the property during the years under review.

Surplus Land

The Court also accepts Mr. Sterling’s addition to the above market values of the value of surplus land present on the property in each of the tax years that such land was present there. Mr. Sterling, as set forth previously, calculated values for the surplus land by utilizing the comparable sales approach, by examining comparable sales of similar properties in Westchester County. Respondents assert that the land was not in fact vacant, but cannot explain its subsequent use for building new structures. Respondents also fail to properly dispute the value assessment by Mr. Sterling. The value of the surplus land on the relevant tax dates therefore was:

1997	1998	1999	2000
$ 3,500,000	$ 3,400,000	$ 3,800,000	$ 4,100,000

2001	2002	2003
$ 4,500,000	$ - 0 -	$ - 0 -

Final Market Values

This results in final values of:

1997	1998	1999	2000
$ 40,299,430	$ 46,789,652	$ 49,093,279	$ 55,211,688
2001	2002	2003	
$ 58,423,393	$ 73,754,484	$ 80,849,844,	

and rounded final values of:

1997	1998	1999	2000
$ 40,300,000	$ 46,800,000	$ 49,100,000	$ 55,200,000
2001	2002	2003	

$ 58,400,000	$ 73,800,000	$ 80,800,000

Final Value, Assessment, and Refund

When the values for each year are multiplied by the Equalization Rate for that year, as follows:

1997	1998	1999	2000
5.42 %	5.30 %	4.68 %	4.20 %
2001	2002	2003	
3.79 %	2.85 %	2.64 %,	

the indicated assessed values are:

1997	1998	1999	2000
$ 2,184,260	$ 2,480,000	$ 2,297,880	$ 2,318,400

2001	2002	2003	
$ 2,213,360	$ 2,103,300	$ 2,133,120.	

The assessed values for the tax years at issue were:

1997	1998	1999	2000
$ 2,584,000	$ 2,794,000	$ 2,794,000	$ 2,794,000
2001	2002	2003	
$ 2,794,000	$ 3,224,000	$ 3,224,000.	

This would result in a reduction in assessed value for each of the tax years (and a corresponding tax refund, where payments were already made on said over-assessments) of

1997	1998	1999	2000
$ 399,740	$ 314,000	$ 496,120	$ 475,600
2001	2002	2003	
$ 580,640	$ 1,120,700	$ 1,090,880.	

Summary of Figures

	1997	1998
Potential Gross Income	$6,443,836	$7,149,875
Vacancy & Collection Loss	3.5 %	3.5 %
Effective Gross Income	$6,218,301	$6,899,629
Total Expenses	$1,633,092	$1,775,311
Net Operating Income	$4,585,209	$5,124,318
Capitalization Rate (overall)	12.46 %	11.81 %
Total Value[5] (Rounded)	$40,300,000	$46,800,000
Equalization Rate	5.42 %	5.30 %
Indicated Assessment	$2,184,260	$2,480,000
Assessed Value	$2,584,000	$2,794,000
Over-assessment	$399,740	$314,000

	1999	2000
Potential Gross Income	$7,461,836	$8,019,553
Vacancy & Collection Loss	3.5 %	3.5 %
Effective Gross Income	$7,200,672	$7,738,869
Total Expenses	$1,828,889	$1,896,803
Net Operating Income	$5,371,783	$5,842,066
Capitalization Rate (overall)	11.86 %	11.43 %
Total Value (Rounded)	$49,100,000	$55,200,000
Equalization Rate	4.68 %	4.20 %
Indicated Assessment	$2,297,880	$2,318,400
Assessed Value	$2,794,000	$2,794,000
Over-assessment	$496,120	$475,600

[5] Including vacant land.

	2001	2002
Potential Gross Income	$8,207,959	$11,492,303
Vacancy & Collection Loss	3.5 %	3.5 %
Effective Gross Income	$7,920,680	$11,090,072
Total Expenses	$1,945,968	$ 2,932,827
Net Operating Income	$5,974,712	$ 8,157,246
Capitalization Rate (overall)	11.08 %	11.06 %
Total Value (Rounded)	$58,400,000	$73,800,000
Equalization Rate	3.79 %	2.85 %
Indicated Assessment	$2,213,360	$2,103,300
Assessed Value	$2,794,000	$3,224,000
Over-assessment	$580,640	$1,120,700

	2003
Potential Gross Income	$11,774,544
Vacancy & Collection Loss	3.5 %
Effective Gross Income	$11,362,435
Total Expenses	$ 3,051,071
Net Operating Income	$ 8,311,364
Capitalization Rate (overall)	10.28 %
Total Value (Rounded)	$80,800,000
Equalization Rate	2.64 %
Indicated Assessment	$2,133,120
Assessed Value	$3,224,000
Over-assessment	$1,090,880

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 the Decision and Order of this Court regarding the tax exemption issues raised herein.

Dated: June 5, 2007

White Plains, N.Y.

HON. THOMAS A. DICKERSON

JUSTICE SUPREME COURT

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