# *The Evaluator*: 2020 Valuation Analyses

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AUTHORED ARTICLE | 10.2020

## ARKANSAS JUDGE DENIES SCHOOLS' REQUEST TO INTERVENE IN HIGHLY CONTESTED WALMART AND SAM'S CLUB APPEALS

***Walmart Real Estate Business Trust v. Pulaski Cty, et al.* case numbers 60CV-19-6548, 60CV-19-6550, 60CV-19-6551, and 60CV-19-6553 pending before the Circuit Court of Pulaski County, Arkansas.**

Little Rock School District sought to intervene in four cases in which Walmart and Sam's Club (collectively Walmart) are seeking to reduce their properties' assessments by a combined value of $29.6 million. The school district sought to participate in these cases in April, on the basis that it had a larger stake in the disputes than other taxing entities.

These are four of the ten cases that Walmart filed in 2018 across Arkansas seeking to reduce the property valuations for the ten locations from a value of $145.8 million to $74.3 million.

The school district argued that it relies heavily on property tax revenue and that if Walmart prevails in the four cases, it would loss approximately $124,000 in revenue per year if Walmart prevails in the four cases in its district. The school district also asserted that this amount was more than half the tax revenue at issue for the four properties. The school district also argued that the amount of revenue at issue for the other taxing entities combined is smaller than the potential loss if Walmart were to prevail.

In its motion in opposition, Walmart urged against permitting the school district's intervention, citing to a 1961 Supreme Court of Arkansas decision rejecting a school district's request to intervene. In the 1961 decision, the Court found that the school district is not a necessary party in the determination of the value of property for tax purposes. The Court went on to state that if the school district had the ability as a matter of right to intervene in tax proceedings, the same right would have to be extended to all other beneficiaries of property taxation.

Walmart also asserted that the existing defendant, the County can adequately represent the school district's interest.

The Circuit Court Judge, without stating any reason denied the Motions to Intervene, and these cases will continue to proceed forward, without the school district's involvement.

## CALIFORNIA COURT DETERMINES TRANSFER TAX NOT APPLICABLE TO PURCHASE OF REAL ESTATE ENCUMBERED BY LONG-TERM LEASE

***731 Market Street Owner LLC. V City and County of San Francisco*, 1st Dist. Case No. A154369, Sup. Ct. CGC-16-553010 (June 18, 2020).**

In June, a California appellate court affirmed the trial court's decision, finding that the purchase of realty encumbered by a long term lease is not subject to San Francisco's transfer tax if the leasehold has a remaining term of 35 years or more at the time of transfer. In California, transfer tax is due when there is "realty sold" because code and case law have developed in a way that defines this similar to "change in ownership" where transfer tax would be due.

In 2011, the owners of a six-floor office building entered in a 45-year lease for the ground floor retail space with CVS. At the time of the lease, the owner paid transfer tax on the leasehold pursuant to law. Then, in 2015, with a lease term of 41 years remaining, the entire building was sold, with the long-term lease remaining in place. Because transfer tax was paid at the time the long-term lease commenced, the purchaser argued that the CVS lease for the ground-floor space did not constitute "realty sold" for transfer tax purposes. The purchaser asserted that California law established that CVS was the "owner" of the property and that the 2015 sale for the CVS portion of the property did not create a transfer tax event (transfer tax was paid on the remainder of the building not subject to a lease of 35 or more years at the time of transfer).

The city disagreed with the property owner's position, claiming that as a charter city it had developed a broader definition of "realty sold" subject to transfer tax.

The court rejected the city's argument, finding that the transfer tax on "realty sold" definition in the city ordinance was virtually the same as the state of California's standard transfer tax provisions.

This case illustrates that an understanding of the complex transfer tax provisions and careful planning may result in significant transfer tax savings in California.

## CALIFORNIA "SPLIT ROLL" MEASURE QUALIFIES FOR NOVEMBER BALLOT

The ballot measure commonly known as the split-roll tax initiative, which is aimed at reforming the California's landmark Proposition 13 tax law, has officially qualified for the statewide ballot on November 3rd. The California Secretary of State's Office received over 1.17 million petition signatures in an effort to put the measure, officially known as the California Schools and Local Communities Funding Act of 2020, on the ballot for voters. If the proposed measure passes, it would allow the state to reassess commercial properties and land that is valued at more than $3 million in market value beginning with the 2022-2023 fiscal year. Since Proposition 13 went in effect in 1978, all properties in California have only been reassessed when a

change in ownership occurred or new construction was completed. Moreover, the current law mandates that assessed values of properties can increase by no more than 2% per year. If the split-roll initiative passes in November, many commercial properties will likely face a significant increase in property tax liability as tax assessments begin to reflect current fair market value. Furthermore, the Legislature will be required to develop an entirely new process for hearing assessment appeals.

## INDIANA TAX COURT FINDS THAT THE INDIANA BOARD OF TAX REVIEW UNREASONABLY DENIED PROPERTY OWNER'S VOLUNTARY DISMISSAL

***CVS Corporation #2519-01 v. Prince, Lake County Assessor* (May 22, 2020), Indiana Tax Court Nos. 19T-TA-00004 and 19T-TA-00005.**

CVS initiated appeals challenging vale for real property tax purposes. Months before the scheduled hearing, CVS filed voluntary dismissal of its appeals, which the Board of Tax Review initially granted. The Board of Review later vacated the dismissal and proceeded to increase the value of the two stores at issue.

CVS appealed to the Tax Court, arguing that the Board of Tax Review erred in vacating the dismissals and changing value. On appeal, the Tax Court agreed. The Court stated that, under Indiana statute, a voluntary dismissal must be given unless the adverse party has incurred substantial expense or will suffer legal prejudice. The Court concluded that the Board's vacation of the voluntary dismissal was erroneous because the County Assessor, the adverse party to the proceedings, failed to present any evidence of the amount of expenses involved in the cases, nor did the Assessor establish legal prejudice. The Court noted, too, that the voluntary dismissals came did not come at an advanced stage of the proceedings. The Court ordered that the voluntary dismissals be reinstated and that the original, lower valuations be restored.

## MASSACHUSETTS APPELLATE TAX BOARD EVALUATES MARKET CONDITIONS AFFECTING DATA CENTERS AND PERFORMS INDEPENDENT INCOME APPROACH TO DETERMINE VALUE

***Digital 55 Middlesex, LLC v. Board of Assessors of the Town of Billerica*, Massachusetts Appellate Tax Board, Docket Nos. F329647 & F332675.**

The Massachusetts Appellate Tax Board (Board) rejected Appellant's testimony regarding the state of the market generally and in the Boston area regarding data centers when it conducted its own independent determination of valuation a data center.

Appellant, the owner of an approximately 100,000 square foot data center, filed an appeal to reduce the assessment in tax years 2016 and 2017. Appellant presented fact and expert witness testimony that the market for data centers had become more competitive as technology advanced and as more companies were moving their data storage to the cloud. Moreover, Appellant's witnesses testified that there was more concentration of data centers in California, Northern Virginia, Dallas and Chicago, and that Boston was a second or third tier data center market. All of these factors, according to Appellant's witnesses, put downward pressure on lease rates and increased the capitalization rates for these types of properties.

Appellant and Appellee presented competing appraisal evidence. Both appraisers utilized the sales comparison approach and income approach in their valuation. However, the Board found that the lack of timely, local, comparable data center sales precluded the use of the sales comparison approach.

In analyzing the income approach, the Board agreed that while there was a downward trend in lease rates for data centers, the market did not indicate a reduction to the level advanced by Appellant's appraiser. Moreover, although Boston has higher utility rates (a factor affecting the placement of data centers) and less demand than other markets, it was still a strong market. In performing its own income approach, the Board determined that the assessment exceeded its fair cash value for tax year 2016 and 2017 and reduced the assessment, but to an amount less than that in Appellant's appraisal.

## MICHIGAN TAX TRIBUNAL PERFORMS INDEPENDENT INCOME APPROACH TO DETERMINE VALUE FOR 920 BED STUDENT HOUSING COMPLEX

***Algen GV Owner LLC v. Allendale Township*., Mich. Tax Tribunal, Dkt. No. 18-000844, June 15, 2020.**

The Michigan Tax Tribunal (MTT) performed its own income approach using data from both appraisers' reports to determine a value for a 920 bed student housing complex near Grand Valley State University for tax year 2018. The subject property was comprised of 28 buildings located on 34 acres approximately half a mile west of Grand Valley State University.

As a starting point in the case, Petitioner's appraiser determined a true cash value for the subject property of $30,600,000 for tax year 2018. The MTT noted that the subject property sold in the fall of 2016, approximately a year before the tax day at issue in the case, for the total amount of $52 million, which put Petitioner's appraiser's value under some scrutiny. Moreover, Petitioner's appraiser had previously prepared an appraisal for the subject property in connection with the sale but concluded that value include business value and personal property. Ultimately, the MTT determined that his lower contention of value in this case was not at odds with his prior work.

Respondent and Petitioner presented competing appraisals opining to the value of the subject property as of December 31, 2017. Both appraisers utilized the sales comparison approach and income approach in their reports, noting that the cost approach was not applicable to this type of property. However, in reviewing both reports, the MTT found that the sales approach was not the most persuasive indication of value. Specifically, the MTT noted that the appraisers' location adjustments failed to consider the "dynamic factors" related to student housing including enrollment, supply, physical location and proximity to campus central areas.

The MTT also pointed out that this type of property was most widely utilized for investment purposes, the best way to review the property was through the income approach. In arriving at the factors utilized in its pro forma income approach, the MTT focused on utilizing data that reflected the local market as opposed to other student housing throughout the state. Using components from each appraisers' income approaches, the MTT concluded a true cash value under the income approach of $41,200,000.

## MICHIGAN TAX TRIBUNAL RULES IN FAVOR OF MENARDS AND IGNORES CITY'S CLAIM THAT THE RETAILER RELIED UPON A "DARK STORE" VALUATION THEORY

***Menard Inc. v. City of Escanaba*, Mich. Tax Tribunal, Dkt. No. 14-001918, May 28, 2020.**

On remand from the Michigan Court of Appeals, the Michigan Tax Tribunal (MTT) determined the true cash value of the taxpayer's big-box retail property and found that the subject property had been over assessed by the city. The MTT had been instructed to take additional evidence with regard to the market effect of deed restrictions and allow the parties to submit additional evidence regarding the cost-less-deprecation approach to value, which it found to be the appropriate technique to employ in this case given the testimony and evidence presented.

The MTT concluded that the greater weight of the evidence in this case demonstrates that deed restrictions do not impact the sale price achieved as those restrictions have a neutral market effect due to "carve-outs" for buyers. Whether a property is occupied or not at the time of sale, the MTT decided, is not determinative of its highest and best use. The MTT found that the subject property's highest and best use cannot be extended to "continued use as a freestanding *home improvement* store" since it is highly unlikely that another home improvement store could move into the property without extensive modification. The MTT indicated that the present use of the subject property may be considered because it might be indicative of the potential buyer's use but its "value-in-exchange is what its true cash or fair market value should reflect".

In response to the city's continued claim that the property owner was attempting to reduce its property tax liability using the "dark store theory", the MTT reiterated that there is no Michigan statute or case law on the "dark store theory" and that it can only follow well-established appraisal theory, Michigan statutory and case law. As additional response to the city's claim, the MTT simply found that, to transfer the fee simple estate, a property must be vacated at the time of sale so that the purchaser has the full bundle of rights and that it must be valued as vacant and available for immediate occupancy or lease at market rents. The MTT also determined that the Appraisal Institute's definition of fee simple in *The Appraisal of Real Estate* was the proper definition of fee simple as opposed to the definitions of fee simple contained in a recent IAAO white paper and Black's Law Dictionary.

## FLORIDA APPEALS COURT CHANGES MIND ON DISNEY HOTEL RULING; REJECTS DISNEY'S VALUATION EVIDENCE AND ORDERS A REASSESSMENT

***Rick Singh v. Walt Disney Parks and Resorts, US, Inc., et al.*, Case No. 2927 (Fla. 5th DCA Aug. 7, 2020).**

In August, a Florida appeals court reversed its previous ruling in a long-standing dispute over the assessment of a Walt Disney World resort. In its original decision, which was issued in June, the Court ordered that the assessment for Disney's Yacht & Beach Club Resort be reduced from $337 million to $209 million and held that the Rushmore valuation method utilized by the county appraiser violated Florida law. This outcome was considered a sweeping victory for Disney and the entire state's lodging industry, with the potential to save big hotel owners millions of dollars in taxes in the future. However, before owners could cash in on these savings, the Court changed course.

On a reconsideration order filed by the county appraiser, the Court revised its previous decision to hold that the Rushmore methodology may be used in the state, but confirmed that the manner in which the county appraiser had applied the method was impermissible. The Court also overturned its order to reduce the resort's value to $209 million, instead remanding the matter back to the county appraiser's office for further determination.

The Rushmore method, named after an author of appraisal textbooks, is a type of income approach that is often utilized to value hotel properties, though its application can vary. The county appraiser, in applying his version of the method, added an "ancillary income" figure to the resort's gross income based on the resort's restaurant, retail and spa spaces. He then removed a management and franchise fee from the total property income to account for and exclude any intangible business value. This methodology resulted in a 118% increase in the resort's value for 2015, which Disney appealed.

Disney argued that the county's approach improperly excluded the business value and by underestimating such value, overestimated the remaining value of the real estate. Disney presented appraisal evidence of its own, including a rental income figure from restaurant, retail and spa spaces that differed from the county's ancillary income figure by about $70 million. The Court originally adopted Disney's figure, setting aside the ancillary income the county relied upon.

In its revised decision, the Court held that the manner in which the county appraiser had applied the Rushmore method was impermissible. It also reversed its decision to accept Disney's figure relating to the value of the restaurant, retail and space spaces, finding that there was not competent substantial evidence in the record to allow the Court to make an independent assessment determination. Determining that the record was not sufficient for the Court to resolve the parties' dispute, the Court remanded the case back to the appraiser and ordered a reassessment.

## KENTUCKY COURT OF APPEALS SIDES WITH KROGER IN VALUATION APPEAL AND CONFIRMS PROPER APPLICATION OF RELATED EVIDENTIARY BURDENS

***Kroger Limited Partnership I v. Boyle County Property Valuation Administrator et al.*, Case No. 2019-CA-000935-MR (Ky. Ct. of Appeals Aug. 14, 2020)**

The Kentucky Court of Appeals recently sided with Kroger in a valuation appeal that hinged on proper application of the parties' respective evidentiary burdens. On appeal from the Kentucky Claims Commission (the Commission), Kroger argued that the Commission had misinterpreted and misapplied the applicable presumption that the property valuation administrator (PVA's) value is correct.

At the Commission's hearing of the matter, Kroger submitted an appraisal that utilized the sales comparison and income capitalization approaches to value and offered the testimony of the appraiser. The PVA testified that he had relied upon a summary report prepared by an employee of the Kentucky Revenue Cabinet to determine the subject assessment.

The Commission rejected Kroger's appraisal evidence, concluding that merely offering alternative evidence was not sufficient to rebut the presumption that the PVA's value was correct. Holding that Kroger had failed to carry its burden of showing that the PVA's assessment was erroneous, the Commission upheld the PVA's original assessment.

On appeal, the Court agreed with Kroger that the Commission had misapplied the presumption of validity. While the Court confirmed that, in assessment appeals, there is a statutory presumption that the PVA's assessment is correct, that presumption can be rebutted. Specifically, once an appellant presents competent evidence supporting a contrary value, the presumption of validity disappears and the burden shifts to the PVA to present competent evidence supporting its valuation.

As a result, because Kroger's appraisal evidence was sufficient to rebut the statutory presumption of validity, the PVA was required to present competent evidence supporting its valuation. As noted by the Court, as long as the PVA relied upon a "properly supported valuation," the Commission was not obligated to accept Kroger's valuation. However, because the summary report the PVA relied upon was unreliable hearsay testimony, the Court found that the PVA had failed to present competent evidence in support of its assessment. In addition, because the Commission had failed, in its rejection of Kroger's appraisal, to set forth any significant reasons for doing so, the Court found that the Commission had erred and reversed the Commission's order.

## COURT OF APPEALS CONCLUDES THAT THE OHIO BOARD OF TAX APPEALS PROPERLY VALUED A CASINO AND RACETRACK AT $21.5 MILLION, THUS REJECTING A SCHOOL BOARD'S BID TO VALUE THE PROPERTY AT MORE THAN $44 MILLION.

***Harrah's Ohio Acquisition Co. v. Cuyahoga Cty. Bd. of Revision*, 2020-Ohio-4214 (August 27, 2020).**

This case involves two parcels located in Warrensville Heights, which collectively comprise a 128-acre horse-racing facility with a track, an eight-story grandstand, barns, and other structures. In July 2010, the property was purchased by Harrah's Ohio Acquisition Company, L.L.C. (Harrah's) for $43 million. According to Harrah's, between January 1, 2012 and January 1, 2013, it spent approximately $7 million on improvements to the property. Shortly after the January 1, 2013 tax lien date, it obtained a video lottery terminal (VLT) license; the license cost $50 million. In April 2013, Harrah's began operating as Thistledown Racino.

For tax year 2013, the Cuyahoga County fiscal officer valued the property at $37,658,000. Both Harrah's and the BOE filed complaints with the Board of Revision ("BOR"). Harrah's sought a decrease in value to $23,315,888 (the fiscal officer's 2012 valuation plus the improvements), and the BOE sought an increase in value to $43 million (the 2010 purchase price). After haring, the BOR retained the fiscal officer's value.

On appeal to the Board of Tax Appeals, both parties relied upon appraisals. Both experts relied primarily upon the income approach to value. Harrah's appraiser used a unit appraisal methodology. He valued the entire property. He then deducted the value attributable to property other than real property, which meant he deducted the value of the VLT license ($50 million), the value of personal property ($30.7 million), and about $4.5 million, to account for the fact that the racino did not begin operating until April 2013. The valuation for the tax year 2013 under the income-capitalization approach was $21.5 million

Unlike Harrah's income-capitalization approach, the BOE's appraiser assumed that the property would be leased to a racino operator at market rent, and assumed that a typical lease of this type would call for a percentage rate of a racino's "wagering handle." The appraiser analyzed racetrack-property leases from 1986 to 1996 to estimate what those percentages would be. Those percentages included live on-track wagering handle and net revenue from VLTs. He opined a value of $44.5 Million.

The BTA adopted Harrah's value, finding that the BOE's reliance upon income from the race track activities resulted in a leased fee value, rather than a value in fee simple, as required under Ohio law. According to the BTA, the BOE's leased-fee value "'taint[ed] the validity of the entire report.'"

The BOE appealed to the Ohio Supreme Court, which reversed and remanded based a finding that the "BTA's refusal to consider Bovard's appraisal was legal error because the appraiser could take the possibility of encumbering the property with a lease into account when valuing it consistent with *R.C. 5713.03*'s directive to determine the "'true value of the fee simple estate, as if unencumbered,'" so long as the appraisal assumed a lease that reflected the relevant real estate market." *Harrah's Ohio Acquisition Co., L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 154 Ohio St.3d 340, 2018-Ohio-4370, at ¶ 27. The BTA was instructed on remand to weigh the strengths and weaknesses of the BOE's appraisal evidence.

Upon remand, the again rejected the BOE's evidence and valued the property in accordance with the evidence submitted by Harrah's. The BOE appealed to the Court of Appeals, arguing that the BTA failed to review the evidence on remand as instructed and relied upon the same incorrect legal conclusion that led to the Court's remand.

The Court of Appeals disagreed. The Court noted that the remand order in the earlier decision was based on the BTA's complete disregard of the BOE appraisal. On remand, however, the BTA did consider the appraisal, but found the methodology to be flawed. Specifically, the BTA found that the appraisal took into consideration income from the business operated on the property, in violation of *Higbee Co. v. Cuyahoga Cty. Bd. of Revision*, 107 Ohio St.3d 325, 2006-Ohio-2. The Court stated that the BTA had fully considered the BOE's approach, but the BTA found that *Higbee* demonstrated the flaw in the BOE's valuation; "that is, his valuation would vary depending on the success or lack thereof of the business, rather than establishing a lease rate that reflected realty value."

As to the remaining issue, the BOEs claim that the BTA failed to properly weigh the strengths and weaknesses of both appraisals, the Court stated that it was not its role to decide issues of fact. From its review of the BTA's decision, the Court concluded that there was evidence to support the BTA's findings regarding the reliability of Harrah's appraisal evidence and the flaws in the BOE's evidence. The Court concluded that the "BTA considered Bovard's approach as it was mandated to do, and gave specific reasoning as to why it did not find it reliable. We will not second-guess the decision, or substitute our judgment for the decision."

## OHIO BOARD OF TAX APPEALS REVERSES COURSE ON REAL PROPERTY TAX EXEMPTIONS FOR PERMANENT HOUSING FACILITIES

***Columbus City Schools Dis. Bd. of Edn. v. McClain, et al.*** **(May 28, 2020), BTA No. 2018-649.**

The Ohio Board of Tax Appeals (BTA) recently determined that real property that is used primarily for private residential purposes cannot qualify for real property tax exemption based upon charitable use. With this decision, which involved a 40-unit supportive housing facility in Columbus, the BTA reversed exemptions that have been available to supportive housing facilities since at least 2007.

The facility, known as Hawthorn Grove, provides housing and supportive services, free of charge, to low income, disabled individuals, many with a history of homelessness. The Tax Commissioner granted real property tax exemption to Hawthorn Grove as a property used exclusively for charitable purposes. On appeal by the impacted school district, the BTA reversed the Commissioner's determination, holding that Hawthorn Grove's primary use was as a private residence for tenants living there. As a result, and despite the circumstances of its residents, the BTA held that the facility could not qualify for exemption. In so holding, the BTA failed to reconcile its decision with long-standing precedent allowing such an exemption for facilities just like Hawthorn Grove.

The BTA has since had occasion to apply this holding to other properties, recently denying exemption for a similar facility known as Terrace Place on the basis that "a distinctly residential use" of real property defeats a claim of charitable exemption. *See Columbus City Sch. Dist v. McClain, et al.* (July 20, 2020), BTA No. 2018-1184. In its decision, the BTA also explicitly confirmed that it had "effectively overruled" the precedent granting exemption for supportive housing facilities. Both the Hawthorn Grove and Terrace Place decisions have been appealed to the Ohio Supreme Court.

## TENNESSEE'S LARGEST CITY APPROVES 34% INCREASE IN REAL PROPERTY TAX RATES

Nashville faces a projected revenue loss of $216 million for fiscal year 2021. This was due, in part, to the coronavirus pandemic but the city has been facing budgetary shortfalls for other reasons. To help alleviate the gap, the Metropolitan Council of Nashville and Davidson County adopted an increase in the property tax rate by an additional $1.066 per $100 of assessed value, bringing the total rate to $4.221 per $100 of assessed value (The prior rate was $3.155 per $100 of assessed value).