The Evaluator: Spring 2020

AUTHORED ARTICLE | 4.30.2020

CALIFORNIA APPELLATE COURT REVERSES LOWER COURT AND FINDS THAT TENANT IS RESPONSIBLE FOR ADDITIONAL TAXES DUE TO REASSESSMENT

***Whittier Self Storage, LLC v. The Villari Family Partnership et al.*, Court of Appeals of California, Second District, Division One, No, B293051 (Feb. 28, 2020).**

In reversing a judgment from the Superior Court of Los Angeles, the 2nd Appellate District determined that a tenant subject to a long-term lease was responsible for paying the increase in property taxes that resulted from a property's reassessment, which was triggered by the death of the landlord and subsequent transfer of the property into trusts of the landlord's beneficiaries.

In 2003, the original landlord entered into a ground lease with Progressive Development Company, LLC ("Progressive") for land located in Whittier, CA. The term of the lease was more than 35 years. Within a few years of the commencement of the lease, Progressive assigned its interest in the lease to Whittier Self Storage, LLC ("Self Storage"), which constructed a building and other improvements on the property. Following the death of the original landlord in 2012 and conveyance of ownership interests in the property into trusts of the landlord's beneficiaries, the Los Angeles County Assessor reassessed the property for the 2012 tax year and increased the taxable value by nearly $3.5 million due to "a value correction of a partial interest transfer". As a result of tax assessment increase, the property tax liability for the property increased by more than $38,500 for the 2012 tax year. As the party responsible for paying the property taxes as the tenant under a long-term lease, Self Storage sued the landlord in district court and claimed that, under the terms of the lease, the landlord should be responsible for paying the increased real property taxes that resulted from the reassessment following the death of the original landlord. The trial court ruled in favor of Self Storage based on its interpretation of the lease and entered a judgement for the additional taxes that Self Storage paid as a result of the reassessment.

Under California precedent, it is well established that a tenant under a lease between sophisticated commercial entities lasting more than 35 years should be considered the owner of the property for property tax purposes. In overruling the trial court and finding the its interpretation of the lease to be "erroneous", the 2nd Appellate District determined that the lease terms "uniformly" required Self Storage to pay all property taxes, including increased taxes that result from a reassessment of the property, and afforded them control to challenge the tax assessments.

DELAWARE COURT FINDS THAT LOCAL BOARD OF ASSESSMENT REVIEW FAILED TO CONSIDER THE IMPACT OF PROPERTY'S HIGH VACANCY RATE WHEN VALUING MULTI-TENANT OFFICE BUILDING

***1313 Owner LLC v. New Castle County Bd. of Assessment Review*, C.A. No. N19A-05-006 DCS (Jan. 30, 2020).**

The Delaware Superior Court reversed the findings of the New Castle County Board of Assessment Review for the tax assessment of a multi-tenant office building. The building, known as the Hercules Building, was erected in 1982 as a single-tenant facility. The building has since been converted for multi-tenant use but has struggled to maintain occupancy.

The county valued the property at $41 million. The current owner, who had purchased the property in a foreclosure sale for $22.9 million (with lenders forgiving another $65 million in debt) sought a reduction in value to $21.9 million. Before the board, the owner argued that the subject had a high vacancy rate over 33%. The owner also argued that the property was built as a single-tenant facility, which resulted in there being areas that were not leasable when the property became a multi-tenant property. In support of their valuation reduction, the owner presented appraisal evidence that employed all three approaches to value and placed overall emphasis on the income approach. The appraiser estimated market rent from actual rent in the area and made adjustments to account for the subject's high vacancy. The county rebutted with its own appraisal evidence, which relied on asking rental rents and made no adjustments for vacancy. The board voted to affirm the county's valuation.

On appeal, the court faulted the board for not considering how the high vacancy rate impacted the value of the property. As the court stated: "Delaware courts 'have followed the general principle that *all elements* entering into the value of property are pertinent and relevant and to be considered by the assessors in valuing it.'" The court then confirmed that Delaware law holds that a high vacancy rate is a factor to consider when performing the income approach. Since the board failed to consider the impact that the high vacancy rate had on the subject property, the court remanded the matter for further proceedings.

GEORGIA APPEALS COURT REVERSES DENIAL OF TAXPAYER'S MOTION FOR SUMMARY JUDGMENT AND HOLDS THAT COUNTY DID NOT HAVE AUTHORITY TO INCREASE APARTMENT COMPLEX'S VALUATION

***Columbia Brookhaven, LLC v. DeKalb County Bd. of Tax Assessors,* Court of Appeals of Georgia, A19A1815 (Feb. 10, 2020).**

A Georgia appeals court granted a property owner's motion for summary judgment in a valuation appeal, holding that the county did not have the authority to reassess and increase the value of the subject apartment complex for the tax year at issue. Because the property's value had just been adjusted by the county Board of Equalization the year before, the county was prohibited from increasing the value for the next two successive years.

Following the owner's successful tax year 2016 valuation appeal, the county increased the complex's value from approximately $55 million to more than $60 million. The owner appealed the new value, alleging that the county was statutorily prohibited from increasing the property's value for the next two years after the

board's determination. The county countered this argument, citing an exception to the statutory rule that permits value changes based on the occurrence of "other material factors" that would substantially impact a property's fair market value. The county claimed that the phrase "other material factors" authorized it to increase the subject complex's value based on a marked change in market conditions.

The court rejected this argument, holding that a change in market conditions does not satisfy the "other material factors" exception to the statute. The court cited one of its own recent decisions involving the same county in which it determined that "other material factors" must be factors that an on-site inspection of a property would reveal and that are specific to the particular property at issue. Because market conditions would not be discernable from an on-site inspection or specific to a particular piece of property, the court found that the exception cited by the county was not applicable and, as a result, the owner was entitled to summary judgment.

IOWA BOARD GRANTS SLIGHT REDUCTION FOR NESTLE MANUFACTURING FACILITY

N*estlé USA-Beverage Division v. Bremer Cty. Bd. of Revision*, PAAB No. 2017-009-02791 (Jan. 16, 2020).

Nestlé initiated a petition claiming that its property was assessed for more than the value authorized by law for its Waverly, Iowa manufacturing facility. The property is a food processing plant built between 1923 and 1999 and consists of 355,286 square feet of building area. The county assessor originally valued the property at $5,021,990 as of January 1, 2017. Nestlé presented an appraisal that opined to a value of $2.7 million relying upon a sales comparison approach and cost approach. The county submitted an appraisal that developed the sales, income and cost approaches to value and opined to a value of $4.9 million.

The Property Assessment Appeals Board considered both appraisals and ultimately found significant flaws with Nestlé's appraisal making it unreliable. In the sales approach, the board determined that Nestlé's appraiser failed to identify sufficiently similar sales and questioned the sufficiency and quality of the appraiser's adjustments. The board also found Nestlé's cost approach unpersuasive and faulted the appraiser for depreciating the land value. The board reviewed the county's appraisal and determined that three approaches to value supported a slight reduction in value. The board also disregarded the county's assertion that the original value should be maintained because the income and cost approaches to value supported the original valuation, despite the county's appraiser concluding to a valuation of $4.9 million. Ultimately, the board found that the property was overvalued and granted a reduction in value to $4.9 million.

KANSAS INTRODUCES BILL INTENDED TO STOP SO CALLED "DARK STORE" PROPERTY TAX ASSESSMENTS

Kansas House Bill 2498

The Kansas House of Representatives has recently introduced a bill that would alter the state's current definition of fair market value under K.S.A. § 79-503a. The current statute defines "fair market value" as the amount in terms of money that a well-informed buyer is justified in paying and a well-informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting

without undue compulsion. The bill proposes to add the following after the definition: "*A hypothetical leased fee shall not be included in the determination of fair market value of any property*".

The sponsor of the bill supposedly offered its response to recent rulings by the Kansas Board of Tax Appeals and the state's Court of Appeals that sided in favor of big-box retailers in their attempts to lower their tax valuations. The sponsor of the bill believes the revised statute would halt the use of comparable sales of vacant stores by retailers in tax assessment challenges for their open locations. However, many view the legislation as pro-taxpayer and believe the bill would negate the arguments proffered by the taxing jurisdictions in their attempt to defend tax assessment challenges brought forth by big-box retailers. The House Committee on Taxation has not yet scheduled a hearing on the measure.

MAINE INTRODUCES LEGISLATION AIMED AT CREATING SPECIAL VALUATION METHOD FOR LARGE RETAIL PROPERTIES

Maine H.P. 1456 / LD 2045

The Maine House of Representatives has introduced legislation that would amend Maine's "just valuation" statute, 36 MRSA § 701-A, to create a special valuation method for a certain class of retail properties. The proposal would have the effect of targeting only larger retail properties over 20,000 square feet by requiring these properties to be valued based on their current use compared to similar properties or, if the properties are vacant, at their highest and best use. In response to the legislation, the Council on State Taxation (COST) has publicly expressed concern that the proposed legislation would inequitably and discriminately target retail properties for potential valuation increases and would potentially violate the state's uniformity clause. Moreover, COST believes that the proposal would restrict the use of the sales comparison valuation method and cause appraisers to run afoul of USPAP appraisal guidelines.

Michigan Tax Tribunal Finds City Unlawfully Uncapped Value When Transfer Was Between Commonly Controlled Entities

***Washtenaw Commons LLC & NEJ-Washtenaw, LLC v. City of Ann Arbor*, Michigan Tax Tribunal, Docket No. 18-001381 (Feb. 19, 2020).**

Petitioner, the owner of a commercial strip center, filed a case arguing that the city unlawfully uncapped the taxable value for the property when the property transferred between related entities. The Michigan Tax Tribunal indicated that the case concerned a purely legal issue about whether the transfer of ownership was exempted from the uncapping requirements and neither side presented any evidence of valuation. Petitioner presented argument and evidence demonstrating that transfer was not arms-length and was between entities that had common control. Petitioner presented documents, including the quit claim deed, affidavit and operating agreements of the two entities, as well as the testimony of the individual who had control and authority of both entities that were party to the transfer.

Petitioner's witness testified that the property was originally acquired and held in a joint tenancy for financing purposes. He testified that the original entity transferred its interest to the new related LLC for one dollar, it was not an arms-length transaction between unrelated parties. The Tribunal, after review of the operating agreements, concluded that both entities in the transfer were unified in a single individual

who had authority to control both entities. The tribunal also noted that the transaction at one dollar was not at market rate, further evidencing that the transfer was between related entities. For these reasons, the tribunal determined that the underlying transaction was between commonly controlled entities within the plain language of the uncapping exception, the city improperly uncapped the taxable value for the subject property for tax year 2018.

MINNESOTA SUPREME COURT FINDS MINNESOTA TAX COURT ERRED IN RELYING ON SECTION 1031 TAX EXCHANGE SALE AS ONLY INDICIA OF MARKET VALUE

***Inland Edinburgh Festival, LLC v. County of Hennepin*, A19-0567 (Minn. Feb. 12, 2020)**

The Minnesota Supreme Court found that the Minnesota Tax Court abused its discretion when it utilized a single sale, which was conducted as a 1031 tax exchange, to determine value of a property. In 2015, the property owner appealed the tax assessment for a grocery-anchored retail shopping center. During the pendency of the tax court case, the property transferred in a "like-kind" tax exchange under 26 U.S.C. § 1031.

The property owner presented an appraisal report which contained both an income approach and a sales-comparison approach. After the tax court noted that the property owner's appraisal report contained errors that affected the credibility of the valuation opinion, the owner offered a second corrected report into evidence. The county did not call an expert witness or present any appraisal report. In its analysis, the tax court gave no weight to the property owner's appraisal citing that his creditability was undermined by the revised report. Instead, the tax court utilized the 1031 exchange sale price as the sole basis for determining the assessment after making certain adjustments.

The Supreme Court found that the tax court acted within its discretion to disregard the property owner's appraisal report as it was uniquely situated to assess the credibility of the property owner's expert. However, the Supreme Court concluded that the tax court's reliance on a single sale, which was conducted as part of a tax exchange under section 1031, was erroneous. The Supreme Court noted that there was no evidence in the record to indicate the factors that affected the 1031 exchange and whether the price paid for the property reflected the fair market value of the property. Based on the lack of evidence in the record, the Supreme Court remanded the case to the tax court to decide whether to reopen the record for purposes of making a value determination.

MISSOURI COURT UPHOLDS VALUATION FOR TWO LOW-INCOME HOUSING PROJECTS BASED ON ACTUAL INCOME AND EXPENSES

***Tibbs v. Poplar Bluff Associates I, L.P.,* Mo. Court of Appeals, SD 35625 (April 14, 2020).**

The Missouri Court of Appeals recently upheld the valuation of two low-income housing projects, affirming that low-income housing should be valued using an income approach based on actual income and expenses rather than market income and expenses. Though the county assessor alleged that such valuation was impermissible and that market data should instead be utilized, the court held that consideration of the subject properties' actual income and expenses was consistent with well-established case law involving properties covered by Low Income Housing Tax Credit Land Use Restriction Agreements

("LUR Agreements") in Missouri. Because the subject properties were both subject to LUR Agreements, which limit the income that a property can produce by limiting the rent that may be charged, valuing the properties based upon their actual income and expenses was appropriate.

NEW HAMPSHIRE SUPREME COURT UPHOLDS INCOME APPROACH BASED UPON HYBRID OF ACTUAL AND MARKET EXPENSES TO VALUE SKILLED NURSING FACILITY

***Ventas Realty Limited Partnership v. City of Dover*, Supreme Court of New Hampshire, No. 2018.0680 (Oct. 23, 2019).**

The New Hampshire Supreme Court recently upheld the value of a skilled nursing facility in the City of Dover, rejecting the owner's request for a value abatement. In reaching its decision, the court considered the parties' respective appraisals, concluding that the city's appraisal most accurately reflected the subject property's value. Though the two appraisers utilized similar capitalization rates and provided similar estimates of projected gross income, they differed greatly in their estimates of the property's projected gross operating expenses. While the owner's appraiser relied upon the property's actual expenses for the 11 months prior to the relevant lien date, the city's appraiser utilized a hybrid approach that indicated projected gross expenses that fell between the property's actual expenses and the average expenses of similar properties.

The trial court sided with the city's appraiser, finding her approach to be more credible than the one utilized by the owner's appraisal. On appeal, the owner argued that the trial court erred in this determination. The court noted, however, that because it defers to the trial court's judgment on matters of fact, including credibility, it would uphold the trial court's determination. As a result, the court upheld the trial court's ruling in favor of the city, though it did also outline additional specific reasons why the owner had nonetheless failed to meet its burden of proof and why its appraisal failed to support its request an abatement.

NEW JERSEY TAX COURT REJECTS ASSESSOR'S "SPOT ASSESSMENT" BASED ONLY ON SALE

***Plaza Twenty Three Station LLC v. Twp. of Pequannock*, New Jersey Tax Court Nos. 2870-2018, 2215-2019 (Jan. 9, 2020).**

In February of 2017, Plaza Twenty Three, LLC purchased a grocery-anchored shopping center for $51.05 million. At that time, the assessed value of the property was $24,446,100. In the same year, the Municipal Assessor imposed a twelve-month added assessment on the property for the 2017 tax year in the amount of $20.5 million, which he claimed was based on added improvements in 2014, 2016, and 2017. However, the Assessor also admitted during deposition testimony that he considered the February 2017 leased fee sale a part of the added assessment.

The court began by noting that an assessor possesses the authority to reassess a property but that such authority is not unrestricted. In looking at the Assessor's actions, the court determined that the Assessor was motivated to reassess the property based singularly on the sale, not upon any evidence of a change in

the property, change in income, or other evidence of value. The court noted this practice of singling out certain properties for reassessment while maintaining the assessments of other similarly-situated properties violates the New Jersey Constitution's uniformity provisions.

Here, the municipal assessor was prompted to reassess the subject property after learning of its sale in 2017, which constituted an unconstitutional "spot assessment." The court ordered that the property be returned to its pre-reassessment value. Moreover, the court ordered that the following tax year value, based on the reassessment, also be returned to the original value.

OHIO BOARD OF TAX APPEALS CLARIFIES GUIDING PRINCIPLES OF VALUING LOW-INCOME HOUSING PROPERTIES IN NUMBER OF RECENT DECISIONS

In recent months, the Ohio Board of Tax Appeals ("BTA") has issued a number of decisions relating to the valuation of low-income housing tax credit (LIHTC) projects. In these decisions, the board has restated and clarified the governing principles for valuing these properties. Overall, when a property is encumbered by a restrictive covenant that restricts rental rates due to its participation in the LIHTC program, these restrictions must be taken into account.

In general, in applying the income approach to value, there is a preference that market rent be utilized over contract rent; however, this preference is presumptive, not conclusive. In order to overcome this presumption, the record must support using a property's actual income and expense information. In addition, government subsidies should not be taken into account to the extent that they increase the value above the conventional unrestricted market.

Applying these principles, that BTA recently determined that:

- An appraiser's removal of the income received for portable tenant-based subsidized units that "inflated" rents above the restricted market rents from his income approach without a showing that the subsidies elevated rates above conventional rates was improper. *See Westerly I, L.P. v. Cuyahoga Cty. Bd. of Revision*, No. 2019-207 (Jan. 8, 2020).
- An appraiser's reliance upon a property's actual, below-market rents was proper and lawful when the property in question received below-market rents and was required to pass to pass on any surplus profit to the USDA. See *Woda Meadow Glen Limited Partnership v. Wyandot Cty. Bd. of Revision*, BTA No. 2017-1458 (March 5, 2020).
- A property owner's mere statement that a particular property is subject to LIHTC restrictions, without more, is not sufficient to overcome the presumption that market data be utilized; instead, the record must include specific information to support deviation from the rule, which can include details of: the specific low-income housing program by which the property is bound and the terms of such program, the limited income-producing potential resulting from such program, consequences of surplus profit (e. g., must return it to the governing agency), etc. *See Tallmadge City Schools. Bd. of Edn. v. Summit Cty. Bd of Revision*, BTA No. 2017-1500 (March 10, 2020).
- An appraiser's removal of the value of HUD subsidies from his income approach was proper where there were no tenant-based, portable vouchers at issue. *See Trinity Manor Senior Housing Limited Partnership v. Butler Cty. Bd. of Revision*, BTA No. 2018-1155 (March 25, 2020).

OHIO SUPREME COURT FINDS ENTITY SALE BEST EVIDENCE OF VALUE FOR APARTMENT COMPLEX

***Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. Revision*, Slip Opinion No. 2020-Ohio-353, (Feb. 6. 2020).**

The Ohio Supreme Court affirmed the Ohio Board of Tax Appeals ("BTA") decision increasing the valuation of an apartment complex from $16 million to $34.5 million based upon the sale of a limited liability company that owned the real estate. The court found in substance that the sale in corporate entity "constituted a contrivance for the sale of commercial real estate", and thus found that the BTA could rely upon the sale price as the best evidence of the property's value.

At the BTA, the Board of Education introduced documentation obtained in discovery that established that the real estate, and personal property sold for $35.25 million. At hearing, the property owner submitted an appraisal that valued the real property at $25 million. The BTA determined that the sale, less the value of personal property established in the property's owner's appraisal was the best indication of value.

On appeal, the property owner argued that the BTA incorrectly considered the transaction to be a sale of real estate, instead of the sale of a corporate entity. The court found that the real estate was the primary subject of the sale, and found that it was proper for the sale to be utilized to establish the valuation for real estate tax purposes.

OHIO APPEALS COURT REMANDS CASE TO DETERMINE IF FACTORS IMPACTING SALE INDICATE SALE SHOULD BE DISREGARDED FOR BUILD-TO-SUIT INDUSTRIAL PROPERTY

***MDC Coast I, LLC v. Union Cty. Bd. of Revision,* Slip Opinion No. 2020-683 (Feb. 27, 2020).**

The 10th District Court of Appeals reversed the BTA decision finding that the sale price was the best indication of value for a leased industrial property and remanded the case for further consideration based upon the court's findings.

The property at issue was a 355,000 square foot warehouse facility constructed in 2014 based upon a build-to-suit lease agreement. The cost of construction was approximately $13.5 million. After completion of the property, the property was sold in December 2015 for $19 million. The BOE filed a complaint seeking to increase the valuation to the sale price. At the Board of Revision ("BOR"), the property owner objected to the use of the sale price and presented the testimony of a general manager for the tenant and a real estate appraiser to establish the value of the property. The BOR and BTA both found that the sale was the best indication of value for the property, and the property owner appealed the decision.

On appeal, the court addressed the property owner's argument that the BTA applied outdated legal analysis in determining the value of the fee simple estate because it disregarded factors in arriving at the fee simple value, as if unencumbered. The court found that the BTA failed to consider factors impacting the amount a buyer would pay to own a leased property including (1) the amount of rent charged under the lease in comparison to market rent; (2) the creditworthiness of the tenant; and (3) whether the lease is a net lease, under which the tenant defrays expenses related to the property. The court also found that the

BTA erred by requiring the property owner to rebut some aspect of the sale before considering the appraisal evidence. The court determined that the BTA disregarded the appraisal evidence and testimony and also the testimony from the general manager of the tenant, and thus failed to address all of the relevant non-sale price evidence. The court held that the BTA erred by disregarding factors that may have made the sale price not indicative of value and also erred by ignoring the non-sale price evidence, and therefore remanded the case back to the BTA for additional consideration.

OHIO APPELLATE COURT FINDS OHIO BOARD OF TAX APPEALS IMPROPERLY FAILED TO CONSIDER PROPERTY OWNER'S EVIDENCE REBUTTING THE PRESUMPTION THAT A RECENT LEASED FEE SALE PRICE REFLECTED THE VALUE OF THE PROPERTY

***Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. Revision*, Slip Opinion No. 2020-Ohio-200, (Jan. 23, 2020).**

The 10th District Court of Appeals reversed the Ohio Board of Tax Appeals' ("BTA") decision and held that the BTA wrongfully disregarded Ohio's valuation statute and precedent from the Ohio Supreme Court regarding the use of leased fee sales to determine value for a property.

The issue of the value of the subject property, a building leased by State Farm, had been before the Ohio Supreme Court for tax year 2012. For tax year 2012, the Ohio Supreme Court found that it was error for the BTA to rely upon a sale-leaseback price for taxation purposes. In the case before the court, the BTA considered the valuation for the same building for tax year 2013-2015. Notably, the property sold subsequent to the sale leaseback transaction for a recorded transfer price of $26.1 million (the "2014 sale"). The BTA had held that the property owner did not provide evidence of market rent so it could not determine whether the lease in place was above market. The BTA found that the sale at $26.1 million was the best indication of value and rejected the appraisal submitted by the property owner at $13.2 million.

The court did not embrace the property owner's argument that the 2014 sale was not valid for purposes of establishing value simply because it was based on the same lease that was created in the sale leaseback transaction. However, the court did find that the property owner presented substantial evidence at the BTA that the creditworthiness of the tenant, State Farm, affected the leased fee sale price. The court criticized the BTA for ignoring Ohio Supreme Court case law regarding rebutting the presumption of a leased fee sale. The court found that the BTA failed to properly perform an analysis of all the evidence, including the evidence about the creditworthiness of the tenant and the property owner's appraisal. As the BTA was required to consider that evidence, the court remanded the case to the BTA for further consideration consistent with recent Ohio Supreme Court precedent.

OHIO APPELLATE COURTS AND OHIO BOARD OF TAX APPEALS RULE AGAINST LOWE'S IN FOUR RECENT DECISIONS

***Lowe's Home Centers, LLC v. Cuyahoga Cty. Bd. of Revision*, Slip Opinion No. 2020-Ohio-464, (Feb. 11, 2020).**

The 10th District Court of Appeals affirmed the BTA decision finding that the special purpose doctrine applied. Furthermore, the court found that the requirement to value property for tax purposes as if unencumbered, does not mean that the appraiser is to assume that the property was vacant or distressed, but instead meant that an adjustment in value based upon market rent and occupancy was appropriate.

This case involves the valuation of an owner-occupied Lowe's store constructed in 1999. Both the property owner and BOE obtained appraisals before the BTA. For tax year 2015, the fiscal officer originally valued the property at $9.5 million, Lowe's appraiser opined to value at $6.79 million and the BOE appraiser opined to value at $12.02 million.

The BTA as fact finder analyzed the appraisers' determination of the property's highest and best use. Lowe's appraiser determined that it was for the "continued use as a single tenant retail facility..." and noted that the improvements were functionally obsolete for most second generation users due to the substantial amount of accrued depreciation. The Board of Education ("BOE") appraiser determined that the highest and best use was "for continued use by the current occupant for its ongoing business" explaining that the improvements continue to make a substantial contribution to the property's overall value. Lowe's appraiser focused on sales and leases of properties no longer occupied by its original intended user, and the BOE appraiser focused on properties that continue to be occupied by its original intended user.

The BTA determined that there was no evidence of Lowe's vacating properties of similar age and determined that the BOE's highest and best use was most appropriate. It further stated that it found the "special purpose" doctrine to be applicable and that consideration of first generation comparables—those properties occupied by the original intended user—were the most appropriate.

The court affirmed the BTA's decision, finding that it would not disturb the question of fact determined finding that the Lowe's store was special purpose. This finding was based upon the size, type and fact that it was still profitable in use by its original user and would remain in such use for the foreseeable future. Secondly, the court found that valuing the property consistent with statute, "as if unencumbered", that the appraiser must adjust comparable properties to account for the market, and does not mean that the appraiser must assume that the property is vacant.

***Rancho Cincinnati Rivers, LLC v. Warren Cty. Bd. of Revision*, Slip Opinion No. 2020-Ohio-1319, (April 6, 2020).**

The 12th District Court of Appeals ("court of appeals") affirmed the decision of the Warren County Court of Common Pleas ("common pleas court") that found the school district's appraisal evidence to be the most competent and probative evidence of value for a Lowe's property. The court of appeals found that the requirement to value property in its "fee simple estate, as if unencumbered" for tax purposes does not mean that the appraiser is to assume that the property was vacant or distressed but instead meant that an adjustment in value to simulate market rent and occupancy was appropriate.

This case involves the 2015 tax year valuation of a 141,000 square foot retail property that was constructed in 2008 and is leased by Lowe's. The county auditor valued the property at $8.5 million for the 2015 tax year. At a hearing before the Warren County Board of Revision (BOR), Lowe's presented the appraisal report and testimony of an appraiser who opined to a value of $5.66 million. Lowe's appraiser valued the property under the theory that the "fee simple unencumbered" language required by R.C. 5713.03 requires that a

property be valued as though it is vacant and assumes a hypothetical sale of the property without a tenant in place. The BOR rejected Lowe's appraisal and retained the Auditor's value.

Lowe's appealed the BOR''s decision to the common pleas court. The local Board of Education (BOE) presented their own appraisal report and testimony at the hearing before the court magistrate. The BOE's appraiser, which opined to a valuation of $8.48 million as of the tax lien date, appraised the property as if it could be purchased with a lease in place at market rate, and therefore utilized comparable sales of properties that sold with leases in place and made adjustments for any non-market terms. After the evidentiary hearing, the magistrate issued its decision in favor of Lowe's. However, following the timely objection by the school district and county to the magistrate's decision, the common pleas court found that the magistrate placed an improper burden on the BOE to prove its valuation without first determining whether Lowe's was entitled to a decrease in valuation as required by law. Although the common pleas court found Lowe's appraisal evidence to be competent and probative evidence of the property's value, it reversed the magistrate's decision and found that the BOE's appraiser provided the "most" competent and probative evidence of the property's value.

Lowe's appealed the decision to the court of appeals, which overruled the assignment of errors raised by Lowe's. First, the court found that Lowe's allegation that the common pleas court erred by finding that their appraisal was not competent and probative evidence of value was without merit because the court actually found both appraisals to be competent and probative evidence of value. Second, the court found that the common pleas court did not err by accepting the BOE's appraisal despite Lowe's allegation that the BOE appraiser adopted a "leased at market" valuation in violation of R.C. 5713.03. The court noted that "as if unencumbered" under the statute means that if the subject property is encumbered, the appraiser adjusts for the effects of those encumbrances, but does not mean that the appraiser must assume that the property is vacant and ignore the fact that the property is leased at a market rate. Third, the court found that the common pleas court did not deprive Lowe's of equal protection under the law.

***Midway Realty Property Holdings, LLC (et. al.), v. Lorain Cty. Bd. of Revision*, Ohio BTA No. 2018-692 (March 13, 2020).**

The Ohio Board of Tax Appeals (BTA) recently increased the Lorain County Auditor's value for a 124,000 square foot big-box property that is leased by Lowe's after finding that the county's appraisal evidence provided the best evidence of its true fair market value. The county auditor had originally valued the property at $4,510,320 for the 2017 tax year. In support of their contention that the Auditor's value was not reflective of fair market value, Lowe's presented an appraisal report that opined to $1.87 million and relied primarily on a sales comparison approach that only included comparables that were vacant at the time of sale. Meanwhile, the county presented an appraisal report that utilized both vacant and leased sale comparables in their sales comparison approach. The county's appraisal opined to a valuation of $6.825 million.

After reviewing the evidence and testimony from the appraisers, the BTA found that the county appraiser's sales comparison approach provided the best indication of value. Although the county's appraiser relied primarily on the sales of comparables that sold with leases in place, the BTA found that his conclusion of value was closer to the range of the fee simple sales which "demonstrates his adjustment to remove the value associated with a particular brand to focus instead on the type of likely tenant." The BTA rejected the taxpayer's argument that the appraisal of a property in "fee simple unencumbered" must assume a

property is vacant and available to be occupied at the time of the sale. To conform with the valuation opinion reached by the county's appraiser in his sales comparison approach, the BTA issued a decision that increased the auditor's valuation to $6.775 million.

***Lowe's Home Centers, LLC v. Washington Cty. Bd. of Revision*, Ohio BTA No. 2018-598 (March 9, 2020)**

The Ohio Board of Tax Appeals (BTA) recently increased the Washington County Auditor's value for a 143,000 square foot Lowe's after finding that the county's appraisal evidence provided the best evidence of its true fair market value for the 2017 tax year. The county auditor had originally valued the property at $9,801,260. Lowe's presented an appraisal report that opined to $4.28 million and which relied primarily on a sales comparison approach that only included comparables that were vacant at the time of sale. The county presented their own appraisal report that concluded to a value of $10 million and which relied on a sales comparison approach that included comparables that were both vacant and leased at the time of sale. The BTA noted that the appraisers differed in their fundamental views of how to appraise property in its "fee simple estate, as if unencumbered…" as required by R.C. 5713.03.

After reviewing the evidence and testimony from the appraisers, the BTA found that the county appraiser's valuation conclusion was the best indication of value and, therefore, increased the auditor's valuation to $10 million. The BTA noted that the county appraiser's sale comparables were generally closer geographically to the subject, and that his sale and rent comparables were generally more analogous to the subject in terms of age and size. The BTA also concluded that the county's appraiser met his responsibility by adjusting leased fee sales to take into account the terms of the lease and rates, and that he did not develop a value in use appraisal "simply because he recognized the current use of the property" in his highest and best use analysis. The BTA again rejected Lowe's argument that R.C. 5713.03 requires the subject property to be valued as if it were vacant and available to be occupied on the tax lien date.

OREGON TAX COURT GRANTS REDUCTIONS FOR TWO MACY'S STORES

***Macy's Department Stores Inc. v. Clackamas County Assessor*, Case Nos. TC-MD-180139G and TC-MD-180138G (Jan. 21, 2020).**

The Oregon Tax Court granted reductions for two Macy's locations primarily based upon the income approaches utilized in the appraisals for Macy's. The Macy's stores at issue consist of multi-level department stores located at a super-regional mall near Happy Valley, Oregon. The first is a traditional Macy's store consisting of 199,436 square feet, and the second is a home store consisting of 168,693 square feet. Both stores were constructed in the early 1980s.

Both Macy's and the county prepared appraisals utilizing the income and sales approaches to value. Macy's appraiser placed equal weight upon the income approach to value; while the county's appraiser gave no weight to the sales approach. In finding that Macy's had provided a better indication of value, the tax court found that Macy's had provided more reliable data for market rents, and better data to determine the capitalization rate (primarily based upon leased fee sales in the sales approach). While Macy's appraiser found that the market rental rate should be less for the home store than the main store, the court found that the data did not support any difference. Ultimately, the tax court granted a reduction in real market value for the main store from $23.7 million to $15.8 million and for the home store from $17.8 million to $13.25 million.

PENNSYLVANIA APPELLATE COURT CONFIRMS INCOME APPROACH IS PROPER METHOD FOR DETERMINING VALUE OF PERSONAL CARE FACILITY SUBJECT TO LEASE

***Missouri River Corp. v. Erie Cty. Bd. of Assessment Appeals, et al.*, Commonwealth Court of PA, No. 639 C.D. 2019.**

A Pennsylvania appellate court held that the trial court did not commit any error when it accepted the school district's appraisal report utilizing the income approach for a 69-room personal care facility. The property was subject to a lease which was held by a large real estate investment trust. The lease defined "leased property" to include "personal and intangible property."

On appeal, the taxpayer and the school district presented competing appraisals. The taxpayer presented an appraisal report, which relied on the cost and income approach, relying on the cost approach. In preparing his income approach, the taxpayer's appraiser did not use the property's annual lease payments because the leases included intangible assets, personal property, and business value. The school district's appraiser developed all three valuation approaches but he gave almost all weight to the income approach since the property was encumbered by a long-term lease, and relied upon the property's annual lease in developing the income approach.

The court determined that under Pennsylvania law, the income approach is the most appropriate method for appraising a property typically purchased as an investment. When real estate is subject to a long-term lease, the portions of the property subject to a leasehold interest cannot be disregarded in determining value. The court noted that even though the lease contained intangibles and other personal property, the value of these were *de minimis*. Therefore, the trial court did not err when it gave greater weight to and credited the school district's income approach which reflected the property's income producing nature.

VIRGINIA CIRCUIT COURT FINDS TAXPAYER FAILED TO ESTABLISH ERROR IN ORIGINAL ASSESSMENT

***Portsmouth 2175 Elmhurst, LLC v. City of Portsmouth,* Record No. 181439, Portsmouth Cir. Ct. (Jan. 23, 2020).**

This matter relates to the valuation of a former meatpacking plant that ceased operations in 2012 for tax years 2013, 2014 and 2015. The property was marketed for sale for $1.9 million and was purchased by the Portsmouth 2175 Elmhurst, LLC ("taxpayer") for $875,000 in 2013. The property remained vacant for the tax years at issue. After purchase, the taxpayer removed equipment and fixtures from the building and then marketed the property for resale at $1.1 million. The property was sold for $575,000 in September 2015, and the new owner tore the building down to construct a distribution center.

The City of Portsmouth valued the property at $6,132,520 for 2013 and 2014 and lowered the valuation to $3,786,160 for 2015 as a result of an appeal to the Board of Equalization. To support its request for reduction, the taxpayer retained an appraiser who determined that based upon the condition of the building, the property's highest and best use was to demolish the former meatpacking plant and build a new industrial building. The appraiser determined a value of $950,000 after determining the value of the land and deducting the cost of demolishing the building. The taxpayer also submitted testimony of another

appraiser who supported the taxpayer's highest and best use and criticized the assessor for relying upon a cost approach to value an older industrial building due to the difficulty in determining depreciation and also submitted an appraisal review that indicated there were violations of USPAP in arriving at the mass appraisal valuation. The assessor also testified and indicated he did not consider the sale in assessing the property because it was not "at market" and relied upon mass appraisal techniques to arrive at a valuation utilizing the cost approach to value. Additionally, the city also offered the testimony of an appraiser who determined the highest and best use would be for commercial use, instead of industrial. The trial court upheld the assessments finding that the there was no evidence to establish that it was unsuitable for use by another manufacturer, but did note that by 2015 the property had fallen into disrepair, thus finding the reduced valuation for 2015 was appropriate. Ultimately the trial court found that the Taxpayer did not establish that the city had violated any accepted practices, standards or rules of Virginia laws.

On appeal to the circuit court, the court reviewed the record and determined that the taxpayer did not meet its burden of proof to establish that the property in question is valued at more than its fair market value or the assessment is not uniform in its application and the assessment was not arrived at in accordance with generally accepted appraisal practices, procedures and standards. Most of the analysis focused on whether the taxpayer established whether the city's assessment violated generally accepted appraisal practices, procedures and standards. While the taxpayer submitted a review appraisal that claimed violations of USPAP in the city's original mass appraisal, it failed to explain the standards and how the mass appraisal violated the standards. In addressing the arguments advanced by the taxpayer regarding the use of the written appraisal review, the court noted that submitting a written report without additional clarifying testimony may not be sufficient to persuade the factfinder that the assessment was incorrect and that only merely asserting conclusory violations of practices, procedures, rules and standards is not the same as proving such violations. Ultimately, the reviewing court determined that it was reasonable for the trial court to arrive at its decision based upon the evidence presented.

WASHINGTON BOARD OF TAX APPEALS REJECTS USE OF ASSESSOR'S INCOME APPROACH, WHERE INCOME RATES USED WERE NOT REFLECTIVE OF MARKET

***Essex Property Trust v. Wilson*, Wash. BTA Nos. 91517 and 91518 (Nov. 26, 2019)**.

The Board of Tax Appeals ("BTA") ordered a reduction in the value of a multi-story, 63-unit apartment complex based upon a review of expert appraisal evidence submitted by both the property owner and the county assessor. Both appraisals used the sales comparison and income approaches to value. The local Board of Equalization affirmed the assessor's valuation of $19.226 million. However, on appeal the BTA reversed. First, the BTA rejected both the owner's and the assessor's sales as not being comparable to the subject property. The BTA found the sales incomparable in terms of age, location, amenities and construction.

The BTA noted that the owner and the assessor's income capitalization approaches were nearly identical except for the rental rates used. The BTA found the owner's rates to be more reliable, as the rates were based on actual rents at the facility as well as market rates. The BTA rejected the assessor's rates because the assessor provided no market rents to support his rates, and the rates he used exceeded rates seen in the marketplace. The BTA thus accepted the owner's contention that the assessor had used older rental

rates and trended them up, rather than looking to current market rates. Based upon its review, the BTA decided in favor of the property owner and reduced the assessor's valuation to $17.09 million.