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COLORADO COURT OF APPEALS FINDS THAT CREATION OF SPECIAL TAX DISTRICT VIOLATED PROPERTY OWNERS' DUE PROCESS RIGHTS

Landmark Towers Ass'n, Inc. v. UMB Bank, N.A., et al., Colo. Ct.App., Dkt. Nos. 14CA2099; 14CA2463, 05/31/2018, cert. denied U.S. S.Ct., Dkt. No. 19-241,11/25/2019.

The Colorado Court of Appeals, on remand from the Colorado Supreme Court, held that the creation of a special tax district and subsequent taxation of certain landowners included in that district violated the owners' due process rights. The district, which included properties owned by members of a condominium association, was created to generate funds to pay for improvements to other properties. The members of the condo association received no benefit from those improvements.

The Court concluded that inclusion of properties in a special taxing district that receive no benefit from the taxing district was a taking without due process. Moreover, Colorado law provides that imposing a special assessment on property that does not specifically benefit from the funded improvements violated due process. The Court found that the tax was a special assessment because it did not defray the general expenses of government, but instead funded a private venture's infrastructure.

GEORGIA COURT OF APPEALS UPHOLDS LOWER COURT'S INTERPRETATION OF GEORGIA STATUTE BARRING REASSESSMENTS BASED ON CHANGES IN GENERAL MARKET CONDITIONS FOR TWO YEARS AFTER ASSESSMENT APPEALS

***DeKalb Cty. Bd. of Tax Assessors v. CWS SGARR Brookhaven, LLC & WRH Aztec, LLLP*, Case Nos. A19A1541 & A19A1618 (Ga. Ct. App., Oct. 30, 2019).**

The Georgia Court of Appeals rejected the Dekalb County Board of Tax Assessor's challenge to a lower court ruling that the Board could not reassess properties due to an increase in the sales prices of similar properties in the same neighborhood, when the properties had been the subject of a recent appeal.

By statute, assessments are frozen for two years following an appeal and valuation determination. In two cases that were consolidated for purposes of the appeal, the owners of two apartment complexes had challenged their assessments at the Board and received determinations setting new values for their properties for tax years 2015 and 2016.

The assessments should have remain unchanged for two years following the appeals. But, the Board conducted site visits in the years following the appeals and recommended an increase in valuation based on market conditions.

The property owners challenged the increased assessments and argued that the assessments should have been frozen for two years following the appeals. The Board argued that the statute permitted the increase during the two year freeze period because of an exception to the assessment statute. Specifically, the Board cited that the increased neighborhood values were a material factor that substantially affected the fair market value. In reviewing the statute and applying principles of statutory construction, the Court held that the phrase "material factors" meant only those changes that were specific to the property and could be determined from a visual on-site inspection of the property.

The Court also rejected the Board's argument that preventing the increases in the assessments violated the state constitution requirements for uniformity. If the Court had adopted the Board's logic, the county would be required to reassess values whenever any real estate market experienced a significant change, for the better or worse. The Board's interpretation was not only "impracticable and unworkable" but unsupported by the applicable statutes and regulations.

INDIANA TAX COURT CONCLUDES PETITIONER'S ISSUES WERE SUBJECTIVE DETERMINATIONS AND WERE NOT PROPER FOR FORM 133 APPEALS PROCESS

***Square 74 Associates LLC v. Marion County Assessor*, Indiana Tax Court, Cause No. 19T-TA-00020 (Dec. 3, 2019).**

Petitioner leased five separate tenant spaces on the ground floor of a parking garage owned by the City of Indianapolis. Petitioner claimed that there were errors in the assessments of each of the tenant spaces, because the assessments included the value of the underlying land that was the responsibility of the City of Indianapolis, the owner of the parking garage, not the Petitioner, the tenant.

Petitioner filed Form 133 administrative appeals ("Form 133 Appeals") to challenge these assessments. Form 133 Appeals function as an error correcting device and can be filed within three years from the date the taxes were first at issue. The statute governing Form 133 Appeals expressly enumerates the types of errors that can be corrected and classifies them as "objective issues." The Indiana Board of Tax Appeals determined that because resolution of the appeals depended upon the subjective determination of how the Petitioner's leasehold was to be valued, the appeals could not be resolved under the Form 133 process. As a result, the Board dismissed the appeals.

Petitioner claimed that its assessments for the five tenant spaces contained mathematical errors and were proper for the subject of a Form 133 Appeal. Petitioner argued that the assessments were mathematically incorrect because they included amounts for the land, which were not the responsibility of the Petitioner. In furtherance of its argument that response to the question of whether this issue was appropriate for adjudication as a Form 133 Appeal, Petitioner argued that determining the leasehold interest to be assessed was objective as it depended only on the plain language of the Master Lease agreement. Upon review of the Master Lease in evidence, the Court held that determining the leasehold interest was not an objective question because the Master Lease did not expressly state that the leasehold interest in the tenant spaces excluded the land. Because any decision would require parsing of the intent, which would require the exercise of discretion, it could not be considered an objective issue. The Court found no basis for reversing the final determination of the Indian Board of Tax Appeals and affirmed the dismissal.

INDIANA TAX COURT OVERTURNS DENIAL OF CHARITABLE EXEMPTION FOR SECTION 42 HOUSING COMPLEX

***Hebron-Vision, LLC v. Porter County Assessor*, Indiana Tax Court, Case No. 18T-TA-00019 (Oct. 28, 2019).**

The Indiana Tax Court recently reversed the state Board of Tax Review's denial of a charitable exemption for the owner of a low-income housing complex in Hebron, Indiana. While the Board determined that the owner operated the subject property with an eye toward profit, the Court rejected this determination on appeal, finding that the property was entitled to a charitable exemption.

In order to qualify for a charitable exemption in Indiana, a taxpayer must provide actual evidence that a government burden exists, which is relieved by its use of the property in question. The Court found that the property owner had relieved the government's burden to provide affordable housing to eligible individuals and families by voluntarily charging its tenants below market rental rates, keeping evictions to a minimum, and providing a variety of social services and activities. In addition, though the Board had focused on the owner's evidence relating to management fees, rental rates, and tax credits to deny the exemption, the Court found that there was no evidence that owner utilized the subject property to generate profits. Based on the totality of the evidence, the Court determined that the Board had erred and that the owner was entitled to the charitable exemption.

INDIANA TAX COURT ADMONISHES BOARD FOR VALUING A KOHL'S BASED UPON BUILD-TO-SUIT RENTS THAT WERE NOT PROPERLY ADJUSTED TO MARKET

***Southlake Indiana LLC v. Lake County Assessor*, Indiana Tax Court, Nov. 25, 2019, Cause No. 18T-TA-00016.**

The Indiana Tax Court recently overturned the state Board of Tax Review's valuation of a Kohl's for several tax years, finding that the Board improperly relied upon unadjusted build-to-suit rents. Before the Board, both the owner and assessor presented appraisals that primarily relied upon in the income approach to value. The Board issued a final determination assigning no weight to either party's appraisal. Instead, the Board used its own unique valuation method, relying upon leases from both the owner's and assessor's data, which included nine Kohl's build-to-suit leases from across the country. The Board ultimately

determined that the assessor's lease rate conclusion was more credible, faulting the owner's analysis because it was based upon gross rent clauses and rent as a percentage of gross sales.

On appeal the Court determined that the Board erred in determining the subject property's market value in use by relying heavily on build-to-suit rental data that was neither adjusted nor explained as reflecting market rent. The Court also found the adjustment made to the property owner's analysis was erroneous. Continuing, the Court found that the Board failed to cite evidence or authority to support its methodology or show that the Board corrected the alleged error in the owner's appraisal. As a result, the Court determined that there was not enough evidence to support the Board's reconstruction of the owner's analysis and found that it was improper to rely upon the assessor's rent estimates. The Court remanded the case back to the Board to calculate NOI based upon the owner's market rents, and then to apply the owners capitalization rates for some of the years at issue, and the assessor's rates for other years at issue.

INDIANA TAX COURT UPHOLDS VALUATION OF CVS BASED ON COST APPROACH

***CVS Corp. v. Cathy Searcy,* Indiana Tax Court, Case No. 18T-TA-00018 (Dec. 9, 2019).**

The Indiana Tax Court recently affirmed the state Board of Tax Review's valuation of a CVS pharmacy in Elkhart, Indiana after CVS took issue with the Board's sole reliance upon the cost approach. After rejecting the sales comparison and income approaches employed in the parties' appraisal reports, the Board found only the respective cost approaches to be probative. The Board ultimately adopted CVS' cost approach after removing the appraiser's negative adjustment for external obsolescence, which resulted in an increase in the property's original value.

CVS appealed, arguing that because neither appraiser gave primary weight to the cost approach, the Board was not permitted to do so. The Court rejected this argument, noting that the Board has discretion to weigh the evidence presented and was not bound to afford the same weight that the appraisers did in their reports. Similarly, the Court upheld the Board's removal of the appraiser's obsolescence deduction, noting that the Board had acted properly within its discretion and its decision was supported by the record. Noting that because CVS was simply asking the Court to reweigh the evidence, and had not shown an abuse of the Board's discretion, the Court upheld the Board's determination.

KANSAS BOARD OF TAX APPEALS REJECTS RELIANCE ON SALES OF OLDER PROPERTIES FOR VALUING MENARD'S RETAIL PROPERTY

***In the Matter of the Equalization Appeals of Menard, Inc. for the Tax Year 2018 in Douglas County, KS* (Nov. 4, 2019), KBTA No. 2018-2276-EQ.**

The Kansas Board of Tax Appeals affirmed a $12,750,000 assessment for a Menard's located in Douglas County for tax year 2018. The owner of the Menard's was seeking a reduction in value down to $11,250,000. Both the owner and Douglas County presented appraisal evidence utilizing the income approach to value. The Board noted that both approaches were fairly consistent, with the major difference being the capitalization rate used. The BTA found that the county's 7.63% capitalization rate was more appropriate, as it was based on market data taken from local sales and compared to regional and national trends. The owner's 10% capitalization rate, however, utilized older sales and was based on the unsupported premise that the subject property's occupant would vacate the property upon sale and that it would take a

significant period of time to re-lease the property. Relying upon the County's capitalization rate, the Board upheld the property's original $12,750,000 assessment.

KANSAS BOARD OF TAX APPEALS REFUSES TO GRANT FURTHER REDUCTION FOR 11 WALMART PROPERTIES

***In the Matter of the Equalization Appeals of Wal-Mart Stores, Inc.*, Docket Nos. 2016-2691-EQ, et al. (Oct. 30, 2019).**

The Kansas Board of Tax Appeals denied Walmart's petition for reconsideration relating to the valuation of eleven of their stores in Johnson County, Kansas. After the Board ruled in Walmart's favor and granted a total reduction of more than $120,000,000 for the stores in question last year, Walmart asked the Board to reconsider aspects of its decision.

Specifically, Walmart took issue with the Board's conclusion that Kansas tax law does not use the term "fee simple." Agreeing that this conclusion was made in error, the Board ordered that it be stricken from its decision, noting, however, that the correction had no impact on its original findings. Walmart also asked the Board to reconsider the adjustment it had made to the capitalization rate utilized by Walmart's appraiser in his income approach. The Board determined that because Walmart had not introduced any new evidence to support this capitalization rate, it was not persuaded to modify its original decision.

MASSACHUSETTS APPELLATE TAX BOARD DETERMINES THAT MACY'S ANCHOR IN CLASS A MALL WAS OVERVALUED

***Macy's Retail Holdings, Inc. v. Bd. of Assessors of Town of Burlington, Mass. App. Tax. Bd*. 2019-581, Nos. F323027, F327642, F329659, 10/31/19.**

The Massachusetts Appellate Tax Board ("ATB") decided to grant property tax abatements to Macy's after finding that its department store at Burlington Mall was overvalued for the 2014, 2015, and 2016 fiscal years. The Board of Assessors of the Town of Burlington ("Board of Assessors") had assessed the 254,712 square foot department store at $19,541,000 for the 2014 fiscal year, at $22,745,300 for the 2015 fiscal year, and at $22,475,300 for the 2016 fiscal year. Macy's challenged these tax assessments and provided an appraisal report and testimony from an appraiser who valued the property at $15,000,000 for the 2014 fiscal year, and at $15,450,000 for the 2015 and 2016 fiscal years. To support their tax assessments, the Board of Assessors provided an appraisal report and testimony from an appraiser who concluded to valuation opinions that surpassed their own tax assessments for each fiscal year.

Macy's appraiser, the town's appraiser, and the ATB all concluded that the income capitalization approach was the most reliable methodology to value the subject property given its age and the lack of sufficient arm's length sales of comparable properties. Although there was a sizeable difference between the market rental rates and capitalization rates that were used by the two appraisers, they essentially applied the same vacancy percentage, management expense, and replacement reserve amounts in their income capitalization approaches for each fiscal year. After finding that Macy's appraiser used too low of a market rental rate and too high of a capitalization rate, and finding that the Assessor's appraiser used too high of a market rental rate and too low of a capitalization rate, the ATB made their own independent determinations for the appropriate market rental rates and capitalization rates for each fiscal year. The ATB

found the fair cash value for the property to be $18,080,000 for 2014 fiscal year, $18,720,000 for the 2015 fiscal year, and $18,730,000 the 2016 fiscal year. Since these amounts were lower than the Board of Assessors' assessments, the ATB granted tax abatements to Macy's that totaled over $263,000 for the fiscal years at issue.

MICHIGAN COURT OF APPEALS UPHELD MICHIGAN TAX TRIBUNAL'S DETERMINATION OF VALUE FOR FORMER BIG BOX STORE

***Greenfield – 8 Mile Plaza v. City of Southfield*, No. 346183 (Mich. Ct. App. Dec. 12, 2019).**

Petitioner, an owner of a big box retail store formerly owned by Home Depot in the City of Southfield, appealed the Michigan Tax Tribunal ("MTT")'s determination that the property was under-assessed for tax year 2017. Petitioner utilized the property as a wholesale business from which it would sell products to retailers who operated dollar stores. Petitioner raised several issues regarding the MTT's decision, none of which the Court found persuasive.

At the MTT, Petitioner provided an appraisal report that opined that the highest and best use for the property was as an industrial warehouse in part because it was operating as a wholesale distribution center. Petitioner's sales and income approaches relied on this highest and best use analysis and included shopping centers as well as warehouses. The appraiser also believed that the closure of a nearby mall severely impacted the value of the real estate. Last, the property had a deed restriction which the appraiser concluded negatively affected the property's value.

The city assessor did not submit an appraisal but rather provided a valuation disclosure. The assessor testified that the current zoning did not permit use as an industrial warehouse and also opined that the deed restriction had little impact on the market for the subject property because its only limitation was that it could not be used as a hardware or home improvement store.

The Court held that the MTT properly made an independent determination of the property's value. Specifically, the MTT properly considered the impact of the deed restriction as required by the holding in *Menards*, but was not, as Petitioner argued, required to reduce the assessment simply because one existed. The Court also found that the MTT did not improperly rely on the city assessor's valuation disclosure or testimony, which the MTT acknowledged was not an appraisal report. The Court noted that the MTT had properly considered the impact of the closure of the nearby mall but determined that it did not have a significant impact on the property's value. The Court upheld the MTT's decision as it was supported by competent, material and substantial evidence on the record.

MICHIGAN TAX TRIBUNAL AFFIRMS COUNTRY CLUB ASSESSMENT BASED ON A NUANCED HIGHEST AND BEST USE

***Walnut Creek Country Club v. Lyon Twp.*, (Oct. 18, 2019), MOAHR Dkt. No. 17-002531.**

The Michigan Tax Tribunal ("MTT") denied a country club's requested decrease in value because the MTT concluded that there is a difference between the highest and best use of a private golf club and public golf club. The MTT also found that the appraiser for the club used "stale data" in reaching his value conclusions.

The subject property was a non-profit, non-equity, member-owned, private country club with a 27-hole golf course, club house with dining room, banquet room, members' lounges, pool, and all of the other accoutrements of a private golf facility. The property sits on approximately 250 acres.

The country club's appraiser concluded that the property's highest and best use was as a public daily fee golf course, which would allow the appraiser to utilize both private and public facilities in his report. The assessor argued that use as a public course was inconsistent with current zoning, making the club's highest and best use conclusion problematic. Consistent with this testimony, the assessor provided appraisal evidence based on a highest and best use as a private club, which the MTT found more persuasive.

The MTT also found that the data used by the club's appraiser dated back to 2004, 2005, 2008, and 2009 and was stale, further supporting its finding in favor of the assessor.

NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION RULES IN FAVOR OF MALL ANCHOR DEPARTMENT STORE FINDING IT WAS NOT UNIFORMLY ASSESSED WITH OTHER ANCHORS AT THE SAME MALL

***Sears Roebuck and Company v. Douglas County Bd. of Equalization*, Case No. 16C 0092 (November 4, 2019).**

The Nebraska Tax Equalization and Review Commission found that the Sears anchor at the Oak View Mall in Omaha was not uniformly and proportionally assessed compared with the other anchor department stores at the same shopping mall. The Nebraska Constitution requires that real property is uniformly and proportionally assessed for taxation purposes. The taxpayer alleged that its tax assessment of $6,030,600 for the 2016 tax year was disproportionally higher when compared with the tax assessments for the other anchor department stores at the mall. The County's tax assessment for the land area of each anchor department store at the mall, including the Sears, was $7.49 per square foot. However, the County's tax assessment for the Sears building was $44.93 per square foot compared with the tax assessments for the other anchor department store buildings which ranged from $30.76 to $31.22 per square foot.

The County used an income approach to value the Sears anchor, but it was discovered that it valued the other anchor department stores using "reconciled" values that were based solely on value changes made by an administrative tribunal for those properties in prior tax years. The Commission found that there was competent evidence to rebut the presumption that the County Board faithfully performed its duties, and found there to be clear and convincing evidence that the Board's decision was arbitrary or unreasonable. The Commission determined that the Sears building should be assessed at $30.98 per square foot, which represented the median of the per square foot building assessments for the other anchors at Oak View Mall. As a result, the Commission reduced the 2016 tax year assessment for the Sears from $6,030,600 to $4,308,034.

OHIO APPEALS COURT AFFIRMS BTA'S RELIANCE ON RECENT SALE PRICE TO SET VALUE FOR RETAIL SPACE LEASED TO CVS

***Menlo Realty Income Properties 28, LLC v. Franklin Cty. Bd. of Revision,* 2019-Ohio-4872.**

The 10th District Court of Appeals affirmed a decision of the Ohio Board of Tax Appeals (BTA) that rejected a taxpayer's attempt to discount the price it recently paid in an arm's-length sale for retail space leased to CVS. The taxpayer argued that the sale price of any leased property must be automatically discounted based solely on the vacancy rate in the area without consideration of whether the lease in question was above, below, or at market rates at the time of the sale. In response, the Court explicitly rejected application of any such blanket rule, holding instead that it was appropriate for the BTA to consider if the lease was at market terms and a number of other non-sale factors, including the creditworthiness of the tenant, in addition to vacancy rates.

In its decision, the BTA confirmed that a recent arm's-length sale presumptively represents the value of the unencumbered fee-simple estate, but noted that such presumption can be rebutted with evidence of encumbrances, including leases, and their effect on the sale price. The BTA further acknowledged that appraisal evidence can serve to rebut the presumption created by a sale price. However, the BTA was unconvinced by the taxpayer's appraisal, as it focused solely on background vacancy rates and provided no evidence specific to the terms of the subject lease.

Overall, both the BTA and the Court faulted the taxpayer for its "highly generalized" argument and evidence. In affirming the BTA, the Court emphasized the fact that the taxpayer had failed to make any arguments related to the particular duration of the lease, the monthly rental amount, or the character of the tenant. Specifically, the Court noted, the taxpayer's argument did not focus on whether the lease in place reflected market terms, as it should have, but merely on the fact that the lease existed at all.

With its holding, the Court made clear that the mere existence of a lease is not, on its own, sufficient to rebut a recent arm's-length sale price. Instead, the opponent of a sale price must present a lease-specific rationale, based on the lease itself, to successfully show the lease's impact on the sale price.

OHIO BOARD OF TAX APPEALS GRANTS SIGNIFICANT REDUCTION FOR ASSISTED LIVING FACILITY

***HCP EMOH, L.L.C. v. Washington County Board of Revision*, (Oct. 28, 2019), BTA No. 2017-1910.**

For tax year 2016, the Ohio Board of Tax Appeals granted a reduction in value for an 89-unit assisted living facility, located in rural Marietta, Ohio, adopting the property owner's appraisal. For tax year 2016, the auditor originally determined a value of $9.018 million based upon a lease-coverage ratio analysis. The property owner submitted an appraisal that opined to a value of $3.92 million based upon a cost approach and a sales comparison approach that utilized both traditional apartments and assisting living facility comparables. The county's appraiser determined a value of $13.1 million, again utilizing a lease-coverage ratio analysis and attempting to extract the value of the real estate from the business.

In a 2014 case, BTA determined that the property owner's appraisal was not probative of value. The property owner appealed the case to the Ohio Supreme Court and the Court found that the county's evidence relying upon an improper lease coverage ratio analysis was flawed. In the 2016 case, the BTA found that the methodology utilized by the property owner's expert was the best indication of value, noting the differences from the 2014 appraisal which included the addition of a cost approach and the use of assisted living facility comparables in the property owner's appraisal report.

WASHINGTON BOARD OF TAX APPEALS GRANTS DECEASE FOR RECENTLY PURCHASED SELF-STORAGE FACILITY

***Sound Storage, LLC, v. Hjelle*, BTA Docket No. 16-002 (unpublished).**

The Washington Board of Tax Appeals (BTA) granted a reduction in the tax year 2014 value of a self-storage facility from $3,334,000 to $2,600,000. The BTA found that the county assessor failed to provide a reliable indication of the property's value because the assessor relied upon sales of properties that were not sufficiently comparable to the subject property. While the BTA noted that the owner had purchased the property on June 2014 at a price of $2,000,000, the BTA did not consider the purchase price controlling. Instead, the BTA considered the purchase price along with the assessor's income approach, which indicated a value of $2,835,500. The BTA "reconciled" the sale price and income approach value to find a value of $2,600,000.

WASHINGTON BOARD OF TAX APPEALS FINDS THAT COUNTY ASSESSOR DID NOT OVERVALUE SEATTLE SKYSCRAPER

***1201 Tab Owner, LLC v. Wilson*, Washington BTA Docket No 92556 (2019).**

The Washington State Board of Tax Appeals (BTA) recently upheld the King County Assessor's tax valuation for a 55-story, class A+ office building in Seattle's central business district. In addition to having over 1,100,000 square feet of rentable office space, the property has over 36,000 square feet of retail space, a 285,000 square foot underground parking garage, and numerous other amenities for tenants. For the 2016 assessment year, the property owner contended that the true fair market value should have been $528,060,000. However, the King County Board of Equalization sustained the Assessor's valuation of $576,989,000 for the property.

Under Washington law, all property must be valued at one hundred percent of true and fair value and the appellant has the burden of proving a value correction through "clear, cogent, and convincing" evidence. Both the property owner and the Assessor relied primarily on the income approach to value the property but they also supported their valuation conclusions with comparable sales of office buildings. After reviewing the evidence from both parties, the BTA determined that the property owner did not overcome the burden and that the evidence in the record supported the Assessor's valuation.

In particular, the BTA found that (1) the Assessor's rental rate conclusion in their income approach was supported by the property owner's own rental rate range, (2) the property owner's comparable rental data included data that came from less desirable office buildings, and (3) the Assessor's capitalization rate was supported by sales of similar office buildings and the sale of the subject property that occurred just three years before the assessment date. Additionally, the BTA found that the Assessor's comparable sales, which

included the recent sale of the subject property, supported the Assessor's tax valuation.

WASHINGTON BOARD OF TAX APPEALS AFFIRMS REVISED VALUATION BY BOARD OF EQUALIZATION FOR WAREHOUSE

***Upland Corporate Park West v. Wilson,* BTA Docket No. 92519 (unpublished)**

The owner of warehouse storage space sought a reduction in value for assessment year 2016. The 64,000 square foot warehouse, which was built in 1979, was originally valued at $5,824,200. The owner sought a value of $4,500,000. At the county Board of Equalization hearing the assessor presented a revised value of $5,332,700, after increasing the capitalization rate utilized in his income approach. Both the owner and assessor relied upon the income approach to value, where the only difference in the approach was the rental rate. In addition to the income approaches, both the owner and assessor presented evidence of sales in the market. The owner argued that the assessor's comparables had more office space than the subject, making them less comparable to the subject property.

In order for the owner to prevail, it needed to overcome the assessor's presumption of correctness, which is typically the very high "clear, cogent and convincing" evidence standard. However, in this case because the assessor revised the valuation based upon an exercise of his appraisal judgment, using a higher capitalization rate, a lower preponderance standard applied to the appeal. Utilizing this standard, the Board reviewed the evidence and determined that the assessor's lease rate supported his value. The Board was not persuaded by the owner's arguments that tenants would pay less for warehouse with smaller percentage of office. Even with the lower burden, the Board found that the preponderance of the evidence supported the assessor's revised valuation for 2016.

VIRGINIA SUPREME COURT CLARIFIES RULE PERMITTING EXPERT TESTIMONY BY APPRAISERS NOT LICENSED IN VIRGINIA

***Virginia International Gateway, Inc. v. City of Portsmouth*, Case No.: 180810 (VA Sup. Ct., Oct. 31, 2019).**

A property owner hired a licensed New York appraiser with significant experience as a tax consultant and in the appraisal of complex industrial properties to value a property owned by Virginia International Gateway, Inc. which operated as a marine container terminal. The subject property was 610 acres including a wharf, buildings, cranes, and rail tracks.

The appraiser was not a licensed Virginia appraiser. When the appraiser first took the assignment he reviewed the property and reached an informal conclusion. He then obtained a temporary Virginia license, and, during that period of licensure, completed an appraisal report updating his informal conclusions to comply with Virginia laws and Uniform Standards of Professional Appraisal Practice ("USPAP"). At trial the Court initially qualified the appraiser as an Expert Witness permitting him to give opinion evidence in the face of an objection by the city that he was not a Virginia licensed appraiser and that his temporary license expired prior to the trial.

In the Court's final order, the trial judge reversed his decision qualifying the appraiser as an expert and dismissed the taxpayer's claims asserting that it was an "abuse of power to recognize [the appraiser] as an expert in real estate values in Virginia and permit his testimony because his appraisal work was unlicensed

and he was again unlicensed at the time he gave testimony." The judge did not want to "promote illegal conduct."

After a thorough review of the statutory history and the case law, the Supreme Court held that as a factual matter, the appraisal report was performed during the period that the appraiser had a temporary license. Moreover, that the Supreme Court noted that the licensure requirements of the Virginia Code impact, but do not control a trial judge's discretion to qualify a witness as an expert. The determination of whether a witness can testify as an expert is within the power of the trial judge and holding a valid license at the time of testimony is but one factor that might be considered in making that determination.

Because the judge incorrectly determined that the appraiser was not licensed at the time of his report and because licensure was not the only factor to be considered in qualifying an expert, the Supreme Court reversed the decision.