SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

BRESLER & REINER,

Petitioner,

v. Tax Docket Nos. 5778-93
6310-94

DISTRICT OF COLUMBIA, (consolidated for trial)

Respondent.

ORDER

These cases are before the Court pursuant to the respondent's Motion for A Continuance, filed on or about November 7, 1995. All counsel were before this Court on November 13, 1995 regarding other matters but did make representations concerning the instant motion. The motion is opposed by the petitioner.

This Court will grant the instant motion for the following reasons. First, the specific reason cited by the District is that respondent's counsel did not receive a copy of the written appraisal report of the petitioner's expert in a timely fashion. This Court did order both parties to exchange any written expert appraisal reports at least 30 days prior to the trial date. This directive is part of the Court's pretrial order that was issued on November 29, 1994 in Docket No. 5778-93.

Second, while petitioner's counsel indicates that her expert's report was delivered to the respondent on November 9, 1995, the Court has determined that respondent is entitled to at least 30 days in which to review it prior to the commencement of trial.

Third, this Court has previously continued the trial date of

these cases in order to accommodate certain pretrial preparation needs of the petitioner.

Finally, this Court would normally continue the trial date only for a period long enough to cover the missing time between the delivery of the report and the time of trial. Here, that window of time is approximately nine days. However, the Court's calendar is very full between November 30 and December 20, 1995, prior to the Court being unavailable until January 1, 1996. Accordingly, the trial date must be advanced to the first date that is practicable for the Court.

One further matter was broached by Government counsel in open court on November 13, 1995. The Assistant Corporation Counsel assigned to the cases indicated that the Government may desire to retain an expert after reviewing the petitioner's appraisal report. However, discovery has been closed for many months and the Government has never indicated that it would retain an expert for any purpose, regardless of whether that expert would testify at trial.[1] In open court on September 18, 1995, this Court ordered both parties to exchange expert appraisal reports no later than October 30, 1995. Since the Government has failed to provide such a report based upon its own pretrial preparation activity (and since any reports were to be divulged simultaneously), it is too late for the Government to add an expert to its witness list for

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[1]In the Government's pretrial statement that was filed on November 21, 1994, the only witness who was listed as being a potential witness for the respondent is Leighton Jones, a representative of the petitioner.

trial. In the interim, however, the Government may take the deposition of the petitioner's expert.

WHEREFORE, it is by the Court this 13th day of November, 1995

ORDERED that the respondent's Motion For a Continuance of the trial date is hereby granted; and it is

FURTHER ORDERED that the trial in these consolidated cases shall commence at **10:30 a.m. on Monday, January 22, 1996** in courtroom 101.

Cheryl M. Long
Judge

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Tax Division

JOHN J. McAVOY and JOAN Z. McAVOY **Petitioners**	:	**Tax Docket No.: 6368-95**
v.	:	**Judge Washington**
DISTRICT OF COLUMBIA **Respondent.**	:	

ORDER

This matter comes before the Court on Petitioners' and Respondent's cross-motions for summary judgment. Petitioners, husband and wife, paid income tax to the District of Columbia for the years 1991, 1992 & 1993. During those years, Petitioner John McAvoy was a partner in a New York partnership and Petitioners made tax payments to New York City under the New York Unincorporated Business Tax.

On December 19, 1994, Petitioners filed amendments to their tax returns for the years 1991- 1993, taking a credit against their District of Columbia income tax for the unincorporated business tax ("UBT") payments they made during those years. Petitioners based their amended return and request for a refund on D.C. Code §47-1806.4 ("the Statute") which provided, in pertinent part:

> The amount of tax payable under this subchapter by a resident of the District of Columbia in respect to the taxable year shall be reduced by credit equal to the amount of the individual income tax such individual is required to pay and, in fact, has paid to any state. . . of the United States, or political subdivision thereof. . . upon income attributable to such state. . . for such taxable year or portion thereof while concurrently a resident of the District.

Petitioners' decision to file amended tax returns for the years 1991-1993 was prompted by the District of Columbia Court of Appeals decision in District of Columbia v. Califano, 647 A.2d 761 (1994). In that case, decided September 15, 1994, the D.C. Court of Appeals held that UBTs paid to another jurisdiction were taxes on personal income and were therefore entitled to a credit under the Statute.

On December 27, 1994, the D.C. Council, in response to the Court's ruling in Califano, enacted D.C. Act 10-372, which amended the Statute, by adding:

> No franchise tax, license tax, excise tax, unincorporated business tax, occupation tax or any tax characterized as such by the other taxing jurisdiction shall qualify as a credit under this section.
>
> This amendment is retroactive and shall apply to any taxable year beginning after December 31, 1990. (emphasis added).

Based on this amendment, the D.C. Department of Finance and Revenue denied the Petitioners' amended refund claim. Petitioners now urge this court to declare the retroactive portion of the Council's amendment to the Statute unconstitutional because it violates the Due Process clause of the Fifth Amendment.

It is well established that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984). It is similarly true that retroactive aspects of such legislation must independently meet due process requirements. The burden of showing

that retroactive application is itself justified by a rational legislative purpose lies with the government. See United States v. Carlton, 114 S.Ct. 2018 (1994).

The U.S. Supreme Court has repeatedly upheld retroactive tax legislation against due process challenges upon a showing that retroactive application of the legislation is itself justified by a rational legislative purpose and that the period of retroactivity is not so harsh and oppressive as to transgress constitutional limitations. United States v. Carlton, 114 S.Ct. at 2021; United States v. Hemme, 476 U.S. 558 (1986); United States v. Darusmont, 449 U.S. 292(1981); Welch v. Henry, 305 U.S. 134 (1938); Milliken v. United States, 283 U.S. 15 (1931).

In the instant case, the Petitioners argue that the D.C. Council's Statute, acted in an arbitrary and irrational way in amending the Statute because there was no independent rational legislative purpose in having the amended Statute apply retroactively. Petitioners further argue that even if there were a rational legislative purpose, the period of retroactivity is harsh and oppressive. Respondent, on the other hand, argues that the Statute was enacted as a curative measure and, therefore, has a rational legislative purpose. Respondent also argues that the retroactive effect of the amendment, as it applies to the Petitioners, is limited, since the emergency legislation was enacted only four months after the Court of Appeals decision in Califano and eight days after the Petitioners filed their amended tax returns. [1]

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[1] Respondent argues that "tax legislation is not a promise" and that "a taxpayer has no vested right in the Internal Revenue Code." This proposition however, applies to prospective legislation and has no bearing on whether the retroactive application of tax legislation is constitutional.

The parties, having fully briefed this issue, agree that this Court must follow the U.S. Supreme Court's decision in United States v. Carlton, in deciding whether the retroactive provision of the Council's amendment to the Statute is constitutional. Because of the Court's reliance on the Carlton decision, it is instructive to consider the facts on which that decision is based.

The Carlton case arose out of a challenge to the constitutionality of an amendment to Section 2057 of the Tax Reform Act of 1986 ("Act"). Section 2057 was included in the Act to encourage employee ownership of businesses by providing an estate tax deduction for half the proceeds of "any sale of employer securities by the executor of an estate" to "an employee stock ownership plan" (ESOP). Carlton, an executor for an estate who wanted to take advantage of the new tax provisions, purchased shares in a corporation, sold them to the company's ESOP at a loss, and claimed a large deduction on the estate's tax return. In December 1987, Congress amended the law providing that in order to qualify for the deduction, the security sold to an ESOP must have been directly owned by the decedent "immediately before death." Congress also made the amendment retroactive to the date the Act was passed. On the basis of that amendment, the Internal Revenue Service disallowed the estate tax deduction claimed by Carlton. Carlton appealed alleging that retroactive amendment of the Act was unconstitutional because it violated the due process clause of the Fifth Amendment. In the present case, as in Carlton, there is no claim that the legislature acted arbitrarily or irrationally in passing the tax amendment

prospectively. Instead, the challenge here, as in Carlton, is directed solely at the Statute's retroactive provision.

In Carlton the U.S. Supreme Court looked to the legislative history of Section 2057 of the Act to determine whether retroactive application of the amended legislation was justified by a rational legislative purpose. The Court reached the following conclusions: That Congress in passing Section 2057 intended to create an incentive for stockholders to sell their companies to their employees; that Section 2057 of the Act would cost the federal government approximately $300 million over a five year period; and that transactions like the one involving Carlton threatened to cause an estimated revenue loss to the federal government of up to $7 billion.

Based on these findings the Supreme Court determined that Congress, in amending Section 2057, was acting to correct a mistake in the drafting of the original provision of the Act and that such curative action had a legitimate legislative purpose. The Court held that applying the amendment retroactively was not a violation of due process because the amendment was rationally related to its legitimate legislative purpose, the prevention of unanticipated revenue losses caused by the inartful drafting of the original provisions. The Court also held that the period of retroactivity was neither harsh nor oppressive because Congress had acted promptly to address the drafting error.

Respondent argues that the Council's action in the instant case was similar to Congress' action in Carlton and that the intent of the Council was to cure a problem with the Statute. Specifically, Respondent argues that the drafters of the original Statute never

envisioned that individuals who pay UBTs to other jurisdictions would be given the benefit of a credit against their District taxes.

However, in the present case, unlike the Carlton case, there is no clear legislative history to support Respondent's argument. The legislative history of the Statute does not indicate that the Council was unfamiliar with UBTs nor that there was a specific intent to exclude UBTs from the list of income taxes eligible for the credit, nor that there was a limitation on the scope of the term "income tax" as applied to the Statute. Further, a review of the legislative history of the amendment to the Statute does not reflect that the Council was acting to cure any perceived defect in the drafting of the original language of the Statute. In sum, the legislative history accompanying the amended Statute indicates that the Respondent's purpose in making the tax amendment apply retroactively, was ". . . to save the District an estimated $4 million in refunds which otherwise might have to be paid to resident partners for the last four years. . . ". D.C. Law 11-62 §114.

Because there is nothing in the legislative history of the Statute to support Respondent's argument that UBTs were meant to be excluded from the definition of income taxes, the Court must look beyond the legislation itself to determine whether there is a rational basis for concluding that the Council's action was curative.

In this regard, the only other evidence presented for the Court's consideration was the D.C. Court of Appeals decision in Bishop v. District of Columbia, 401 A.2d 955 (1979). In Bishop, the appellant challenged the District's right to impose an unincorporated business tax on professionals and owners of personal businesses who were

doing business in the District even though those individuals were not residents of the District. The Court of Appeals framed the issue to be decided as ". . . whether [the Act] imposes a tax on the personal income of nonresidents or whether the tax is levied on something other than income." Id. at 956. The Court, after an exhaustive discussion, held that the District's UBT, regardless of what it was called, was an income tax because it was a tax on the net income of individuals. Thus, ten years prior to the enactment of the Statute, the District was on notice that a tax levied against the net income of individuals were considered to be treated as income taxes by the District of Columbia Court of Appeals. Therefore, neither the case law in this jurisdiction nor the legislative history of the Statute or the amended Statute support Respondents' argument that the Council did not intend or were not aware that UBT's would be considered as an eligible income tax under the Statute for purposes of the tax credit.

If the actions of the Council in the present case are deemed to be curative, the definition of curative, in the context of tax legislation becomes so broad as to render the term meaningless. Under the Respondent's theory of the case, any amendment to a tax statute could be considered curative if it purges the original statute of a benefit or provision the legislature no longer wishes to provide. This interpretation is inconsistent with common sense. The fact that the Respondent challenged the inclusion of UBTs within the definition of income taxes and the Council changed the law subsequent to the Court of Appeals ruling does not make such actions, without more, curative. [2]

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[2] Although the legislative history of the amended statute does address potential revenue losses, the Court has not found any legal support for the proposition that saving money in and of itself, is a legitimate rational basis for retroactive amendment of a tax statute.

In the case at bar, the D.C. Council simply sought to change the law, both prospectively and retroactively, without an independent rational legislative purpose for the retroactive aspect of the amendment. Therefore, the retroactive provision of the amended Statute is unconstitutional because it does not meet the due process test enunciated by the Supreme Court in Carlton. Because the Court has concluded that there was no rational independent legislative basis for making the amended Statute retroactive, the Court need not reach the issue of whether the period of retroactivity under the circumstances is harsh and oppressive.[3]

Therefore, it is, this 18th day of August, 1997

ORDERED: that the Petitioners' Motion for Summary Judgment is granted.

FURTHER ORDERED: that the Respondent's Motion for Summary Judgment is denied.

Eric T. Washington
(signed in chambers)

[3] Although the Court did not reach a decision on the question of whether the amended statute was harsh and oppressive, the Court notes that a statute made retroactive for the entire period of the statute of limitations, without more, appears on its face to unreasonable.

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

BRESLER AND REINER, INC., et al.

Petitioners,

v. Tax Docket Nos. 5778-93
6310-94

DISTRICT OF COLUMBIA,

Respondent

MEMORANDUM OPINION AND ORDER

These consolidated cases came before this Court for trial, de novo regarding appeals from real property tax assessments.

The property in litigation is a pair of high-rise apartment buildings that form a combined rental complex that is located at 1001 and 1101 Third Street, S.W. in the District of Columbia. The property is denominated as Lot 79 in Square 542. It is situated in an area known as RLA Southwest (hereinafter "Southwest"),[1] referring to the Redevelopment Land Agency urban renewal area.[2]

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[1]This is a short-hand reference to this particular section of the District, even though it is clear that the Southwest quadrant embraces numerous other neighborhoods as well.

[2]This property is thus within that portion of the Southwest quadrant of the city, west of the Anacostia River, that was re-built in the 1960s by the Redevelopment Land Agency as part of a massive urban renewal project. It is to be distinguished from another part of the Southwest quadrant that is closer to Maryland.

The tax years in dispute are tax year 1993 and tax year 1994.

The issues in the instant case focus upon the treatment of vacancy rates and the composition of capitalization rates in the estimation of market value.

This Court's judgment is based upon discrete findings of fact and conclusions of law set forth herein.

I. THE CONTROLLING STATUTE AND CASE LAW

The factual findings must be viewed in light of the fundamental law that applies to the judicial process of fixing a value on commercial property, to provide relief from an excessive tax 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. This is prescribed clearly in the District of Columbia Code. See 47 D.C. §§ 820 and 830 (1990 Repl.); see District of Columbia v. Washington Sheraton Corp., 499 A.2d 109, 112 (D.C. 1985). "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.

47 D.C. § 47-802(4)(1990 Repl.).

The Court of Appeals in Washington Sheraton further

emphasized, "In determining the estimated market value, the assessment shall take into consideration:

> [A]ll available information which may have a bearing on the market value of the real property including but not limited to government imposed restrictions, sales 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.

Id. at 112.

A person who appraises a property for the purpose of determining its value for taxation

> may apply one or more of the three generally recognized approaches of valuation when considering the above factors. Those approaches are the replacement cost, comparable sales, and income methods of valuation. Usually the appraiser considers the use of all three approaches, but one method may be most appropriate depending on the individual circumstances of the subject property.

Id. at 113 [citations omitted].

The "replacement cost approach," also called simply the "cost approach," involves deriving the "'cost of replacing property with new property of similar utility at present price levels, less the extent to which the value has been reduced by depreciation because of age, condition, obsolescence, or other factors.'" Id. at 113, quoting 16 DCRR § 108(b)(2); 9 DCMR § 307.4. The replacement cost may "'be estimated either by (1) adjusting the property's original cost for price level changes, or (2) applying current prices to the

property's labor and materials components and taking into account any other costs typically incurred in bringing the property to a finished state.'" Id.

The "comparable sales approach" requires the comparison of "[r]ecent sales of similar property" and "the price must be adjusted to reflect dissimilarities with the subject property." Id.

As to the "income capitalization approach," the District of Columbia Court of Appeals has articulated the fundamental factors in the application of this appraisal method.

> 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) (hereinafter "Rock Creek").

In the instant case, both parties agree that the correct approach to value is the income approach.

Both actual rents and market rents must be considered in arriving at the fair market value of an office building, when using the income capitalization method. See Wolf v. District of Columbia, 597 A.2d 1303, 1309 (D.C. 1991). To be sure,

> [e]stimated market value is not determined. . . . by reference to 'income available to the property as of the assessment' but by reference to 'income earning potential.' The fundamental notion that the market value of income-producing property reflects the 'present worth of a future income stream' is

> at the heart of the income capitalization method.

District of Columbia v. Sheraton Washington Corp., supra, 499 A.2d at 115 (citations omitted).

This Court must examine the evidence offered by both parties to determine the dollar value of the "future income stream" of the subject property as of January 1, 1992 and January 1, 1993.

The Superior Court's consideration of an assessment appeal is a two-step process in trial. First, the Petitioner bears the "burden of proving the incorrectness of the government's assessment." Brisker v. District of Columbia, 510 A.2d 1037, 1039 (D.C. 1986). The taxpayer can meet this burden when the evidence shows that the "valuation was flawed." Id.

Second, the Petitioner may (and always does) produce its own evidence to support what the taxpayer contends is the fair market value of the property for the valuation date in question.

The District may introduce evidence to challenge or rebut the taxpayer's evidence.

Ultimately, the Court must determine whether to accept the Petitioner's evidence, the District's evidence as to value, or yet a third valuation that the trial court itself may construct from the totality of the evidence.

There is a fourth option as well, i.e. "to cancel the District's proposed assessment, leaving in place the last assessment carried out in accordance with the statute." Id.

II. FINDINGS OF FACT

A. Petitioners' Case-in-Chief:

The tax periods in issue include tax year 1993, tax year 1994 and a "stub year," covering the period of July 1, 1993 through September 30, 1993.

For tax year 1993, the valuation date being January 1, 1992, the District's assessment was $5,504,600. The real estate taxes that were billed based upon this assessment were $84,770.84.

For tax year 1994 and the "stub year", the District's assessment was $5,504,000. The taxes that were paid by the Petitioner for tax year 1994 were $84,770.84. The taxes that were paid for the "stub year" were $47,895.52.

Herein, for the sake of simplicity, any references to tax year 1994 include the "stub year," as well.

All taxes have been paid in full and all administrative appeals have been exhausted.

The assessor for tax year 1993 was Mr. Leighton Jones. He was called as a witness by the Petitioner. Through questions from counsel, he detailed exactly what he did in constructing this particular tax assessment. He testified that he relied completely upon the income approach.

Jones admitted that he looked at the prior year's assessment (tax year 1992), which was $5,465,500. He was unable to justify **why** he increased the assessment, even though he admitted that the property's actual net operating income was lower and that vacancies were increasing.

As to his capitalization rate, Mr. Jones used the gross

potential income that was reported by the taxpayer in its 1990 income and expense statement. For the vacancy rate, Jones stated that he had a choice among three rates that were developed by officials in the Standards and Review Division of the Department of Finance and Revenue. They set forth a trio of rates: reflecting a high, a low, and a median rate. He selected 11.3%, which was the "high" end rate. The actual vacancy rate for this property (of which he was aware) was 16.68%.

The vacancy problem had worsened dramatically. The record reflects that the actual vacancy rates during the relevant time period were as follows:

1989	9.00%
1990	16.68%
1991	27.84%
1992	35.23%

Where expenses were concerned, Jones used an artificially lower expense figure from the same table, and again applied the "high" figure. He ignored the actual and historical expenses of the subject property.

Significantly, Jones agreed that his valuation assumed that the property was operating under "normal conditions." The Court interprets this phrase to indicate that he was referring to "stabilized" conditions.

Jones was asked to recount what he had done to adjust his valuation to the current (for January 1, 1992) or "as is" condition. He conceded that he had done nothing to reflect the "as is" value. He did not take into account such factors as the rapidly rising vacancy rate, the costs of upgrading the units,

advertising, commissions, or any other costs necessary to reverse the vacancy problem. Accordingly, this property clearly was not in "stabilized" or "normal" operating condition.

After deriving his economic net operating income, Jones divided his NOI of $577,981 by a capitalization rate of .105, to obtain an estimated value of $5,504,600 for tax year 1993.

Mr. Jones acknowledged that he found the rate in a table (Petitioner's Exhibit 5) that was provided by Standards and Review. He could not say how the figures were derived. He did not check the capitalization rate to determine whether it was high enough to cover the mortgage, taxes, and a fair return on cash. Moreover, he did not perform a cash flow analysis, to verify whether the rate was high enough.

It is important to note that the "table" used by Jones was a study or survey of apartment buildings in a geographic area known as Geographic Area 4. This area included the RLA Southwest area, as well as Foggy Bottom, "downtown," and Capital Hill, where the market and character of the apartment buildings bore no relationship to the subject property. It is notable that information concerning the subject property was not included.

As far as the land was concerned, Mr. Jones did not formulate a new assessment for the land portion of this property. He used the same land assessment that had been used for tax year 1992, i.e. $2,302,610.

Aside from his execution of the income approach, Jones claimed that he also performed an analysis using the comparable sales

approach. He did not retain any records or notes of this process. He could not remember or identify which properties he had allegedly used as "comparables." He merely made the blanket statement that he had performed this analysis.

The balance of the Petitioners' initial presentation consisted of expert testimony.

The Petitioners offered the testimony of Mr. Harry A. Horstman, MAI. Respondent stipulations to his qualifications. He is a highly experienced appraiser of real property. He teaches appraisal courses at the American University and is a member of the Appraisal Institute, with the designation of MAI. The Court admitted into evidence his written appraisal reports for each tax year.

Essentially, Horstman testified that in his opinion the fair market value for the subject property for tax year 1993 is $2,830,000 and that the fair market value for tax year 1994 is $2,210,000. His testified in detail concerning exactly how he arrived at these two appraisals.

Horstman commenced his appraisal process by considering the general rental market in apartments, but also the specifics of how the market affected the subject property. His analysis is summarized as follows.

While these two apartment houses were subject to local rent control as of the valuation dates, the market rents were lower than the rents set under this law. The taxpayer was faced with the fact that, in Southwest, tenants had a choice from among several

apartment buildings with similar location, similar rents, and similar conditions. Furthermore, the subject property had never been renovated or modernized. It was not competitive.

While the supply of apartments had not increased, the loss of jobs in the downtown area has made the inventory of apartments more than enough to satisfy the demand for housing in this area.

Another factor that was important to Horstman was the decline in mortgage rates. This was relevant because potential tenants were able to purchase condominiums and townhouses in the same neighborhood, paying the same amount of money per month as they would have paid rent.

Another negative market factor was that the subject property is located directly across the street from a public housing project.

Where land value is concerned, Horstman testified that the use of the land for a high-rise apartment complex was not the highest and best use of the land. He came to this conclusion because there were no District of Columbia sales of land for apartment buildings. A second approach would be a residential approach.

Ultimately, he concluded that if this land were vacant, its highest and best use would be for the construction of townhouses or piggyback units, not high-rise buildings. Thus, he examined four sales of land for townhouses, in order to derive his land value. He then valued the land, as if vacant for this type of use, reaching a value of $570,000 for both tax years.

In arriving at a value for the entire property, Horstman

considered all three approaches to value, including the sale comparison, income, and cost approaches. He performed analyses based upon the income and sales approaches, but relied primarily on the income capitalization approach.

In his execution of the income approach for tax year 1993, Horstman first estimated the net income of the property for 1991, as though the property was "stabilized." He examined comparable rental rates and the actual rents at the subject property. In his professional judgment, he placed great emphasis on the existing rental rates. He then estimated the stabilized vacancy at 12%. He testified that the neighborhood vacancy rate was 14%.

Horstman estimated his stabilized expenses by first examining the expense history of the subject property. He also examined other data and concluded that, excluding utilities, the subject's expenses were significantly lower. After subtracting estimated expenses, Horstman arrived at a projected 1991 net operating income of $576,982 for the subject, as stabilized.

Next, Horstman capitalized that stabilized NOI at a capitalization rate of .1254, to determine a stabilized value of $4,600,000, including a land value of $570,000.

In developing his capitalization rate, Horstman examined rates from sales of comparable properties. He developed his rate by using the financial band of investment technique. This is a traditional method of capitalization that is used when there is sufficient market data available.

He considered typical loan-to-value ratios, debt service, and

equity dividend rates. He did so by making a study of the commercial real estate market. This included a survey of comparable investments such as bank rates and bond yield rates. Due to the greater risk and non-liquidity of real estate investments, Horstman determined that the higher rates of Corporate "Baa" and "A" bonds provided the most relevant basis for risk, as compared to other bank rates and bond yields.

He also considered the terms of real estate transactions, as noted in the Investment Bulletin (published by the American Council of Life Insurance). This publication is the premier, nationwide list of mortgage terms for investment-grade properties in the United States.

Horstman applied other factors, based upon a presumption that an investor would obtain a 75% mortgage at an interest rate of 9.25% for a term of 25 years, for a loan constant of .1027658. He estimated the pre-tax equity dividend rate at 13%. He used 13% because the subject property is not an investment-grade property. This is so because the property is over 30 years old and is subject to rent control. His conclusion was that the capitalization rate should be 11%, to which he added the real estate tax rate of 1.54%. This results in an overall capitalization rate of 12.54%, rounded. He reached the stabilized value of $4,600,000.

The expert estimated that it would take two years to bring the property to a stabilized status. Thus, he calculated rent loss for this two-year period to be $288,000, assuming a pro-rata lease-up. To attract new tenants to the vacant space, he testified that the

property requires modernization to the interior.

Interior modernization would, in Horstman's view, consist of new kitchen appliances for each unit, new carpet, new bathroom fixtures, and some tile, plaster, paint, and carpentry work. Horstman testified that the owners had budgeted $4,000 per unit for these renovations. He indicated that this was a reasonable budget, in view of the work to be performed. Thus, he deducted $4,000 per unit for renovations.

Finally, Horstman made a deduction for entrepreneurial return of 10%. This is to reflect the risk and effort to bring the property to stabilization and is not reflected in the stabilized capitalization rate. The issue of risk is important, because the buyer is taking a risk in withdrawing the purchase money out of the bank, where it otherwise safely earns interest.

Horstman performed an analysis under a sales comparison approach. He determined four relatively comparable buildings: two sales, one pending sale, and one being offered for sale. He adjusted them for time, location, condition/age, functionality, size, etc. All four of these apartment buildings are located in the Northwest quadrant of the city, as he found none in the Southwest. He determined a range from the sales, after adjustments, of $9,400 to $12,300 per unit (rounded), with a mean value of $10,400 per unit. Mr. Horstman concluded that $10,000 per unit was appropriate for the subject property, or a value of $2,560,000 "as is."

For tax year 1994, Horstman testified that the vacancy rate at

the subject property had increased to 35%. Rent levels remained the same. He stated that the overall market had remained soft and that investors' requirements were more stringent. While interest rates declined, overall capitalization rates had increased.

Just as he did in the first tax year, Horstman performed an income approach to value. He used the same process.

He reached an "as is value" of $4,299,571, from which he made the same types of deductions as described above. In this tax year, he estimated that it would take 2.7 years to bring the property to stabilization. He concluded that the "as is" value was $2,210,000, including $570,000 for the land.

Again, Horstman performed a comparable sale analysis for this second tax year. He had two sales, two pending sales, and one offering, all in Northwest as there were none in Southwest. After adjustments, the range of per unit values was from $8,100 to $9,900, with a mean of $9,000 per unit. His conclusion was $9,000 per unit, or a value of $2,300,000 "as is."

For tax year 1994, Horstman primarily relied upon the income approach in formulating his final appraisal.

Aside from explaining how he reached his own appraisals, Horstman rendered his expert opinion on the correctness of the District's assessment for tax year 1994 and tax year 1993.

He observed that for tax year 1993, the assessor failed to use the historic income and expenses and failed to account for the vacancy problem. He testified that the assessor erred in capitalizing a "stabilized" net operating income without then

accounting for the adjustment to "as is." Thus, the assessor's valuation was "as if stabilized." Clearly, this property was not stabilized. Finally, Horstman critiqued the assessor's capitalization rate and concluded that it did not provide a fair return on equity, after payment of the mortgage and the real estate taxes.

For tax year 1994, Horstman testified that it appeared that the original assessment was likewise a value "as if stabilized." He explained that it thus could not be the correct fair market value.

Horstman was cross-examined on the effect of the District of Columbia's rent control law on the subject property. He noted that the rents that the owners charged were actually lower than the rates available under rent control. Thus, the rent control law was not a burden to this property.

The expert further explained that there is a provision in the rent control law that technically may permit the owners to increase rents if the property is renovated. However, the type of renovation that is contemplated and recommended for this property will not permit the owner to obtain higher rents because such upgrading will merely allow the owners to remain competitive. Gross potential rents -- before and after renovation -- would be approximately the same. Furthermore, in Horstman's view, the owners would not be allowed to charge enough of a rental increase to cover the costs of the renovation. See further discussion in footnote 8, infra.

B. The District's Defense:

The District called only one witness in its defense case, Ms. Deanna Clark, an assessor at the Department of Finance and Revenue.

Clark formulated a new, proposed assessment for the subject property for tax year 1994. This new assessment was for $4,085,100. This new valuation undercut the original assessment substantially.

She testified that she performed her valuation in January 1995, approximately two years after the valuation date. She stated that she considered all three approaches to value and opted for relying on the income approach.

In valuing the property using the income approach, she used the actual 1992 gross potential rental income and subtracted a 20% vacancy. She asserted that the 20% figure was based on the three year history of the property. However, she admitted that vacancy had been increasing from 16.65% in 1990, to 27.84% in 1991, to 35.23% in 1992. She ignored the upward trend.

Clark then subtracted 68% for expenses. She testified that her expense figure was taken from a table that was similar to Petitioners' Exhibit 5 (for tax year 1993). However, Respondent did not offer this other table into evidence. Respondent did not offer Clark's written calculations into evidence. Her expense figure was well below the historical expenses of the subject property.

As to capitalization rate, Clark testified that she used a rate of 11.5%, again from a table given to her by Standards and

Review. This rate was in the "good" category on that table, she said. Clark admitted that she did not know which sales had been used by Standards and Review to develop their capitalization rates.

Clark did not make any adjustments to reflect that the property was not stabilized.

Clark did not perform a cash flow analysis, to test her capitalization rate. She admitted that a cash flow analysis would show a negative cash flow for this property.

C. Petitioners' Rebuttal Case:

Mr. Horstman was recalled as a rebuttal witness for Petitioners, to address the new assessment that had been proffered through Clark's testimony.

He testified that it was flawed, in several respects. He testified that Clark's valuation, like the one derived by Mr. Jones, was of a stabilized condition. She also failed to make the necessary adjustments to reflect the significant and increasing vacancy problem.

Horstman noted that while Clark's capitalization rate was higher than the one used by Mr. Jones, it was still not high enough to meet the Rock Creek requirements. He testified that despite the Department's "policy" of not performing cash flow tests, such a test could have been done.

III. CONCLUSIONS OF LAW

This Court concludes as a matter of law that the assessments for both tax years were flawed and that the fair market value of

the property for both tax years must be subject to de novo determination by this Court. For the reasons that follow, this Court concludes that the fair market value for tax year 1993 is $2,830,000 and that the fair market value for tax year 1994 is $2,210,000.

The Flawed Assessments. The tax assessments for both years are flawed or incorrect for three distinct reasons: (1) the NOI to which the capitalization rate was applied did not represent the "as is" value but only purported to represent the "stabilized" value; (2) the capitalization rates were not high enough to meet all of the required elements enunciated in Rock Creek; and (3) the capitalization rates utilized by the District were based in part upon irrelevant or misleading comparable sales information.

In determining both assessments, the Government's assessors failed to take into account certain highly important peculiarities of this property.

It is well recognized that the income approach analysis requires that an appraiser or assessor make any and all necessary deductions from the NOI to account for the "as is" value of the property as of a particular valuation date. Conceptually, it is a fatal error not to make such a calculation because the statutory definition of estimated market value requires that the assessment reflect a particular price at which the property could be expected to sell if exposed for sale on the open market on a date certain,

i.e. the valuation date.[3]

Consequently, an assessment must recognize the expenses that must be incurred to alleviate or account for discrete problems that would deter a sale under normal market conditions. The appraisal or assessment likewise must reflect a deduction for ongoing losses, the knowledge of which (by a potential buyer) could easily serve to lower the sales price even further.

In the instant case, the discrete expenses and losses that the assessor failed to translate into "as is" deductions were mostly associated with losses due to sharply growing vacancy rates.

In the expense category, the assessors failed to make a deduction for the cost of making major repairs that resulted from so-called "deferred maintenance."

In the cost category, the assessors failed to make a deduction for the cost of "lost rent" due to an unmistakable trend of rising vacancies.

This case presents a classic example of why it is virtually impossible to determine the value of a commercial property by merely taking a one year snapshot of the cost of operating the property and the income for that one-year period. Here, an investor would have sought out and obtained data on the trends affecting the property, principally by reviewing information from several recent years of operation. The petitioner's expert did precisely that. He reviewed the expense and income history for

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[3] In layman's terms, the key question is: "What would it take, reduced to dollars, to attract a typical buyer on the date of valuation?"

four years, with special attention to the vacancy loss problem. See further discussion, infra.

Another flaw is revealed in the District's determination of the capitalization rate.

For both tax years, each assessor's capitalization rate is incorrect because it does not comport with the Rock Creek definition of a capitalization rate, i.e. it is not high enough to cover payment of mortgage, payment of real estate taxes, and provision of a fair return on equity.

For tax year 1993, the testimony shows that the assessor made no pretense of trying to account for the three Rock Creek factors. He plainly failed to comprehend the pivotal importance of certain actual market forces on the subject of a fair return to equity. The assessor candidly acknowledged that he never attempted to estimate what rate would be required to account for a fair return to an owner's equity if the property were sold on the valuation dates.

Furthermore, to the extent that the assessor claims to have relied upon "comparable sales" information in determining the capitalization rate -- and, indeed, the value of the land portion of the assessment -- he relied upon sales information of irrelevant and non-comparable properties.

Another aspect of the assessment process virtually doomed the sufficiency of the District's capitalization rate: the decision by unnamed officials in the Department to instruct assessors to use a survey of market information regarding apartment buildings that

were geographically near each other, but which were very different in character. The geographical area was known as "D4."

The geographical sector that was denominated "D4" in this survey included RLA Southwest, Foggy Bottom, Capitol Hill, and "downtown."

The actual basis for grouping these neighborhoods together has not been explained by the District. Horstman emphasized that they are different types of neighborhoods in several respects, when compared to RLA Southwest.

The District did not rebut Horstman's observation. The District did not produce any witness who was personally knowledgeable about the drafting of the survey or the reasons underlying the groupings of neighborhoods. There is no basis for the Court to assume, for example, that the Department had any facts to show that real estate values in Foggy Bottom are closely similar to those of RLA Southwest.

There is likewise no basis for the Court to assume (as the Department must have done) that the multi-story apartment buildings found in these four areas are actually in competition with **each other**, such that they form a market or sub-market.[4] Only this kind of assumption would make the survey meaningful. In the end,

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[4]Anyone, including an individual assessor, should wonder why Foggy Bottom (with its luxury high rises such as Columbia Plaza and Watergate) is not more readily linked with Forest Hills rather than RLA Southwest, which is peppered with public housing complexes. There are no public housing compounds in Chevy Chase, Forest Hills or upper Connecticut Avenue. The lack of evidence on the design of the survey compromises the weight that might be given to the survey otherwise.

the Court is forced to conclude that the neighborhood grouping is arbitrary, based merely upon street boundaries rather than verifiable economic factors reflecting similarity of properties.

Jones testified that he derived a vacancy rate based upon vacancy information that was summarized on this survey. Thus, vacancy rates for Foggy Bottom, Capitol Hill, and "downtown" were combined with vacancy rates of RLA Southwest properties in order to provide a norm against which the subject property was compared. Yet, even a layman can recognize that these four neighborhoods are not substantially similar. To be sure, these areas need not be perfect mirror images of each other. However, there differences should be enough to compel the District, if it can, to make a better explanation of the genesis and design of this survey.

A further problem with the survey is that it included a variation factor of ten percent on either side of the median that was calculated.

The District offered no factual basis for the selection of a variation of ten percent -- as opposed to six percent or eleven percent. Thus, the high and low vacancy rates were derived in an arbitrary fashion. Nothing in the testimony of either assessor demonstrates otherwise.

There is a third issue that causes the Court to discount the survey as a meaningful and accurate tool. There is no evidence offered by the District as to the particular buildings that were considered in the survey.

All that the assessor was able to say is that the survey was

restricted to those property owners who reported information for the particular period covered by the survey. Thus, those persons who conducted the survey may have missed altogether certain data that would dispel the generalities that are set forth in the range of vacancy rates. For example, there is no way to know if the two or three largest apartment buildings (in any one or all of the four neighborhoods) were included or omitted in the survey. Data from those properties may have changed the survey results if they had been included.

Addressing this issue, the Government contends that the District of Columbia Code prohibits the District from ever divulging the identities of the apartment buildings that were a part of the survey. This sweeping statement is wrong. The statute to which the District alluded provides in pertinent part:

> All information **submitted by a property owner** to the Mayor regarding transfers of ownership, construction or reproduction costs, and income or economic benefits derived from real property in the District of Columbia shall be accorded the same confidentiality as that applied to District of Columbia income tax returns under § 47-1805.4 and any violation of such confidentiality shall be punishable as provided in subsection (e) of said § 47-1805.4.

47 D.C. § 821(d)(2) (1990 Rep.) [emphasis supplied]. This statute is inapposite for two basic reasons.

First, the mere identity of apartment buildings that were considered in a survey is certainly not information that was "submitted by a property owner." The selection of the properties was done internally by the Government. There is no suggestion that

the property owners somehow nominated or "submitted" their buildings to be included in the survey.

Second, the mere identity of the properties is not the same thing as substantive economic information that is proprietary in nature, as defined in the statute quoted above.

The real concern of an owner of a commercial property is that a competitor could use inappropriate, public revelations about that owner's income and expenses in order to make strategic changes in its own lease rates, tenant concessions, incentives, etc. Here, no property owner could be harmed in that way by the mere identification of the properties in the survey. The need for confidentiality of these identities is non-existent.

Ironically, anyone who might attempt to ferret out vacancy information about a particular property in this survey would be stymied by the arbitrary ten percent variable. The unexplained percentage variable for the highs and lows serves to mask the underlying facts.[5]

The De Novo Fair Market Values. The petitioner's expert provided cogent and practical observations about the realities of the local market for apartment buildings. He did this in the context of providing an opinion on the appropriate deductions from the NOI, as well as his opinion on the equity return factor that is involved in deriving a capitalization rate.

Significantly, Mr. Horstman fully recognized the downward

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[5]Without knowing the theoretical or mathematical origins of the percentage variable, no one could ever begin to extrapolate which building was at the high or low end.

impact of market forces on the subject property. For example, he (unlike the assessor) took care to examine the **real** reason why the vacancy rate was skyrocketing in this particular property. His analysis, in turn, demonstrates that it is misleading to rely upon vacancy rate information of a conglomeration of neighborhoods.

It would appear that the survey grouped RLA Southwest together with "downtown," Foggy Bottom and Capital Hill only because they have abutting boundaries. Horstman emphasized that the uniqueness of Southwest created a distinct basis upon which to differentiate the subject property from apartment buildings in Foggy Bottom, Capital Hill, or "downtown."

More specifically, Horstman testified that the operative reason for the growing vacancy rate in the subject property is the strong competition from townhouse rentals and sales opportunities

[redacted]

persons who, by income level, are present and potential renters of the subject property's units can just as easily afford to rent a townhouse in Southwest for little more money than the cost to rent a unit at the subject property. Moreover, in many instances, those same potential renters can also afford to <u>purchase</u> a townhouse or condominium outright because housing prices in the immediate neighborhood are low and interest rates had declined substantially since the 1980s.

The upshot of these factors is that the vacancy loss trend of this property is partly a result of a unique marketplace in Southwest and the subject's poor competitive position within that marketplace. Horstman certainly implied that any potential buyer of this building would only buy it at a price that was low enough to offset the effects of the immediate neighborhood competition.

In the Court's view, the subject property's vacancy problem is not actually related to the market forces that otherwise might drive the vacancy percentages in places like Foggy Bottom or Capitol Hill. In any event, the District offered no expert who could present a different interpretation of the evolution of the Southwest market or who could challenge Horstman's observations.

A second momentous problem has beset this property. Coupled with the side-by-side competition, the property itself is badly in need of renovation, due to deferred maintenance.

Realistically, on the two valuation dates, the subject property was not attractive and its worn state was a problem. Horstman concluded that in order to keep the property profitable at all, it would be necessary to embark upon a renovation project as units became vacant.

Horstman learned that the units would require many upgrades and replacements, such as appliances, plumbing, plastering, carpet, and more. This is an extensive project, but a necessary one. He estimated that such work would require an expenditure of $4,000 per unit. This figure contributed to the expenses that he determined should be recognized in the ultimate NOI for each tax year.

It is important also to note that neither assessor who testified ever made an interior inspection of this property. This was a major shortcoming, in view of the age of the building and the fact that no notable renovations were disclosed on any of the income and expense forms.

In other words, the assessors should have been suspicious about the actual condition of the interior of the building, since the owner had not been known to have upgraded the twin buildings **in their entire 32-year existence**. Expenses for such upgrades would have been revealed in the annual income and expense statements that are submitted to the Department of Finance and Revenue. Horstman, on the other hand, made a thorough inspection of the premises and demonstrated a detailed knowledge of its lack of energy efficiency and the impact on such problems by the nature of the construction itself (much glass). Color photographs in Horstman's appraisal reports amply show the floor-to-ceiling glass walls on each living unit floor.[6]

The income and expense history of this property, inclusive of the vacancy history, reflects a trend that would have been a significant negative factor in an investor's decision to buy the property on the date of valuation in either tax year.[7] The

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[6]The lack of energy efficiency (particularly before the completion of renovations) is relevant to the cost of paying for utilities. This is especially so in the building, such as the subject property, wherein the utilities are not paid individually by the tenants through separate metering.

[7]In cross-examining Horstman, Government counsel implied that the so-called "rent control" statute (found in Title 45 of the Code) permits the owner of this property to finance the cost of

undeniable trend is that between 1989 and 1991, the vacancy rate for this property had almost doubled. This, alone, is rather alarming in light of the undisputed fact that the building's rent levels were clearly below the rent levels that were authorized by law. In other words, potential tenants were not being repelled because the rents were excessive.[8] Rather, the problem was that next-door competition was simply a better overall bargain.

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renovations over a period of time through increased rents. The District thus implied that Horstman had recommended an unnecessarily direct outlay of money. The statute that permits rental increases to pay for renovations is 45 D.C. § 2520 (1996 Repl.) It provides in pertinent part that the Rent Administrator "may approve a rent adjustment to cover the cost of capital improvements to a rental unit or housing accommodation if: (1) The improvement would protect or enhance the health, safety, and security of the tenants or the habitability of the housing accommodation. . . ."

This statute is not a panacea for the renovation expenses of this property because, as Horstman testified, the mere fact that a landlord is legally permitted to charge higher rent does not guarantee that any potential tenant in the marketplace will actually choose to pay it. The statute is not a direct and immediate subsidy, as such. Moreover, higher rents for this particular property would only highlight the comparative "bargains" to be found in the same neighborhood, as described earlier herein.

The whole notion of raising rents to pay for renovations is a matter that is complex because certain public policy interests are involved. The District of Columbia Court of Appeals has held that the purpose of Section 2520 is **not** to pay for cosmetic changes or to fund renovations "that are newer than those that they replace, or because the proposed improvements will add new features in the housing accommodation which do not presently exist." Ft. Chaplin Associates v. Rental Housing Commission, 649 A.2d 1976, 1081 (D.C. 1994). Instead, the goal of a Section 2520 increase is to improve "habitability" while insuring that such a change will not "serve to erode the availability of moderately-priced housing." Id. On balance, the purpose of this provision of the "rent control" statute is not to make the building more valuable for the benefit of an investor.

[8]The owner, thus, did not seem to be thwarted in any way by the rent control law.

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[8]The owner, thus, did not seem to be thwarted in any way by the rent control law.

In a very realistic way, the fair market value of this property as to both valuation dates is dependent upon the very issues that the assessors never explored at all. The cues were always there. They were not subtle.

The appraised values that were calculated by Horstman are well supported. While the District presented no expert of its own to challenge his opinions, the Court has decided that the Court does not need to resort to the appointment of any independent expert in order to adjudicate this case. There is no sound reason to reject his appraisals and the Court will adopt them as the de novo values.

The instant case is an occasion on which to evaluate closely the District's attempt to defend its assessment without any reliance upon an expert witness at trial. This was not successful and the Court pauses to set forth more explicitly why experts are usually needed, once a Petitioner's case has survived a motion for directed verdict at the end of its case-in-chief.

First, it cannot be overemphasized that an assessor is not an expert witness.[9] An additional assessment, secured only for litigation purposes, cannot be substituted for expert testimony. At most, it denotes nothing more than a settlement offer that was not accepted. Viewed another way, it may be an attempt to offer expert testimony through a non-expert.

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[9]Tax assessors, as a group, do not receive the level of training that is typically found in those appraisers who, historically, have qualified as experts in Superior Court. Assessors have not been able to proffer the usual qualifications of experts, such as teaching or publication experience in the appraisal industry.

Second, a new after-the-fact assessment is of no value in a trial de novo without accompanying explanation from a genuine expert, to assist the Court in figuring out exactly **why** the Court should accept it in lieu of Petitioner's expert appraisal.

Third, the subject of commercial real estate appraisal is sufficiently technical that if assessment appeals were tried before juries no one could seriously contend that experts are not needed. The District of Columbia Court of Appeals has stated that "expert testimony is required when the subject presented is 'so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman.'" District of Columbia v. White, 442 A.2d 159, 164 (D.C. 1982), quoting Hughes v. District of Columbia, 425 A.2d 1299, 1303 (D.C. 1981). This Court is convinced that the subject of commercial real estate appraisal easily falls into this category.

As finders of fact on technical issues, judges are in the shoes of a layman and are equally in need of expert analysis. There is no less of a need for experts in these cases than in trials involving medical malpractice.

There may be occasional cases in which the District chooses to defend itself only through cross-examination and oral argument. This is a tactical choice. It is not improper, as such. It is highly risky, however, when a Petitioner is relying on expert testimony.

In the instant case, the more recent assessment developed by Ms. Clark was afflicted with the same kinds of defects that plagued

the original assessment for tax year 1994. Here, Ms. Clark's rate did not comply with Rock Creek and she made no attempt to justify why she did not attempt to apply the definition of a capitalization rate. Thus, her valuation can be rejected for this reason alone.

Given the Superior Court's published and unpublished opinions on the rate issue in assessment appeals of the post-Rock Creek era,[10] the Government had to have known about the Rock Creek requirements prior to using her testimony at trial. Accordingly, there is nothing to be gained by proffering an assessment that does not comport with Rock Creek.

Ms. Clark's testimony was unhelpful to the Government because she revealed an unfortunate fact about the setting in which assessors perform their function (or at least how they performed during the periods in question). Essentially, she acknowledged that they are not informed or trained about appellate decisions that are clearly a source of legal requirements for the composition of tax assessments.

She stated, in effect, that assessors limit their analyses to what is literally required by the District of Columbia Code and that no one instructs them (or expects them) to change their assessment procedures in light of developing case law. Appellate case decisions such as Rock Creek and Washington Sheraton are

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[10]Examples are: Square 345 Associates, L.P. v. District of Columbia, Tax Docket No. 4670-90 (May 22, 1995) and L'Enfant Plaza Properties, Inc. v. District of Columbia, Tax Docket No. 4822-91 (November 22, 1995). In such cases, the Superior Court has strictly followed and enforced the rate concept that was enunciated in Rock Creek.

indeed controlling law, designed to implement what the legislature has mandated. Furthermore, this controlling case law is clearly aimed at the hands-on work that is performed by the assessors themselves (not their lawyers).

Finally, although Ms. Clark was forthright and earnest in her testimony as an individual person, she lacks understanding of certain important analytical considerations. For example, she was incredulous at the suggestion that performing a cash flow analysis is relevant to determining estimated market value, even though estimated market value (according to statute) is supposed to be the price that the property could command if offered for sale.

Logically, a potential purchaser would want to know whether a property was fundamentally profitable or unprofitable, looking at a trend or track record. Yet, Clark seemed perplexed that anyone would bother to perform a cash flow test when attempting to establish a market value.

In any event, Clark testified that assessors do not perform cash flow analyses for reasons of "policy." She could not explain the theory or justification of such a policy.

A final word must be said about the unusual position that the Government took in presenting Clark's newly created "assessment" to the Court during trial.

Let there be no doubt that the only assessment that the subject of a Superior Court appeal is the assessment that was actually used to bill the Petitioner for its real property taxes in these two tax years. The District produced no testimony about the

worth or correctness of the original tax year 1994 assessment during its defense of this case.

The tactic of calling Ms. Clark as a witness was, in retrospect, an oblique attempt to offer a different assessment altogether.

The Assistant Corporation Counsel represented to the Court, as a preliminary matter at the commencement of the trial, that the District "was prepared to support" the new assessment that was produced by Clark. The Government ignored and abandoned the original assessment in mounting its defense. The Court, on the record, treated this situation as a concession that the original assessment was somehow incorrect or flawed. The District did not object.

The more recent so-called "assessment" that was offered through the testimony of Clark is not, as a matter of law, any legitimate substitute for the assessment that actually caused the taxpayer to pay money to the District. History simply cannot be re-written. Since Clark does not qualify as an expert (and was not proffered as such), the presentation of her testimony was meaningless.

The Government should be hereby on notice that this Court, in the future, will not entertain trial testimony concerning post hoc, "new" assessments that are prepared by the Department of Finance and Revenue.

The District is bound by the fact that the original assessment is the sole subject of the appeal. Other latter-day attempts to

re-formulate an assessment, at best, would be indirect attempts to provide expert testimony from non-experts. This practice will not be permitted.

In the instant case, this Court allowed the testimony of Clark to be presented, purely as a discretionary matter in order to insure that the record was clear as to what her testimony did or did not establish. Now, the record is clear.

Her testimony did not establish anything that either supports the original assessment or casts doubt about the expert's conclusions.

Having experimented with the admission of testimony concerning a "new" assessment, the Court is now convinced that such evidence should not be admitted.

For all of the reasons set forth herein, the Court accords no weight to the new assessment presented by Clark.

The Petitioner has successfully convinced the Court that the original assessments were flawed and that the fair market values that were presented at trial by Petitioner for both tax years should be accepted as the de novo values for these assessment appeals.

WHEREFORE, it is by the Court this 31st day of January, 1997

ORDERED, ADJUDGED, AND DECREED that judgment shall be entered in favor of the Petitioner and that the estimated market value of the subject property is determined as follows:

Tax Year 1993

Land	$ 570,000
Improvements	$2,260,000
Total	$2,830,000

Tax Year 1994

Land	$ 570,000
Improvements	$1,640,000
Total	$2,210,000

It is

FURTHER ORDERED that the District's assessment record card shall be adjusted to reflect the values determined by this Order; and it is

FURTHER ORDERED that Respondent shall refund to Petitioners any excess taxes collected for tax year 1993 and tax year 1994 and "stub year" resulting from assessed values which are in excess of the values determined by this Order; and it is

FURTHER ORDERED that entry of decision shall be withheld pending submission of a proposed order by Petitioner's counsel.

Cheryl M. Long
Judge

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Claudette Fluckus
Tax Officer [FYI]