2016 WL 4191857 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

RITE AID CORPORATION, Petitioner,
v.
Terie HUSEBY, Assessor and Board of Assessment Review of Town of Irondequoit, Respondents.
Rite Aid Corporation, Petitioner,
v.
Stephen Haywood, Assessor and Board of Assessment Review of Town of Williamson, Wayne County, Respondents.

No. 16-36.
August 5, 2016.

On Petition for a Writ of Certiorari to the State of New York, Appellate Division, Fourth Judicial Department

Brief In Opposition for Respondents Stephen Haywood, Assessor and Board of Assessment Review of Town of Williamson, Wayne County

E. Stewart Jones, Jr., E. Stewart Jones Hacker Murphy LLP, 28 Second Street, Troy, New York 12180, (518) 274-5820, esjones@joneshaeker.com, for respondents Stephen Haywood, Assessor and Board of Assessment Review of Town of Williamson, Wayne County.

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***1** COUNTERSTATEMENT OF THE CASE

New York State law requires that property be assessed based upon its fair market value, which the courts have ruled is best reflected by the actual lease rate or sale price of the subject property or, alternatively, the same information derived from comparable properties. The outcome in this case depends upon which submarket presents transactions of comparable properties that most accurately reflect the fair market value of a Rite Aid drugstore. Based on an Equal Protection claim that has not been raised at any point before in this case, petitioner seeks review of a decision by New York's mid-level appeals court that relied on the lease rates and verified actual sales prices of the subject drugstore and other properties in the submarket of national chain net lease drugstores.

The appraisers for both petitioner and respondents identified and acknowledged this submarket. The three types of participants in this submarket are the contractors who build the drugstores; the chain drugstores who select the site, set the building specifications and lease the property; and the investors/owners who acquire the properties after they are built. All three types of participants are sophisticated real estate operators, each acting in their own best interest to strike the best deal possible for themselves.

All three national chain drugstores - Walgreens, CVS and Rite Aid - acquire their properties in the same "build to suit" manner. Each enters into an agreement with a contractor whereby they pay rent based upon the costs the contractor incurs to acquire the site and construct the drugstore to the chain's specifications. As with the subject ***2** property, these sites are located at signaled intersections, i.e., higher profile corners in each town or city. These locations ensure high traffic counts, functionality for parking and maximum exposure. Once the sites are fully constructed, the contractor often sells the property to the owner who acquires it subject to the lease entered into between the contractor and national chain drugstore. Both appraisers agreed all of these transactions meet the definition for arm's length sales or leases and fall in the same range of lease rates and sale prices as the other national chain drugstores.

The New York State Appellate Division, Fourth Department, noted that "there is no serious dispute that the submarket identified and relied upon by respondents' expert exists, and sales and rental data for that submarket are readily available." *Rite Aid Corp. v. Haywood,* 130 A.D.3d 1510, 1513 [4th Dep't 2015]. This conclusion was based upon the agreement of petitioner's expert that there is a whole separate, national, net lease drugstore real estate submarket, and upon respondents' expert's reliance upon transactions from that submarket. *Id.* Petitioner's expert stated that the sales and leases for these national chain drugstores were in line with each other, including the subject. As such, petitioner's Petition for a Writ of Certiorari to this Court rests upon the faulty assertion that the rents and sales of national chain drugstores exceed the market norms for those properties. They do not.

Under New York law, the Appellate Division relied on the undisputed submarket for national chain net lease drugstores in finding that transactions from that submarket should be applied to determine the fair ***3** market value of the subject property and, ultimately, the correctness of the assessment. As a result, national chain drugstores pay taxes based upon the prices at which their properties are bought, sold and leased. This places them on the same footing with taxpayers of other types of properties who are similarly assessed based upon the market value of properties from their respective portion or submarket for real estate. The current Petition presents no scheme of unfair assessment, let alone one that implicates the Equal Protection Clause, even if the argument had been preserved. As such, respondents Town of Williamson, *et al.* respectfully request that the Petition be denied.

REASONS FOR DENYING THE PETITION

I. Petitioner's Equal Protection Clause Claim is Unpreserved

In general, federal appellate courts, including this Honorable Court do not consider issues not presented to the courts below. *Exxon Shipping Co. v. Baker,* 554 U.S. 471,487 [2008], *quoting Singleton v. Wulff,* 428 U.S. 106, 120 [1976]. There are certain exceptions to this rule, but these are left to the sound discretion of the Court, to be exercised with regard to the facts of individual cases. Nevertheless, "precedent generally counsels against entertaining arguments not presented to the district court." *Golden Bridge Tech., Inc. v. Nokia, Inc.,* 527 F.3d 1318, 1322 [Fed. Cir. 2008], *citing Sage Prods., Inc. v. Devon Indus., Inc.,* 126 F.3d 1420, 1426 [Fed. Cir. 2007] ["In short, this Court does not 'review' that which was not presented to the district court."]; *Romain v. Shear,* 799 F.2d 1416, 1419 [9th Cir. 1986]. The petitioner bears the ***4** "burden of showing that the issue was properly presented" to the court(s) from which review is sought. *Adams v. Robertson,* 520 U.S. 83, 86 [1997].

Although the rule of preservation, as it is typically articulated, applies to Supreme or Circuit Court review of federal cases, this Court, in *Walters v. City of St. Louis, Mo.,* declined to "undertake to review what the [state supreme] court below did not decide." *Walters v. City of St. Louis, Mo.,* 347 U.S. 231, 233 [1954]. This is a rule of long standing. *See Quimby v. Boyd,* 128 U.S. 488, 489 [1888] [holding that it was too late for the Supreme Court to make a ruling, on appeal, regarding the dimensions of a mining lode, when that issue was not put before either the trial or supreme court of Colorado]; *First Nat. Bank v. Commonwealth of Kentucky,* 76 U.S. 353, 363-64 [1869]. In *Walters v. City of St. Louis, Mo.,* the appellant wage earners in the City of St. Louis challenged a municipal income tax ordinance that excised the gross salary and wages of those employed by others, but only taxed the net profits of self-employed individuals. *Walters,* 347 U.S. at 232. The appellants claimed, in state court, that the ordinance violated both the Due Process and Equal Protection clauses of the Fourteenth Amendment. *Id*. These claims were ultimately denied by the Supreme Court of Missouri, that state's court of last resort, but because the Missouri Supreme Court passed final judgment on these issues, this Court granted review of those issues. *Id*. However, this Court declined to grant review on several other issues that the appellants attempted to raise on review, but

upon which the Missouri Supreme Court had not passed judgment. *Id*. at 233-34.

***5** This Court's jurisprudence does not forbid outright appellate review of issues not presented in lower courts, and appellate courts have entertained unpreserved issues in certain very limited circumstances. *U.S. v. U.S. Dist. Court for S. Dist. of California,* 384 F.3d 1202, 1205 [9th Cir. 2004]. *See Mhany Management, Inc. v. County of Nassau,* 819 F.3d 581, 615 [2d Cir. 2016] [permitting review to prevent "manifest injustice" or where no further fact finding was necessary]; *see Romain,* 799 F.2d at 1419 [identifying similar criteria, but further allowing appellate review of unpreserved issues where there has been a change in the law during the pendency of the action]; *see also Hormel v. Heverling,* 312 U.S. 552, 557 [1941]. Even when one of these circumstances is present, appellate review is rarely granted when the party seeking review cannot justify its failure to present all of its arguments to the court below. *Mhany Management, Inc.*, 819 F.3d at 615; *In re Nortel Networks Corp. Securities Litigation,* 539 F.3d 129, 133 [2d Cir. 2008].

In *U.S. v. Keshner v. Nursing Personnel Home Care,* appellants attempted to argue, for the first time on appeal, that appellee's attorney improperly sought attorney's fees in a federal case for work performed in a related state court matter. 794 F.3d 232, 234 [2d Cir. 2015]. Reasoning that the appellant had "numerous opportunities" to raise its new argument in lower courts, the Second Circuit declined to hear the argument. Id Similarly, the Ninth Circuit refused to exercise its discretion in *Romain v. Shear,* in which the appellant attempted to advance, newly upon appeal, several arguments as to why his termination from the Department of Transportation was illegal. *Romain,* 799 F.2d at 1417-19. Declining to hear appellant's new arguments, the Court found nothing "exceptional" ***6** about his case, pointed out that no laws had changed in his favor during the pendency of the appeal, and identified several relevant issues of fact upon which the district court had made no findings, such as whether the appellant had properly filed his notice of intent to sue on the grounds now at issue. *Id*. at 1419-1420.

The question whether net lease national chain drugstores constitute a submarket was well-developed at trial, and briefed to the trial, mid-level appeals court and the New York Court of Appeals - five separate submissions. At no time did petitioner claim that searching the undisputed submarket for comparable properties created a violation of the Equal Protection Clause.

Plainly, in this light, the petitioner in the present case never presented nor preserved for appeal in any New York State court an Equal Protection claim.

II. New York Law Requires Property be Valued from the Applicable Market on the Taxable Status Date, not how it may be Repurposed in the Future

New York Courts are guided by the ultimate purpose of a challenge to a real property tax assessment, which is to "arrive at a fair and realistic value of the property involved so that all property owners contribute equitably to the public fisc." *Matter of Allied Corp. v. Town of Camillus,* 80 N.Y.2d 351, 356 [1992]; *FMC Corp. v. Unmack,* 92 N.Y.2d 179, 192 [1988]. Assessing a property based upon the actual prices and rents paid for them and other properties in their respective submarket comports well with this State policy. By contrast, in this case, Rite Aid insists that its property should be assessed for $1.0- ***7** 1.1 million, which is less than the $1.6 million spent for the land alone before constructing the store, and ignores the $3.5-$4.5 million sales prices for such drugstores in favor of speculative alternate uses for the properties that may arise years from now if Rite Aid later abandons the property.

Under §302(1) of the New York Real Property Tax Law, "the taxable status of real property in the cities and towns shall be determined annually according to its condition or ownership as of the first day of March, and the valuation thereof determined as of the applicable valuation date." RPTL §302(1) [McKinneys 2016]. This means that real property is valued and assessed for tax purposes based on its condition and ownership on the taxable status date, without regard to future uses, and may not be valued or assessed on the basis of some future use. *General Electric Co. v. Assessor of the Town of Rotterdam,* 54 A.D.3d 469, 474 [3d Dep't 2008]; *Matter of Ross v. Town of Santa Clara,* 266 A.D.2d 678, 680 [3d Dep't 1999]. Under New York law, courts are required to consider the property's occupancy and its market. In this case, the subject Rite Aid was admittedly part of the submarket for national net lease chain drugstores for which submarket its rental rates and sale prices fall in line with those of other upstate New York properties in the same submarket.

By valuing property according to its actual condition and ownership, the owners of property may reliably predict their tax

burdens when the market values of their properties are based upon the results of their own arm's length negotiations with similarly sophisticated parties. When a national chain drugstore negotiates its leases ***8** with developers, they strive to pay as little as they can in the same way that contractors seek to extract maximum payment to reward their efforts. When those leases are finalized, the contractor is free to remain as the landlord or to sell the property subject to a lease similar to other national chain drugstores in upstate New York for the maximum amount that they may realize. The purchaser of the property also, no doubt, seeks to pay the smallest price possible.

Transactions such as these occur daily for all types of commercial properties, from strip shopping centers to suburban office complexes to single tenant national chain net lease drugstores. In each instance, the fair market value is best measured by the actual sale or lease of the subject property with comparison to the segment of the market in which the property participates. As such, the foundation for the current Petition goes lacking - the leases and sales of national net lease chain drugstores do not exceed the actual market norms for such properties.

*9 CONCLUSION

There is no unfair treatment of petitioner's assessment, let alone one that implicates the Equal Protection Clause. Thus, even if this uniquely State-based legal question had been preserved, it would not warrant review by this Court.

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