2016 WL 4191754 (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 4, 2016.

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

Brief in Opposition for Respondents Terie Huseby, Assessor and Board of Assessment Review of Town of Irondequoit

Thomas A. Fink, Esq., Davidson Fink, LLP, 28 East Main Street, Suite 1700, Rochester, New York 14614, (585) 546-6448, tfink@davidsonfink.com, for respondents Terie Huseby, Assessor and Board of Assessment, Review of Town of Irondequoit.

***i** COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review Petitioner's claim alleging a violation of the Fourteenth Amendment Equal Protection Clause where Petitioner failed to properly present this claim to the state courts and the state courts failed to decide this issue.

2. Whether Petitioner has set forth any evidence that the laws of New York governing the assessment of real property violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the New York Appellate Division, Fourth Judicial Department, in deciding to dismiss Petitioner's claim, employed a standard that denied Petitioner equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution.

***ii** PARTIES TO THE PROCEEDING

The description of Rite Aid Corporation set forth at page ii of the Petition is accurate. Terie Huseby is the Assessor of the Town of Irondequoit, duly appointed by the Town Board of the Town of Irondequoit. The Board of Assessment Review of the Town of Irondequoit is a volunteer citizen board appointed by the Town Board of the Town of Irondequoit to review grievances. There are no corporate parents of Respondents and Respondents are not publicly traded.

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*1 CITATIONS TO OPINIONS BELOW

The list of lower court citations set forth at page one of the Petition is correct.

COUNTER-STATEMENT OF JURISDICTION

The procedural history of the case appearing at page one of the Petition is correct. However, Respondents Terie Huseby, assessor, and Board of Assessment Review of Town of Irondequoit submit that this Court does not have federal question jurisdiction under 28 U.S.C. § 1257(a). Respondents submit that the purported federal question posed in the Petition for Writ of Certiorari did not arise in the record below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 (Equal Protection Clause) of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

***2** Article I, section 11 of the New York Constitution states:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Article XVI, section 2 of the New York Constitution states: "The legislature shall provide for the supervision, review and equalization of assessments for purposes of taxation. Assessments shall in no case exceed full value."

COUNTER-STATEMENT OF THE CASE

The underlying dispute relates to an assessment of certain real property located at 689 East Ridge Road in the Town of Irondequoit, State of New York. The subject property is located at the intersection of Hudson Avenue and East Ridge Road in the Town of Irondequoit. Both roads have high-density traffic. Prior to the development of the building presently occupied by Petitioner, the property was occupied by a Carvel ice cream store. The main parcel was purchased by Benderson Corporation ("Benderson") in or around 2001 for $1,250,000.00. Thereafter, Benderson, a major developer in Western New York, constructed a new building. The new building featured a drive-thru window, high ceilings, and other architectural requirements of Eckerd Corporation, the original tenant. Construction costs were estimated to be in the range of $2,000,000.00. Prior to the commencement of ***3** construction, Benderson entered into a 20-year lease with Eckerd Corporation. Construction was completed by May 13, 2002. Benderson continued to act as landlord for five years after construction was completed. On November 23, 2005, Benderson sold the property to Inland Western New York Portfolio ("Inland"), a major real estate company, for $4,903,183.00. Subsequently, Eckerd Corporation merged with petitioner Rite Aid Corporation, which obtained ownership of the subject property. Rite Aid continues to rent the property under Eckerd Corporation's 20-year lease. At trial, both appraisers testified that the sale between Benderson and Inland was a market sale.

In accordance with New York State assessment procedures, for the 2008 tax year, Inland, as owner of the property, and Petitioner, as tenant, were issued an assessment for $3,650,000.00 by respondent Terie Huseby, as Assessor of the Town of Irondequoit. In May 2008, Petitioner, acting under a provision in their lease, filed a grievance and commenced tax certiorari proceedings requesting that respondent Board of Assessment Review of the Town of Irondequoit (hereinafter, the "Board") reduce its assessment to $1,490,000.00. The Board is a voluntary board appointed to review the grievances of taxpayers who believe that their taxes are not set at fair market value. The Board declined to reduce the assessment. In July 2008, Petitioner filed a challenge, as enumerated in Article 7 of the New York Real Property Tax Law. Petitioner continued to file grievances and commence separate legal proceedings under Article 7 for each subsequent year, through and including the 2013 tax year. Around this time, both Petitioner and Respondents each commissioned an appraisal from a New York State licensed appraiser as to the fair market value of the property.

***4** In 2013, Rite Aid's Article 7 grievances were tried in the New York State Supreme Court for Monroe County. A decision was entered in favor of the Petitioner. (Petitioner's Appendix G). In its analysis, the trial court found that, in determining the proper market value, it could not consider the recent sale of the property nor would it consider the income produced by the Rite Aid lease. (Petitioner's Appendix G, pp. 40a-42a). Instead, the court relied upon data from comparable sales submitted by Petitioner's appraiser and rentals of properties not occupied by a major drugstore chain.

Respondents appealed the trial court decisions. On appeal, the New York Appellate Division, Fourth Judicial Department (hereinafter, the "Fourth Department") reversed the trial court. The Fourth Department dismissed the petition of petitioner Rite Aid on the grounds that the fair market value of the property, based on the sale between Benderson and Inland, was at least equal to the assessment set by the Assessor of the Town of Irondequoit. (Petitioner's Appendix A, p. 9a). The court also found that the actual rentals were at market rate and, therefore, must be utilized in an evaluation of fair market value. (Petitioner's Appendix A, pp. 9a-10a).

Petitioner then submitted an application to the Fourth Department to appeal to the New York Court of Appeals. This application was denied. (Petitioner's Appendix C). Petitioner then submitted an application to appeal the decision directly to

the New York Court of Appeals, which also was denied. (Petitioner's Appendix E). Finally, Petitioner filed a Motion to Reargue with the New York Court of Appeals, which was denied. (Petitioner's Appendix I).

*5 REASONS FOR DENYING THE PETITION

As an initial matter, it is inappropriate for Petitioner to waste this Court's valuable time on its claim that it was denied equal protection under the law when at no time did Petitioner bring such issue before the trial court, the appellate court reviewing the trial court's decision, or in its application to New York's highest court. The methodology adopted by New York State to determine how property should be assessed so as to ensure the property owner pays its fair share of taxes does not violate the Equal Protection Clause of the United States Constitution. Petitioner has failed to demonstrate that the manner in which New York's laws are implemented by the courts of New York State discriminate against drugstore companies such as Rite Aid and deny them equal protection under the law. As a result, Petitioner has not met its burden of demonstrating any compelling reason for the instant Petition to be granted. *See* Sup. Ct. R. 10.

I. THE FEDERAL QUESTION POSED BY PETITIONER WAS NOT PROPERLY PRESENTED AND PRESERVED IN THE STATE COURTS.

Petitioner, in its presentations to the trial court (Petitioner's Appendix G) and Fourth Department (Petitioner's Appendix A), as well as its applications to the New York Court of Appeals (Petitioner's Appendices C, E, and I) fails to allege any violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution or to its counterpart in the New York Constitution. As a result, Petitioner's claim that the application of different methods of taxation to national ***6** drugstores violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is not properly before this Court as it was not properly presented to the Fourth Department or New York Court of Appeals. Accordingly, this Court should not grant Petitioner's petition for certiorari.

Pursuant to 28 U.S.C. § 1257(a), this Court will only review a final judgment of a state court if the record as a whole shows that the federal claim was adequately presented in the state system. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550 (1987). In its state court petition, the petitioner must have clearly cited either the federal source of law on which it relies or a case deciding its claim on federal grounds. *See Howell v. Mississippi,* 543 U.S. 440, 443-45 (2005); *Adams v. Robertson,* 520 U.S. 83, 89 (1997). Under 28 U.S.C. § 1257(a) "and its predecessors, the Supreme Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision the Supreme Court has been asked to review.' " *Howell,* 543 U.S. at 443 (quoting *Adams,* 520 U.S. at 86); *see Regents of the Univ. of Cal. v. Bakke,* 438 U.S. 265,283 (1978); *Tacon v. Arizona,* 410 U.S. 351, 352 (1973); *Moore v. Illinois,* 408 U.S. 786, 799 (1972); *Stanley v. Illinois,* 405 U.S. 645, 658 n.10 (1972); *Hill v. California,* 401 U.S. 797, 805 (1971); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969) ("The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions."). Further, in cases where a state constitution contains counterpart provisions to the federal constitution, a petitioner must demonstrate that it clearly invoked the federal provision in state court, or else the state court will be viewed as having considered the ***7** constitutional challenge to be based in the state constitution. *See Webb v. Webb,* 451 U.S. 493, 496-98 (1981).

In the instant case, Petitioner failed to cite the Fourteenth Amendment to the United States Constitution as a basis for a federal claim in the lower state courts or in its application to the New York Court of Appeals. In fact, Petitioner did not allege any express violation of its rights as protected by the Fourteenth Amendment to the United States Constitution. Further, Petitioner failed to allege a violation of article I, section 11 to the Constitution of the State of New York, entitled "Equal Protection of Laws," which provides:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

N.Y. Const. art. I, § 11. Petitioner's pleadings and other filings contained no reference to the Fourteenth Amendment to the United States Constitution or to its counterpart in the New York Constitution. In addition, none of the lower courts mentioned or discussed the Fourteenth Amendment to the United States Constitution, or even the term "equal protection," in their orders. (Petitioner's Appendices A, C, E, G, and I). As this Court stated in *Adams v. Robertson:*

> When the highest state court is silent on a federal question before [the Supreme Court of the United States], [this Court] assume[s] that the issue was not properly presented … and the ***8** aggrieved party bears the burden of defeating this assumption … by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented.

520 U.S. at 86-87 (internal citations omitted) (internal quotation marks omitted).

The federal question asserted by Petitioner, therefore, has not been properly preserved as it was not raised and argued below. The lower courts did not pass on the merits of the federal question presented in Petitioner's petition herein because Petitioner has not previously raised this issue. In the interest of fairness:

> [O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556 (1941). Petitioner cannot raise new arguments in its petition for certiorari to the Supreme Court of the United States.

Since Petitioner's federal question was raised for the first time in its petition for certiorari, this Court should refuse to consider the argument and deny Petitioner's petition for certiorari.

***9 II. THE LEGISLATIVE STRUCTURE CREATED BY NEW YORK STATE ESTABLISHING THE BASIS UPON WHICH REAL PROPERTY TAXES ARE DETERMINED IS REASONABLE AND DOES NOT VIOLATE THE NEW YORK STATE CONSTITUTION OR THE UNITED STATES CONSTITUTION.**

This Court, previously, has held that the states have broad powers to impose and collect taxes. *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty, W. Va.,* 488 U.S. 336, 344 (1989). In accordance with this broad power, "[a] State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable." *Id.* A state will only run afoul of the Equal Protection Clause of the Fourteenth Amendment when the taxing scheme "in fact bears unequally on persons or property of the same class." *Charleston Fed. Savings & Loan Ass'n v. Alderson,* 324 U.S. 182, 190 (1945). Even if the application of real property taxes has the "effect of restricting or even destroying an occupation or business[,]" the taxing system would be "sustained, so long as the regulatory power asserted is properly within the limits of the federal-state regime created by the Constitution." *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 360 (1973).

In *Nashville, Chattanooga & St. Louis Railway v. Browning,* this Court stated:

> The fact that states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than ***10** others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate are among the commonplaces of taxation and of constitutional law.

310 U.S. 362, 368 (1940). Significantly, in that case, the Supreme Court found that the assessment for tax purposes of the

property of public service corporations, such as railroads, at their full value, while all other property was assessed at less than their true worth, did not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* The fact that different types of property may be evaluated by different methods is not of any constitutional moment. *See Great Atl. & Pac. Tea Co. v. Grosjean,* 301 U.S. 412 (1937) (finding a Louisiana law levying an occupation or license tax upon persons, firms, partnerships, corporations, or associations of persons engaged in the business of operating two or more stores or mercantile establishments, one or more of which is located in Louisiana, under the same general management, supervision, ownership, or control did not violate the Equal Protection Clause of the Fourteenth Amendment).

In the instant case, the different methodologies adopted by New York State to determine real property taxes for different types of property are reasonable. Article XVI, Section 2 of the New York Constitution provides: "The Legislature shall provide for the supervision, review, and equalization of assessment for the purpose of taxation. Assessments shall in no case exceed full value." NY. Const, art. XVI, § 2. The terms of this statute are rational and, when applied by the courts of New York State, does not in any way discriminate against property owners, ***11** particularly against first-generation drugstore owners. As the New York Court of Appeals noted:

> [I]t must always be remembered that an underlying aim of valuation is to assure that, in providing for public needs, the share reasonably to be borne by a particular property owner is based on an equitable proportioning of the fair value of his property vis-a-vis the fair value of all other taxable properties in the same tax jurisdiction. Otherwise, the landlord who fails to realize the fair potential of his property would, in effect, shift part of his tax burden to the shoulders of his fellow taxpayers.

Merrick Holding Corp. v. Bd. of Assessors of Nassau, 45 N.Y.2d 538, 544 (N.Y. 1978).

Foremost, section 305 of the New York Real Property Tax Law ("RPTL") dictates that property shall be assessed at a uniform percentage of value and that the methods of evaluating such value should utilize "existing assessing methods." N.Y. Real Prop. Tax Law § 305.

Further, RPTL § 302(1) sets forth the taxable status of real property as to its condition and ownership shall be based on its use on the 1st day of March of each year. N.Y. Real Prop. Tax Law § 302(1). The valuation date for the assessor to value the property pursuant to RPTL § 301 is July 1st of the year preceding the tax status date. N.Y. Real Prop. Tax Law § 301. The courts of New York State have universally found that a property's "condition," as provided in section 302(1), means the fair market value of the property based on its existing use. In tax assessment ***12** cases in New York, valuation is not based on the highest and best use or any "future potentialities or possibilities [that] may not be assessed on the basis of some use contemplated in the future." *Addis Co. v. Srogi,* 79 A.D.2d 856 (N.Y. App. Div. 4th Dep't 1980); *see Miriam Osborn Mem'l Home Ass'n v. Assessor of Rye,* 275 A.D.2d 716 (N.Y. App. Div. 2d Dep't 2000); *Stillwell Equip. Corp. v. Assessors for Greenburgh,* 251 A.D.2d 672 (NY. App. Div. 2d Dep't 1998); *Alexander's Dep't Store of Valley Stream, Inc. v. Bd. of Assessors,* 227 A.D.2d 549 (N.Y. App. Div. 2d Dep't 1996); *Gen. Motors Corp. Cen. Foundry Div. v. Assessor of Massena,* 146 A.D.2d 851 (N.Y. App. Div. 3d Dep't 1989).

The definition of fair market value if not disputed. Each appraiser retained in *Rite Aid Corporation v. Huseby* used the same definition. This definition follows the one contained in the *Bible* for appraisers, *The Appraisal of Real Estate*:

> The most probable price, as of the specific date, in cash, or in terms equivalent to cash, or in the precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

Appraisal Institute, *The Appraisal of Real Estate* 58 (14th ed. 2013).

***13** The courts of New York State have held that the goal of the assessor and courts reviewing an assessment is to determine what the fair market value of the property is with respect to its ownership and condition as of March 1st of each year. *See FMC Corp. v. Unmack,* 92 N.Y.2d 179, 179 (N.Y. 1998); *Commerce Holding Corp. v. Bd. of Assessors of Babylon,* 88 N.Y.2d 724, 729 (N.Y. 1996); *Great Atl. & Pac. Tea Co. v. Kiernan,* 42 N.Y.2d 236, 242 (N.Y. 1977).

III. THE DECISION BY THE FOURTH DEPARTMENT TO DISMISS PETITIONER'S ARTICLE 7 PETITION WAS BASED ON THE APPLICATION OF ACCEPTED ASSESSMENT TECHNIQUES THAT DO NOT DISCRIMINATE AMONG OWNERS OF REAL PROPERTY.

As previously discussed, pursuant to RPTL § 305, New York State uses all of the existing standard methods of evaluating real property. N.Y. R.P.T.L. § 305. These methods include the Cost Approach, Market Comparable Approach, and Income Approach. The Cost Approach attempts to determine the cost of any new buildings on the property and value the market value of the land. The buildings are depreciated to the date of evaluation. This method has been found not very useful for properties, except those properties that cannot utilize any of the other methods.

A second method of evaluating real property is the Market Comparable Approach, or Comparable Sales Method. The New York Court of Appeals generally has held that this is the primary approach for determining the market value of property. *See Gen. Electric Co. v. Town of Salina,* 69 N.Y.2d 730, 731 (N.Y. 1986) ***14** ("the market value method of valuation is preferred as the most reliable measure of a property's full value for assessment purposes"); *G.R.F., Inc. v. Bd. of Assessors of Nassau,* 41 N.Y.2d 512, 513 (N.Y. 1977).

In the Market Comparable Approach, the appraiser finds the best possible sales of comparable properties to serve as a guide in determining the market value of the property. *See FMC Corp.,* 92 N.Y.2d at 189; *Gen. Electric Co.,* 69 N.Y.2d at 731. If the comparables are not similar to the subject property, then the courts have indicated that the comparables should be rejected. *See W.O.R.G Realty Corp. v. Bd. of Assessors,* 100 A.D.3d 75, 90-91 (N.Y. App. Div. 2d Dep't 2012) (citing Appraisal Institute, *The Appraisal of Real Estate* 297 (13th ed. 2008)); *Gen. Electric Co. v. Assessor of Rotterdam,* 54 A.D.3d 469, 474-75 (N.Y. App. Div. 3d Dep't 2008) (rejecting a multi-use industrial complex, including warehouses, as comparables to manufacturing facilities).

In using the Market Comparable Approach, the courts of New York have determined that if there is an actual sale of the actual property being evaluated within the timeframe in which a time adjustment can be utilized, then this method is by far the best way of predicting the market value of the property. *See Allied Corp. v. Town of Camillas,* 80 N.Y.2d 351, 356 (N.Y. 1992). As the Fourth Department previously stated in this case:

> A recent sale has been characterized as evidence of the "highest rank" in determining market value (*Matter of F.W. Woolworth Co. v. Tax Commn. of City of N.Y.,* 20 NY2d 561,565, 232 NE2d 638, 285 NYS2d 604 (1967) [emphasis ***15** omitted]; *see Plaza Hotel Assoc. v. Wellington Assoc.,* 37 NY2d 273, 277, 333 NE2d 346, 372 NYS2d 35 (1975), *rearg denied* 37 NY2d 924 (1975)). The scope of a "market" need not be limited to the locale of the subject property and, depending on the nature of the use, it may encompass national and/or international buyers and sellers (*see e.g. Matter of Saratoga Harness Racing v. Williams,* 91 NY2d 639, 646, 697 NE2d 164, 674 NYS2d 263 (1998)).

(Petitioner's Appendix A, p. 5a). The Fourth Department found that the suggestion by Petitioner's appraiser that the market sale of the property several years before the date of assessment should be ignored had no rational basis. (Petitioner's Appendix A, p. 9a-10a). The Court found that there was a national market for the sale and purchase of built-to-suit net lease national chain drugstores which provided an abundance of drugstore comparable sales both locally and regionally. (Petitioner's Appendix A, p. 9a-10a). A description of the national market was described by Respondents' appraiser and commented on at length by the Fourth Department. (Petitioner's Appendix A, p. 6a-7a).

Other than the trial court's decision in the instant case, there has never been a decision by any court in New York State to not accept a market sale of the property as being the best evidence of value. In the line of chain drugstore cases decided in New York State, a major case was the New York Appellate Division, Third Judicial Department's decision in *Rite Aid Corp. v. Otis,* which reversed a lower court's decision to ignore the prior market sale of the property. ***16** 102 A.D.3d 124 (N.Y. App. Div. 3d Dep't 2012), *leave to appeal denied by* 21 N.Y.3d 855 (N.Y. 2013); *see Rite Aid Corp. v. Town of Schodack Bd. of Assessment Review,* 41 Misc. 3d 1221(A) (N.Y. Sup. Ct., Rensselaer Cnty. 2013) (discussion of how *Rite Aid Corp. v. Otis* indicates proper valuation in New York). Other New York cases also have rejected the position of the major drugstore chains where there was evidence of a prior market sale of the property. *See Rite Aid of N.Y. No. 4928 v. Assessor of Colonie,* 58 A.D.3d 963 (N.Y. App. Div. 3d Dep't 2009); *Eckerd Corp. v. Gilchrist,* 44 A.D.3d 1239 (N.Y. App. Div. 3d Dep't 2007).

A third method of evaluating property is the Income Approach, which is generally used for income-producing properties. *See 41 Kew Gardens Rd. Assocs. v. Tyburski,* 70 N.Y.2d 325 (N.Y. 1987). In the Income Approach, the appraiser attempts to determine the appropriate income that the property will produce minus the reasonable expenses that will have to be paid by the property owner. The appraiser attempts to determine an appropriate capitalization rate, which, when divided into the net income, produces the fair market value of the property. *See* Appraisal Institute, *The Appraisal of Real Estate* (14th ed. 2013).

Some states appear to be what might be described as fee simple absolute states. In these states, the appraisers are not allowed to consider prior sales of the property being evaluated if they are required also to consider the leases that are in effect at the time of the appraisal. There is no provision under New York State law that indicates that New York State requires appraisers or assessors to evaluate property fee simple absolute. Even appraisers who state in their appraisal that they are performing a fee ***17** simple absolute appraisal actually take into consideration sales of the subject property and utilize the actual income coming from the subject property. Thus, the appraisers are not performing a fee simple absolute appraisal.

New York law, as opposed to other states, does not dictate that property should be evaluated fee simple absolute and actual leases of properties should be ignored. Instead, New York courts have always concluded that the actual income produced by a property under a lease is the best indication of what the income would be when trying to determine the market value of the property. *See Century Realty, Inc. v. Comm'r of Fin.,* 15 A.D.3d 652 (N.Y. App. Div. 2d Dep't 2005); *Myron Hunt/Shaker Loudon Assocs. v. Bd. of Assessment Review for Colonie,* 6 A.D.3d 953 (N.Y. App. Div. 3d Dep't 2004); *N. Country Hous., Ltd. P'ship v. Bd. of Assessment Review for Potsdam,* 298 A.D.2d 667 (N.Y. App. Div. 3d Dep't 2002); *Troy Realty Assocs., Inc. v. Bd. of Assessors of Troy,* 227 A.D.2d 813 (N.Y. App. Div. 3d Dep't 1996); *Schoeneck v. City of Syracuse,* 93 A.D.2d 988 (N.Y. App. Div. 4th Dep't 1983); *Cnty. Dollar Corp. v. City of Yonkers,* 97 A.D.2d 469 (N.Y. App. Div. 2d Dep't 1983); *Pepsi-Cola Co. v. Tax Comm'n of N.Y.,* 19 A.D.2d 56 (N.Y. App. Div. 1st Dep't 1963).

The highest court in New York State, in evaluating whether lease income can be used in assessments, found that unless there is some serious anomaly in the lease, the actual income coming from the lease should be utilized. *See Merrick Holding Corp.,* 45 N.Y.2d at 542. In *Merrick Holding Corp.* the court specifically indicated that below-market leases could be used and that in only unique situations should the actual income not be considered. *Id.* at 543. In ***18** *Conifer Baldwinsville Assocs. v. Town of Van Buren*, the New York Court of Appeals held that only when the rent is below market can there be an adjustment. 68 N.Y.2d 783, 785 (N.Y. 1986). In addition, the Fourth Department found it had a right to adjust an above market lease when the lease was created in boon times and the appraisal was being done during a recession. *See Schoeneck,* 93 A.D.2d at 988.

New York State has a right to permit its assessors and those evaluating the market value of property to consider the actual income being produced by the property. The effect of other states requiring the valuation to be done fee simple absolute would, in fact, distort the fair market value of those properties as evidence by the theory requiring the ignoring of actual sales of the property in the market. All commercial property owners as well as all other property owners are treated equally as their properties are evaluated using the same assessment methods. Therefore, the Fourth Department's dismissal of Petitioner's Article 7 petition acknowledged the court's acceptance of New York's assessment scheme as non-discriminatory.

IV. THE COMPLAINT THAT FIRST-GENERATION DRUG STORES ARE EVALUATED DIFFERENTLY THAN OTHER COMMERCIAL PROPERTIES IN NEW YORK STATE HAS NO BASIS.

Ultimately, the issue is whether the prior sale of the property in which Petitioner is a tenant should be considered and whether the income produced by the relevant store should be considered in the Income Approach. In its Petition, Petitioner argues that this question is a national issue. In support, Petitioner cites to two state cases where the position of the drugstore ***19** was upheld by the state's highest court. *See Rite Aid of Ohio, Inc. v. Wash. Cnty. Bd. of Revision,* 2016-Ohio-371, *reconsideration denied by* 145 Ohio St. 3d 1447 (Ohio 2016); *Walgreen Co. v. City of Madison,* 752 N.W.2d 687 (Wis. 2008). However, there are other instances where states have rejected the drugstore's position, as was done in New York. *See Wilgreens, LLC v. O'Neill,* No. 14-CI-1566 (Fayette Cir. Ct., Feb. 13,2015) (Kentucky).

In further support of its argument, Petitioner cites the article "You Can't Get The Value Right If You Get The Rights Wrong" by David C. Lennhoff, MAI, SRA. David C. Lennhoff, "You Can't Get The Value Right If You Get The Rights Wrong," *The Appraisal Journal*, Winter 2009, at 60-65. This article, written by a Washington, D.C. appraiser, asserts that when

performing an appraisal for assessment purposes, the appraiser needs to consider the highest and best use of the property. *Id.* The analysis contained within this article, however, has drawn a significant amount of criticism from appraisers across the country. *See* "Letters to the Editor," *The Appraisal Journal*, Summer 2009, at 274-283 (Comments on "You Can't Get the Value Right If You Get the Rights Wrong"). One such critic, members of the Maricopa County Assessor's Office, cautioned readers that different appraisal laws apply to different states. *See id.* at 275.

In New York State, however, the concept of highest and best use is not considered. Other states may have different structures as to how to evaluate property to determine real property tax. However, New York has the right to create its own appraisal structure and, assuming it is rational, the adopted structure should not be disturbed especially on the grounds of equal protection.

***20** Petitioner further argues that properties created by a built-to-suit model cannot be considered. The fallacy of this concept is that in conducting its appraisal, Petitioner's appraiser used rental comparables that were created through the built-to-suit model. In addition, the Petitioner's appraiser, for most of the properties that he evaluated, valued the property using the income derived from actual leases. When asked why there was a difference between the value when using the actual income versus the sale of the drugstores, the appraiser could only state that they were above market.

To demonstrate the fallacy of Petitioner's theory, it should be pointed out that, at trial, Petitioner valued the full value of the land, plus the new building built upon the land, at only $1,000,000.00. The value of Petitioner's appraisal is less than the land purchase of only one of the parcels of land, which previously was purchased for $1,250,000.00, the sale price of the prior owner of the Carvel ice cream store. Considering the testimony at trial indicated that the cost of construction was approximately $2,000,000.00 and the assumption that Benderson's actual profit was approximately 7% to 10% of the total cost, despite the lack of testimony as to this figure, the conclusion that the entire property had a market value of $1,000,000.00 is not logical.

While the appraisers did argue about which income comparable was more comparable to the market, the evaluation by Respondents' appraiser of the income comparable, which included more than just drugstores, can be seen as correct based on the fact that when the property was put to sale five years after its opening, it sold for $4,903,183.00. As discussed herein, the goal of ***21** New York's taxation statutes is to ensure the market valuation of property is not above full value, but rather at market value.

New York State does not discriminate against any class of property owners by allowing the use of actual rentals of those properties and allowing the consideration of market sales of those properties in its evaluation. A proper evaluation of New York structure based on the constitutionality of the structure has been upheld by the highest court of New York State in *Foss v. City of Rochester.* 65 NY.2d 247 (NY. 1985).

Major drugstore chains are entering the market place as sophisticated tenants with a business plan that provides them with the possibility of making profits. The business plan requires the developers who are assisting them in developing their stores to find the most important locations in a municipality, such as the corner of East Ridge Road and Hudson Avenue, a key corner in the Town of Irondequoit. The major drugstores would not attempt to enter into business transactions where they are paying above market for the properties in which they locate under long term 20-year leases. The present trend by the major drugstores, especially Petitioner, is to try and find a way to reduce its expenses even if that means it is not paying its fair share of taxes to the municipalities where its stores are located.

*22 CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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