

To commence the statutory time period of appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

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In the Matter of the Application of

TARGET #1954,

Petitioner,

-against-

THE BOARD OF ASSESSORS AND/OR
THE ASSESSOR OF THE TOWN OF MOUNT KISCO
AND THE BOARD OF ASSESSMENT REVIEW,

Respondents.
-----X

In the Matter of the Application of

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Respondents.
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TOLBERT, J.

APPEARANCES:

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DECISION & ORDER

INDEX NO: 65054/2014
65361/2015
63124/2016
64696/2017

INDEX NO: 55449/2014
55872/2015
54660/2016
54497/2017

The instant proceedings were commenced by TARGET # 1954 (hereinafter "Petitioner"), against the Town of Mt. Kisco and the Village of Mt. Kisco (hereinafter "Respondents") challenging the correctness of the Respondent Town and Village's real property tax assessment of the subject property pursuant to Article 7 of the New York Real Property Tax Law. Petitioner challenged said assessments for Assessment Years 2014, 2015, 2016, 2017 in both the Town and Village. The property is designated as Section 69.48, Block 2, Lot 1.1 by the Town and Village of Mt. Kisco.

A non-jury trial was conducted on November 27, 28, and 29, 2018 and on December 12, 2018.

STIPULATIONS

Prior to commencement of testimony of the parties, through counsel, a stipulation was placed on the record that the underlying petitions were timely and properly served. They further stipulated to the qualifications of their respective appraisal experts to testify as experts and to the conditional admission of the appraisal reports into evidence subject to cross examination by opposing counsel. In addition, they stipulated to the assessed values and equalization rates as well as each parties value contentions follows:

Town of Mount Kisco

Year	Assessed Value	Equalization Rate	Market Value	Petitioner's appraisal	Respondent's appraisal
2014	\$3,285,100	18.08%	\$18,169,801	11,400,000	22,500,000
2015	\$3,285,100	17.56%	\$18,707,859	11,500,000	23,500,000
2016	\$3,350,000	17.44%	\$19,208,716	11,500,000	22,300,000

2017	\$3,350,000	17.25%	\$19,420,290	11,500,000	22,400,000
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Village of Mount Kisco

Year	Assessed Value	Equalization Rate	Market Value	Petitioner's appraisal	Respondent's appraisal
2014	\$1,588,860	9.90%	\$16,049,091	11,400,000	22,500,000
2015	\$1,588,860	8.58%	\$18,518,182	11,500,000	23,500,000
2016	\$1,600,000	8.46%	\$18,912,530	11,500,000	22,300,000
2017	\$1,600,000	8.22%	\$19,464,720	11,500,000	22,400,000

SUBJECT PROPERTY

The subject property is a 117,470 square foot retail building built in 2004. It was built on a 8.79 acre parcel as part of a 30 year ground lease. The ground lease existed in 2005 with a ground rent of \$1,500,00.00 subject to adjustment every five years based upon the Consumer Price Index.

The subject property was acquired in 2007 as part of a portfolio package of nine shopping centers. At time of valuation, the subject property was considered to be of good quality construction.

It is located in the Mount Kisco Commons shopping center near a busy commercial area and has good access to local and regional roadways. The subject is in an upscale bedroom community with high value homes and high median family incomes.

INITIAL BURDEN

Assessments of real property, by the taxing authorities are deemed presumptively valid. Roth v. City of Syracuse, 21 NY 3d 411 (2013). Those seeking to challenge can rebut that presumption by bringing forth substantial evidence that the property was overvalued. The substantial evidence standard has been determined to mean that the taxpayer "demonstrated the existence of a valid and credible dispute regarding valuation." FMC Corp. V. Unmack, 92 NY 2d 179 (1998).

The obligation is most often achieved by offering a "detailed competent appraisal based on standard accepted appraisal techniques and prepared by a competent appraiser." Niagra Mohawk Power Corp. v. Assessor Town of Geddes, 92 NY 2d 192 (1998).

The Uniform Rules of the trial Courts speaks to appraisal reports at 22NYCRR 202.59 (g) (2), and reads:

(2) The appraisal reports 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. If sales, leases or other transactions involving comparable properties are to be relied on, they shall be set forth with sufficient particularity as to permit the transaction to be readily identified, and the report shall contain a clear and concise statement of every fact that a party will seek to prove in relation to those comparable properties. The appraisal reports also may contain photographs of the property under review and of any comparable property that specifically is relied upon by the appraiser, unless the Court otherwise directs.

This Court finds that the Petitioner has met its initial burden by filing a

detailed appraisal based upon accepted appraisal techniques prepared by a competent appraiser and the Court will now look to and weigh the entire record to determine if Petitioner has met its ultimate burden through the preponderance of the evidence.

METHODOLOGY

Both appraisers approached the valuation of the subject utilizing the income capitalization approach to value. Appraiser for Petitioner also developed a sales comparison approach to value.

The parties concede that their task was to reach and conclude a value of the fee simple interest of the subject property. Further, the parties were to value the property as of each June 1, 2014, 2015, 2016, 2017 for the Town petitions and as of each January 1, 2014, 2015, 2016, 2017 for the Village petitions. Both sides presented expert testimony and documentary evidence in support of their respective positions. Petitioner also offered a rebuttal witness.

Petitioner's expert testimony was proffered through certified appraiser, Christopher L. Harland. Respondent proffered expert testimony from Daniel Houlihan. Both appraisers carry the MAI designation (Member Appraisal Institute). As indicated, herein above, the appraisers ability to offer expert testimony on value was stipulated by the parties as well as their respective reports, subject to cross examination.

The fact that the subject exists as a "big box" property is not disputed by either side. The approaches utilized by the parties are appropriate for this assignment. The fact that one appraiser, the Petitioner's appraiser, utilized two approaches and the other

appraiser utilized one, does not automatically allow a determination that one conclusion of value is more reliable than the other. The ultimate purpose of valuation, whether eminent domain or tax certiorari proceedings, is to arrive at a fair and realistic value of property involved. PGC Associates, LLP V. Assessor of Town of Riverhead, 270 A.D. 2d 825 (2d Dept. 2000).

COMPARABLE SALES

Petitioner utilized four (4) comparable sales located in Long Island, Westchester, County, Bridgewater, New Jersey and Bloomfield, New Jersey. All of the above sales were originally "big box" sales. Petitioner's analysis revealed that Petitioner did not know the terms of the leases that encumbered sales #1 and #2 that the purchases of the respective properties were subject to. Further, Mr. Harland did not recognize that the lease encumbering Petitioner's sale #2 was a ground lease and failed to adequately address any complications that might have on the analysis. He considered the buyout of leases #2 and #4 to be market transactions even though no information was presented that supports the conclusion that the leases were market.

The subject property is located in Northern Westchester County, along a commercial roadway in both the Town and Village of Mt. Kisco. The subject neighborhood has good access to local and regional highways. Because of this Mr. Harland concluded upon commencing his investigation, that the appropriate market area for this project would be the New York Metropolitan market. He said the market would encompass Westchester, New York City, Long Island and Northern New Jersey. He maintains that the market for this property location would optimally be Westchester County, but there were a limited number of sales in Westchester that he could identify

that quality as a comparable sale.

All of the four were originally designed for big box users. Further he sought comparables that were built in the last 20 years. He researched public records and industry resources like COSTAR. He also sought to speak to a primary person involved in the transaction like a broker, buyer, seller.

Two of the sales were encumbered by leases. Only one of the properties was located in Westchester County. Two of the properties were the subject of tenant improvement. He made adjustments to one of those leases but not the other, and explained why he came to the conclusion to adjust or not adjust a particular comparable category. Harland further testified that he would verify the particular in various ways.

INCOME CAPITALIZATION

Petitioner's appraiser (Harland) and Respondent's appraiser (Houlihan) both approached the valuation by the Income Capitalization method. Both appraisers concede that the value that they were attempting to conclude was a fee simple interest. Harland testified that he was not looking to determine a value based upon a leased fee interest because leased fee sales could have below market lease terms analysis by Income Capitalization techniques. They both identified properties then adopted the following process:

- 1) Estimate the annual Gros Potential Income of the property based on the actual leases in effect and/or on comparable rental data.
- 2) Deduct from Gross Potential Income the estimated loss of income resulting from vacancies and/or non-collections to arrive at an estimate of Gross Effective Income.
- 3) Estimate the expenses which are anticipated to be incurred

in the operations of the property. The total expenses are deducted from Gross Effective Income to arrive at an estimate of Net Operating Income (NOI - income before debt service, income taxes and depreciation).

4) Derive a capitalization rate by reference to the return requirements of the equity and capital (mortgage) markets. Select an appropriate method of capitalization and convert the NOI into a value estimate.

Both appraisers filed a report in support of their conclusions on value, each point to claimed deficiencies in the others' valuation technique and/or procedures.

Petitioner references the several leases identified and analyzed by Respondent and argues that 5 of the 7 leases had fundamental flaws in their analysis. Respondent concedes that one of his proffered leases was not the result of an arms length negotiation and, therefore, should not be considered in the analysis.

Of the remaining leases utilized by Respondent, Petitioner claims Respondent in some instances failed to make appropriate adjustments to address issues like tenant improvements and rent concessions. The record indicates that such adjustments were addressed by Respondent's appraiser as explained in testimony. In one instance it was demonstrated that terms of a lease that would or should have been addressed in the evaluation process, were agreed to after the appraisals had been completed and, therefore, did not exist when the appraisal was completed.

Similarly, Respondents attack the Petitioner's appraisal and analysis. Generally, Respondents' cite to Petitioner's appraisers failure in some instances, to specifically identify a verification source by name. Petitioner does in most instances references a "category" of person he verified with; i.e. grantor, agent, that should allow for fruitful investigation by the adversary.

Petitioner urges this Court to conclude that the proffered analysis by Respondents of the selected rental income properties did not, in fact, analyze the appropriate property interest; fee simple. However, this record does not support such a conclusion by this trier of fact.

Similarly, Respondents urge the Court not to credit Petitioner's analysis of "comparable" leases because in his income capitalization approach Petitioner did not make sufficient adjustments to his analysis for differences between the subject and the two comparables. Petitioner did, in fact, provide reasonable explanation in testimony. Even if a reasonable explanation was not made, those points would not be dispositive in this case.

The Petitioner, as previously indicated, has met the initial burden. Now upon the preponderance of the evidence, the need to establish that the property is overvalued. Further, the fact that Petitioner approached value using two methods, comparable sales and income capitalization, and Respondent approached value by one method, income capitalization, does not automatically lend more credence to the value concluded by the party using, in this case, the one method, income capitalization.

CONCLUSIONS OF LAW

The subject property is a "big box" store located in Northern Westchester, NY. The Assessment of the subject property is presumed valid, and the Petitioner in the proceeding herein has the burden of proving the challenged Assessments erroneous by substantial evidence. Board of Managers of French Oaks Condominiums V. Town of Amherst, 23 NY 3d 168; FMC CORP V. Umack, 92 NY 2d 179 (1998).

This burden, is minimal, but requires "that the documentary and testimonial evidence

proffered by the Petitioner must be based on sound theory and objective data.” French Oaks Condominiums, 23 NY 3d 168; FMC Corp., 92 NY 2d at 188. Therefore the Court must determine whether by a preponderance of the evidence that the challenged assessment fact excessive.

The best evidence of value would be the arms-length sale of the subject, but absent that the tradition methods of value are comparable sales, income capitalization and reproduction costs. With respect to the last three, the sales comparable methods would be preferred.

The goal of a tax certiorari proceeding is to arrive at a fair and realistic value of the property involved. Matter of Allied Corp. V. Town of Camillus, 80 NY 2d 351 (1992).

The Court having determined that Petitioner has met its initial burden, the Court must weigh the entire record, including claimed differences in the assessment. to determine whether Petitioner has established by a preponderance of the evidence that the property has been overvalued Matter of FMC Corp. V. Unmack, 92 NY 2d 179 (1998).

Petitioner utilized two (2) methods; Comparable sales and Income Capitalization. Respondents utilized only the Income Capitalization. Petitioner's comparable sales consisted of four sales, only one being located in Westchester and two in New Jersey.

The record supports a conclusion that two of the proffered comparable sales (Harland Comparable Sale #3 & #4 are from New Jersey and based upon the indicated market values were in dissimilar markets to the subject Harland Comparable sales #1 & #2 were subject to leases that Harland was not aware of the terms of the leases). Although Hartland maintains that those leases were at market, he provides little factual

back up to support that conclusion.

Harland's Income Capitalization approach consisted of the review of six leases, only two being in Westchester. The two Westchester leases are located above street level in a multi-story building, which has paid parking. Harland did not deem it appropriate the comparable lease properties in Westchester County were signed prior to the first valuation years under review.

With regard to the deduction of expenses, Harland utilized, in part, expenses that he gleaned from properties previously appraised by him in upstate New York. Harland's testimony to the lack of market similarity between Northern Westchester and Northern New York State implicates the reliability of the use of expenses from properties in that region as to value the subject.

Respondents' sole method of establishing value was the income capitalization, by which Respondents used seven properties. Respondents concede that one of the comparable leases (#3) was not an arms-length transaction and should not be part of his analysis.

Each of Respondents' transactions contained a specific verification source. Petitioner argues that Respondents' comparables as detailed are unreliable/ Respondent's appraisal and testimony put forth the adjustments that Respondent's appraisers deem warranted.

Based upon a review of the testimony and evidence adduced at trial, post trial submissions, the Court determines that Petitioner has not carried its burden of persuasion with the preponderance of the evidence.

While the record clearly reveals that both valuation documents have some

deficiencies, the Court concludes and determines that the report, testimony and value conclusions of Harland are less reliable. Of import is the fact that Harland chose comparables, both sales and leases that were from dissimilar areas. Properties selected by Harland for the sale comparison half were located in the State of New Jersey.

With respect to the income capitalization approach, Harland similarly identified six properties, however, only two being located in the subject market. This is buttressed by the fact that Harland's analysis of the two New Jersey properties indicated market values that were significantly lower than the indicated values for the subject.

Respondents' appraisal also raises issues: As to Respondents' lease selections (7), are except one are smaller in leased area than the subject.

Mr. Houghlihan, in adjusting for size, adjusted all the properties that were smaller than the subject to the same extent.

Once again, the ultimate goal of property valuation in any tax proceeding is to arrive at a fair and realistic value of the property involved (See, Matter of Roth v. City of Syracuse, 21 NY 3d 411, 416 (2013)). On this record this Court finds and determines that Petitioner has not sustained its burden by the preponderance of the evidence that the subject property is over valued.

Therefore, be it hereby

ORDERED that the petition(s) are dismissed. The assessments challenged on the 2014, 2015, 206, 2017 roll of the Town of Mt. Kisco are all confirmed.

The foregoing constitutes the Decision and Order of this Court.

Dated: June 5th, 2019

White Plains, New York

ENTER



HON. BRUCE E. TOLBERT, J.S.C.