

Publications

The Evaluator: Fall 2021 Valuation Analyses

Related Attorneys

Nicholas M.J. Ray
 Andrew E. DeBord
 Lauren M. Johnson
 Lindsay Doss Spillman
 Hilary J. Houston
 Steven L. Smiseck
 Megan Savage Knox
 Anthony L. Ehler
 David A. Froling
 Scott J. Ziance
 Steven R. Rech
 Adam S. Hamburg
 Jacinto A. Núñez
 Michael P. Oliverio

Related Services

Federal Taxation
 Property Tax Management
 Real Estate
 State and Local Taxation
 Taxation

AUTHORED ARTICLE | Fall 2021

VALUATION HEADLINES

ASSESSED VALUATION OF FLORIDA'S WALT DISNEY WORLD REDUCED BY \$428 MILLION FOLLOWING SETTLEMENT OF PROPERTY TAX DISPUTE WITH COUNTY PROPERTY APPRAISER

Walt Disney Parks and Resorts US, Inc. v. Rick Singh, as Property Appraiser, et al., Case Nos. 2016-CA-005291-O, 2017-CA-004873-O, 2018-CA-006390-O, 2019-CA-007421-O, and 2020-CA-006093-O, in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida.

The assessed valuation for 15 Walt Disney World properties was cut by \$428 million over a five-year period after a settlement was reached between the entertainment giant and the new Orange County Property Appraiser. Given the significant tax revenue issues at hand, the Orange County Tax Collector's Office had previously been instructed to hold revenues in reserve in anticipation of a settlement with the property owner or unfavorable ruling from the Court. The property owner will receive \$1.3 million in tax refunds for the 2015 tax year and the County expects to remit over \$12 million of tax refunds in total to the property owner for the tax years at issue.

The Walt Disney World properties include EPCOT, the Magic Kingdom, Hollywood Studios and Animal Kingdom. The long standing legal battle over the fair market valuation of the property began in 2016 when Walt Disney World filed suit against the former Orange County Property Appraiser over the County's tax assessment for the property. The property owner continued to file new lawsuits against the County in each subsequent year. The County's recent valuations for the properties have exceeded \$2 billion. In a previous landmark ruling in these matters, the Fifth District Court of Appeals had already determined that the County Appraiser could not use the so-called Rushmore appraisal method, which does not remove intangible business value from a property assessment, before remanding the cases back to the trial court.

INDIANA SUPREME COURT DETERMINES ASSESSMENT SHOULD REVERT TO PRIOR YEAR WHEN BOTH THE ASSESSOR AND PROPERTY OWNER FAILED TO MEET THEIR BURDEN OF PROOF

Southlake Indiana LLC v. Lake County Assessor, Indiana Supreme Court, Case No. 21S-TA-239 (September 22, 2021).

An Indiana mall owner (Southlake) sought a reduction in its assessment for tax years 2011-2014 after the 2011 value increased to nearly \$240 million, which was more than double the 2010 assessment of approximately \$110 million. The county's appraisal evidence opinions for the 2011-2014 tax years ranged from \$239 million to \$256 million, and the property owner's appraisal evidence opined to values between \$98 million and \$146 million for the same period. The state board found flaws in both appraisals and determined values of \$173.5 million to \$190.6 million for the years at issue. Southlake appealed to the Indiana Tax Court, which ultimately affirmed the state board's values. Southlake then appealed to the Supreme Court and asserted that the tax court erred by not applying the revisionary clause in Indiana Code. The state board found that both parties' appraisal evidence was lacking, meaning that neither party met its burden of proof. In not applying the revisionary clause, the tax court reasoned that because the parties submitted evidence of value ("burden of production") the revisionary clause should not apply. However, neither party established that its proffered value was correct.

Ultimately, the Supreme Court determined that the tax court erred when it did not apply the state's revisionary statute upon finding that both the assessor and property owner did not meet their burdens of proof. More specifically, the Court determined that when the new assessment increases by more than five percent over the previous year and the Indiana Board of Tax Review does not accept either the assessor's or property owner's value, statute requires that the assessment revert to the assessment for the prior year.

OHIO SUPREME COURT FINDS THAT OHIO'S REQUIREMENT THAT PROPERTIES BE VALUED AS FEE SIMPLE DOES NOT REQUIRE PROPERTIES TO BE VALUED AS IF THEY WERE VACANT AT THE TIME OF TRANSFER

Rancho Cincinnati Rivers, LLC v. Warren County Board of Revision, et al., Slip Opinion No. 2021-Ohio-2798.

In its review of a property owner's challenge to the assessment on a Lowe's Home Improvement store, the Ohio Supreme Court held that Ohio's valuation statute, R.C. 5713.03, *does not* require leased properties to be valued as if they were vacant at the time of transfer. Based on its interpretation of the phrase "fee simple estate, as if unencumbered" in R.C. 5713.03, the Court affirmed the Twelfth District Court of Appeals which found that for tax year 2016, the \$8.48 million value in the appraisal from the Kings Local School District Board of Education (BOE) reflected the proper valuation for the subject property.

The subject property is a Lowe's Home Improvement store. The 141,400 square foot improvements are located on a parcel that is approximately 12 acres. The property owner acquired the subject property in 2011 for \$5,130,000 pursuant to a 20-year ground lease pursuant to which Lowe's pays \$375,000 per year.

For 2016, the Warren County Auditor assessed the real estate at \$8,493,150. The property owner appealed the assessment to the Warren County Board of Revision (BOR) and presented the appraisal report which opined to a value of \$5.8 million based on the sales comparison approach and income approach to value. The appraiser for the property owner adjusted downward the sales price of any comparable property that

was subject to a lease because “a premium was considered to have been paid for the property rights conveyed.” The BOR did not reduce the county’s value and the property owner appealed the case to the Warren County Court of Common Pleas.

A magistrate conducted a hearing at the court of common pleas. The property owner relied on its appraisal report presented at the BOR. The BOE offered a competing appraisal report and determined that the subject property had a value of \$8,480,000. The magistrate rejected the BOE’s argument that “encumbered comparable properties may be used in a comparable sales approach, unadjusted, merely because the rent for such properties is at market rate” and adopted the property owner’s appraisal and value.

The BOE and the County filed objections to the magistrate’s decision. The common pleas court sustained those objections and found that the BOE’s appraisal was the most probative evidence of value of the subject property and set the value at \$8.48 million. The common pleas court criticized the use of vacant and second generation stores in the property owner’s appraisal, noting that the property is currently leased to its first and only tenant and the lease agreement “is fruitful.” The court found that the BOE’s appraisal was more reflective of precedent because it considered first-generation leases similar to the Lowe’s lease, made qualitative adjustments based on the leases, and inquired if the lease were at market value or if adjustments were required.

The property owner appealed the case to the Twelfth District Court of Appeals, which affirmed the judgment of the common pleas court. The court of appeals interpreted the phrase “as if unencumbered” to mean that if the subject property is subject to a lease, the appraiser adjusts for the effects of the encumbrance, not that the appraiser assumes the property is vacant or “ignore the fact that the property is leased at a market rate.”

The property owner requested that the Ohio Supreme Court accept jurisdiction of the appeal, and the Court agreed to consider the case pursuant to its authority under R.C. 5715.05.

The Court’s decision turned on interpreting the language in R.C. 5713.03 – specifically the phrase “fee simple estate, as if unencumbered.” The property owner maintained that the plain language of R.C. 5713.03 requires that an assessment reflect the hypothetical situation that the property was vacant at the time of sale and transfer. Following this line of argument, the property owner concluded that the plain language of the statute “bars valuation of property assuming the presence of lease encumbrances, whether at market rate or otherwise.” The County argued that the statute *does not* explicitly require that the property be valued as if it were vacant at the time of sale and transfer.

The Court agreed with the County that the express terms of R.C. 5713.03 do not require a vacant at transfer rule but was only one possible interpretation of the relevant statutory language. The Court then went on to review its prior decisions to discern the meaning of fee simple estate as unencumbered. The Court ultimately held that its case law establishes a “market-lease rule,” which has two aspects – (1) the leased fee sale price is the best evidence of value of the property and establishes presumptive value subject to rebuttal and (2) when there is no recent arm’s length transaction, the tribunals should adopt an appraisal that takes into account a lease with terms that are typical for the market.

In evaluating the two appraisals, the Court noted that following the market lease rule, appraisers in their expert capacity may make adjustments to sale prices so long as the sales and adjustments relate to the market for the property at issue. The Court also rejected the property owners' contention that the Court's precedent imposed a fixed legal requirement of a property rights adjustment for leased-fee sales used as comparables.

TENNESSEE STATE BOARD OF EQUALIZATION REDUCES VALUATION OF DEPARTMENT STORE VIA INCOME CAPITALIZATION APPROACH METHOD AND REJECTS THE COUNTY ASSESSOR'S DARK STORE THEORY ARGUMENT

In Re J.C. Penney Properties, LLC, Case Nos. 113631 and 132999, before the Tennessee State Board of Equalization (Decided July 26th, 2021).

In finding in favor of the property owner's appraisal evidence, which relied primarily on the income capitalization approach, the Tennessee State Board of Equalization significantly reduced the assessed valuation of a standalone JCPenney department store by nearly \$35 million over a period of four tax years.

The property owner's appraisal considered all three approaches to value but the appraiser concluded that the income approach provided the best measure of the valuation of the property. The appraiser did not consider big box home improvement stores as comparable properties in his income approach or in his sales comparison approach because they are too dissimilar to department stores. The appraiser noted that the market for big box retail has declined and the marketability of the property has been impacted by vacancies of big box stores as well as the overall decline in in-person retail sales.

The judge rejected the Assessor's argument that the owner's appraiser used the "dark store" approach in his appraisal and noted that "a hypothetical investor or lessor would presumably anticipate a high likelihood of vacancy for this single-tenant configured space and a high likelihood of lease-up and reconfiguration costs." The judge indicated that the dark store theory discussion would have been examined more thoroughly if the owner's appraiser had placed primary emphasis on the sales comparison approach and the subject property were a stable property that was thriving rather than surviving. The judge stated that the market value of the subject property should reflect the "inherent instability" of a "challenging, highly volatile time for big box retail".

OTHER VALUATION HEADLINES OF NOTE

MAINE'S HIGHEST COURT REFUSES TO REDUCE TAX ASSESSMENT FOR SHUTTERED PAPER MILL

Madison Paper Industries v. Town of Madison, 2021 ME 35 (July 6, 2021).

The Supreme Judicial Court of Maine recently decided that a paper mill was not entitled to a reduced assessment, even though the mill closed during the tax year at issue. The town's assessment for the paper mill was \$72.4 million while the mill owner argued for a reduction to \$34.5 million. The relevant tax year issue began on April 1 and the paper mill closed in May of that tax year. The Court held that the paper mill's highest and best use for valuation purposes was its current use (as of April 1), as an operating paper mill. In so holding, the Court rejected the owners' argument that, based on the mill's closure announcement, the highest and best use was liquidation instead of continued operation.

The Court affirmed the notion that the owner's business decision to close the mill and sell its assets should not dictate the mill's highest and best use. In addition, because the paper mill was fully operational as of, and did not close until after, the relevant April 1 tax lien date, the Court held that the mill owners were not entitled to a reduction for the tax year at issue. Instead, the owners were essentially one year too early: the mill received a reduced, nominal assessment for the following tax year, because it was no longer operational as of then.

MICHIGAN TAX TRIBUNAL ISSUES TWO DECISIONS VALUING BIG BOX STORES - TRIBUNAL ENDORSES COST APPROACH FOR RECENTLY CONSTRUCTED BIG BOX PROPERTY AND ADOPTS PROPERTY OWNER'S APPRAISAL UTILIZING SALES COMPARISON APPROACH FOR OLDER BIG BOX PROPERTY

Meijer Inc. v. City of Flat Rock, Mich. Tax Tribunal, Dkt. No. 16-001205, Sept. 30, 2021

Walmart Real Estate Business Trust v. City of Bad Axe, Mich. Tax Tribunal, Dkt. No. 19-001078, Sept. 27, 2021

In the case of a recently constructed Meijer store, the Michigan Tax Tribunal (Tribunal) found that the cost approach was the most appropriate method to determine the true cash value of the four month old newly constructed store. In the appeal by the property owner, the parties presented competing appraisals to support their position as to the true cash value of the subject property. In evaluating the parties' sales comparison approach, the Tribunal determined that the comparable sales were not in the same condition as the subject property given its age. The Tribunal also found that the income approach was not reliable because the subject was not an income producing property. In reviewing the property owner's cost approach, the Tribunal rejected the property owner's obsolescence adjustment because it was not based upon properties that were comparable to the subject property.

In contrast to its endorsement of the cost approach to value a newly constructed four month old big box store, the Tribunal adopted the property owner's sales comparison and income approach for a Walmart constructed in 2008. The property owner presented an appraisal report in which it provided a sales comparison analysis with nine sales and one offering and also analyzed build to suit leases in its income approach. The Tribunal noted that this approach was logical and reasonable. In its extensive criticism of the City's appraisal report, the Tribunal noted that the City's appraiser used sales from outside of the state of Michigan and improperly valued the store as leased fee.

OHIO APPELLATE COURT HOLDS COLLATERAL ESTOPPEL BARS REVIEW AS COURT RULED AND DECIDED ISSUES REGARDING APPRAISAL PREPARED USING THE SAME METHODOLOGY FOR PRIOR TAX YEAR

Thistledown Racetrack LLC, et al. v. Cuyahoga Cnty. Bd. of Revision, et al., 8th Dist. Cuyahoga No. 109469, 2021-Ohio-2511.

The Eighth District Court of Appeals affirmed the Ohio Board of Tax Appeals' (BTA) decision adopting the Property Owner's appraisal value for the Thistledown Racetrack Racino (the Subject Property). The Subject Property consists of two parcels and includes 128 acres, a grandstand, racetrack, 20 barns and other structures. Both the Property Owner and the Board of Education (BOE) filed complaints against valuation of the Subject Property in 2013, 2014, and 2015.

In the 2014 and 2015 tax year BTA cases, the parties offered competing appraisals. Those appraisals were completed by the same appraisers as in the 2013 cases. The Property Owner's appraiser relied primarily on the income-capitalization approach. The Property Owner's appraiser opined to a value of \$27 million for 2014 and a value of \$25.2 million in 2015 given competition from other casinos. The Property Owner's appraiser valued the entire property as a going concern subtracting value attributable to property other than real property, including the gaming license and personal property. The BOE offered testimony from a reviewing expert criticizing the Property Owner's appraisers' methodology.

The BOE offered its own appraisal in support of its case, which concluded to a value of \$48.5 million for 2014 and \$50 million for 2015. The BOE's appraiser relied primarily on the income-capitalization approach. He estimated market rent based on a percentage rate of a racino's wagering handles. The Property Owner presented its own review experts, one of whom criticized the BOE's appraisal as valuing a leased fee rather than a fee simple interest.

In its decision, the BTA noted that the 2014 and 2015 appraisal reports were substantially similar to the 2013 appraisal reports. The BTA cited to its 2013 decision in explaining its rejection of the BOE's appraisal on the basis that the lease rate reflected business value instead of realty value and was legally flawed. The BTA noted that the Property Owner's appraisals were the most probative of value and adopted those values for tax year 2014 and 2015.

Two main issues made up the BOE's multiple assignments of errors: (1) the BTA erred when it rejected the BOE's appraisal because it improperly found his income-capitalization approach to be "per se" unlawful; and (2) the BTA failed to explain its reasoning for finding that the Property Owner's appraisal was the most probative.

On the first issue, the court noted that it had previously ruled on these same issues in connection with the parties' 2013 appeal. Specifically, the parties had litigated and the court determined the question of whether the BTA erred by rejecting the BOE's appraisal because of an unlawful income approach. The court held that the doctrine of collateral estoppel prevented the BOE from relitigating whether the BTA made an unlawful legal determination when it rejected the BOE's appraisal method.

The BOE also argued that the BTA improperly relied upon the Property Owner's appraisal report. The BOE maintained that the BOE demonstrated flaws using its review experts and that the BTA should have explained why it rejected those criticisms. The court held that the BTA's explanation of why it ruled the way it did was sufficient to allow the court to review its decision for reasonableness and lawfulness.

OREGON TAX COURT DETERMINES REAL MARKET VALUE OF VACANT LAND RELYING ON THE SALES COMPARISON APPROACH WHILE USING A VARIATION OF THE INCOME APPROACH KNOWN AS THE DISCOUNTED CASH FLOW ANALYSIS

GLC-South Hillsboro, LLC v. Washington County Assessor, Oregon Tax Court, Case No. TC-MD 180141R (June 4, 2021).

This appeal before the Oregon Tax Court involved a 140-acre portion of a larger development site, which in turn was a subset of a larger master-planned community comprised of single-family homes, multi-family homes, and commercial units. As of the assessment date at issue, the subject property was vacant land,

with some grading and a zoning plan in place, but without entitlements that would allow for development. Prior to building, a number of conditions needed to be met which both parties agreed were not in place as of the assessment date.

The parties generally agreed that the sales comparison approach was the best starting point for valuing the subject property, but disagreed on how to categorize and analyze the three zoned sections. The property owner combined the zones into a single analysis and averaged them, while the County broke out each zoning type individually and found comparable sales for each category. The property owner further asserted that a Discounted Cash Flow (DCF) analysis was essential to account for the cost, time, and risk in completing the infrastructure improvements and the remaining hurdles needed to take place to sell the land. In fact, the property owner appraiser considered the DCF analysis as superior because of the unique size of the property and because he believed that is how market participants would determine its value. The County preferred the use of a sales comparison approach because the DCF method, in their opinion, required too many assumptions.

The Court ultimately ruled that the property owner's sales comparison approach, which averaged the three zones, was superior because the property was undeveloped as of the assessment date. Moreover, the Court adopted the property owner's DCF analysis and deemed it necessary to determine the real market value of the property given that market participants would use this valuation approach. The Court attributed the divergent value differences between the property owner's sales comparison approach and the DCF analysis to the fact that none of the comparables were easily adjusted to the raw conditions of the subject property as of the assessment date.

WISCONSIN COURT OF APPEALS AFFIRMS DECISION UPHOLDING THE 2016 AND 2017 ASSESSMENTS FOR A LOWE'S HOME IMPROVEMENT STORE

Lowe's Home Centers LLC. v. City of Delavan, Wis. Ct. App., Appeal No. 2019AP1987 (July 28, 2021).

Lowe's, which owned and occupied a store in the City of Delavan (City), Wisconsin challenged the assessment for 2016 and 2017. No change had been made to the valuation for 2016 and 2017, which were maintenance years for tax assessment purposes. The Board of Review waived hearing on the claims and denied the claims. Lowe's then brought action in circuit court to challenge the assessments. At trial, both Lowe's and the City presented expert appraisal testimony. The circuit court determined that Lowe's did not overcome the presumption of correctness afforded to tax assessments by showing that the City did not follow the Wisconsin Assessment manual or by providing significant contrary evidence showing that the assessor's value was incorrect.

In arriving at its decision, the circuit court analyzed the assessments under the three tier hierarchy provided in Wisconsin statutes and case law. First, the circuit found that the City assessor conducted an independent analysis to arrive at the values for 2016 and 2017. Second, the circuit court found that Lowe's appraiser did not provide sufficiently reliable testimony due to problems with the appraisal including utilizing sales of vacant and distressed properties. The circuit court determined that the sales of "dark" and "distressed" properties were not similar to an operating store and there was no error when it determined that the Lowe's appraisal did not constitute evidence to establish that the assessments were excessive. Under the Tier II analysis, the circuit court also reviewed the City's evidence and determined that the City's appraiser provided credible testimony on the value of the subject property. Because of these findings, the

circuit court did not reach the Tier III analysis prepared by the appraisers.

On appeal, the Wisconsin Appeals Court determined that Lowe's did not overcome the presumption of correctness that attached to the City's assessments and that the record supported the circuit court's decision.

WYOMING BOARD OF EQUALIZATION AFFIRMS ASSESSMENT OF WALMART DISTRIBUTION CENTER

Matter of Walmart Stores East LP, Wyo. SBE, Dkt. No. 2020-42 (June 6, 2021).

The Wyoming Board of Equalization (the Board) recently rejected Walmart's assessment challenge relating to its distribution center located near Cheyenne. Seeking a reduction of more than \$30 million in fair market value, Walmart argued that the County Assessor's appraisal improperly included significant personal property value and illegally relied upon a cost approach. On appeal, the Board accepted the County's appraisal and its cost method and rejected Walmart's appraisal, which employed both the income and sales comparison methods.

In response to Walmart's argument that the County Assessor had "double assessed" personal property and, therefore, had overvalued the distribution center, the Board held that Walmart had failed to offer any evidence to support its claim. Because all of Walmart's real and personal property was assessed similarly, Walmart was not able to show any particular detriment and could not verify its allegation of double assessments. The Board also rejected Walmart's claim that the County Assessor's reliance on the cost approach was contrary to law, noting that Wyoming law expressly permits its application. Overall, the Board held that Walmart's arguments against the County Assessor's appraisal were simply not sufficient to overcome the strong presumption in the state that an assessor's appraisal and resulting valuation are correct.