

To commence the statutory time for 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**

Present: **HON. BRUCE E. TOLBERT**

J.S.C.

-----X  
In the Matter of the Application for a Review under  
Article 7 of the Real Property Tax Law of a  
Tax Assessment by

**COOLIDGE 545 SOUTH LLC,**

**Petitioner,**

**-against-**

**CITY OF PEEKSKILL, a Municipal Corporation, its  
Assessor, or Board of Assessors and Board of Review,**

**Respondents,**

**-and-**

**PEEKSKILL CITY SCHOOL DISTRICT,**

**Intervenor,**

-----X  
**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER**  
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In the Matter of the application for a Review under  
Article 7 of the Real Property Tax Law of a  
Tax Assessment by

**545 PARKWAY PLAZA LLC,**

**Petitioner,**

**-against-**

**CITY OF PEEKSKILL, a Municipal Corporation, its  
Assessor or Board of Assessors and Board of Review,**

**Respondents,**

**-and-**

**PEEKSKILL CITY SCHOOL DISTRICT,**

**Intervenor.**

-----X  
**TOLBERT, J.**

**DECISION AND ORDER**  
Index Nos.: 15318/05  
07134/06

Index Nos.: 17559/07  
19823/08  
20331/09  
22027/10  
14143/11  
64552/12 E-FILE  
63796/13 E-FILE

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The instant proceedings were commenced pursuant to Article 7 of the Real Property Tax Law, challenging the real property tax assessments on the subject property for each of the valuation dates May 1, 2005 through and including May 1, 2012.

A Bench Trial was conducted on March 24<sup>th</sup> and 25<sup>th</sup>, 2016. After careful review of the trial record and exhibits, pre and post-trial Memorandum of Law, the Court is now prepared to render a Decision on valuation.

**SUBJECT PROPERTY**

The property which is the subject of the proceedings is an irregular and elongated parcel with frontage of 146.25 feet on the southeast side of South Street, 97.2 feet on the westside of Smith Street, a depth on its north line of about 262.44 feet, and a depth on its irregular south and southwest lines totaling about 368.92 feet. The parcel comprises an area of about 36,276 sq. ft. or .833 acre. The topography along South Street is about 4-5 feet above street grade and is supported by stone retaining walls. It gradually ascends about 12-13 feet from there to the building's rear, and is substantially level to the rear/east periphery along the Smith Street frontage, which is at street grade.

On all the taxable status or valuation dates herein (May 1 of each year in the City of Peekskill), the subject parcel was improved with a 6 and 7 level apartment building containing 40 units built about 1925.

The lobby level of the building has a vestibule, mailbox area, four apartments, laundry room, superintendent's workshop/gas and water meter room, electric meter area, compactor room and boiler utility room. The second level has a grade level entry and lobby entrance from the rear. It contains seven apartments; the third through sixth levels contain seven apartments each and the seventh level contains one apartment. There is a total of 40 apartment units containing a total of 142 rooms and 40 bathrooms. There is one apartment of two rooms; one apartment of 2.5 rooms; 14 apartments of three rooms; and 12 apartments each of 3.5 and 4.5 rooms. All apartments have one bathroom.

Site improvements include a paved driveway (curb cut to Smith Street) and a parking area for cars.

### EXPERT WITNESSES

Only two witnesses testified at trial; Robert Balog of Balog Consulting, Inc., as Appraiser for Petitioner and Bob Sterling, MAI, of Sterling Appraisals, Inc., on behalf of Respondent.

Based upon their education, certification and long and varied experience in the field of real estate appraisals, this Court finds and determines that each is qualified to testify at trial and render an opinion on value.

### INITIAL BURDEN

Assessments of real property by the taxing authorities are deemed presumptively valid *Roth v. City of Syracuse*, 21 N.Y. 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 “demonstrate the existence of a valid and credible dispute regarding valuation” *FMC Corp. v. Unmack*, 92 NY2d 179 (1998).

This 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 N.Y. 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 similarly finds that the Petitioner has met its initial burden and the Court will now look to and weigh the entire record to determine if Petitioner has met its ultimate burden with the preponderance of the evidence.

## **MOTION TO DISMISS**

Respondent City and Intervenor City School District urge this Court to dismiss the cases under the authority of *In the Matter of the Board of Managers of French Oaks Condominium*, 23 NY 3d 168 (2014). This Court concludes that the deficiencies, as argued by Respondent in Petitioner's appraisal go more toward weight and would therefore survive a motion to dismiss under these facts.

## **METHODOLOGY**

All parties conceded that the subject parcel, being an income producing property, that the most effective methodology to estimate value is income capitalization. Both that appraisers in their submitted and exchanged appraisals as well as trial testimony, followed this methodology, with Respondent factoring in two recent sales of the subject parcel. Based upon the record, this Court is inclined to agree that the method of appraisal (Income Capitalization) was appropriate.

Both appraisers followed the basic steps of

- a) Estimate the subject's potential gross income.
- b) Estimate a vacancy and credit loss and subtract that amount from the potential gross income to determine effective gross income.
- c) Estimate the subject's annual expenses and subtract said amount from effective gross income to establish net income.
- d) Select an appropriate capitalization technique to capitalize annual net income into an estimate of market value.

In this somewhat of a unique situation where the subject parcel was sold twice during the years in question, how one utilizes the sale prices to estimate value is important. Respondent urges an "averaging" or blending of 2 or 3 components, depending on the year. Since a sale price can factor into a value before and after the sale *W.T. Grant Co. v. Sorgi*, 52 NY2d 496 (1981). Respondent analyzed the value concluded by Income Capitalization along with the sale price within two years of each sale date. The average of those is the estimate of value. The Court concludes that the procedure is a fair and reasonable one under the facts presented and further noting that Petitioner did not factor in the sales at all.

## **INCOME/EXPENSE ANALYSIS**

Both experts calculated potential gross income, operating expenses and used those to get to net operating income. Evaluating the testimony and evidence on this record relative to those processes, the Court finds greater merit to the analysis done by Respondent's expert. Petitioner's expert readily admits that he did not necessarily follow or adhere to the principles of Uniform Standards of Professional Appraisal Practice in this regard.

One example exposed on the record was Petitioner's expert treated painting costs both as a deductible expense and including same as part of the reserve. As it pertains to the annual reserve estimated by Petitioner's expert, he offers no documentary or other testimonial evidence to support the figures he estimates. When challenged on this point during cross examination, he maintained his opinion without adding anything additional. Similarly, Petitioner's expert fails to support his conclusion on the issue of Replacement reserve with any data, documentation that lends support to his number.

Respondent's appraiser on the other hand provides support for his conclusions by testing them against published data, surveys and statistics. Unlike Petitioner's expert, Respondent's expert deducted renovation costs in the year they were incurred. Said deductions made were subtracted from the capitalized net income for that year. This procedure is consistent with "The Appraisal of Real Estate" (14<sup>th</sup> Edition) published by the appraisal Institute.

The Court finds and credits the Respondent's Income/Expense Analysis and the conclusions therein.

#### **EFFECTIVE TAX RATE**

The parties vary slightly in their calculation of the effective tax rates. The Court is inclined, based upon the overall credibility of Respondent's appraisal, to credit and accept the rates reached by Respondent.

#### **CAPITALIZATION RATE**

The parties differ substantially on the capitalization rate to be used in each of the years. They arrived at their rates by different means.

Petitioner clearly states that he based his selected capitalization rate, in part, on capitalization rates chosen after trial, by a Justice of this Court in two earlier cases. Neither of those cases concerned the subject property (apartment building) or property similar to such. Properties reviewed in those cases concerned a large retail chain store and the second a "light industrial" property.

According to the Petitioner's expert, the similarities between those properties and the subject, warranting consideration in developing a capitalization rate, is that they are all among the class of "income producing properties". In addition, some of the years in dispute in this case overlap in some instances the years in the prior decisions relied upon by Petitioner's expert.

Petitioner's expert also consulted surveys compiled by PriceWaterhouse Coopers (Korpacz) for some guidance on capitalization rates, but admits in testimony that he gave the greatest weight and took the greatest guidance from the capitalization rates set in the two prior matters he referenced.

Opining that an investment in the subject property carried more of a risk than an investment in a large retail chain store, he added one percentage point to the rates determined in

the two prior cases to establish his initial capitalization rate.

Respondent utilized the band of investment technique in developing his capitalization rate. He testified that such a technique was a weighted average of the return of investment required to cover mortgage payments as well as the return on investment to provide a competitive equity return. In developing same, he referenced the Korpacz Real Estate Investor Survey that is published quarterly by Pricewater House Coopers. He specifically spoke to the Yield Comparison Chart that indicated rates for average long term mortgage interest rates for a variety of types commercial properties. He selected rates for dates near each of the valuation dates (month of April and month of July), in question as well as the annual rate for each of the years. He opined, based upon his experience, that the interest rate for the subject property should be 25 basis points below the survey average for multi-family property contained in Korpacz. He checked this conclusion by referencing the Korpacz survey average for January 2007, of long term mortgages, noted at 6.40% and compared that with the interest rate of 5.98% attached to the mortgage in the 2007 sale of the subject property. He calculates the equity component by opining that the subject is close in investment attractiveness and risk to BAA Bond and adds a load factor of 1% for the illiquidity of real estate and 50% for necessary investment management. He references his data source of the BAA Bond from a website address. He then concludes his overall capitalization rates established by the Band of Investment technique.

Petitioner fails to demonstrate how the prior referred to Court decisions related to this subject property in the development of his capitalization rates.

Petitioner's expert testified that he utilized the Korpacz Real Estate Investor survey for overall cap rates for the second quarter of each of the valuation years. While he references and includes copies of pages of the Korpacz capitalization rates for the Regional Apartment Markets- Mid Atlantic Region, he was obligated to admit that prior to 2010, Korpacz did not publish Regional Reports Mid-Atlantic Region. Further, he ultimately had to concede that the Korpacz definition of Mid-Atlantic Region does not include the State of New York. Further, Petitioners submitted documentation supporting his use of Korpacz cap rates reveals that the rates he referenced were for institutional grade properties. He conceded that the subject was not institutional grade. These facts, figures and calculations identified as being used have questionable relevancy to the subject.

Based upon the testimony, evidence and record in the instant matter, the Court is inclined, and does, discredit the Petitioner's selected Capitalization Rates and credits those of the Respondents as being more appropriately supported by data and documentary proof.

The respective concluded capitalization rates are as follows:

#### **OVERALL CAPITALIZATION RATES**

	<b><u>Petitioner</u></b>	<b><u>Respondent</u></b>
May 1, 2005	12.44%	10.56%

May 1, 2006	12.10%	11.11%
May 1, 2007	11.75%	10.79%
May 1, 2008	11.25%	10.79%
May 1, 2009	12.18%	11.48%
May 1, 2010	12.26%	10.44%
May 1, 2011	12.21%	10.21%
May 1, 2012	12.40%	10.21%

The Court will adopt the Respondent's capitalization rates as being the more credible and supported by data and documentation.

#### MARKET VALUE

It is undisputed that in a case seeking to review a real property tax assessment, a key component of the process is to opine on the estimate of market value. In the case at bar, it is undisputed that the subject property sold on April 2, 2004, for \$2,450,000.00. The transaction involved Crestwood Associates selling the subject to Coolidge 545 South, LLC. In 2007, Coolidge 545 South LLC sold the subject to 545 Parkway Plaza LLC for \$3,235,000.00. Petitioner's expert admits that he did not factor these sales into his valuation of the subject. His primary contention as to why he did not factor either or both of these sales into his calculations was because they were not "Arms Length". The expert offered little, if any, documentary factual information to support his conclusion that the sales were not arms length, except to say that the arrangement between lender and borrower in the 2007 sale obligated the purchaser to embark upon a repair program of the subject apartment building.

One who claims that a sale is not one made at arms length or is abnormal carries the burden to present facts and evidence to establish same (*Metropolitan Transportation Authority v. Washed Aggregate Resources, Inc.*, 102 AD 3d 787, 792 (2d Dep 2013)). Petitioner in the case at bar has failed to carry that burden. The expert's decision not to consider either of the two sales at all is based on his unsupported conclusion that in his experience he has never seen rehabilitation obligations imposed by a lender. Petitioner produced no witnesses who either participated in or had first hand knowledge of the negotiation of or consummation of either sale.

The record does contain documentary evidence comprised of certified copies of filed documents relating to each sale. Said documentation is evidence supporting this Court's conclusion that transactions were arms length and not abnormal.

Respondent did consider and analyze the two sales. Respondent's decision to consider the recent sales affords his conclusions more reliable.

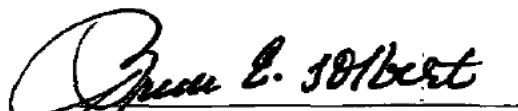
<u>Year</u>	<u>Value</u>
2005	\$2,586,000.00
2006	\$2,551,000.00
2007	\$2,894,500.00
2008	\$2,764,500.00
2009	\$3,164,000.00
2010	\$3,479,000.00
2011	\$3,551,000.00
2012	\$3,595,000.00

Weighing the testimony and evidence, the Court concludes that the preponderance of the evidence supports the conclusions on value estimated and concluded, as noted above by Respondent's expert for all years in question. This finding supports a determination that for the years 2005, 2006, 2007, 2008, 2009, the petitions are sustained and a reduction to the assessment shall be made to the extent indicated herein. For the years 2010, 2011, 2012 the petitions are dismissed and the assessments established by the City are upheld.

#### CONCLUSION

The Petition, with costs [RPTL 722[1]] are sustained to the extent indicated above, the appropriate assessment rolls are to be corrected accordingly, and any overpayment of taxes are to be refunded with interest.

The foregoing shall constitute and be the Decision and Order of this Court.

  
Honorable Bruce E. Tolbert  
Justice of the Supreme Court

Dated: August , 2016  
White Plains, New York