

# Publications

## The Evaluator: March 2022 Valuation Analyses

### Related Attorneys

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

### Related Services

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

**AUTHORED ARTICLE** | 3.2022

### Valuation Headlines

#### **COLORADO SUPREME COURT RULES THAT NET INCOME GENERATED FROM INDIVIDUALLY OWNED CONDOMINIUM UNITS SHOULD NOT HAVE BEEN INCLUDED IN RESORT'S VALUATION FOR TAX PURPOSES**

*Lodge Properties, Inc. v Eagle County Board of Equalization*, Colo. en banc, No. 2022 CO 9 (February 22, 2022).

Colorado's highest court determined that the net income derived from individually owned condominium rentals that are considered a part of a luxury resort's property should not have been computed in the property's assessment for tax purposes.

The property at issue is a resort in the Vail Mountain ski area that is owned by Lodge Properties, Inc., a subsidiary of Vail Resorts, Inc. The resort includes a lodge with 80 hotel rooms, a spa, a fitness center, a ski valet, restaurants and a pool. There are also an additional 74 residential condominium units that are individually owned but which are still considered to be a part of the resort. Some of the condominium owners contract with Vail/Beaver Creek Resort Properties (VBC), a subsidiary of the resort's owner, to provide rental management services for a fee that equates to 40% of the gross rental proceeds. Starting in 2017, the Eagle County Assessor started to include the income that VBC received in connection with its contractual services for the condominium owners and drastically increased the assessment for the resort to over \$41 million.

The resort's owner appealed the increased assessment to the Eagle County Board of Equalization (county BOE). After the county BOE sustained the Assessor's assessment, the owner filed a further appeal to the Colorado Board of Assessment Appeals (BAA). The BAA concluded that the VBC's net rental management income constituted an intangible asset that did not reflect additional value of the property and determined a valuation of \$26,245,000 for the 2017 tax year.

The county appealed the BAA's decision to the court of appeals, which vacated the BAA's decision. The court of appeals concluded that the rental management income had to be included in the value calculation because the contributory value of the rental management income would be a factor considered by a willing buyer and a willing seller in any sale of the property. They also concluded that the BAA had erred in finding that VBC's net rental management income was an intangible asset that needed to be excluded from the property's assessed value.

Both the property owner and the BAA petitioned for certiorari review to the Colorado Supreme Court, which granted the petitions. The court reversed the judgement from the court of appeals and held that VBC's net rental management income from the individually owned condominiums should not have been included in the valuation for the resort under the income approach. The court ruled that "VBC's rental management agreements are contracts for VBC's management services, paid for out of net rental income generated by the condominiums; the agreements are not contracts for an interest in (or the use of) the Lodge's real property." The court found it to be undisputed that the resort property and the condominiums were legally separate and distinct parcels of real property that were owned by different taxpayers and which must be separately appraised and valued.

#### **CONNECTICUT COURT REDUCES THE ASSESSMENT FOR A MALL ANCHOR DEPARTMENT STORE**

*Macy's Retail Holdings, Inc. vs. City of Danbury*, No. HHB-CV-18-6046735, in the Connecticut Superior Court, Judicial District of New Britain Tax Appeals (March 2, 2022).

The assessment for a Macy's department store was recently reduced by a Connecticut court after it considered the valuation approaches and conclusions reached by the parties' appraisal experts.

The property at issue is the Macy's anchor department store at Danbury Fair Mall in Danbury, CT. The three-level property is over 240,000 square feet in size and was built in 1987. As of the October 1, 2017 assessment date, the city had assigned an assessment of \$17,206,800 for the property. Macy's appealed the assessment to the Board of Assessment Appeals, which denied the appeal and sustained the assessor's valuation. Macy's then appealed the board's denial to court and thereafter amended its complaint to also include the 2018, 2019, and 2020 assessments for the property.

Macy's appraiser determined a fair market value of \$11,500,000 for the property as of the assessment date. He relied on the income capitalization approach and did not utilize a sales comparison approach because of the lack of good comparable sale data for mall anchor department stores. The city also retained an independent appraiser to value the property and their appraiser determined a fair market value of \$19,000,000 for the property. The city's expert did include a sales comparison approach and, within that approach, relied primarily on sale-leaseback transactions from a bulk portfolio transaction for another department store operator.

After reviewing the competing appraisal evidence, the court determined that the income capitalization approach was the most appropriate valuation method for the owner-occupied department store. The court found the city expert's use of sale-leaseback transactions in their sales comparison approach to be "unreliable comparisons to market reality" and further noted that, in general, "sale-leaseback transactions are primarily financing vehicles and often do not provide a reliable indication of market rent."

The court ultimately determined that the appropriate value for the property was \$15,300,000. The court arrived at this valuation by utilizing a triple net rental rate of \$6.00/sf, market vacancy of 5%, and a capitalization rate of 7.9%. The adopted rental rate and capitalization rate represented the near exact midpoints between the rates used by the competing appraisal experts. The court also noted the decline in store sales at the subject property since the last revaluation in 2012 due to the fact that “large anchor department stores attached to malls experience significantly increasing competition from online sales.” Moreover, the court mentioned that the attachment of the property to a mall limits the possibilities of redevelopment of the site.

### **INDIANA TAX COURT REVERTS VALUE TO PRIOR ASSESSMENT AFTER REJECTING BOTH THE ASSESSOR'S AND OWNER'S APPRAISAL EVIDENCE ON SHOPPING MALL**

*Southlake Indiana, LLC v. Lake County Assessor*, Indiana Tax Court, No. 19T-TA-22 (Dec. 13, 2021).

In this matter, the owner of a super-regional shopping mall challenged the Lake County Assessor's values for 2015 and 2016. The assessor valued the mall at \$242,890,500 for both years. The owner supported its requested decrease through appraisal evidence, which opined to a value of \$142,300,000 for tax year 2015 and \$144,500,000 for tax year 2016. Countering this evidence, the assessor presented its own appraisal evidence, asserting a value of \$258,990,000 for the 2015 tax year and \$241,690,000 for the 2016 tax year.

In rejecting the assessor's evidence, the court stated that, under I.C. 6-1.1-15-17.2, when a taxpayer challenges an assessment that increased more than 5% from one year to the next (as happened here), the assessor has the burden of proving that the assessment is correct. If the assessor fails to meet that burden, the taxpayer may introduce evidence to prove the correct assessment. If neither the assessor nor the taxpayer meet the burden, the value must revert to the assessment for the prior year.

Noting that the term “correct” is not defined by the statute, the court concluded that evidence presented by an assessing official to prove an assessment is correct under the statute must “exactly” and “precisely” conclude to the original assessment. The court acknowledged that it may not be feasible for appraisal evidence to be exactly the same as the original assessment; however, the statute, as written, gave the court no choice but to reject the assessor's appraisal evidence in this case because it did not match the assessor's original value. “The court recognizes that the legislature has chosen to write the statute the way it has, without defining the word ‘correct,’ without specifying a range within which an assessment would be ‘correct,’ and without providing any other guidance for measuring ‘correctness.’ See I.C. § 6-1.1-15-17.2. The court will not fill that void.” *Id.* at 9. Because the assessor's evidence did not exactly match her original assessment, the court concluded that the assessor could not meet her burden of proof.

Because the assessor failed to meet its burden, the court ruled that the owner could present evidence to show the correct value of the property. However, the court ruled that the owner's evidence was too general, failed to consider property specific characteristics and market influences, and failed to take into consideration risk factors impacting capitalization rates.

Finding that neither party had met its burden to demonstrate the correct value of the mall, the court ruled that the 2015 and 2016 values must revert to the assessment that was in place for tax year 2010, as required by I.C. § 6-1.1-15-17.2.

**IOWA APPEALS COURT GRANTS REDUCTION FOR DES MOINES OFFICE HEADQUARTERS**

*Nationwide Mutual Insurance Co. v. Polk County Bd. of Review*, Iowa Ct. App., No. 20-1290 (Feb. 16, 2022).

The appeals court reversed a district court decision and found the valuations of Nationwide Mutual Insurance Company’s (Nationwide) headquarters properties at \$78.8 million and \$36 million for tax years 2017 and 2018, the minimum valuations established in an urban renewal development agreement entered into by Nationwide and the city in 2007. The court found that Nationwide met its burden by relying upon the sales comparison approach.

The Polk County Assessor increased the valuation of 1100 Locust Street from \$80,230,000 to \$87,050,000 and the valuation of 1200 Locust Street from \$41,390,000 to \$44,910,000 for tax years 2017 and 2018. Nationwide challenged these valuations at the board; however, the board upheld the assessor’s valuation. Before the district court, Nationwide presented appraisals from two different appraisers that primarily relied upon the sales comparison approach to value. One appraiser stated he relied primarily upon the sales comparison approach because it focused on single-tenant buildings that were sold for continued single office use, and the other appraiser also relied primarily upon the sales comparison approach finding that it was the most reliable approach and gave it the most weight. Polk County also submitted appraisals from two different appraisers that found values that supported or exceeded the original values, with one appraiser placing the least amount of weight upon the sales comparison approach, and the other placing reliance upon both the sales and income approaches, but utilizing multi-tenant properties in the sales approach.

The district court found that Nationwide produced two disinterested witnesses who indicated that the market value of the property was less than the market value determined by the board, and the burden shifted to the board to uphold the value. The court did not find that the properties could not be valued using the sales comparison approach, but considered the county’s evidence more reliable and gave it more weight and found the board’s appraisers provided competent evidence using the cost approach to value and affirmed the original values.

On appeal, the appellate court noted that the finding the fair market value of property through comparable sales is the preferred method of valuation pursuant to statute. Nationwide argued that the board failed to meet its burden because the board did not follow the statutory scheme to value the properties. Nationwide asserted that the fair market value can be determined through an analysis of the sales of comparable single-occupant building in Des Moines and similar markets. The court found that the board’s experts did not present competent evidence of value because neither relied upon the sales approach to value the properties. Instead of remanding the cases for a determination of value, the court, consistent with the request of the parties found value consistent with the minimum valuations in the urban renewal development agreement, despite the fact that Nationwide’s appraisals supported lower valuations.

**MICHIGAN COURT OF APPEALS AFFIRMS VALUATION REDUCTION FOR OWNER-OCCUPIED BIG-BOX STORE**

*Menard, Inc. v. City of Escanaba*, No. 354900, 2022 Mich. App. LEXIS 825 (February 10, 2022).

This case involves a 166,196 square foot “big box” store in Escanaba, Michigan. In previous proceedings, the property owner, Menards. (owner), challenged its property tax assessments for 2012, 2013 and 2014. The Michigan Tax Tribunal declined to consider the cost-less-depreciation approach to value, determined that the sales-comparison approach was the most persuasive approach, and found that deed restrictions had no effect on the sales price of comparable sales. The Michigan Court of Appeals (court) reversed and remanded. Following the court’s remand, the tribunal determined that the true cash value of owner’s property was \$5,000,000 for each of the 2012, 2013 and 2014 tax years. This appeal followed, where the City of Escanaba asserted that the tribunal’s valuation was flawed.

A primary issue on appeal involved the determination of the amount of obsolescence of owner’s property. The difference between the parties’ analyses was whether the market analysis of functional obsolescence should include all big-box stores or only big-box home-improvement stores. The court concluded that the tribunal did not err by finding that another big-box store chain was a hypothetical purchaser for the property and would be required to make substantial modifications to the building. The court accepted the tribunal’s conclusion that the value of the property to a potential buyer was significantly less than the property’s replacement costs.

The city further argued that the tribunal erred by excluding sales of properties on which there was an existing tenant as “leased fee” sales. However, the court found this argument inconsistent with valuing the property as an owner-occupied property. The salient issue was whether, using the sales-comparison approach, comparables should be fee alone or leased fee. The court held that what must be valued is what would actually be sold. In this case, a hypothetical buyer would not be buying a property that was subject to a lease because it is owner-occupied. For the same reason, the court held that the tribunal did not err by valuing the property as if it were vacant and available to the market rather than subject to an existing lease.

#### **GEORGIA APPEALS COURT ENFORCES MANDATORY LANGUAGE OF LOW-INCOME HOUSING VALUATION STATUTE**

*Bainbridge Ltd., LP v. DeKalb County Tax Assessors*, Ga. Ct. App., Dkt., No. A21A808, (Feb. 15, 2022).

The Georgia Court of Appeals recently reversed the trial court’s fair market valuation of a low-income housing tax credit (LIHTC) project known as Granite Crossing, finding that the trial court had misapplied the applicable valuation statute. Specifically, while Ga. Code Ann. § 48-5-2(3)(B) (the LIHTC Statute) requires county assessors to apply rent limitations, higher operating costs and other factors when valuing LIHTC projects, the trial court determined that assessors are only required to consider such factors.

The DeKalb County Assessor testified that he utilized the cost approach to assess Granite Crossing and that, with a cost approach, the factors listed in the LIHTC Statute were not applicable. As a result, while the county did consider those factors, they ultimately did not apply them to determine the subject property’s valuation. The property owner argued that the cost approach is unreliable for LIHTC properties and that the income approach should have been utilized to value Granite Crossing; further, within that income approach, the restrictive covenants and higher operating costs should have been applied.

On appeal, the property owner asserted that the county's assessment of the subject property was improper, because the assessor had failed to apply the negative impact of the restrictive covenants and higher operating costs. Because the language of the LIHTC Statute provides that assessors "shall apply" these factors, the court ruled that the trial court had committed plain legal error by failing to do so. As a result, the court overturned the trial court's determination and remanded the case back to the trial court to properly determine the subject property's value.

### **OREGON TAX COURT PERFORMS INDEPENDENT VALUATION ANALYSIS FOR REGIONAL MALL AND MOVIE THEATER AND FAVORS PEROPERTY OWNER APPRAISER'S INCOME ANALYSES**

*Rialto Capital Advisors, LLC v. Marion Cnty. Assessor*, Tax Ct. of Oregon, No. TC-MD 190092G (Sept. 29, 2021).

The Oregon Tax Court concluded that a regional mall, exclusive of anchor department store space, and a movie theater were overvalued for tax year 2018 and 2019. The portion of the property under appeal included the mall concourse, including inline tenant spaces, and excluded the anchor department store space. The mall building, which was constructed in 1980 and remodeled in 2013 and 2014, covered two city blocks. The mall was connected by sky bridges, which also served to connect the mall to city-owned parking structures. The movie theater was on a separate parcel. The parties stipulated to the land value prior to trial.

The mall property was placed into receivership prior to the tax lien dates at issue. Eight months after the tax lien date, the petitioner purchased the property for \$27 million at a trustee's sale, subject to the leases in place, including ground leases where applicable.

The court began its analysis by concluding that the property's highest and best use was its current use although it noted the appraisers disagreed on the long-viability of that use. Second, the court determined that the mall and movie theater should be valued separately.

Both appraisers placed primary reliance on the income approach to valuation while also completing a sales comparison approach. Both appraisers considered the historical operations at the mall but the court gave more weight to the property owner appraiser's analysis which was more robust in its check of historical operations against market data. The other area the appraisers differed was in the capitalization rate. Ultimately, the court held that the sources the county's appraiser relied upon were not well supported and independently determined a capitalization rate of 11.1% based on the average of the two comparable sales it determined needed the least adjustments.

For the sales comparison approach for the mall, the county's appraiser failed to adjust the comparable sales he provided and admitted that he had not verified them. The court gave that analysis no weight.

Like their analysis for the mall, both appraisers placed primary weight on the income approach in determining a value for the movie theater. The main differences in their analyses concerned market rent and the capitalization rate. The court found that the property owner's appraisers rent comparables were more probative because he personally generated the list and the leases were closer to the assessment date. After reviewing the comparables provided by the appraisers, the court determined a capitalization rate of 9%.

The appraisers also prepared a sales comparison approach for the movie theater. The court did not place any reliance on the county's sales comparison analysis because of its primary reliance on a linear regression analysis of unadjusted comparables. The court also determined that the county's cost approach was of little value given the age of the improvements.