NO. HHB CV 12-6015514S	:	STATE OF CONNECTICUT
WALGREEN EASTERN COMPANY, INC.	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
TOWN OF WEST HARTFORD	:	DECEMBER 29, 2015

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Memorandum of Decision

This case is a real estate tax appeal concerning commercial rental property leased by plaintiff Walgreen Eastern Company, Inc. in the defendant town of West Hartford (town). The court finds that the plaintiff has proven aggrievement but accepts the town's appraisal and finds that the value of the property as of October 1, 2011 is $4,900,000.

I

The court finds the following facts. The subject property is a 1.45 acre improved parcel located on 940 South Quaker Lane in the town. The property abuts another parcel to the south, with which it was once merged, near the intersection of South Quaker Lane, which is to the west, and New Britain Avenue, which is to the south, in the Elmwood section of the town.

The improvement on the subject property is a 12,805 square foot building originally constructed in 1949 as a movie theater. In 2003, a developer, Nixon Plainville, LLC, purchased the subject property and the adjoining property to the south for $2,500,000, formally subdivided them, and began to convert the building on the subject property into a Walgreen pharmacy. In appraisal terms, the property was of the "build to suit" type.

The developer entered into a "triple net" or "NNN" lease with the plaintiff under which the plaintiff was responsible for the payment of all insurance, maintenance, and property tax

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expenses. The lease commenced in December, 2004, but the pharmacy did not open until 2006. The lease runs for seventy-five years, but the plaintiff can terminate it after twenty-five years and every five years thereafter. The rent is fixed at $430,000 per year for the term of the lease plus a small percentage of the gross sales. This rate converts to $33.58 per square foot.

In 2006, the developer sold the subject property to Maple West Hartford, LLC, which has been described as an investor, for $6,718,750. There have been no further sales of the property.

The pharmacy now has parking space for approximately 75 cars. Some of the parking space is shared with Webster Bank, which occupies the property to the south. There is no drive-up service window for the pharmacy. Although the pharmacy is not on the exact corner of South Quaker Lane and New Britain Avenue, it is near the corner. There is a full, two-way auto access from and to South Quaker Lane. From New Britain Avenue, cars going westbound can make a right turn into a driveway, marked by a Walgreens sign, that goes behind the bank on the corner and into the Walgreens parking lot.

The pharmacy is visible from the road from all directions except westbound. The westbound view from New Britain Avenue is blocked by the bank and a tree. The intersection of South Quaker Lane and New Britain Avenue has high traffic volume and has a traffic light.

For purposes of the October 1, 2011 property tax revaluation, the town appraised the property at $5,020,000. That amount converts to a 70% assessment of $3,514,000, or $9.81 per square foot. See General Statutes § 12-62a (b).[1] The plaintiff appealed to the board of assessment appeals for the town, which declined to reduce the assessment.

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[1]Section 12-62a (b) provides in pertinent part: "Each such municipality shall assess all property for purposes of the local property tax at a uniform rate of seventy percent of true and actual value . . . ."

The plaintiff then brought this two count complaint in Superior Court. The first count arises under General Statutes § 12-117a and alleges that the town has overvalued the property. Count two alleges pursuant to General Statutes § 12-119 that the assessment was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property.

The court conducted a five day evidentiary hearing. The plaintiff presented the testimony of appraisers Anthony Barna and Richard Michaud, who appraised the property at $3,000,000. The town presented the testimony of appraisers John Leary, who did the reevaluation for the town, and Christopher Kerin, who appraised the property at $4,900,000.

II

The standards governing a municipal tax appeal are well settled. "Section 12-117a, which allows taxpayers to appeal the decisions of municipal boards of [assessment appeals] to the Superior Court, provide[s] a method by which an owner of property may directly call in question the valuation placed by assessors upon his property. . . . In a § 12-117a appeal, the trial court performs a two step function. The burden, in the first instance, is upon the plaintiff to show that he has, in fact, been aggrieved by the action of the board in that his property has been overassessed. . . . In this regard, [m]ere overvaluation is sufficient to justify redress under [§ 12-117a], and the court is not limited to a review of whether an assessment has been unreasonable or discriminatory or has resulted in substantial overvaluation. . . . Whether a property has been overvalued for tax assessment purposes is a question of fact for the trier. . . . The trier arrives at his own conclusions as to the value of land by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value,

and his own general knowledge of the elements going to establish value including his own view of the property. . . .

"Only after the court determines that the taxpayer has met his burden of proving that the assessor's valuation was excessive and that the refusal of the board of [assessment appeals] to alter the assessment was improper, however, may the court then proceed to the second step in a § 12-117a appeal and exercise its equitable power to grant such relief as to justice and equity appertains. . . . If a taxpayer is found to be aggrieved by the decision of the board of [assessment appeals], the court tries the matter de novo and the ultimate question is the ascertainment of the true and actual value of the applicant's property." (Citations omitted; internal quotation marks omitted.) *Breezy Knoll Assn., Inc. v. Morris,* 286 Conn. 766, 775-776, 946 A.2d 215 (2008). "[T]he taxpayer bears the burden of establishing the impropriety of the assessor's valuation." *Sears Roebuck & Co. v. Board of Tax Review,* 241 Conn. 749, 755, 699 A.2d 81 (1997).[2]

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[2]General Statutes § 12-117a provides in pertinent part as follows: "Any person, including any lessee of real property whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease to pay real property taxes, claiming to be aggrieved by the action of the board of tax review or the board of assessment appeals, as the case may be, in any town or city may, within two months from the date of the mailing of notice of such action, make application, in the nature of an appeal therefrom . . . to the superior court for the judicial district in which such town or city is situated, which shall be accompanied by a citation to such town or city to appear before said court. . . . Any such application shall be a preferred case, to be heard, unless good cause appears to the contrary, at the first session, by the court or by a committee appointed by the court. The pendency of such application shall not suspend an action by such town or city to collect not more than seventy-five per cent of the tax so assessed or not more than ninety per cent of such tax with respect to any real property for which the assessed value is five hundred thousand dollars or more, and upon which such appeal is taken. If, during the pendency of such appeal, a new assessment year begins, the applicant may amend his application as to any matter therein, including an appeal for such new year, which is affected by the inception of such new year and such applicant need not appear before the board of tax review or board of assessment appeals, as the case may be, to make such amendment effective. The court shall have power to grant such relief as to justice and equity appertains, upon such terms and in such manner and form as appear equitable, and, if the application appears to have been made without

As discussed below, the court credits Kerin's appraisal of the property, which reduces the final valuation to an amount below the town's assessed value of $5,020,000. Therefore, the plaintiff has proven aggrievement.[3] The court accordingly turns to the ultimate question, which is "the ascertainment of the true and actual value of the applicant's property." (Citations omitted; internal quotation marks omitted.) *Breezy Knoll Assn., Inc. v. Morris,* supra, 286 Conn 776.

III

A

In a case, such as the present one, in which real property is being used primarily to produce rental income, General Statutes § 12-63b (a) requires that "[t]he assessor or board of assessors in any town, at any time, [determine] the present true and actual value of [the] real property . . . ."[4] Other statutes also refer to the "true and actual value," or "fair market value," as

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probable cause, may tax double or triple costs, as the case appears to demand; and, upon all such applications, costs may be taxed at the discretion of the court. If the assessment made by the board of tax review or board of assessment appeals, as the case may be, is reduced by said court, the applicant shall be reimbursed by the town or city for any overpayment of taxes, together with interest and any costs awarded by the court, or, at the applicant's option, shall be granted a tax credit for such overpayment, interest and any costs awarded by the court. Upon motion, said court shall, in event of such overpayment, enter judgment in favor of such applicant and against such city or town for the whole amount of such overpayment, together with interest and any costs awarded by the court. The amount to which the assessment is so reduced shall be the assessed value of such property on the grand lists for succeeding years until the tax assessor finds that the value of the applicant's property has increased or decreased."

[3]The plaintiff's status as a lessee does not negate its standing because § 12-117a authorizes an appeal by any person, "including any lessee of real property whose lease has been recorded as provided in section 47-19 and who is bound under the terms of his lease to pay real property taxes, claiming to be aggrieved by the action of the board of tax review or the board of assessment appeals, as the case may be, in any town or city . . . ."

[4]Section 12-63b (a) provides in full: "The assessor or board of assessors in any town, at any time, when determining the present true and actual value of real property as provided in

the benchmark of an assessment. See General Statutes § 12-62a (b) ("Each such municipality shall assess all property for purposes of the local property tax at a uniform rate of seventy percent of true and actual value . . . ."); General Statutes § 12-63 (a) ("[t]he present true and actual value of . . . property shall be deemed by all assessors and boards of tax review to be the fair market value thereof and not its value at a forced or auction sale.")

"The starting point for the analysis of [a property's] true and actual value" is a property's "highest and best use." *United Technologies Corp. v. East Windsor,* 262 Conn. 11, 25, 807 A.2d 955 (2002). "[U]nder the general rule of property valuation, fair [market] value, of necessity, regardless of the method of valuation, takes into account the highest and best value of the land. . . . A property's highest and best use is commonly defined as 'the use that will most likely produce the highest market value, greatest financial return, or the most profit from the use of a particular piece of real estate.'. . . The highest and best use determination is inextricably intertwined with the marketplace because 'fair market value' is defined as 'the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land

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section 12-63, which property is used primarily for the purpose of producing rental income, exclusive of such property used solely for residential purposes, containing not more than six dwelling units and in which the owner resides, shall determine such value on the basis of an appraisal which shall include to the extent applicable with respect to such property, consideration of each of the following methods of appraisal: (1) Replacement cost less depreciation, plus the market value of the land, (2) capitalization of net income based on market rent for similar property, and (3) a sales comparison approach based on current bona fide sales of comparable property. The provisions of this section shall not be applicable with respect to any housing assisted by the federal or state government except any such housing for which the federal assistance directly related to rent for each unit in such housing is no less than the difference between the fair market rent for each such unit in the applicable area and the amount of rent payable by the tenant in each such unit, as determined under the federal program providing for such assistance."

assuming, of course, that a market exists for such optimum use.' . . . The highest and best use conclusion necessarily affects the rest of the valuation process because, as the major factor in determining the scope of the market for the property, it dictates which methods of valuation are applicable." (Citations omitted; internal quotation marks omitted.) Id., 25-26.

In the present case, the plaintiff's appraisers considered the highest and best use of the property to be continued retail and commercial use. Kerin identified the highest and best use to be continued use as a retail pharmacy.

The plaintiff and the town are not necessarily inconsistent. Rather, the town simply defines the highest and best use more narrowly or specifically than does the plaintiff. In *United Technologies Corp. v. East Windsor,* supra, 262 Conn. 11, our Supreme Court confronted a similar issue of whether a trial court had erred by adopting an "improperly restrictive" highest and best use of a property as an industrial facility, as offered by the defendant, when the plaintiff's appraisers had reached a more "generalized" highest and best use conclusion, namely that the highest and best use was as an industrial manufacturing-repair-office facility with a single user-occupant. Id., 12, 24-25. The Court approved the trial court's reliance on the more restrictive definition, citing the plaintiff's continued profitable use of the subject property. Id., 28.

The Court noted its concern that "an extremely narrow highest and best use conclusion might result in a very small or even nonexistent market, thereby eliminating the availability of market sales analysis as a useful valuation tool." Id., 26 n.22. That concern is not initially present here, as Kerin was able to do a full comparable market sales analysis.

Ultimately, this concern translates into the question of whether a more specific or

restrictive market actually exists. The testimony and reports of Kerin and Leary convincingly answer this question in the affirmative. They identify the existence of a national chain pharmacy submarket, which is a subset of the single-tenant building submarket in the retail market sector. The physical characteristics of this market include a free-standing building at a corner location with a traffic signal at the intersection.[5]

The other characteristic of this submarket is the potential in this sort of property to receive rental income and to prove marketable to other investors. Typically, these properties support a single tenant with a triple net lease, and the tenant has the property built to suit or, as in the present case, remodeled to suit. The tenant is willing to pay above-market rents because its focus is on location, sales, and customer convenience rather than real estate costs and immediate profit. (testimony of Nestor Eliadis.) The landlord has minimal or no responsibility in maintaining the property because of the triple net lease. No management company is needed. Because of this factor, and the tenant's willingness to pay higher rents, "the price paid for the land is often not comparable to the market range for other commercial sites in a community . . ." (Leary report (Exhibit X), p. 3; See also Kerin appraisal (Exhibit CC), p. 19, citing "above market land acquisition costs.")

Properties of this type tend to attract investors interested in "like kind" exchanges. See 28 U.S.C. §1031.[6] Demographic trends such as the aging of the baby boom generation work to

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[5]The appraisers referred to such an intersection as "signalized."

[6]"In general, a like kind exchange occurs when one piece of property is sold and, within a given period of time, a similar piece of property is purchased. The like kind exchange allows the exchanger to delay recognizing a gain on the sold property, as the tax basis of the sold property carries forward to the newly acquired property. Thus, the recognition of a gain and the payment of capital gains tax are delayed. [28 U.S.C.] § 1031(d). For the newly acquired property to

supply an assurance of demand for pharmaceuticals. (Leary report, p. 3.) As a result of all of these factors, there is an active market for these properties. (Exhibits Y, Z.) Therefore, it is fully appropriate to consider the highest and best use of the subject property to be as a retail pharmacy.

B

The plaintiff protests that the court cannot consider the nature of the leasehold interest in assessing real property. The plaintiff argues that the court must evaluate the "fee simple" interest in real property rather than the "leased fee." The plaintiff also suggests that a lease is a contract interest, not a property interest, and that a contract is too transitory or amendable to constitute a factor in property assessment.

This issue is one in need of clarification. The General Statutes do not specifically address the nature of the property interest that the town should assess but instead only require an assessment of the "true and actual value of real property. . . ." General Statutes § 12-63b (a).

Both parties to this case actually agree that the town should assess the fee simple interest in real property. They disagree, however, on the meaning of a fee simple interest. The plaintiff claims that a sale of a property subject to a lease is a "leased fee" sale and not a fee simple sale. It relies on an article that states the following: "Simply put, the owner of the fee interest owns the entire bundle of rights that comes with property ownership, subject only to the four governmental powers of escheat, eminent domain, police power, and taxation. The bundle of rights includes the right to sell an interest, the right to lease an interest, the right to occupy the property, the right to mortgage an interest, and the right to give an interest away. Once the property has been leased

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qualify as 'like kind,' it must be identified within forty-five days and be purchased within one hundred and eighty days of the sale of the sold property. Id. § 1031(a)(3)." (Internal quotation marks omitted.) *United States v. Bailey,* 926 F. Supp.2d 739, 754 n.7 (W.D.N.C. 2013).

– regardless of the terms of that lease – the owner no longer has the right of occupancy, the right to lease, or the right to give an interest away. Even if the lease is at market rent, the fee [simple] does not necessarily equal the leased fee." D. Lennhoff, "You Can't Get the Value Right If You Get the Rights Wrong," The Appraisal Journal, Winter 2009, p. 62 (Exhibit 7.) Stated differently, "a lease never increases the market value of real property rights to a fee simple estate." (Barna appraisal (Exhibit 2), p. 6; "Combatting Voodoo Valuations of Sale/Leaseback Retail Properties," IPT Insider, p. 4 (July, 2015) (Exhibit 6.)) [Internal quotation marks omitted.]

The town counters that the court should consider leased fee sales if the rentals are at market rates or can be adjusted to market rates. Kerin adopted this approach, which the court also finds more logical. This approach finds support in the following commentary on the article that the plaintiff cites: "If comparable market rents do support the contract rent, and the contract rent is equal to market rent, then fee simple value equals leased fee value." M. Kenney, "Comments on 'You Can't Get the Value Right If You Get the Rights Wrong,'" The Appraisal Journal, Winter 2009, p. 113 (Exhibit 7).[7]

The plaintiff also relies on *Sheridan v. Killingly,* 278 Conn. 252, 897 A.2d 90 (2006).

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[7]See also *Grossomanides v. Wethersfield,* 33 Conn. App. 511, 513-14, 636 A.2d 867 (1994) ("[s]emantics aside, there is no difference between the definition of 'lease fee title' as used in the report and defined therein and the definition of a fee simple estate, which the report defined as '[a]bsolute ownership unencumbered by any other interest or estate; subject only to the limitations of eminent domain, escheat, police power, and taxation.'"); *HIN, L.L.C. v. Cuyahoga County Bd. of Revision,* 138 Ohio St. 3d 223, 228-29, 5 N.E.3d 637 (2014) (The distinction between 'fee simple' and 'leased fee' is one drawn in the context of appraisal practice. The appraisal industry uses the term 'fee simple' to refer to unencumbered property—or to property appraised as if it were unencumbered. This distinction is not one recognized by the law, however. A 'fee simple' may be absolute, conditional, or subject to defeasance, but the mere existence of encumbrances does not affect its status as fee simple.") [Internal quotation marks omitted.]

The precise holding of the case is that, for purposes of the income capitalization assessment method, when contract rental rates fall below the market rate, the court should rely on market rates to capture the "true and actual value" of the property. Id., 262-64. See also *Caldwell v. Dept. of Revenue*, 122 Ariz. 519, 521, 596 P.2d 45 (Ariz. App. 1979) ("The fact that an unfavorable lease may make the property less desirable to prospective buyers does not affect its full cash value for tax valuation.") The plaintiff contends that the same principle applies when, as here, rentals are above market and the lease is very favorable to the owner. In that situation, as well, the plaintiff argues, the lease should not affect the fair market value. However, the plaintiff does not consider the possibility – a reality in this case – that what may seem like above-market rentals are actually in line with the market when the latter is properly defined.

There is very little appellate authority on this question in the pharmacy context. A Wisconsin case, *Walgreen Co. v. Madison,* 311 Wis. 2d 158, 752 N.W.2d 687 (2008), does hold that, for purposes of the income capitalization method, the court should consider market rates rather than above-market contract rates for a Walgreen pharmacy. The court reasoned that "a lessor may be more than fully compensated for an encumbrance through above market rent in cases such as the present one, but that does not transform the lease from an encumbrance to part of the 'bundle of rights' appertaining to a property, nor does it transform the rent payments into anything more than compensation for an encumbrance." Id., 186. The court also was bound by Wisconsin law which, unlike Connecticut law discussed below, neither required nor allowed appraisers using the income capitalization method to increase the market value of a property when the actual contract lease rate is above the market rate. Id., 165, 178. Nevertheless, the concurring justice, although bound by state law, found the following rationale persuasive: "[a]

buyer generally would pay more for real property that has a high stream of income from a lease than for property with a lower stream of income from a lease. Because the sum at which a property will be bought and sold is dictated in part by the income from a lease attaching to the property . . . the actual income stream from the lease should be capitalized to reach the assessed value of the property." (Footnote omitted.) Id., 209 (Abrahamson, J., concurring.) See also *Rite Aid v. Assessor of Colonie,* 58 A.D.3d 963, 870 N.Y.S.2d 642 (2009) (upholding trial court's acceptance of testimony that there was a triple net lease drug store submarket on which to base sales and income analyses); cf. *In re Prieb Properties,* 47 Kan. App. 2d 122, 135, 275 P.3d 56 (2012) (citing cases and authorities for proposition that "with a very few exceptions, it is generally recognized that build-to-suit lease rental rates are not reflective of market conditions.")

The plaintiff similarly objects that a lease is a contractual right, not a taxable, property right, and that it is transitory in nature. However, what the town really seeks to tax is not the actual value of the lease in place but rather the capacity or potential of the real property to be leased. That characteristic is not contractual or transitory but rather inheres in the property. In the case of a built to suit single tenant property near a busy corner location, there is a good potential to rent the property to a national chain pharmacy at above market rates with no management responsibilities. That potential makes the property more attractive to buyers and investors and drives the market price up. The town's assessment of the "true and actual value" should reflect that fact. Indeed, the entire concept of the "highest and best use" is not limited to the actual use, but rather encompasses the use that will "'*most likely* produce the highest market value.'" (Emphasis added.) *United Technologies Corp. v. East Windsor,* supra, 262 Conn. 25-26. See also *PJM & Associates, LC v. Bridgeport,* 292 Conn. 125, 139, 971 A.2d 24 (2009) (the

income capitalization approach analyzes a property's "*capacity* to generate benefits (i.e., usually the monetary benefits of income and reversion) . . . .") [emphasis added; internal quotation marks omitted.)[8]

As a practical matter, the issue here devolves into a question of defining the relevant market or, in reality, the highest and best use of the property. If a market exists for properties that produce relatively high rents with minimal landlord responsibilities, then the leased fee value of the sale may coincide with the fee simple value. In this case, as discussed, it is possible to identify this sort of discrete market in the case of properties suitable for building and renting to a single pharmacy with a triple net lease. As discussed, the subject property has these characteristics.

It therefore follows that the highest and best use of the property is to lease it to a retail pharmacy and that it is fully permissible to consider the rental potential of the property in determining the true and actual value of its fee simple interest. Only Kerin's appraisal takes this approach. For these reasons, the court credits Kerin's appraisal.

IV

General Statutes § 12-63b (a) identifies three approaches to appraising rental income property such as the subject parcel: "(1) Replacement cost less depreciation, plus the market value of the land, (2) capitalization of net income based on market rent for similar property, and (3) a sales comparison approach based on current bona fide sales of comparable property." All appraisers in this case used the income capitalization approach and the comparable sales

[8]Arguably, the plaintiff also considers the lease potential of the property but just defines the rental market to be general retail rather than national chain pharmacies. As discussed, the court believes that the latter more precisely and accurately describes the relevant market.

approach to appraising real property and all except for Kerin also used the cost approach.

A

The income capitalization approach is an important method of valuation for income-producing property. See *Walgreen Co. v. Madison,* supra, 311 Wis. 2d 169. Section 12-63b (b) provides as follows: "For purposes of subdivision (2) of subsection (a) of this section and, generally, in its use as a factor in any appraisal with respect to real property used primarily for the purpose of producing rental income, the term 'market rent' means the rental income that such property would most probably command on the open market as indicated by present rentals being paid for comparable space. In determining market rent the assessor shall consider the actual rental income applicable with respect to such real property under the terms of an existing contract of lease at the time of such determination." General Statutes § 12-63b (b). See also note 4 supra. As our Supreme Court has stated: "the statute requires that, in determining a property's 'market rent,' the assessor and, therefore, the court, in determining the fair market value of the property, must consider both (1) net rent for comparable properties, and (2) the net rent derived from any existing leases on the property. This legislative approach makes sense because it reflects the reality that a willing seller and a willing buyer — whose judgments are what we mean by 'fair market value' — would themselves consider in arriving at a price for the property that is subject to leases that do not closely approximate current rentals for similar properties." *First Bethel Associates v. Bethel,* 231 Conn. 731, 740, 651 A.2d 1279 (1995). Accord *Redding Life Care, LLC v. Redding*, 308 Conn. 87, 110-11, 61 A.3d 461 (2013).

Barna and Michaud, the plaintiff's appraisers, determined that the market rent for comparable triple net retail properties, which included stores in in-line shopping centers,

averaged $20 and $22 per square foot, respectively. They calculated the subject property's contractual rent at $33.58 per square foot. They declined to adjust the market rate for their analyses because the contract rate was above market.

Kerin, looking at pharmacies only, found the average market rental rate to be $32.16 per square foot. Because the contract rate of $33.58 was similar, he used a rate of $32 per square foot for the income capitalization analysis.

The analysis of Barna and Michaud did not comply with the statutory command to "consider the actual rental income . . . ." General Statutes § 12-63b (b). The court cannot interpret this phrase to be meaningless or superfluous. See *Lopa v. Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010). Yet that is what Barna and Michaud have done. Their only "consideration" of the actual rental income was to mention it in their reports. They automatically rejected further consideration of actual rental income because in their opinion it was above the market. They did not attempt to reconcile contract rents and market rents, as did Kerin. Essentially, Barna and Michaud gave the contract rents no substantive consideration at all. As our Supreme Court has stated: "Such a construction, however, would mean that contract rent would factor into the analysis only if it had no effect on the overall valuation, rendering meaningless the direction of § 12-63b (b) to 'consider' actual rental income." *First Bethel Associates v. Bethel,* supra, 231 Conn. 740-41. Accordingly, the court cannot accept their approach.[9]

Kerin capitalized net rental income at a rate of 7.4% based on a "band of investment"

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[9]Reliance on actual contract rates would seem to have particular importance when, as here, the property is subject to a long-term lease that a new purchaser would likely assume.

formula, regional sales, and national investor surveys. This rate does not differ significantly from the capitalization rate of 8% used by Barna and Michaud. Based on his capitalization rate, Kerin found the value of the subject property using the income capitalization approach to be $5,210,000. The court credits this analysis.

B

Turning to the comparable sales approach, the principal dispute was whether to rely on general commercial retail sales, as did the plaintiff's appraisers, or compare other sales of Connecticut properties leased to Walgreens, as did Kerin. Plaintiff's appraiser Michaud, for example, wrote that "[t]he analysis does not include transactions of build-to-suit drugstores because they represent a non-market lease for a build-to-suit property." (Michaud appraisal (Exhibit 1), p. 50.)

For the reasons explained above, however, the court finds that a market for the sales of pharmacies does exist and that sales of property leased to Walgreens are the most comparable. Kerin did adjust the sales price of these comparables downward for what he considered to be the leased fee, above-market nature of the sales.[10] Although these sales took place further away from West Hartford than did the sales of the comparable properties identified by Barna and Michaud, Kerin in most cases considered the other locations slightly inferior and made appropriate upward adjustments.

After all adjustments, Kerin found the value of the property under the comparable sales

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[10]As discussed, a leased fee sale may require downward adjustment because it does not transfer the full bundle of rights encompassed by a fee simple and instead compensates the seller for the loss of his right to occupy the premises. See *Walgreen Co. v. Madison,* supra, 311 Wis. 2d 186.

approach to be $4,610,000. The court accepts this finding.

C

Kerin did not appraise the property under the cost approach because the building, originally constructed in 1949, was too old. This decision was a reasonable one, as even Michaud acknowledged in his appraisal, which did conduct a cost approach analysis, that the cost approach is relevant when "the improvements are relatively new." (Michaud appraisal, p. 46.) Reconciling the values obtained using the comparable sales and the income capitalization, Kerin concluded that the market value of the subject property was $4,900,000. For the reasons stated, the court credits this opinion. The court concludes that the plaintiff has not met its burden of proving that the Kerin appraisal represents an overvaluation under § 12-117a. *Sears Roebuck & Co. v. Board of Tax Review,* supra, 241 Conn. 755.

IV

The second count arises under General Statutes § 12-119 and alleges manifestly excessive assessment or, in essence, unequal treatment. "Cases in this category must contain allegations beyond the mere claim that the assessor overvalued the property. [The] plaintiff . . . must satisfy the trier that [a] far more exacting test has been met: either there was misfeasance or nonfeasance by the taxing authorities, or the assessment was arbitrary or so excessive or discriminatory as in itself to show a disregard of duty on their part." (Internal quotation marks omitted.) *Redding Life Care, LLC v. Redding*, supra, 308 Conn. 121.

There is certainly no direct evidence of misfeasance, nonfeasance, or discrimination against or singling out of the plaintiff. The plaintiff does not dispute that the town used the same general methodology to appraise the subject property as it did other commercial properties in the

town.

The plaintiff instead focuses on the fact that the assessed $9.81 tax per square foot on the subject property greatly exceeds the assessed tax of $5.98 per square foot for a CVS located in Elmwood at an actual corner, as well as the tax on several other pharmacies in other town neighborhoods. (Kerin appraisal, p. 16.) The initial response is that Kerin's appraisal, which the court finds to be thorough and fair, leads to a tax rate of $9.57 per square foot and thus supports the town's assessed tax rate of $9.81 per square foot.[11] Further, the rental rate of $32 per square foot used by Kerin for the income capitalization approach for the subject property is well beneath the highest actual rent in Elmwood in 2010 of $42.74. (Exhibit S.) In addition, although the average valuation for all properties in Elmwood increased 4.4% from 2006 to 2011, the valuation of the subject property increased only .4% from $5,000,000 to $5,020,000. (Exhibit W.) Indeed, the $5,000,000 figure comes from a stipulated judgment to which the plaintiff agreed. See *Walgreen Eastern Co. v. Town of West Hartford,* Superior Court, judicial district of New Britain, Docket No. CV07 4014227S (June 13, 2008). It is hard to see how the plaintiff can claim that $5,020,000 represents a discriminatory or highly excessive assessment when it earlier agreed to an assessment of $5,000,000 for the same property. For all these reasons, the court rejects the claim of discrimination.

V

For the reasons stated, the court values the subject property at $4,900,000. Pursuant to General Statutes § 12-117a, the city shall provide the plaintiff with an appropriate

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[11]Kerin's $4,900,000 appraised value is 97.6% of the $5,020,000 appraised value reached by the town. By that measure, under Kerin's appraisal the tax per square foot on the subject property comes to $9.57.

reimbursement or credit for any overpayment plus interest. The court declines to award costs to either party.

It is so ordered.

Schuman, J.

Carl J. Schuman
Judge, Superior Court