SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

SRI SIX HAMILTON SQUARE, LLC	:	**Tax Docket 8528-05**
Petitioner,	:	
v.	:	**Judge Rhonda Reid Winston**
DISTRICT OF COLUMBIA	:	
Respondent	:	

AMENDED ORDER

This matter came before the Court on appeal of the 2005 tax year real property assessment of the Petitioner's property, Lot 824 in Square 224 in the District of Columbia, also known as 600 14th Street and 1401 F Street, N.W. ("the subject" or "Petitioner's property"). The parties agree that Petitioner has satisfied all conditions precedent to bringing this appeal.[1] Petitioner's complaint is that the Government assessed its property at over 98.4 per cent of its value, while significantly undervaluing similar property. Petitioner contends that the undervaluation of similar properties caused it to bear an unequal proportion of the tax burden of the District of Columbia Government, thereby violating District of Columbia law by denying it "equalization" with other properties and violating the Equal Protection Clause of the United States

[1] Petitioner is the owner of the subject property and, as such, is required under District of Columbia law to pay taxes on the property. The Office of Tax and Revenue of the District of Columbia (OTR) assessed the property at $91,612,000.00. The Petitioner timely filed an appeal of that assessment to OTR, which upheld the assessment. Thereafter, Petitioner filed an appeal to the Board of Real Property Assessments and Appeals (BRPAA), which also upheld the assessment of the subject property. Prior to filing its petition with this Court appealing the decision of the BRPAA, Petitioner paid all taxes that were due based on OTR's 2005 tax year assessment.

Constitution made applicable to the District of Columbia by the Due Process Clause of the Fifth Amendment,[2]

THE TRIAL

The trial in this case lasted one and one-half days. Petitioner presented three witnesses, Quinton Harvell, the Office of Tax and Revenue ("OTR") assessor who determined the Tax Year 2005 assessment for the subject property; Lester Morter, a senior appraiser at OTR, and David Lennhoff, its expert witness, who prepared a uniformity study of the 2005 tax year assessment of the subject property, Petitioner's Exhibit 20.

Mr. Harvell testified that he assessed the property in the subject tax year and several years before and that, he had assessed approximately 1000 to 1100 properties for Tax Year 2005 ("TY 2005"). His testimony was that he used the income approach to value in reaching his assessment. He described that method. He explained that a tax assessment derived by application of this approach has two essential components, the net operating income of a property and a capitalization rate determined by OTR. The assessment is determined by converting the net operating income into value by the application of a capitalization rate and then deducting lease-up costs.[3] OTR has no written guidelines for determining the applicable capitalization rates. However, once a

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[2] *Bolling v. Sharpe*, 347 U.S. 497 (1954).

[3]Generally, when appraising commercial grade office buildings, OTR uses the mass appraisal technique. When applying that technique, OTR is required to consider all three methods of determining value: the income approach to value, the comparison sales approach and the replacement cost approach. D.C. Code § 47-820(a)(3)(2001). However OTR focuses on the income approach to value when applying that technique. Properties are classified as Best Value, or Class A, B, or C, depending on the rent level, the condition of property, and its location. The first step is for OTR to obtain the net operating income of a property based on its review of the property's long and short term leases. From this figure, the office deducts allowable expenses to determine the net operating income. (Some expenses, e.g. debt service and real estate taxes, are not included in this calculation). After arriving at the net operating income, the assessor determines the value by applying a capitalization rate to it. The capitalization rate for each tax year is determined by OTR's analysis of individual capitalization rates of the prior year's office building sales. Based on its analysis, OTR produces an "Office Building Capitalization Rates" study ("cap rate study") which shows the median and average capitalization rates for each property class (Best Available, A, B, or C).

range of capitalization rates is determined for the categories of property sales, an average and a mean capitalization rate are calculated for each class of commercial property. Based on the average and mean rates, an OTR supervisor determines the applicable capitalization rate for assessors to use in assessing individual properties.

Here, because the subject property had sold on December 16, 2003, just several weeks before the January 1, 2004 valuation date for TY 2005 assessments, Harvell testified, rather than applying the capitalization rate based on the cap rate study for that year, he selected the capitalization rate based on the sales price of the property and applied that rate to the net operating income.[4] Had the subject not sold, Harvell testified, he probably would have used a capitalization rate of 8.5 per cent. Harvell calculated the net operating income for the property to be $6,479,090. He applied a 7.00 percent capitalization rate to that and arrived at a stabilized value of $92,558,425. After deducting lease-up costs of $946,406, he determined the market value of the subject property to be $91,612.019, 98.4 of its December, 2003 sales price. Harvell testified that he believed the sale to have been an arms length sale, and therefore, determined that the capitalization rate derived from the sales price would yield the most accurate assessment of the market value of the property.

Lester Morter is a senior appraiser in the OTR. His testimony concerning the methods of assessment used by OTR was consistent with that of Mr. Harvell that the income approach to value ("income approach") is the method primarily used by OTR in its application of the mass appraisal technique of assessing commercial property in the

[4] The Tax Year 2005 estimated tax assessments were based on the calendar year 2002 income and expense reports submitted by property owners.

District. According to Morter, that approach is given the most weight by OTR because it is the method given most weight by participants in the marketplace.

Morter described the method for obtaining the appropriate capitalization rate to use in determining value. He testified that assessors who have office buildings within their areas that sell derive capitalization rates for each sale. Those rates are forwarded to him electronically, and OTR then arrives at a mean and average capitalization rate for each class. He then compiles the cap rate study for each class of properties. The range of rates within each class and the average and mean rates for each class are included in the study. Assessors refer to these figures when deciding the appropriate capitalization rate to use when determining value. Morter is responsible for compiling the Pertinent Data Books (PDB) published by OTR for each tax year. The PDB includes information, including capitalization rates, pertinent to rents and sales of commercial properties in the District.

After being confronted with prior deposition testimony, Morter conceded that there is a standard capitalization rate for each property class and that the standard rate is usually between the mean and average for the class. According to him, the mean and average capitalization rates are usually close to each other percentagewise. For TY 2005, he testified, the standard capitalization rate for Class A properties was approximately 8.75 percent. He testified that, within his area of responsibility, absent special considerations based on the location or condition of the building, assessors are to apply a capitalization rate within a range of 25 to 30 basis points (.25 to .30 on either side) of the standard rate. Morter reluctantly admitted – consistent with prior testimony that he gave at a deposition – that it was his understanding that other assessors usually stay within a

similar range when selecting capitalization rates[5]. Even if a property sold, Morter testified, he would typically use a capitalization rate within the range to determine the assessment for a property. He said that, in light of the wide ranges of individual capitalization rates within classes, for "consistency" purposes, he would use a rate used from a wide range of data sources rather than one based solely on the sales price of a property.

Petitioner's final witness was an expert real estate appraiser, David Lennhoff. Lennhoff had, at the request of Petitioner, prepared a uniformity study of the TY 2005 assessment for the subject. Petitioner introduced the uniformity study into evidence as its Exhibit 20. Lennhoff also testified that the District uses the mass appraisal method of assessing commercial office buildings. Given the sheer number of buildings in a city the size of the District, he said, individual assessments of commercial properties is impractical. Lennhoff testified that most large municipalities use the income approach to value when assessing commercial properties, and he did not quarrel with the use of that approach in this case. He acknowledged that, except for its method of choosing the capitalization rate, OTR used the income approach in assessing Petitioner's property in the same manner it used it for other properties. He also testified that use of the mass appraisal method promotes the goal of equalization of tax rates among taxpayers in the District.

Lennhoff had access to the assessor worksheet used by Harvell to calculate the assessment in this case, as well as the income and expense data used by the assessor. In addition, he had access to the OTR pertinent data books for Tax Years 2005, 2006, 2007,

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[5] At trial, although apparently not at the deposition, he reported his understanding was not based on his review of the work of assessors in other units.

and 2008, Petitioner's Exhibits 4, 7, 10, and 12, respectively, and assessor worksheets for a number of other office buildings assessed by OTR for TY 2005, including buildings that did not sell prior to the valuation date. Lennhoff also reviewed the assessment/ sales ratio studies prepared by OTR included in the Pertinent Data Books for tax years 2005, 2006, 2007, and 2008, received into evidence as Petitioners Exhibits 6, 8, 11, and 13, respectively.

The assessment/sales ratio studies compare the proposed tax assessed value for a given tax year with the sales prices of properties that sold in that year after the date of value, and expresses the relationship as a percentage.[6] Lennhoff testified these studies have a purpose: OTR uses them to monitor "how well they're doing," i.e. how close their assessments are to the actual value of commercial properties. In his uniformity study, Lennhoff identified nine properties classified as either Class A or "Best Available" that he considered "competitive with" the subject property and compared the capitalization rates used in determining their value with that used to determine the value of the subject.

After his review of the data, Lennhoff concluded that, for properties that did not sell prior to the date of value, OTR used capitalization rates derived from the capitalization studies.[7] However, whenever a property sold, OTR used capitalization rates based on the sales of the properties themselves. As a result, the assessment-to-value ratio for the latter properties was higher.

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[6] For each property, the assessment/sales ratio study provides a ratio based on the sales price and a ratio based on the sales price adjusted to the date of value for that year, the time adjusted sale ratio. For purposes of this discussion, references to the assessment/sales ratio refers to the time adjusted sale ratio. The study provides a median and an average ratio, which, upon review and according to Stanley Morter, do not differ significantly. For purposes of this discussion, the Court will refer to the average assessment/sales ratio.

[7] Lennhoff testified that this statement was based on his review of the assessor worksheets. Also, in the uniformity study that he prepared, introduced into evidence without objection as Petitioner's Exhibit 20, he noted that he was informed of this practice by a former OTR assessor.

It was Lennhoff's opinion that OTR under assessed properties in the subject's class vis-à-vis the subject. The use of the different capitalization rate was the device by which the lower assessments were achieved. He testified there is an inverse relationship between the capitalization rate and the value of the property: the lower the capitalization rate applied to the net operating income, the higher the value of the property for tax assessment purposes. To illustrate the relationship between capitalization rate and value, Lennhoff prepared a capitalization sensitivity study, Petitioner's trial Exhibit 15. In the study, he applied different capitalization rates to Petitioner's net operating income as determined by Harvell,[8] demonstrating the impact of the capitalization rate on the assessed value. Lennhoff opined that the correct capitalization rate to use in valuing the subject was a rate close to 8 percent, given the quality of the property.

Respondent presented the testimony of one witness, Ryland Mitchell, who prepared a retrospective appraisal of the subject property for TY 2005. Mitchell used two approaches to valuation – the income approach used by the assessor here – and the comparable sales approach. He then reconciled the two. Mitchell had available to him and used, not only the data available to OTR at the time of the assessment, but also income and expense data from calendar year 2003. He applied an 8.85 percent capitalization rate to Petitioner's net operating income to determine value based on the income approach, arriving at a value of approximately $85 million. Using the comparable sales approach, he then identified properties comparable to Petitioner and arrived at an assessment of $92,000,000. He reconciled the two, but gave greater weight

[8] The chart used in the study contained the stabilized value for the property and the lease-up costs and applied the capitalization rate to the difference, or net operating income.

to the cost approach because of the sale of the subject just prior to the date of value. He placed a value of $90 million on the subject for TY 2005.

LEGAL AUTHORITY

Our statutes require "the Mayor [to] assess all real property … and administer and collect the real property tax within the District." D.C. CODE § 47-821(a)(2008). The "assessed value for all real property shall be the estimated market value of such property as of January 1st of the year preceding the tax year, as determined by the Mayor."[9] *Id.* § 47-820(a). A primary purpose of our real property tax law is to achieve the "equitable sharing of the financial burden of the Government of the District of Columbia." *Id.* § 47-801(1).

This requirement is based on the Equal Protection Clause of the United States Constitution as applied to the District of Columbia through the Due Process Clause of the Fifth Amendment. *D.C. v. Craig*, 930 A.2d 946, 969 n.31 (D.C. 2007) (quoting *D.C. v. Green*, 310 A.2d 848, 855 n.15 (D.C. 1973)). "[T]he amount of a property tax owner's bill must be related as nearly as possible to the value of his property as compared to the value of the property of others. The ratio of his property's value to the total value of property in the District should parallel the amount of tax he pays compared to total taxes paid by all property owners." *See Green*, 310 A.2d at 855; *see also Allegheny Pitt Coal Co. v. County Comm'n of Webster County, W. VA.*, 488 U.S. 336, 346 (U.S. 1989). The intentional and systematic undervaluation of comparable property … over time … denies … the Equal Protection of the Law. *Allegheny*, 488 U.S. at 346. It is not unconstitutional

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[9] Estimated market value is "100% of the most probable price at which a particular piece of real property, if exposed to sale in the open market with a reasonable exposure time for the seller to find a purchaser, would be expected to transfer under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other." D.C. Code §47-802(4) (2001).

to assess property based on the purchase price obtained in a recent arms length sale. *See id.* at 342. The Equal Protection Clause does not require strict equality, but only "the seasonable attainment of a rough equality in tax treatment of similarly situated property owners," or that general adjustments be enough to obtain over a short period of time, rough equality in tax treatment of similarly situated property owners. *Id.* at 343.

The Supreme Court has held that [e]rrors of judgment and reasonable mistakes are not enough to deny a taxpayer equal protection. *Washington Post Co. v. District of Columbia*, 596 A.2d 517, 522 (D.C. 1991) (citing *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 353 (1918). There must be something more – something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Washington Post,* 596 A. 2d at 522. The good faith of such officers and the validity of their acts are presumed. *Id.* When a property owner does prove that undervaluation of property similarly situated to his, is in violation of the Equal Protection Clause, the taxing authority must lower his tax assessment to eliminate the relative undervaluation. *See Sioux City Bridge Co. v. Dakota County, Nebraska*, 260 U.S. 441 (1923).

DISCUSSION

Petitioner's focus at trial was the use of a sales price-based capitalization rate by the OTR assessor to determine the TY 2005 assessment of the subject. According to Petitioner, OTR accomplished the allegedly unconstitutional undervaluation of similar properties using capitalization rates derived from the 2005 cap rate study when assessing them, but used a sales price based capitalization rate when performing the assessment of the subject. The District does not dispute the use of different capitalization rates, but contends Petitioner has not proved an Equal Protection Clause violation based on the

evidence in this case. Petitioner, on the other hand, argues that its evidence conclusively establishes that the TY 2005 assessment is unconstitutional.

In evaluating Petitioner's claims, the Court must first determine whether 1) similar properties in the District were significantly undervalued vis-à-vis the subject and, 2) if so, whether the undervaluation was the result of the kind of intentional systematic discrimination prohibited by the Equal Protection Clause.

Most of Petitioner's evidence at trial relates to TY 2005, and Petitioner claims that it allows the Court to make the comparisons necessary to find an Equal Protection violation. Petitioner points to the testimony comparing 425 13th Street, N.W., the evidence concerning the nine properties referenced in Lennhoff's testimony, the capitalization rates sensitivity study, and the stipulation that Petitioner was assessed using a 7.00 percent capitalization rate – lower by a full percentage point than the capitalization rate for any other commercial office building assessed in the District in TY 2005. Petitioner also urges the Court to give great weight to its Exhibit 8, the TY 2005 assessment/sales ratio study reflecting average and median assessment/sales ratios for that year's assessments. In addition, Petitioner considers significant the parties' stipulation that, in TY 2005, OTR assessed at least 150 large commercial office buildings using the income approach, most of which were assessed using capitalization rates in the 8.25 to 9.00 percent range.

In addition to the evidence that Petitioner chose to emphasize at trial, the Court has considered the assessment/sales ratios concerning seven Class A properties in the Central Business District of the District of Columbia that sold in 2004 after the January 1,

valuation date for TY 2005, one of which is included in Lennhoff's uniformity study. [10] In the Court's view, the assessment/sales ratios for these properties are the most relevant information in Petitioner's Exhibit 8, since Petitioner suggested at trial that this was the class to which the subject belonged. [11]

The TY 2005 assessment of 425 13th Street, N.W. is a stark example of the undervaluation of a property similar to the subject. In TY 2005, that property was strikingly similar to the subject property in net rentable area and net operating income. Its assessment for the tax year was calculated using a net operating income of $6,556, 337. Mr. Harvell, also the assessor in this case, calculated the value of that property for TY 2005 to be $77,074,116. Yet, Harvell assessed the subject property – with a slightly lower net operating income of $6,479,090.00 – at $91,612.019 – approximately 14 ½ million more than the 13th Street property. The only factor that can account for the tremendous difference between the assessments of the two properties is Harvell's use of different capitalization rates for the properties – 7.00 percent for the subject and 8.5 percent for 425 13th Street.

The income method is based on the premise that the capitalization rate converts net operating income into an accurate market value. If that premise is correct, even accepting OTR's contention that Harvell's use of the 7.00 percent capitalization rate yielded the true market value of the subject property, the evidence demonstrates that 425 13th Street was assessed at a significantly lower proportion of its value than was Petitioner.

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[10] The identification of Class A properties sold in 2004 after the date of value for TY 2005 was made by reference to the 2006 Pertinent Data Book, Petitioner's Exhibit 7, concerning 2004 sales.

[11] The pertinent data books and assessment/sales ratios introduced at trial contain information concerning Class A property in other sections of the District. For purposes of this discussion, however, all references to Class A properties when discussing the assessment/sales ratio studies are to Class A properties in the Central Business District.

Petitioner did not present evidence about the TY 2005 assessments of other Class A properties in the District, but presented other evidence that it claims supports its theory of discrimination. This evidence related to the capitalization rates Harvell used to determine the TY 2005 assessments of the nine properties in Lennhoff's study.[12]. Those rates ranged from 8.85 percent to 9.50 percent. Petitioner suggests that this evidence shows that properties with incomes the same as that of the subject were assessed at percentages less than the subject. Yet, although its expert alleged that these nine properties were "competitive" with the subject, curiously he omitted from his testimony and his uniformity study the net operating incomes for those properties and their TY 2005 assessments.

Despite Lennhoffs omission, however, the Court finds the exhibit relevant. There are two reasons why. First, Lennhoff testified that all properties in the study were at least Class A properties. Also, another of Petitioner's exhibits revealed the assessment of one of the properties in the study. The property at 901 F Street, N.W. was one of the nine "competitive" properties in Lennhoff's uniformity study, and Lennhoff indicated that it was assessed using a 9.00 percent capitalization rate. That property sold in 2004, after the date of value for TY 2005, and its assessment/sales ratio was included in Petitioner's Exhibit 8. The assessment was 85.16 percent of its ultimate sales price.

The only other direct evidence called to the Court's attention regarding TY 2005 tax assessments is Petitioner's Exhibit 8. That exhibit compares the TY 2005 assessments of 36 properties that sold in 2004 after January 1st with their sales prices. The average assessment/sales ratio was 86.1 percent, over 12 percent lower than the assessment-to-value ratio for the subject.

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[12] *See* Petitioner's Exhibit 20.

Exhibit 8 also shows that, of the 36 properties in that study, the assessments of six – 16 percent – were greater than 96 percent of their sales prices. [13] Further, of the seven Class A properties in that study that sold after the date of value,[14] two – 28 percent – had been assessed at greater than 90 percent of their sales prices. The property known as 1501 M Street, N.W. had been assessed at greater than 90 percent of its sales price, and the TY 2005 assessment for 1330 Connecticut Avenue, NW was 102.77 percent of its sales price. If the eight other[15] properties in Lennhoff's study are added to the number of Class A properties assessed in TY 2005 about which the Court has evidence, it finds that three (including Petitioner) of seventeen (Petitioner, 425 13th Street, the aforementioned Class A properties in Petitioner's Exhibit 8, and eight of the Lennhoff properties), or 17.6 percent, of the Class A properties were assessed at greater than 90 percent of their sales prices.

This evidence initially appears to compel a conclusion that the subject was overvalued vis-à-vis a significant percentage of similar properties. However, that conclusion would be ill-advised due to its reliance on such a small number of properties, and therein lies the weakness in Petitioner's case. (The Court disagrees that the average assessment/sales ratio in Exhibit 8 deserves to be given the weight urged by Petitioner in light of Petitioner's comparison of the subject to Class A properties. The average is not that for Class A properties, but is an average for all classes of property.)

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[13] 1707 H Street had been assessed at 98.35 percent of its sales price; 734 15th Street, at 96.27 percent of its ultimate sales price; 2100 2nd Street, at 100.92 percent of its ultimate sales price; 727 15th Street, N.W. at 103.77 percent of its sales price; 1130 Connecticut Avenue, at 96.37 percent of its sales price, 1125 15th Street, N.W. at 96.14 percent of its sales price; and 1800 M Street, NW, at 95.57 percent of its sales price.

[14] The seven Class A properties that sold in the Central Business District in 2004 after the date of value were the following: 901 F Street, NW, 1111 Pennsylvania Avenue, NW, 700 14th Street, NW (also apparently known as 1401 G Street, NW), 1341 G Street, NW, 1150 18th Street, N.W., 1330 Connecticut Avenue, N.W., and 1501 M Street, N.W.

[15] One of the properties in Lennhoff's study, 901 F Street, N.W., is also one of the Class A properties that sold in 2004 after the date of value and included in Petitioner's Exhibit 8.

In order to prove systematic discrimination, Petitioner must convince the Court that "an unreasonable number of typical or representative properties were assessed [at a significantly lower percentage of their value than the subject.]" *Skinner v. N. M.Tax Comm'n*, 66 N.M. 221, 224, 345 P. 2d 750, 752 (N.M. 1959). Therefore, Petitioner must present evidence concerning a large enough sample of assessments so that the Court need not speculate. *Id.* Here, in order to make a finding that the TY 2005 assessment of the subject was the result of systematic discrimination, the Court would be required to do just that.

Petitioner's request that the Court find intentional, systematic discrimination is based primarily on the practices of Quinton Harvell, the assessor in this case. With regard to Harvell, Petitioner has proved (in addition to his assessments of the subject and 425 13th Street) 1) that when he uses the income method to assess a property that sells, he uses a capitalization rate based on the sales price of the property; 2) that when he assesses a property that has not sold, he uses a capitalization rate based on OTR's market rate capitalization studies; and 3) that, for TY 2005, he assessed nine properties that Petitioner says were at least Class A properties using capitalization rates ranging from 8.85 to 9.50 percent. What Petitioner has failed to prove to the Court, however, is that these properties comprise a representative sample of the Class A properties that Harvell assessed. The Court cannot assume that, and the evidence that he used sales-price based capitalization rates for properties that sold does not permit that inference.

The totality of the evidence that the Court has about the number of properties assessed by Harvell is that he assessed 1000 to 1100 properties in TY 2005 and prepared approximately 400 assessor worksheets. The Court deduces that some of those were for

Class B properties, which Harvell assesses as well. What is missing is some general idea of the universe of Class A properties Harvell assessed, some indication of the percentages of those properties that were undervalued, and the amounts by which they were undervalued. Evidence about his application of the income method is insufficient.

Essentially, Petitioner urges the Court to find, based on evidence about Harvell's assessments of eleven properties using the income method, that a significant number of properties similar to it were undervalued. This, of course, would require the Court to assume that these eleven properties are representative of the number of Class A properties he assessed. That may be so, but the evidence does not show that. While it is clear that OTR assessors – including Harvell – focus on the income method when assessing large commercial properties, the Court would have to assume that Harvell did not assess any similar properties by other methods for TY 2005, and there is nothing in the record to suggest that. Since it is the assessed value – and not the method of valuation – that is Petitioner's complaint, in deciding whether "an unreasonable number of typical or representative number of properties" *Skinner v. N.M. Tax Comm'n, Id.* were under assessed, the Court must take into consideration the assessments of properties assessed by Harvell by other methods as well, however small that number may be. Further, a determination that properties similar to the subject were significantly under assessed would also have to take into account other properties that sold and that Harvell assessed like he assessed the subject – using a sales-price based capitalization rate.

By focusing on the stipulation that the subject was assessed for TY 2005 using a capitalization rate 100 basis points lower than any other property in the city, Petitioner urges the Court to infer that the subject's assessment-to-value ratio for that year was

higher than that of a representative number of similar properties. Again, that may be the case. However, in the Court's view, the small sample of Class A properties whose assessments are in evidence does not support that conclusion, and the evidence in the record concerning the TY 2005 assessments of 1330 Connecticut Avenue, N.W. and 1501 M Street, N.W. is proof that evidence about a larger number of Class A properties is required to make the finding Petitioner requests. In sum, evidence about Harvell's assessments of eleven properties, the subject, 425 13th Street, and the properties in Exhibit 20 – even in conjunction with the testimony about his general practices – is simply not sufficient.

Even if the Court considers Petitioner's claim of discrimination as it relates to OTR's TY 2005 assessments agency-wide, Petitioner's evidence still falls short. The evidence concerning the practices of other OTR assessors is inconclusive. Lennhoff testified that, based on his review of assessor worksheets, other assessors follow Harvell's practice of assessing properties that sell using capitalization rates based on their sales prices. In his uniformity study, Petitioner's Exhibit 20, Lennhoff referred to a statement by a former OTR assessor that other assessors follow the same practice. [16] However, this evidence from Lennhoff conflicts with the testimony of Stanley Morter, the senior OTR appraiser.

It is Morter's practice to use a capitalization rate based on the market rate capitalization study when valuing properties, including those that sell. Responding to questions by Petitioner's counsel, Morter testified that it was his understanding that other assessors at OTR assessed properties using capitalization rates within a range of the mean/average rate, varying from the range only based on location or condition of the

[16] Petitioner's Exhibit 20, p. 4.

property. Morter did not limit his answer to those properties that did not sell, and counsel did not ask him about other assessors' practices in assessing properties that sold. So this record contains insufficient evidence for the Court to make a finding about the practices of other OTR assessors.

A finding that other assessors at OTR followed Harvell's practices would still leave the Court without sufficient information to make the finding urged by Petitioner. First, there is no evidence in the record about the assessments of other Class A properties assessed by Harvell or by other OTR assessors. Second, Petitioner has not provided the Court with any estimate of the number of Class A properties assessed by OTR altogether for TY 2005.

By referencing the parties' stipulation that, for TY 2005, OTR assessed at least 150 large Class A properties using the income method, Petitioner would have the Court conclude that the properties Harvell assessed are representative of the Class A properties assessed by OTR. However, the Court cannot make that conclusion. The stipulation provides the Court with a *minimum* number of Class A properties assessed by that method. So even if one were to conclude that eleven properties were representative of a group of one hundred fifty, the Court could not make the conclusion urged by Petitioner on these facts because the stipulation itself suggests that OTR may have assessed more than one hundred fifty properties using the income method. If the number of Class A properties OTR assessed by the income method was higher than one hundred fifty, it is less likely that eleven properties are representative of the group. Finally, Petitioner not proved that all Class A properties were assessed for TY 2005 using the income method.

Petitioner's Exhibit 8, does not prove undervaluation of similar properties. Besides containing data about properties other than Class A properties, it is limited to information about the assessments of 36 properties that sold, and there is no evidence that the assessment/sales ratios capture the data from all the sales in the District for a given tax year[17] Thus, it would be an enormous leap for the Court, based on the information before it to find intentional systematic discrimination. Simply put, Petitioner has not provided the Court with sufficient information to find that, for TY 2005, the subject was overassessed vis-à-vis a representative number of similar properties.

In addition to failing to convince the Court of undervaluation of similar properties for TY 2005, Petitioner has failed to meet its burden in another significant respect. "[T]he constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners." *Craig*, 930 A.2d at 970 citing *Washington Post*, 596 A.2d at 522. So, as recently as 2007, the Court of Appeals emphasized that a property owner pursuing an Equal Protection Claim is required to prove "undervaluation of comparable properties *'over time'*". *Craig*, 930 A.2d at 970, and Petitioner has failed to meet this temporal prong of its burden.

The evidence that Petitioner introduced concerning tax years after TY 2005 consists of the assessment/sales ratio studies comparing later sales with the proposed assessments for tax years 2006, and 2007, Petitioner's Exhibits 11, and 13 respectively. This evidence demonstrates that the proposed TY 2006 assessments of properties that sold in 2005 after the date of value were, on average, 79.2 per cent of their sales prices, with 5 of the 37 properties in Exhibit 11 having been assessed at more than 96 percent of

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[17] Indeed, the Court infers that they do not. The number of properties in the assessment/sales ratio studies introduced at trial ranged from 36 to 40, which suggests to the Court that the studies are based on samples.

their sales prices. Of the Class A properties in Exhibit 11, two of the five -- or 40 percent -- had been assessed at greater than 97 percent of their ultimate sales prices.[18] Therefore, while Petitioner's Exhibit 13 shows that the proposed TY 2007 assessments of Class A properties that sold in 2006 after the date of value were close to the average assessment/sales ratio of 86.9 percent, the evidence concerning years subsequent to TY 2005 does not support Petitioner's contention of systematic discrimination by OTR over time.

The evidence Petitioner has introduced to meet the temporal aspect of its burden is lacking for another important reason. It is the *relative* undervaluation of comparable properties over time that offends the Constitution. *Craig*, 930 A.2d at 970, and, aside from Petitioner's exhibit 6, there is no evidence in the record about the subject's assessments for tax years other than TY 2005. Petitioner's failure to prove its own assessments for those tax years is fatal to its cause. Moreover, the evidence that the Court does have concerning the subject's assessment for another tax year contradicts Petitioner's claim of systematic discrimination over time. Petitioner's Exhibit 6, the assessment/sales ratio study comparing proposed TY 2004 assessments with sales prices of properties that sold in 2003 after the date of value for that tax year, shows that Petitioner's TY 2004 assessment was 82.33 percent of its ultimate sales price that year – 3.87 percent less than the average assessment/sales ratio for that year.[19]

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[18] The property at 900 17th Street, N.W. had been assessed at 97.57 percent of its ultimate sales price, and 2400 N Street, N.W. had been assessed at 102.93 percent of its sales price.

[19] Even if Petitioner's proof had shown relative undervaluation of similar properties in tax years 2004 through 2007, it is not clear that Petitioner would have met its burden. This case is unlike cases in which taxpayers' property has been overvalued for much longer periods of time. *See*, e.g. *Allegheny Pitt Coal Co. v. Comm'n v. County Comm'n of Webster County, W.VA., Id*, 488 U.S. 336 (Taxpayer's property valued at eight to thirty-five times that of similar properties over a ten-year period.)

In sum, in light of the applicable legal authority, on the evidence in this record, the Court concludes that Petitioner has not proved its Equal Protection claim. At most, it has proved that at least one assessor, Quinton Harvell, intentionally calculated its Tax Year 2005 assessment so as to reach an assessment close to its sales price, causing some properties to be undervalued, compared to it, for that tax year. While the Court cannot not characterize Harvell's actions as "error" or "mistake," the record in this case does not support a finding of intentional, systematic discrimination over time. Finally, none of Petitioner's evidence convinces the Court that either Harvell or OTR acted with a discriminatory intent that ran afoul of the Equal Protection Clause.

The only remaining issue for the Court to decide is whether OTR's assessment of Petitioner's property for the 2005 tax year is incorrect notwithstanding Petitioner's failure to prove an Equal Protection violation. Petitioner contends that it is, and that the testimony of the District's own witness proves it. The District cautions that it is insufficient for the Court to find that another assessment is different from that determined by OTR, but that Petitioner must demonstrate that the assessor's valuation was incorrect. While the District does not concede that Harvell's assessment was incorrect, it nevertheless agrees that, if the Court rejects Petitioner's Equal Protection challenge, it may conclude that its expert's assessment of $90 million is correct.

The Court agrees with the District that it may make no adjustment to the tax assessment unless the current assessment is incorrect. See *Safeway Stores, Inc. v. D.C.*, 525 A. 2d 207, 211 (1987). In this case, the testimony of Respondent's expert convinces the Court that OTR's assessment of the subject property was incorrect. Based on Respondent's exhibit 1, OTR underestimated the net operating income for the subject for

Tax Year 2005. Respondent's expert calculated stabilized net operating income as of the date of value was $7,520,000.00, whereas OTR calculated net operating income to be $6,479,000.00. [20]

Instead of applying a 7.00 percent capitalization rate to the net operating income to reach a stabilized value as OTR did, Mitchell applied a loaded capitalization rate[21] of 8.85 percent. He selected that rate by first conducting a mortgage equity analysis based on the rate of return an investor could expect to receive, given certain assumptions about investment conditions. This yielded a 7.00 percent capitalization rate, to which he added the 1.85 percent tax burden in the District, arriving at the 8.85 percent rate. Mitchell's assessment using the income approach was $85,000,000.

In his report, Mitchell stated that his review of sales of comparable properties supported the 7.00 per cent capitalization rate used by Harvell. However, he did not indicate that the rates of the comparables were loaded capitalization rates. What is clear is that Mitchell's 7.00 per cent rate (the rate before the addition of the tax burden) does not support Harvell's use of the 7.00 per cent rate used to assess the subject. Mitchell's 7.00 capitalization rate was not loaded whereas Harvell's purported to be loaded. The fact that Respondent's own expert used a much lower capitalization rate – one closer to

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[20] See Respondent's Exhibit 1, the retrospective appraisal of the subject performed by Respondent's expert, Ryland Mitchell. Mitchell calculated net operating based on the subject's income and expense reports for calendar years 2002 and 2003, and the subject's rent roll on January 1, 2004, the date of value, whereas at the time of its proposed assessment, OTR did not have available to it the income and expense data for calendar year 2003 or the 2004 rent roll. However, for 2002, the last year for which OTR did have data, it did not include revenue from storage as a source of income, and Quinton Harvell, the OTR assessor, testified that there was no storage income. Yet, Respondent's Exhibit 1 convinces the Court that, based on the calendar year 2002 data, there was $80,863.00 in storage income which should have been included in the income calculus. Mitchell also calculated the vacancy rate at 5.1 per cent, slightly lower than the 6.0 per cent that Harvell used as a standard vacancy rate. Mitchell's report also indicated that operating expenses at the subject for calendar year 2002 were lower than indicated on Harvell's assessor worksheet, Petitioner's Exhibit 1. Harvell calculated operating expenses at $2,607,000; Mitchell calculated them to be $2,355,365.00.

[21] According to the witnesses at trial, a loaded capitalization rate is one which adds the $1.85 tax burden in the District of Columbia to the pure capitalization rate.

the median for TY 2005, albeit determined by a different method – convinces the Court that the 7.00 capitalization rate used by Harvell was incorrect.

In addition to arriving at a value based on the income approach, Mitchell also developed an assessment based on a sales comparison approach, in which he compared the subject property to several recent sales, including the subject's December, 2003 sale, made adjustments to reflect the differences between the comparables and the subject, and arrived at an estimated value. Using this method, he calculated a value of $92,000,000.00. Mitchell then reconciled the $92,000,000.00 figure with the $85,000,000.00 he obtained using the income approach. In his reconciliation, he gave greater weight to the sales comparison approach because of the sale of the subject prior to the date of value.

The Court finds that an accurate assessed value for the subject property for TY 2005 using an income approach is $85,222, 328.00.[22] This amount was determined by using the PGI calculated by the OTR, and using a vacancy rate, storage income figure, and net operating expenses based on Mitchell's calculations from the 2002 expense and income reports, which the Court finds to be accurate. Based on the testimony of

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[22] The Court finds it appropriate to start the assessment calculation based on OTR's PGI calculations. Mitchell's calculations, although based on more recent data, appeared not to take into account lease-up costs, which, despite Mitchell's finding of a lower vacancy rate for later years, should not have been excluded from the assessment calculation. However, Mitchell's report that the subject received storage income in 2002, in the face of Harvell's testimony that there was none, suggests to the Court that his calculations of the vacancy rate and operating expenses are likely more accurate. Therefore, the Court has used those figures in computing a revised assessment for the subject for TY 2005.

The Court has applied a 5.1 per cent vacancy rate to Harvell's PGI of $9,498,353.00, based on Mitchell's determination of the vacancy rate for TY 2005. This yields a subtotal of $9,013,397, to which the Court added $145,000.00 for parking, $2400.00 for roof revenue, $10,238,000.00 for other expenses, and $80,863.00 for the storage income referenced in Mitchell's appraisal. From that, the Court deducted $2,355, 365.00, the operating expenses as determined by Mitchell. This yielded a net operating income of $6,897,073, to which the Court applied an 8.00 per cent capitalization rate, the rate that Petitioner's expert testified was appropriate in light of the condition of the subject, arriving at a stabilized value of $86,213,412. The Court then deducted lease-up costs of $946,406.00. The resulting assessed value is $85,267,006.

Petitioner's expert, the Court is of the view that the application of an 8 per cent capitalization rate is appropriate.

The Court finds it appropriate that the assessment of this subject also reflect its sale prior to the date of value,[23] and that it is therefore appropriate to reconcile the assessment determined from the income approach, $85,267,006 with the $92,000,000 assessment Mitchell determined using the comparison sales approach [24] However, the Court finds that Mitchell's reconciliation weighed the value obtained from the sales comparison approach too heavily. Instead, greater weight must be placed on the assessment derived from the income method. In Mitchell's own report, he indicated that "[i]ncome producing property is typically purchased for investment purposes and return on investment is the most critical element effecting [sic] property value."[25] A reconciled assessment placing greater weight on the assessment derived from the income method is consistent with the testimony of the witnesses from OTR, Harvell and Morter, that OTR emphasizes the income to value method because it is the method upon which market participants rely most heavily. Therefore, in the view of the Court, these methods, appropriately reconciled, yield an assessment of $87,267,006,00. [26]

FINDINGS OF FACT

1. Petitioner purchased the subject, located at 600 14th Street, N.W. Washington, D.C., in December, 2003, for $93,030,000.

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[23] Mitchell used the December, 2003 sale of the subject as one of the comparable properties in his study. Thus, his assessment based on the comparison sales approach takes that sale into account.
[24]Indeed the statute requires OTR to consider the comparable sales approach. See n. 3.
[25] Respondent's Exhibit 1, p. 23.
[26] The Court disagrees with the District that, if it does not find an Equal Protection Violation, the Court's options for determining an assessment are limited to sustaining OTR's assessment or to accepting that of Respondent's expert. Once an assessment is appealed, the Court may sustain OTR's assessment, accept the the value requested by Petitioner, or determine the value based on the evidence at trial. See *Safeway Stores, Inc. v. D.C.,* 525 A. 2d 207, 211 (1987), *Id.*, n. 2.

2. Quinton Harvell assessed the subject property for TY 2005, using a 7 percent capitalization rate, at $91,612,019. The subject was assessed at 98.4 percent of its sales price. Harvell assessed the subject with the specific intent to achieve an assessed value approaching the December 16, 2003 sales price of the subject.

3. For TY 2005, the average assessment/sales ratio was 86.1 percent.

4. Harvell did not act with any discriminatory intent in calculating the TY 2005 assessment for the subject property.

5. In TY 2005, Harvell assessed 425 13th Street, N.W., a property that did not sell. That property, was similar to the subject property, also a Class A property, had a net operating income similar to the subject. Its TY 2005 assessment was approximately $14.5 million less than that of the subject.

6. In TY 2005, Harvell assessed nine other properties that did not sell prior to the date of value, all of which were at least Class A properties. The capitalization rates for those properties ranged from 8.85 to 9.90 percent.

7. For TY 2005, Harvell assessed approximately 1000 to 1100 properties. He prepared approximately 400 assessor worksheets.

8. When assessing large commercial grade properties, OTR uses a mass appraisal technique and, in applying that technique, relies primarily on the income approach to value, the method that market place participants rely on most heavily in decisions about purchasing investment properties.

9. For TY 2005, the District assessed at least 150 large Class A commercial properties using the income method. Most of these properties were assessed using

capitalization rates ranging from 8.25 to 9.0 per cent. Except for its assessment of the subject property, OTR did not use a capitalization rate lower than 8 percent.

10. Quinton Harvell's practice is to assess properties that sell using a capitalization rate based on the sales price of the property. For properties that do not sell, he uses a capitalization based on the "Office Building Capitalization Rates Derived From Sales" studies conducted by OTR and included in the Pertinent Data Book for the appropriate tax year.

11. In TY 2005, OTR assessed at least 150 Class A properties using the income approach to value. OTR did not apply a capitalization rate of less than 8 percent to determine the assessment of any property except the subject.

12. The TY 2005 assessments for two of seven Class A properties in the Central Business District were greater than 90 percent of their sales prices in 2004.

13. The average assessment/ ratio for TY 2006 properties that sold in 2005 was 79.2 percent. The TY 2006 assessment sales ratio for two of the four Class A properties in the Central Business District that sold in 2005 exceeded 96 percent.

14. The average TY 2007 assessment/ratio for properties that sold in 2006 was 86.9 percent. The TY 2007 assessment/sales ratios for the six of the Class A properties in the Central Business District that sold in 2006 were at or near the average assessment/sales ratio.

15. The average TY 2004 assessment/sales ratio for properties that sold in 2003 was 86.2 percent. The TY 2004 assessment/sales ratio for the subject property for 2004 was 82.33 percent .

16. OTR's calculation of the TY 2005 assessment of the subject was incorrect. The OTR assessor underestimated net operating income for the subject and applied an incorrect capitalization rate. The correct stabilized value of the subject property was $86,213,412. The correct assessment for the subject for TY 2005 is $87,267,006.

CONCLUSIONS OF LAW

1. Petitioner has not established that the TY 2005 assessment of the subject property was the result of intentional, systematic discrimination over time

2. The TY 2005 assessment of the subject property did not violate District of Columbia law [27] or the Equal Protection Clause of the United States Constitution as applied to the District of Columbia by the Fifth Amendment.

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[27] Petitioner's complaint concerning the actions of the assessor in this case was not limited to its assertion that OTR violated the Equal Protection Clause of the United States Constitution. It also complained that the assessor's actions violated the law of the District of Columbia, suggesting that the relative undervaluation of its Property in Tax Year 2000 violated the law of the District of Columbia by failing to "equalize" its 2005 Tax Year assessment with the assessments of similarly situated property. Petition, ¶ 8(b). If "failure to equalize" as a separate cause of action survived the 2000 amendments to the tax code, the Court's conclusion that Petitioner did not prove that the subject was overvalued as compared to a representative number of similar properties in TY 2005 would compel a conclusion that Petitioner failed to prove its "equalization" claim. However, it appears to the Court that the amended tax code does not include "equalization" as a separate cause of action. While the District of Columbia real property tax statute has as its purpose the "equitable sharing of the financial burden of the Government of the District of Columbia," the current statute, D.C. Code § 47-801(1), contains no specific statutory requirement of equalization.

Prior to 2000, the tax code specifically allowed District of Columbia property owners to appeal their tax assessments based on lack of equalization. However, in 2000, the tax Code was amended by the D.C. Law 13-305, the Tax Clarity Act of 2000, and the word "equalization" was eliminated. The "Section by Section Analysis" of the Tax Clarity Act gives no reason for the omission of the word "equalization" from section 'f' of the statute. D.C. Law 13-305, p. 16. Neither the legislative history for the Tax Clarity Act nor the "Tax Clarity Act of 2000 Summary" mentions whether the amendment purports to limit property owners' rights on appeal. The only reference to "equalization" appears in the testimony on the Act presented by a witness from the Apartment and Office Building Association of Metropolitan Washington. The witness expressed his fear that the bill's omission of the word "equalization" as grounds for appeal would eliminate that as a ground for appeal and urged that equalization be maintained as an independent basis for appeal. D.C. Law 13-305, Attachment, Testimony by David J. Chitlik p. 4. There was no indication of a response to the concern expressed by the witness.

ORDER

The Court hereby

ORDERS that the assessed market value of the property as of January 1, 2004 was $87,267.006; and the Court further

ORDERS that the District of Columbia Office of Tax and Revenue adjust its records to reflect the assessment in the foregoing paragraph; and the Court further

ORDERS that the District of Columbia forthwith refund to Petitioner $80,382.39, the amount of excess taxes paid by Petitioner on the subject property, whose correct assessed value for Tax Year 2005 is $87,000,000.00 (reduced from $91,612,000.00), plus interest accruing from September 23, 2005.

SO ORDERED.

Date: 10-29-08

Rhonda Reid Winston
Associate Judge
Signed in chambers

Copies to:

David A. Fuss, Esq.
Wilkes Artis, Chartered
1150 18th St., NW
Suite 400
Washington, DC 20036

Patrick Allen, Esq.
Assistant Attorney General
Office of the Attorney General
1150 5th St., NW
Suite 800
Washington, DC 20005