

<b>Matter of Parisi v Assessor of the County of Nassau</b>
2010 NY Slip Op 31539(U)
June 2, 2010
Supreme Court, Nassau County
Docket Number: 414818/07
Judge: Thomas A. Adams
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 33

NASSAU COUNTY

In the Matter of the Application of  
ANTON PARISI,

Petitioner(s),

**TRIAL DECISION**

**INDEX NO. : 414818/07**

-against-

THE ASSESSOR, THE BOARD OF ASSESSORS, and THE  
ASSESSMENT REVIEW OF COMMISSION OF THE COUNTY  
OF NASSAU,

Respondent(s).

This is a proceeding pursuant to Article 7 of the Real Property Tax Law for judicial review of the assessments for the tax years 2003/04; 2004/05; 2005/06; 2006/07; 2008/09 and 2009/10. The tax year 2007/08 is excluded.

The subject property of these proceedings is a full service gas station with 3 auto repair bays and a convenience store. The slightly irregular sloped site of 11,879 sq. ft. is paved and level with curb cuts and frontage of 123.18' along Sunrise Highway and 100' along Marion Place. The building is 1,827 sq. ft. and was constructed in 1969. There are 3 pumping islands with 3 double-sided pumps under a fixed canopy. The matter was tried on January 6, 2010. Each side submitted an appraisal report in conformity with § 202.59(g) of the Uniform Rules for the New York State Trial Courts. Experts qualified in the field of real estate appraisal testified on behalf of the respective parties.

A property valuation by a tax assessor is presumptively valid. A petitioner may overcome that presumption by demonstrating the existence of a valid and credible dispute regarding valuation through the presentation of documentary and testimonial evidence that is based on sound theory and objective data (see *Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 187-188; *Matter of Century Realty, Inc. v Commissioner of Fin.*, 15 AD3d 652, 653. If the petitioner meets this initial burden, the petitioner must then prove by a preponderance of the evidence that the property was overvalued (see *Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d at 188; *Matter of Century Realty, Inc. v Commissioner of Fin.*, 15 AD3d at 654). The petitioner met its initial burden and overcame the initial presumption in favor of the Board when it submitted an appraisal report and presented expert testimony that supported its claims. See *Matter of Century Realty, Inc. v Commissioner of Fin.*, 15 AD3d at 653.

Respondents used the square footage of the land (11,879 sq. ft.) as its unit of measurement. Petitioner used the square footage of the building (1,827 sq. ft.). The court agrees with the respondents' expert that the square footage of the land should be used as the unit of comparison based on the assumption that when gas stations are bought and sold, the prospective buyer is looking

at the site and determining how much it is worth based on square footage of land, not square footage of building.

Both appraisal experts used the income capitalization approach for valuation of the subject income producing properties. *Kew Gardens Road Assoc. v Tyburski*, 70 NY2d 330, 331. “Under the income capitalization approach, the income stream subject to capitalization consists of the property’s economic net operating income, derived by deducting a vacancy and collection loss allowance and appropriate operating expenses from potential gross income.” *Matter of Senpike Mall Co. et al. v Assessor of the Town of New Hartford et al.*, 136 AD2d 19.

Under the income capitalization method, potential income is based upon fair market rent, representing the prevailing market rent that a property would command assuming it were available to be rented on the taxable status date. 13-132 Warren’s Weed New York Real Property § 132.18.

To arrive at gross income, petitioner’s expert utilized the actual contract rent - - rent that was set in the 1990 agreement, and then added in the actual taxes paid. The contract is nearly twenty years old and a full thirteen years before the first tax year at issue in this matter. Reliance on contract rents established by below market long term leases can yield distorted valuations. *Merrick Holding Corp. v Board of Assessors County of Nassau*, 45 NY2d 538, 543. The court agrees with respondents’ expert’s assumptions that the rents set forth in the original leases are obsolete and not relevant in determining a fair market value.

In order to arrive at a dollar value of square footage, the court considered the respective appraisal reports with their annexed comparative appraisals as well as the trial testimony of the appraisers. In determining the market rent per square foot the respective appraisers looked at comparable gas stations. The petitioner studied six comparable gas stations. Respondents looked at eight comparable gas stations. The appraisers considered the vehicular traffic at the comparative locations. Petitioner considered the subject location as being moderately traveled. Petitioner argues that the subject property does not have good access. Petitioner opines that although located on Sunrise Highway, it is not set on a busy corner location that would generate higher traffic and can only be accessed by the eastbound lanes of Sunrise Highway or by a very quiet residential street. Petitioner asserts its appraisers made appropriate adjustments for those comparables that had superior busy corner locations. Respondents’ appraiser found the subject location to have a higher traffic Court than most of the comparables based on traffic flow studies and maps from the New York State Dept. of Transportation and Nassau County Dept. of Planning.

Respondents’ appraisers made time adjustments of about 6% to account for perceived aggressive economic growth in the commercial real estate market during the years in issue. Petitioner contends that gas stations have been struggling for a very long time as a result of several factors including, but not limited to, the leasing of vehicles, repairs being done at the dealership (rather than a repair shop), the technology involved in fixing cars, the competition from larger chains such as Mavis and the environmental problems common to gas stations. “The best comparables, from both an appraisal and legal standpoints, are those that are most similar. To the appraiser this means the properties requiring the fewest adjustments to equalize them to the property under appraisal” (see, *Bertelsmann Property, Inc. v Tax Commission of the City of New York Slip Op. 52249U* (Sup. Ct. NY Co. 2007) at pg. 5 citing J.D. Easton; *Real Estate Valuation in Litigation* 2<sup>nd</sup>

Ed. Chicago Appraisal Institute 1995. Respondents' expert argues that because petitioner's Comparable 6 is more than 300% larger than the subject property (5,893 sq. ft. vs 1,827 sq. ft.), the large size difference makes the properties not comparable. Respondents, therefore, contend that by excluding petitioner's Comparable 6 the average rent would rise by 10% per square foot, and the inclusion of Comparable 6 drives the petitioner's market rent artificially low. However, petitioner's appraisal report states that a moderate size adjustment was reflected in Comparative 6 to compensate for economics of scale. Respondents assert petitioner's Comparable 3 is 50% larger than the subject and fails to adjust for the difference in size. Petitioner's appraisal states that Comparables 3 and 5 did not require location adjustments since they are similar to the subject premises being on a moderately traveled road without a busy corner locale. Respondents' expert asserts that even though petitioner's Comparables 1, 3 and 4 are older buildings with fewer amenities, such as a convenience store or canopy over the pumps, petitioner fails to make any upward adjustments over time for them other than Comparable 3.

Petitioner's expert used actual collected income to establish his gross income and then applied a 7% vacancy rate and collection loss to the figure, thereby "double dipping." "Vacancy and collection loss is an allowance for reductions in potential gross income" (the Appraisal of Real Estate (12<sup>th</sup> Ed.) Appraisal Institute, Chicago, Ill., 2001, at 512), so application of the deduction to actual income is inappropriate. See e.g. *IMA Bertelsmann Property, Inc. v The Tax Commission and the Commissioner of Finance of the City of New York*, 17 Misc. 3d 1133A, 2007 N.Y. Misc. LEXIS 7768, 239 N.Y.L.J. 1 (2007 NY Slip. Op. 52249U, 11); *IMA Century Realty, Inc. v Commissioner of Finance*, 15 AD3d 652, 653. Respondents' expert argues he used a vacancy rate to establish a market derived income rent. Respondents' vacancy rate was approximately 2.8 to 3.1%. Disregarding both a vacancy and collection loss in the calculation, the court will use a vacancy rate of 5%.

The court has considered the testimony of both appraisers and their respective appraisal reports in determining the valuation of the property. The following additional components were used to reach a final determination.

#### GROSS POTENTIAL INCOME (GPI)

The GPI is determined by multiplying the leaseable area by the estimated market rent per square foot. In determining the estimated market rent per square foot, the court had to discount the amounts submitted by petitioner since they were based on a building area of 1,827 sq. ft. rather than the area of the land which is 11,879 sq. ft. For the subject years the estimated market rent per square foot in the petitioner's appraisal ranged from \$29.56 sq. ft. to \$32.84 sq. ft. and for the respondents', \$9.25 sq. ft. to \$12.35. sq. ft.

#### VACANCY AND CREDIT ALLOWANCE

Based on the testimony of both appraisers and considering the actual vacancy and credit experience at the subject property during the years under review, as previously indicated the court estimates that the appropriate vacancy and credit allowance for each of the years under review is 5%.

### EFFECTIVE GROSS INCOME (EGI)

The EGI is determined by subtracting the vacancy and credit allowance from the GPI.

### OPERATING EXPENSES

Based upon the testimony of the appraisers and the respective appraisal reports the court will determine an appropriate level of expenses for the subject property for each of the years under review. Petitioner's appraiser used a management expense of 5% of effective gross income and a professional expense of 1.5% of effective gross income. Respondents' calculated management and professional expenses as 3.5% of effective gross income.

### NET OPERATING INCOME (NOI)

The NOI is determined by subtracting the expenses from the effective gross income.

### THE CAPITALIZATION RATE (CAP RATE)

The cap rate is the annual return that an investor expects to receive. It is considered the primary method to estimate the present value of income producing properties. The value of the property is estimated by converting net annual income into an indication of present value by the application of the cap rate. The cap rate is what other investors are achieving on like investments in the same area. A capitalization rate is a relationship between net income and total value expressed as a percentage factor, which is applied to the income and results in the present worth of the property being appraised. The major elements of this rate are the cost of debt service, which includes both interest and amortization of the debt, and equity or net cash flow requirements of an investor after the payment of debt service. In the instance of mortgage-equity development of a capitalization rate, capital recovery and/or recapture of the depreciating improvements is provided through the periodic increasing of the mortgage amortization, which is a component of the mortgage constant utilized. This results in annual equity build-up, which is realized in cash by the owner-investor at the end of the income projection period, through either resale, refinance or exchange.

Petitioner's expert utilized Realty Rates, a national survey to derive his capitalization rates. Respondents' expert used American Council of Life Insurers (ACLI) which breaks down the information regionally. Respondents deem ACLI a more reliable data source because Realty Rates being a national survey, includes much weaker commercial markets in varying parts of the country. Respondents assert these markets would have much higher capitalization rates than strong markets similar to Long Island in this region of the country. Respondents argue that since petitioner used a national survey to derive its capitalization rates, and acknowledges that Long Island is a comparatively strong market, that the petitioner should have developed its rates for this strong market by employing the lower rates in the survey that reflect other strong markets. Respondents assert the petitioner utilized interest rates that were higher than average, reflective of much weaker market conditions, thereby artificially raising his overall rate to match those weak markets. (For example, in 2003, the Realty Rates survey showed a minimum interest rate of 5.50%, an average interest rate of 6.76% and a maximum rate of 8.03%. Further, respondents argue that rather than using a rate in line with the minimum, petitioner used 8.03%, a rate in line with the maximum.

Respondents suggest this rate would reflect the absolute worst market conditions in the weakest commercial market in the country, rather than the rate for the stronger Long Island market. As regards the loan amortization rates, petitioner elected to use 20 years - across the board. The choice of a 20-year term, respondents contend, represents either the minimum term in the data or below the average term for all years under review; and use of a 20 -year amortization term in the development of petitioner's composite rate would effectively push the capitalization rate artificially high. Respondents based their mortgage on a 25-year payout schedule.

Petitioner used a loan to value ratio of 75% to 25%. Respondents used a ratio of 65% to 35%. Petitioner used a mortgage rate from 8% to 8.25%. Respondents used a mortgage interest rate from 6.25% to 6.50%. Petitioner used a mortgage constant ranging from 10.04% to 10.22%. Respondents used a mortgage constant from 7.916% to 8.102%. Petitioner used an equity dividend rate from 10% to 10.75%. Respondents used an equity dividend from 10.75% to 10%. Petitioner's overall capitalization rate ranged from 10.3% to 10.36%. Respondents' overall capitalization rate ranged from 8.908% to 8.766%.

The equity rate represents the rate of return sufficient to induce an investor to choose the subject as an investment. The investor must consider that their equity contribution will be behind the mortgage in order of preference, and that the investment is essentially illiquid. The investor will also consider that in addition to the anticipated return on the investment, there is a significant possibility of an increase in value over the period during which they hold property.

The court has reviewed the alternative types of investment as reflected in the appraisal reports and testimony of the appraisers. Considering these factors, the court determined the appropriate equity component of the overall rate for each of the years in review. The court has reviewed the calculation of the tax factors. The tax factor, a component of the equalization and tax rates is utilized to represent the percentage of market value which should be paid in taxes if the assessment is correct. There is not a significant difference between the tax factor shown by the respective appraisals. Adding effective tax rates to overall capitalization rates yields the composite capitalization rates used to correlate net income to value. The petitioner's composite capitalization rate ranged from 15.93% to 15.66%. The respondents' composite capitalization rate ranged from 14.849% to 14.119%. This process avoids the use of the actual assessment since it is the subject of the controversy. The parties agree on the equalization rate.

This court determination of the market value and indicated assessment for the year 2004/05 is as follows:

Gross Leaseable Area	11,879
Market Rent per square foot	x <u>9.00</u>
Gross Potential Income	\$ 106,901
Less: Vacancy and Credit Allowance (5%)	- <u>5,346</u>

	equals (=)	
Effective Gross Income		\$ 101,565
Expenses		
Fire Insurance		\$ 3,047
Reserve Structural Repair (2.5%)		2,539
Reserve for Replacement (1%)		1,016
Management (4%)		<u>4,063</u>
Total Expenses	less (-)	\$ 10,664
	equals (=)	
Net Operating Income		\$ 90,901
	divided by (÷)	
Composite Capitalization Rate		14.62%
	equals (=)	
Market Value (rounded)		\$621,865
Equalization Rate		x <u>.9350%</u>
Indicated Assessment		\$ 5,814
(=) (-) Actual Assessment		\$ 4,994
Reduction (none)		\$ (- 820)

The application to vacate, modify or otherwise correct the assessed valuation of the subject property for the tax year 2004/05 is denied.

This court determination of market value and indicated assessment for the year 2005/06 is as follows:

Gross Leaseable Area		11,879
Market Rent per square foot	x	<u>9.25%</u>
Gross Potential Income		\$ 109,880
Less: Vacancy and Credit Allowance (5%)		<u>- 5,494</u>
	equals (=)	
Effective Gross Income		\$ 104,387
Expenses		
Fire Insurance		\$ 3,132

Reserve Structural Repair (2.5%)		2,610
Reserve for Replacement (1%)		1,044
Management (4%)		<u>4,175</u>
Total Expenses	less (-)	\$ 10,961
	equals (=)	
Net Operating Income		\$ 93,426
	divided by (÷)	
Composite Capitalization Rate		14.40%
	equals (=)	
Market Value (rounded)		\$ 648,796
Equalization Rate	x	<u>.9350%</u>
Indicated Assessment		\$ 6,066
(=) (-) Actual Assessment		\$ 5,122
Reduction (none)		\$ (- 944)

The application to vacate, modify or otherwise correct the assessed valuation of the subject property for the tax year 2005/06 is denied.

This court determination of market value and indicated assessment for the year 2006/07 is as follows:

Gross Leaseable Area		11,879
Market Rent per square foot	x	<u>9.50%</u>
Gross Potential Income		\$ 112,880.50
Less: Vacancy and Credit Allowance (5%)		<u>- 5,643</u>
	equals (=)	
Effective Gross Income		\$ 107,208
Expenses		
Fire Insurance	\$	3,216
Reserve Structural Repair (2.5%)		2,680
Reserve for Replacement (1%)		1,072
Management (4%)		<u>4,288</u>
Total Expenses	less (-)	\$ 11,257
	equals (=)	

Net Operating Income	\$ 95,951
	divided by (÷)
Composite Capitalization Rate	14.60%
	equals (=)
Market Value (rounded)	\$ 657,312
Equalization Rate	x <u>.9350%</u>
Indicated Assessment	\$ 6,146
(=) (-) Actual Assessment	\$ 5,723
Reduction (none)	\$ (- 423)

The application to vacate, modify or otherwise correct the assessed valuation of the subject property for the tax year 2006/07 is denied.

This court determination of market value and indicated assessment for the year 2008/09 is as follows:

Gross Leaseable Area	11,879
Market Rent per square foot	x <u>10.00%</u>
Gross Potential Income	\$ 118,790
Less: Vacancy and Credit Allowance (5%)	<u>- 5,940</u>
	equals (=)
Effective Gross Income	\$ 112,851
Expenses	
Fire Insurance	\$ 3,386
Reserve Structural Repair (2.5%)	2,821
Reserve for Replacement (1%)	1,129
Management (4%)	<u>4,514</u>
Total Expenses	less (-) \$ 11,849
	equals (=)
Net Operating Income	\$ 101,001
	divided by (÷)
Composite Capitalization Rate	14.32%
	equals (=)

Market Value (rounded)	\$ 705,439
Equalization Rate	x <u>.9600%</u>
Indicated Assessment	\$ 6,772
(=) (-) Actual Assessment	\$ 6,697
Reduction (none)	\$ (- 75)

The application to vacate, modify or otherwise correct the assessed valuation of the subject property for the tax year 2008/09 is denied.

This court determination of market value and indicated assessment for the year 2009/10 is as follows:

Gross Leaseable Area	11,879
Market Rent per square foot	x <u>9.75%</u>
Gross Potential Income	\$ 115,820.25

Less: Vacancy and Credit Allowance (5%)	<u>- 5,791</u>
	equals (=)
Effective Gross Income	\$ 110,029

Expenses	
Fire Insurance	\$ 3,301
Reserve Structural Repair (2.5%)	2,751
Reserve for Replacement (1%)	1,100
Management (4%)	<u>4,401</u>
Total Expenses	less (-) \$ 11,553
	equals (=)
Net Operating Income	\$ 98,476

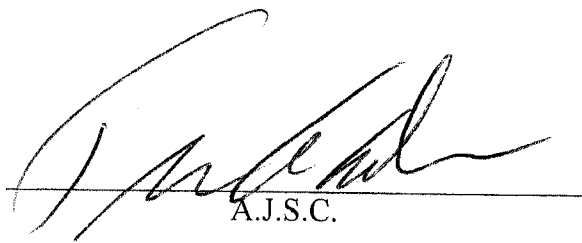
divided by (÷)

Composite Capitalization Rate	14.47%
	equals (=)
Market Value (rounded)	\$ 680,789
Equalization Rate	x <u>.9750%</u>
Indicated Assessment	\$ 6,638
(=) (-) Actual Assessment	\$ 8,208
Reduction	\$ 1,570

The application to vacate, modify or otherwise correct the assessed valuation of the subject property for the tax year 2009/10 is granted and shall be reduced from \$8,208 to \$6,638 .

Settle Judgment on Notice.

DATED 6/2/10

  
A.J.S.C.

**ENTERED**  
JUN 10 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE