

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

CASE NO. 95-60292
Chapter 11

IN RE:

NORTHEAST MANAGEMENT
SERVICES, INC.

Debtors

APPEARANCES:

STEFAN D. BERG, ESQ.
Attorney for Debtor
309 Arnold Avenue
Syracuse, NY 13210

JOSEPH E. LAMENDOLA
Corporation Counsel for
City of Syracuse
301 City Hall
Syracuse, NY 13202

JOHN STONE, ESQ.
Assistant Corporation
Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This contested matter is before the Court by way of a motion (“Motion”) filed by Northeast Management Services, Inc. (“Debtor”) on July 31, 1996, seeking an adjustment in real property taxes by the City of Syracuse (“City”) on five parcels located at 334 through 354 North Midler Avenue, Syracuse, New York, pursuant to § 505(a) of the Bankruptcy Code (11 U.S.C. § 101-1330) (“Code”). Although originally scheduled to be heard on August 20, 1996, the Motion was adjourned to the Court’s regular motion term in Syracuse on September 17, 1996. Following oral argument, the Court reserved decision on the issue of whether the Debtor was entitled to seek review of the assessments. On November 29, 1996, the Court rendered a decision

(“Letter Decision”) in which it concluded that the Debtor was entitled to proceed with a determination of the tax assessments for the tax years 1990/91 through 1993/94 since there had been no adjudication by the City’s Board of Assessment and Review for those years.

Thereafter, an evidentiary hearing was scheduled for April 3, 1997, in Utica, New York. On or about March 17, 1997, the Debtor sought authorization to employ John R. Mako, Jr. (“Mako”) to appraise the Debtor’s property. An order granting the Debtor’s request was entered on April 15, 1997. In the interim, the evidentiary hearing was rescheduled to be held on July 28, 1997, and was again adjourned to February 11, 1998, on consent of the parties.

At the conclusion of the evidentiary hearing on February 11, 1998, pursuant to a Stipulation and Order dated March 4, 1998, each party was afforded 30 days from the date of receipt of the transcript of the hearing, but no later than May 4, 1998 to submit a critique, proposed findings of fact and a memorandum of law (“memorandum of law”). The transcript of the February 11, 1998 hearing (“Tr.”) was filed with the Court on March 16, 1998, and memoranda of law were received from the Debtor on April 17, 1998, and from the City on April 21, 1998.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. § 1334(b), 157(a), (b)(2) (A) and (O).

FACTS

The Debtor filed a voluntary petition pursuant to chapter 11 of the Code on January 31, 1995. Debtor is the owner of commercial real property formerly known as the Lenox Industrial Park, which it purchased in 1986 for \$660,000. At that time, the property consisted of approximately 17 acres on which were located eight structures. Parcel “A”¹, comprised of 2.326 acres and two buildings, was renovated by the Debtor at the cost of approximately \$90,000, *see* Tr. at 56, and was sold in May 1989 to Robert Merola for \$180,000. *See* Debtor’s Exhibit 62 (“Mako Appraisal”) at 34. Parcels “B” and “C”, comprising approximately 1.10 acres of vacant land were sold to Eastside Serenity, Inc. for \$71,000 in January 1990. *See* Tr. at 51. A portion of Parcel “I”, comprising approximately .11 acres of vacant land was sold to Jon and Carol Ward in September 1989 for \$4,500. *See* Mako Appraisal at 34. The remaining .878 acres of Parcel “I”, including a building of approximately 16,000 square feet, were sold to Louis Vallar in September 1990 for \$175,000. *Id.* According to the testimony of Florine Basile (“Basile”), the Debtor’s president, approximately \$80,000 was spent in renovating the building located on Parcel “I”. *See* Tr. at 56. Parcels “J” and “K”, comprising a total of 1.856 acres of vacant land, were sold in June 1989 to Jan Nastri and Robert Abbott for \$115,000.² *See* Mako Appraisal at 34 and Debtor’s Exhibit 61.

As of the date of the hearing, the Debtor’s property was comprised of approximately 8.14 acres, on which were located five buildings and which were assessed as five separate parcels,

¹ For illustrative purposes, the various lots and the structures thereon are identified by letters A-I. *See* Debtor’s Exhibit 61.

² The City’s appraiser, Harlan LaVine (“LaVine”), lists the lot size for Parcels “J” and “K” as .794 acres. *See* City’s Exhibit F (“LaVine Appraisal”) at 40. According to the deed issued in connection with the transaction in June 1989, there were two parcels transferred, one of which contained .794 acres. *See* LaVine Appraisal at Tab “O”.

Parcels “D-H.” A portion of Parcels “G” and “H” is located in the Town of Dewitt. According to the City, only 7.7 acres are actually located in the City of Syracuse (“Premises”). *See* LaVine Appraisal at 15. Of the approximately 194,505 square feet of buildings, the City estimates that 4092 square feet of the 11,792 square foot building located on Parcel “G” and approximately 25,040 square feet of the 40,000 square foot building located on Parcel “H” are in the Town of Dewitt. *See id.* at 32, 33 and 83. Thus, LaVine estimates that approximately 165,372 square feet of building space are located within the City of Syracuse and are subject to the analysis herein.³

The history of assessment of the Premises by the City is as follows:

July 1, 1989 - July 1, 1993

<u>Address/Parcel</u>	<u>Land</u>	<u>Improvements</u>	<u>Assessment</u>
334 N. Midler/D	\$ 8,450	\$ 22,000	\$ 30,450
338 N. Midler/E	9,650	31,000	40,650
348 N. Midler (Rear)/F	10,350	35,000	45,350
352 N. Midler (Rear)/G	3,675	20,000	23,675
354 N. Midler (Rear)/H	<u>3,075</u>	<u>10,000</u>	<u>13,075</u>
	\$35,200	\$118,000	\$153,200

Calculation of Full Value for July 1, 1989 to July 1, 1993

<u>Tax. Status Date</u>	<u>Equaliz. Rate</u>	<u>Land</u>	<u>Improvements</u>	<u>Full Value</u>
July 1, 1989	14.41%	\$ 244,275	\$ 818,875	\$1,063,150
July 1, 1990	13.08%	\$ 269,113	\$ 902,140	\$1,171,253
July 1, 1991	11.06%	\$ 318,264	\$1,066,907	\$1,385,171
July 1, 1992	11.13%	\$ 316,262	\$1,060,198	\$1,376,460
July 1, 1993	11.45%	\$ 307,423	\$1,030,568	\$1,337,991

³ The Debtor’s motion seeks adjustment in its taxes only with respect to the City of Syracuse. The certificate of service filed in connection with the Motion does not indicate service on the Town of Dewitt and the assessments referenced in the Motion are clearly those made by the City and not the Town of Dewitt.

The Court heard testimony from the two appraisers in connection with the value of the Premises. Both Mako and LaVine agree that the highest and best use for the Premises is as a multi-tenant office/warehouse, light manufacturing complex. *See* LaVine Appraisal at 36; Mako Appraisal at 43. Both of them analyze the value of the Premises using the Sales Comparison Approach, also referred to as the Market Comparison Approach, and the Income Capitalization Approach.⁴ LaVine testified that the Income Capitalization Approach is “workable” with respect to the Premises but “it’s probably not the best.” *See* Tr. at 135. It was his view that the Sales Comparison Approach was a “bit stronger” in this case. *See id.* at 136. Mako also testified that with respect to the subject property, he would have given less weight to the Income Capitalization Approach and but for the fact that this was an “assessment case,” he would only have used the Sales Comparison Approach. *See id.* at 108. In his appraisal, however, he actually indicates that more weight was given to the Income Capitalization Approach. *See* Mako Appraisal at 78.

Sales Comparison Approach

Both appraisers examined various comparables in determining both the value of the land and also the value of the improvements constructed on the Premises. Included in LaVine’s comparables for land value were the sales of Parcels “J” and “K” in June of 1989 and Parcels “B”

⁴ Both appraisals submitted to the Court contain an analysis of additional years subsequent to those which are the subject of the decision herein and will not be considered in the present discussion. Although the Debtor has requested that the Court also review the assessments for the tax years 1994/95, 1995/96, 1996/97 and 1997/98, that is not before the Court in the form of a motion. There has been no notice to the City of the Debtor’s intent to expand the relief sought from this Court. As noted in the Letter Decision, the Debtor has sought review by the Board of Assessment and Review for the tax years 1994/95, 1995/96 and 1996/97, and it is likely that the Board will have LaVine’s appraisal, as well as Mako’s, to consider in connection with that review. Therefore, the Court will deny the Debtor’s request as set forth in its memorandum of law.

and “C” in January 1990 by the Debtor. *See* LaVine Appraisal at 40-42. Four of his comparables are zoned “Industrial.” *See id.* at 40-48. He also includes the sale of one parcel zoned “Planned Development” in the Town of Cicero and described as “an interior lot in [a] business park,” which sold in 1992 at a price of \$45,079/acre, which he has adjusted down 10% to \$40,571 based on the fact that it is smaller than the Premises. *See id.* at 46. His adjusted sales on five parcels range from \$27,882⁵ to \$51,636 (the latter sale being that of Parcels “B” and “C”⁶), from which he estimates a price of \$35,000 per acre for the Premises.

Mako examined five sales of vacant parcels, ranging in adjusted value from \$17,799.10 to \$23,661. *See* Mako Appraisal at 46. In concluding that \$19,000 per acre is an appropriate value for the Premises, Mako notes that in 1994 the City of Syracuse offered to purchase a 9.1 acre parcel of land located adjacent to the Premises for \$180,000 or \$19,780 per acre.⁷ *See id.* at 52.

In estimating the value of the improvements located on the Premises, LaVine examined twelve properties with an adjusted price/square foot of \$3.73 to \$8.98 and concluded that the

⁵ In his calculations, LaVine improperly bases the price per acre of Sale #1 on a lot size of .794 acres. The record indicates that the lot size was actually 1.856 acres. *See* LaVine Appraisal at Tab “O”. LaVine’s adjusted sales price/acre was calculated to be \$65,176. *See* LaVine Appraisal at 49. Using the same adjustment of -55%, the Court estimates the adjusted sales price/acre on what LaVine has identified as “Sale #1” to be \$27,882, rather than \$65,176.

⁶ LaVine’s adjusted value for Sale #2 was based on a purchase price of \$75,000. Basile testified that the consideration paid was \$71,000. The deed executed in connection with the transaction also indicates consideration of \$71,000. *See* LaVine Appraisal at Tab “T”. Thus, the per acre price was \$64,545, and the Court has incorporated LaVine’s downward adjustment of 20% to arrive at an adjusted figure of \$51,636/acre, rather than \$54,545.

⁷ The article apparently upon which Mako relies appeared in the December 3, 1994, issue of The Post-Standard. *See* Mako Appraisal at 110. In the article, the statement is made that the “asking price of less than \$20,000 per acre is well below the market value of industrially zoned, environmentally clean land in the city. * * * The parcel is listed for \$35,000 an acre now.” *Id.*

market value of the buildings located on the Premises is \$4.00 per square foot. *See* LaVine Appraisal at 79. His actual range of prices is \$4.38 to \$17.61 with adjustments ranging -10% to -50% based only on building size and physical condition of the buildings. *See id.* Included as Property #1 is the sale in March 1988 of Parcel A by the Debtor at an adjusted price of \$3.98/square foot and as Property #2 is the sale in September 1990 of a portion of Parcel I by the Debtor at an adjusted price of \$8.14/square foot, for which LaVine makes adjustments of -10% and -25% respectively due to “building size.” He makes no adjustment to the two properties based on physical condition.

Mako examined five sales of improved properties ranging in price from \$1.12 to \$7.63. *See* Mako Appraisal at 54. He calculates an adjusted price range from \$1.01 to \$3.22/square foot, after adjustments ranging from -20% to -65% based on building size and physical condition for the most part. *See id.* He concludes that \$1.50 per square foot was an appropriate valuation for the Premises with respect to improvements thereon. *See id.* at 60.

Both appraisers considered property located at 222 Teall Avenue in Syracuse, New York. Based on 80,697 square feet, LaVine estimates a price of \$7.99/square foot, adjusted down 20% for size and condition to \$6.39 square foot. *See* LaVine Appraisal at 79. Mako calculates a price of \$7.63/square foot based on 84,500 square feet, which he then adjusts down 65%, including -30% for building condition, to \$2.67/square foot. *See* Mako Appraisal at 54.

LaVine’s estimates of valuation for the Premises using the Sales Comparison Approach were as follows:

Value of Site as if Vacant - \$269,500 (7.7 acres X \$35,000/acre)
Value of Site with Improvements - \$661,500 (165,372 sq.ft. X \$4.00/sq. ft.)

Mako's estimates of valuation for the Premises using the Sales Comparison Approach were

as follows:

Value of Site as if Vacant - \$146,300 (7.7 acres X \$19,000/acre)
Value of Site with Improvements - \$248,058 (165,372 sq.ft. X \$1.50/sq. ft.)⁸

Income Capitalization Approach

The initial step in both appraisals using the Income Capitalization Approach was to estimate the economic rent which the Premises would generate if vacant and available to be leased. LaVine examined seven commercial properties, which he deemed comparable to the Premises, with rents ranging from \$1.75 - \$3.51/square foot. *See* LaVine Appraisal at 93-107. Upon review of the actual leases in connection with the Premises, he concludes that the overall average economic rent for the "entire area of the subject complex which is leasable", including the property located in the Town of Dewitt, was \$2.00/square foot or \$315,426 in Potential Gross Income for the 157,713 square feet considered rentable.⁹ *See id.* at 107. LaVine, using a vacancy and credit loss rate of 25%, subtracted \$78,856, to arrive at an Estimated Gross Income ("EGI") of \$236,570 for all years. *See id.* at 110.

⁸ Mako's actual calculations are based on 8.14 acres and 195,000 square feet of improvements. The Court has extrapolated those figures to more accurately reflect valuation of only those portions of the Debtor's property located in the City of Syracuse, namely the "Premises" as previously defined.

⁹ LaVine determined that 25,000 square feet of Building F was unleaseable and all of Building G and deducted 36,792 square feet or approximately 20% from the total 194,505 square feet. He indicated that he felt that Building E, which contains approximately 48,469 square feet, was leaseable with minimum repairs to the roof. According to the statement of income and expenses for the Premises, rental income was generated from Building E for the years in question and ranged from a low of \$4,800 in 1989 and a high of \$39,350 in 1994. *See* Mako Appraisal at 62.

Mako, on the other hand, examined six comparables and concluded that of the 195,000 square feet, including those portions of the buildings located in the Town of Dewitt, 60,000 square feet of office/retail space would generate \$5.00/square foot in rental income and 135,000 of storage/warehouse space would generate \$1.50/square foot in rental income or a total of \$502,500 in Potential Gross Income for all years. *See* Mako Appraisal at 61-62a. He estimates that approximately 35% of the space was unleaseable¹⁰ and that the vacancy and credit loss rate on the balance of the space was 20-25%. *See id.* at 63. It appears that he then combined the two rates to arrive at a total vacancy and credit loss on the entire property of 55-60% of gross income. *See id.* Mako notes the actual collected income for each year and also estimates EGI for the entire property in arriving at the following:

<u>Taxable Status date</u>	<u>Estimated EGI</u>	<u>Collected Income¹¹</u>	<u>Year</u>
July 1, 1989	\$201,000	\$111,765	1989
July 1, 1990	\$201,000	\$147,484	1990
July 1, 1991	\$201,000	\$121,788	1991
July 1, 1992	\$201,000	\$170,659	1992
July 1, 1993	\$226,125	\$178,623	1993

See id.

The next step in both analyses was to determine the amount of expenses associated with the rental of the property for the years at issue. A comparison of the annual expenses applied by both appraisers in calculating Net Operating Income (“NOI”) is as follows:

¹⁰ It is the Debtor’s position that approximately 15,000 square feet of Building E cannot be rented as at least a portion of it is without a roof. *See* Debtor’s Memorandum of Law at 15. Debtor also asserts that the City of Syracuse has condemned all of Building F and, therefore, the entire 50,000 square feet is not leaseable. *See id.*

¹¹ According to figures contained in the LaVine Appraisal, the income collected in 1989 was \$148,525 and that collected in 1990 was \$172,084. *See* Addenda to LaVine Appraisal.

<u>Expense</u>	<u>LaVine Appraisal</u>	<u>Mako Appraisal</u>	<u>Actual (through 1994)</u>
Utilities	\$ 30,000	\$ 35,000	\$ 12,566-38,500
Maintenance & Repair	\$ 25,000	\$ 24,000	\$ 15,553-36,926
Remodeling		\$ 12,000	\$ 1,553- 4,892
Trash & Snow Removal	\$ 5,400	\$ 7,500	\$ 1,325- 4,760
Real Estate Commissions	\$ 5,000	\$ 4,020-4,523	\$ 1,783- 18,783
Legal & Accounting	\$ 4,000	\$ 3,500	\$ 1,640- 10,540
Advertising	\$ 3,600	\$ 2,500-3,500	\$ 1,530- 4,267
On-site Mngt./Janitor	\$ 25,000	\$ 2,400	\$ 2,400
Management	\$ 11,829(5%*)	\$ 20,100-22,613(10%*) ¹²	\$36,000
Reserves	\$ 7,097 (3%*)	\$ 10,050-11,307(5%*)	
Misc./Office Supply		\$ 6,000-7,000	\$ 471- 1,330
Insurance	<u>\$ 14,600</u>	<u>\$ 13,365-19,500</u>	<u>\$ 6,495- 14,600</u>
	\$131,526	\$140,435-152,843	\$81,316-163,512

*of income

Based on the above, LaVine estimates NOI to be \$105,044; for all years, see LaVine Appraisal at 110; Mako estimates it to be \$33,530 for 1989-1992 and \$41,184 for 1993, when he decreases the vacancy and credit loss from 60% to 55% and increases the expenses from \$167,420 to \$184,941, See Mako appraised at 69-73.

The final stage of the analyses was to estimate the overall capitalization rates using the

¹² Mako acknowledges in his appraisal that typical management fees for commercial property range from 3-7% of gross income, See Mako Appraisal at 64.

band of investment technique.¹³ Both appraisers assume that an investor would seek a loan of 75% of the appraised value of the property and an amortized schedule of payments over 20 years. Mako assumes an interest rate of 10.0% for all years and estimates an annual constant for debt service to be 11.58%. Mako calculates the overall capitalization rate to be 11.19%.¹⁴

LaVine assumes an interest rate of 2% over prime, which he notes fluctuated over the years in question. He also assumes a 9% return on investment for July 1, 1989 and 1990, and an 8% return on investment return for 1991, 1992 and 1993. LaVine calculates the overall capitalization rate as follows:

July 1, 1989

$$\begin{array}{rcl} 75\% \text{ Mortgage @ } 14.05\% & = & 10.54\% \\ 25\% \text{ Equity @ } 9.00\% & = & \frac{2.25\%}{12.79\%} \end{array}$$

July 1, 1990

$$\begin{array}{rcl} 75\% \text{ Mortgage @ } 13.21\% & = & 9.91\% \\ 25\% \text{ Equity @ } 9\% & = & \frac{2.25\%}{12.16\%} \end{array}$$

July 1, 1991

$$\begin{array}{rcl} 75\% \text{ Mortgage @ } 11.98\% & = & 8.98\% \\ 25\% \text{ Equity @ } 8.00\% & = & \frac{2.00\%}{10.98\%} \end{array}$$

¹³ This method takes into account the rate of interest an investor would have to pay on a mortgage on the property and also receive a fair value on his/her equity investment. *See Ames No. 82 v. Board of Review of Village of Tupper Lake*, 173 A.D.2d 943, n.1, 569 N.Y.S.2d 818 (N.Y. App. Div. 1991).

¹⁴ Mako does not set forth his methodology in arriving at 11.19%. If the Court applies the methodology used by LaVine, the overall capitalization rate is 11.6% (75% X 11.58% plus 25% X 12% [return on investment]).

July 1, 1992

$$\begin{array}{r}
 75\% \text{ Mortgage @ } 10.04\% = 7.53\% \\
 25\% \text{ Equity @ } 8.00\% \quad = \underline{2.00\%} \\
 \hline
 9.53\%
 \end{array}$$

July 1, 1993

$$\begin{array}{r}
 75\% \text{ Mortgage @ } 10.04\% = 7.53\% \\
 25\% \text{ Equity @ } 8.00\% \quad = \underline{2.00\%} \\
 \hline
 9.53\%
 \end{array}$$

Both appraisers use the same equalization rate in their calculation of a tax factor for each of the years.¹⁵ However, with respect to the tax rates for the years in question, LaVine uses the tax rate for the City of Syracuse; whereas, Mako uses a “blended tax rate” based on the tax rate of both the City of Syracuse and the Town of Dewitt. Their calculated tax factors are as follows:

<u>Taxable Status Date</u>	<u>LaVine Tax Factor</u>	<u>Mako Tax Factor</u>
July 1, 1989	3.34%	3.36%
July 1, 1990	3.24%	3.23%
July 1, 1991	3.02%	3.03%
July 1, 1992	3.22%	3.28%
July 1, 1993	3.56%	3.67%

Adding the tax factors to the capitalization rates, the two appraisers calculate the following overall tax rates:

<u>Taxable Status Date</u>	<u>LaVine Overall Rate</u>	<u>Mako Overall Rate</u>
July 1, 1989	.1613	.1455
July 1, 1990	.1540	.1442
July 1, 1991	.1400	.1422
July 1, 1992	.1281	.1441

¹⁵ A tax rate factor is derived by multiplying the tax rate per thousand by the equalization rate and dividing the result by 1,000. The factor is then added to the capitalization rate and the combined percentage divided into net income. This approach is intended to correct any distortion of value that would otherwise occur if actual real property taxes were included as an expense. See *Senpikie Mall Co. v. Assessor*, 136 A.D.2d 19, 22, 525 N.Y.S.2d 104 (N.Y. App. Div. 1988).

July 1, 1993	.1320	.1478
--------------	-------	-------

Applying the above tax rates to the property as a whole, the two appraisers found the following indicated value for the entire complex located in both the City of Syracuse and the Town of Dewitt using the Income Capitalization Approach:

<u>Taxable Status Date</u>	<u>LaVine Indicated Value</u>	<u>Mako Indicated Value</u> ¹⁶
July 1, 1989	\$651,000	\$230,000
July 1, 1990	\$682,000	\$230,000
July 1, 1991	\$750,500	\$235,500
July 1, 1992	\$820,000	\$235,000
July 1, 1993	\$796,000	\$280,000

Based on both approaches to valuation, the conclusions of both appraisers may be summarized as follows:

LaVine's Value of the Entire Complex

<u>Taxable Status Date</u>	<u>Sales Comparison*</u>	<u>Income Capitalization</u>	<u>Reconciled</u>
July 1, 1989	\$778,000	\$651,000	\$750,000
July 1, 1990	\$778,000	\$682,000	\$750,000
July 1, 1991	\$778,000	\$750,500	\$775,000
July 1, 1992	\$778,000	\$820,000	\$800,000
July 1, 1993	\$778,000	\$796,000	\$780,000

Mako's Value of the Entire Complex

¹⁶ The City alleges that Mako failed to use the correct tax status dates for years 1990, 1992 and 1994 and asserts that Mako's valuations for those years should not be considered by the Court. Because Mako's appraisal covers the valuation of the entire complex, it appears that he has applied tax status dates for both the City and the Town of Dewitt, the latter apparently falling on March 1 of each year. A review of Mako's valuations convinces the Court that he has used the correct status dates using a somewhat inclusive approach. For example, he estimates the reconciled value of the Premises at \$195,000 for valuation dates of 3/1/89 to 7/1/90. Accordingly, he estimates the reconciled value of the Premises on 7/1/89 and 7/1/90 as \$195,000, thereby covering two tax status dates. See Mako Appraisal at 79.

<u>Taxable Status Date</u>	<u>Sales Comparison</u>	<u>Income Capitalization</u>	<u>Reconciled</u>
July 1, 1989	\$291,750	\$230,000	\$230,000
July 1, 1990	\$291,750	\$230,000	\$230,000
July 1, 1991	\$291,750	\$235,000	\$235,000
July 1, 1992	\$291,750	\$235,000	\$235,000
July 1, 1993	\$291,750	\$280,000	\$280,000

*based on 194,500 sq.ft. @ \$4.00/sq. foot

Based on the above calculations, the two appraisers conclude that the reconciled values of only the Premises are as follows:

<u>Taxable Status Date</u>	<u>LaVine's Reconciled Values**</u>	<u>Mako's Reconciled Values***</u>
July 1, 1989	\$637,500	\$195,000
July 1, 1990	\$637,500	\$195,000
July 1, 1991	\$658,000	\$200,000
July 1, 1992	\$680,000	\$200,000
July 1, 1993	\$663,000	\$235,000

** calculated as 85% of the reconciled value of the entire complex

*** based on breakdown of value apportioned between the City and the Town of Dewitt, see Mako Appraisal at 79.

DISCUSSION

Property is to be assessed for tax purposes on an annual basis according to its condition on the taxable date. *See Commerce Holding Corp. v. Board of Assessors*, 88 N.Y. 2d 724, 729, 67 N.E.2d 127, 649 N.Y.S.2d 932 (1996); *Stillwell Equipment Corp. v. Assessors for Town of Greenburgh*, 675 N.Y.S.2d 870 (N.Y. App. Div. 1998) (citations omitted). Property of no practical commercial value is to be excluded from the assessment. *See Syracuse Univ. v. Syracuse*, 83 A.D.2d 783, 783-84, 443 N.Y.S.2d 463 (N.Y. App. Div. 1981); *McCrary Corp. v.*

Srogi, 101 A.D. 2d 696, 476 N.Y.S.2d 37 (N.Y. App. Div. 1984). There is a presumption that the assessment made by the taxing authority is valid and it is the Debtor's burden, in this case, to establish "by substantial evidence that the assessments are excessive." *Matter of Adirondack Mountain Reserve v. Board of Assessors*, 99 A.D.2d 600, 601, 471 N.Y.S.2d 703 (N.Y. App. Div.), *aff'd* 64 N.Y.2d 727, 475 N.E.2d 115, 485 N.Y.S.2d 744 (1984); *see also South Slope Holding Corp. v. Board of Assessment Review*, 244 A.D.2d 891, 665 N.Y.S.2d 147 (N.Y. App. Div. 1997) (citations omitted) (indicating that assessments are presumptively valid).

The determination of the full value of the property is a question of fact. *See W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 510, 420 N.E.2d 953, 43 N.Y.S.2d 761 (1981). It is noteworthy that in both instances, the appraisers' estimates of the value of the Premises fall far short of the prior assessments for which the Debtor seeks reconsideration:

<u>Taxable Status Date</u>	<u>Prior Assessments</u>	<u>LaVine's Reconciled Value</u>	<u>Mako's Reconciled Value</u>
July 1, 1989	\$1,063,150	\$637,000	\$195,000
July 1, 1990	\$1,171,253	\$637,500	\$195,000
July 1, 1991	\$1,385,171	\$658,000	\$200,000
July 1, 1992	\$1,376,460	\$680,000	\$200,000
July 1, 1993	\$1,337,991	\$663,000	\$235,000

Since as a matter of law the assessment may not exceed the full value of the property, *see Commerce Holding*, 88 N.Y.2d at 729, it would appear that the Debtor has succeeded in its request for a reduction in its assessments based on the valuation of the City's appraiser. However, it is also necessary for the Court to consider whether it is appropriate to further reduce the assessments based on the values estimated by the Debtor's appraiser. It is evident from a review of the figures that the two appraisers take a rather divergent view of the value of the Premises during the periods in question.

Sales Comparison Approaches

The Court has examined both appraisals with particular attention to the arguments made by the Debtor in its memorandum of law in which it raises a number of issues. For instance, the Debtor focuses the Court's attention on the comparables utilized by LaVine in estimating the land value of the Premises. The Debtor is particularly concerned by LaVine's failure to make adjustments for location on four of five comparables. LaVine did make a 10% downward adjustment on Parcel #4 based on its size but makes no adjustment for the fact that it is located in a business park and is zoned "planned development" rather than simply industrial. With respect to Sale #2, sold as a vacant lot by the Debtor to Eastside Serenity Inc. in January 1990, LaVine makes a 20% adjustment for size given that the lot is comprised of only 1.1 acres and is much smaller than the 7.7 acres of the Premises. The Debtor contends that further downward adjustments should be made as it was "purchased with special conditions and 100% financing" by the Debtor. There was no testimony to indicate the nature of said conditions in order for the Court to determine whether further downward adjustment is appropriate. However, as discussed previously, the Court has made certain adjustments in the price of Parcel #2 based on the inaccuracy in LaVine's appraisal with respect to the purchase price, which he indicates was \$75,000 and the evidence supports the fact that it was actually \$71,000.

Mako concludes that the value of the Premises, if vacant land, was \$19,000/acre for the periods in question. Yet, the newspaper article included in his report makes it clear that less than \$20,000 per acre "is well below the market value" of such property at least as of December 1994, which admittedly is beyond the periods at issue but, having been cited by the Debtor's appraiser, requires at least some consideration by the Court. The same article indicates that vacant land

adjacent to the Premises was being marketed at \$35,000/acre at that time. Admittedly, Mako presents several comparables with adjusted values of less than \$20,000/acre but three of those are located in Clay, New York, approximately 15 miles from the Premises. Also, the Court takes note of the fact that Mako makes two downward adjustments of 20% each for location with respect to Sale L-5. If a single adjustment for location of 20% were to have been made, the adjusted sale price would have been \$31,548. The Court does find merit in Debtor's argument that the Premises have limited road frontage and that only a single waterline services the five parcels. Since "the assessment of property value for tax purposes must take into account any factor affecting a property's marketability . . .", see *Commerce Holding*, 88 N.Y.2d at 729, the Court concurs that a downward adjustment is warranted based on both conditions. The Court concludes, based on the evidence before it, that \$30,000/acre is a reasonable value for the Premises as vacant land, and the overall value of the 7.7 acres is estimated to be \$231,000.

The Debtor raises questions regarding LaVine's choice of comparables in analyzing the value of the Premises "as improved." Debtor suggests that "[i]t is not possible that a parcel zoned industrial with no street frontage, is comparable in location without adjustment" to three of those examined by LaVine, namely Prop. # 3, 5 and 7. In those three instances, LaVine makes adjustments, ranging from -20% to - 45%, only for the size of the buildings and their physical condition. The Court finds it reasonable that there be a downward adjustment for the lack of road frontage of 10% in those cases, resulting in adjusted sales of \$5.25, \$7.35 and \$5.59/square foot, respectively. LaVine's only adjustment for Prop. #1, which was previously part of the property originally purchased by the Debtor, is with respect to its size. However, Basile testified that the particular building was in good to excellent condition after the investment of more than \$90,000

in renovations prior to its sale. *See* Tr. at 11. A downward adjustment of 10% for the physical condition of Prop. #1, as compared to the Premises, results in an adjusted sales price of \$3.54/square foot. The Court also notes that Prop. #6, with an adjusted value of \$6.60/square foot, is zoned “Business” and Prop. #9, with an adjusted value of \$8.81/square foot, is zoned “Commercial”, rather than “Industrial” as is the case with the Premises and, therefore, those two comparables will be given less weight by the Court in considering LaVine’s analysis. LaVine’s comparables, as adjusted by the Court, range in adjusted price from \$3.43 to \$8.98/square foot, which still comports with his conclusion that the market value of the Premises, including land and buildings, is \$4.00/square foot.

Mako considers five parcels of improved properties in his appraisal. The Court finds it inappropriate to consider Sales P-1, P-2 and P-4 for purposes of this decision because those sales occurred subsequent to the period of assessment under consideration. Sale P-3, which apparently is located in close proximity to the Premises, was sold in December 1988 for \$325,000, or approximately \$1.55/square foot. However, Mako indicates that there was PCB and asbestos contamination on the property and approximately \$1 million was spent in renovating the facility after its purchase. Mako’s only adjustments are downward with respect to site size and building condition, the latter of which he deems superior to that of the Premises. While acknowledging an environmental problem, he makes no upward adjustment for the fact that the Premises apparently have no environmental problems. Yet, it is clear that environmental contamination is relevant to property tax assessment and should be considered. *See Commerce Holding*, 88 N.Y. at 729. Therefore, the Court finds that the only comparable utilized by Mako in this portion of his Sales Comparison Approach which it finds reasonable to consider is that of the property

located at 222 Teall Avenue, which is also a site which LaVine includes in his analysis. A comparison of their findings is as follows:

	<u>Mako's Adjustments</u>	<u>LaVine's Adjustments</u>
Price/square foot	\$7.63	\$7.99
Adjustment for location	- 10%	
Adjustment for building size	- 20%	- 10%
Adjustment for building condition	- 30%	- 10%
Adjustment for partial occupancy	- 5%	
Adjusted price/square foot	\$2.67	\$6.39

Upon review of the both appraisals and the testimony at the hearing, the Court accepts Mako's adjustments for location and building size, but feels that a 20% adjustment (the average of the two appraisers) is appropriate with respect to building condition. The Court finds nothing to support an adjustment of 5% for partial occupancy. Accordingly, the Court estimates the adjusted price for the property located at 222 Teall Avenue to be \$3.90 ($\$7.81^{17} - (50\% \times \$7.81)$) 1 square foot.

Based on the evidence presented, the Court finds that \$4.00/square foot is a reasonable value for the Premises and accepts LaVine's estimate of the value of the Premises with improvements of \$661,500.

Income Capitalization Approach

The Debtor takes exception to certain assumptions made by LaVine in applying the Income Capitalization Approach. For example, the Debtor takes the position that approximately 50,000 square feet of warehouse space in Building F is unleaseable due to its poor condition and,

¹⁷ There was no evidence presented to explain the discrepancy in the price/square foot for the property at 222 Teall Avenue. Therefore, the Court deems it appropriate to average the figures used by the two appraisers for purposes of reconciling the adjusted price.

therefore, only approximately 14,000 square feet in office space located in Building F should be considered. The Debtor generated between \$21,410 in 1989 and \$54,398 in 1993 from the rental of Building F. There was no evidence that the income was derived exclusively from the lease of the office space. Furthermore, Debtor's own appraiser indicates that only 50 to 75% of the warehouse space in Building F was unleaseable, not 100% as Debtor contends. *See Mako Appraisal* at 31. Therefore, the Court accepts LaVine's contention that only 25,000 square feet is unleaseable.

Debtor would have the Court exclude Building E in any valuation of the Premises and states in its memorandum of law that both appraisers agree that approximately 15,000 square feet cannot be rented. LaVine's summary of valuation using the Income Capitalization Approach indicates that he excluded Building G's 11,792 square feet and 25,000 square feet of Building F. No mention is made of excluding Building E. In fact, he testified that he felt Building E, comprised of a total of 48,469 square feet, was leaseable if repairs were made at "nominal expense." *See Tr.* at 147.

A review of the leases of the Premises reveals that portions of Building E were leased by the Debtor during the periods in question and that rents were generated between 1989 and 1993 which ranged from \$4,800/year to \$29,200/year. If one calculated the income from the entire 48,469 square feet using LaVine's figure of \$2.00/square foot and a 25% vacancy rate, estimated rents total \$72,703/year, which far exceeds those actually generated in any single year at issue. While LaVine suggests that the expense to the Debtor in repairing Building E would be minimal, the fact of the matter is that in assessing property for tax purposes it is the condition of the property on the taxable status date which is relevant, "without regard to future potentialities or

possibilities” *Matter of Addis Co. v. Srogi*, 79 A.D. 2d 856, 857 (N.Y. App.Div. 1980).

The Court finds it reasonable that 15,000 square feet of 48,469 square feet of Building E be considered unleaseable and, therefore, that no income was generated from that portion of it for purposes of calculating the value of the Premises.

The Debtor argues that the actual rents collected are the best data to be used in applying the Income Capitalization Approach. Yet, his own appraiser admits that while he examined the total income for each building and for the property as a whole, he stabilized the income based on the market rents of comparable properties and a review of the subject rent in arriving at an estimated income figure because of the manner in which the actual rents fluctuated over the years. *See* Tr. at 99-100. Mako estimates that there was \$502,500 in potential rents to be generated based on 60,000 square feet of office space at \$5.00/square foot and 135,000 square feet of warehouse space at \$1.50/square foot, less 60% vacancy and credit loss for all years but July 1, 1993, when he applied at 55% vacancy and credit loss. He calculates EGI of \$201,000 for 1989-1992 taxable status dates and \$226,125 for 1993. LaVine, on the other hand, calculates an EGI of \$236,570 for all years based on 157,713 square feet in leaseable space at \$2.00/square foot and a vacancy and credit loss rate of 25%. However, given that the Court has determined that 15,000 square feet of Building E is unleaseable, LaVine’s EGI should be reduced from \$236,570 to \$214,070, which is more in line with the EGI applied by Mako, namely \$201,000 for 1989-1992 and \$226,124 for 1993.

In examining the expenses utilized by both appraisers in calculating NOI, the Court notes that LaVine estimates expenses of \$131,526. Mako, on the other hand, has a range of expenses between \$140,435 and \$152,843. Although Mako indicates that his expense figures exceed the

actual expenses in order to account for the higher income figures he has estimated, the Court believes a reduction in Mako's expenses is appropriate in the category of "Remodeling" and "Trash and Snow Removal." Mako estimates \$12,000 in remodeling but the actual expenses range between \$1,553-4,892. So too the cost of trash and snow removal between 1989 and 1993 varies from \$1,325-4,760/year, making Mako's figure of \$7,500 inappropriate in the view of the Court. This decreases expenses to a range of approximately 120,707-133,475. LaVine's estimate of \$131,526 is certainly well within this range.

Mako estimates a management fee on the basis of 10% of income; whereas, LaVine applies a 5% rate. Mako himself acknowledges that normally management fees range between 3 and 7% but felt it appropriate to apply 10% to the Premises. Mako's higher rate appears offset by LaVine's inclusion of an on-site manager at an annual salary of \$25,000 versus Mako's inclusion of a janitor at an annual salary of \$2,400. If one combines the expense categories for on-site management/janitor, management and reserves, the expenses total \$43,926 using LaVine's figures and \$32,550-36,320 using Mako's figures. Thus, LaVine's figures actually favor the Debtor as they result in a lower NOI. The Court finds that the expenses applied by LaVine are appropriate for purposes of calculating NOI under the circumstances.

The Debtor does not question the overall tax rates utilized by LaVine. Mako's range from 14.22-14.78%; whereas LaVine's range between 12.81% and 16.13%, with the higher rates favoring the Debtor in that it reduces the calculated value of the Premises. The Court finds credibility in the fact that LaVine considered the fluctuation of interest rates over the years in question in calculating his overall capitalization rates which form the basis for his tax factors, rather than applying a single interest rate for all years as Mako does. Accordingly, the Court will

apply LaVine's overall tax rates in calculating an adjusted value of the entire property using the Income Capitalization Approach, assuming \$82,544 in NOI (\$214,070 EGI - \$131,526 Expenses). Applying similar rates as originally evidenced by LaVine's reconciled values,¹⁸ the Court calculates the following values for the entire property:

<u>Taxable Status Date</u>	<u>Sales Comparison</u>	<u>Adjusted Income Capitalization</u>	<u>Reconciled Values</u>
July 1, 1989	\$778,000	\$511,742	\$675,000
July 1, 1990	\$778,000	\$536,000	\$675,000
July 1, 1991	\$778,000	\$589,000	\$690,000
July 1, 1992	\$778,000	\$644,372	\$710,000
July 1, 1993	\$778,000	\$625,333	\$700,000

Applying the above amounts to the Premises on the same assumption as LaVine that the Premises comprise 85% of the entire complex owned by the Debtor, the Court determines the following values for purposes of calculating the assessments on the Premises:

<u>Taxable Status Date</u>	<u>Value of the Premises</u>
July 1, 1989	\$573,750
July 1, 1990	\$573,750
July 1, 1991	\$586,500
July 1, 1992	\$603,500
July 1, 1993	\$595,000

The Debtor has failed to provide sufficient evidence that would convince the Court to reduce the value of the Premises to the levels suggested by Mako.

IT IS SO ORDERED.

¹⁸ For example, LaVine estimated a value for the entire property as of July 1, 1989, of \$778,000 using the Sales Comparison Method and a value of \$651,000 using the Income Capitalization Method, which he then reconciled to a value of \$750,00. In order to approximate LaVine's reconciled values, the Court added the two values, \$778,000 and \$651,000 and determined that to arrive at \$750,000, one needed to divide the sum of the two values by 1.905. This figure changed for each year from 1.947, to 1.972, to 1.998, to 2.018, respectively.

Dated at Utica, New York

this 2nd day of October

STEHEN D. GERLING
Chief U.S. Bankruptcy Judge