STATE OF NEW YORK
SUPREME COURT **ULSTER COUNTY**

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

BENDERSON 85-1 TRUST,

Petitioner,

-against-

THE BOARD OF ASSESSMENT REVIEW FOR THE TOWN OF ULSTER; THE ASSESSOR OF THE TOWN OF ULSTER and the **TOWN OF ULSTER, NEW YORK,**

Respondents.

Decision, Order and Judgement
Index Nos.: 09-3594
10-3398
11-2880

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

ULSTER CROSSINGS, LLC,

Petitioner,

-against-

THE BOARD OF ASSESSMENT REVIEW FOR THE TOWN OF ULSTER; THE ASSESSOR OF THE TOWN OF ULSTER and the **TOWN OF ULSTER, NEW YORK,**

Respondents.

Index No.: 12-2457

Supreme Court, Ulster County

Present: Christopher E. Cahill, JSC

Appearances:

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Cahill, J.:

Pursuant to Real Property Tax Law article 7, petitioner Benderson 85-1 Trust (Benderson) commenced tax certiorari proceedings challenging respondent Town of Ulster's tax assessment of Benderson's real property in the Town of Ulster for the 2009-2012 tax years. The trial of these proceedings took place before this Court on May 21 and 22, 2014. Prior to trial, the parties filed and exchanged their respective appraisal reports in accordance with Uniform Trial Court Rule 202.59. By stipulation, these reports were conditionally marked into evidence "subject to the opposing counsel's rights to cross examine the witnesses and to move to strike any or all parts of the appraisal reports as they deem appropriate during or after the trial, either orally or with post-trial submissions." Howard Schultz, a real estate appraiser from Buffalo, New York, testified

for the petitioner. Michael Bernholz, a real estate appraiser from the Hudson Valley, testified for the respondents. By stipulation, both were qualified as appraisal experts.

The parties agreed prior to trial that the applicable valuation dates, tax status dates and equalization rates are:

Tax Year	Valuation Date	Tax Status Date	Equalization Rate
2009	July 1, 2008	March 1, 2009	69.10%
2010	July 1, 2009	March 1, 2010	74.50%
2011	July 1, 2010	March 1, 2011	80.94%
2012	July 1, 2011	March 1, 2012	78.14%

The tax parcel at issue is a large "strip mall" style shopping center named "Ulster Crossings," located at 1137-1187 Ulster Avenue, on the west side of Route 9W (Ulster Avenue) and the north side of Boices Lane. It was not disputed that Ulster Crossings was in excellent and new condition on the valuation dates, having been constructed in 2005. Located on 12.70 acres of land, it contains 120,239 square feet of rental space. For the tax years at issue, the property was comprised of 12 rental units which had a tenant mix including: AT&T Mobility, Talbot's and Applebee's (all located in separate buildings in the Ulster Crossings' parking area), Panera Bread, Moe's Southwest Grill, Chico's, Coldwater Creek, Aspen Dental, Ameribag, Pier 1 Imports, Sports Authority, Barnes & Noble, and Bed Bath & Beyond.

It was also not disputed that the tenants usually have triple net leases, requiring them to pay expenses such as taxes and common area maintenance, and that the property

has had vacancy rates of 5% or less during the tax years at issue.

As to the law applicable to these proceedings, real property assessments are presumed valid, and the petitioner has the burden of proving, by substantial evidence, that an assessment is erroneous (see FMC Corp. v Unmack, 92 NY2d 179, 187 [1998]). In complex cases like this, substantial evidence requires the submission of "a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser" (Niagara Mohawk Power Corp. v Assessor of Geddes, 92 NY2d 192, 196 [1998]). The substantial evidence standard also requires that the evidence be "grounded in objective data and sound theory" (id.; see also 22 NYCRR 202.59 [g] [2]). "If the petitioning taxpayer fails to present sufficient evidence of an over-assessment, the presumption, as well as the assessment, remain intact and the court is not even required to review the assessed value" (Carvalho v Bd. of Assessors, 2005 NY Misc LEXIS 3555, 234 NYLJ 115 [Sup Ct., Nassau County 2005]; see Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst, 23 NY3d 168 [2014]; FMC Corp., supra at 188; General Motors Corp. Central Foundry Div. v Assessor of Massena, 146 AD2d 851, 853 [1989]). The Court must examine the petitioner's case, standing alone, to determine whether the requisite burden of proof has been met, and it may not look to the contents of the respondents' case to cure weaknesses in the petitioner's case (see 50 Front Street Corp. v Dearborn, 73 AD2d 1022, 1022-1023 [1980]). If the petitioner fails to meet this burden, "it is of no avail to assert claimed deficiencies in [the] respondent's appraisal"

(City of Troy v Kusala, 227 AD2d 736, 739 [1996]; see also 50 Front Street Corp., 73 AD2d at 1022-1023). If the petitioner meets this initial burden, however, the petitioner must then prove by a preponderance of the evidence that its real property has been overvalued (see FMC Corp., 92 NY2d at 188; Niagara Mohawk Power Corp. v Assessor of Geddes, 92 NY2d 192, 199 [1998]).

Proceeding to the evidence presented at trial, both appraisers relied on the income approach to valuation, and agreed that it provided a more accurate indication of value than the other valuation methods (Petitioner's appraiser testified: "I . . . essentially gave more weight to the income approach" [T at 77]; R App [July 2008/09] at 84). Using the income approach, both appraisers estimated potential income, reduced it for vacancy loss and expenses, applied the assessor's formula, and capitalized income.

In estimating potential income, they both ascertained that the rentals at the property were at or near market value and essentially relied upon actual rental data to derive potential gross income (see e.g. P App at 76 ["the subject rents were at market during the valuation years"]; R App [July 2008/09] at 37-64; R App [July 2010/11] at 7-10; see also P App at 40-93; T at 85, 151-161). Mr. Schultz, for instance, relied upon a reconstructed rent roll , including in potential gross income the potential rent for the vacant space at the property, as is typically done (P App at 87-90).

Respondents' appraiser, however, reconstructed rent, but used the property's actual operating statements to derive an estimate of potential gross income, an approach which

did not apparently include potential rent for the vacant space (R App [July 2008/09] at 61-66), which in turn could have resulted, if anything, in his undervaluation of the property (R App [July 2008/09] at 37-70; R App [July 2010/11] at 7-16).

Their approaches differed slightly also when they considered the tenant reimbursements for triple net leases. Mr. Schultz, it appears, excluded the tenant reimbursements from potential gross income and did not take the corresponding expenditures as expense deductions (P App at 44-58, 86-90). Instead, it appears that he included only the expenses for which petitioner did not receive reimbursements from the tenants (P App at 40-93), although he did later add certain taxes back into gross income to apply the assessor's formula (P App 87-90).

On the other hand, respondents' appraiser, who also applied the assessor's formula, included tenant reimbursements in potential gross income and expenses, regardless of whether they ultimately canceled each other out (see e.g. R App [July 2008/09] at 63-70, 74-76). In making these calculations, Mr. Bernholz used petitioner's operating statements, which detail the expenses, but do not identify the exact extent of the breakdown of tenant reimbursements (see e.g. R App [July 2008/09] at 64-65). In view of the high value of expenses and relatively small value of charge backs on petitioner's operating statements, the Court agrees that it is possible that the tenant reimbursements are higher than the value of the charge backs reported on the operating statements and that the respondents' appraiser may have undervalued the property by not including all of

the actual tax reimbursements in gross income (see e.g. R App [July 2008/09] at 61-65); but any undervaluation by respondents' appraiser would contradict petitioner's case, not support it.

In addition, as to vacancy, consistent with low vacancy rates of 5% or less at the property for the 2009-2012 tax years, as well as the market data (P App at 40-43, 85, 87-90; R App [July 2008/09] at 65-66; R App [July 2010/11] at 11-12), both appraisers utilized the same vacancy and collection/credit loss of 5% and reduced gross income accordingly.

Both Mr. Schultz and Mr. Berhnolz also applied similar expense reductions to reach effective gross income, but excluded taxes from expenses to apply the assessor's formula (P App at 86-90; R App [July 2008/09] at 67-70). As just addressed above, petitioner's appraiser also apparently did not deduct the expenses that were reimbursed by the tenants because he apparently did not include tenant reimbursements in potential income (P App at 86-90).

A major difference existed as to expenses, however, involving petitioner's use of a vacancy expense deduction (P App at 86-90). As will be addressed below, there was no justification to take this deduction because petitioner had already taken a vacancy loss and credit reduction that accounted for vacancy-related costs (P App at 86-90).

Turning to the merits, at the conclusion of the petitioner's case, the Town of Ulster moved to dismiss these proceedings based on Matter of Board of Mgrs. of French Oaks

Condominium v Town of Amherst, 23 NY3d 168 (2014) because Mr. Schultz, petitioner's appraiser, failed to adequately set forth the facts, figures, calculations and reasoning forming the basis of his capitalization rate. Respondents argue that Mr. Schultz failed to include sufficient information about the particular type of property or notes describing the properties he used to derive the capitalization rate. Specifically, the respondents contend that the contracts, rents, rental increases, expense information, vacancy rate, tenant information, abstracts, and underlying leases of the properties relied upon by petitioner's appraiser to formulate the capitalization rate he testified to were not set forth in the appraisal.

The Court agrees with the respondents. Mr. Schultz's failure to disclose the underlying "facts, figures and calculations" upon which he based his conclusions renders his appraisal and testimony unreliable as a matter of law (22 NYCRR 202.59 [g] [2]; see Matter of Board of Mgrs. of French Oaks Condominium, supra at 168). Moreover, even assuming that petitioner's appraiser could have attempted to explain this failure during trial, he did not do so (see Pritchard v Ontario County Indus. Dev. Agency, 248 AD2d 974, 974-975 [4th Dept 1998]; Orange & Rockland Utils., Inc. v Williams, 187 AD2d 595, 595-597 [2d Dept 1992]). Indeed, the Court observes that contrary to Third Judicial District Rule H (4) (d), Mr. Schultz did not bring his file to Court. While the respondents did not ask for dismissal of the case or preclusion of Mr. Schultz's testimony because of his failure to bring his notes for review by respondents' counsel prior to cross-

examination, this omission detracts from the weight and credibility of his testimony.

Even if this Court were to consider petitioner's appraisal, it contains numerous defects which prevent the Court from concluding that the Town has overvalued Ulster Crossings for the years at issue. First, in this Court's judgment, petitioner's appraiser improperly used the sales approach to reduce the valuation of the property which he derived from the income approach. Petitioners's appraiser determined higher values for the income approach, but then reduced them by providing equal weight to lower valuations from the sales comparison approach which resulted in a total overall reduction of $2,000,000 for the four years in question.

The sales approach should not enter into the equation where, as here, actual rental and expense data for the property and comparable rentals exist, thereby making the income-capitalization approach rather than the sales comparison approach the better and more accurate approach to appraising the property (see Matter of Senpike Mall Co. v Assessor of the Town of New Hartford, 136 AD2d 19, 21 [4th Dept 1988]; see also Merrick Holding Corp. v Bd. of Assessors of the County of Nassau, 45 NY2d 538, 542 [1978]; Myron Hunt/Shaker Loudon Assocs. v Bd. of Assessment Review Town of Colonie, 6 AD3d 953, 953 [2004]).

As this case involves the valuation of a shopping center which has a detailed income stream sufficient to value the property, there was no compelling reason to rely upon the sales approach because actual rental data existed to value the property.

Accordingly, the Court gives, little, if any, weight to the sales approach and to petitioner's appraiser's use of the sales approach to reduce the results of his income analysis.

Furthermore, even if the Court were to consider the sales approach, it would fall short of reducing the assessments. Respondents' appraiser credibly explained that insufficient data exists to properly perform a sales approach (R App [July 2008/09] at 34 ["Without detailed income and expense data for (comparable sale) properties, it is impossible to determine if the leases in place at the time of those sales were at, above, or below market levels"]; R App [July 2008/09] at 79, 83-84; T at 200, 208, 210, 214).

And, as already addressed above, petitioner's appraisal does not contain any of the data necessary to properly make adjustments or verify the reliability of the figures reported as it did not include any information regarding the alleged comparable sales about the rents, vacancy rates, lease terms, or even the number of tenants (P App at 96-110; T at 111-114). In addition, in this Court's opinion petitioner's sales are not reasonable comparables since they consist of considerably older shopping centers including Kings Mall, located across Ulster Avenue from Ulster Crossings (four of the five date to the 1970s and 1980s and the remaining one was constructed in the 1990s) than the subject property, which was built in 2005 (P App at 96-110; R App [July 2008/09] at 22). Also, three of the sales occurred in Western New York (including Rochester and Buffalo) (P App at 106), a considerable distance from the location of the subject property which is approximately only 90 miles from the country's largest

metropolitan area.

Additionally, as respondents point out, rather than using different sales for each tax year, petitioner's appraiser performed mass valuations for all four tax years based on the same five sales, making no adjustments for market conditions, despite the several years passing between the valuation dates and the sales. Finally, Mr. Schultz made no adjustments for building size, despite the fact that three of the sales ranged from 208,000 to 320,000 square feet (compared to the property's 120,000 square feet). In fact, no adjustments were made for any of the differences between these sales and Ulster Crossings other than for building age/condition (P App at 40-44, 107-108).

In rigid contrast, Mr. Bernholz's sales approach utilized buildings much more like Ulster Crossings, i.e., in excellent condition, which supported a value of over $15,000,000 (R App [July 2008/09] at 80-83). Petitioner's appraiser has no reasonable explanation regarding why his sales analysis produced a much lower value. In any event, the lack of available data in each appraisal to support a sales approach has made it difficult, if not impossible for this Court to make a truly informed decision on this issue. Accordingly, petitioner has failed to meet its burden of proving an overvaluation of Ulster Crossings based on the sales approach.

Turning to the income approach, the appraisals conflict significantly as to capitalization rates. Petitioner's rate for all four years was 11.5% while respondents' rate was lower than petitioner's and different for each year (7.25% in 2009; 7.75% in 2010,

8.5% in 2011; 7.8% in 2012). In what this Court finds is very detrimental to the petitioner's case, and as will be discussed further, in determining the capitalization rate petitioner's appraiser did not review or rely upon any investor surveys or perform any "band of investment" analysis. Rather, petitioner's appraiser only relied on limited sales data which mostly consisted of sales of apparently supermarket-anchored shopping centers (P App at 91-94) that differ considerably from Ulster Crossings as it does not have a supermarket or, in fact, any kind of food market. As occurred with the sales analysis, petitioner's capitalization rate analysis contains no facts, figures, calculations, or supporting documents necessary to intelligently review Mr. Schultz's conclusions rendered as the contracts, rents, rental increases, expenses, vacancy rate, tenant information, abstracts, underlying leases, etc., for the properties he relied upon in deriving a capitalization rate were not set forth within the appraisal (T at 92-101).

In addition, the sales utilized for the capitalization rate are also not comparable to Ulster Crossings as they include groups of sales involving mostly older properties from areas outside of Ulster County (and, again, as far away as The Niagara Frontier) (P App at 91-92).

The first group was sales from 1999 to 2006, well before the valuation periods, of buildings in different conditions and ages than Ulster Crossings, and the second group was a bulk transfer of properties located throughout the State to petitioner for $234,125,000, at a time when the seller, which was not located in New York State, was

experiencing financial difficulty. Indeed, this transaction underscores the fact that a national market exists for the purchase and sale of shopping centers like Ulster Crossings, thus justifying respondents' appraiser's reliance on national investment surveys for determining appropriate capitalization rates.

The third group consisted of supermarket centers largely located outside of Ulster County, and it strongly appears that they were much older buildings producing lower net operating income than Ulster Crossings (P App at 91-93; T at 59).

Significantly, the sales data does not support petitioner's 11.5% capitalization rate since the first group indicated an average capitalization rate of 9.7% and the second group indicated an average capitalization rate of 9.8% (P App at 91). Although the last group (the six Tops supermarket centers) allegedly generated an average 13.2% capitalization rate, Ulster Crossings, in comparison to the Tops centers was newly built, did not have a supermarket, and generated much higher net income than the Tops centers (P App at 92; R July 2008/09] App at 22, 63-64). Indeed, Mr. Schultz did not adopt the capitalization rate from this third group but used a much lower rate (P App at 91-94). The Court also agrees with respondents that Mr. Schultz speculated in part to support an 11.5% capitalization rate in concluding that two of the tenants of the subject property, Sports Authority and Barnes and Noble were "credit risks" without providing any data to support this analysis.

In any case, Ulster Crossings was recently built and it would be sheer speculation

to conclude that the property (which enjoyed vacancy levels of 5% or less throughout the period in question) could not attract other tenants if these tenants left. As space has become vacant, the evidence indicated that new tenants have emerged (P App at 40-43, 87-90; T at 78-80, 124, 163-164). Petitioner's appraiser also tried to justify his capitalization rate by asserting that "approximately 47% of the leased space has lease expiration dates in 2013 and 2015" (P App at 92), but this is irrelevant considering that the valuation dates at issue in this proceeding begin with July 2008.

He also testified that "the retail market has been softening since 2008" and that "rental rates on new tenants have been declining in the subject center" (P App at 92). Regardless of this fact, each appraiser already accounted for it when they calculated net income using the actual rents and market conditions (P App 40-94; R App [July 2008/09] 37-70).

On the other hand, respondents' appraiser concluded that an 11% capitalization rate was too high for the following reasons: (1) the property was built in or around 2005; (2) it was in great condition as of the valuation dates; (3) the demographics of the area "are tremendous" and there is a very low vacancy factor in the Town of Ulster (T at 247). In determining a much lower capitalization rate, Mr. Bernholz, in view of the fact that a national market exists for shopping centers like Ulster Crossings, credibly relied upon numerous investor surveys to determine the capitalization rate, including the following: Retail Traffic Magazine--Regional Retail East; Real Capital Analytics; Appraisal

Institute; and American Counsel of Life Insurers, among others (R App [July 2008/09] at 71-73; R App [July 200/11] at 17-18; T at 168-176). The survey averages ranged from 6.71% to 7.3% for the 2009 and 2010 tax years; and from 7.48% to 8.6% for the 2011 and 2012 tax years (R App [July 2008/09] at 71; R App [July 2010/11] at 17-18). He testified that "considering the physical and economic characteristics of the subject property, and the credit quality of the current occupants," Ulster Crossings would fall within the lower end of the range indicated by the investor surveys (R App [July 2008/09] 71; T at 247). The Court finds that he also relied credibly upon the "band of investments" method to determine the capitalization rate (T at 168-176; R App [July 2008/09] at 72-73). Under this method, respondents' appraiser applied a formula to determine the mortgage capitalization rate (4.35%) and the equity capitalization rate (3.65%), which indicated a capitalization rate of 8% (R App [July 2008/09] at 72-73). In ultimately determining the range of 7.23% to 8.5% for capitalization rates for Ulster Crossings, Mr. Bernholz took into account the property's location and quality (R App [July 2008/09] at 71; T at 247).

Accordingly, based on the foregoing factual determinations and legal conclusions, it is

ORDERED that the petitions are dismissed in all respects.

This shall constitute the decision and order of the Court. The original decision and order is being delivered to the Supreme Court Clerk for transmission to the Ulster County

Clerk for filing. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York
November 13, 2015

ENTER,

CHRISTOPHER E. CAHILL, JSC