

STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

THAT IS SO FRANCO, LLC,

COPY

Petitioner,

-against-

THE ASSESSOR FOR THE CITY OF TROY, THE BOARD OF
ASSESSMENT REVIEW FOR THE CITY OF TROY AND
THE CITY OF TROY ,

Respondents.

All Purpose Term

Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding

Index Nos: 2017-256978 and 260268

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DECISION

Zwack, J:

Petitioners That's So Franco, Inc. filed this Real Property Actions and Proceedings Law Article 7 petition against the City of Troy seeking a review and reduction the 2017 and 2018 real property taxes as assessed against its property at 41 114th Street, Lansingburgh ("The Lansingburgh Apartments"). The property consists of a 96 unit age restricted apartment project at the former and now renovated Lansingburgh Hospital, which they purchased on June 2, 2016. The City has appraised the property at \$3,770,000 for both years. Petitioners appraisal of the property gives a value of \$2,049, 743 for 2018.¹ Respondent asserts that Petitioners have failed to establish a basis to disturb the presumptive validity of the assessment made on the property for the years 2017 and 2018.²

Following a bench trial, at which both appraisers testified in support of their appraisals, Richard J. Lambert, certified general appraiser, for the

¹Petitioners appraisal concluded a market value for July 1, 2017. It did not develop a value for July 6, 2016.

²At the time Petitioner purchased the property, it was under the benefit of a PILOT program—payment in lieu of taxes—and was paying \$57,282. That program ended in the 2017 tax year, and petitioner saw a tax increase to \$157,670.

petitioners and Stephen Clark, also a certified general appraiser, of Empire State Appraisal Services for the City, the Court directed further submissions in the form of findings of fact and conclusions of law³. Based upon the trial transcripts, those submissions, and the appraisals in evidence, the Court finds that Petitioner has failed to meet its burden regarding the validity of the City's assessment and its petition is dismissed. The legal precedent and the Court's findings follow.

It is well settled law that tax assessments enjoy a presumption of validity (*Farash v. Smith*, 59 NY2d 952 [1983]). The petitioner in a tax proceeding, however, only has to make an initial showing of "substantial evidence" proving that an assessment is erroneous to meet its initial burden to proceed (*FMC Corp. v Unmack*, 92 NY2d 179 [1998]). Despite this minimal burden, the petitioner is required to offer proof through an "a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser, " one that encompasses "objective data and sound theory" (*Matter of Niagara Mohawk Power Corp. Assessor of the Town of Geddes*, 92 NY2d 192, 196 [1988]). Where the Court determines, after a review of the preponderance of the evidence, that

³At the outset of the trial, the parties stipulated to the City's assessed value and the equalization rate, and that both appraisers were qualified.

an expert's appraisal lacks credibility in its valuation analysis, the report must be rejected (*Foxcroft Village LLC v. Assessor of Town of Fallsburgh*, 176 AD3d 1527 [3d Dept 2019]).

Both appraisers utilized the income capitalization approach required by law. As a subsidized housing project, where at least 20 percent of the units are subject to an agreement with the federal Department of Housing and Urban Development, the assessed value of the property "shall be determined using the income approach as applied to the actual net operating income, after deducting reserves as required by any federal, state or municipal programs..." (NY RPTL 581-a).

The income valuation approach involves first a determination of the revenue producing potential of the property. Thereafter, periodic operating expenses are deducted from anticipated revenues, which results in an income stream. To determine the appraisal value, the net operating income is divided by a capitalization rate.

Petitioner's calculation of the capitalization rate was deficient in that it contained no information about the market transactions or market value of residential properties in Troy. Mr. Lambert acknowledged that capitalization rates in 2017, according to *realtorates.com*, varied between 4 to 11 percent, but he presumed for his analysis a 9 to 10 capitalization rate.

The capitalization rate minimum in 2017 was 4.34, the average was 7.8, the maximum 11, and the Fannie Mae or HUD rate was 6.5. Even though Mr. Lambert acknowledged that the market extraction rate was the most reliable indicator of a capitalization rate, he did not use as comparables any senior housing in the area, saying that he was not able to locate any. Mr. Lambert advises in his appraisal that "development of a capitalization rate is best viewed from recent comparable sales" and that "the sales data [used] was not truly comparable." Mr. Lambert concluded that the equalization rate was 12 percent, and with the added tax factor of 4.199, the effective equalization rate was 16.99. The next step in determining the value is dividing the net operating expenses—\$377,000 for petitioner—by the 16.19 capitalization rate. Petitioner concluded that the appropriate assessed value of the property was \$2,049,743.

Respondent determined the capitalization rate to be 6 percent with a 4.20 tax factor, for a total rate of 10.20. Mr. Clark utilized surveys and three separate methodologies to come up with a capitalization rate, including , a market extraction method, an band of investment technique, and an imputed capitalization rate derived from the actual sale of the property one year prior to the valuation date. In describing the methodology using the actual sale price, he did the following: first

determined the net operating income as follows: \$853,600 potential gross annual income with other fees actually collected for a total of \$874,500.00. From that figure, net expenses were deducted, \$435,000, as well as the required HUD reserve, and the actual 2017 taxes of \$197,000, for an overall actual income of \$216,000. Actual income of \$216,000 divided by the sale price of \$4,077,500, netted a 5.31 percent capitalization rate. Respondent's appraiser concluded the value of the subject property to be \$3,950,000.

In addition to the unreliability of Mr. Lambert's calculation of the capitalization rate, his appraisal as a whole simply fails to meet the preponderance of the evidence needed to establish that the City has overvalued this property. The appraisal by Mr. Lambert is based upon a false assumption, that being that it was not a market sale or arms length transaction. This allowed the appraiser to conveniently disregard the property sales market in Troy altogether and led to very convoluted and strained attempts to calculate a capitalization rate. Statements made, which Mr. Lambert appeared to rely on, including the assertion that there was no expected growth in the property sales market in Troy for the next five years, were wholly unsupported but appear to be pivotal points in his analysis. Petitioner purchased the property on June 2, 2016, one month before it's appraisal date, for \$4,077,500. While petitioner makes much of

the fact that some data—*Salesweb*—indicated that the sale was not arms length and market, he admits that when met with the apparent discrepancy, he neither questioned the purchaser nor the City of Troy Assessor. Mr. Lambert further admits that Form 5217 clearly indicates that the sale was an arms length, market sale. As a matter of law, an appraisal report that ignores a recent sale of the subject property has no probative weight (*Rite Aid Corp. v. City of Troy*, 155 AD3d 1172 [3d Dept 2017]). “The best evidence of value...is a recent sale of the subject property between a seller under no compulsion to buy and a buyer under no compulsion to buy” (*Matter of Allied Corp. v. Town of Camillus*, 80 NY2d 351 [1992]). Mr. Lambert admitted that under none of the models that he used in his appraisal did he take the actual sale price of the property and analyze it.

Petitioner’s appraisal of \$2,049,743 inexplicably represents a 50 percent depreciation of market value in just one year. In order to support such a radical conclusion—especially in light of the fact that this was an arms length transaction—the Court is looking for substantiation of the value that is economically realistic and pragmatic. Again, petitioner’s proof falls far short. In order to use the income approach and utilize net operating income, petitioner’s appraiser made certain unfounded assumptions and failed to verify his figures. In reaching net operating

income of \$377,000, reported expenses were \$76,000 higher than in previous years, without adequate explanation. The appraiser admitted he did not verify the expense data he was given by the property manager, and included "capital expense items," because that was what the property's accountants had done. In contrast, Mr. Clark explained that Respondents determined net operating income to be \$403,000. His calculation took out what he considered to be capital expenses from the expenses reported, as well as an every three year HUD fee, and a casualty loss.

As the Court notes above, the most speculative of Mr. Lambert's conclusions involved the market for senior housing, and housing in general in the City of Troy. Using what he described as the Claritas model, he concluded that there would be no appreciation in the value of real estate in the City of Troy for the next five years. Under cross-examination Mr. Lambert admitted that the Claritas model is demographic based, not based on value or appreciation.

Unlike petitioner's expert, Mr. Clark relied on readily identifiable market data that was germane to the valuation of the subject property. Mr. Clark analyzed comparable properties in the area, which included subsidized housing and non-subsidized housing and determined that in fact rents were rising from 2013 to 2019. Mr. Clark analyzed demographic data

related to the senior population in the immediate area and concluded that there was a “tremendous demand” for properties similar to the subject and that such demand and demographic data represented not a decrease in the market value of the property as posited by petitioner, but rather an indicator of its actual market value.⁴

Unlike Mr. Lambert, Mr. Clark did review the expenses of the property with the property manager, and was able to reduce/remove some which represented an every three year HUD inspection fee (\$37,362), capital projects (new parking lot) and a casualty loss. His conclusion of expenses-\$435,000-was consistent with expense ratios reported by other HUD properties in the City of Cohoes and Mechanicville. The capitalization rate reached by Mr. Clark was also similar to a HUD property in the City of Cohoes, and he used the investment technique, market surveys, the imputed capitalization rate from the sale of the subject property, and the market extraction method to arrive at that rate. Applying his percent capitalization rate to the net operating income, he was able to arrive at a market valuation of the subject property

⁴Much was made as to the classification of the property, however, neither appraisal actually classified the property as a Class C property. The subject is a HUD property, last modernized in 1978, in an economically depressed area of the City of Troy. Testimony revealed that 53 percent of the building’s population was under age 50, and it did serve the developmentally disabled. It was also noted that there was no vacancy, but rather a waiting list.

in the amount of \$4, 039, 500—a value within 4 percent of the reported arms length sale for \$4,077,500 a year prior.

Having concluded that petitioner failed to meet its initial burden, the Court does not need to address petitioner’s contention of claimed deficiencies in respondent’s appraisal (*Matter of City of Troy v. Kusala*, 227 AD2d736 [3d Dept 1996]). The Court finds that respondent’s assessment is based on sound data and represents a sound conclusion as to the value of the subject property. The Court finds that the City’s appraisal it is pragmatic and consistent with the economic reality. Respondents appraisal report and the supporting testimony were based upon relevant, readily identifiable market data and are consistent with data provided by the actual sale of the property.

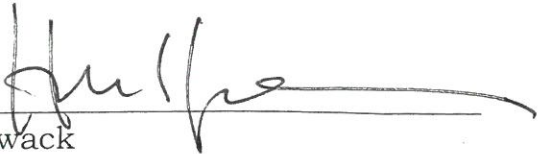
Accordingly, it is

ORDERED, that the petition is dismissed.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorneys for the petitioners. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated:

JUL 09 2020
Troy, New York


Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition dated July 2, 2018, Petition for Review of Re-Property Tax Assessment Verified July 2, 2018, Notice of Petition and Petition Verified July 25, 2017.
2. Transcript of trial proceeding on January 22, 2020;
3. Petitioner's Exhibit 1;
4. Respondent's Exhibit A
5. Petitioner's Findings of Fact and Conclusions of Law
6. Respondent's Memorandum of Law dated June 19, 2020