STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

DANTE AND RALPH GULLACE &
ORCHARD GROVE PARK, LLC,

Petitioner,

v.

Christine Luyeyn, Assessor, and
THE BOARD OF ASSESSMENT REVIEW of
the TOWN OF ONTARIO, WAYNE COUNTY
NEW YORK,

Respondent.

DECISION AND ORDER

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

based on 'sound theory and objective data' . . . rather than on mere wishful thinking . . . 'bare surmise, conjecture, speculation or rumor.'" Id. (emphasis supplied)(quoting Matter of Commerce Holding Corp. 88 N.Y.2d 724, 732, and 300 Gramatan Ave. Assocs. v. State Div. Human Rights, 45 N.Y.2d 176, 180 (1978)). The idea is to take petitioner's proof, such as it is, and then determine whether he has met the "minimal threshold" of a genuine and valid dispute concerning valuation. Id. 92 N.Y.2d at 188.

Any rejection of evidence which "entail[s] a weighing of the evidence" is not permitted at this stage. Matter of Century Realty v. Commissioner of Finance, 15 A.D.3d 652, 653-54 (2d Dept. 2005). For this reason, Petitioner's motion to strike Respondent's appraisal, particularly on the ground of his use of MLS and NADA figures, is denied. Matter of Frontier Park v Assessor, Town of Babylon, 293 A.D.2d 608, 609 (2d Dept. 2002). Accordingly, I find that Petitioner met this initial burden employing the rationale of Matter of Century Realty v. Commissioner of Finance, 15 A.D.3d at 653-54; Matter of Frontier Park v Assessor, Town of Babylon, 293 A.D.2d at 609.

"Once . . . [a court determines, as in this case, that a petitioner's] initial burden has been met, the reviewing court 'must weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether [the]

petitioner has established by a preponderance of the evidence that its property has been overvalued.'" Matter of United Parcel Source v. Assessor, Town of Colonie, 42 A.D.3d 835, 837 (3d Dept. 2007)(quoting Matter of FMC Corp. [Peroxygen Chems. Div.] v. Vimack, 92 N.Y.2d at 188). An examination of the parties' proof in this case yields the conclusion that petitioner adduced preponderant evidence of overvaluation, and that it's appraiser provided substantially more reliable evidence of valuation that did the Respondent's appraiser. Matter of Frontier Park v Assessor, Town of Babylon, 11 A.D.3d 461 (2d Dept. 2004), affirming the credibility assessment of Supreme Court in an analogous context but with the parties reversed.

First, respondent's unit appraisal, which concerned the sales comparison approach using in part the multiple listing service and NADA comparisons, is compromised by the appraiser's failure to adequately support the conclusion, made for each comparable unit, that no adjustments were considered necessary. Respondent's appraiser used STAR exemption sales obtained from one of the assessors, broker information from the MLS, and on-site sales excluding sales under $1,000. Indeed, his STAR sales, MLS sales, and on-site sales were all given the same weight without any explanation why adjustments were unnecessary. These sales were divided into seven groupings based on multi or single section homes built in various years. Averaging was the

prohibited result (Exh. A, 41-45, taking the 2003 year as an example).

An appraisal must in the usual case "provid[e] the relevant adjustment grids and market analysis to permit a meaningful comparison to the subject property." Matter of United Parcel Service, 42 A.D.3d at 838. While this might be excused if the narrative analysis in the appraisal provided adequate "explanations for the adjustments made" (or lack thereof), id. 42 A.D.3d at 838, here respondent's appraisal is wholly wanting on these subjects, as was his testimony at trial. T.M. at 223-24. Respondent's appraiser did not use a traditional sales comparison approach, and did not select from among an array of sales the most comparable ones and then make appropriate adjustments as between the comparables and the subject homes. He instead calculated average sales price per square foot in each category of mobile home, using averages of sales in each grouping drawn from the MLS data (Exh. A, 41-45), pigeonholed each subject mobile home into a corresponding category drawn from the MLS data and applied that average per sq. ft. price to the particular square footage of the subject home to arrive at "Predicted MV via Avg $/SF" (Exh. A, 46-55)(2003 tax year, but the process was the same for each year). While he also used the proprietary NADA database, it was clear from his testimony that the only three relevant lines in his analysis of value (after those

accomplishing the pigeonholing into a particular category) were the "Tot SF" figure for the subject home, and the last two far right columns, "Mkt Average $/SF" (which correspond precisely with the averages for each comparable category on Exh. A, 41-45) and "Predicted MV via Avg $/SF" (which the assessor testified at trial was "my value"). See e.g., Exh. A, 46-55 for the 2003 tax year). In other words, respondent's valuation of the subject mobile homes was a simple exercise of multiplying the square footage of the subject by the average price per square foot of the comparable sales in each of the pigeonholed categories.[1]

Without appropriate comparison data and adjustment, use of these average sales, whether from the MLS or otherwise, is prohibited by Latham Holding Co., Inc. v. State of New York, 16 N.Y.2d 41, 45 (1965)("The trouble here is that expert Babbitt did not do this. He simply took the indicated front foot values of these parcels and averaged them, then multiplied the resulting figure by the frontage of the subject parcel."); id. 16 N.Y.2d at 46 ("Upon the other hand, an expert cannot reach his result mechanically by the mere mathematical process of averaging front footage sales prices, of parcels having obvious differences one

[1] What adjustments appear on the tables (e.g., Exh. A, 46-55) appear to be NADA adjustments to NADA figures, not to the data from the subject homes or the comparison sales from which the average square foot price in each of the seven categories was derived. The tables and ultimate calculation of value for each subject home belie the seemingly sophisticated discussion on the appraiser's report on pp. 39-40.

from another as denoted by their locations and sales prices, without making adjustments for the prices of those that are more similar or dissimilar to the one in question."); City of Rochester v. Hennen, 56 A.D.2d 719 (4th Dept. 1977).[2] Thus, averaging in this manner, even when combined with the use of NADA, is not persuasive when compared to petitioner's approach. Matter of Frontier Park v Assessor, Town of Babylon, 293 A.D.2d at 609 ("a properly performed appraisal utilizing comparable sales in close proximity to the petitioner's trailer park may be a superior method of determining the market value of the mobile homes" - i.e., superior to a NADA approach); Matter of Fourth Garden Park v. Assessor, Town of Riverhead, 271 A.D.2d 531 (2d Dept. 2000). I agree with Justice Rossetti's careful analysis in his November 8, 2002 decision (made a part of this record by the Post Trial Reply Brief), which after judgment was entered thereon, was affirmed on appeal. Matter of Frontier Park v Assessor, Town of Babylon, 11 A.D.3d 461.

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[2] Contrary to respondent's suggestion in it's Post Trial Reply Memorandum of Law, Latham Holding is applied in Article 7 proceedings. See e.g., Landau v. Assessor of Town of Carmel, 236 A.D.2d 403 (2d Dept. 1997). "It is a settled principle that 'sales of other parcels, where used as a criteria in the evaluation of the subject property, need to be adjusted to differences between one another and between each of them and the subject property' (Latham Holding Co. v. State of New York, supra, 16 N.Y.2d at 45)." Matter of Northville Industries Corp. v. The Board of Assessors of the Town of Riverhead, 143 A.D.2d 135, 137 (2d Dept. 1988).

The court also credits Petitioner's appraiser on the issue of land valuation. Respondent's appraiser did not adequately explain why he prepared an income approach only for the year 2003, did not explain to the satisfaction of the court why he simply kept the land value constant at $5,000,000 in each succeeding year despite the decline in occupancy. I credit Petitioner's appraiser's greater reliance on the income approach and his effort to perform one for each tax year in question.

It is appropriate in these circumstances to discredit Respondent's expert opinion, Landau v Assessor, Towm of Carmel, 236 A.D.2d 403, 404 (2d Dept. 1997), and "[i]n view of . . . [this] holding that the . . . [respondent]'s evidence of value lacked probative value, the conclusion of value reached by petitioner must be given full weight." Matter of Northville Industries Corp. v. Bd of Assessors, Town of Riverhead, 143 A.D.2d 135, 137 (2d Dept. 1988). The court has carefully considered Respondent's arguments concerning Petitioner's appraisal and testimony and find them either to be without merit in the final analysis, or where they have some merit the court finds that Petitioner's appraisal and the appraiser's testimony not to be substantially compromised. See Exh. #12.[3] Accordingly,

[3] The explanation of Exh. #12 and Harland's trial testimony corrections to his appraisal on pp.75-89 provided in Petitioner's Post Trial Reply Brief (at pp. 3-5) is credited as against Respondent's Proposed Findings of Fact and Conclusions of Law. Petitioner's Post Trial Reply Brief (at pp. 3-5) is hereby made a

the court concludes that petitioner adduced preponderant evidence of overvaluation. The proposed findings of fact submitted by petitioner (excluding ¶¶ 27-32) are adopted and are hereby made a part hereof.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: January 22, 2010
Rochester, New York

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part hereof.