

**Matter of Excelsior v Assessor, Town of Amherst**

2014 NY Slip Op 33930(U)

April 16, 2014

Supreme Court, Erie County

Docket Number: 2009-8728

Judge: Timothy J. Walker

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This opinion is uncorrected and not selected for official publication.

[\* 1]  
STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

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In the Matter of the Application of  
EXCELSIOR,

Petitioner,

**COMMERCIAL DIVISION  
DECISION AND ORDER**

Index No. 2009-8728

v.

ASSESSOR, TOWN OF AMHERST AND  
BOARD OF ASSESSMENT REVIEW OF TOWN  
OF AMHERST, COUNTY OF ERIE AND STATE  
OF NEW YORK,

Respondents,

AND

AMHERST CENTRAL SCHOOL DISTRICT,

Intervenor-Respondent

For Review of the Assessment Under Article 7 of  
the Real Property Tax Law.

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BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **WOLFGANG & WEINMANN, LLP**  
Peter A. Weinmann, Esq., Of Counsel  
Attorneys for Petitioner

**HODGSON RUSS, LLP**  
Daniel A. Spitzer, Esq., Of Counsel  
Joshua Feinstein, Esq., Of Counsel  
Attorneys for Intervenor-Respondent Amherst Central School District

**WALKER, J.**

Petitioner commenced this special proceeding, pursuant to Article 7 of the Real Property

Tax Law (“RPTL”), seeking to reduce the assessment of its real property located in the Town of Amherst, New York, at 3925 Sheridan Drive (the “Property”). Petitioner operates the Property as a medical office building. The challenge pertains to the 2009-2010 tax year.

Petitioner and Respondents entered into a stipulation of settlement in this Proceeding (last dated January 4, 2010), which was incorporated into an “Interim Order” granted on January 4, 2010 (the “Interim Order”). Intervenor- Respondent neither participated in the settlement, nor consented to the entry of the Interim Order, electing instead to continue with this Proceeding - which it was entitled to do (*PNL Stillwater, LLC v. Bd. of Assessors*, 94 AD3d 1401, 1403 [3<sup>rd</sup> Dept 2012] [“Upon exercising the option to intervene in an RPTL article 7 proceeding, a school district’s right to fully participate in its resolution, either by settlement or trial, cannot be compromised as here proposed”]).

A bench trial was conducted on April 3, 2014. The parties (Petitioner and Intervenor- Respondent) waived post-trial submissions.

It is well settled that challenged assessments are presumed correct, and a petitioner bears the burden of overcoming such presumption by coming forward with “substantial evidence” to the contrary (*Matter of FMC Corp. v. Unmack*, 92 N.Y.2d 179, 187 [1998]). Substantial evidence is “evidence grounded in objective data and sound theory (*Niagara Mohawk Power Corp. v. Assessor*, 92 N.Y.2d 192 [1998]). In the context of a tax *certiorari* matter, substantial evidence:

will most often consist of a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser (*Id.* at 196).

In preparing appraisals of real property, appraisers have traditionally relied on one of three methods of valuation: comparable sales, capitalization of income or reproduction cost less depreciation<sup>1</sup> (*Allied Corp. v. Town of Camillus*, 80 NY2d 351 [1992]). The comparable sales method of valuation is “generally the preferred measure of a property’s value for assessment” (*Id.*, at 356). Pursuant to the sales comparison approach to value, an appraiser selects one or more properties that he or she deems similar to the subject property and makes adjustments to them to address the differences between them and the subject property (*Latham Holding Co. v. State*, 16 NY2d 41 [1965]<sup>2</sup>; *Matter of Peck v. Obenhoff*, 84 AD2d 633 [3d Dept. 1981] [petitioner in a tax certiorari proceeding was incapable, as a matter of law, of establishing that the subject property was overvalued where his appraiser failed to make necessary adjustments to comparable sales]).

In comparing and adjusting comparable sales to the subject property, appraisers typically evaluate the following elements of comparison: property rights conveyed; financing terms; conditions of sale; expenditures made after purchase; market conditions; location; the use(s) to which the subject and comparable properties are being made; non-realty components of value; economic characteristics; and physical characteristics (The Appraisal of Real Estate, 12<sup>th</sup> Edition,

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<sup>1</sup> The reproduction cost less depreciation method of valuation is not relevant to these proceedings, because it is typically used to value specialty property or property that is otherwise incapable of being valued by the sales comparison or income approaches to value (*Matter of Great Atlantic & Pacific Tea Company, Inc. v. Kiernan*, 42 NY2d 236 [1977]).

<sup>2</sup>*Latham Holding Co. v. State* was decided in the context of a claim following an appropriation of a portion of claimant’s real property. While not a tax *certiorari* case, its holding that comparable sales must be appropriately adjusted applies to tax *certiorari* proceedings as well as appropriation (and eminent domain) matters.

Appraisal Institute, p. 426]. Physical characteristics, which may require adjustment, typically include:

differences in building size, quality of construction, architectural style, building materials, age, condition, functional utility, site size, attractiveness, and amenities (*Id.*, at 426).

Moreover, RPTL §302(1) mandates that a property's assessment shall be based on, *inter alia*, its "condition" as of March 1 of the current tax year.

The income capitalization approach to value is typically used to value income producing properties (*Conifer Baldwinsville Associates v. Town of Van Buren*, 115 AD2d 325 [4<sup>th</sup> Dept. 1985]). This approach attempts to reflect the importance investors in such property place on the income generating capacity of the property. The more income it produces, the more an investor would be willing to pay to acquire that property. An investor gives up the use of funds in exchange for the expectation of receiving a future income stream. Value is created by that expectation. The focus of this approach is to estimate income-generating capacity of the property and convert it to an estimate of present worth.

The Property is income producing. The final determination as to the market value of the Property shall be based on the appropriateness of the valuation approaches, the accuracy of the results developed and the quantity and quality of evidence presented.

Based on the record of these proceedings, the Court determines that the Property consists of an approximate 11.73 acre site improved with a masonry multi-tenant, multi-use building containing 61,400 square feet of gross and net leasable building area, constructed in 2005.

The taxable status date is March 1, 2009.

The Property was assessed for the relevant tax year at \$7,574,900, with an equalization rate of 100%.

Petitioner's appraiser valued the Property at a fair market value of \$6,500,000.

Intervenor-Respondent's appraiser valued the Property at a fair market value of \$11,000,000.

Despite the fact that both appraisals were lacking in some respect, the Court will not reject, nor accept in totality either appraisal. Instead, the Court elects to accept the most reliable evidence from each, and apply a "pragmatic balancing analysis" utilized by the Court deciding *G.R.F., Inc. v. Board of Assessors of the County of Nassau* (41 NY2d 512 [1977]). In that case, an assessment reduction was upheld even though the trial court had rejected the theories of valuation used by both appraisers. The Court of Appeals noted that the trial court had properly made a "balancing analysis" adjustment to what otherwise would have been flawed theories of valuation to arrive at a fair market value.

Here, both appraisers utilized the sales comparison and income capitalization approaches to value.

Comparing the two appraisers' uses of these methods, and after considering the record and after due deliberation thereon, the Court determines that the appropriate value for the Property as of the taxable status date (March 1, 2009) is \$8,600,000.

For the foregoing reasons, it is hereby

**ORDERED**, that the Petition is denied; and it is further

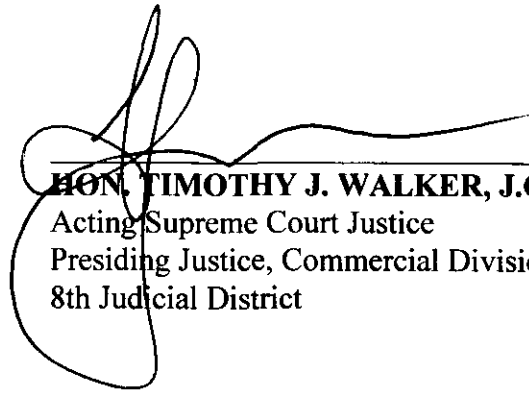
**ORDERED**, that the provisions of §727 of the Real Property Tax Law shall apply; and it is further

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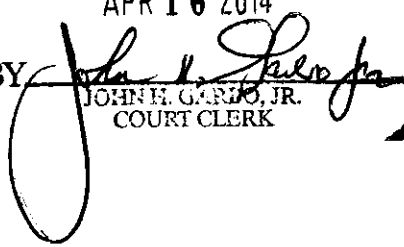
**ORDERED**, that, to the extent Petitioner paid taxes to Intervenor-Respondent based on the real property tax assessment for the tax years 2009-2010, 2010-2011, 2011-2012, and 2012-2013 as set forth in the Interim Order (i.e., ~~\$6,600,000~~ <sup>76,600,000</sup>), Petitioner shall remit to Intervenor-Respondent the balance of taxes owing based on this Decision and Order without interest or penalties if paid within thirty (30) days of service of this Decision and Order, together with notice of entry.

This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: April 16, 2014  
Buffalo, New York

  
**HON. TIMOTHY J. WALKER, J.C.C.**  
Acting Supreme Court Justice  
Presiding Justice, Commercial Division  
8th Judicial District

**GRANTED**

APR 16 2014  
BY   
JOHN H. GARFO, JR.  
COURT CLERK