SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

ROSE ASSOCIATES

v. Tax Docket Nos. 5282-92
5772-93

DISTRICT OF COLUMBIA

MEMORANDUM ORDER

In an opinion filed on July 24, 1997, the District of Columbia Court of Appeals reversed the judgment that had been entered against the respondent, in which this Court required a refund of taxes with interest. District of Columbia v. Rose Associates, 697 A.2d 1236 (D.C. 1997). This Court's judgment effectively was a finding that the real property tax assessments in these consolidated cases was flawed and that a lower tax assessment in each case was warranted. The Court of Appeals, in its own published opinion, did not order the imposition of judgment in favor of the District of Columbia, nor did it order that a new trial be conducted. Instead, it ordered that further "proceedings" be commenced on remand.

The reversal yielded an appellate holding concerning the importance of the definition of a capitalization rate as is found in Rock Creek Plaza-Woodner Ltd. Partnership v. District of Columbia, 466 A.2d 853 (D.C. 1983). In Rock Creek Plaza, the Court of Appeals had observed that a capitalization rate is "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." Id. at 858.

In the instant case, the appellate panel concluded that the Rock Creek Plaza definition of a capitalization rate was not a "binding and all-encompassing definition . . . [but an] oft-repeated dictum, not a binding precedent." Id. at 1237. The Court of Appeals certainly did not forbid or invalidate the elements of a capitalization rate as described in Rock Creek Plaza, but observed that "[t]he disputed language from Rock Creek Plaza is nothing more and nothing less than a handy, but imprecise, description of a technical term." Id. at 1238. In essence, the Court of Appeals in the instant case found that the trial court should not have presumed, as it did, that the Rock Creek Plaza definition was the only legitimate method of constructing a capitalization rate.

This Court conducted a post-appeal hearing on remand, and inquired of all counsel as to exactly what they intended to present in light of the appellate ruling, e.g. additional trial testimony, further argument of the facts, or additional submissions of any kind.

Counsel for the Government expressly suggested and requested an opportunity to reopen the trial record for the addition of further expert testimony. At trial, the District had not called any expert witnesses to challenge the opinions of the Petitioner's expert.

On remand, the District now seeks to utilize expert testimony in order to establish that the valuation methodology that was used

by the assessor was "generally accepted" in the real estate appraisal industry as a valid form of determining the fair market value of commercial realty.

The Petitioner, on the other hand, proffered that the trial record itself already contained a sufficient basis upon which this Court could reconsider the actual trial evidence in full compliance with the appellate ruling -- and still render a verdict in favor of the taxpayer.[1]

As an alternative presentation, counsel for the Petitioner also presented written opinions of several different experts, all indicating that the methodology used by the District was not in fact a "generally accepted" method of valuation.[2] It is known that the District only utilized the capitalization method herein for a period of three years, and then abandoned it for its own reasons that are not articulated in the record.

At the direction of this Court, Petitioner's counsel obtained a transcript of the oral argument in the Court of Appeals and provided it to chambers. As part of the Court's effort to decide how to comply with the appellate ruling on remand, the Court was in need of this transcript. The Court had required production of this transcript because of the possibility that certain statements made

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[1]On November 3, 1997, counsel for Petitioner filed a pleading styled as "Corrected Petitioner's Brief on Remand." This pleading contains a logical explanation as to why a new trial or re-opened trial is not necessary. The Court, rather than merely adopting Petitioner's analysis, prefers to articulate this point in its own fashion.

[2]The Court herein does not rely upon those affidavits, as consideration of this evidence is not necessary.

by Government counsel in oral argument had mis-characterized the record and had possibly caused an unnecessary and unwarranted remand. It was necessary for this Court to compare the trial record to certain factors that seemed to be a guiding assumption in the appellate opinion.

The Court's attention was especially drawn to a passage in the panel's opinion, in which the Court of Appeals wrote:

> In short, the determination of an appropriate capitalization rate for a particular year for a particular property is a fact-specific determination not susceptible to a singular definition. **So long as DFR bases its decision on a generally accepted method, its position on the appropriateness of a selected capitalization rate should be given due consideration** by the trial court.
>
> Because the trial court **did not afford that due consideration to DFR's evidence supporting its choice of capitalization rates**, we remand these cases to the trial court for further proceedings in light of this opinion.

Id. at 1238 [emphasis supplied].

This Court, as part of the required remand "proceedings," asked counsel to explain the above-quoted language. This quoted language was instructive, in light of the fact that the District of Columbia plainly had not called **any expert witness** to explain how its method of arriving at a capitalization rate in this particular case was "generally accepted" in the appraisal industry.

The above-quoted passage from the appellate opinion tends to suggest that there was discrete evidence brought forth by the

District at trial and that such evidence had been improperly ignored by the Court.

Counsel for the Petitioner was concerned that some misleading statements had been made by the Assistant Corporation Counsel who argued the appeal for the District. Petitioner's counsel suggested that certain aspects of oral argument -- rather than the actual trial record -- may have convinced the appellate court that certain evidence had been ignored by the trial judge, when in fact no such evidence had ever been presented.

The lawyer representing the District before this Court on remand (and who was also trial counsel) could not explain the basis for the quoted language from the Court of Appeals transcript. She had not been counsel for the District on appeal.

Ultimately, this Court directed counsel to produce the transcript of the oral argument, to assist this Court in isolating exactly what the Court of Appeals might have been told regarding this Court's failure to fairly and properly consider the District's trial evidence. This Court decided that an examination of the transcript also would assist this Court in complying with the remand order, because this Court would be better informed as to any evidentiary gaps that would have to be addressed.

As a background for reviewing the oral argument transcript, it is relevant to recall what the District's officials actually had to say during trial on the subject of how the District constructed its capitalization rate in these assessments.

The assessor (Larry Hovermale) was not an expert witness --

and, more importantly, did not even purport to have personal knowledge as how his capitalization rate had been formulated. He had capitulated to the proverbial marching orders of other people within the Department, even though he personally disagreed with the merits of certain aspects of the capitalization rates that he was required to use.

The source of the assessor's capitalization rate was a range of rates that had been dictated to him by the Office of Standards and Review. Hovermale did not independently question or test these capitalization rates. Thus, the real focus of the problem is upon the Office of Standards and Review.

At trial, this Court heard testimony from an official of Standards and Review, Mr. Phillip Appelbaum.

The practical upshot of his testimony was that there were serious factual discrepancies in the data that was used to arrive at their range of rates. This witness, candidly, could not account for the discrepancies.

Significantly, as this Court observed in its Memorandum Opinion and Order filed on November 30, 1995:

> Appelbaum was asked to describe the mathematical calculations that were actually employed in order to translate the sales information into the various capitalization rates from which the range was constructed. He was unable to remember anything at all about what was actually done with the sales figures.
>
> The inability of the District of Columbia to provide the Court with the operative facts as to how the rates were derived is a factor that totally compromises the reliability of the range of rates. In other words, this

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>
> The inability of the District of Columbia to provide the Court with the operative facts as to how the rates were derived is a factor that totally compromises the reliability of the range of rates. In other words, this

> Court cannot accord these rates any evidentiary weight in the context of a trial de novo.

Memorandum Opinion and Order, at page 21. From the face of the trial record, this Court plainly did not ignore any evidence that allegedly now supports the position taken by the District in the Court of Appeals.

This Court has reviewed the entire record, carefully taking into account the admonitions from the Court of Appeals as to how to regard the Rock Creek Plaza language. In particular, this Court has reconsidered the testimony of Petitioner's expert witness without reliance upon the Court's initial view that the Rock Creek Plaza definition of a capitalization rate is "binding."

In analyzing the trial evidence to reach a verdict on remand, this Court carefully considered exactly what the evidence showed about the "methodology" that the District had utilized -- and the Court has considered whether the acceptability of the methodology itself is the real issue on trial, as opposed to the actual assessments. This is relevant as to the first prong of a de novo tax appeal, because the Petitioner's evidence as to valuation only becomes relevant if the Court can determine that the original assessments were flawed or incorrect.

The only testimony concerning the development of the District's method for formulating the capitalization rate used in these two assessments was the explanation from Mr. Appelbaum. In its findings of fact and conclusions of law, this Court summarized his testimony as follows:

> He testified that the rates were determined by analyzing a number of sources: market transactions in the District of Columbia, publications and commercial material that was available, including certain publications of the American Council of Life Insurance (ACLI).
>
> Appelbaum stated that most of the emphasis was placed on what he described as the 'direct capitalization method.' This involved calculating a capitalization rate by dividing actual sales prices of office buildings in the District of Columbia by either a pro forma income based on market figures or the actual income of the particular sale properties. The theory behind this method is that it should reproduce a capitalization rate that is experienced in the market.
>
> One of the key assumptions used by Standards and Review was to assume that investors would retain a property for a minimum holding period of seven years. Appelbaum, however, **never explained the factual basis for this assumption about a holding period.**
>
> Appelbaum could not recall how the final conclusions were drawn as to the range of rates. **He acknowledged that no mathematical formula was applied, only that 'a decision was made.'**
>
> Further, he **admitted that the rates that were provided to the assessors for these tax years were partly based upon sales information that was faulty. He admitted that several different sales prices were listed for the sale of one particular office building on 15th Street, N.W. He could not explain the error.**

Memorandum Opinion and Order, at pages 11-12 [emphasis supplied].

Clearly, the factual witness with the most direct knowledge of the District's rate methodology admitted numerous defects in the rate calculation. This translates into an admission that the assessments were flawed. This is not a close question at all.

With the facts remaining unchanged on the subject of whether the original assessments were flawed, the trial court is required to adjudicate (now for the second time) the de novo evidence as to the fair market value of the subject property for the two Tax Years in question. As a practical matter, this is where the District's defense originally collapsed, because of its fatal decision to go to trial with no expert to challenge the appraisal offered by the Petitioner. The District presented no expert witness who could provide a competing de novo appraisal for the Court to consider.

This Court has reviewed the trial record and finds that the evidence presented as to the de novo value of the property for the two Tax Years is, on its own, sensible and reliable. This Court's findings of fact and conclusions need not be disturbed on remand, because the testimony was amply supported by the factual and analytical merit of the expert's work. For the sake of brevity, this Court did not repeat its initial critique of the evidence, as preserved in its original Opinion.[3]

To be certain of complying with the mandate for remand proceedings, this Court has now reviewed the oral argument transcript of Court of Appeals as it compares to the original trial record. They do not compare favorably.

The most striking portion of the Government's oral argument was the point at which the Assistant told the panel:

> we were using **an empirical method** which as a rule factors in investor expectation automatically because it looks at it at

[3]It is incorporated herein by reference.

> investor behavior. And, in -- so, regardless of what our independent assessment of the market was, we were attempting to get away from that precisely by using this methodology that looks at investor behavior and therefore factors in what the investors themselves think of the market.

Transcript of Oral Argument, at page 41 [emphasis supplied].

In context, the gist of the oral argument was a suggestion that the methodology used by the District in these cases was a genuine, recognized formula -- not that it was guesswork or speculative. However, this contention cannot be squared with the candid testimony of Mr. Appelbaum.

The oral argument that was made in the Court of Appeals was misleading.[4] This oral argument by the District assumed that the assessor (and/or Standards and Review) in these particular cases actually used -- and **accurately** used -- a so-called "empirical method." However, the theoretical question of whether the attempted methodology itself was a generally accepted, "empirical" method is a red herring.[5] This abstract question was not the issue on trial. The issues on trial were: (1) the correctness of the assessments themselves; and (2) the de novo evidence as to value. On remand, then, the District's efforts are focused on resolving a question that is not outcome-determinative.

Even assuming arguendo that the assessor and the Office of Standards and Review -- in these particular assessments --

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[4]The Court will not speculate whether this was intentional or simply the product of the heat of argument.

[5]It was a red herring on appeal, as well.

attempted to employ the so-called "direct capitalization" method and that such a method is generally accepted in the appraisal industry, the District of Columbia officials did not do it accurately or in a fashion that could be factually explained.

As the finder of fact, there is nothing further for this Court to do, except to reconsider the taxpayer's evidence while recognizing that the Rock Creek Plaza description of a capitalization rate is not exclusive. Such a recognition, as a practical matter, does not change the ultimate result in this case.

There is no human being who can fill in the factual blanks at this late date. Additional experts cannot suffice as additional fact witnesses. This much is amply demonstrated by the testimony of Appelbaum.

Somehow, the District convinced the Court of Appeals that the trial court erroneously entered judgment in favor of the taxpayer primarily because it rejected, in principle, the so-called "direct capitalization method." This Court did find fault with the extent to which this method -- as actually employed -- appeared to ignore the rate definition (or rule of thumb) in Rock Creek Plaza. Realistically, however, the truly pivotal problem is that the assessments were based upon an arbitrary and error-filled process that had nothing to do with the theoretical model that the assessor **thought** he was using.

Regardless of the technical label that one might put on the DFR's attempted method or conceptual model for deriving a capitalization rate in these cases, the **unrebutted** facts are: (1)

that no one from DFR could account for the conflicting, underlying sales information that was utilized in formulating the range of rates that was dictated to Mr. Hovermale; (2) that Standards and Review inexplicably incorporated an assumption of a totally arbitrary "holding period" of seven years with no justification; and (3) that no identifiable mathematical or other formula was used to derive the rates, but that the DFR simply made "a decision."

The facts of record easily demonstrate that no genuinely objective process was actually used on these two assessments, regardless of the label that any expert now might use to describe it. On remand, this Court cannot ignore or countenance the use of inherently faulty and conflicting sales data, as well as the arbitrary imposition of the mysterious 7-year "holding period," as the underpinnings of a correct capitalization rate. The "due consideration" that must be given to this evidence supports the conclusion that the assessments were plainly incorrect and unreliable.

Hearing expert testimony on the worth of a particular analytical model is of no help to the finder of fact when the known defect in the assessments was at the **execution phase** of using the alleged methodology.

To analogize to a different subject matter, this Court is being asked by the District to hear expert testimony on whether a certain cooking recipe is generally accepted, when in fact the real problem is that the chef botched whatever recipe he claimed to have used. Such expert testimony would be a total waste of time and

would make no difference in the outcome of this case.

Constitutionally, this Court cannot sit for the purpose of rendering an advisory opinion as to whether a certain analytical model is an "accepted" methodology in the appraisal industry. Under the totality of circumstances here, such an exercise would be tantamount to rendering an advisory opinion, since the nub of this case does not involve a mere model, in the abstract.

It cannot be overemphasized that the District consciously chose to go to trial in these two appeals with no expert testimony. Like any other litigant, it must bear the consequences of such a choice. In fact, during the era in which these consolidated cases went to trial, the District proceeded to trial in many tax appeals without utilizing any expert witnesses. In the instant case, no expert can erase the factual errors and arbitrary decision-making that will forever haunt these two assessments.

The District appears to suggest that since no one can reconstruct the underlying facts of how the District made its calculations in developing its range of rates in these cases, the Superior Court should simply accept as a substitute a blanket assertion that a certain "methodology" was used -- and then extrapolate certain facts from that contention. This is totally unacceptable as a form of fact-finding. In the criminal litigation arena, for example, it would be utterly absurd and unfair for a trial judge to conclude that a search or arrest was supported by probable cause merely by accepting a police officer's conclusory assertion, "I had probable cause." The underlying facts of what

constituted the "probable cause" still must proved and subject to cross-examination. This principle should be no different in a tax appeal.

The Court of Appeals recognized that the determination of a capitalization rate is "fact specific" in each tax appeal. The specific facts in the instant cases are that the District's assessments were factually flawed and based upon a capitalization rate that was capriciously developed.

The only de novo appraisal evidence that any party produced at trial was sound and well-supported. Even referring to the Rock Creek Plaza factors in formulating a capitalization rate, the expert never hinted in any way that this did not comport with the normal method by which this expert's appraisal would have been calculated. Cross-examination did not yield any such distinction.[6] Thus, there is nothing inherently faulty in the de novo evidence as to value. There is no reason to reject it.

The Court is aware that there are numerous other cases pending in the Court of Appeals where this Court's application of Rock Creek Plaza is at issue. Each case must be regarded on its own merits and its own idiosyncracies. This Court is tempted to re-open the trial record, if for no other reason that to forestall further misleading contentions by the District in the Court of Appeals as they might affect other cases. However, upon careful reflection, this would not be the proper role of this Court. In

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[6]The Rock Creek Plaza definition of a capitalization rate has been used for many years in countless cases, as the Court of Appeals itself has recognized in the instant appeal.

summary, this Court has no justification for requiring Rose Associates to spend its money on further litigation that is unnecessary to resolving this party's own business.

WHEREFORE, it is by the Court this 5th day of March, 1998

ORDERED that, upon remand and full reconsideration of the record, the verdict in these cases shall not be modified. The judgments stand as rendered, in favor of Petitioner.

Cheryl M. Long
Judge

Copies mailed to:

Gilbert A. Hahn, Esq.
Counsel for Petitioner
815 Connecticut Avenue, N.W., Suite 601
Washington, D.C. 20006

Nancy Smith, Esq.
Assistant Corporation Counsel
441 Fourth Street, N.W., 6th Floor North
Washington, D.C. 20001

Claudette Fluckus
Tax Officer [FYI]

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

ROSE ASSOCIATES	:	
	:	
Petitioner	:	
	:	
v.	:	**Tax Docket Nos.** 5282-92
	:	5772-93
	:	
DISTRICT OF COLUMBIA	:	
	:	
Respondent	:	

ORDER

These cases came on to be heard before the Court on June 6, 1995. Upon the Petitions filed herein, as amended, the stipulations between the parties and upon consideration thereof and the evidence adduced at trial, the Court having entered Findings of Fact and Conclusions of Law filed November 30, 1995, it is by the Court this 7th day of December, 1995 hereby

1. ORDERED, ADJUDGED and DECREED that the correct estimated value for lots 3 and 804 in square 184, the subject property, is determined to be as follows:

TAX YEAR 1992

Land	12,756,652
Improvements	4,143,348
Total	16,900,000

TAX YEAR 1993

Land	10,461,900
Improvements	4,338,100
Total	14,800,000

2. ORDERED, that Respondent be and hereby is, directed to reduce the assessment on lots 3 and 804 in square 184 for purposes of District of Columbia real estate taxes for Tax Year 1992 from $22,627,000 to $16,900,000 consisting of $12,756,652 for the land and $4,143,348 for the improvements.

3. ORDERED, that the Respondent be and hereby is, directed to refund to Petitioners Tax Year 1992 real estate taxes on lots 3 and 804 in square 184 in the amount of $123,130.50 with interest from March 31, 1992 to the date of refund, at the rate of six (6) percent per annum, the statutory rate as provided by law.

4. ORDERED, that Respondent be and hereby is, directed to reduce the assessment on lots 3 and 804 in square 184 for purposes of District of Columbia real estate taxes for Tax Year 1993 from $19,383,000 to $14,800,000 consisting of $10,461,900 for the land and $4,338,100 for the improvements.

5. ORDERED, that the Respondent be and hereby is, directed to refund to Petitioners Tax Year 1993 real estate taxes on lots 3 and 804 in square 184 in the amount of $98,534.50 with interest from March 31, 1993 to the date of refund, at the rate of six (6) percent per annum, the statutory rate as provided by law.

Phyllis M. Fay
JUDGE

copies to:

Gilbert Hahn, Jr., Esq.
Tanja H. Castro, Esq.
Amram and Hahn, P.C.

Suite 601
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Nancy Smith, Esq.
Assistant Corporation Counsel
D.C. Office of Corporation Counsel
441 Fourth Street, N.W.
6N89
Washington, D.C. 20001

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

ROSE ASSOCIATES,

Petitioner

v.

DISTRICT OF COLUMBIA

Respondent.

Tax Docket Nos.
5282-92 & 5772-93

ORDER

In the previous order signed and docketed by the Court on November 30, 1995, the Court inadvertently wrote an erroneous case number on the order. The incorrect case number appeared as 5291-92 and 5773-93.

Wherefore, it is by this Court this 8th day of December, 1995,

ORDERED that the aforementioned order be corrected to reflect the following case number, Tax Docket Nos. 5282-92 & 5772-93.

Cheryl M. Long
Judge

Copies Mailed to:
Nancy Smith, Esq.
Assistant Corporation Counsel
441 4th street, N.W. 6th Floor
Washington, D.C. 20001

Gilbert Hahn, Esq.
Tanja Castro, Esq.
Amram and Hahn
815 Connecticut Avenue, N.W.
Suite 601
Washington, D.C. 20006

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

ROSE ASSOCIATES,

Petitioner

v.

DISTRICT OF COLUMBIA,

Respondent.

5282-92
5772-93

Tax Docket Nos. 5291-92
and 5773-93

MEMORANDUM OPINION AND ORDER

This case proceeded to trial before this Court based upon petitioner's demand for a partial refund of taxes paid on commercial real estate for two different tax years: tax year 1992 and tax year 1993. The District of Columbia levied tax upon what it determined was the "estimated market value" of this property during these tax years.

The property involved is an office building known as the Commonwealth Building, located at 1625 K Street, N.W. in the District of Columbia. It is denominated as Lot 3 and Lot 804 in Square 184.

Three witnesses testified at trial: the assessor, petitioner's expert appraiser, and a government witness who is an official in the Division of Real Property Assessment in the Department of Finance and Revenue. The District did not call any expert witnesses.

Classically, the assessment for both years was derived through

application of an analytical model known as the "capitalization of income approach to value."[1] It is one of three primary, alternative methods of appraising commercial real estate.[2] In the instant case, both the assessor and the petitioner's expert relied upon the "capitalization of income approach." Thus, there is no debate about whether the assessor selected the proper formal approach to valuation.

The District of Columbia Court of Appeals explicitly has summarized its definition and understanding of what is involved in executing the "capitalization of income approach" and what it assumes an assessor or appraiser is actually doing when using it:

> 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. Partnership v. District of Columbia, 466 A.2d 857, 858 (D.C. 1983)(hereinafter "Rock Creek").

In most trials de novo concerning appeals of commercial real property assessments, the factual issues often dissolve into disputes over the correctness of one or both of the two major components of this method, i.e. the net operating income of the property ("NOI") or the capitalization rate.

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[1]It is also called simply the "income approach."

[2]The other two, well-known methods are: (1) the replacement cost approach and (2) the comparative sales approach.

As to the net operating income (hereinafter "NOI") of this property, the figure calculated by the assessor for each tax year was similar to the NOI that was developed retrospectively by petitioner's expert appraiser. The assessor's figures are subject to attack for underlying conceptual reasons that are entirely separate from the literal question of whether the Government's NOI was too high. Ultimately, however, the trial issues focused primarily upon the more critical matter of the derivation of the capitalization rate.

The District of Columbia, having called no expert witness to defend or buttress the assessor's decision, attacks the petitioner's expert testimony largely on a categorical basis. The District's challenge is embraced in a bold assertion that the definition of "capitalization rate," as recognized by the Court of Appeals in Rock Creek and its progeny somehow violates the statutory definition of "estimated market value."

In other words, the Government argues that the Court of Appeals itself has ruled in a manner that flouts the relevant statute and that the trial court should ignore the above-quoted language in Rock Creek.

For the reasons that follow, in the Court's conclusions of law herein, this Court cannot agree with the District's position. Indeed, the Superior Court has no authority to overrule the District of Columbia Court of Appeals or to evade its working definitions that underlie its rulings, even if this Court could

agree with the interior merits of the District's argument.[3]

Having considered all trial evidence, applicable law, and having made determinations as to credibility of testimony, this Court renders the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Petitioner, Rose Associates, is a general partnership organized and existing under the laws of the District of Columbia. It has its principal place of business at 380 Madison Avenue, New York, New York. Petitioner is the owner of the subject property and is obligated to pay all real estate taxes assessed against the subject property.

The improvements on the land consist of a 12-story, high-rise office building that was erected in 1941. The interior was renovated in 1984. The building has two basements and no parking. The building has 102,153 square feet of net rentable area (91,349 for offices and 5,803 for retail spaces, and 5,001 on one of the lower levels.

The District's assessment for tax year 1992, as of January 1, 1991, was $22,627,000.[4]

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[3]The subtext to the District's argument, on the merits, is basically a contention that the capitalization should have no necessary connection to whether the property is operating at a profit or positive cash flow.

[4]The Code requires that the tax valuation reflect the estimated market value of the property as of January 1 preceding the tax year. 47 D.C. § 820 (1981).

The petitioner did appeal this tax assessment to the Board of Equalization and Review. The Board sustained the assessment and the appeal to the Superior Court followed.

The assessment for tax year 1993, as of January 1, 1992, was $19,383,000. This was also subject to a timely appeal to the Board. The Board likewise sustained this assessment. Taxes for both years were timely paid.

The person who was the tax assessor for both tax years in dispute was Mr. Larry Hovermale, a commercial assessor with the Department of Finance and Revenue.

At trial, the petitioner contended that the fair market value of the subject property was $16,900,000 for tax year 1992 and $14,800,000 for tax year 1993. These are the values that correspond to the appraisals rendered by the petitioner's expert witness.

The assessor was called as a witness by the petitioner, in its case in chief.

Specifically, the assessor was asked at the outset of his testimony whether he examined sales information for other properties, as part of his process of determining the capitalization rates applicable to comparable properties.[5] In his testimony, he made the categorical statement that he had looked at "all" real estate sales information in a compendium popularly known as the Pertinent Data Book (hereinafter "PDB"). This an annual

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[5]These, in turn, ostensibly were used as a basis for selecting a final rate to use as to the subject property.

document that is compiled by the staff of the Division of Standards and Review in the Department of Finance and Revenue.

This Court finds that the assessor did not actually review "all" sales information. The Court's rejection of his testimony on this point is based upon his impeachment with a prior inconsistent statement that he made in a pretrial deposition in which he was queried on this very subject. He was confronted at trial with the following questions and answers from that deposition:

> Q. Did you use any particular sale or sale [sic] to make that check?
>
> A. No.
>
> Q. Are you familiar with the sale of any property that is comparable to this building?
>
> A. There is no sale that is exactly comparable. There are a lot of sales in the central business district that are in the subject's neighborhood.

Deposition of Hovermale, page 7, lines 1 through 9.[6]

Mr. Hovermale never attempted to reconcile his diametrically opposed testimony and he, on the witness stand, appeared not to appreciate the significance of his inconsistency.[7]

Having been impeached on this basic point, Hovermale then testified that in actuality he merely selected a capitalization

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[6]The context of this passage is that the assessor was being questioned in his deposition about what he did to "check" the results of his development of the capitalization of income approach. Petitioner's counsel was obviously alluding to the possible use of the comparable sales approach as an alternate analysis that might have tested the accuracy of the figures derived through the income approach.

[7]There was no attempt by the Government to rehabilitate the witness on this point.

rate from a range of rates that were supplied to him by Standards and Review. In other words, he made no independent determination of the capitalization rate but accepted purely at face value the range of rates that had been developed and circulated by other people.

In any event, none of the figures regarding capitalization rates in the relevant excerpts from the Pertinent Data Book mention a capitalization rate of .0850.

Queried on his possible use of financial information from nationally recognized sources, Hovermale acknowledged that he did not use any sales data, for example, from the American Council on Life Insurance Investment Bulletin because he did not consider this data to apply to the District of Columbia. He did not elaborate as to why he believed that it did not apply.

The assessor's knowledge of the subject property was very superficial.

Hovermale testified, for example, that he was "not aware" of any "poor condition" of the building. Yet, he admitted that he did not know whether the building has a fire sprinkler system, whether any dangerous asbestos was still lingering on site, or whether the building was in compliance with laws affecting persons with disabilities. He barely knew more than a brief description of the building and its date of construction, 1941 -- and the fact that the building contains **no** parking spaces.

Hovermale was asked frankly whether he had taken into account whether the capitalization rate of .085 was sufficient to cover

payment of the mortgage, payment of real estate taxes, and provision of a return on equity. He replied, "No."

For tax year 1993, the assessor performed his analysis in similar fashion. He did not rely upon the actual income and expense history of the property. Whatever he may have learned about it, he chose to ignore it totally in favor of using other data furnished to him by the Department of Finance and Revenue. From this data, he used a value of $23.90 per square foot for office space and the figure of $37.37 per square foot for retail space. He testified that he again did not make any adjustments for actual income, actual expenses, or vacancies in this building.

Hovermale's stabilized net income, $1,841,394, was similar to the actual stabilized income of the property owner. Nonetheless, Hovermale erroneously used market income and expenses, totally ignored the contract rental information and the historical expenses for this property.

Because an assessment involves both the valuation of land and the valuation of improvements, the assessor was queried with regard to how he determined the value of the land.[8] The most conspicuous aspect of what he did is the extent to which he acted at odds with his own convictions, following instead the dictates of the Division of Standards and Review.

Hovermale testified that for tax year 1992, Standards and

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[8]In the instant case, the land comprises two adjoining lots. They are considered together, their respective values are set forth separately and later added to the value of the improvements (i.e. the building).

Review dictated that assessors were to recognize an appreciation factor of 33 and 1/3 percent as to land values -- a substantial increase from 1991. The directives to the assessment staff took a sudden turn. For tax year 1993, Standards and Review decreed that land values were to be reduced by 18%.

The assessor stated that he had been "instrumental" in reviewing real estate sales as he took part in this group research process. However, he indicated that he personally did not endorse the notion that a 33 and 1/3 % appreciation was justified. Despite his personal, professional disagreement, he followed the dictates of Standards and Review anyway. These land value pronouncements are found in the Pertinent Data Books. Hovermale stated that the Pertinent Data Books are only a guideline. However, he did not explain why he did not raise an objection or attempt to modify what had been communicated to him.

This discussion of how the assessor derived his land values goes to the depth of his analytical skills, or lack thereof, rather than the ultimate value that he determined for the land. Petitioner's expert eventually determined not to dispute the land value that was used by the District in these assessments. However, the worrisome aspect of what the assessor did only highlights the superficial quality and unreliability of his determination of capitalization rates. The rates are a pivotal part of the assessments and are described as follows.

For both tax years, the assessor divided his net operating income figures by a capitalization rate. The rate that he used for

1992 was 8.5% and the rate that he used for tax year 1993 was 9.5%.

Hovermale testified that these rates were adequate for this particular property because of the condition of the building. However, he was unable to describe the condition of the building except to say that it was built in 1941. Based on these figures, Hovermale calculated the fair market value of the property to be $22,627,000 for tax year 1992 and $19,383,000 for tax year 1993.

The capitalization rates that were used by the assessor were selected by him from a range of rates that were given to him by the Standards and Review Section of the Department of Finance and Revenue. He claimed that they were derived from actual sales information of improved properties in the District of Columbia, as well as pro forma net operating incomes, i.e. NOIs that were not derived from the actual expense and income data for these buildings. The assessor was unable to explain how the pro forma incomes were derived.

Hovermale testified that the assessment office prepared and published a schedule calculating a capitalization rate using the mortgage equity band of investment technique (known as the Akerson format). This schedule included a substantial downward adjustment of the rate, as a result of an assumption of a large appreciation in value. The assessor testified that the capitalization rate -- without this assumption -- was 12.5% for tax year 1992 and 12.51% for tax year 1993. He admitted, however, that he did not assume that the property would appreciate by 35% over several years for tax year 1992 and used a rate of 8.5% He acknowledged that when

the use of these rates are compared, the difference in the assessment is $6,665,888 for tax year 1992 and $4,663,623 for tax year 1993.

The assessor agreed, in his testimony, that the capitalization rates that were used by him were not sufficient to cover the annual mortgage payments, plus the real estate taxes and a fair return on the cash investment of the taxpayer. He admitted that his figures, in demonstrative illustrations, produced negative cash flows for both years.

While the District relied upon the testimony of an expert witness at trial (summarized infra herein), the District did present a rebuttal case in which it offered the testimony of another Department of Finance and Revenue employee to further explain the source of the capitalization rates that the assessor used. It is useful to recapitulate his testimony before retrospectively comparing the merits of the assessments to the opposing views of the petitioner's expert.

The District called to the stand Phillip Appelbaum. He is employed currently as the Acting Chief in the Standards and Review Division of the Department of Finance and Revenue. He was a member of that staff during tax years 1992 and 1993. He attempted to explain how Standard and Review developed the range of rates that were used by Hovermale and other assessors.

He testified that the rates were determined by analyzing a number of sources: market transactions in the District of Columbia, publications and commercial material that was available,

including certain publications of the American Council of Life Insurance (ACLI).[9]

Appelbaum stated that most of the emphasis was placed upon what he described as the "direct capitalization method." This involved calculating a capitalization rate by dividing actual sales prices of office buildings in the District of Columbia by either a pro forma income based on market figures or the actual income of the particular sale properties. The theory behind this method is that it should reproduce a capitalization rate that is experienced in the market.

One of the key assumptions used by Standards and Review was to assume that investors would retain a property for a minimum holding period of seven years. Appelbaum, however, never explained the factual basis for this assumption about a holding period.

Appelbaum could not recall how the final conclusions were drawn as to the range of rates. He acknowledged that no mathematical formula was applied, only that "a decision was made."

Further, he admitted that the rates that were provided to the assessors for these tax years were partly based upon sales information that was faulty. He admitted that several different sales prices were listed for the sale of one particular office building on 15th Street, N.W. He could not explain the error.

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[9]He stated that ACLI information is only used by Standards and Review as some type of check to determine whether regional (for the South Atlantic region) or national rates are in the same "ballpark" as capitalization rates for District of Columbia properties. He acknowledged, however, that the ACLI survey does include District of Columbia sales.

Appelbaum acknowledged that he did not check to see whether the capitalization rates offered by Standards and Review were sufficient to cover a taxpayer's mortgage payments, tax payments, and a fair return on equity. Nonetheless, he observed that when someone buys an office building that buyer "normally" is expecting to receive income.

To challenge the District's assessments for both years, respondent called to the stand an expert witness, Carol Mitten. Ms. Mitten is an experienced appraiser of commercial real estate. She is a member of the Appraisal Institute and has the MAI designation. She has qualified as an expert in this field in various courts.

Referring to her extensive and detailed written appraisals, she testified that for tax year 1992 she appraised the subject property at a value of $16,900,000. For tax year 1993, she appraised the property at $14,800,000.

Ms. Mitten commenced her appraisal process by noting the condition of the real estate market at the relevant dates of valuation. She testified that, as of the valuation date of the first year, the market was entering a real estate recession. Vacancy rates then were increasing as newly constructed buildings were delivered. This resulted in an oversupply of office space in the District of Columbia. As to the second year, she testified that the national economy had been in a recession for three quarters. Rents had fallen and there was a significant excess of office space.

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The condition of the subject property was well documented by Mitten. She testified that the building was erected in 1941 and that the interior was renovated in 1984. This renovation as only cosmetic and was not a functional make-over. She stressed, for example, that this office building has small floor plates, that it is not accessible for persons with disabilities, and that it has no sprinkler system. Also, it does not contain parking spaces.

Relying on the income approach, Mitten carefully reviewed the expense and income history of this property over a period of several years. She scrutinized the income and expense information for the years 1987 through 1990. Moreover, she examined the rent rolls and leasing information for this office building.

She testified that she relied upon the actual rents that were received but that she applied an economic (or purely market-based) rental level for the vacant space ($24.00 per square foot). She determined that retail market rent was $40.00 per square foot for the street frontage. In her expert opinion, it was $20.00 per square foot for rear retail space and $16.00 for the lower level retail space. This resulted in a total potential gross income of $2,785,026. From this figure, she subtracted a stabilized 8% vacancy rate and a rent loss factor, to arrive at an effective gross income of $2,562,224.

As her next step in the income approach, Mitten stabilized expenses at $6.27 per square foot, based upon typical operating expenses in comparable buildings, or $640,000. The range reported was $6.50 to $8.25 per square foot. Mitten net operating income

was $1,922,224. Mitten then applied her capitalization rate of .11382 to the NOI figure, to reach the estimate market value of $16,888,280.

For the other tax year, Mitten's analysis was very similar. She was able to take advantage of having yet another year's actual information at her disposal.

For tax year 1993, Mitten used the actual expense and income data for this building. For vacant office space, she used the same market rent values. For the retail space, she elected to apply the same market rental rates -- except for the category of rear retail space, which she estimated to have a somewhat increased market value of $22.00 per square foot.

Her analysis produced a potential gross income level of $2,774,893. From this figure, she subtracted a stabilized vacancy and loss of 8.0%, to arrive at an effective gross income of $2,552,902.

The NOI calculated for 1993 by Mitten was $1,897,902. This figure resulted from subtraction of stabilized expenses at $6.41 or 55,000. The market range that she reviewed was from $5.71 to $8.20 per square foot. Mitten capitalized the NOI at a rate of .12825, to yield a value of $14,798,456, rounded to $14,800,000.

The capitalization rates that were selected by Mitten were the product of her application of the financial band of investment technique. This is a traditional method of capitalization, so long as sufficient market data is available.

Under this technique, the appraiser must develop a weighted

component of the mortgage and equity factors, to arrive at an overall rate. Mitten considered typical loan-to-value ratios, debt service, and equity dividend rates. She made a study of the market, including yield rates for comparable investments, surveys of rates conducted by the American Council of Life Insurance. This survey is the premier list of investment-grade mortgage terms. She also considered the views of the Appraisal Institute. The comparative risk and lack of liquidity of a real estate investment suggests the requirement of higher yield rates -- higher, for example, than the rates for Treasury bonds.

All of the sources that she examined pointed to a capitalization rate of 9.2% to 9.3% for January 1, 1991, not including the District of Columbia tax rate.[10] She applied factors based upon a 72.% mortgage at 9.5% for a term of 30 years, for a constant of .101. Mitten estimated the equity dividend rate to be 7.0%. Her conclusion was a capitalization rate of .11382 (11.382%), inclusive of the tax rate.

For the second tax year in dispute, Mitten also determined a capitalization rate, using the same process. She noted that, by comparison, yield rates were up, in recognition of the real estate market recession. She assumed factors of a 65% mortgage at 10.0%, for a term of 30 years, for a constant of .105. She estimated the equity dividend rate at 11.0%. She concluded that the logical capitalization rate for this tax year, for this property, was

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[10]The higher the capitalization rate, the lower the value of the property.

.12825 (12.825%), inclusive of the tax rate.

In addition to providing a detailed explanation of her own appraisals, Mitten also testified to her expert opinion concerning the adequacy or accuracy of the assessments. In this critique, she noted that the assessor failed to account for the actual income and expenses of the property. As to the capitalization rates that were used, she noted that they were flawed or cast into question by unexplained, underlying errors. For example, she highlighted the fact that the so-called range of rates on which he relied contained several different rates attributed to the same sale of the same property. Finally, noting the required elements of a capitalization rate,[11] she testified that Hovermale's rates were not sufficient to provide a fair return on the owner's equity, after the payment of the mortgage and taxes.

II. CONCLUSIONS OF LAW

Based upon various factors set forth as follows, this Court concludes as a matter of law that both assessments were incorrect and flawed and that the petitioner's expert has convincingly calculated the estimated market value that should have been used in determining tax liability.

The District of Columbia Code requires the Department of

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[11]She referred to the definition of a capitalization rate, as articulated by the District of Columbia Court of Appeals in Rock Creek Plaza-Woodner Ltd. v. District of Columbia, infra ("a number representing the percentage rate that taxpayers must recover annually to pay the mortgage, to obtain a fair return on taxpayer's equity in the property and to pay real estate taxes").

Finance and Revenue to tax commercial real property based upon the property's "estimated market value." As a practical matter, this term refers identically to the concept of fair market value. The District of Columbia Code defines estimated market value 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. § 802(4) (1981).

A. Why the District's Assessments are Flawed.

Applying all applicable law, this Court concludes that the two assessments are incorrect and flawed for the following reasons.

First, the assessor failed to utilize the actual expense and income history of the property and exclusively used market data in order to determine "net operating income." The practice or decision to ignore the historic experience of the building runs afoul of the admonishment of the Court of Appeals that genuine income and expense information is to be considered, even if market data is also a part of the assessor's valuation.

The Court of Appeals has stated, "When an income producing property has been in operation for a period of time, the past earnings assist the assessor in projecting future earning ability." District of Columbia v. Washington Sheraton Corp., 499 A.2d 109, 115 (D.C. 1985). It would be virtually impossible for a potential buyer to analyze the trends occurring with the income stream of a

commercial property if such a potential investor literally ignores (or is not told) what has actually occurred with the property as a profit-seeking venture. "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 approach." Id. The reference to "a" future income stream is that of the subject property, not the income stream of some other particular property or sampling of properties.

As counsel for petitioner recognizes, the end result of using only market data was, **purely by accident** in the instant case, a net operating income that is very close to the NOI figure that was derived by petitioner's expert.

Even though their respective figures are almost the same, an important principle is involved: the assessor used a deficient method and this should not be countenanced by the Court. Accordingly, in order to be intellectually honest, it is still necessary in a trial de novo to scour the figures of both parties. The Court concludes that the petitioner's NOI should be adopted by the Court. Even though the difference is small, the Court adopts the NOI that was established by petitioner's expert because it is well-supported and better-supported (as inclusive of actual, historical information regarding the subject property).

Second, the capitalization rate used by the assessor was incorrect and indeed improperly derived under the requirements of Rock Creek and its progeny. This is not a close question on the facts of this record.

The assessor candidly admitted on the witness stand that he did not examine his calculations as to either tax year in order to figure out whether his capitalization rate was sufficient to account for payment of mortgage, payment of taxes, and obtaining a fair return on equity. He made utterly no pretense of having done this.[12]

Third, to the extent that the assessor relied strictly upon the range of rates provided in the Pertinent Data Book, the assessor's capitalization rate was pre-ordained to be faulty. This is because the range of rates issued by Standards and Review was **itself** based upon unreliable conclusions.

A good example of the unreliability of the dictated range of rates is the manner in which capitalization rates are expressed therein for precisely the same sale of a single property in two different tax years. This is an instance in which Standards and Review came up with two extremely different capitalization rates that are attributable to the **same sale** -- where there is no way of reconciling **why** they are different.

Mr. Appelbaum was confronted in his testimony with the following facts. Referring to the Pertinent Data Books that were admitted into evidence[13], Petitioner's counsel pointed to the sale of a certain office building located on 15th Street, N.W. This building was sold in 1990. The 1992 Pertinent Data Book indicates

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[12]He seemed to be distinctively unconcerned about this issue.

[13]Respondent's Exhibits 1 and 2, for tax years 1992 and 1993 respectively.

that the capitalization rate associated with this sale was 6%. However, in the Pertinent Data Book for tax year 1993, the Division stated that the rate associated with this sale is 10%. The serious discrepancy between these two rates is totally unexplained. In his trial testimony, Mr. Appelbaum was unable to reconstruct why the rates were different for this building.

Superimposed on the rate discrepancy for one of the most recent local sales that formed the basis for the PDB's range of rates, there is another damaging note to the District's case.

In his testimony before this Court, Mr. Appelbaum was asked to describe the mathematical calculations that were actually employed in order to translate the sales information into the various capitalization rates from which the range was constructed. He was unable to remember anything at all about what was actually done with the sales figures.

The inability of the District of Columbia to provide the Court with the operative facts as to how the rates were derived is a factor that totally compromises the reliability of the range of rates. In other words, this Court cannot accord these rates any evidentiary weight in the context of a trial de novo.

On balance, then, the evidence shows that the Government is left with an assessor who literally never addressed the most crucial factors in determining a capitalization rate and who chose a rate that was limited to a range of rates that has not been shown to be reliable in this particular instance. Under these circumstances, each of the assessments as whole must be rejected by

the Court even if the Court were to accept the assessor's NOI for each tax year.[14]

B. The Correct Appraisal of This Property.

Having concluded that the original assessments were incorrect and improperly composed, this Court is obligated to determine whether the particular appraisal offered by the Petitioner is itself correct and reliable. This Court concludes as a matter of law that it is.

Clearly, the two most outstanding and convincing aspects of her appraisals are (1) the correct mixing of both historical income and expense information with relevant market data, for purposes of developing the NOI for each year and (2) the better-supported and more sufficient capitalization rates that she applied.

Where the NOI for each year is concerned, Mitten's execution of the income approach is classic. She was careful not to attempt to rely merely upon a snapshot of the alleged market rents, for example. Instead, she examined several years worth of actual rental data and expense information for this specific piece of property. This enabled her to see the income "stream" over time, so as to be in a position to detect trends and patterns. When the real information about an office building is rejected out of hand

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[14]The credibility of the assessor and the weight to be accorded his testimony was also compromised by his testimony concerning how he derived the land values. See text herein, supra, at page 8. This testimony seriously calls into question (1) whether Hovermale was in any way intellectually independent of Standards and Review in performing his two assessments and (2) whether he had been similarly superficial in determining the capitalization rates that would affect petitioner's tax liability.

in favor of reliance upon market sampling, this compromises the entire enterprise of determining the present value of a future income stream. For a potential buyer, there is only one source for the income stream that is of significance to the buyer, i.e. the income stream of the office building that is hypothetically being offered for sale.

The law requires that the taxable value of the property must reflect the "most probable" price that could be obtained in the open market. Thus, an assessor or appraiser must pay attention to what a buyer would examine. Certainly, no real buyer would categorically ignore the significance of the real figures that apply to the subject property.

Finally, the Court pauses to note that Mitten's appraisals carry additional credibility because she appropriately mixed actual income data with market data. For example, she used actual rental data only for space that was rented. For vacant space, she relied upon comparable market information to fill in the blanks, so to speak. Where retail space is concerned, she did not assume that rents would be the same for retail space that was situated in parts of the building that were different. She drew distinctions between highest retail rents that the taxpayer could command for "street frontage" that is most accessible to foot traffic, as opposed to the lower rents for spaces on the lower level. This was a shrewd and realistic detail.

The Court has the discretion to accept or reject the opinion of an expert, even if that expert is the only expert who testified

at trial. Here, the Court chooses to credit the testimony and opinion of Ms. Mitten. Her explanations are logical and there is a solid factual basis for the data upon which she built her capitalization rates.

In the Court's view, she relied upon sources of investment information that is particularly relevant to office buildings, e.g. the ACLI survey. This survey is especially useful in rate analysis, because life insurance companies are known to invest large sums in commercial real estate and, as national players in the market, can choose to direct their investments to the District of Columbia or elsewhere. This is why the reference to non-District of Columbia sales is such a useful exercise.

The capitalization rates developed by Mitten address all of the factors that would normally be significant to a potential buyer who is seeking to maximize gains in the open market. This is what the law requires in an assessment. This is what the trial court must investigate in order to arrive at a de novo valuation.

C. Why the Rate Definition from the Court of Appeals Does Not Violate the District of Columbia Code.

This Court rejects the District's novel argument that the definition of "capitalization rate" that is enunciated in Rock Creek is in contravention of the District of Columbia Code.

This Court concludes as a matter of law that the Rock Creek definition only enhances and clarifies what the Code itself requires. The Code definition of "estimated market value" specifically refers to two distinct elements that are certainly

embraced by Rock Creek's discussion of the composition of the capitalization rate.

First, the Code speaks of sellers and buyers who both are "seeking to maximize their gains. . . ." This obviously does not connote buyers who seek to do anything **other than** purchase a commercial property for profit-making purposes and who seek anything other than a property that actually does produce a positive cash flow of some kind, however small.

Second, the Code commands the Department of Finance and Revenue (and ultimately the courts) to determine the "most probable" price at which the property would be sold under "prevailing market conditions. . . ." Even if there are a few potential purchasers of office buildings who would accept a property with a present negative cash flow, such potential purchasers do not reflect what **most** buyers are doing. It is illogical to presume that most buyers in the commercial market invest in properties that are generally loosing money. The language in Rock Creek is a tacit recognition of this reality.

In other words, there is no basis for assuming that the "prevailing" tactic among office building investors is to purchase buildings that do not produce income. The term "prevailing" refers to what is happening most of the time -- or whatever constitutes **the norm**.[15] The statute does not mandate the calculation of

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[15]To be practical, this Court recognizes that from time to time there may be investors who are willing to purchase office buildings that are currently not profitable. However, this is not difficult to understand or reconcile when one considers that such sales may very well take place because the object of the purchase has nothing

property taxes based upon the behavior of outlyers, i.e. investors who are the exception to the norm.[16] The Code's reference to the "open market" is yet another indicator that the legislature focused upon what would be important to the universe of typical buyers and sellers.

Finally, the statutory mandate of equalization of commercial taxation[17] would be violated rather ironically if an assessment is made on the basis of a selling price that appeals only to a subset of investors whose purchases are idiosyncratic.[18] Reliance upon unusual or hidden investment strategies of atypical investors would be chaotic and extremely speculative grounds for taxation.

The Government's contention regarding the petitioner's reliance upon Rock Creek is unpersuasive for another reason.

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to do with an attempt to buy a profit-making building. A good example would be the purchase of an unprofitable office building for purposes of acquiring the underlying land for "assemblage" purposes for a larger development, for expansion from a contiguous building, or for demolition for a different type of commercial venture altogether. The mere location of an unprofitable office building may have a potential value that can justify some sort of payment for the improvements as well as the land. The location issue need only make sense to the buyer. Based upon the statute and case law that applies to tax valuation, however, the courts are entitled to assume that the norm calls for estimating market value of an office building for sale as an office building -- not for sale as something else.

[16]Bowing to the behavior of atypical purchasers is also not consistent with the concept of equalization that is certainly important to the taxation system.

[17]As the foundation of the local real property tax system, Congress intended as one of its objective the "[e]quitable sharing of the financial burden of the government of the District of Columbia; . . . ." 47 D.C. § 801(1).

[18]See footnote 15, supra.

It is axiomatic that a trial court has no power to overturn the decision or directive of an appellate court. Moreover, it is equally basic to our system of justice that the decision of a panel or division of the Court of Appeals can only be reversed by the entire court sitting en banc. M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. 1971; see Johnson v. United States, 610 A.2d 729, 730 (D.C. 1992); Asuncion v. Columbia Hosp. For Women, 514 A.2d 1187, 1189 (D.C. 1986).

There has never been an en banc review of Rock Creek, nor could government counsel even account for whether the District of Columbia has ever sought such rehearing from the Court of Appeals -- in that case itself or in any subsequent litigation. If indeed the Government has ever requested such relief, its effort plainly has not met with success.[19] Thus, the definition of a capitalization rate in the Rock Creek opinion has never been modified by the Court of Appeals en banc or by the original panel itself. Meanwhile, the statute has never been changed to override what the Court of Appeals has written in Rock Creek.

The Government stresses that Rock Creek's definitional language regarding the elements of the capitalization rate is mere "dicta" and should be ignored by the Superior Court for this reason. While it is true that a defect in the assessor's capitalization rate was not held to be the keystone to the

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[19]The Government could not provide this Court with any evidence that its argument has been presented to the Court of Appeals, such as copies of petitions for rehearing or rehearing en banc. This Court is aware of none.

appellate disposition in Rock Creek, the District of Columbia Court of Appeals examined precisely the issue of the extent to which a definitional underpinning of a case -- even as dicta -- can still bind future panels or divisions of the Court of Appeals (and the trial court).[20] A good example is found in the opinion in Peoples v. United States, 640 A.2d 1047 (D.C. 1994).

In Peoples, the principle issue was whether the trial court erred in failing to instruct the jury that specific intent to maim is an element of the crime of mayhem. Id. at 1052. Defendant therein had been convicted of this crime and argued that this precise issue had never been addressed by the Court of Appeals. The Court of Appeals held that it was already bound by certain language in prior decisions that was, in a hypertechnical sense, only dicta, but which was a fundamental assumption underlying the particular holdings of those cases. Id. at 1053. In other words, the District of Columbia Court of Appeals fully supports and adopts the principle that when dicta is part of the context of a holding,

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[20]Where definitional underpinnings are concerned, it is useful to recall that in Rock Creek, having assumed that a capitalization rate must cover payment of the mortgage and other elements, the crux of the holding was the arbitrary way in which the trial court had rejected the testimony of the taxpayer's expert on the subject of the value of the mortgage. The technical issue of designing an **overall** rate to cover the payment of the mortgage, taxes and return on equity could well have been affected by the realistic or true meaning of the size of the mortgage. It was alleged to be too large to encompass merely the present worth of the building. Thus, no one can dismiss the ultimate, potential connection between the proper capitalization rate and the special factor of an inflated mortgage. These issues can easily blend together, so that the basic elements of a capitalization rate must always be taken into account, even when the rate itself is not the sole, isolated subject of the appeal.

subsequent divisions of the Court are bound by it -- just as if it had been a holding.[21]

Whether or not the definition of capitalization rate was the precise holding in Rock Creek, it is clear that the Court of Appeals itself relied upon the quoted definition in Rock Creek and various subsequent cases. Through the years since Rock Creek, our appellate court has relied upon its definition as the contextual foundation and background for disposing of appeals from assessments that were reached through the income approach. The Rock Creek Plaza definition of what a capitalization rate must cover has retained its vitality in other appellate and trial court decisions in the intervening 12 years since it was issued.[22] See Wolf v. District of Columbia, 597 A.2d 1303, 1309 (D.C. 1991). This Court is bound by it and the binding effect cannot be obliterated or evaded.

To boot, the District presented no expert testimony in this case to attempt to prove on the merits that the Rock Creek

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[21]Ironically, the "dicta" that was attacked by the appellate in Peoples also involved definitional language of prior cases. There, the Court of Appeals noted that at least two prior opinions of that Court had subsumed an acceptance of the principle that specific intent to maim was not an element of the offense. In one of those cases, the actual holding only involved a question of merger of offenses. Yet, the panel had to accept certain assumptions about the elements of the offense of mayhem in order to do its job as to the narrower issue that was the subject of the appeal. Just as definitional language is disputed by the District of Columbia in the instant case, definitional language was disputed in Peoples -- with no success.

[22]The Court of Appeals uses this definition in making assumptions about what assessors and appraisers are actually doing or what they ought to be doing as they go about applying the income approach.

definition is faulty or unrealistic. In fact, the District has failed to do so in all other assessment appeals that have been tried to this Court previously.

It appears that the District attacks the definition in Rock Creek for understandable tactical reasons because its application so often leads to a conclusion that an assessment is incorrect or flawed. However, it is important not to confuse a tactical position with a supportable legal argument or expert evidence.

WHEREFORE, it is by the Court this 29th day of November, 1995

ORDERED, ADJUDGED, AND DECREED that the estimated market value of the subject property was $16,900,000 for tax year 1992, of which $12,756, 652 is attributed to the value of the land component and the remainder attributed to the improvements; and it is

FURTHER ORDERED, ADJUDGED, AND DECREED that the estimated market value of the subject property for tax year 1993 was $14,800,000, of which $10,461,900 is attributed to the land component and the remainder to the value of the improvements; and it is

FURTHER ORDERED that the Government's assessment record cards for the subject property, maintained by the District of Columbia, shall be corrected to reflect the values determined by the Court in this order; and it is

FURTHER ORDERED that the District of Columbia shall refund to the petitioner any excess taxes collected for tax year 1992 and tax year 1993, resulting from the assessed values that were used as the basis for such taxes, insofar as those values exceed those

determined by this Court; and it is

FURTHER ORDERED that entry of decision shall be withheld, pursuant to Rule 15 of the Superior Court Tax Rules, pending submission by petitioner of a proposed order, within 30 days hereof, bearing appropriate refund calculations.

Cheryl M. Long
Judge

Copies mailed to:

Nancy Smith, Esq.
Assistant Corporation Counsel
441 4th Street, N.W. 6th Floor
Washington, D.C. 20001

Gilbert Hahn, Esq.
Tanja Castro, Esq.
Amram and Hahn
815 Connecticut Avenue, N.W.
Suite 601
Washington, D.C. 20006

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

ROSE ASSOCIATES,

Petitioner

v.

DISTRICT OF COLUMBIA

Respondent.

Tax Docket Nos.
5282-92 & 5772-93

ORDER

In the previous order signed and docketed by the Court on November 30, 1995, the Court inadvertently wrote an erroneous case number on the order. The incorrect case number appeared as 5291-92 and 5773-93.

Wherefore, it is by this Court this 8th day of December, 1995,

ORDERED that the aforementioned order be corrected to reflect the following case number, Tax Docket Nos. 5282-92 & 5772-93.

Cheryl M. Long
Judge

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Nancy Smith, Esq.
Assistant Corporation Counsel
441 4th street, N.W. 6th Floor
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