SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

WILLIAM B. WOLF, JR., *et al.*, Petitioners, v. DISTRICT OF COLUMBIA Respondent.	Tax Docket Nos. 4056-88, 4195-89, 4468-90, 4779-91 (Gardner, J.)

JOINT MOTION FOR ENTRY OF JUDGMENT
PURSUANT TO SUPERIOR COURT TAX DIVISION RULE 15

Petitioners and Respondent, through undersigned counsel, respectfully move this Court, pursuant to the Court's February 2, 1998 Memorandum Opinion and Order in this case and Superior Court Tax Rule 15, to enter an Order in the form attached hereto, or in such other form as the Court may deem appropriate, and to enter judgment in this case. In support thereof, the parties state as follows.

1. In this Court's February 2, 1998 Memorandum Opinion and Order, the Court ordered that entry of judgment be withheld in this case pending submission, within 14 days, of a proposed order under the provisions of Superior Court Tax Rule 15.

2. Therefore, Counsel for Petitioners and Respondent respectfully submit the attached proposed order pursuant to Superior Court Tax Rule 15 setting out computations in accordance with the Court's determination of the issues in this case and showing the amount of tax refund due Petitioners.

3. The parties are in agreement as to the computations reflected on the attached order and the figures shown are in accordance with the Court's findings and conclusions set forth in the February 2, 1998 Memorandum Opinion and Order. Further, the parties move this Court to order all tax refunds in these consolidated cases to be made to Mid-City Investment Company, the name of the entity under which Petitioners transact business.

WHEREFORE, Petitioners and Respondent respectfully move this Court to enter an Order in this case in the form attached hereto or in such other form as the Court deems appropriate and to enter judgment in this case.

Respectfully submitted,

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Attorney for Respondent

Respectfully submitted,

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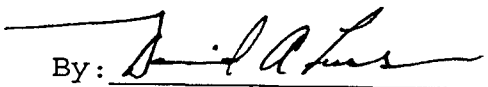
By: 

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

WILLIAM B. WOLF, JR., et al.,		
Petitioners,		
v.	Tax Docket Nos.	4056-88
	(Gardner, J.)	4195-89
		4468-90
DISTRICT OF COLUMBIA		4779-91
Respondent.		

ORDER

This case came before the Court in January, June and September, 1994. Upon the Petitions filed herein, the stipulations between the parties and upon consideration thereof, the evidence adduced at trial and the applicable law, the Court having entered its Memorandum Opinion and Order filed February 2, 1998, it is by the Court this _____ day of _____, 1998 hereby

1. **ORDERED**, that Respondent's Motion for Summary Judgment in Tax Docket No. 4056-88 be and hereby is **Granted**; and

2. **IT IS FURTHER ORDERED**, that Respondent be and hereby is, directed to reduce the assessment on Lots 2 and 3 in Square 164 for purposes of District of Columbia real estate taxes for Tax Year 1989 from $27,090,921 to $20,215,000, consisting of $15,133,151 for the land and $5,081,849 for the improvements; and

3. **FURTHER ORDERED** that the Respondent be and hereby is, directed to refund to Petitioners Tax Year 1989 real estate taxes on Lots 2 and 3 in Square 164 in the amount of $139,581.20 with interest thereon from March 31, 1989, to the date of refund, at the rate of six (6) percent per annum, the statutory rate as provided by law.

4. **IT IS FURTHER ORDERED**, that Respondent be and hereby is, directed to reduce the assessment on Lots 2 and 3 in Square 164 for purposes of District of Columbia real estate taxes for Tax Year 1990 from $24,165,000 to $20,731,000, consisting of $19,665,425 for the land and $1,065,574 for the improvements; and

5. **FURTHER ORDERED,** that the Respondent be and hereby is, directed to refund to Petitioners Tax Year 1990 real estate taxes on Lots 2 and 3 in Square 164 in the amount of $69,710.20 with interest from March 30, 1990 to the date of refund, at the rate of six (6) percent per annum, the statutory rate as provided by law.

6. **IT IS FURTHER ORDERED**, that Respondent be and hereby is, directed to reduce the assessment on Lots 2 and 3 in Square 164 for purposes of District of Columbia real estate taxes for Tax Year 1991 from $23,813,000 to $18,270,000, consisting of $17,869,887 for the land and $400,113 for the improvements; and

7. **FURTHER ORDERED,** that the Respondent be and hereby is, directed to refund to Petitioners Tax Year 1991 real

estate taxes on Lots in Square 164 in the amount of $119,174.50 with interest from March 29, 1991 to the date of refund, at the rate of six (6) percent per annum, the statutory rate as provided by law.

8. **FURTHER ORDERED,** that, as agreed between the parties, the Clerk of the Tax Division shall issue all refund vouchers and Respondent shall issue all refunds in the name of Mid-City Investment Company, as the name of the entity under which Petitioners transact business.

Judge Wendell P. Gardner, Jr.

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Superior Court of the District of Columbia

Tax Division

William B. Wolf, Sr., et al, Petitioner,	:	
v.	:	Tax Docket Nos. 4056-88
	:	4195-89
District of Columbia,	:	4468-90
Respondent.	:	4779-91

Memorandum Opinion and Order

This matter came before the Court for trial upon a petition for a partial refund of real property taxes for Tax Years 1988, 1989, 1990, and 1991. The parties filed stipulations pursuant to Rule 11(b) of the Superior Court Tax Rules. Upon consideration of the stipulations, the evidence adduced at trial, the applicable law, and having resolved all questions of credibility, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Petitioner, William B. Wolf, Jr. et al ,[1] the general partners of a limited partnership known as MidCity Investment Company, are legally obligated to pay all real

[1] These matters were originally brought in the name of William B. Wolf, Sr., et al. However, upon the entry of a suggestion of death, the matters have been carried in the name of the remaining general partners of the limited partnership.

estate taxes assessed against Lots 2 and 3 in Square 164. Petitioner owns the land and improvements thereon known as 1001 Connecticut Avenue, N.W., situated in the District of Columbia. The tax in controversy is a real estate tax assessed against said Lots 2 an 3, in square 164, and improvements thereon (known as the "subject property") for Tax Years 1988, 1989, 1990, 1991. These cases were consolidated for purposes of trial.

2. The subject property, an office building at 1001 Connecticut Avenue, N.W., Square 164, Lots 2 and 3, is a corner site in the heart of the Central Business District. Its location at the intersection of Connecticut Avenue and K Street is considered one of the best locations in the city. The site contains a twelve-story and basement level commercial office building with two levels of retail space. Overall, the building has 148,528 square feet of gross building area and approximately 138,499 square feet of net rental area. The land is developed to its highest and best use.

3. The building was constructed in the 1952-1953 period and has never been renovated. In 1971, the Washington Metro Area Transit Authority purchased an

easement on the property for fair market value. This easement reduced the amount of available retail space and lowered the fair market value due to the increased costs of construction on the subject property.

4. For each of the assessments at issue before the Court, Petitioner filed an administrative appeal with the Board of Equalization and Review (BER).

Tax Year	1988:	Appeal filed with BER. Board sustained the Department's assessment.
	1989:	Appeal filed with BER. Board increased the assessment from $24,127,000 to $27,000,000.
	1990:	Appeal filed with BER. Board sustained the Department's assessment.
	1991:	Appeal filed with BER. Board sustained the Department's assessment.

For each year, the Petitioner timely paid the taxes and timely filed for an appeal.

5. At trial, Petitioner presented the testimony of Mr. William B. Wolf, Jr. regarding Tax Year 1988, and for years 1989-1991, Mr. William B. Harps testified as an expert witness on behalf of the Petitioner. The Respondent presented the Department's tax assessors to testify concerning their assessment, i.e. Mr. James Conway for 1988, Mr. Philip S. Appelbaum for Tax Years 1989 and 1990, and Mr. Larry Hovermale for Tax Year 1991. In addition to the

testimony of the assessors , the Respondent presented the expert testimony of Ms. Sandra Allen regarding the fair market value of the subject property for all tax years in question.

6. The witnesses presented testimony in support of the following opinions of value:

	Petitioners	Respondent
1988	$16,607,450	$21,148,272 -$22,243,200
1989	$19,770,000	$23,137,500 -$24,127,000
1990	$18,840,000	$24,142,000 -$24,165,000
1991	$18,270,000	$23,813,400 -$23,983,000

7. For all years in question, both Petitioner and Respondent agree that the mass appraisal approach should be used to evaluate the property. This approach encompasses the three recognized techniques to value property: 1) cost of replacement; 2) comparable sales of similar properties; and 3) capitalization of income. Of these three, both parties also agree that the capitalization of income approach is the most appropriate procedure to derive fair market value. For this procedure, the appraiser first determines the net operating income of the property. This figure is equal to a property's gross income minus expenses. The net operating income is then divided by a capitalization rate. One method to determine the capitalization rate is to find the percentage rate that allows the taxpayer to

recover enough income annually to pay the mortgage, to obtain fair return on taxpayers' equity in the property, and to pay real estate taxes, but there are other methods.

Tax Year 1988:

Respondent's Motion for Summary Judgment Granted.

At the close of Petitioner's case-in-chief, during the trial without a jury, the Respondent moved for judgment as a matter of law on the grounds that the Petitioners failed to carry their burden of proving the Department's assessment incorrect or illegal. At that time the Court took the motion under advisement. The Court now grants this motion for judgment as a matter of law and renders judgment in favor of the Respondent for Tax Year 1988.

Under Rule 52(c) of the District of Columbia Court Rules, a Court may grant such a motion, "If during a trial without a jury a party has been fully heard on an issue and the Court finds against the party on that issue." Super. Ct. Civ. R. 52(c). The proper standard is if "there is insufficient credible evidence to sustain each element of plaintiff's claim . . . judgment for the defendant is justifiable." Kearns v. McNeill Bros. Moving and Storage Co., Inc., 509 A.2d 1132, 1135 (D.C. 1986) (citing Marshall

v. District of Columbia, 391 A.2d 1374, 1379 (D.C. 1978). A judgment as a matter of law under Rule 52(c) is substantially different from a directed verdict in a jury trial. Unlike a directed verdict, this Court is not required to "take plaintiff's evidence as true, draw reasonable inferences in plaintiff's favor, or limit evaluation of the evidence to legal sufficiency." Keefer v. Keefer and Johnson, Inc. 361 A.2d 172 (D.C. 1976).

The rule in real estate tax assessment cases is firmly established that the taxpayer has the burden of proving an assessment is incorrect or illegal, not merely that alternative methods exist giving a different result. Safeway Stores v. District of Columbia, 525 A.2d 207, 211 (D.C. 1987); Brisker v. District of Columbia, 510 A.2d 1037 (D.C. 1986); Respondent argues that the Petitioner failed to produce a sufficient amount of evidence to support the critical element in the claim that the assessment was erroneous. During the trial for Tax Year 1988, the Petitioners presented only one witness, the owner of the property, William Wolf, Jr. Mr. Wolf is not an expert in real estate appraisal, and his testimony simply covered his appraisal methods. The assessor for the Department did not

testify during the Petitioners' case. The Respondent's argue that the testimony of Mr. Wolf is insufficient as evidence to overcome the burden of proof. This Court agrees.

As mentioned above, this Court is not required to view Mr. Wolf's evidence in the light most favorable to the Petitioners. As the principal owner of the subject property, he was neither presented as an expert witness nor accepted as one. Mr. Wolf only offered testimony on his appraisal methods, which, under normal circumstances, are insufficient to overcome the assessment's presumption of validity. This is especially true when the witness has a financial interest in the outcome as Petitioner does here. In some situations--such as a mathematical mistake or a clearly wrong choice of appraisal methods--an error in the assessment will be so obvious that Mr. Wolf's testimony would have sufficed. However, in a case such as this, a credible witness must be able to explain the Department's assessment, pointing out critical errors and their relevance. Mr. Wolf does not meet this standard, nor was his testimony persuasive enough to overcome the burden.

Having fully heard the Petitioners' testimony concerning the Department's original assessment and finding that they have not produced sufficient evidence to carry the burden of proof, the Court finds for the Respondent for Tax Year 1988.

Tax Year 1989

Respondent's Motion for Judgment as a Matter of Law Denied.

At the close of the second trial, concerning Tax Years 1989-1991, Respondent again moved for a judgment as a matter of law under Rule 52(c). Unlike the first trial, Petitioner offered as evidence the testimony of an expert witness, William B. Harps. During Mr. Harps' testimony, he discussed not only his independent appraisal, but also his concerns regarding the Department's assessment.

In this motion for judgment as a matter of law, the Respondent's argument rests upon the assumption that in order to prove an assessment wrong, Petitioner must present evidence detailing not only what the assessor did in appraising the property, but also why those choices were made. Only then, after discussing the rational of the assessor can the Court find that the assessment is flawed. The Respondent argues that the Petitioner has been fully

heard on the issue of the assessment, and since they failed to produce evidence of the assessor's rational, they have failed to produce sufficient credible evidence to allow a Court to find in their favor. Super. Ct. R. 52(c). In denying this motion for judgment as a matter of law, this Court first rejects the Respondent's argument that the error in question requires the testimony and rational of the assessor for sufficient proof. Second, this Court finds that the testimony of the Petitioners' expert witness stating the assessment was excessive and his reasons therefor are sufficient to overcome the burden of proof in demonstrating that the assessment is incorrect.

The Respondent concedes that some errors are so fundamental that the assessor's rational is not necessary, such as a mistake in calculation, or excluding legitimate expenses. The Respondent's list of visible flaws, however, fails to take into account relevant cases and statutes. For example, an assessment that assesses the property without considering the current leases could be found void by the Court without requiring an explanation from the assessor. This Court may find that an assessment is invalid if the capitalization rate fails to provide a fair return for the

investors. Rock Creek-Woodner v. District of Columbia, 466 A.2d 857 (D.C. 1983).

In the present case, the Petitioners contend that the assessor erred by not including the value of the current leases in the assessment. If the Petitioners meet the burden of proof, this Court could then reject the Department's appraisal for that tax year.

The Respondent's also maintain that judgment as a matter of law should be granted on grounds that the Petitioner has failed to produce sufficient evidence even with the expert testimony. This argument is also rejected. During their case-in-chief, the Petitioners presented the testimony of William B. Harps as an expert appraiser. Mr. Harps has been long recognized as an expert in this field in both District of Columbia and Maryland local and federal courts, and was previously President of the Appraisal Institute. Although, the testimony of an expert witness is not binding, the Court may not arbitrarily disregard or reject such testimony. Rock Creek Plaza-Woodner Ltd. v. District of Columbia, 466 A.2d 857 (D.C. 1983) (citing Mann v. Robert C. Marshall, Ltd., 227 A.2d 769 (D.C. 1967).

The Court finds no appropriate grounds for rejecting Mr. Harps' testimony. His method in appraising the subject property is not per se illegal and quite similar to the technique he used in Wolf v. District of Columbia, 611 A.2d 44 (D.C. 1992). In addition, Mr. Harps calculated his capitalization rate through an intensive survey of the market. The Court finds that Mr. Harps' credentials and well founded testimony supply the Court with sufficient evidence to find that the Department erred in assessing the subject property. Having found that the Petitioners supplied sufficient evidence concerning the critical elements of their claim, the Respondent's motion for judgment as a matter of law is denied.

Tax Year 1989

8. Between the proceedings for Tax Year 1988 and 1989, this Court was notified that Mr. Zimmerman would not be able to continue as counsel for Petitioner in the remaining cases and Petitioner was given time to obtain new counsel. Thereafter, Petitioner engaged Stanley J. Fineman of Wilkes & Artis as counsel to try the remaining tax years (1989-1991). These tax cases were consolidated, and

Petitioner retained Mr. Harps to testify as an expert appraiser. The trial resumed after several months.

9. Mr. Appelbaum was the assessor for Tax year 1989. He testified that he considered the three approaches to value mandated by statute and selected the income approach as most appropriate for the subject. Mr. Appelbaum testified that he had based his original appraisal upon an economic income and expense study which he had prepared, taking into account actual rents. He further stated that he used this study to develop market rents and expenses for Tax year 1989 on all the commercial office-building properties which he assessed, including the subject. Mr. Appelbaum included information from the income/expense and rent roll forms of the subject, similar submissions on comparable buildings and the market rents they achieved to develop this study.

10. Mr. Appelbaum testified that to arrive at his original valuation of $19,104,000 ($136.41 per square foot of net rentable area) he had used a stabilized net operating income of $2,107,147 and a capitalization rate of 11.03% . This original square foot rate of $136.41 was consistent

with the Tax Year 1989 assessments for similar, nearby office buildings.

11. To arrive at this net operating income, Mr. Appelbaum testified that he had used an economic office rental rate of $21.50. This figure is extremely close to the building's actual average office rental rate of new 1987 leases at $20.58 and new 1988 leases at $21.72, as reported by the Petitioner's expert witness, Mr. Harps. Mr. Appelbaum further testified that he used retail income of $429,612, a vacancy rate of 5%, and expenses of $6.25 per square foot.

12. For his capitalization rate, Mr. Appelbaum used the capitalization rate derived by the Akerson Mortgage-Equity yield capitalization technique to determine the assessed value of the property. He determined a capitalization rate of 11.03% for the Tax Year. Dividing his net operating income with the capitalization rate of 11.03%, Mr. Appelbaum calculated an appraisal value of $19,104,000.

13. Mr. Appelbaum stated that other buildings of similar age (early 1950's) that he valued were assessed in the same manner as the subject property and thus were equalized with his original valuation of $19,104,000. Mr.

Appelbaum's original valuation is within 3.5% of the Petitioner's expert witness Mr. Harps' appraisal of $19,770,000.

14. Mr. Appelbaum further testified that after discussions with Mr. Klugel, Chief of Standards and Review, Mr. Klugel decided that the original valuation of $19,104,000 was too low and that Mr. Appelbaum should adjust the figures. Mr. Appelbaum testified that as a result of his discussion with Mr. Klugel, the assessment methodology was modified. The revised assessment did not value the property in its current condition. Instead, it was based upon the assumption that the building had been renovated and increased rental rates could be achieved. Under this scenario, Mr. Appelbaum increased the imputed office rental rate from $21.50 to $30.00 and decreased the expenses from $6.25 per square foot to $5.15 per square foot. These changes resulted in a decrease in the expense allotment and an approximate $1 million increase in the imputed gross office income--from $2,709,925 to $3,781,290. Under this new method, the net operating income increased almost $1.2 million, from $2,107,247 to $3,279,100. Finally, by

capitalizing the net operating income at 11.03% an indicated value of $29,728,921 was achieved.

15. Mr. Appelbaum then, upon the suggestion of Mr. Klugel, deducted renovation costs of $40 per square foot ($5,602,000 in total) from the revised value of $29,728,921 to reach a revised assessment of $24,127,000. This resulted in an approximate $39 per square foot increase in the assessment to $172.27 per square foot of net rentable area. The testimony of Mr. Appelbaum indicated that the $40 per square foot of renovation costs was not based upon an independent analysis of such costs but instead, was a suggested figure from Mr. Klugel. Mr. Appelbaum did indicate, however, that the $40 figure included both hard (e.g., construction) and soft (e.g., plans, permits, financing) costs of renovation, but the specific breakdown was not known to him. The $40 per square foot figure also included the loss of any rent to the landlord during the period of construction. Mr. Appelbaum agreed that if two years of total rent were lost as a result of renovation, then under the District's assumption of a net operating income of $3,279,100 per year, the calculated rent loss alone would exceed Mr. Appelbaum's hypothetical $5,602,000

expense total. Mr. Klugel did not testify to explain his figures.

16. Mr. Appelbaum could not specifically recall using this type of methodology for any other of the office buildings which he had assessed in Tax Year 1989 or any other year for the subject property. The revised Klugel/Appelbaum methodology resulted in a 26% increase in the assessment. The revised appraisal is too loosely based upon assumptions for the Court to accept as competent evidence. Consequently, this Court cannot accept such a large increase in appraisal without sufficient justification from the Department. Accordingly, the Department's assessment is rejected.

17. Ms. Allen also testified for Tax Year 1989 in support of the revised assessment. As she did for all years in question, Ms. Allen determined the net operating income with office leases from other buildings and without just cause, failed to include the value of the current leases. The Court finds at least three other problems with her assessment. Ms. Allen acknowledged that of the leases she chose to use, she did not know if they were representative of all the new leases in those other buildings. Further,

Ms. Allen could not determine whether the buildings from which she chose her comparable leases had been renovated. Finally, Ms. Allen acknowledged a steady decline of income, yet failed to include this trend into her net operating income calculations. As Ms. Allen used the same methodology for all years in issue, the Court rejects her net operating income calculations.

18. Mr. William S. Harps, member of the Appraisers Institute testified as an expert witness for the Petitioner. He is a past National President of the Appraisal Institute and a former member of the D.C. Board of Equalization and Review. He has been qualified as an expert on numerous occasions in both the local and federal courts in Maryland and the District of Columbia. This Court finds Mr. Harps' evidence credible and accepted his testimony into evidence. Respondent also stipulated to Mr. Harps' expert qualifications.

19. Mr. Harps reviewed the assessor's worksheet for the Tax Year 1989 assessment. He testified that the assessor's original estimate of value of $19,104,687 was within 3.5% of his estimate. Further, he stated that the net operating income originally utilized by the assessor was

reasonably consistent with the actual experience of the property. The assessor's capitalization rate was also very close to Mr. Harps' rate of 11.28% for Tax Year 1989. Mr. Harps agreed with the assessor's note that the building had reached the end of its competitive life.

20. The District's original assessment calculation, however, was revised at Mr. Klugel's suggestion. In these revised calculations, the assessor used office income of $30 per square foot and expenses of $5.15 per square foot. Mr. Harps testified that these figures were inappropriate for the subject property and were not supported by market data. According to Mr. Harps, the resulting net operating income of $3,279,100 was approximately $1,000,000 higher than what the building was capable of earning. The subsequent deduction of estimated renovation costs (the equivalent of $40 per square foot) was, in Mr. Harps' opinion, grossly inadequate to achieve rent of $30 per square foot. Mr. Harps testified that a major renovation would cost at least $60 to $65 per square foot, and up to $75 per square foot when soft costs are included. Mr. Harps disagreed with the income, expense, and renovation figures used by the assessor

to calculate the assessment of $24,127,000 which was placed upon the property for Tax Year 1989.

21. In his appraisal for Tax Year 1989, Mr. Harps relied on the actual gross income for the building, subject to an upward adjustment for owner-occupied space. Ms. Allen had cited the below-market lease to the owners as well as others as reason for rejecting the actual leases. Instead of rejecting all the building's leases, however, Mr. Harps adjusted them to reflect the earning levels of the rest of the building. This allowed the appraisal to reflect the property's earning history while accounting for the less than arms-length transactions. From this data, Mr. Harps developed an effective gross income of $3,118,701 for 1988. Relying on the actual operating expenses for the subject building, he then made a minor adjustment in the management expense to correspond with his adjustment for the owner-occupied space and added the pro rata expense of the delayed water bill attributable to that year. This resulted in stabilized expenses of $930,077 ($6.68 per square foot of net rentable space), well within the range of comparable office building expenses.

22. Mr. Harps testified regarding the importance of considering actual income and operating expenses in using the income approach to value. He stated that

> [Y]ou always rely on actual expenses at the subject property more than you do any other expenses with an office building or an apartment building because every one of those big buildings has its own characteristics. . . [T]here's just nothing better as an example of the expenses for the building for a given year than what those expenses were for a given year. There's nothing better for the rent for a given year than what those rents were for the given year.

(Harps testimony, 6/13/94, Tr. at 110). Mr. Harps testified that the approach to valuation upon which he relied for Tax Years 1989-1991 was the same as that which he had used when he was appointed by this Court in Wolf v. District of Columbia, Tax Docket Nos. 3715-86, 392697 (Super. Ct. 1991), aff'm, 611 A.2d 44 (D.C. 1992).

23. Mr. Harps deducted the stabilized expenses of $930,077 from the effective gross income of $3,159,742 to arrive at a stabilized net operating income of $2,229,665. This was divided by a capitalization rate of 11.28% yielding a total value of $19,770,000.

24. The Court finds Mr. Harps' net operating income much more accurate and reflective of the property's actual income history. More importantly, by closely examining the property's submitted income and expense reports, Mr. Harps projects an accurate picture of the building's future economic life. Accordingly, the Court accepts Mr. Harps' net operating income of $2,229,665.

25. Although the Petitioner provided substantial evidence that the assessors net operating income was incorrect, they have not provided any evidence concerning the assessor's capitalization rate. For Tax Year 1989, Mr. Appelbaum used the capitalization rate 11.03% that was derived by the Akerson Mortgage-Equity yield capitalization technique. He found this rate appropriate for buildings of the subject's age, location, size, and condition.

26. The Petitioners ask the Court to adopt the capitalization rate developed by Mr. Harps. In his appraisals, Mr. Harps considered the American Council of Life Insurance Companies figures, band of investment, short yield method and direct capitalization approach in calculating his capitalization rate for the subject property. After balancing the results from the different

techniques and completing a survey of the market, Mr. Harps determined the proper capitalization rate to be 11.28%.

27. The assessor's capitalization rate, however, is supported by the Respondent's expert appraisal. Ms. Allen derived her capitalization rate for all tax years in question through Akerson Mortgage-Equity yield capitalization technique. In determining her rate of 10.43% she surveyed published economic and financial indicators, real estate market conditions, agent, broker and appraiser information, investor and seller market expectations, and transaction data from building sales. From this data, Ms. Allen calculated an income capitalization rate that is actually well below Mr. Appelbaum's rate of 11.03%. Not only does Ms. Allen's findings refute the notion that the Department's rate is too low, but in comparing the Department's rate with the rates of both experts, the Respondent's approach shows more clearly as corroboration for the opposing approach in calculating capitalization rates. Accordingly, the Court accepts the Department's capitalization rate of 11.03% for Tax Year 1989.

28. Dividing the net operating income of $2,229,665 by the capitalization rate of 11.03%, the Court finds the subject property's appraisal value at $20,214,551 for the 1989 tax year.

Tax Year 1990

29. Mr. Appelbaum was again the assessor of the subject property for Tax Year 1990. In developing his assessment, Mr. Appelbaum testified that he did not include the actual income from the property, even though the Income/Expense form was available. Instead, Mr. Appelbaum used economic income and expenses, as developed from his economic study of leases in pre-1960 office buildings. Mr. Appelbaum used his economic study to determine a $2,549,407 net operating income for Tax Year 1990. This study was not introduced into evidence.

30. In completing the capitalization of income approach, Mr. Appelbaum chose 10.55% as his appropriate capitalization rate. For the 1990 Tax Year, Standards and Review provided Mr. Appelbaum with two rates from which to choose, 9.83% and 10.55%. Mr. Appelbaum chose the higher rate (the higher the rate the lower the assessment). Capitalizing the net operating income of $2,549,407 by the

rate of 10.55%, Mr. Appelbaum assessed the value at $24,165,000.

31. Ms. Allen also used the same methodology for calculating the net operating income. By ignoring the impact of the existing leases, as well as new leases, and valuing the property on a "free and clear" basis, Ms. Allen created an inaccurate and unreflective appraisal. Rather than using the property's numerous new leases, 18 in 1988, as a basis for determining the rents the subject property was capable of achieving, Ms. Allen looked to the rents other properties were achieving. As a result, Ms. Allen did not compare the office rents the subject property was actually achieving through its new leases with other market office leases.

32. For Tax Year 1990, Mr. Harps used the actual gross income for the subject building, again subject to an upward adjustment for the owner-occupied space. In recognition of the upward trend in retail rents in the area, Mr. Harps added 4% to the actual retail income to reflect the increased earning potential of the retail space. Mr. Harps developed effective gross income of $3,137,497 while the reported effective gross income for 1989 was $3,076,525.

33. Mr. Harps relied upon the actual operating expenses for the subject building, then made a minor adjustment in the management expense and an additional added pro rata expense for the delayed water bill attributable to that year. He amortized both the tenant alteration expense of $225,457 and lease-up expense of $96,168 as reported on the 1989 Income and Expense Form over a five year period. This reduced the actual expenses by $258,900. These adjustments resulted in total indicated expenses of $950,379.

34. The indicated expenses of $950,379 were deducted from the effective gross income of $3,137,497 to arrive at a stabilized net operating income of $2,187,118.
The Court finds this to be an accurate net operating income, and accepts it in evaluating the subject property. The Court finds that the assessor erred by estimating his gross income by solely using market rents without reference to actual rents of existing tenancies and for using market expense data without including historical expense data, having given no persuasive reason for using economic income and expenses versus actual ones.

35. With regard to the proper capitalization rate, the Petitioners again ask this Court to reject the assessor's capitalization rate of 10.55% and accept Mr. Harps' rate of 11.53%. Petitioner argues that the assessor's rate should be dismissed because it was one of the two rates, the other 9.83%, that were provided for him by Standards and Review Division of the Department of Finance and Revenue. Petitioner also points out that Mr. Appelbaum did not know the specific basis for the capitalization rates or the financial and economic information in the market place from which they were derived.

The Court finds that the lack of an independent calculation, by itself, is not determinative in accepting or rejecting an assessor's capitalization rate. Petitioner has not demonstrated to the Court that the capitalization rate is flawed, inaccurate, or incorrect.

36. Ms. Allen's expert testimony is again strongly supportive of the assessor's capitalization rate. Through her independent analysis, and considering the factors and market concerns listed above, Ms. Allen determined a rate of 10.59%, which is extremely close to Mr. Appelbaum's rate.

Mr. Harps' capitalization rate may have been well researched, but the Court finds that the greater strength of the evidence lies with the assessor's.

37. The Court finds that the assessor properly determined the capitalization rate at 10.55% for Tax Year 1989. Mr. Appelbaum's original rate is supported by the expert testimony of Ms. Allen. Also, Petitioner provides no evidence that the selection of the rate was incorrect, flawed, or inaccurate. Dividing Petitioner's net operating income of $2,187,118 by the assessor's capitalization rate of 10.55%, the Court finds the proper appraisal value to be $20,731,000.

Tax Year 1991

38. Larry Hovermale testified as the District's assessor of the subject property. He stated that the had assessed the property for $23,813,000 based on the income approach to value. Mr. Hovermale testified that he looked at the newer leases in the subject property and that they averaged around $21.00, which he then compared with the Department's Pertinent Data Book. He stated that the property's actual leases fell within the acceptable range of rents for this age of property so he used the actual new

office lease rate of $21.00. From these rates Mr. Hovermale developed a net operating income of $2,024,107.

39. For Tax Year 1991, Mr. Harps again relied on the property's actual gross income, again subject to an upward adjustment for owner-occupied space. In recognition of the upward trend in retail rents in the area, Mr. Harps increased the retail income by 4% in order to reflect the increased earning potential of the retail space. Mr. Harps also included net income received by the owner as a result of litigation. From those considerations, Mr. Harps developed an effective gross income of $3,088,993. The property's reported 1990 effective gross income was $3,000,910.

40. With respect to the property's expenses, Mr. Harps used the building's actual operating expenses as reported on the 1990 Income-Expense Form. Mr. Harps then adjusted the actual expenses by 1) amortizing the tenant alteration expense of $315,268 over a three year period; and 2) deducting the asbestos abatement cost of $132,169 from the operating expenses since it was actually a capital improvement item. These adjustments resulted in stabilized expenses of $990,922.

41. The stabilized expenses of $990,922 were deducted from the effective gross income of $3,088,993 to arrive at a stabilized net operating income of $2,098,071. Mr. Harps' calculations led him to find a *higher* net operating income figure than Mr. Hovermale's. The income figures of Mr. Harps and Mr. Hovermale are quite close, less than 4% difference. Therefore, finding that Mr. Harps' net operating income is more accurate and reflective of the subject property's income potential, even if only slightly, the Court finds his figure of $2,098,071 as the appropriate net operating income for Tax Year 1991.

42. For a capitalization rate, Mr. Hovermale developed a rate of 8.5% for his assessment. He testified that the rate was selected from the Pertinent Data Book, which gave a range of capitalization rates from 8% to 9%. He stated that he did not do an individualized, specific analysis to determine the proper capitalization rate to employ; but instead, Mr. Hovermale testified that he simply selected the mid-point of this range. He stated that the capitalization rates were derived from the sales of office buildings, but he did not know over what exact period. Mr. Hovermale further admitted that he did not know either

which particular sales study was used by Standards and Review to establish the capitalization rates or what adjustments may have been made to the range of rates.

43. Of all the witness presented by both parties at trial, Mr. Hovermale's Tax Year 1991 capitalization rate was the lowest over the four year period. Ms. Allen, Mr. Appelbaum, Mr. Wolf and Mr. Harps' each presented rates ranging from 9.76% to 11.63% . The Respondent's own expert witness, Ms. Allen, testified that her independent analysis calculated a rate of 9.76%--significantly higher than the assessor. Ms. Allen's testimony actually strengthens the Petitioner's argument that the capitalization rate for the subject year is too low and substantially incorrect (the lower the capitalization rate, the higher the assessment). This Court cannot find the Department's rate credible when the party's own expert witness determines a substantially higher rate, and accordingly rejects this rate and the Department's overall assessment.

44. Ms. Allen independently calculated her capitalization rate of 9.76% through the Akerson Mortgage-Equity yield capitalization technique. In determining a rate, the assessor must include certain assumptions

concerning value such as age, location, market conditions, and appreciation. These assumptions can substantially alter the capitalization rate and inevitably, the appraised value of the property. As detailed above, Ms. Allen only used one method to determine her capitalization rate without providing any other method as a check. One of the assumptions in her calculations was that the subject property would appreciate by 15% over a five year period. This is not consistent, however, with Ms. Allen's acknowledgment that signs of the recession were becoming apparent in mid-to-late 1989 (valuation date is January 1, 1990), that rental concessions were becoming more prevalent in the market and that the District's office-vacancy rate was increasing. Ms. Allen's assumption of an appreciation of property value is clearly erroneous in light of her concession that the real estate market had soured. Since Ms. Allen used only one method to derive her capitalization rates, she provided no check for her assumptions regarding the property's appreciation and the ultimate rate she employed.

45. The Court notes, however, that Ms. Allen's appraisal for 1991 is clearly different from other years at

issue. In no other year was there a substantial recession in the market that could lead to a miscalculation in determining a capitalization rate. In light of this, Ms. Allen's capitalization rates for the previous tax years are easily distinguished, and they maintain their credibility as evidentiary support for the assessor's initial capitalization rates.

46. Mr. Harp's capitalization rate of 11.40% was determined through more than one method as detailed above. His calculations included the down turn in property prices and more accurately reflect the prevailing market conditions. Accordingly, the Court accepts the capitalization rate of Petitioners' expert, Mr. Harps, for the 1991 Tax Year.

47. Dividing the Mr. Harps' operating income of $2,098,071 by the 11.40% capitalization rate, yields a value of $18,404,000.

48. Included in his appraisal, Mr. Harps deducted from the value of the property $132,169 as the cost of asbestos abatement. Without refuting evidence from the Respondent, this abatement is accepted. The Court finds the

total value of the property for Tax Year 1991 to be $18,270,000.

Conclusions of Law

This Court has jurisdiction over this matter pursuant to D.C. Code Ann. § 47-825.1 and § 47-3303 (1990 Repl.). The Superior Court's review of a tax assessment is *de novo*, which necessitates competent evidence to prove the issues. Wyner v. District of Columbia, 441 A.2d 59, 60 (D.C. 1980). The Court is satisfied that there is such evidence on the record for the Court to determine the fair market value of this property.

Petitioner, represented by William B. Wolf, Jr., bears the burden of proving that the assessment appealed from is incorrect, flawed, or illegal. Safeway Stores, Inc. v. District of Columbia, 525 A.2d 207, 211 (D.C. 1987); Brisker v. District of Columbia, 510 A.2d 1037, 1039 (D.C. 1986). Petitioner is not required to establish the correct value of its property. Id. When a taxpayer appeals an assessment to this Court, the Court can affirm, cancel, reduce, or increase the assessment. D.C. Code Ann. § 47-3303 (1990 Repl.). The Court's obligation is to determine

whether there are any flaws in the assessment and whether such flaws impact the fair market value of the property.

For the years 1989-91 at issue, this Court concludes as a matter of law that Petitioners have met their burden in proving the District's assessments were erroneous. As an accomplished expert witness, Mr. Harps presented credible and reliable testimony as evidence in finding the Department's assessments flawed. In determining the capitalization rate for each year, this Court appropriately considered the testimony of both expert witness as well as the respective assessors for the Department. Upon finding that the Petitioner has met their burden in proving the Department's assessment incorrect, however, the Court refuses to simply discard all of the Respondent's evidence, especially considering that the Respondent provided the Court with a credible expert witness to support different figures in the assessment.

Real property taxes are based upon the estimated market value of the subject property as of January 1st of the calendar year that precedes the tax year for an annual assessment and, as of December 31st for a second half

supplemental assessment. See D.C. Code Ann. § 47-820, 830 (1990 Repl.); "Estimated market value" is defined as

> 100 per centum of the most probable price at which a particular piece of real property, if exposed for sale in the open market with a reasonable 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. 47 § 820(a) (1990 Repl.).

The District of Columbia Court of Appeals has generally recognized the three approaches to value property--capitalization of income, comparable sales, and cost of replacement--and all three must be considered. Safeway Stores, Inc. v. District of Columbia, 525 A.2d 207, 209 (D.C. 1987); District of Columbia v. Washington Sheraton Corp., 499 A.2d 109, 113 (D.C. 1985); Rock Creek Plaza-Woodner, Ltd. Partnership v. District of Columbia, 466 A.2d 857 (D.C. 1983). After properly considering all three approaches, both parties agree on using the capitalization of income approach as it is the preferred method for income-producing properties.