

cc: Ms. Daniels Rivera by Scan  
Ms. Mailloux by Scan  
Ms. Bordeaux by Scan  
Ms. Marks by Scan  
BOA by scan  
SAPA File



# Department of Health

KATHY HOCHUL  
Governor

JAMES V. McDONALD, MD, MPH  
Commissioner

JOHANNE E. MORNE, MS  
Executive Deputy Commissioner

September 5, 2025

## CERTIFIED MAIL/RETURN RECEIPT

Elliot Smeltzer, Esq.  
NYS Office of the Medicaid Inspector General  
800 North Pearl Street  
Albany, New York 12204

Matthew Leonardo, Esq.  
Hinman Straub PC  
121 State Street  
Albany, New York 12207

### **RE: In the Matter of Triboro Center for Rehabilitation and Nursing**

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter.

If the appellant did not win this hearing, the appellant may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the appellant wishes to appeal this decision, the appellant may wish to seek advice from the legal resources available (e.g. the appellant's attorney, the County Bar Association, Legal Aid, OEO groups, etc.). Such an appeal must be commenced within four (4) months after the determination to be reviewed becomes final and binding.

Sincerely,

A handwritten signature in cursive script that reads "Natalie J. Bordeaux".

Natalie J. Bordeaux  
Chief Administrative Law Judge  
Bureau of Adjudication

NJB: cmg  
Enclosure

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

COPY

In the Matter of the Appeal of  
**Triboro Center for Rehabilitation And  
Nursing**  
Medicaid Provider #00310325,  
from a determination to recover Medicaid Program  
overpayments.

**Decision After  
Hearing**

Audit #22-2392

Before: Jeanne T. Arnold  
Administrative Law Judge

Hearing date: March 12, 2025  
By videoconference  
Record closed April 28, 2025

Parties: New York State Office of the Medicaid Inspector General  
800 North Pearl Street  
Albany, New York 12204  
By: Elliot E. Smeltzer, Esq.

Triboro Center for Rehabilitation and Nursing  
1160 Teller Avenue  
Bronx, New York 10456  
By: Matthew J. Leonardo, Esq.  
Hinman Straub PC  
121 State Street  
Albany, New York 12207

**JURISDICTION**

The New York State Department of Health (Department) acts as the single state agency to supervise the administration of the Medical Assistance (Medicaid) Program in New York State. 42 USC § 1396a; Public Health Law (PHL) § 201(1)(v); Social Services Law (SSL) § 363-a. The New York State Office of the Medicaid Inspector General (OMIG), an independent office within the Department, is authorized to

investigate and pursue civil and administrative enforcement actions to recover improperly expended Medicaid funds. PHL §§ 31, 32.

The OMIG conducted an audit and issued a final audit report determining to recover Medicaid Program overpayments from Triboro Center for Rehabilitation and Nursing (Appellant). The Appellant requested this hearing pursuant to SSL § 145-a and former Department of Social Services (DSS) regulations at 18 NYCRR 519.4 to review the overpayment determination.

### **HEARING RECORD**

The OMIG presented one witness, audit supervisor Sheroldeen Masters, and documents (Exhibits A-O). The Appellant presented one witness, certified public accountant Samuel Fogel, and documents (Exhibits 1-13). A transcript of the hearing was made. (T pages 1-105.) The record closed with the submission of post-hearing briefs on April 28, 2025.

### **SUMMARY OF FACTS**

1. Appellant Triboro Center for Rehabilitation and Nursing is a proprietary, or for-profit, residential health care facility, or nursing home, located at 1160 Teller Avenue in Bronx, New York. It is enrolled as a provider in the Medicaid Program. (T 36-37.)
2. The Appellant acquired its facility in receivership and became a proprietary owner from a voluntary, or not-for-profit, ownership on or around September 15, 2016. (Exhibit 1.)
3. At or around the time the Appellant became a proprietary owner of the facility, the Department calculated a Medicaid-Allowable Transfer Price (MATP) by

determining the fixed assets of the voluntary facility less the accumulated depreciation for the land improvements, building and building improvements (T 34-40, 87-89) and by adding onto that the cost of land. (T 38; Exhibit 1.)

4. Prior to becoming a proprietary owner, the Appellant entered into a lease on August 1, 2013 with DOJ Parking Associates for two parking lots, located at 373 E. 167<sup>th</sup> Street and 1174 Teller Avenue, both used by its facility. (Exhibit 8.)

5. In April 2022, the OMIG commenced an audit of the Appellant's reported costs for the capital component of its Medicaid reimbursement rate for the period January 1, 2017 through December 31, 2021. The Appellant's Medicaid reimbursement during this period for the capital component of its rate was based upon its cost reports for the period January 1, 2015 through December 31, 2019. (Exhibit A.)

6. On January 29, 2024, the OMIG issued a draft audit report (DAR) that identified several disallowances of reported property costs. The OMIG advised the Appellant that these findings had resulted in a determination to recover Medicaid Program overpayments in the amount of \$1,777,981. (Exhibit E.) The Appellant submitted objections to the DAR. (Exhibit F.)

7. On May 20, 2024, after reviewing the Appellant's objections to the DAR, the OMIG issued a final audit report (FAR) that advised the Appellant of the OMIG's determination to recover Medicaid Program overpayments in the amount of \$1,131,549. (Exhibit G.) By letter dated July 1, 2024, the Appellant requested this hearing to review the determination. (Exhibit H.)

8. The Appellant's remaining objections to the FAR, at issue here, include: (A) the real property adjustment disallowance number 1, wherein the OMIG determined

to reduce the MATP by eliminating the land cost from the calculation; and (B) the real estate tax adjustment disallowance number 3, wherein the OMIG disallowed real estate tax expenses associated with its parking lot rentals. (Exhibit G p 68.)

### ISSUES

Has the Appellant established that the OMIG's determination to remove land from the MATP calculation, as detailed in the FAR's disallowance 1, was incorrect?

Has the Appellant established that the OMIG's determination to disallow real estate tax expenses associated with its parking lot rentals, as detailed in the FAR's disallowance 3, was incorrect?

### APPLICABLE LAW

A residential health care facility (RHCF) can receive reimbursement from the Medicaid Program for costs that are properly chargeable to necessary patient care. 10 NYCRR 86-2.17. When not provided by Department regulations at 10 NYCRR Part 86-2 or specific determination by the Commissioner, allowable costs shall be determined by the application of the principals of reimbursement developed under the Medicare Program. 10 NYCRR 86-2.17(a). The Provider Reimbursement Manual (PRM-1) prepared by the Centers for Medicare and Medicaid Services offers detailed explanations regarding provider costs deemed allowable under the Medicare Program.

The facility is reimbursed by means of a per diem rate established by the Department's Bureau of Nursing Home and Long Term Care Rate Setting (BNHLTCRS) in a computation that reflects costs reported by the facility annually on its RHCF-4 forms. PHL § 2808; 10 NYCRR 86-2.10.

Allowable costs can include a component for capital costs which “shall mean costs reported in the depreciation, leases and rentals, interest on capital debt and/or major moveable equipment depreciation cost centers, as well as costs reported in any other cost center under the major natural classification of depreciation, leases and rentals on the facilities annual cost report (RHCF-4).” 10 NYCRR 86-2.10(a)(9).

A facility’s rate of payment is provisional and subject to audit. 10 NYCRR 86-2.7. The facility is required to prepare and to maintain contemporaneous records demonstrating its right to receive payment; to keep all records necessary to disclose the nature and extent of services furnished; and to furnish records to the Department upon request. 18 NYCRR 504.3(a). If an audit identifies errors in reported costs, the Department can retroactively adjust the facility’s rate. SSL § 368-c; 10 NYCRR 86-2.7; 8 NYCRR 517.3. The Department may then require the repayment of any amounts not authorized to be paid under the Medicaid Program. 18 NYCRR 518.1.

If the Department determines to recover an overpayment, the facility has the right to an administrative hearing. 18 NYCRR 519.4. At the hearing, the facility has the burden of showing that the determination of the Department was incorrect and that all costs claimed were allowable. 18 NYCRR 519.18(d)(1).

The initial allowed facility cost of a **proprietary RHCF** shall mean the portion of certified costs approved by the commissioner or costs imputed pursuant to 10 NYCRR 86-2.21 (g), in or prior to the first year of useful facility life **attributable to the acquisition of land** and the construction, acquisition or renovation of building and nonmovable equipment. 10 NYCRR 86-2.21(a)(6).

The capital cost component of **proprietary** RHCFs shall include a payment factor sufficient to return equity. A facility shall be eligible for the **return of equity** commencing in the first year following the department's determination, among other factors, that the facility has the ability to meet current capital indebtedness (including principal and interest) over the balance of useful facility life. 10 NYCRR 86-2.21(d)(4). Equity is defined as "all cash or other assets, net of liabilities, invested by a facility or its operator **in land**, building and nonmovable equipment, and found by the commissioner to be reasonable, necessary and in the public interest with respect to the facility." 10 NYCRR 86-2.21(a)(4) (emphasis added).

The capital cost component of **voluntary** facilities includes **depreciation**. "Reported depreciation based on approved historical cost of buildings, fixed equipment and capital improvements thereto is recognized as a proper element of cost for voluntary and public residential health care facilities." 10 NYCRR 86-2.19(a). Certain qualifying voluntary facilities who acquire a remaining mortgage on a facility shall also be reimbursed return of equity (10 NYCRR 86-2.19[g][1]) in the following manner: "The equity portion of the Medicaid-allowable transfer price, **except for that portion which is attributable to the acquisition of the land**, shall be reimbursed in equal annual amounts beginning in the first year following the expiration of the term of the mortgages over the remaining useful facility life." 10 NYCRR 86-2.19(g)(2)(iii) (emphasis added).

In this case, the facility's RHCF-4 forms included a MATP set by the Department when the facility was acquired and went from a voluntary to a proprietary facility in 2016. That MATP assigned by the Department included the cost of land.

## DISCUSSION

### A. Disallowance 1

The OMIG determined to adjust real property capital costs, as explained in Disallowance 1 of the FAR:

As a result of a change of ownership on September 15, 2016, the Provider has changed from a public entity to a proprietary entity. Therefore, the Provider should receive capital reimbursement in the form of return of real property equity, rather than real property depreciation expense. Accordingly, a Medicaid Allowable Transfer price (MATP) was calculated, which is the basis for the return of real property equity that should be reimbursed. **In addition, an adjustment was made to eliminate land from the calculation.** Adjustments were also made to eliminate expenses not supported by documentation and operating expenses. Consequently, real property equity was allowed and real property depreciation allowed in the rates was disallowed. See Attachment E for details.

Regulations: 10 NYCRR Sections 86-2.4, 86-2.17(a) & (d), 86-2.19(g)(2)(i) & (iii), 86-2.21, 451.230 and 455.6, PRM-1 Sections 2300 & 2304.

(Exhibit G p 68 [emphasis added].)

OMIG's rationale on audit to remove land from the MATP calculation is two-fold: First, OMIG contends that it "confirmed" with the Department that land should not be included in a MATP calculation and that "according to the Bureau of Nursing Home and Long Term Care Rate Setting (BNHLTCRS), 'the MATP is calculated based on historical cost, and is comprised of depreciable assets only'." (OMIG Br p 5, citing T 40-45, Exhibit G p 74.) Next, OMIG contends that the regulations, at 10 NYCRR 86-2.19, 86-2.21, and the Provider Reimbursement Manual (PRM-1), at PRM-1 104.10E, 104.23 and 104.6, require that land be excluded from the MATP. (OMIG Br p 5.)

When a nursing home facility changes ownership, and - as here - changes from a voluntary to a proprietary facility, the Department is charged with calculating its MATP, which is the fixed assets of the voluntary facility, less the accumulated depreciation, with the remaining amount then divided by the average of the depreciation of that year, resulting in a new calculation for the life of the facility. (T 39, 89; *see* 10 NYCRR 86-2.21[a][6] [defining initial allowed facility cost for a proprietary facility].) A MATP is calculated because return of equity will not be calculated based on the original building but includes the land, the historical cost, land and building improvements. (T 89.) The Department calculates the MATP by using the last cost report that the voluntary filed to prepare a worksheet. That worksheet is then submitted to the facility and is reviewed for accuracy and, if any error is identified, an appeal can be filed. (T 89-90.)

Both the Appellant and the OMIG concur that the MATP at issue here was calculated by the Department and included the cost of land, separate and apart from land improvements and other costs which were appropriately reduced by accumulated depreciation. (T 70-71; Exhibit 1.) The OMIG does not dispute that the Appellant accurately reported the land value in the appropriate section of its cost reports. The Department exercised its judgment in including land in its MATP calculation. (Exhibit 1.) Certified public accountant (CPA) Fogel testified that the Appellant is his client and that he was involved in reviewing the Department's MATP calculation. Because the Department correctly filled in the MATP work sheet and included land (Exhibit 1), he did not need to discuss the calculation with the Department and did not file an appeal. (T 90.) Indeed, CPA Fogel testified that in his 40-year professional experience, he has had approximately 25-30 cases involving MATP calculations and that the Department *always*

included land in the MATP calculations (*see* Exhibits 1-6 [other examples of MATP calculations by the Department where land was included]) until a couple of years ago when the Department inexplicably began excluding land. (T 92.)

The OMIG's own witness conceded that the Department calculated the MATP, yet the OMIG determined, on audit, that the MATP was incorrect because it included land. Although it claims it later "did confirm with the Department that land is not supposed to be included" (T 45) and that it was entitled to correct the error in this audit, the OMIG did not present any direct confirmation from the Department agreeing with OMIG that there was an error in calculating the Appellant facility's MATP that the OMIG is entitled to correct on audit. In its brief, the OMIG offered only an unsupported assertion, presented as a quote from the BNHLTCRS, or ratesetters, that "the MATP is calculated based on historical cost, and is comprised of depreciable assets only." (OMIG Br p 5, citing Exhibit G p 74, its own FAR.)

In any event, even if the OMIG auditor confirmed with the Department ratesetters that the Department made a mistake in including land in the MATP, the Department and the OMIG are not supposed to confer with each other on what an audit should uncover. *Atlanticare Management, LLC v Ives*, 212 AD3d 132, 139 (3d Dept 2022), *lv denied* 40 NY3d 902 (2023). In *Atlanticare*, the court rejected a suggestion that the Department and OMIG can jointly determine a methodology such as rate setting. OMIG's audit authority is set forth in former DSS regulations at 18 NYCRR Part 517. Rate setting authority is found in the Department of Health regulations at 10 NYCRR Part 86-2. OMIG auditors have the authority to review a Medicaid provider's books and records for factual errors in the cost data supplied to the Department's rate setters, but the Part 517 audit regulations

do not authorize the OMIG auditors to review judgment decisions made by the Department in computing a facility's Medicaid rate -- or a MATP, as here at issue.

Where a facility's reimbursement rates were based upon mathematical miscalculation, computer error, or the submission of false information, the OMIG may retroactively adjust rates and recoup overpayments. *Westledge Nursing Home v Axelrod*, 68 NY2d 862, 864-865 (1986). However, these situations are different from a review of alleged mistakes in judgment by the Department. There is no authority to recoup regarding "judgmental considerations involving expertise." *Westledge, supra* at 865. It is undisputed that the nature and amount of the land cost at issue in this case was fully and accurately reported to the Department when it calculated the MATP. The OMIG's audit adjustment was not a correction of a mistake of fact but rather a rejection of the Department's judgment of how the MATP, used for the rate period under review, was calculated. The MATP audit adjustment to exclude land was not within the legal scope of the audit process. *See Atlanticare Management, LLC v Ives, supra* at 139-140.

Furthermore, the authority relied upon by the OMIG to exclude land from the MATP does not support its determination. *See Matter of Riverdale SNF, LLC a/k/a Schervier Nursing Care Center Decision After Hearing Audit No. 21-4040* (decided August 20, 2025) (determining that OMIG erred in removing the cost of land from the calculation of a MATP). OMIG claims its auditors made the decision to remove land from the MATP using supporting regulations (T 40) and, when the regulations needed further explanation or clarity, they relied on the PRM-1. (T 44.) *See* 10 NYCRR 86-2.17(a).

OMIG relied primarily on 10 NYCRR 86-2.19(g)(2)(iii), which provides: “The equity portion of the Medicaid-allowable transfer price, **except for that portion which is attributable to the acquisition of the land**, shall be reimbursed in equal annual amounts beginning in the first year following the expiration of the term of the mortgages over the remaining useful facility life” (emphasis added). However, OMIG did not explain why it determined to rely on this regulation, which applies only to **voluntary** facilities, instead of 10 NYCRR 86-2.21(i), which applies specifically to **proprietary** nursing homes and uses the same language concerning the MATP and return of equity. In fact, the only language that differs is how land is treated. The plain language of 10 NYCRR 86-2.21 -- describing capital cost reimbursement for proprietary nursing homes – includes land by defining equity as “all cash or other assets, net of liabilities, invested by a facility or its operator **in land**, building and nonmoveable equipment and found by the commissioner to be reasonable, necessary and in the public interest with respect to the facility.” Indeed, whereas 10 NYCRR 86-2.19(g)(2)(iii) for voluntary facilities excludes land because land is not depreciable, 10 NYCRR 86-2.21(i)(2)(iii) does not exclude, thereby necessarily including, land in return of equity. *Compare* 10 NYCRR 86-2.19(g)(2)(iii) to 10 NYCRR 86-2.21(i)(2)(iii).

In any event both provisions, 10 NYCRR 86-2.19(g)(2)(iii) and 10 NYCRR 86-2.21(i)(2)(iii), concern “qualifying facilities” and no one has alleged that the Appellant is a qualifying facility. Indeed, the regulatory impact statement submitted when the regulations at issue were to be amended describes that the then-proposed regulations provided latitude to accommodate various types of financing arrangements *not at issue herein*. The drafters of the regulations intentionally dealt with voluntary and proprietary

facilities separately by adding the exclusion attributable to the acquisition of the land when addressing the MATP in 10 NYCRR 86-2.19(g)(2)(iii) to allow return of equity for a voluntary facility where certain conditions, not at issue herein, are present. There is no indication anywhere that the regulation at 10 NYCRR 86-2.19(g)(2)(iii) was intended to address the calculation of a MATP when a voluntary facility is sold and becomes a proprietary facility. *See Matter of Riverdale SNF, supra*, citing *Proposed Agency Action Re: Residential Health Care Facility Capital Cost Reimbursement for Assumable Mortgage Financing*, I.D. No. HLT-38-80-00008-P, Regulatory Impact Statement, Sept. 17, 1980.

Auditor Masters testified that OMIG chose to apply 10 NYCRR 86-2.19 for the Appellant, although a proprietary facility, because “it addresses return of equity. Voluntaries never receive return of equity. . . Only proprietaries. . . receive return of equity.” (T 43.) Yet, the regulation itself directs that certain “qualifying [voluntary] facilities” shall receive return of equity when the conditions set forth in 86-2.19(g)(1) are present. 10 NYCRR 86-2.19(g)(2)(iii).

CPA Fogel testified that land is included in the MATP, and he bases this conclusion on 10 NYCRR 86-2.21, *which applies to proprietary facilities and does not exclude land*. (T 89.) OMIG’s determination to follow the language of 10 NYCRR 86-2.19 when there is corresponding language in 86-2.21 that applies to proprietary facilities, quite frankly, does not make sense. The initial allowed facility cost of a proprietary RHCF, such as the Appellant, shall mean the portion of certified costs in or prior to the first year of useful facility life **attributable to the acquisition of land** and the construction, acquisition or renovation of building and nonmovable equipment. 10

NYCRR 86-2.21(a)(6); *see also Matter of Bethany Nursing Home and Health Related Facility, Inc. v Axelrod*, 106 AD2d 809, 810 (3d Dept 1984) (“Guidelines for determination of the rates are provided and found in 10 NYCRR subpart 86-2 which include, *inter alia*, a factored expense item to provide for a return upon the equity invested in the facility. This expense allowance is computed by subtracting from the historical cost [**total cost of land**, improvements and nonmoveable equipment], the amount of liabilities pertaining to the facility. . .”). Indeed, equity is defined for proprietary facilities as “all cash or other assets, net of liabilities, invested by a facility or its operator **in land**, building and nonmovable equipment, and found by the commissioner to be reasonable, necessary and in the public interest with respect to the facility.” 10 NYCRR 86-2.21(a)(4) (emphasis added).

Although Auditor Masters attempted to explain why 10 NYCRR 86-2.21 does not exclude land by citing certain provisions of the PRM-1 for further clarity, there is no reason to look to the PRM-1 Medicare rules when the Medicaid regulations are clear that land is not removed in the calculation of the MATP for proprietary facilities. 10 NYCRR 86-2.17(a).

The PRM-1 provisions cited recognize only depreciation costs and do not address return of equity. There is nothing in the PRM-1 that would recognize any of the associated capital costs for proprietary facilities. Nowhere in the PRM-1 is there a MATP. Rather, such construction is wholly the creation of New York laws and regulations about Medicaid, not Medicare reimbursement. The Department thus acted within its discretion to include land in the MATP and the OMIG exceeded its audit authority in determining that it was error for the Department to do so.

Therefore, the Appellant has established that the OMIG's determination to remove land from the MATP calculation, as detailed in the FAR's disallowance 1, was incorrect.

**B. Disallowance 3**

The OMIG determined to adjust real estate tax disallowances, as explained in Disallowance 3 of the FAR:

The reported real estate tax for rate years 2017 and 2018 varied from the amount verified on audit. Therefore, disallowances were necessary. **Additionally, the Provider's real estate tax included taxes for offsite parking lots. Parking lot rental is considered a real property lease, and real property leases entered into after March 10, 1975 are not reimbursable.** Therefore, real estate tax expenses associated with the parking lots were disallowed.

Regulations: 10 NYCRR Sections 86-2.17(a)&(d) & 86-2.21(f)(3), PRM-1 Sections 2300, 2304.

(Exhibit G p 68 [emphasis added].)

The Appellant leased two offsite parking lots and made lease payments to the owner, DOJ Parking Associates LLC, pursuant to a lease dated August 1, 2013. (Exhibit 8.) Real estate taxes on the lots were billed to the owner, DOJ Parking Associates LLC. (T 47, 51; Exhibit L.)

Parking lot rental is a real property lease, and the capital cost component of a rate shall not be affected by any lease occurring after 1975. 10 NYCRR 86-2.21(f)(3). The parking lots were leased by the Appellant after 1975, in 2013, and the OMIG properly applied that regulation here. *Matter of Concourse Rehabilitation and Nursing Center, Inc. v Zucker*, 217 AD3d 1189, 1192 (3d Dept 2023).

The Appellant first argues that it is not seeking reimbursement for the lease payments for the parking garages but only for the real estate taxes associated with the leased garages. New York regulations at 10 NYCRR 86-2.21(f)(3) indicate that a lease agreement such as the one at issue here shall not *affect* a capital cost component. Clearly, any taxes paid on leased property *would affect* a capital cost component. *Matter of Bushwick Center for Rehabilitation & Health Care* Decision After Hearing Audit No. 19-5171 (2024).

The Appellant relies on the Consolidated Fiscal Reporting (CFR) Form 1 (CFR-1) which allows reporting for real estate taxes. (App Br pp 17-18.) However, the CFR-1 is part of a reporting manual, used by agencies including the Department, that is inapplicable to nursing homes and, therefore, was not used or considered in this audit. (T 52; CFR Manual, p 2 [The CFR is required to be completed by service providers receiving funding from waiver programs for the Department for Care at Home I and II, Traumatic Brain Injury and Nursing Home Transition and Diversion].)

The Appellant next contends that pursuant to the law, and the lease itself, it is required to pay real estate taxes and, therefore, should be reimbursed for same. (App Br p 18.) It is undisputed that New York City regulations require the Appellant to have parking spaces and that necessarily requires payment of taxes. A requirement that a nursing home have parking spaces is not a requirement that the nursing home pay real estate taxes. Taxes are required to be paid, but it is the property owner/lessor, not the Appellant, that was billed for and required to pay them. *See Matter of Bushwick Center for Rehabilitation & Health Care, supra.*

The Appellant contends that, unlike *Bushwick*, pursuant to its lease agreement it was required to pay the real estate taxes on the parking lots. The lease agreement indicates that “the net basic rent required to be paid under this Lease shall be fully net to Lessor over and above any and all taxes.” (Exhibit 8 p 29.) Yet, the language of the lease itself is immaterial as the submitted quarterly tax bills for the parking lots are addressed to DOJ Parking Associates LLC, not to the Appellant. (Exhibit L; T 51.) The Appellant did not present any proof indicating that it actually paid the taxes directly during the audit period and, even if it did, pursuant to the lease itself, that would be considered “additional rent” and still part of the lease arrangement. (Exhibit 8 p 29 [“Lessee shall pay or cause to be paid, as additional rent before any fine, penalty, interest or cost may be added thereto for the nonpayment thereof, all taxes”].)

The OMIG auditors requested that the Appellant provide proof that the offsite parking lots were part of the approved historical cost of the facility under 10 NYCRR 86-2.21 but none was provided. (T 50; Exhibit M pp 122-124.) To the contrary, the asset purchase agreement establishes that a separate entity, DOJ Parking Associates LLC, was purchasing the “parking garage property” located at 1174 Teller Avenue. (T 83-84; Exhibit 13 pp 88-89.) Similarly, the deed for the two parking lots show that the buyer is DOJ Parking/Land Associates and not the Appellant. (Exhibits 9, 10.) The parking lots were not owned by the Appellant nor were the parking lot leases included in approved historical costs recognized for capital reimbursement under 10 NYCRR 86-2.21. (Exhibits M, 8, 13; T 50, 80.)

The burden of proof was on the Appellant, not the OMIG, to establish the capital costs it reported were allowable. 18 NYCRR 519.18(d)(1). The Appellant’s arguments

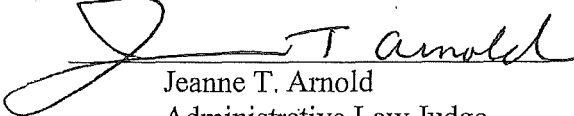
do not explain why, contrary to the express provisions of 10 NYCRR 86-2.21(f)(3), taxes paid for parking lot leases entered into after 1975 should be reimbursed as capital costs of the Appellant.

**DECISION**

The OMIG's audit report property expense **disallowance 1** is modified, to reverse the OMIG's determination to remove land from the calculation of the MATP.

The OMIG's audit report real estate tax **disallowance 3** is affirmed.

DATED: Rochester, New York  
September 4, 2025

  
Jeanne T. Arnold  
Administrative Law Judge

TO:

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