SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

FILED
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SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

9 E ASSOCIATES,

Petitioner,

v.

Tax Docket Nos. 5240-92; 5783-93

DISTRICT OF COLUMBIA,

Respondent.

MEMORANDUM OPINION AND ORDER

These cases came before this Court for a trial *de novo* concerning petitioner's appeal of commercial property tax assessments for two tax years: 1992 and 1993. The two actions were consolidated for trial and final adjudication, because they involve the same property.

The particular property in dispute is denominated as Lot 40 in Square 377. As a practical matter it is an office building located at the corner of 9th and E Streets, N.W., in the District of Columbia, across from the rear of the F.B.I. headquarters.

One of the outstanding factual controversies in this litigation is the significance of certain zoning regulations as they affect the value of the land portion of the assessments. The petitioner and the District presented very different contentions as to exactly what these regulations mean.

For the reasons that are set forth herein, the assessments must be set aside in favor of a *de novo* determination of the value

of this property on both of the tax valuation dates in question.

The facts and the legal issues can be best understood when seen against the background of basic case law and statutory requirements that apply to assessment cases.

I. APPLICABLE CASE LAW, STATUTES, AND REGULATIONS

The law of the District of Columbia mandates that real property assessments reflect the estimated market value of the property as of a specific date, i.e. the date of the assessment. Each tax year the valuation date is January 1st of the preceding calendar year. Moreover, the applicable statute explicitly defines what is meant by estimated market value:

> 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.

47 D.C. § 802(4) (1990 Repl.).

The District of Columbia Court of Appeals has emphasized, "[i]n determining the estimated market value, the assessment **shall take into consideration**:

> all available information which may have a bearing on the market value of the real property **including but not limited to** government imposed restrictions, sale information for similar types of real property, mortgage or other financial considerations, replacement costs less accrued depreciation because of age and condition, income earning potential (if any), **zoning**, the highest and best use to which the property can be put, and the present use and condition of

the property and its **location**.

District of Columbia v. Washington Sheraton Corp., 499 A.2d 109, 112 (D.C. 1985)[emphasis supplied]. The quoted factors above are found directly in the District of Columbia Code. 47 D.C. § 820(a).

The assessor is required, as a practical matter, to develop an assessment figure that mirrors as closely as possible the value that a potential buyer, in the open market, would also place on the property. This, in turn, means that the assessor cannot logically ignore the very same factors that would normally have an impact on a decision to buy the property.

The Court, in examining the assessment de novo, is obliged to engage in a two-step process.

First, the Court must determine whether the petitioner has established by a preponderance of the evidence that the particular assessment is "flawed." Brisker v. District of Columbia, 510 A.2d 1037, 1039 (D.C. 1986).

Second, if the Court is convinced that the assessment is flawed, the Court itself must then render its own decision on the fair market value of the property. The petitioner is not strictly required to present proof of the "correct" value, though typically this is exactly what petitioners endeavor to do. The Court, as the finder of fact, may accept either party's competing evidence as to value or the Court may seek further input from one or more independent experts.

Where office buildings are concerned, the accepted methodology for property appraisal is known as the "income approach" or the

"capitalization of income approach." It has been defined by the District of Columbia Court of Appeals as follows:

> This method entails deriving a 'stabilized annual net income' by reference to the income and expenses of the property over a period of several years. That annual net income is then divided by a capitalization rate -- a number representing the percentage rate that taxpayers must recover annually to pay the mortgage, to obtain a fair return on taxpayers' equity in the property, and to pay real estate taxes.

Rock Creek Plaza-Woodner, Ltd. v. District of Columbia, 466 A.2d 857, 858 (D.C. 1983).

While there are two other well-recognized approaches to real property valuation (the replacement cost approach and the comparable sales approach),[1] there is no dispute in the instant case that the income approach was the correct type of analysis to apply.

The Court's findings of fact herein will explicate what the parties presented at trial and those significant facts that were proven by a preponderance of the evidence. The Court's conclusions of law articulate the reasoning that the Court has employed in reaching its decision.

II. FINDINGS OF FACT

The subject property is owned by 9E Associates Limited Partnership, Quadrangle Development Corporation, General Partner. The property is land that is improved by a ten-story office

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[1]See District of Columbia v. Washington Sheraton Corp., supra, 499 A.2d at 112.

building, erected during 1989-1990. It includes three levels of underground parking.

Within this property there is 236,702 square feet of gross building area above grade. There is 230,775 square feet of leasable office space and 9,474 square feet of leasable retail space. The property also has storage space, an exercise facility, and approximately 200 parking spaces. This commercial property is zoned C-4 and developed to a 10.0 FAR (floor to area ratio). The property is located within an area known as the "downtown development district," or "the DDD."

The District of Columbia, for tax year 1992, assessed the property at a value of $66,182,000 ($31,307,364 allocated to land and $34,874,636 allocated to improvements). For tax year 1993, the District assessed the property at a value of $53,891,000 ($23,646,744 allocated to land and $30,244,256 allocated to improvements). As to both tax years, petitioner unsuccessfully pursued appeals to the Board of Equalization and Review.[2]

The assessor for both tax years was Mr. Quinton Harvell. He is a commercial assessor at the Department of Finance and Revenue. He was called as a trial witness by the petitioner.

The 1992 Assessment. For tax year 1992, in applying the income approach, Harvell developed figures representing the property's net operating income (NOI).

Because the subject property had no tenants during calendar year 1990 (for which Harvell had the owner's income and expense

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[2]Petitioner has paid all taxes prior to the instant appeals.

data), he developed a rental rate for the office space by reference to "economic" (i.e. marketplace) rates only. In calculating the gross, economic income, he determined typical lease rates by relying upon leases that had been signed for other properties.

Harvell testified that he used an assumption of a 4% (four) vacancy rate, even though he presumed that it would take 12 to 18 months to lease up this building.

The stabilized NOI used by Harvell was $5,625,493 -- even though the 1991 actual income was a negative $1,152,073.[3] Nevertheless, the assessor created a tax bill for this property under an assumption that the building was producing millions of dollars of income.

Mr. Harvell did not make any downward adjustments for the actual vacancy losses or for the costs of tenant improvements, so-called "free rent,"[4] lost earnings, etc.

The capitalization rate derived by the assessor was 8.5% See further discussion, infra

The 1993 Assessment. For tax year 1993, Harvell also ignored the actual expense and income history of the building. For this particular tax year, there were a few existing leases for this property. However, he derived rental rates only by relying upon a range of rates from other office buildings.

Furthermore, Harvell applied a 19% adjustment to account for

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[3]Harvell's worksheet showed only $0 for the income and expenses for calendar year 1990.

[4]This is a standard marketing incentive.

tenant concessions; but this percentage rate was supplied to him by other persons in the Department and was not a product of his own knowledge or analysis. Harvell acknowledged that he failed to apply any adjustment of the alleged income for such expenses as leasing commissions, above-standard tenant build-out, etc.

Harvell computed an NOI of $5,119,602 for this tax year. He applied to this figure a capitalization rate of 9.5%.

Matters Common to Both Tax Years. There are three aspects of the trial evidence that are common trial issues as to both tax years: (1) the assessor's treatment of vacancy losses; (2) the development of the capitalization rates; and (3) the valuation of the land component of each assessment.

1. Vacancy loss. As to both valuation dates, there was a significant issue as to how the assessor treated the large amount of vacant space in this property.

The facts of record show that, at the end of calendar year 1990, this building had only two office leases in place. The assessor initially claimed that the building had 98,356 square feet of vacant space. Ultimately, he admitted that the vacancy problem was much greater, i.e. 180,000 square feet as of January, 1991.

Harvell testified that he relied exclusively upon a certain formula for calculating vacancy rates and that this formula was supplied to him by the employees of the Standards and Review Section of the Department. He used this formula for the 1993 assessment.

Essentially, according to this formula, he was instructed to

spread the vacancy over three calendar years. His testimony was unclear as to precisely when he expected the building to be fully leased up. Next, Harvell used the following steps: (1) he extracted what he considered to be a normal vacancy of 9,231 square feet; (2) he multiplied this figure by his estimated per square foot value for office space; (3) he discounted this result at least 12%, in order to arrive at a present value. He did the same thing for the second and third years of this three-year spread. After making the same kind of calculation for retail space, Harvell applied a 9.5 capitalization rate. This reflected a $474,330 loss due to "excess" vacancy.

Because the assessor capitalized the vacancy loss figure, this entire procedure served to amortize the vacancy loss over the entire life of the building -- instead of capturing the loss for the particular tax year involved. Yet, Harvell testified that he regarded the vacancy problem as merely a temporary condition. The facts show that, by January 1, 1992, the property's income had stabilized.

2. Capitalization rate. Capitalization rates that were used for the assessments were explained by Harvell in the following manner. Harvell testified that his capitalization rates were selected from a pre-determined range of rates that were provided to him by Standards and Review. These rates, in turn, had been calculated from data concerning sales of improved properties and pro forma net operating incomes. The evidence demonstrates that the Department listed in its Pertinent Data Books **different** pro

forma information for the **same three sales** that are published in the Pertinent Data Books for both 1991 and 1992. Thus, different capitalization rates resulted. This error rendered the assessor's capitalization rates to be unreliable.

The literal unreliability of the assessor's capitalization rates is separate from another problem that was highlighted in the assessor's testimony. He testified that the Department's annual rate schedules included a substantial adjustment downward in the rates based upon the Department's assumption of a large appreciation in value.

The assumption of an appreciation in value is sharply inconsistent with several facts: (1) that the District's application of an 18% reduction in land values; (2) that the 1991-1992 real estate market suffered a recession; and (3) that the District's own assessments for the subject property decreased from tax year 1992 to tax year 1993. The assessor was unable to offer any testimony to justify the appreciation factor that was dictated to him by Standards and Review.

3. Land valuation. The land component of each assessment was also a subject of the assessor's trial testimony. Mr. Harvell acknowledged that the land assessment for tax year 1992 was almost double the figure for tax year 1991, based upon an assumption that real estate had appreciated by that proportion in one year. Harvell testified that in preparing the assessment for tax year 1992 he had not actually checked or reviewed what the assessed value of the land had been for tax year 1991.

Also, Harvell testified that although Department guidelines call for an adjustment for the negative effect of certain zoning "overlays" that are applied to buildings in the DDD, Harvell failed to make any such adjustments. See further discussion, infra, regarding expert testimony.

Expert Testimony. The only expert who testified at trial was a witness who was called by the petitioner. The expert was Mr. Harry A. Horstman, III, MAI.[5] He prepared a written appraisal of the subject property for each tax year and testified extensively about the details of those appraisals, making liberal references to specific portions of his reports.

For tax year 1992, he determined that the subject property's total fair market value was $35,800,000.

For tax year 1993, Horstman concluded that the property's total fair market value was $39,600,000.

Horstman utilized the income approach as the ultimate basis of each appraisal.[6] He composed his appraisals after taking several distinct steps.

First, Horstman observed the operation of the local real estate market. He testified that as of the first assessment date, the market was entering a recession. For example, in mid-1989, commercial land acquisitions ceased in the District of Columbia. The initial decline in the market was highlighted by increasing

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[5]Respondent stipulated to his expert qualifications.

[6]He used the sales approach and the cost approach as checks on his estimates of value.

vacancy rates in newly constructed buildings. By January 1, 1991, commercial real estate transactions had ceased and, in his words, the local market had virtually "dried up." By tax year 1993, a national recession had developed. Rents were falling.

As to land values, Horstman concluded that the land underlying the subject property was negatively affected by certain zoning requirements (overlays).[7] He valued the land at $487.50 per square foot or $14,100,000.

Aside from estimating the value of the land, Horstman appraised the improvements as well. To do this, he applied the income approach, calculating the NOI for each tax year in the following way.

For tax year 1992, Horstman calculated that the NOI was $2,115,588. He derived this figure by subtracting expenses from the gross income of the property. The gross income, in turn, was estimated by examining comparable office and retail leases as well as the actual leases in the subject property. He then estimated a "stabilized" net operating income of $4,567,183.

This figure was capitalized at a rate of 11.19%, to arrive at a stabilized value of $40,814,861.

In order to estimate the "as is" value of this property for final appraisal purposes, Horstman deducted the 1991 expenses for lease-up costs and tenant improvements. He applied a further discount in order to derive a present day value.

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[7]For a discussion of how "overlays" function, see further discussion, infra, in text.

His final appraisal for the subject property, as of January 1, 1991 was $35,760,000. For tax year 1993, Horstman essentially performed the same type of analysis, with different income and expense figures, based on the fact that the property, by then, was substantially leased up. His appraised value for tax year 1993 was $39,600,000.

For both tax years, Horstman estimated the land value to be $14,100,000. He calculated this figure by examining comparable land sales and by observing the effect of relevant zoning requirements and restrictions that affected the legal uses that were reserved for this particular site.

For each tax year, the differences between the land value and the overall appraised value represents the estimated value of the improvements.

Where the capitalization rate itself is concerned, for each tax year, Horstman calculated his rate in the following manner.

Using what is known as the "mortgage band of investment technique," Horstman studied the rate information regarding investment quality properties as reflected in the 1992 Investment Bulletin of the American Council of Life Insurance.[8] He verified the rate that he selected through the Elwood yield analysis (Akerson format). He performed a cash flow analysis as well, in order to determine that the capitalization rate would be sufficient

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[8]This publication is highly relevant and helpful because the rate information relates to other investment-grade properties that may compete with the subject property for the investment dollars of potential buyers. Life insurance companies, for example, are known to invest in substantial commercial real estate.

to cover mortgage debt service, payment of real estate taxes, and provision of some type of positive cash flow to the equity position of the owner.

Horstman checked his overall estimate of value by performing a cost approach analysis and a sales comparison analysis.

The expert witness provided a critique of the work that was performed by the assessor as to both tax years, in order to demonstrate why the assessments were faulty. In essence, Horstman concluded that the assessments were flawed because: (1) the assessor failed to account for any difference between stabilized value and "as is" value; (2) the assessor failed to make reductions for excess vacancy loss in tax year 1992; (3) when the building was finally leased up as of tax year 1993, the assessor amortized the vacancy loss instead of treating it as a one time-only loss that applied to that particular year; (4) the assessor's capitalization rate was insufficient to provide a fair return on equity, after payment of the mortgage, and real estate taxes; and (5) the assessor failed to identify and consider in any meaningful way the impact of the relevant zoning requirements.

III. CONCLUSIONS OF LAW

This Court finds as a matter of law that the original assessments for both tax years were flawed. The Court also concludes as a matter of fact and law that the valuations proffered through the petitioner's evidence are sufficient to form the basis of the *de novo* estimated market value of this property for these

two particular tax years.

A. **The Flawed Assessments.** In short, the assessments were flawed for the following particular reasons.

1. Tax Year 1992.

With respect to tax year 1992, there are two major flaws.

First, this assessment is defective because the land portion of the assessment ignored the negative impact of certain zoning restrictions that impinge upon the property's location in the Downtown Development District (the DDD). These zoning restrictions were an important factor because of how they intersect with the basic, legal tenets of appraising land. Certain elaboration is necessary.

There is no doubt that the standard premise upon which land is valued for local tax purposes, with respect to commercial real property, is that the land must be valued **as if vacant** on the valuation date and if it is offered for sale **for the purpose of being put to its "highest and best use."**[9] Here, there is no doubt

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[9]By definition, land must be assessed as if it is vacant because the Code requires that a tax assessment reflect the two **separate** components of land and improvements. 47 D.C. § 821(a). While the Court must determine whether the assessment was defective as a whole, a defect in **either** of the two components can suffice to trigger the second prong of the trial analysis.

Bearing in mind that anything is possible, it is possible that in a particular case the Court may find that an assessor's over-valuation of one component is offset by that assessor's under-valuation of the other. In the instant case, this Court has searched the record for such off-setting factors. The Court finds none. Where, as here, there is no off-setting consideration that would compensate for a flaw in one of the two components, it does not matter whether the flaw or defect is attributable to the land component, the improvements component, or both.

that the highest and best use of the subject property is that of an office building. Thus, anyone who is assessing this parcel of land is required to determine what an investor would consider when deciding whether to buy the land specifically in order to erect an office building on that site.

As petitioner's expert pointed out, vacant land that was located in the DDD as of January 1, 1991 (and which normally should be developed as an office building) is land that was negatively affected by the **zoning regulations that were then in place**. The subject property is indeed located in the DDD and the applicable zoning regulations, as of the valuation dates, imposed serious restrictions and requirements for development.

Specifically, on both of the valuation dates herein, any investor who would have purchased the subject land could have erected an office building on this land **only** if the developer had set aside a specific portion of the building for retail space and residential space -- regardless of whether such choices would have been justified by prevailing marketplace forces. These retail and residential requirements are known as "overlays" to the basic zoning designation of the subject property.

Under the applicable zoning regulations, any DDD developer would have been required to devote 1.5 to 2.0 FAR out of the allowable FAR to stores or other retail tenants -- even if this choice made absolutely no sense economically.

Additionally, any developer of this land on either of the valuation dates also would have been required to include 2.0 FAR of

housing (residential space) inside the building. This is a requirement that was designed to address a public policy of creating housing in the downtown area. Regardless of the independent merits of such a policy,[10] Horstman concluded that the regulations effectively narrowed the realistic choices of a DDD investor in these two tax years.[11] According to petitioner's expert witness, the overlays created a negative impact on the value of the land.

Since the law requires that an assessment be set forth with a figure that is allocated specifically to land and a value that is allocated specifically to improvements, there is clearly no way to evade the importance of these zoning regulations for any DDD office building property.

The law itself creates the issue, insofar as the District of Columbia Code requires the assessor to consider "zoning" issues as well as the property's "location."[12] See 47 D.C. § 820(a). Furthermore, the regulations that implement the statute also

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[10]The public policy issue itself, of course, was certainly not debated as part of this trial; nor was the policy itself relevant as to its merits.

[11]Tax years 1992 and 1993 came shortly after the Zoning Overlays were adopted, according to the expert witness. He recalled that the Zoning Commission enacted these requirements in or about December 17, 1990. He reflected this in his appraisal reports.

[12]Location and zoning are two of a long list of specific factors that are minimally part of what a tax assessor "shall take into consideration." District of Columbia v. Washington Sheraton Corp., supra. Thus, the instant case presents a relatively rare example of a tax assessment that is based upon the assessor's own direct violation of the law, by omission.

specifically require tax assessors to consider "government imposed restrictions" and "zoning" among other factors. See 9 DCMR §§ 307.1(a) and (f). Nothing could be clearer. The assessor failed to consider these zoning requirements and restrictions. Assessors cannot ignore the law.

The assessor's omission is compounded by his complete personal lack of understanding of the mechanics of the relevant zoning requirements. In his trial testimony, the assessor was asked very directly by Government counsel why he did not calculate the value of the rentable office space based upon the amount of FAR that **legally** could be developed for this use, if the land had been offered for sale on the valuation dates.

The assessor answered that he assumed that the entire allowable FAR could be developed for office space merely because a total FAR of 8.5 is allowed under the C4 zoning regulations. He was wrong.

The shop and housing requirements are refinements or "overlays" of the basic zoning classification. In other words, once it is clear that a property has the C4 zoning designation, the overlays are thereafter applied to create more precise exceptions to what a developer can build, as well as requirements for future re-development or renovation.

The petitioner's expert has never suggested (nor is it true) that the DD/shop or housing overlay regulations have reduced the total allowable FAR for the subject property. Plainly, there was no such reduction. Instead, the regulations dictate what type of

use must be reserved for **part of** the total FAR. In retrospect, Mr. Harvell had no understanding of how "overlays" function in relationship to a general zoning designation.[13]

According to Horstman, the effect of the overlays during the period of these two tax years is not a matter of speculation. The record reflects that these zoning regulations, in conjunction with the reduced availability of financing during this period, actually did have the impact of dissuading developers from completing office building projects in the DDD.

The petitioner's expert gave a vivid and totally unchallenged explanation of this problem.

Horstman emphasized, for example, that some developers who had actually executed contracts to purchase downtown property during these years nonetheless decided to forfeit their deposits rather than go forward with the projects.

In other words, numerous developers concluded that foregoing a downtown development project altogether was less costly than forfeiting their deposit money -- because of the great likelihood of losing future profits due to the need to comply with the DD/shop and housing overlays.[14]

The unfortunate impact of the DD/shop and housing overlays,

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[13]A tax assessor, if anyone, must be conversant with zoning issues.

[14]Ironically, if the assessor had only confronted the zoning overlay issue originally, he may have been able to determine an effect on value that was less negative than the opinion of petitioner's expert -- and he may have been able to justify his position at trial. However, he literally never included such analysis as part of his actual assessments.

according to Horstman, evolved simultaneously with a crisis in the availability of loans for office building development.

This crisis, in essence, was the result of the nation-wide collapse of parts of the savings and loan industry and the advent of FIRREA legislation.[15]

FIRREA, in turn, caused lenders to be wary of extending development loans without substantial equity held by the owner. Consistent with his trial testimony on this subject, Horstman wrote in his appraisal report for tax year 1993:

> Federal audits across the country are forcing banks and savings and loans to increase loan loss reserves (at the expense of current profits), and to reclassify some existing loans. Lenders that are most affected include those financial institutions with large portfolios of loans to development countries or **real estate loans in high risk properties and over-built markets**. Highly leveraged transactions (HLT) or loans above 75 percent loan-to-value ratio, are under continuing scrutiny of federal bank auditors. The bulk of loans on real estate were previously made at or above the 75 percent ratio to imputed value.

See Petitioner's Exhibit 22 at page 17 [emphasis supplied]. Horstman generally characterized the District of Columbia as such an "overbuilt" commercial market during the years that are relevant to the instant case.

The upshot of Horstman's observations about the effect of FIRREA is that any estimate of fair market value of office buildings during these two years should reflect the realistic

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[15]This acronym refers to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

purchase price that would have persuaded an investor that such an acquisition would allow him or her to obtain a fair return on equity, acquire financing, and pay the mortgage.

Parenthetically, the valuation of the land is not the sole reason for paying attention to the effect of the DDD overlays. Those regulations are looming in the background as a potential issue for any originally non-conforming improvements (office buildings), i.e. an office building that was developed prior to the issuance of these regulations. The subject property is indeed "non-conforming."

The regulations can apply to originally non-conforming buildings in certain circumstances that can occur in the future.[16]

According to Horstman, for example, the overlays would apply in the event of major renovation or repair that occurs specifically due to fire. Second, they also would apply whenever a property owner redevelops or renovates such an office building at a cost that is at least equal to 50% of the value of the building.

The taxable value of an office building property must reflect the present day value of a future income stream. Thus, the zoning overlays will always exist as a consideration for this particular property whenever a DDD property is held out for sale, even though its improvements are presently non-conforming.[17]

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[16]In other words, the so-called "grandfathering" of pre-overlay buildings does not amount to total protection from the requirements of the overlays.

[17]This consideration goes to the statutory presumption that the fair market value, for tax purposes, assumes that a buyer knows of the "uses to which the property may be put." 47 D.C. § 802(4).

To be sure, it is not proper to fix a tax valuation or appraisal upon mere conjecture. Yet, where future income stream is at risk, the assessor must at least identify and confront the unique risk factor, such as zoning regulations. An assessor may, of course, consciously choose to give the zoning factor minimal weight, as long as this is done for an articulated reason that objectively makes sense.[18] However, this did not occur in the instant case.[19]

The entire discussion herein regarding the zoning overlays serves to establish that a tax assessment of a DDD property can be deemed "flawed" if the assessor in question either ignores the zoning issue altogether or interprets it in a mistaken or negligent manner.

Second, entirely aside from the zoning issue, the assessment for tax year 1992 is significantly flawed because the assessor, in performing the income capitalization approach, failed to include certain important expenses and costs in calculating the NOI.

Third, the assessor failed to calculate and apply a

The overlays regulate those uses.

[18]To be clear, the instant case does not afford a basis for speculating about the actual impact of the zoning overlays today. This trial concerned only two discrete tax years in the past.

[19]To some extent, the District argued at trial that the zoning overlay issue is irrelevant, since the office building that now occupies the subject property was "grandfathered" in such a way as to avoid the application of the overlays to the current improvements. This is wrong, however, because the grandfathering issue only goes to the value of the improvements. The existence of "grandfathered, non-conforming" improvements on the site does not erase the effect of the zoning laws on the valuation of vacant land itself. Issues as to land and improvements should not be confused.

capitalization rate that was sufficient to comply with the requirements of Rock Creek Plaza-Woodner and its progeny.

The assessor candidly admitted on the witness stand that he never checked to determined whether his capitalization rate was sufficient to cover payment of taxes, payment of the mortgage, and a fair return on the owner's equity. In view of the longstanding opinion in Rock Creek Plaza-Woodner, it is not clear whether Mr. Harvell does not understand the opinion, whether he is not capable of complying with it, or whether he purposely ignored it.[20]

Apart from the problems with the capitalization rate, the assessment was faulty because the NOI that was developed by the assessor did not at all comport with realty where the property's income and vacancy rates were concerned. The NOI figure for this tax year resulted in a grossly misleading characterization and valuation of the subject property. This is significant in view of the statutory obligation to assume that the property is actually being offered for sale and that a willing buyer would know the correct facts about the property and its earning potential.

2. Tax Year 1993.

With respect to tax year 1993, the assessment is flawed because (1) the assessor again failed to make some adjustment to

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[20]Assessors have a duty to comply with the laws and judicial decisions that regulate what they do. Without any doubt, the assessors are the very persons to whom all judicial tax decisions are ultimately directed, where assessment appeals are concerned. No assessor who has ever testified before this Court, including Harvell, has ever claimed that he or she was unaware of Rock Creek Plaza-Woodner or that he or she had not been informed of the content of that decision.

the land portion of the assessment, or at least to consider doing so, based upon the zoning overlay issue; (2) the assessor relied on a range of capitalization rates that itself was the product of facially unreliable data; and (3) the assessor's capitalization rate was not high enough to comply with the Rock Creek Plaza-Woodner requirements. Here, the Court observes the very same problems that have been identified herein as to tax year 1992's assessment.

Any one of these separate flaws is sufficient to render this assessment to be incorrect. When viewed in toto, however, such defects are all the more fatal.

B. The De Novo Estimated Market Value.

The Court finds as a matter of fact and law that the fair market value of this property for tax year 1992 is $35,800,000. The Court finds as a matter of fact and law that the fair market value for this property for tax year 1993 is $39,600,000.

On the whole, the petitioner's evidence was compelling. The District failed to call any expert witness to debunk the professional opinions of the petitioner's expert. This was poor strategy in a case, such as the present one, in which petitioner's expert provided intricate support for his conclusions during both direct and cross-examination.

The gist of the District's approach to this case was to argue that tax assessments, by nature, are performed on such a timetable that the assessors do not have the most up to date information on the property. This, however, is not a sound reason for the Court

to affirm an assessment in the context of a trial de novo.

In anticipation of trial, the Government does not necessarily have to rely solely upon the original assessment itself in order to attack the petitioner's demand for a refund. For trial purposes, it is not uncommon for the Government to engage the services of an expert witness. Such a witness can at least offer a competitive opinion that the property cannot be valued as high as the figure that is proffered by the petitioner -- even if the District's own expert disputes the original assessment. There is always the option of presenting a middle ground position, as a fall-back strategy. That did not occur in this trial.

The opinions of the petitioner's expert were internally sensible and he was a credible witness.[21] His depth of knowledge of the relevant issues was very evident. Under the totality of circumstances, this was not a close case.

WHEREFORE, it is by the Court this 22nd day of April, 1996

ORDERED, ADJUDGED, AND DECREED that the estimated market value of the subject real property is as follows:

Tax Year 1992	
Land	$14,100,000
Improvements	$21,700,000
Total	$35,800,000

Tax Year 1993	
Land	$14,100,000
Improvements	$25,500,000
Total	$39,600,000

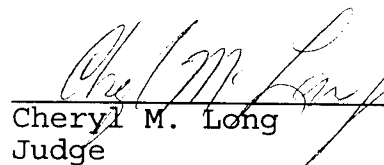
[21]There was no need for the Court itself to engage yet another expert.

and it is

FURTHER ORDERED that the assessment record card for the property, maintained by the District of Columbia, shall be adjusted to reflect the values determined by the Court; and it is

FURTHER ORDERED that respondent shall refund to petitioner any excess taxes collected for tax year 1992 and 1993 resulting from the assessed values which are in excess of the values determined by the Court; and it is

FURTHER ORDERED that entry of judgment shall be withheld pending submission of a proposed order under the provisions of the Superior Court Tax Rules.



Cheryl M. Long
Judge

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Tax Officer [FYI]

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

9E ASSOCIATES	:	
	:	
Petitioner	:	
	:	
v.	:	**Tax Docket Nos. 5240-92**
	:	**5783-93**
	:	
DISTRICT OF COLUMBIA	:	
	:	
Respondent	:	

ORDER

These cases came on to be heard before the Court on June 27, 1995. Upon the Petitions filed herein, as amended, the stipulations between the parties and upon consideration thereof and the evidence adduced at trial, the Court having entered Findings of Fact and Conclusions of Law filed April 23, 1996, it is by the Court this 29th day of April, 1996 hereby

1. ORDERED, ADJUDGED and DECREED that the correct estimated value for lot 40 in square 377, the subject property, for Tax Year 1992 is determined to be as follows:

TAX YEAR 1992

Land	14 ,100,000
Improvements	21,700,000
Total	35,800,000

2. ORDERED, that Respondent be and hereby is, directed to reduce the assessment on lot 40 in square 377 for purposes of District of Columbia real estate

taxes for Tax Year 1992 from $66,182,000 to $35,800,000 consisting of 14,100,000 for the land and $21,700,000 for the improvements.

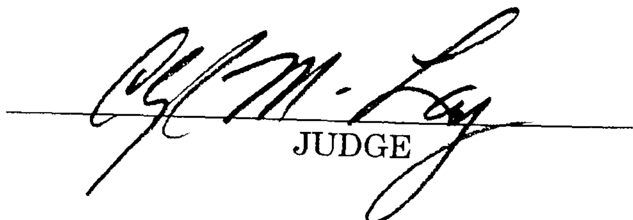
3. ORDERED, that the Respondent be and hereby is, directed to refund to Petitioner's Tax Year 1992 real estate taxes on lot 40 in square 377 in the amount of $653,213.00 with interest from March 31, 1992 to the date of refund, at the rate of six (6) percent per annum, the statutory rate as provided by law.

4. ORDERED, that the correct estimated value for lot 40 in square 377, the subject property, for Tax Year 1993 is determined to be as follows:

Tax Year 1993	
Land	14,100,000
Improvements	25,500,000
Total	39,600,000

5. ORDERED, that Respondent be and hereby is, directed to reduce the assessment on lot 40 in square 377 for purposes of District of Columbia real estate taxes for Tax Year 1993 from $53,891,000 to $39,600,000 consisting of $14,100,000 for the land and $25,500,000 for the improvements.

6. ORDERED, that the Respondent be and hereby is, directed to refund to Petitioner's Tax Year 1993 real estate taxes on lot 40 in square 377 in the amount of $307,256.50 with interest from March 31, 1993 to the date of refund, at the rate of six (6) percent per annum, the statutory rate as provided by law.



JUDGE

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