

IN THE SUPREME COURT

STATE OF OHIO

APPEAL FROM THE BOARD OF TAX APPEALS

BOARD OF EDUCATION OF THE COLUMBUS)
CITY SCHOOLS,)

Appellee,)

vs.)

FRANKLIN COUNTY BOARD OF)
REVISION, COUNTY AUDITOR,)
AND TAX COMMISSIONER OF THE)
STATE OF OHIO,)

Appellees,)

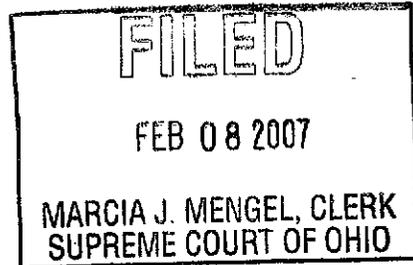
and)

2100 MAPLE CANYON PLAZA LLC,)

Appellant.)

SUPREME COURT CASE NUMBER
06-1429

BOARD OF TAX APPEALS
CASE NUMBER 2005-A-381



REPLY BRIEF OF APPELLANT

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LAW AND ARGUMENT

The Appellee Board of Education of the Columbus City Schools (hereinafter Appellee and/or Board of Education) has filed a brief in this appeal. The Franklin County Board of Revision, County Auditor and Tax Commissioner have not filed briefs in this appeal. This reply brief of the Appellant responds to the issues and arguments raised by the Board of Education in their brief.

With respect to the standing issue raised by the Appellee at page 2 in their brief, the Appellant submits that the notice of appeal from the Franklin County Board of Revision decision to the Ohio Board of Tax Appeals filed by the Appellee lists 2100 Maple Canyon Plaza LLC as the Appellee. Supp. at page 141. There is no rule or procedure before the Ohio Board of Tax Appeals for the filing of a substitution of parties. See Ohio Administrative Code Rules 5717-1-01 through 5717-1-22. The Appellee was obviously aware of the fact that the property had transferred between the time that they filed their complaint before the Franklin County Board of Revision and their appeal to the Ohio Board of Tax Appeals. The Appellee listed Ted and Maria's Plaza, LLC as the owner of the property in their notice of appeal from the Franklin County Board of Revision decision to the Ohio Board of Tax Appeals. Supp. at page 141. However, Ted and Maria's Plaza, LLC is not listed as an Appellee in that notice of appeal. In this regard Revised Code 5717.01 provides that "[u]pon receipt of such notice of appeal of such county board of revision shall by certified mail notify all persons thereof who were parties to the proceeding before such county board of revision, and shall file proof of such notice with the Board of Tax Appeals." No notice of the Appellee's notice of appeal was served on the Appellant.

The address noted by the Appellee at page 3 in their brief is the lessee of the property (CVS), not 2100 Maple Canyon Plaza, LLC. It is only by reference to the conveyance fee

statement and deed upon which the Appellee's complaint is based that the correct address for the property owner can be ascertained. See Supp. at pages 2-4. Lessees do not have standing to contest real property tax valuations in Ohio. N. Olmsted Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (1998), 122 Ohio App. 3d 654, 660 (citing Soc. Natl. Bank v. Wood Cty. Bd. of Revision (1998), 81 Ohio St.3d, 401.) But more troubling is the Appellee's insistence that properly listing the property owner's address on a Board of Revision complaint is not a jurisdictional requirement.

I. PROPER SERVICE IS ALWAYS THE ULTIMATE RESPONSIBILITY OF A COMPLAINANT.

A Complainant, whether it be a Plaintiff in the civil context (see Civil Rule 4.6 (E)) or a party to a tax complaint under Revised Code 5715.19, is ultimately responsible for insuring that a court, or in this case the County Auditor and Board of Revision, properly follow the law and issue the appropriate notices to the parties. This appeal involves an action initiated by the Appellee, not the County Auditor or Board of Revision. The Appellee, in their brief, overlooks this fact in an attempt to find fault with the statutes under which notices were required to be given in this case. The Appellant submits that it is incumbent upon litigants to point out when a court or administrative board is wrong or commits an error. In this case the Appellee should have properly filled out their complaint form and made sure that the County Auditor and Board of Revision give proper notice to the Appellant before proceeding in this appeal.¹

At page 4 in their brief the Appellee alleges that the deed and conveyance fee form were attached to their complaint. No reference to either document appears on the face of the complaint. See Supp. at page 1. At the hearing before the Franklin County Board of Revision

¹Alternatively, a waiver as to any defect in service could have been requested at the hearing in this case.

copies of the conveyance fee statement and deed were marked as Exhibits A and B. Supp. at page 8. The Appellee attempts to shift the burden to the Appellant to prove that the tax mailing address of the Appellant was in fact the tax mailing address listed on the conveyance fee form and deed. This attempt to shift the burden of proof is absurd. This is the Appellee's action, initiated by them, the burden to prove jurisdiction is on them, not the Appellant. Moreover, the Appellee's attempt to call into question the accuracy of the information contained in the conveyance fee form and deed is contrary to their request before the Franklin County Board of Revision and Board of Tax Appeals that the value of the subject property be determined based solely on those two documents. If those documents are sufficient to prove value as the Appellee urges, they are also sufficient to prove Appellant's address. The fact in this appeal is that there is no evidence that service of the Appellee's complaint and notice of the Board of Revision hearing and Board of Revision decision was ever made on the Appellant. Nor was service ever perfected utilizing the address listed on line one of the complaint form filed by the Appellee.² It was only when service was perfected on the subsequent purchaser of the property, Ted and Maria's Plaza LLC in September of 2004 that the Appellant was made aware of this proceeding.

The Appellant owned the property at the time that the Appellee filed their complaint on March 30, 2004 and it was incumbent upon the Appellee as the originator of this action to make sure that service was obtained on the property owner at the address contained in the conveyance fee form and deed that served as the basis for their complaint. The Appellant submits that when attorneys, as was the case in this appeal, file complaints on behalf of taxing entities under Revised Code 5715.19, Civil Rule 4.6(E) should serve as a guide in assigning responsibility for proper service in these proceedings. The Appellee's attempt at pages 9-10 in their brief to

²Even the County Auditor in attempting to give notice to the Appellant under Revised Code 5715.19 did not use the mailing address of the lessee referenced by the Appellee in their complaint.

suggest that they should not be held responsible for the failure of the Appellant to receive notice of their complaint because responsibility lies with the County Auditor or Board of Revision ignores the fact that they initiated this action and they, or their attorney, should be responsible for service just as “the attorney of record or the serving party” are under Civil Rule 4.6(E). The burden is always on the complainant to prove proper service. There is no evidence of proper service in this case.

II. THE LEASEHOLD INTEREST OF A TENANT IMPACTS THE VALUE OF THE LEASED FEE INTEREST OF THE OWNER OF THE PROPERTY.

At several sections in their brief the Appellee makes reference to CVS acquiring the property from Rite-Aid. This is not correct. CVS assumed the leasehold interest of Rite-Aid in the property. Supp. at page 2. Because of the existence of that lease and the time of the July 1, 2003 sale of the property, the Appellant, 2100 Maple Canyon Plaza, LLC acquired not only the real estate but also the leased fee interest in the property in the transaction evidenced in the deed and conveyance fee statement relied on by the Board of Education in their complaint. See Supp. at pages 2-5, 9, 14-25, and 33. The leasehold value (positive or negative) impacts the value of the leased fee interest in real estate, but not the fee simple value of the real estate at issue in this appeal. See The Appraisal of Real Estate, 4th Edition, at pages 81-84. The Appellee devotes a significant portion of their brief to the issue of the leasehold interest of CVS in the property and very little if any of their discussion focuses on the fee simple value of the property at issue in this appeal. It is important that the Court does not confuse these two issues since this Court has held that it is the fee simple value of real estate that is subject to tax in Ohio. Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision(1988), 37 Ohio St. 3d 16(Paragraph 1 of the syllabus, citing Wynwood Apartments, Inc. v. Bd. of Revision (1979), 59 Ohio St.2d 34.) The difference

between leased fee and fee simple value is best highlighted by the following passage from The Appraisal of Real Estate:

When an assignment involves the valuation of a leased fee interest, the appraiser often must also appraise the fee simple interest. If the rent and/or terms of the lease are favorable to the landlord (lessor), the value of the leased fee interest will usually be greater than the value of the fee simple interest, resulting in a negative leasehold interest.

The Appraisal of Real Estate,
Twelfth Edition, at page 82.

The leasehold interest of a tenant can impact the leased fee interest of the property owner. See S. Euclid/Lyndhurst Bd. of Edn. v. Cuyahoga Cty. Bd. Of Revision (1996), 74 Ohio St.3d 314, 317 (a willing buyer would pay less for a property if the leaseback arrangement limited the amount of rent the buyer could collect.) However, the same section of The Appraisal of Real Estate cited above goes on to note that “[t]he cost approach is rarely, if ever, applicable to the valuation of a leasehold interest.” The Appraisal of Real Estate, Twelfth Edition, at page 84. That is why the Appellant has urged this Court to consider the cost approach to value evidence in this appeal as a means to avoid capturing and taxing the leased fee value, as opposed to the fee simple value, of the real estate at issue in this appeal.

Mr. Lorms replacement cost new of \$1,094,810 (before a deduction for depreciation) and value for land of \$620,000 total \$1,716,810. Supp. at pages 79 and 80. The County Auditor’s record card contains the building permit information for the Rite-Aid building constructed in 1997 at \$614,220 and the interior alterations by CVS in 2002 at \$125,000. Supp. at pages 10 and 13. The record card also contains the replacement cost new calculations of the Auditor utilized in assessing the property whose value is at issue in this appeal. Supp. at page 10.

The Court should also note that the Franklin County Board of Revision did not accept the July 1, 2003 sale price as reflecting the value of the fee simple interest in the real estate at issue

in this case. Supp. at page 8. The Franklin County Board of Revision valued the fee simple interest in the real estate utilizing the appraisal report of Robin Lorms. Supp. at pages 8, 26-140.

The above discussion can be shown schematically, like figure 5.4 at page 54 in The Appraisal of Real Estate, as follows:

Leased fee sales:	7/16/2004	\$4,200,000	(negative leasehold interest)
	7/1/2003	\$2,900,000	(negative leasehold interest)
County Auditor	1/1/2003	\$1,760,000	(Supp. at pages 8 and 10)
Lorms RCN plus land value		\$1,716,800	(Supp. at pages 79 and 80)
Lorms fee simple value		\$1,000,000	(no positive or negative leasehold)
Franklin County Board of Revision		\$1,000,000	(no positive or negative leasehold)

Only the Lorms appraisal and cost evidence in the record capture the fee simple value of the real estate and exclude the impact of any leasehold interest.

In the second section of their brief beginning with page 10 the Appellee launches into an attack on the appraisal report relied upon by the Board of Revision in rejecting the assessment increase requested in their complaint. This Court is not a super Board of Tax Appeals. (Citations omitted). The Board of Tax Appeals did not consider the appraisal in their decision and order. Board of Tax Appeals decision and order at pages 7 and 8. The relevance of the Lorms appraisal in this case is the fact that it is the only evidence in this appeal of the fee simple value of the real estate. The Appellee's criticism of Mr. Lorms cost approach analysis ignores the fact that his replacement cost new calculations (before depreciation), which do not take into consideration any of the rental rate and second generation sale concerns argued by the Appellee, values the property at \$1,716,810, which is very close to the County Auditor's assessment of \$1,760,000 which was also based, in part, on the cost approach. See Supp. at pages 10, 13, 79 and 81. As noted previously, "[t]he cost approach is rarely, if ever, applicable to the valuation of

a leasehold interest.” The Appraisal of Real Estate, Twelfth Edition, at page 84. Since we are valuing the fee simple interest in the real estate for tax purposes the consideration of the cost approach allows us to avoid capturing the leased fee interest in the real estate which, The Appraisal of Real Estate recognizes, “could be greater than the fee simple interest...” (a negative leasehold situation). See The Appraisal of Real Estate, at page 82. Because the sale at issue in this appeal exceeds the replacement cost new of the property (before the consideration of any depreciation), the lease on the property (to CVS) increases the leased fee interest beyond the value of the fee simple interest in the property (a negative leasehold situation).³ As a result the July 1, 2003 leased fee sale of the property cannot be used to value the fee simple interest in the property for real property tax purposes in Ohio.

With respect to the allegations made at page 12 in the Appellee’s brief, neither the Appellant nor Mr. Lorms argued that the subject property lost 50% of its value the moment its doors opened. As of January 1, 2003 the subject property was six years old and a six year old property built for a specific user is not as valuable to buyers or other users of the property. The Appellee only asked Mr. Lorms one question at the hearing before the Board of Revision. See Tape of Board of Revision, Exhibit 16 in the Transcript on Appeal. Then, they waived their right to a hearing on appeal before the Board of Tax Appeals where further cross examination of Mr. Lorms appraisal and methodology could have taken place. There is no evidence or appraisals of other types of retail properties (such as big-box retail stores used by Wal-mart, Kmart, Target, Meijer, and so forth) in the record in this appeal. The Appellee discusses these other types of

³CVS assumed the Rite Aid lease, a negative leasehold. Supp. at page 16. There is no evidence in the record that CVS paid any consideration to assume the above market lease (negative leasehold). The July 16, 2004 sale of the property for an even higher sale price suggests that the market since the time of the July 1, 2003 sale has assigned an even greater value to the negative leasehold since neither the lease nor the physical real estate changed between the time of the two sales. Supp. at pages 14 and 11.

retail properties at page 13 in their brief. Similarly, the Appellees allegations at page 14 and 15 in their brief are not supported by the facts in this appeal. As noted previously CVS did not acquire the property from Rite-Aid. CVS acquired Rite-Aid's leasehold interest in the property. The record shows that around the time that Rite-Aid's lease of the property began a building permit in the amount of \$614,220 was taken out. Supp. at pages 10, 13. And, subsequent to CVS's assumption of that lease a building permit for interior alterations of \$125,000 was taken out. Supp. at pages 10, 13. There is no evidence in this appeal that Rite-Aid abandoned or dumped stores on the market. And, a review of the lease comparables and sale properties in Mr. Lorms report clearly shows that CVS as a seller and lessee was not dumping properties on the market either. See Supp. at pages 86 and 91. The Appellee's criticisms of Mr. Lorm's appraisal, of which the Appellee made next to no inquiry on cross examination before the Board of Revision and absolutely none on appeal, are mere speculation and unsupported allegations.⁴

III. THE THEORY OF SUBSTITUTION SERVES AS A BENCHMARK TO AVOID CAPTURING AND TAXING LEASED FEE VALUE FOR REAL PROPERTY TAX PURPOSES IN OHIO.

The Appellee does not address the theory of substitution in their brief other than to continue its criticism of the Lorm's appraisal beginning at page 17 in their brief. The Appellee misreads Mr. Lorm's report and the evidence in this case. On page 17 in their brief the Appellee states that Mr. Lorms "acknowledges that the sale price of \$2.9 million dollars was based on the actual construction cost of the property." This is not correct. At page 3 in his appraisal Mr. Lorms notes "this rental rate was part of a build-to-suit arrangement where as the rental rate is an amortization of the development cost and does not necessarily reflect market rent." Supp. at

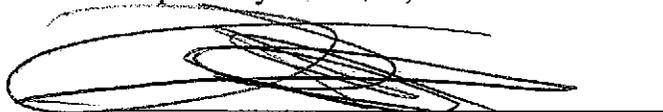
⁴The Appellee did not object to the admission of the appraisal report and the affidavit and lease abstract at the Board of Revision. See tape of Board of Revision hearing included in the Transcript on Appeal as Exhibit 16.

page 33. See Cleveland Hts. Univ. Hts. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (1995), 72 Ohio St.3d 189, 192 (sale/leaseback was primarily a means of financing); Kroger Co. v. Hamilton Cty. Bd. of Revision (1993), 67 Ohio St.3d 145, 147 (sale/leaseback transaction sale price does not establish true value.) The impact on leased fee value of a sale/leaseback and build-to-suit transaction are the same. Supp. at pages 33 and 89. The original lease may have been a function of the development costs, the sale price upon which the Board of Education's complaint is based was not. The actual costs to construct the property, which would have been six years old as of the tax lien date are not part of the record in this appeal. The only evidence of those costs is the \$614,200 building permit figure in the record card. Supp. at page 10. If the Appellee wanted to use the actual cost information to impeach the replacement cost analysis in Mr. Lorm's appraisal they should have requested them before the Ohio Board of Tax Appeals and not waived the hearing. Their attempt to speculate what those costs might be does not provide any basis for a rejection of the cost information in this appeal. Lastly, neither the Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, (2005) 106 Ohio St.3d 269 (hereinafter Berea) nor Lakota Local Sch. Dist. Bd. of Educ. v. Butler County Bd. of Revision, (2006) 108 Ohio St.3d 310, (hereinafter Lakota) cases have any application to the facts in this appeal. In Berea, as previously discussed at page 9 in Appellant's initial brief, the sale of the property occurred at an amount below the appraised fee simple value of the property (i.e. below the replacement cost of the property) and as a result the theory of substitution was not implicated in that case. The Berea case is an example of positive leasehold interest (See The Appraisal of Real Estate at page 82.) No appraisal evidence was submitted in the Lakota case so the theory of substitution was not an issue in that case.

CONCLUSION

For the foregoing reasons the Appellant, 2100 Maple Canyon Plaza, LLC respectfully requests that this Court reverse the decision and order of the Ohio Board of Tax Appeals and issue an order remanding the appeal to the Board of Tax Appeals with directions to the Board to remand the case to the Franklin County Board of Revision with instructions to dismiss the complaint filed by the Board of Education of the Columbus City School District and reinstate the County Auditor's value for the property. In the alternative, the Appellant respectfully requests that the Court reverse and remand the case the Board of Tax Appeals with instructions to determine the true value in money of the property based upon the appraisal evidence in the record.

Respectfully submitted,

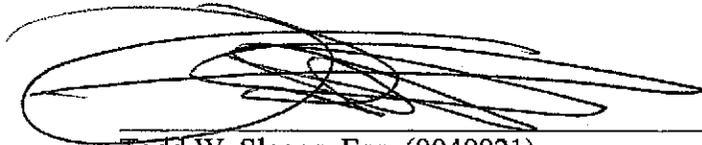


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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant 2100 Maple Canyon Plaza, LLC was mailed via regular U.S. mail postage prepaid, the 8 day of February, 2007 to the following: Paul M. Stickel, Assistant County Prosecutor, 373 South High Street, 20th Floor, Columbus, Ohio 43215, Attorney for the Appellees Franklin County Board of Revision and County Auditor; Mark H. Gillis, Rich, Crites & Dittmer, LLC, 300 East Broad Street, Suite 300, Columbus, Ohio 43215, Attorney for the Appellee Board of Education of the Columbus City Schools; and Marc Dann, Ohio Attorney General, State Office Tower, 17th Floor, 30 East Broad Street, Columbus, Ohio 43215-3428, Attorney for the Appellee Tax Commissioner of the State of Ohio.



Todd W. Sleggs, Esq. (0040921)

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Court Rules

RULES OF CIVIL PROCEDURE

TITLE II. COMMENCEMENT OF ACTION AND VENUE; SERVICE OF PROCESS; SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS SUBSEQUENT TO THE ORIGINAL COMPLAINT; TIME

RULE 4.6 Process: Limits; Amendment; Service Refused; Service Unclaimed

RULE 4.6 Process: Limits; Amendment; Service Refused; Service Unclaimed

(A) Limits of effective service.

All process may be served anywhere in this state and, when authorized by law or these rules, may be served outside this state.

(B) Amendment.

The court within its discretion and upon such terms as are just, may at any time allow the amendment of any process or proof of service thereof, unless the amendment would cause material prejudice to the substantial rights of the party against whom the process was issued.

(C) Service refused.

If service of process is refused, and the certified or express mail envelope is returned with an endorsement showing such refusal, or the return of the person serving process states that service of process has been refused, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued. If the attorney, or serving party, after notification by the clerk, files with the clerk a written request for ordinary mail service, the clerk shall send by ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth in the caption, or at the address set forth in written instructions furnished to the clerk. The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. Answer day shall be twenty-eight days after the date of mailing as evidenced by the certificate of mailing. The clerk shall endorse this answer date upon the summons which is sent by ordinary mail. Service shall be deemed complete when the fact of mailing is entered of record. Failure to claim certified or express mail service is not refusal of service within the meaning of division (C) of this rule.

(D) Service unclaimed.

If a certified or express mail envelope is returned with an endorsement showing that the envelope was unclaimed, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued. If the attorney, or serving party, after notification by the clerk, files with the clerk a written request for ordinary mail service, the clerk shall send by ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth in the caption, or at the address set forth in written instructions furnished to the clerk. The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. Answer day shall be twenty-eight days after the date of mailing as evidenced by the certificate of mailing. The clerk shall endorse this answer date upon the summons which is sent by ordinary mail. Service shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery. If the ordinary mail envelope is returned undelivered, the clerk

shall forthwith notify the attorney, or serving party, by mail.

(E) Duty of attorney of record or serving party.

The attorney of record or the serving party shall be responsible for determining if service has been made and shall timely file written instructions with the clerk regarding completion of service notwithstanding the provisions in Civ. R. 4.1 through 4.6 which instruct a clerk to notify the attorney of record or the serving party of failure of service of process.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1978; July 1, 1997.]

Staff Note (July 1, 1997 Amendment)

RULE 4.6 Process: Limits; amendment; service refused; service unclaimed

Prior to the 1997 amendment, service of process under this rule was permitted only by certified mail. It appears that service of process by express mail, i.e. as that sort of mail is delivered by the United States Postal Service, can always be obtained return receipt requested, and thus could accomplish the purpose of notification equally well as certified mail. Therefore, the amendment provides for this additional option for service.

Other amendments to this rule are nonsubstantive grammatical or stylistic changes.

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BOARD OF TAX APPEALS

RULES OF PRACTICE AND PROCEDURE

As adopted to be effective January 14, 2005, pursuant to R.C.5703.14.

Prior rules, effective June 1, 2002, are available:

Prior rules, effective March 1, 1996, are available.

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5717-1-01 Organization.

(A) The board of tax appeals shall hereinafter be referred to as the "board." The office of the board shall be at Columbus, Ohio and shall be open every day for the transaction of business from eight a.m. to five p.m., Saturday, Sunday and legal holidays excepted. All notices of appeal, submissions, requests and other communications shall be delivered to the board at the "James A. Rhodes State Office Tower, 24th Floor, 30 East Broad Street, Columbus, Ohio 43215."

(B) The board shall be in continuous session and open for the transaction of business during the hours herein provided. The sessions of the board shall be open to the public. Sessions shall stand and be adjourned without further notice thereof on its records.

(C) All of the proceedings of the board shall be entered on its journal which shall be a public record and each member's vote shall be recorded on the journal as cast.

(D) The board shall, from time to time, elect a chairperson and a vice-chairperson from its membership and shall enter such election in its journal.

5717-1-02 Appearance and practice before the board.

(A) In any proceeding before the board, a person who is a party to an appeal may appear and act on his or her own behalf. A person may appear and act on behalf of a partnership, limited liability company, or association of which he or she is a member or on behalf of any corporation for which he or she is an officer if such partnership, limited liability company, association, or corporation is a party to the appeal.

(B) All parties not acting on their own behalf shall be represented by an attorney at law authorized to practice before the courts of the state of Ohio.

(C) Persons authorized to practice law in other jurisdictions may, upon proper application to the board, be authorized to practice before the board in a particular proceeding. The applicant shall include an affidavit containing the following:

- (1) A list of the jurisdictions in which the applicant has been authorized to practice law, including attorney registration numbers, if applicable;
- (2) A statement as to whether the applicant is in good standing in each of the jurisdictions in which the applicant is authorized to practice law;
- (3) A statement as to whether the applicant is the customary legal counsel for the party in jurisdictions where the applicant is admitted to practice law;

(4) A statement as to why the complexity or subject matter of the appeal requires representation by the applicant;

(5) A statement as to the extent of the applicant's prior and current appearances before this board and other Ohio tribunals; and,

(6) A statement that the applicant will become familiar with, and conform to, the board's rules of procedure and practice.

5717-1-03 Entry of appearance, change of address, and withdrawal of counsel.

(A) Entries of appearance of counsel in any appeal shall be in writing. Such appearance may be effected by the signing of the notice of appeal or pleading or otherwise entered into the record after the scheduling of the appeal for hearing.

(B) Any party before the board of revision, who desires to participate in an appeal before the board of tax appeals as an appellee, shall enter an appearance with the board of tax appeals within thirty days of the mailing of notice of such appeal by the board of revision.

(C) Where two or more attorneys represent a party, one attorney shall be designated on each document filed as counsel of record to receive notices and service on behalf of that party.

(D) Any change of address of a party or counsel of record must be in writing and must be clearly designated as a change of address. A separate change of address must be filed in each appeal in which the party or counsel is involved, unless otherwise ordered by the board.

(E) A request for withdrawal of counsel in any appeal shall be in writing and shall be filed no later than seven days subsequent to the board's issuance of the notice of hearing date and shall be effective upon filing. Thereafter, a request for withdrawal of counsel shall only be made upon motion and with leave of the board. A substitution of counsel or the party's written acknowledgement that the appeal shall proceed without counsel shall be filed within thirty days of the filing of the withdrawal request.

5717-1-04 Notice of appeal.

(A) An appeal shall be commenced with the filing of a signed original notice of appeal within the time and manner prescribed by law.

(B) A caption in the following form should be substantially followed:

"Ohio Board of Tax Appeals	
	Case No. _____
Appellant	(Type of cause, e.g., Sales and Use Tax)
Address	
	Assessment Amount _____

Appellee	Amount in Controversy
Address	

(C) The notice of appeal should set forth the name, address, telephone number, and fax number, if available, of all parties together with the name, address, telephone number, fax number, and attorney registration number, if applicable, of appellant's authorized agent or attorney at law who executed such notice.

(D) A notice of appeal from a determination of the tax commissioner shall set forth the full name of the appellant and recite in clear and concise fashion the matter and amount in controversy and the action, or final determination appealed from, the errors complained of, and incorporate or attach a copy of the final order from which the appeal is taken. A copy of the notice of appeal filed with the board of tax appeals must also be filed with the tax commissioner within the time prescribed by law.

(E) An appeal taken from a decision of a county board of revision should be upon the form prescribed by the tax commissioner for such appeals. A copy of the notice of appeal filed with the board of tax appeals must also be filed with the county board of revision within the time prescribed by law.

(F) A notice of appeal from a decision of a municipal board of appeal shall set forth the full name of the appellant and recite in clear and concise fashion the matter and amount in controversy and the decision appealed from, the errors complained of, and incorporate or attach a copy of the decision from which the appeal is taken. A copy of the notice of appeal filed with the board of tax appeals must also be filed with both the municipal board of appeal and the opposing party within the time prescribed by law.

(G) Notices of appeal from a decision of a county board of revision, county budget commission, municipal board of appeal, or the tax commissioner filed by certified or express mail, properly addressed and with sufficient postage prepaid, shall be deemed filed on the date of the United States postmark placed upon the sender's receipt by the postal employee. Notices of appeal filed by an authorized delivery service designated by the tax commissioner shall be deemed filed on the date placed on the sender's receipt by an employee of the authorized delivery service. An appeal filed in person, by regular mail, facsimile, or other delivery method is effective upon receipt in the board office.

5717-1-05 Service.

(A) Unless otherwise ordered by the board or an attorney examiner, a copy of all motions or pleadings, briefs, papers and other documents filed with the board subsequent to the notice of appeal shall be served upon the counsel of record or the parties, if not represented by counsel, at the time of filing.

(B) All motions or pleadings, briefs, papers and other documents shall contain a certificate of service indicating that the required service has been made, the manner in which service was made, and the names and addresses of the parties or counsel of record upon whom service was made.

(C) Service upon the counsel of record or a party shall be made by delivering or mailing a copy

to counsel's or the party's last known address upon the board's records. Service by mail is complete upon mailing and effective upon the third day following mailing. Service may be made by fax transmission and will be deemed effective in accordance with rule 5717-1-22 of the Administrative Code.

5717-1-06 Assignment of cases.

Each appeal shall be assigned by the board to a specific attorney examiner. As a matter of administrative efficiency, appeals may be reassigned among the attorney examiners. If appeals assigned to different examiners are consolidated, generally the consolidated case shall be assigned to the attorney examiner having the lower-numbered case.

5717-1-07 Designation of complex litigation.

(A) As used in this rule, "complex litigation" has one or more of the following characteristics:

- (1) It is related to one or more appeal(s) pending before the board of tax appeals;
- (2) It involves more than four real parties in interest;
- (3) It presents unusual or complex issues of fact;
- (4) It involves problems which merit increased board supervision or special case management procedures.

(B) A party or counsel of record in complex litigation, as defined above, may, with the filing of the notice of appeal, serve and file a "notice of complex litigation" which briefly describes the nature of the appeal(s) and identifies by title and case number all other related appeals.

(C) Based upon a review of the notice and the statutory transcript of the subject appeal(s), the board may issue an order which will determine whether the subject appeal(s) shall be treated as complex litigation thereafter. An order under this subdivision may be altered and amended as the appeal(s) progresses through the board.

(D) Once the board has determined by order that an appeal(s) shall be treated as "complex litigation," the subject appeal(s) shall be diverted to and managed by the attorney examiner assigned to the appeal(s). Said examiner will take such action and enter such interim orders as the examiner deems appropriate for the expeditious resolution of the appeal(s), including waiver of an applicable board rule, when necessary.

5717-1-08 Consolidations.

When appeals involving common questions of law or fact are pending, the board, upon the timely application of any party showing good cause therefor, or upon its own motion, may order the appeals consolidated for hearing and other appropriate purposes, and may make such orders governing the proceedings as may be required.

5717-1-09 Statutory transcripts.

(A) Within forty-five days of the filing of a notice of appeal, the tax commissioner shall certify to the board a transcript of the record of the proceedings before the commissioner, together with all evidence considered by the commissioner in connection therewith.

(B) Within forty-five days of the filing of a notice of appeal, the county board of revision shall certify to the board a transcript of the record of the proceedings of the county board of revision pertaining to the original complaint, together with all evidence offered in connection therewith.

(C) Within forty-five days of the filing of a notice of appeal, the county auditor, on behalf of the budget commission, shall certify to the board a transcript of the record of the proceedings of the budget commission pertaining to the action from which the appeal is taken, together with all evidence presented to or considered by the commission.

(D) Within forty-five days of the filing of a notice of appeal, the municipal board of appeal shall certify to the board a transcript of the record of the proceedings before it, together with all evidence considered by it in connection therewith. If the issue appealed is addressed in a municipal corporation's ordinance or regulation, the municipal board of appeal shall include a copy of the ordinance or regulation in its certified transcript.

(E) Upon written request, the board may grant additional time to certify the transcript to the board.

5717-1-10 Interim procedural orders.

(A) The board may delegate to its attorney examiners, with respect to all appeals, the authority to issue interim procedural orders on all motions or other pleadings which do not terminate the appeals and may include, but not be limited to, motions to consolidate, to compel discovery, and for sanctions. Said orders have the same force and effect as any order issued by the board. A party may, by written motion, seek the reconsideration by the board of the interim order. A motion for reconsideration shall not be the basis for continuance of a matter scheduled for hearing.

(B) On motion of the parties or at the board's request, the parties to a hearing may be required to appear at a prehearing conference and provide prehearing statements for purposes of issue identification, scheduling of discovery, or other prehearing matters to be identified prior to such conference.

5717-1-11 Discovery.

(A) Discovery may be permitted by deposition upon oral examination or written questions; written interrogatories; production of documents or tangible things or permission to enter upon land or other property; and requests for admissions. The "Ohio Rules of Civil Procedure" shall be followed for discovery purposes to the extent they are not inconsistent with other board rules, and subject to the following limitations:

(1) Discovery should be commenced by all parties promptly after the filing of a notice of appeal and should be completed as expeditiously as possible. Discovery should be completed not more than one hundred twenty days after the filing of the notice of appeal, which shall also be the last day for a party to seek involvement of the board in discovery matters. Upon motion and for good cause, the board may establish other specific times

for completion of discovery or consideration of discovery motions.

(2) The board expects all counsel to provide for orderly, mutual discovery, freely exchanging discoverable information and documents. Counsel shall make all reasonable efforts to resolve discovery disputes by extra-judicial means, without intervention by the assigned attorney examiner. To the extent counsel may not resolve such disputes, then they may seek intervention of the attorney examiner to supervise discovery.

(3) Answers, objections or other responses to discovery requests shall be served within twenty-eight days after service of such requests unless the board orders or the parties agree to a different period of time. Depositions, interrogatories, and admissions shall not be filed with the board, unless the party intends to offer such discovery documents as evidence in a hearing; and in such event, such discovery documents shall be filed at least one day prior to the hearing.

(4) Any motion concerning discovery shall include only those specific portions of the discovery documents necessary for resolution of the motion and include counsel's statement describing all extra-judicial efforts undertaken to effect discovery.

(5) An expert may not be permitted to testify if he or she has not been timely identified prior to hearing. The parties may mutually agree to the exchange of any written reports of expert witnesses to be relied upon by them. Additionally, an expert's report or portions thereof may be excluded from evidence if the report was not made available in a timely fashion to complete a mutually agreed exchange of reports. In all events, the identity of the expert shall be provided to counsel at least fourteen days prior to hearing, except as otherwise ordered by the attorney examiner, and the written valuation reports shall be provided to counsel at least seven days prior to hearing, except as otherwise ordered by the attorney examiner.

(B) No hearing will be continued for purposes of discovery unless good cause is shown.

(C) Cost of discovery shall be paid by the party requesting such discovery.

(D) Upon the motion of a party and for good cause shown, the board may issue a protective order restricting discovery of a trade secret or other confidential research, development or commercial information.

5717-1-12 Motions.

(A) Unless made at a hearing or otherwise ordered, any request to the board shall be by written motion and shall be accompanied by a brief stating with particularity the grounds for the motion and citations of any authorities relied upon. Except for good cause shown, motions shall be filed within a reasonable period of time following filing of the notice of appeal so as to permit the board to consider and respond thereto in the orderly course of the board's business.

(B) Any party may file a brief contra within fourteen days after service of the motion, or such other period as the board or the attorney examiner requires.

(C) Any party may file a reply brief within seven days of service of a brief contra or such other period as the board or the attorney examiner requires.

(D) Motions for reconsideration of any decision of the board may be filed with the board only by a party or counsel of record in the proceedings before the board within thirty days of the date on which the decision was journalized. The filing of a motion for reconsideration shall not enlarge the period of time upon which an appeal may be taken from this board nor shall the filing of such motion suspend or toll the statutory appeal period. No motion for reconsideration will be determined by this board after an appeal to any court has been perfected.

5717-1-13 Subpoenas.

(A) Upon written request of any party or by action of the board through a member, the secretary or its attorney examiners, subpoenas may be issued to compel the attendance of witnesses and the production of books, accounts, papers, records, documents, and testimony. If any party desires the issuance of subpoenas in order to compel the attendance of witnesses or the production of documents at a scheduled merit or motion hearing or deposition, the request shall be filed with the board at least fifteen days prior to such scheduled date.

(B) Upon request, the board shall supply blank subpoena forms to the requesting party so that the party may complete the form. The requesting party shall return the completed form to the board, along with a self-addressed stamped envelope. If the board issues the subpoena, the subpoena shall be delivered to the requesting party, who shall effect its service.

(C) Subpoenas shall be served by the party or other individual over the age of eighteen years, personally or by certified mail, return receipt requested.

(D) The party or other person serving the subpoena shall file a copy of the subpoena, properly endorsed as to service with the board, at or prior to the time of the hearing for which the subpoena was issued.

(E) Witnesses shall receive their subpoenas at least ten days prior to the hearing at which they are to appear.

(F) All subpoenas issued by this board are deemed continuing, should the hearing or deposition for which they have been issued proceed for multiple days or be continued to a later date. The party issuing a subpoena shall notify any subpoenaed witness(es) of any continuance of the board proceedings at which they were scheduled to appear.

5717-1-14 Sanctions.

(A) Failure to comply with the rules contained in agency designation 5717 of the Ohio Administrative Code or an order of the board may result in any of the following sanctions:

- (1) The dismissal of the appeal;
- (2) The prohibition against introducing matters into evidence in support of certain specifications of error or other parts of the notice of appeal;
- (3) The prohibition against introducing designated matters into evidence;
- (4) The prohibition against introducing expert opinion and testimony into evidence;

(5) The denial or suspension of appearing and qualifying as an expert witness in designated matters before the board;

(6) The denial or suspension of the right of any person to appear or practice before the board;

(7) The payment of reasonable expenses caused by the failure to obey an order including attorney fees, and costs incurred by the board from the disobedient party or the attorney advising such party;

(8) The judicial relief provided by sections 5703.03 and 5703.031 of the Revised Code.

(B) The board may impose sanctions to enforce compliance with this chapter and orders as the board deems just and appropriate after the opportunity for hearing. The repetitious nature of the disobedient party or advising attorney will be considered in determining the appropriate sanctions to be imposed.

5717-1-15 Hearings.

(A) The board's secretary or the designated assignment commissioner may schedule each appeal for hearing, and written notice thereof shall be given to the parties or their counsel of record by ordinary mail.

(B) For good cause shown, hearings may be continued by the attorney examiner to whom the appeal has been assigned, by a board member, or by the board's secretary. The granting of a continuance is within the sound discretion of the board.

(C) Requests for continuances should be directed to the attorney examiner assigned the case and shall be filed, in writing, at least fourteen days prior to the scheduled hearing date, unless otherwise permitted by the board. If a continuance is requested for the reason that counsel or a witness is scheduled to appear for hearing on the same date before the board or another tribunal, a copy of the tribunal's scheduling notice should be attached to the request.

(D) A party seeking a continuance shall provide notice to, or obtain the consent of, all other parties. Any objection to a continuance must be filed, in writing, within three days of the filing of the continuance request, unless otherwise ordered by the board.

(E) As a condition to any continuance that may be granted, the board may require the parties to supply a definite date for hearing, as agreed upon by the parties and subject to the board's approval.

(F) A party may waive, in writing, its right to appear at a hearing, with the consent of the board. Where all parties have waived their right to a hearing, the board may proceed to decide the appeal upon the record.

(G) All hearings shall proceed in similar manner to a civil action, with witnesses to be sworn and subject to cross-examination.

(H) All hearings before the board shall be open to the public. Hearings may be recorded by stenographic means or by audio or video recording systems, as ordered by the board. An audio or

video recording of a hearing will not be transcribed into written form unless found necessary by the board. A stenographic transcript or an audio or video recording shall be made available for examination at the board's office.

(I) Each party shall identify its witnesses to all parties and the attorney examiner at least fourteen days prior to the hearing, unless otherwise ordered by the attorney examiner. Each party shall provide copies of the documentary exhibits it plans to offer into evidence (reduced in size, if necessary) to all parties and the attorney examiner at least seven days prior to the hearing, unless otherwise ordered by the attorney examiner.

5717-1-16 Briefs.

(A) At any time prior to the issuance of a final decision and order in an appeal, a board member or attorney examiner may request briefs from the parties. A party may also file a brief without being so requested. Briefs shall be filed within the time limits set by the board member or attorney examiner. An extension of time within which a brief is to be filed may be requested, in writing, from the attorney examiner assigned to the case. If any party fails to submit a brief within the established time limit, the board may proceed to determine the appeal and exclude the brief from its consideration. After the deadline for submission of briefs has passed, a party may file, as additional authority, relevant cases subsequently decided, but without further argument.

(B) With the exception of this board's decisions, copies of any unreported decisions cited in a brief shall be attached to the brief.

(C) Briefs amicus curiae may be filed with leave of the board and shall be filed according to the briefing deadlines established by the board.

5717-1-17 Voluntary dismissals, joint remands, and stipulations.

(A) The board may dismiss an appeal upon the filing of an appellant's voluntary dismissal at any time prior to the commencement of the hearing. After commencement of the hearing, a dismissal may be granted with the consent of all of the parties and the approval of the board. The dismissal of an appeal is with prejudice.

(B) All voluntary dismissals, joint remands, and stipulations of value must be filed within thirty days of the date on which this board was notified of their existence. Failure to file within thirty days may result in the return of the subject appeal to the hearing schedule on an expedited basis or the board's consideration of the appeal upon the existing record.

5717-1-18 Failure to prosecute an appeal.

The board may journalize an order determining an appeal upon the record or dismissing an appeal when the appellant fails to appear at a duly scheduled hearing on the merits and fails to notify the board that the hearing of additional evidence is waived.

5717-1-19 Clerical amendments to a final order.

Amendments to a final order, arising out of an oversight, error or omission, may be made

by the board or on the motion of any party through a correcting order.

5717-1-20 Fees.

(A) Upon request, the board will provide copies of documents in its records, for a reasonable fee.

5717-1-21 Mediation conferences.

(A) An appeal to the board may be resolved by mediation among the parties. Requests for diversion of an appeal to mediation may be made by any party to the board within ninety days of the filing of the notice of appeal. The board or the attorney examiner assigned the appeal may also recommend that an appeal be diverted to mediation. The diversion of an appeal to mediation will not alter the obligations established by these rules for the orderly disposition of an appeal, except for good cause, as determined by the board or its attorney examiners.

(B) The board's secretary or the designated assignment commissioner may schedule each appeal for a mediation conference, and written notice thereof shall be given to the parties or their counsel of record by ordinary mail.

(C) All parties or their counsel scheduled to appear at a mediation conference must secure authority to respond to settlement proposals offered at a mediation conference prior to such conference. All parties shall be prepared to discuss their positions and to explore any possibility of settlement of an appeal at the conference.

(D) At the conclusion of the mediation conference, the board, upon recommendation of the attorney mediator, may enter an order setting forth the action taken or agreement reached at the mediation conference, which, with the parties' consent, shall govern the subsequent course of the proceedings. Any appeal that cannot be resolved through the mediation process will be scheduled for a merit hearing with an attorney examiner who did not participate in the mediation process.

(E) The attorney mediator shall keep confidential all statements made and information provided by a party at a mediation conference. However, such statements and information may be disclosed upon consent of the party in accordance with Ohio law. No stenographic record of mediation conferences shall be taken or maintained.

(F) Statements made and information provided in the course of a mediation conference are not admissible at a subsequent hearing. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of mediation.

5717-1-22 Filings by facsimile transmission.

(A) A notice of appeal, voluntary dismissal, a stipulation of value, motions, memoranda, briefs, requests for continuances, or extensions of time may be filed with the board by facsimile transmission. The following documents will not be accepted for facsimile filing: subpoenas and statutory transcripts to be filed by the tax commissioner, a county board of revision, a municipal board of appeal or a county budget commission. Facsimile filings may be transmitted only through the facsimile equipment operated by the board. Facsimile transmission does not include transmission by e-mail.

(B) The person filing a document by facsimile shall also include a cover page containing all of

the following information: the date of transmission; the name, address, telephone number and facsimile number of the person transmitting the document; the caption of the case and case number; the name of the attorney examiner to whom the case is assigned; the title of the document; and the number of pages transmitted, including the cover page. If an attorney examiner or case number has not been assigned, that fact should be stated upon the cover page.

(C) The sending party bears the risk of transmitting a document by facsimile to the board. Documents sent by facsimile transmission and accepted by the board shall be deemed filed as of the date and time the facsimile transmission was received by the board. Facsimile filings shall be accepted only during the regular business hours of the board. Any facsimile transmission received after 5:00 P.M. on a business day, or on a Saturday, Sunday or legal holiday, shall be deemed filed on the board's next succeeding regular business day.

(D) A document filed by facsimile transmission shall be accepted as the effective original filing. The party may file the source document with the board within three days thereafter. A party filing by facsimile transmission shall also serve all other parties to the proceeding by facsimile transmission, where permissible.

(E) Facsimile filings shall not exceed twenty pages in length. If the filing includes attachments that cannot be accurately transmitted via fax, or if the enclosure of such attachments would cause the filing to exceed the maximum length provided in this rule, each attachment shall be replaced by an insert page describing the attachment and why it is missing. Unless otherwise ordered by the board, the missing attachments shall be filed with the board, with a copy of the filed document, no later than five business days following the facsimile filing. The board may strike any document or attachment, or both, if the missing attachments are not filed as required by this section.

Since all partial and fractional interests are "cut out" of the fee simple interest, the appraiser must have an understanding of the fee simple interest in a property prior to appraising a fractional or partial interest.

Economic Interests

The most common type of economic interests is created when the fee simple interest is divided by a lease. In such a circumstance, the lessor and the lessee each obtain partial interests, which are stipulated in contract form and are subject to contract law. The divided interests resulting from a lease represent two distinct but related interests—the leased fee interest and the leasehold interest. Additional economic interests, including sub-leasehold (or sandwich) interests, can be created under special circumstances.

Leased Fee Interests

A leased fee interest is the lessor's, or landlord's, interest. A landlord holds specified rights that include the right of use and occupancy conveyed by lease to others. The rights of the lessor (the leased fee owner) and the lessee (leaseholder) are specified by contract terms contained within the lease. Although the specific details of leases vary, a leased fee generally provides the lessor with the following:

- Rent to be paid by the lessee under stipulated terms
- The right of repossession at the termination of the lease.
- Default provisions
- The right of disposition, including the rights to sell, mortgage, or bequeath the property, subject to the lessee's rights, during the lease period

When a lease is legally delivered, the lessor must surrender possession of the property to the tenant for the lease period and abide by the lease provisions.

The lessor's interest in a property is considered a leased fee interest regardless of the duration of the lease, the specified rent, the parties to the lease, or any of the terms in the lease contract. A leased property, even one with rent that is consistent with market rent, is appraised as a leased fee interest, not as a fee simple interest. Even if the rent or the lease terms are not consistent with market terms, the leased fee interest must be given special consideration and is appraised as a leased fee interest.

The valuation of a leased fee interest is best accomplished using the income capitalization approach. Regardless of the

Leased fee: The rights of the lessor (landlord) to collect rent from the lessee (tenant) for the use and occupancy of the property during the lease period. The leased fee interest is the lessor's interest in the property, which is subject to the lease agreement. The leased fee interest is the lessor's interest in the property, which is subject to the lease agreement.

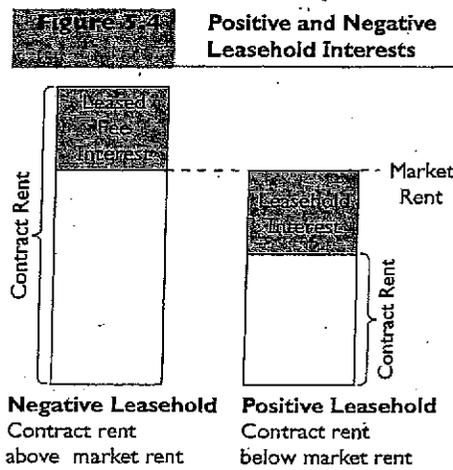
Lessee: One who has the right to use and occupy a property under a lease agreement. The lessee is the tenant who occupies the property under a lease agreement. The lessee is the tenant who occupies the property under a lease agreement.

capitalization method selected, the value of the leased fee interest represents the owner's interest in the property. The benefits that accrue to an owner of a leased fee estate generally consist of income throughout the lease and the reversion at the end of the lease. The sales comparison approach can be used to value leased fee interests, but this analysis is only really meaningful when the sales being used as comparables are similar leased fee interests. If not, adjustments for real property rights conveyed must be considered. The cost approach is more suited to valuing a fee simple interest than a leased fee interest. If contract rent and terms are different than market rent and terms, the cost approach must also be adjusted to reflect the differences.

When an assignment involves the valuation of a leased fee interest, the appraiser often must also appraise the fee simple interest. If the rent and/or terms of the lease are favorable to the landlord (lessor), the value of the leased fee interest will usually be greater than the value of the fee simple interest, resulting in a negative leasehold interest. If the rent and/or terms of the lease are favorable to the tenant (or lessee), the value of the leased fee interest will usually be less than the value of the fee simple interest, resulting in a positive leasehold interest (see Figure 5.4). The negative or positive leasehold interests will cease if contract rent and/or terms equal market rent and/or terms any time during the lease or when the lease expires.

When analyzing a leased fee interest, it is essential that the appraiser analyze all of the economic benefits or disadvantages created by the lease. An appraiser should ask the following questions:

- What is the term of the lease?
- What is the likelihood that the tenant will be able to meet all of the rental payments on time?
- Are the various clauses and stipulations in the lease typical of the market, or do they create special advantages or disadvantages for either party?



- Is either the leased fee interest or the leasehold interest transferable, or does the lease prohibit transfers?
- Is the lease written in a manner that will accommodate reasonable change over time, or will it eventually become cumbersome to the parties?

An appraiser cannot simply assume that each of the interests created by the lease has a market value. Many leases create no separate value for the tenant. For example, when the tenant cannot or will not pay the rent, the market value of the leased fee interest may be reduced to an

amount less than the market value of a comparable property that is unleased or a comparable property leased to a more reliable tenant at below-market terms.

Leasehold Interests

The leasehold estate is the lessee's, or tenant's, estate. When a lease is created, the tenant usually acquires the rights to possess the property for the lease period, to sublease the property (if this is allowed by the lease and desired by the tenant), and perhaps to improve the property under the restrictions specified in the lease. In return, the tenant is obligated to pay rent, surrender possession of the property at the termination of the lease, remove any improvements the lessee has modified or constructed (if specified), and abide by the lease provisions. The most important obligation of a tenant is to pay rent.

The relationship between contract and market rent greatly affects the value of a leasehold interest. A leasehold interest may have value if contract rent is less than market rent, creating a rental advantage for the tenant. This relationship, in turn, is likely to affect the value of the leased fee interest. The value of a leased fee interest encumbered with a fixed rent that is below market rates may be worth less than the unencumbered fee simple interest or the leased fee interest with rent at market levels. When contract rent exceeds market rent, the leasehold is said to have negative value. However, the contract advantage of the leased fee may not be marketable. Even in such circumstances, the tenant still has the right to occupy the premises and, despite the contractual disadvantage, may have other benefits that warrant continued occupancy. It is also possible that the contract disadvantage imperils the tenant's business and increases the risk of continued occupancy.

Leasehold interests are typically valued using the income capitalization approach. The income to the position is the difference between market rent and contract rent. The capitalization or discount rate selected usually depends on the relationship between contract rent and market rent, and frequently the appraiser's judgment is critical in the rate selection. Since the leasehold interest ceases to exist at the expiration of the lease, there is usually no reversion to the leasehold interest. The sales comparison approach is only meaningful in those relatively rare situations in which there are sales of

The market value of a leased fee interest depends on how contract rent compares to market rent. A leasehold interest may have value if the lease provides for a rental advantage to the tenant. If market rents rise, the value of the leased fee interest will increase. If market rents fall, the value of the leased fee interest will decrease.

Leasehold interests are valued by capitalizing the net income to the position. The net income is the difference between market rent and contract rent. The capitalization rate selected usually depends on the relationship between contract rent and market rent. The value of the leased fee interest is the net income divided by the capitalization rate. The value of the leased fee interest is also affected by the length of the lease. The value of the leased fee interest increases with the length of the lease. The value of the leased fee interest decreases with the length of the lease.

similar leasehold interests that the appraiser can analyze. The cost approach is rarely, if ever, applicable to the valuation of a leasehold interest.

Subleasehold or Sandwich Interests

Normally a tenant is free to sublease all or part of a property, but many leases require that the landlord's consent be obtained. A sublease is an agreement in which the tenant in an existing lease conveys to a third party the interest that the lessee enjoys (the right of use and occupancy of the property) for part or all of the remaining term of the lease. In a sublease, the original lessee is "sandwiched" between a lessor and a sublessee (see Figure 5.5). The original lessee's interest has value if the contract rent is less than the rent collected from the sublessee. Subleasing does not release the lessee from the obligations to the lessor defined in the lease agreement. A sublease may affect all the parties, including the owner of the leased fee interest, and such arrangements are common and increasingly upheld by the courts.

A lease contract may contain a provision that explicitly forbids subletting. Without either the right to sublet or a term that is long enough to be

marketable, a leasehold position cannot be transferred and, therefore, has no market value. Furthermore, the value of the leased fee interest would likely be diminished in this case because a lessee who no longer has need of the leased premises and is not allowed to sublease the space is likely to default on the lease.

A tenant under a sublease may not have any of the rights of the leasehold interest under the original lease contract. It is also possible that the holder of the

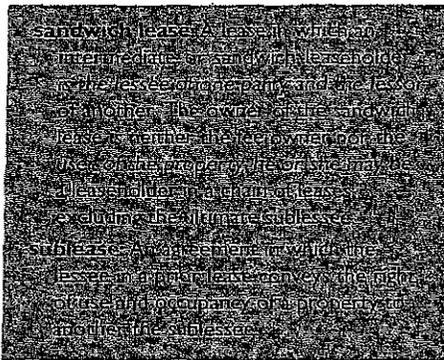


Figure 5.5 Sandwich Position in a Sublease Transaction

